



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

COURT (CHAMBER)

CASE OF BRINCAT v. ITALY

(Application no. 13867/88)

JUDGMENT

STRASBOURG

26 November 1992

In the case of Brincat 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*,

Mr R. BERNHARDT,

Mr Thór VILHJÁLMSÓN,

Mr C. RUSSO,

Mr S.K. MARTENS,

Mrs E. PALM,

Mr F. BIGI,

Sir John FREELAND,

Mr A.B. BAKA,

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

Having deliberated in private on 28 May and 28 October 1992,

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 12 July 1991, 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. 13867/88) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by Mr Joseph Brincat, a Maltese citizen, on 8 January 1988.

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 respondent State of its obligations under Article 5 para. 3 (art. 5-3) of the Convention.

* The case is numbered 73/1991/325/397. 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.

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. He also requested that, as he was a lawyer, he might be allowed to present his own case (Rule 30 para. 1); the President gave such leave on 11 October 1991. The Maltese Government, who had been notified by the Registrar of their right to intervene in the proceedings (Article 48 (b) of the Convention and Rule 33 para. 3 (b)) (art. 48-b), did not indicate that they intended to do so.

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 29 August 1991 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Bernhardt, Mr S.K. Martens, Mrs E. Palm, Mr F. Bigi, Sir John Freeland and Mr A.B. Baka (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 applicant on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 9 December and the Government's memorial on 23 December 1991. On 30 January 1992 the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing, and on 28 April he produced various documents. On 30 April the Government filed their observations on Mr Brincat's claims under Article 50 (art. 50) of the Convention, and on 15 May they produced certain documents.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 May 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr G. RAIMONDI, magistrato,

seconded to the Diplomatic Legal Service, Ministry of
Foreign Affairs,

Co-Agent,

Mr V. ESPOSITO, president of division,
Court of Cassation,

Mr G. GRASSO, professor,
University of Catania,

Counsel;

- for the Commission

Mr H. DANELIUS,

Delegate;

- for the applicants

Mr J. BRINCAT, lawyer,

applicant.

The Court heard addresses by them and their answers to its questions. Various documents were produced by Mr Brincat.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Joseph Brincat, a Maltese lawyer residing at Marsa (Malta), is a member of the Maltese Parliament and the Assembly of the Council of Europe.

7. On 19 November 1987 one of his clients was seriously injured in a road accident near Maratea (Italy).

The applicant was instructed by an insurance company to report on the circumstances of the accident, and on 5 December 1987, accompanied by the victim's wife, he went to a scrapyard at Tortora (province of Cosenza) where the damaged vehicle had been taken. The client's wife having attempted to recover personal property concealed in the petrol tank, the owner of the scrapyard alerted the police, who discovered in her possession *inter alia* a banknote which formed part of the ransom paid for the release of a person who had been kidnapped. The police thereupon took them to Maratea police station, where they were both questioned, and then put them under arrest, at the disposal of the public prosecutor (*procuratore della Repubblica*). The police also confiscated the items which had been taken from the car.

8. On the following day, at 3.00 a.m., Mr Brincat was transferred to Lagonegro Prison (province of Potenza) and imprisoned in an isolation cell which he shared with another detainee. On the same day the Lagonegro public prosecutor informed Mr Brincat's lawyer that he would hear the applicant on Monday 7 December, within the period of forty-eight hours laid down by Article 238 of the Code of Criminal Procedure in force at the time.

Mr Brincat appeared on that date, assisted by two lawyers. After questioning him, the deputy public prosecutor confirmed his detention (*convalidó l'arresto*). He was returned to Lagonegro Prison; he was no longer held in the isolation section, however, but associated with the other prisoners.

9. The Lagonegro public prosecutor conducted the preliminary investigation (*istruzione sommaria*). On 9 December he heard Mr Brincat again, at the latter's request, and checked his statements with Interpol. On 10 December he received a telex from the Palermo public prosecutor confirming the provenance of one of the banknotes which had been seized.

On that and the following day he sent telegrams to the Ministry of Foreign Affairs and the Ministry of Justice in order to obtain information on the applicant's parliamentary immunity.

Finally, after hearing the Maratea chief of police and another witness on 14 December, the Lagonegro public prosecutor declared that he did not have territorial jurisdiction. He sent the file by post to the public prosecutor's office which did have jurisdiction, that of Paola, which received it on 18 December. He also revoked the permission which Mr Brincat had been given to consult his lawyers, communicate with other persons and receive visits in prison, in particular from his sister who had travelled from Malta for this purpose.

The applicant's lawyers had in the meantime attempted to challenge his continued detention, but in vain: as the public prosecutor's office at Lagonegro had declined jurisdiction and that at Paola was not yet in possession of the necessary documents, the Cosenza District Court was not empowered to deal with the matter (Article 76 of the Code of Criminal Procedure).

10. On 18 December the Paola public prosecutor issued a warrant for Mr Brincat's arrest (*ordine de cattura*) for possession of property and money originating from a ransom. He ordered him to be transferred to Cosenza Prison.

11. The applicant was informed of this decision on the same day, and was taken there in a prison van in the early morning of Saturday 19 December, in handcuffs.

