



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PERUŠ v. SLOVENIA

(Application no. 35016/05)

JUDGMENT

STRASBOURG

27 September 2012

FINAL

27/12/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Peruš v. Slovenia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,

Mark Villiger,

Karel Jungwiert,

Boštjan M. Zupančič,

Ann Power-Forde,

Angelika Nußberger,

Julia Laffranque, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 4 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35016/05) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovenian national, Mr Norbert Peruš (“the applicant”), on 15 September 2005.

2. The applicant was represented by Mr B. Kukec, a lawyer practising in Lenart, and, after his demise, by Mr. A. Tušek, a lawyer practicing in Lenart v Slovenskih Goricah. The Slovenian Government (“the Government”) were represented by their Agent, Mrs T. Mihelič Žitko, State Attorney.

3. The applicant alleged, in particular, that one of the judges involved in the proceedings concerning his appeal on points of law could not be considered impartial owing to his prior involvement in the case as a judge of the Higher Court.

4. On 14 January 2011 the application was communicated to the Government.

5. The composition of the Fifth Section sitting on 4 September 2012 was modified in accordance with Rule 25 § 4 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

6. The applicant was born in 1940 and lives in Slovenska Bistrica.

A. Proceedings concerning the labour dispute

7. The case originated in a labour dispute following the applicant's transfer to a different post within a company providing electro-installation (hereinafter referred to as "the company"). Subsequently, the applicant lodged several claims with the Maribor Labour Court requesting, *inter alia*, the annulment of the transfer decision, and payment of the difference in salary.

8. On 16 April 1993 the first-instance court gave a decision upholding the applicant's claims. The company appealed. On 16 December 1993 the second-instance court upheld the company's appeal and remitted the case for fresh examination.

9. On 16 February 1994 the Maribor Labour Court issued a decision whereby it upheld the applicant's claims and annulled the transfer decision. It found that the transfer was related to the applicant's involvement in trade union activities and his efforts to improve human relations in the company. The company, in the court's view, had failed to demonstrate that there were work-related needs which called for a transfer. The court adjudicated that the applicant should be paid the difference in salary. The company appealed.

10. On 18 October 1994 the Ljubljana Higher Labour Court upheld the appeal. The three-judge panel, presided over by judge L.F., found that the first-instance court had failed to provide adequate reasoning in its decision; in particular, it had failed to explore whether lawful grounds for the transfer existed, such as an increased need for resources with respect to the applicant's new post. In the Higher Court's view, the lower court should examine the director and the chief of commerce as witnesses. The case was remitted for fresh examination.

11. On 25 April 1995 the Maribor Labour Court stayed the proceedings since bankruptcy proceedings had been instituted against the company.

12. Subsequently, the court repeatedly requested the applicant to inform it of the progress of the proceedings relating to the company's bankruptcy and to specify whether he still had an interest in pursuing the proceedings in his case. The applicant supplied the required information concerning the outcome of the bankruptcy proceedings on 18 January 1999, and requested that the proceedings in his case be continued.

13. On 5 March 1999 the court resumed the proceedings in so far as they concerned the allegedly unlawful transfer to another post and loss of salary, and dismissed the remaining claims. The applicant lodged an appeal and an appeal on points of law. Both were rejected.

14. On 18 February 2002 the Maribor Labour Court, after holding four hearings and examining witnesses, issued a judgment dismissing the applicant's claims. It found that the applicant's transfer to a different post within the company had been lawfully based on the company's need to

adapt to changes in the market, and that he was therefore not entitled to any compensation. The applicant appealed.

15. On 29 August 2002 the Ljubljana Higher Labour Court rejected the appeal and upheld the Maribor Labour Court's judgment. The applicant lodged an appeal on points of law in which he complained about, *inter alia*, not being present at one of the hearings, and his claims being previously upheld but eventually rejected owing to improper conduct of the court's proceedings.

16. On 4 November 2003 the Supreme Court, sitting as a panel of five judges, one of whom was judge L.F., rejected the appeal on points of law, finding that the lower courts had not committed any errors in the application of the procedural rules and that the applicant had been provided with an opportunity to participate in all hearings. It also noted that the previous court's decisions had been quashed because they had been found to be erroneous. Lastly, the Supreme Court found that the relevant substantive law had been properly applied to the facts of the case as established by the lower courts.

17. On 20 January 2004, the applicant lodged a constitutional appeal in which he disputed the findings of the Supreme Court and complained that the proceedings had been biased because of the involvement of judge L.F., who had previously decided in favour of the company's appeal.

