



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

COURT (CHAMBER)

CASE OF PADOVANI v. ITALY

(Application no. 13396/87)

JUDGMENT

STRASBOURG

26 February 1993

In the case of Padovani 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. BERNHARDT, *President*,

Mr Thór VILHJÁLMSSON,

Mr F. GÖLCÜKLÜ,

Mr B. WALSH,

Mr R. MACDONALD,

Mr C. RUSSO,

Mr J. DE MEYER,

Mr N. VALTICOS,

Mr J.M. MORENILLA,

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

Having deliberated in private on 25 May 1992, 25 September 1992 and 28 January 1993,

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. 13396/87) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by Mr Alessandro Padovani, an Italian national, on 1 July 1987.

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 6 para. 1 (art. 6-1).

* The case is numbered 71/1991/323/395. 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 and designated the lawyer who would represent him (Rule 30). On 16 August 1991 the President of the Court 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 29 August 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr R. Macdonald, Mr R. Bernhardt, Mr J. De Meyer, Mr N. Valticos and Mr J.M. Morenilla (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's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 5 December 1991, the Government's memorial on 23 December 1991 and the observations of the Delegate of the Commission on 24 February 1992.

5. Also on 24 February 1992 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. On 26 February the Chamber decided to dispense with a hearing, having found that the conditions for such a derogation from the usual procedure were satisfied (Rules 26 and 38).

7. On 12 March the Government filed their observations on the applicant's claims for just satisfaction.

8. On 3 June the Registrar, acting on the Court's instructions, asked the Government and the applicant for various documents; these were provided on 26 and 16 July.

9. As Mr Ryssdal was unable to attend the deliberations on 28 January 1993, his place as President of the Chamber was taken by Mr Bernhardt, the Vice-President of the Court (Rule 21 para. 5, second sub-paragraph); Mr B. Walsh, substitute judge, replaced Mr Ryssdal as a member of the Chamber (Rules 22 para. 1 and 24 para. 1).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

10. Mr Alessandro Padovani is a workman and lives in Bergamo.

On 21 February 1987 he was arrested by the police, who had found certain items of stolen property in his possession. On the same day the police brought him before the Bergamo magistrate (pretore), who immediately after questioning him confirmed his arrest. The magistrate also heard two other accused, Mr B. and Mrs M., on 21 and 23 February.

11. On 26 February the magistrate issued a warrant for the applicant's arrest, but not for that of Mr B. or Mrs M., and initiated immediate proceedings (*giudizio direttissimo*) against him and his co-accused. He set a hearing date of 2 March, and found that there was sufficient evidence pointing to Mr Padovani's guilt - namely the discovery of the articles in question at his residence - and that the alleged offences were serious, having regard *inter alia* to the applicant's previous history.

12. The hearing lasted for about half an hour. The applicant stated, as he had also done when questioned on 21 February 1987, that he had bought the items in question from a stranger who had told him that he needed money to pay a bill. He admitted, however, that he had not believed this explanation, but had thought that the vendor had stolen them from his relatives or friends in order to obtain money to purchase drugs.

The magistrate also heard Mr B. and Mrs M. and two witnesses. The public prosecutor's office, which was represented by counsel as permitted in certain cases by section 72 of Royal Decree no. 12 of 30 January 1941 on the organisation of the courts, requested eight months' imprisonment for Mr Padovani.

The magistrate considered that the applicant had not acquired the items in question in good faith, and imposed a suspended sentence of one year's imprisonment and fined him 250,000 lire. The judgment was filed with the registry seven days later, on 9 March 1987.

Mr Padovani did not appeal.

II. RELEVANT DOMESTIC LAW

13. The magistrate has jurisdiction over offences punishable by imprisonment for up to three years or by a fine or both, and also over a number of offences specifically mentioned in Article 31 of the Code of Criminal Procedure (CCP) in respect of which "a person arrested in *flagrante delicto* shall immediately be brought before the magistrate to be tried".

14. Under the heading "Immediate trial procedure" (Giudizio direttissimo), Article 505 of the former Code of Criminal Procedure in force at the time provided as follows:

"... In the case of offences within the jurisdiction of the magistrate (pretore), the police officers who have arrested a person in flagrante delicto or in whose charge an arrested person has been placed shall bring him directly before the magistrate, shall on the latter's instructions (even if merely oral) summon the victim and the witnesses, and shall notify defence counsel chosen [by the arrested person] or appointed by the court.

If the magistrate is not sitting, the police officers who have effected the arrest or in whose charge the arrested person has been placed shall immediately inform the magistrate thereof and shall produce the arrested person at a hearing, arranged by the magistrate, within forty-eight hours from the arrest.

The magistrate before whom the arrested person is brought shall authorise the police officer to make an oral report and shall then question the accused in order to confirm the arrest.

If the arrest is confirmed and the magistrate does not consider that he should release the accused, he shall immediately initiate proceedings according to the direttissimo procedure.

At the request of the accused, the magistrate may grant an adjournment of not more than five days for him to prepare his defence.

...

The magistrate shall exercise the powers conferred on the public prosecutor's office and the magistrate in accordance with the preceding Articles."

Under the heading "Conduct of criminal proceedings by the public prosecutor's office or the magistrate (pretore)", Article 74 of the CCP stated that:

"The public prosecutor's office or, for offences within his jurisdiction, the magistrate shall initiate or conduct criminal proceedings following the procedure provided for by law in accordance with Article 1.

...

The public prosecutor's office shall, if it considers that there is no occasion to initiate criminal proceedings, request the investigating judge to make an order (decreto) [to this effect] ...

For the purpose mentioned in the preceding paragraph, the magistrate shall make an order [discontinuing the proceedings] and shall notify the public prosecutor, who may request the file and decide to continue the proceedings."

Article 231 provided that:

"In the case of offences within his jurisdiction, the magistrate (pretore) shall, before making an order committing for trial or proceeding to give judgment in 'direttissimo'

proceedings or by 'decreto', order or carry out any police measures or summary investigative measures which he deems necessary ..."

III. THE CASE-LAW OF THE CONSTITUTIONAL COURT

15. The Italian Constitutional Court has had occasion to decide on the compatibility with various provisions of the Constitution of the magistrate's dual function of investigation and judgment.

In two decisions, no. 61 of 24 May 1967 (*Foro Italiano* 1967, I, p. 1113) and no. 123 of 9 July 1970 (*Foro It.* 1970, I, p. 1841), it dismissed the objections of unconstitutionality put forward in this respect.

In a more recent decision of 15 December 1986 (no. 268, *Foro It.* 1988, I, p. 1117), the Constitutional Court invited the legislature to take account, in the context of the reform of the Code of Criminal Procedure, of the development in legal thought towards drawing a clear distinction between the above two functions. It stated that in the absence of a legislative measure it would have to reconsider its case-law.

16. The question has now been resolved, as the new code, which came into force on 24 October 1989 and adopted the adversarial system, provides for such a separation in respect of proceedings in the magistrate's court. In Articles 549 to 567 it institutes a public prosecutor's office at each magistrate's court (*pretura*).

PROCEEDINGS BEFORE THE COMMISSION

17. The applicant applied to the Commission on 1 July 1987. He complained that the magistrate had not been an impartial tribunal and relied on Article 6 para. 1 (art. 6-1) of the Convention.

18. The Commission declared the application (no. 13396/87) admissible on 3 December 1990. In its report of 6 June 1991 (made under Article 31) (art. 31), it expressed the opinion, by sixteen votes to two, that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report 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 257-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

19. The Government argued that the applicant had not exhausted domestic remedies, as he had not appealed against the pretore's judgment on the ground that he had not been impartial.

The Court finds that the objection, which was previously raised before the Commission, is unfounded; as the magistrate acted in accordance with the legislation in force at the time (see paragraph 14 above), the Bergamo District Court would not have been able to quash the judgment.

20. The Government also observed that Mr Padovani could have asked the appellate court to refer a question relating to the constitutionality of the said legislation to the Constitutional Court, given the "possibilist attitude" adopted in the judgment of 15 December 1986 (see paragraph 15 above, *in fine*).

This argument was not put forward before the Commission and is subject to estoppel (see, *inter alia*, the *Ciulla v. Italy* judgment of 22 February 1989, Series A no. 148, p. 14, paras. 27-29). In any event, an individual is not entitled to apply directly to the Italian Constitutional Court for a review of the constitutionality of a law, so that he does not have available to him in this respect a remedy whose exhaustion is required under Article 26 (art. 26) of the Convention (see the *Brozicek v. Italy* judgment of 19 December 1989, Series A no. 167, pp. 16-17, para. 34).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

21. Mr Padovani alleged that he had not received a hearing before an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1), which states that:

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

22. The Commission agreed in essence with this argument. It considered that, irrespective of the pretore's actual conduct in concreto, the functions of investigation and judgment were fundamentally incompatible.

23. The Government argued, on the other hand, that the pretore could not be criticised as having lacked impartiality. He had intervened at a stage prior to the hearing, and had used only the powers expressly conferred on him by the law in the context of a special procedure inspired by concern for speed and simplicity.

24. The Court points out that its task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they

were applied to or affected the applicant gave rise to a violation of Article 6 para. 1 (art. 6-1) (see, *inter alia*, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 45).

25. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (*ibid.*, para. 46).

26. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*ibid.*, para. 47), and no evidence has been produced which might suggest bias on the part of the magistrate.

27. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect 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 and above all, as far as criminal proceedings are concerned, in the accused.

It follows 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 accused is important but not decisive. What is decisive is whether this fear can be regarded as objectively justified (*ibid.*, para. 48).

28. In the instant case the fear of lack of impartiality was based on the fact that the pretore had before the trial questioned the applicant, taken measures restricting his liberty and summoned him to appear before him (see paragraphs 10-11 above).

Although such a situation could occasion misgivings on the part of the applicant, they cannot for all that be regarded as objectively justified.

The information obtained by the Court (see paragraph 8 above) in fact shows that the summary investigative measures referred to in paragraph 16 of the Commission's report consisted in the present case merely of questioning the three accused, even though under Article 231 of the Code of Criminal Procedure the magistrate could have carried out further measures (see paragraph 14 above, *in fine*). It also appears that in issuing the arrest warrant of 26 February 1987, the magistrate relied *inter alia* on Mr Padovani's own statements (see paragraphs 11-12 above and the *Sainte-Marie v. France* judgment of 16 December 1992, Series A no. 253-A, p. 16, para. 33).

The Court notes in addition that the pretore followed specific rules applicable to *flagrante delicto* cases within his jurisdiction. *Giudizio direttissimo* is a flexible procedure which seeks to satisfy the "reasonable time" requirement.

29. There has therefore not been a violation of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the objection of failure to exhaust domestic remedies;
2. Holds that there has not been a violation of Article 6 para. 1 (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 February 1993.

Rudolf BERNHARDT
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the concurring opinion of Mr De Meyer is annexed to this judgment.

R. B.
M.-A. E.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

In common with the other members of the Chamber, I am of the opinion that in the particular circumstances of the case the applicant's fundamental rights were not violated.

Like the Fey case¹, which was decided by a different Chamber, the present case demonstrates the difficulties which may arise in applying the principles stated by the Court since the Piersack² and De Cubber³ judgments, with respect to the successive exercise by a judge of different functions. Further thought appears to be called for on this subject.

The question also arises more generally whether the Court is not sometimes more sensitive to appearances than to reality when considering the independence and impartiality of tribunals.

¹ Fey v. Austria judgment of 24 February 1993, Series A no. 255.

² Piersack v. Belgium judgment of 1 October 1982, Series A no. 53.

³ De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86.