On his arrival he was informed that the deputy public prosecutor at Paola had lifted the prohibitions relating to his correspondence, visits and telephone contacts with his family. He applied at once to the Cosenza District Court for the arrest warrant to be examined in accordance with Article 5 para. 4 (art. 5-4) of the Convention and the relevant provisions of the Code of Criminal Procedure; he also complained, relying on Article 5 para. 3 (art. 5-3), that he had not been "brought promptly before a judge or other officer authorised by law to exercise judicial power".

The Paola public prosecutor questioned him on Tuesday 22 December.

12. On Monday 28 December 1987 the Cosenza District Court vacated the arrest warrant of 18 December and ordered the applicant's immediate release, as there was insufficient evidence against him.

The public prosecutor appealed. According to the information available to the Court, these proceedings and the main proceedings, in which the charge was reduced to smuggling, are still pending.

II. THE RELEVANT PROVISIONS OF ITALIAN LAW

13. The Code of Criminal Procedure in force at the time included the following provisions:

Article 238

"...

A police officer who arrests a person or receives an arrested person must inform the public prosecutor ... thereof immediately, and in any event within forty-eight hours ...

He must also notify him of the results of his inquiries within forty-eight hours.

The public prosecutor ... must immediately question the arrested person and, if he considers the arrest to be well-founded, confirm the arrest (convalida) by a reasoned decision, at the latest within forty-eight hours following the above-mentioned notification. This order shall be notified to the arrested person.

..."

Article 243

"In the cases specified in Articles 235 and 236 (flagrante delicto) the public prosecutor ... may order the arrest. If the arrest warrant is oral, it must be confirmed as soon as possible in writing in the usual form."

Article 244

"Police officers who have without an order or warrant from the judicial authorities arrested a person or received a person who has been arrested ... must within twenty-four hours place him at the disposal of the public prosecutor or magistrate ... unless the prosecutor and magistrate have been informed of the arrest and consider an extension of the aforesaid time-limit to be necessary. The record of the arrest shall also be notified to the public prosecutor or magistrate.

..."

Article 246

"...

If he does not have to order the accused's release ... the public prosecutor or magistrate shall by a reasoned decision order the accused to be kept in detention at the disposal of the competent authorities ...

..."

14. The new Code of Criminal Procedure, which came into force on 24 October 1989, no longer authorises the public prosecutor to order detention.

PROCEEDINGS BEFORE THE COMMISSION

15. Mr Brincat applied to the Commission on 8 January 1988, relying on Article 3 and Article 5 para. 3 (art. 3, art. 5-3) of the Convention.

On 13 July 1990 the Commission declared the complaint based on Article 5 para. 3 (art. 5-3) admissible, but declared the remainder of the application (no. 13867/88) inadmissible. In its report of 28 May 1991 (made under Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of that provision. The full text of the Commission's opinion is reproduced as an annex to this judgment*.

AS TO THE LAW

I. SCOPE OF THE CASE

16. In addition to Article 5 para. 3 (art. 5-3) Mr Brincat relied before the Court on Article 3 and Article 5 para. 4 (art. 3, art. 5-4), but the latter two complaints are outside the scope of the case as defined by the Commission's decision on admissibility (see among other authorities, *mutatis mutandis*, the *Margareta and Roger Andersson v. Sweden* judgment of 25 February 1992, Series A no. 226-A, p. 24, para. 70).

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 3 (art. 5-3)

17. The applicant complained that he had not been brought "promptly" before a "judge or other officer authorised by law to exercise judicial power", as required by Article 5 para. 3 (art. 5-3). He argued that the Lagonegro deputy public prosecutor, who questioned him on 7 December 1987, two days after his arrest, and decided to keep him in detention (see paragraph 8 above), did not fulfil the conditions set out in this provision, because of his role as a representative of the prosecuting authority and the restrictions on his power of review (Article 246 of the Code of Criminal Procedure; see paragraph 13 above); generally speaking, a prosecutor acted in the proceedings as the adversary of the accused, investigating the case, drawing up the indictment, speaking against the defence at the hearing and even being able to appeal against an acquittal.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 249-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

18. The Government contended, on the other hand, that in Italy the public prosecutor's office enjoyed the necessary guarantees of independence and impartiality, as a result of the principles laid down in the Constitution and the national legal system. It was composed of members of the judiciary; under the old Code of Criminal Procedure it could not be regarded as a party in the strict sense of the term, but rather as an organ of justice performing an "objective and neutral" function in the exclusive interests of the law, and being under an obligation to investigate with equal care exonerating and incriminating evidence.

19. The Court notes that the applicant did not dispute that the Lagonegro deputy public prosecutor was independent of the executive. Nor did he allege that the prosecutor had acted with personal bias. What is in dispute, therefore, is only his objective impartiality.

20. According to the Court's case-law, a judicial officer who is competent to decide on detention may also carry out other duties, but there is a risk that his impartiality may arouse legitimate doubt on the part of those subject to his decisions if he is entitled to intervene in the subsequent proceedings as a representative of the prosecuting authority (see the *Huber v. Switzerland* judgment of 23 October 1990, Series A no. 188, p. 18, para. 43).

The Government, however, invited the Court to return to the *Schiesser v. Switzerland* judgment of 4 December 1979 (Series A no. 34, p. 15, para. 34), which showed that only the effective concurrent exercise of such functions, as opposed to the mere abstract possibility thereof, was such as to infringe Article 5 para. 3 (art. 5-3). The Lagonegro deputy public prosecutor, after extending the deprivation of liberty, had in fact declared that he lacked jurisdiction and transferred the case-file to the prosecuting authorities at Paola.

This argument is not convincing. The *Huber v. Switzerland* judgment, which was adopted by the plenary Court on 23 October 1990, confirmed a development in the case-law which had started some years earlier in three cases relating to Netherlands legislation on the armed forces (see the *de Jong, Baljet and van den Brink* judgment, the *van der Sluijs, Zuiderveld and Klappe* judgment and the *Duinhof and Duijf* judgment, all of 22 May 1984, Series A nos. 77, 78 and 79; see also the *Pauwels v. Belgium* judgment of 26 May 1988, Series A no. 135). The Court concluded in those cases that the *auditeur-militair* who had ordered the applicants' detention could not be regarded as "independent of the parties" at that preliminary stage, as he was "liable" to become one of the parties. It sees no reason for departing from its case-law.

21. The above-mentioned case-law implies that only the objective appearances at the time of the decision on detention are material: if it then appears that the "officer authorised by law to exercise judicial power" may later intervene, in the subsequent proceedings, as a representative of the

prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified. It is common ground that this was the case on 7 December 1987 when the Lagonegro deputy public prosecutor decided to confirm the applicant's detention. The mere fact that it became clear afterwards, on 14 December 1987, that he lacked territorial jurisdiction and therefore would not be entitled to conduct the prosecution is immaterial.

On the same grounds the Paola public prosecutor too did not fulfil the conditions for a judicial officer deciding on detention; moreover, he did not hear Mr Brincat "promptly" before issuing a warrant for his arrest.

22. There has therefore been a violation of Article 5 para. 3 (art. 5-3).

III. APPLICATION OF ARTICLE 50 (art. 50)

23. 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

24. The applicant claimed in the first place 1,360 Maltese lire (MTL) for loss of earnings. His detention in Italy had prevented him from appearing in an extremely important case, and despite his inactivity he had had to bear all the costs of running his practice as a lawyer.

25. In the present judgment the Court has found that in the circumstances the impartiality of the Lagonegro deputy public prosecutor could arouse doubts which are to be held objectively justified (see paragraph 21 above). However, it cannot be said that another judicial officer who did comply with the conditions which follow from Article 5 para. 3 (art. 5-3) would not also have confirmed the warrant in issue. The Court therefore considers, in agreement with the Government and the Commission, that no causal link has been shown between the violation found and the pecuniary damage alleged.

26. On the other hand, Mr Brincat undoubtedly suffered non-pecuniary damage, as the situation complained of had adverse effects on his reputation and caused him a feeling of insecurity.

The Court, taking its decision on an equitable basis as required by Article 50 (art. 50), awards him MTL 1,000 under this head.

B. Costs and expenses

27. Mr Brincat claimed MTL 506.85 in respect of travel and accommodation costs incurred by his sister and a cousin in Lagonegro and Cosenza for the purpose of visiting him and conferring with his Italian lawyers; these costs were MTL 140 and MTL 181.43 for his sister and MTL 4 (by reason of a special fare) and MTL 181.42 for his cousin.

Despite the Government's argument to the contrary, there appears to have been a sufficient connection, having regard to the applicant's personal situation, between these journeys and the subject of the present case. However, the Court does not see why it was necessary for two persons to travel. Consequently, it awards the applicant only MTL 321.43, corresponding to his sister's expenses.

28. As the Government stated and the applicant acknowledged, the two Italian lawyers did not charge their Maltese colleague anything. There is therefore no need for any reimbursement in this respect.

As to his Maltese lawyer's fees and expenses, Mr Brincat claimed MTL 500, which included MTL 180 for a journey to Italy for the purpose of bringing items of evidence relating to the proceedings in progress. As there can be no doubt as to the connection with the applicant's release, his claims in this respect must be allowed.

29. With respect to the proceedings before the Convention institutions, the applicant claimed 12,000 French francs for the work which he himself carried out in drafting memorials and addresses, and also 400 pounds sterling (GBP) for travel expenses.

The former sum cannot be taken into consideration, as the applicant chose to present his own case (see paragraph 2 above). On the other hand, the award of the latter sum appears justified.

30. In short, Mr Brincat is entitled to the sum of MTL 821.43 plus GBP 400 for costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 5 para. 3 (art. 5-3);
2. Holds that the respondent State is to pay to the applicant, within three months, MTL 1,000 (one thousand Maltese lire) for non-pecuniary damage and MTL 821.43 (eight hundred and twenty-one Maltese lire and forty-three cents) and GBP 400 (four hundred pounds sterling) for 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 in the Human Rights Building, Strasbourg, on 26 November 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar