



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

COURT (CHAMBER)

CASE OF F.C.B. v. ITALY

(Application no. 12151/86)

JUDGMENT

STRASBOURG

28 August 1991

In the case of F.C.B. v. Italy*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court***, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr B. WALSH,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 21 March and 26 June 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 July 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12151/86) against Italy lodged with the Commission under Article 25 (art. 25) by a citizen of that State, Mr F.C.B., on 9 May 1986. The applicant requested the Court not to reveal his identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the

* The case is numbered 40/1990/231/297. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

respondent State of its obligations under Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). On 19 September 1990 the President authorised him to use the Italian language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher, Mr J. Pinheiro Farinha, Mr B. Walsh, Mr R. Bernhardt and Mr A. Spielmann (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Italian Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the Registrar received the Government's memorial on 15 January 1991 and the applicant's memorial on 21 January. In a letter received on 14 March the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 22 February that the hearing should open on 18 March (Rule 38).

6. On 7 March the Commission produced the file on the proceedings before it, as requested by the Registrar on the instructions of the President.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr G. RAIMONDI, magistrato,

on secondment to the Diplomatic Legal Service, Ministry
of Foreign Affairs, *Co-Agent;*

- for the Commission

Mr S. TRECHSEL,

Delegate;

- for the applicant

Mr P. BARONE, avvocato,

Counsel.

The Court heard their addresses and their replies to its questions.

8. On 3 June the applicant produced detailed figures for his claim for just satisfaction, but the Court rejected them as out of time.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 20 September 1972, in the course of an armed robbery in the province of Bergamo, two masked criminals killed one person and seriously injured another; they then fled in a car driven by an accomplice.

Among the suspects, who were swiftly identified, was the applicant.

A. The trial

10. Mr F.C.B. was arrested in Switzerland on 9 November 1973 and extradited to Italy on 19 February 1974. He was charged with armed robbery, murder and attempted murder, these crimes being aggravated by the fact that he had committed them while wilfully evading arrest under other warrants.

11. On 10 November 1977 the Bergamo Assize Court found him and his four co-defendants guilty and sentenced him *inter alia* to twenty-four years' imprisonment.

12. The applicant and three others who had been found guilty appealed, and on 26 March 1980 the Brescia Assize Court of Appeal acquitted them for lack of evidence. Mr F.C.B. was released on the following day; in accordance with Article 171 of the Code of Criminal Procedure (see paragraph 25 below), he indicated his address.

13. The Principal Public Prosecutor and three other parties, including the applicant, appealed on points of law. The prosecution's notice of appeal was served on Mr F.C.B. personally on 5 April 1980 at the address he had given, which was also that of his mother.

14. On 13 April 1983 the Court of Cassation dismissed the applicant's appeal, allowed the prosecution's appeal, and remitted the case to the Milan Assize Court of Appeal.

B. The applicant's conduct after his release on 27 March 1980

15. Mr F.C.B. had in the meantime entered the Federal Republic of Germany on 24 April 1980. He settled at Constance and was granted a residence permit there on 29 September 1980. He claims that he informed the Italian Consulate in Freiburg of his new address, in order for it to be notified to the Italian authorities for "entry in the civil status register". He did not, however, send the authorities an amended version of his declaration of 27 March 1980 (see paragraph 12 above).

16. The applicant was arrested in Brussels on 19 December 1982 under a warrant issued in the Netherlands in connection with proceedings relating to the abduction of a Netherlands woman.

According to Mr F.C.B., after he had been extradited to the Netherlands the Dutch authorities obtained a copy of his criminal record; furthermore, the judge in charge of the case arranged for his Italian colleagues in Milan and Bergamo to co-operate in investigations in Italy and asked the Milan Chief Public Prosecutor's Office to have searches of the dwellings of the applicant, his sister and his sister-in-law carried out. The Government did not contest this point, merely stating that they had no detailed information about it.

Mr F.C.B. maintained that he was held in solitary confinement from 19 December 1982 to 19 February 1985, when his conviction by the 's-Hertogenbosch Court of Appeal became final, and was thus subject to certain restrictions - which were, however, eventually relaxed - on correspondence, visits and contacts with other detainees.

C. The retrial and the fresh appeal

17. On 25 November 1983 the President of the Milan Assize Court of Appeal attempted to serve a summons to appear before that court on the applicant at the address given by him on his release, but neither the applicant nor his mother lived there any more.

On 15 December 1983 the summons was delivered to Mr F.C.B.'s mother, whose new address had been found out in the meantime. The applicant's lawyer had also been informed on 23 October 1983 of the hearing date.

18. The trial opened on 9 April 1984 in Mr F.C.B.'s absence. His counsel informed the court that, according to close relatives of his client, the latter was in custody in Maastricht; he added, however, that he was unable to produce documentary evidence to this effect. The prosecution submitted that there was no objective evidence to show that Mr F.C.B. was in custody and invited the court to try him in absentia as unlawfully absent (contumace). The court decided to do this, but counsel for one of the co-defendants asked it to verify the information that Mr F.C.B. was unable to attend the trial, as the applicant's presence could prove to be of importance for his client. That client and another co-defendant confirmed that Mr F.C.B. was in prison in the Netherlands; the one had learnt of it from the newspapers and the other had received a letter from the applicant sent from Maastricht prison.

19. The prosecution for their part repeated their submissions. After deliberating in private, the Assize Court of Appeal confirmed its declaration that Mr F.C.B. was unlawfully absent, as he had not provided proof that he was unable to attend, despite having been notified in good time of the start of the trial.

On 10 April 1984 the court sentenced him to twenty-four years' imprisonment and issued a warrant for his arrest.

20. On 26 April Mr F.C.B.'s Dutch lawyer sent his Italian colleague copies of documents (two summonses to appear before the Netherlands courts) showing that his client was in custody. Translations were given to the court on 26 May.

21. The applicant's lawyer appealed on points of law to the Court of Cassation; his grounds of appeal were filed in February 1985. He submitted that the Assize Court of Appeal had been wrong in declaring Mr F.C.B. unlawfully absent and questioned the correctness in law of the judgment. On the first point he argued that the decision itself and the subsequent proceedings were null and void, as it had been impossible for his client to attend the hearing. He said that it was only out of excessive regard for formal propriety that the Assize Court of Appeal had declined to rule that the applicant was unable to appear, notwithstanding several concurring statements testifying to the fact.

22. The Court of Cassation dismissed the appeal on 13 November 1985.

It found, firstly, that the appeal court had been right to try Mr F.C.B. as unlawfully absent, as there was no proof that he was unable to attend. The documents produced on 26 May 1984 (see paragraph 20 above) had been offered in evidence only after judgment had been given and therefore had no probative value. With greater diligence the defence could have produced them before the hearing. It could be seen from the statement of appeal that the applicant would have had time to do this, as he had been in custody in the Netherlands well before the summons to appear was served. The Court of Cassation held that it was for the Assize Court of Appeal to assess the alleged inability to attend, and that that court had given proper reasons for its decision.

D. The refusal to extradite the applicant to Italy

23. On 5 September 1984 the Italian authorities had requested Mr F.C.B.'s extradition for the purposes of the judicial investigation concerning him. On 17 June 1985, however, the Maastricht Regional Court dismissed the request as inadmissible, on the grounds that the Milan Assize Court of Appeal had already given a judgment on the merits on 10 April 1984 (see paragraph 19 above). The court added that it would consider the matter again in the event of the judicial investigation being reopened as a result of a retrial being ordered by the Court of Cassation or for some other reason.

24. The Netherlands agreed to extradite Mr F.C.B. to Belgium and he is currently in custody there.

According to the information given to the Court by counsel for the applicant, the applicant will have to return to the Netherlands to serve one year's imprisonment there, and if the Italian authorities succeed in obtaining

his extradition, he will then serve in Italy six years and six months of the prison sentence imposed by the Milan Assize Court of Appeal.

II. THE RELEVANT DOMESTIC LAW

25. In the Foti and Others judgment of 10 December 1982, the Colozza judgment of 12 February 1985 and the Brozicek judgment of 19 December 1989 (Series A no. 56, p. 12, paras. 33-36; no. 89, p. 11, para. 18, and p. 12, paras. 21-22; no. 167, p. 13, para. 26) the Court gave a brief description of the Italian legislation then in force as regards notifications and trials in absentia (*contumacia*).

As to notifications to an accused who has been released but in whose case a final judgment has not yet been given, the first and fourth paragraphs of Article 171 of the Code of Criminal Procedure provide as follows (translation from Italian):

"An accused held in custody who has to be released for a reason other than a final acquittal ... must at the time of release declare or elect an address [for service] by lodging a document with the director of the prison. The director shall enter any declaration he has received in the register specified in Article 80 and shall immediately notify it to the judicial authority which ordered the release

Any change relating to the address declared or elected must be communicated by the suspect or accused to the authority in charge of the case, as provided for in the first paragraph. Notifications made to the address previously declared or elected shall be valid until such communication has been received."

PROCEEDINGS BEFORE THE COMMISSION

26. In his application of 9 May 1986 to the Commission (no. 12151/86) Mr F.C.B. complained of a violation of the rights of the defence, on the ground that as he was wrongly held to be unlawfully absent, he did not have a fair trial. He relied on Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention.

27. The Commission declared the application admissible on 16 March 1989. In its report of 17 May 1990 (made under Article 31) (art. 31) it expressed the unanimous opinion that there had been a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 208-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF PARAGRAPH 1 IN CONJUNCTION WITH PARAGRAPH 3 (c) OF ARTICLE 6 (art. 6-1, art. 6-3-c)

28. Mr F.C.B. complained of the fact that the Milan Assize Court of Appeal had tried him in his absence. He alleged a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention, which read as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing ... ;

... ."

The Commission agreed with this submission, but it was contested by the Government.