18. On 11 March 2005 the Constitutional Court rejected the appeal on procedural grounds, stating that on account of the terminated bankruptcy proceedings against the company and the fact that the company had been deleted from the register of companies, the applicant no longer had any legal interest. The decision was served on the applicant on 15 March 2005.

B. Proceedings concerning the right to a trial within a reasonable time

19. Further to the Court's communication of the present application to the respondent Government, the State Attorney's Office informed the applicant that no settlement offer would be made. The Office considered that no violation of the right to a trial within a reasonable time had occurred in his case. That letter was served on the applicant on 5 February 2009.

20. On 2 November 2009 the applicant initiated proceedings before the Celje Local Court, claiming damages for undue delays in the above-mentioned labour proceedings. He referred to the Act on the Protection of the Right to a Trial without undue Delay ("the 2006 Act") and on that basis claimed EUR 5,000 for non-pecuniary damage. He further claimed EUR 3,000 for non-pecuniary damage on the basis of the Code of Obligations.

21. The court held a hearing on 24 February 2011. On 14 March 2011 it issued a judgment rejecting the applicant's claim for EUR 3,000, finding that it had no basis in law. As regards the claim for EUR 5,000, the court

found that it had jurisdiction to decide on it as the case fell under section 25 of the 2006 Act. However, the court dismissed the claim as it had been lodged outside the six-month time-limit provided for by paragraph 2 of section 25 of the 2006 Act. It found that the applicant had received the letter from the State Attorney's Office on 5 February 2009 and should therefore have lodged the compensation claim under the 2006 Act no later than 5 August 2009. The applicant did not appeal.

II. RELEVANT DOMESTIC LAW

22. The relevant provisions of the Civil Procedure Code (Official consolidated version UPB1, Official Gazette no. 12/2003) read as follows:

Section 70

“A judge or a lay judge shall be prohibited from exercising judicial functions:

...

(5) if he or she has participated in the same proceedings before a lower court ...

(6) if other circumstances raise doubts about his or her impartiality.”

Section 71

“If a judge or a lay judge discovers that there exists a reason for exclusion mentioned in one of points 1 to 5 of section 70 of this Act, he or she must immediately cease to perform any work in the case and must notify the President of the court, who shall appoint a replacement judge.

...”

23. As regards the remedies before the Administrative Court, see paragraphs 34-35 of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011. For the relevant provisions of the 2006 Act, see *Žunič v. Slovenia*, (dec.) no. 24342/04, §§ 16-26, 18 October 2007.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO AN IMPARTIAL TRIBUNAL

24. The applicant complained that one of the judges involved in the proceedings concerning his appeal on points of law could not be considered impartial because of his prior involvement in the case as a judge of the

Higher Court. He invoked Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. Admissibility

1. *The parties' arguments*

25. The Government pleaded non-exhaustion of domestic remedies, submitting that the applicant had failed to avail himself of a claim under the first paragraph of section 4, read together with section 33, of the Administrative Disputes Act. The Government maintained that while the applicant could not have obtained the quashing of the impugned decisions, the Administrative Court could have found a violation of his human rights and awarded compensation for any damage sustained. In support of their argument, the Government referred to the case-law of the Administrative Court which they had submitted in the case of *Mandić and Jović* (cited above, § 99).

26. The applicant disputed that objection. He argued that the claim referred to by the Government could only be lodged in respect of acts and actions, and only when no other judicial proceedings were possible. There was an established practice whereby breaches of procedural rules had to be claimed in the proceedings in which they had allegedly been committed. He referred to the case-law of the Supreme Court, in particular its decision of 13 December 2007 (Up 726/2007). In that decision, the Supreme Court had upheld the Administrative Court's rejection of a claim of violation of human rights lodged under section 4 of the Administrative Disputes Act in which the claimant had complained that the judge in her civil case had not been appointed in accordance with the law. The Supreme Court had found that the claimant had had judicial protection at her disposal within the main proceedings before the ordinary courts. It pointed to the established case-law of the higher courts and the Supreme Court. The case-law indicated that the courts of general jurisdiction should decide on matters of violation of the right to an impartial tribunal within their system of ordinary remedies. A reference was also made to the practice of the Constitutional Court which required the remedies available in the proceedings under general jurisdiction to be exhausted before a constitutional appeal concerning the right to a fair trial allegedly violated therein could be lodged.

27. The applicant further submitted that the provisions in questions were not meant to address situations such as his. It was unclear even when the thirty-day deadline for lodging such a claim would start to run. Moreover, the applicant argued that the Government had submitted no relevant case-law to support their assertions.

2. *The Court's assessment*

28. The Court reiterates that, in accordance with Article 35 of the Convention, it is not required to decide whether or not the facts alleged by an applicant disclose any appearance of a violation unless all domestic remedies have been exhausted according to the generally recognised rules of international law. It falls to a Government pleading non-exhaustion to prove that the remedy in question was available to the applicant in theory and in practice at the material time. Once this burden of proof has been discharged, it is incumbent on the applicant to establish that the remedy relied on by the Government was in fact exhausted or was inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Lukenda v. Slovenia*, no. 23032/02, §§ 43 and 44, ECHR 2005-X).

29. The Court notes that a claim under the first paragraph of section 4, read together with section 33, of the Administrative Disputes Act, is conditional on a number of elements, one of them being that the action concerned had resulted in the unlawful hindrance, limitation or prevention of the enjoyment of a human right, and another being the absence of any other judicial protection. It is not for the Court to speculate on the possible interpretation of the provisions concerned in the context of an alleged violation of the fair trial guarantees in court proceedings. It notes that the applicant referred to a decision of the Supreme Court (see paragraph 26 above) which raised serious doubts that a claim before the Administrative Court would provide redress in cases such as the present one. The Court understands from the material submitted to it that when the alleged violation occurred in the proceedings before the Supreme Court, a constitutional appeal, and not a claim before the Administrative Court, would have been the appropriate avenue of redress. In the present case the applicant did avail himself of that remedy but was unsuccessful for reasons outside his control, such as the company's bankruptcy.

30. Finding that the Government failed to prove that a claim to the Administrative Court was available to the applicant in theory and in practice at the material time, the Court concludes that their objection must be rejected (see, *mutatis mutandis*, *Mandić and Jović*, cited above, § 112, and *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001).

31. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' arguments*

32. The applicant argued that the fact that judge L.F. had decided on his appeal on points of law was an absolute breach of the procedural legislation and should have led to the quashing of the Supreme Court's judgment. He further argued that the fact that the Supreme Court did not appear impartial was enough to find a violation of the right to a fair trial.

33. The Government admitted that the fact that the same judge had participated in two stages of the proceedings was contrary to sections 70 and 71 of the Civil Procedure Code. However, the conduct of judge L.F. disclosed no actual bias. The Government also argued that nine years had passed between judge L.F.'s first involvement in the case and his second, and that the circumstances of the case had significantly changed in the meantime. Moreover, the Supreme Court had assessed an aspect of the case which was entirely different from the one assessed by the panel of the Higher Court of which judge L.F. had been a member.

2. *The Court's assessment*

34. According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether sufficient guarantees were afforded to exclude any legitimate doubt in this respect – the objective approach (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-..., and *Fatullayev v. Azerbaijan*, no. 40984/07, § 136, 22 April 2010).

35. Firstly, as to the subjective test, the tribunal must be subjectively free of personal prejudice or bias. In this regard, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, *Padovani v. Italy*, 26 February 1993, § 26, Series A no. 257-B, and *Morel v. France*, no. 34130/96, § 41, ECHR 2000-VI). In the present case, in the absence of any evidence to the contrary, there is no reason to doubt judge L.F.'s personal impartiality.

36. Secondly, under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality (see *Micallef v. Malta* [GC], no. 17056/06, § 96, ECHR 2009), since "justice must not only be done; it must also be seen to be done". In this regard, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a

legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, among many other authorities, *Micallef*, cited above, § 96).

37. When determining the objective justification for the applicant's fear, such factors as the judge's dual role in the proceedings, the time which elapsed between the two participations, and the extent to which the judge was involved in the proceedings may be taken into consideration (see, *Švarc and Kavnik v. Slovenia*, no. 75617/01, § 40, 8 February 2007; *Fatullayev*, cited above, § 139; and *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, §§ 174 and 175, 21 July 2011).

38. In this regard, the Court observes that judge L.F. presided over the panel of the Higher Court which upheld the opposite party's appeal against a judgment that had been issued in the applicant's favour. It remitted the case for fresh examination. The applicant's claim was subsequently rejected by the first-instance court and he appealed unsuccessfully to the Higher Court. He then lodged an appeal on points of law, which was rejected by the panel of the Supreme Court, of which judge L.F. was a member. The Court acknowledges that nine years elapsed between the date of the judgment adopted by the Higher Court's panel presided over by judge L.F. and the judgment of the panel of the Supreme Court of which judge L.F. was a member. However, the role played by judge L.F. was very significant at both levels of jurisdiction. He was the presiding judge in the Higher Court's panel and a member, or even the rapporteur – this was alleged by the applicant and not disputed by the Government – of the Supreme Court panel. The judgements reached on both occasions concerned the merits of the case and were unfavourable to the applicant. Therefore, the Court finds that the impartiality of the "tribunal" was open to doubt, not only in the eyes of the applicant but also objectively.

39. The Court would note that there is no indication in the case-file that judge L.F. was aware of or reminded of her prior involvement in this particular case. It observes, however, that there is a risk of problems arising in a system which lacks safeguards to ensure that judges are reminded of their prior involvement in particular cases, above all where such matters rely on the judges' own assessment (see *Puolitaival and Pirttiaho v. Finland*, no. 54857/00, § 44, 23 November 2004, and *Švarc and Kavnik*, cited above, § 41).

40. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE CONSTITUTIONAL COURT'S PROCEEDINGS

41. The applicant complained under Article 6 § 1 that the proceedings had also been unfair in that the Constitutional Court had failed to deal with

his complaint concerning a lack of impartiality on the part of judge L.F. In particular, he disputed the Constitutional Court's opinion that the applicant had lost his legal interest in the matter on account of the bankruptcy of the opposite party in the proceedings.

42. The Government contested the applicant's argument.

43. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

44. Having regard to the finding relating to the issue of judge L. F's lack of impartiality (see paragraphs 29 and 34-40 above), the Court does not find it necessary to assess also the Constitutional Court's role in ensuring that the applicant had a fair trial before an impartial tribunal.

III. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION WITH RESPECT TO THE ALLEGEDLY UNDUE LENGTH OF THE PROCEEDINGS

45. The applicant further complained that the labour proceedings had been unreasonably long and that the remedies available in Slovenia in respect of excessively long proceedings were ineffective.

Article 6 of the Convention provides in so far as relevant:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

46. The Government objected that the applicant had failed to exhaust domestic remedies as he had lodged a claim for compensation outside the statutory time-limit. They argued that the local court had clearly taken the position that the claim under the 2006 Act would have been admissible had the applicant complied with the time-limit. The applicant did not comment on the issue.

47. The Court notes that the applicant lodged a claim in which he claimed compensation for damage sustained on account of the allegedly undue length of the proceedings, relying in part on the 2006 Act and in part on the Code of Obligations. The Court observes that it has already been established that the Code of Obligations did not provide for effective remedies with respect to complaints of undue length of proceedings (see *Lukenda*, cited above, §§ 54-60 and 66-71). However, the 2006 Act, on which the applicant also relied in his claim, provided for a special compensatory remedy which was found in *Korenjak v. Slovenia* ((dec.), no. 463/03, 15 May 2007) and *Carević v. Slovenia* ((dec.), no. 17314/03, 3 June 2008) to constitute an appropriate means of redressing a violation of the right to have one's case examined within a reasonable time. The Court

further notes that the Ljubljana Local Court took the position that section 25 of the 2006 Act, which concerned transitional rules, applied to the proceedings in question and that the compensation claim would have been admissible in the applicant's case if it had been lodged within the statutory time-limit. In this connection, the Court observes that applicants must comply with the applicable rules and procedures of domestic law when making use of domestic remedies (see *Beguš v. Slovenia*, no. 25634/05, § 29, 15 December 2011, and *Ben Salah, Araqui and Dhaima v. Spain* (dec.), no. 45023/98, ECHR 2000-IV), and finds that the present applicant failed to do so. The Government's objection concerning the non-exhaustion of domestic remedies as regards the complaint of undue delays under Article 6 § 1 must therefore be upheld (Article 35 § 1 of the Convention).

48. Having regard to the finding above that the applicant had an effective remedy at his disposal but failed to use it properly, the Court concludes that his complaint under Article 13 is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

49. This part of the application must therefore be rejected under Article 35 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

51. The applicant claimed 15,230 euros (EUR) in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage sustained on account of the alleged violations in the present case.

52. The Government argued that the claims were unsubstantiated.

53. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, dealing on an equitable basis it awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

54. The applicant also claimed EUR 3,500 for the costs and expenses incurred before the Court.

55. The Government disputed the claim.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that in the present case the applicant did not explain his claim or submit supporting documents or detailed information showing that the costs claimed had been actually and necessarily incurred (see *S.I. v. Slovenia*, no. 45082/05, § 87, 13 October 2011). The Court therefore rejects this claim.

C. Default interest

57. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 1 concerning a lack of judicial impartiality and the Constitutional Court's failure to deal with the related constitutional appeal admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of impartiality of judge L.F.;
3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention concerning the Constitutional Court's failure to deal with the applicant's constitutional appeal;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage.
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President