29. Unlike the *Goddi*, *Colozza* and *Brozicek* cases (judgments of 9 April 1984, Series A no. 76, 12 February 1985, Series A no. 89, and 19 December 1989, Series A no. 167), the present case relates only to the opportunity for a person charged with a criminal offence to attend his trial alongside his counsel.

As that is the fundamental question and as the requirements of paragraph 3 of Article 6 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1 (art. 6-1), the Court will examine the complaint from the point of view of these two provisions in conjunction (see, as the most recent authority, the *Isgrò* judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 31).

30. The applicant claimed that he did not know when his trial before the Milan Assize Court of Appeal would take place, as he was in solitary confinement while in custody in the Netherlands (see paragraph 16 above). He also submitted that the attempted notification on 25 November 1983 and the service on 15 December 1983 were null and void (see paragraph 17 above).

31. The Government, on the other hand, were convinced that Mr F.C.B. had been made aware of the trial date by his lawyer and his family, who had been notified on 23 October and 15 December 1983 respectively (see paragraph 17 above).

32. The Commission thought it unlikely that the applicant was unaware of when the trial would open, as he was certainly in contact with a co-defendant, his family and his lawyer. In particular, it was difficult to see how else his lawyer could within two weeks have submitted written evidence of his client's inability to attend his trial (see paragraph 20 above). The Commission expressed the opinion, however, that such knowledge was no substitute for personal service, only the latter being conclusive.

33. The Court points out firstly that Mr F.C.B., who was not present at the hearing before the Milan Assize Court of Appeal despite the fact that he was charged with very serious crimes (see paragraph 10 above), had not expressed the wish to waive attendance. Moreover, that court had learnt from concurring sources (Mr F.C.B.'s counsel and two co-defendants) that apparently he was in custody in the Netherlands. Yet it did not adjourn the trial, nor did it investigate further to see whether the applicant had indeed consented to not being present; it merely stated that it had not been provided with proof that he was unable to attend.

It must also be borne in mind that the Dutch authorities had requested the co-operation of the Italian authorities, thereby informing them that the applicant was in prison in the Netherlands (see paragraph 16 above), but the Italian authorities did not draw the necessary inferences as regards the proceedings pending against Mr F.C.B. in Milan. That behaviour was scarcely compatible with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner (see the *Colozza* judgment already cited, Series A no. 89, p. 15, para. 28).

The Court considers it unnecessary to decide whether, as the Government maintained, indirect knowledge of the trial date sufficed to allow the applicant to participate in the trial, a right whose existence is, according to the Court's case-law, shown by the object and purpose of Article 6 (art. 6) taken as a whole (see, *inter alia*, the *Brozicek* judgment cited above, Series A no. 167, p. 19, para. 45). Even if such a method does comply with the requirements of this provision, it does not appear that Mr F.C.B., whether expressly or at least in an unequivocal manner, intended to waive his right to appear at the trial and defend himself (see *inter alia* the above-mentioned *Colozza* judgment, Series A no. 89, p. 14, para. 28).

34. In the Government's opinion the applicant was responsible for the position, in that he failed to take the necessary steps, either before or during the hearing on 9 April 1984, to prove that he was indeed unable to attend and in that he omitted to inform the appropriate authorities of his change of address. They suggested that this was an attempt by him to delay a verdict which was bound to be adverse.

35. The Court considers these two criticisms to be unfounded.

As to the first point, it has not been shown that Mr F.C.B. was aware of the date of the trial.

As to the second point, the applicant's conduct may give rise to certain doubts but the consequences which the Italian judicial authorities attributed to it are - in the light of the information available to the Milan Assize Court of Appeal on 9 April 1984 - manifestly disproportionate, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see the above-mentioned Colozza judgment, Series A no. 89, p. 16, para. 32).

In the instant case, the Court therefore does not have to determine whether and under what conditions an accused can waive exercise of his right to appear at the hearing (see the same judgment, p. 14, para. 28).

36. In sum, there has been a violation of paragraph 1 in conjunction with paragraph 3 (c) of Article 6 (art. 6-1, art. 6-3-c).

II. APPLICATION OF ARTICLE 50 (art. 50)

37. Under Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

38. Mr F.C.B. sought compensation for damage. He stated that he wished to pass the money on to the Italian Association for Cancer Research, but failed to quantify his claim in due time (see paragraph 8 above).

The Court considers that in the present case the finding that there has been a violation of Article 6 (art. 6) in itself affords sufficient just satisfaction.

B. Costs and expenses

39. The applicant claimed a total of 89,500,000 Italian lire in respect of lawyer's fees and costs relating to the domestic and European proceedings.

The Court sees no causal link between the violation found and the costs incurred before the domestic courts. Making an assessment on an equitable basis, and in the light of the evidence before it and its case-law on the point, it awards Mr F.C.B. 5,000,000 lire in respect of costs and expenses incurred before the Convention organs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention;
2. Holds that the respondent State is to pay to Mr F.C.B. 5,000,000 (five million) Italian lire in respect of costs and expenses;
3. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 28 August 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar