



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

COURT (CHAMBER)

CASE OF TRIPODI v. ITALY

(Application no. 13743/88)

JUDGMENT

STRASBOURG

22 February 1994

In the case of Tripodi 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 Thór VILHJÁLMSÖN,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mr C. RUSSO,

Mr A. SPIELMANN,

Mr J. DE MEYER,

Mr R. PEKKANEN,

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

Having deliberated in private on 23 September 1993 and 25 January 1994,

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 19 February 1993, 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. 13743/88) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by an Italian national, Mrs Rosa Tripodi, on 9 July 1986.

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. 3 (c) (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 she wished to take part in

* Note by the Registrar: the case is numbered 4/1993/399/477. 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.

the proceedings and designated the lawyer who would represent her (Rule 30).

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 February 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr L.-E. Pettiti, Mr R. Macdonald, Mr A. Spielmann, Mr J. De Meyer and Mr R. Pekkanen (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Italian Government ("the Government"), the applicant's lawyer and Delegate of the Commission 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 July 1993 and the Government's memorial on 30 July.

5. On 2 September 1993 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President - who had given the applicant leave to use the Italian language (Rule 27 para. 3) -, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 September 1993. 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*,

Mr E. SELVAGGI, Head of the Human Rights Department,

Directorate General of Criminal Affairs, Ministry of
Justice,

Mr V. ESPOSITO, President of Chamber,

Court of Cassation, *Counsel*;

- for the Commission

Mr E. BUSUTTIL,

Delegate.

The applicant's lawyer did not take part in the hearing.

The Court heard addresses by Mr Raimondi, Mr Esposito and Mr Busuttill. At the conclusion of the hearing the Government produced various documents.

7. On 30 September the applicant's lawyer filed observations in reply to the Government's memorial; the Court decided not to include them in the file as they had been lodged belatedly (Rule 37 para. 1, third subparagraph).

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mrs Rosa Tripodi, a shopkeeper, lives in Reggio di Calabria.

9. In 1975 a lawyer, Mr M. F., sold her a plot of land adjoining his property in Riace. Numerous disputes arose between them.

10. On 5 November 1982 Mr M. F. laid a complaint against the applicant with the Reggio di Calabria public prosecutor. On 15 November the local carabinieri questioned Mrs Tripodi in connection with the acts of which she was accused.

On 7 February 1983 notice of criminal proceedings was served on the applicant and on 26 April 1983 she was interviewed by the public prosecutor. In the meantime she had accused Mr M. F. of attempted blackmail.

11. Further incidents led Mr M. F. to file additional complaints on 11 April, 10 May, 10 and 28 June 1983. Pursuant to a warrant issued by the investigating judge on 5 July 1983, Mrs Tripodi was arrested on 8 July and questioned on 12 July.

12. She was released on the same day, but by a decision (*decreto di citazione*) of 7 October 1983 was summoned to appear in the Reggio di Calabria District Court charged, *inter alia*, with threatening to cause bodily harm to Mr M. F. and his son (Articles 610 and 612 of the Criminal Code), issuing threats intended to coerce witnesses into giving false evidence (Article 611), harassment by telephone (Article 660), attacking the complainant's honour and reputation by insults and defamation (Articles 594-595) and criminal damage (Article 635).

13. When the trial opened on 8 November 1983, the public prosecutor called for a charge of repeated false accusation (*calunnia continuata* - Articles 81 and 368) to be added to the indictment, whereupon the District Court adjourned the proceedings.

14. Trying Mrs Tripodi on a new indictment, the District Court sentenced her on 9 May 1984 to a suspended term of one year and ten months' imprisonment, not to be entered on her criminal record. It also fined her 150,000 lire and awarded damages against her.

15. On an appeal by the applicant, the Reggio di Calabria Court of Appeal, giving judgment on 4 February 1985, quashed the conviction on one count and reduced the suspended prison sentence by two months.

16. Mrs Tripodi and the public prosecutor appealed to the Court of Cassation. The applicant filed her submissions in a memorial of 11 March 1985. On 26 March the registrar informed the lawyer appointed by her (*difensore di fiducia*) that the file had reached the Court of Cassation. On 2 October 1985 the lawyer received the notice fixing the date of the hearing.

On 18 November 1985 he asked the court to postpone the hearing set down for 6 December 1985, as his state of health prevented him from attending on that date. He had had an operation and when he had left hospital on 15 November his doctor had prescribed thirty days' total rest for him. The letter reached the registry on 25 November 1985.

17. The hearing before the Court of Cassation was nevertheless held on 6 December 1985. On that date the public prosecutor opposed an adjournment. The Court of Cassation refused to accede to the applicant's lawyer's request and proceeded to hear the case in the latter's absence. In a judgment of the same date, filed with the registry on 14 March 1986, it dismissed the appeals of both parties.

II. THE RELEVANT DOMESTIC LAW

18. The main provisions of the Code of Criminal Procedure in force at the material time with regard to the procedure in the Court of Cassation and various Articles concerning the replacement of counsel and the adjournment of hearings are set out below.

1. The procedure in the Court of Cassation

19.

Article 529

"...

"Where the submissions [in support of the appeal] have been filed in good time, further submissions may be lodged within the time-limit laid down in Article 533."

Article 533

"As soon as the file reaches the registry, the registrar of the Court of Cassation shall advise the defendant's lawyer that, for a period of fifteen days following service of the notice, he may consult the file at the registry, make copies of the documents therein and produce new documents."

Article 536

"...

The parties to the proceedings other than the prosecution may appear only through their lawyers, who must be entered on the special roll of the Court of Cassation; they may file with the registry, not later than eight days before the day fixed for the hearing, memorials ... setting out legal argument in support of their submissions.

...

At the hearing the President or the member of the Court delegated by him shall read out the report. The parties' lawyers are not required to be present or to make final submissions. A lawyer other than the one designated in the notice of appeal may address the Court ... provided that he has received special authority to this effect."

2. The choice of a lawyer

20.

Article 125

"...

The accused may not be assisted by more than two lawyers."

Article 127

"If they are unable to attend on legitimate grounds, the lawyer or lawyers appointed by the parties may each designate a lawyer to replace them; the latter shall be authorised to take part in the hearing only for as long as it remains necessary for them to replace the lawyer or lawyers in question.

..."

3. Adjournment of hearings

21.

Article 432

"Where it is expressly authorised by the law, or if it becomes absolutely necessary to do so, the Court of Cassation, the District Court or the Magistrate's Court ("pretore") may make an order adjourning the hearing."

22. Article 486 of the new Code of Criminal Procedure, which entered into force on 24 October 1989, now provides that "where the lawyer is absent because there are legitimate reasons making it absolutely impossible for him to appear, the judge shall stay or adjourn the hearing".

PROCEEDINGS BEFORE THE COMMISSION

23. Mrs Tripodi lodged her application (no. 13743/88) with the Commission on 9 July 1986. She maintained that her case had not been heard by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention. She also alleged that her arrest and her detention had been contrary to Article 5 (art. 5). Finally, she complained that, in breach of Article 6 para. 3 (c) (art. 6-3-c), she had not had the benefit of the

assistance of a lawyer for the examination of her appeal by the Court of Cassation.

24. On 2 July 1990 the Commission declared the first two complaints inadmissible. It found the third admissible on 13 January 1992. In its report of 14 October 1992 (made under Article 31) (art. 31) it expressed the unanimous opinion that there had been a violation of Article 6 para. 3 (c) (art. 6-3-c). The full text of the Commission's opinion is reproduced as an annex to this judgment**.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (c) (art. 6-3-c)

25. Mrs Tripodi complained that, at its hearing on 6 December 1985, the Court of Cassation had examined her appeal in the absence of her lawyer and had failed to appoint a lawyer to take his place. She relied on Article 6 para. 3 (c) (art. 6-3-c), which is worded as follows:

"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 or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

The Commission in substance accepted the applicant's submission.

26. The Government contested it. They contended that, in view of the special features of the procedure in the Court of Cassation and the relevant provisions of the Italian legislation, the absence of a lawyer during the oral phase of the proceedings had not been contrary to the Convention.

The Government maintained that, in order to assess whether the applicant had been afforded effective legal assistance and whether the principle that proceedings must be *inter partes* had been complied with, it was necessary

** Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 281-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

to view the proceedings in their entirety; that was thus the approach to be adopted.

Once it had been established that the lawyer was going to be unable to attend the hearing, he and his client could have taken appropriate steps to appoint either a replacement or a second lawyer (Articles 125, 127 and 536 of the Code of Criminal Procedure, see paragraphs 19-20 above).

27. The Court notes that in appeal and cassation proceedings the manner in which paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c) are to be applied depends upon the special features of the proceedings in question. Account must be taken of the entirety of the proceedings conducted in the domestic legal system and the role of the particular appellate court therein (see, *inter alia*, *mutatis mutandis*, the following judgments: *Monnell and Morris v. the United Kingdom* of 2 March 1987, Series A no. 115, p. 22, para. 56; *Granger v. the United Kingdom* of 28 March 1990, Series A no. 174, p. 17, para. 44; and *Jan-Åke Andersson v. Sweden* of 29 October 1991, Series A no. 212-B, pp. 43-44, para. 22).

28. In this connection, it should be observed that the Italian Court of Cassation decides on points of law. Its proceedings are essentially written and at the hearing the appellant's lawyer may only present argument in relation to submissions already made in the appeal and the memorials. This rule does not apply where the appellant invokes incurable nullity, reasons precluding the continuation of the criminal proceedings or questions of constitutionality. These are therefore issues which may be raised also at the hearing and indeed may be examined by the court of its own motion, but the applicant did not adduce any such grounds.

29. Mrs Tripodi's lawyer made his submissions in a memorial of 11 March 1985 (see paragraph 16 above). On 26 March he was advised that the file had been lodged with the registry and that he could consult it and produce new documents (Article 533 of the Code of Criminal Procedure - see paragraph 19 above). On 2 October he received the notice informing him of the date of the hearing (6 December 1985). On 18 November he sent a letter attesting to his inability to attend and requesting an adjournment.

30. The Court, like the Commission, fully recognises the value of oral argument before the Court of Cassation, notwithstanding the limits referred to in paragraph 28 above. It has had regard in this connection to the fact that parties other than the prosecuting authorities must be represented by their lawyers (Article 536 of the Code of Criminal Procedure, see paragraph 19 above).

It notes, however, that, despite knowing that he would be unable to attend the hearing set down for 6 December 1985, the applicant's lawyer failed to take any action. Yet he could not have been unaware of the statutory provisions on adjournment (Article 432 of the Code of Criminal Procedure, see paragraph 21 above). From 18 November 1985, if not before, he could - and should - have taken steps to ensure that he was replaced for

the day of the hearing (Article 127 of the Code of Criminal Procedure, see paragraph 20 above). He could also have filed a further memorial, or have arranged for the filing of such a memorial by another lawyer, even as late as eight days before the hearing (Article 536 of the Code of Criminal Procedure, see paragraph 19 above).

In these circumstances the Court cannot hold the State responsible for a shortcoming on the part of the lawyer appointed by the accused (see, in respect of a lawyer appointed for legal aid purposes, the *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, p. 33, para. 65).

31. Having regard to the special features of the procedure in the Court of Cassation and to the conduct of the applicant's lawyer, the Court finds that there has been no violation of Article 6 para. 3 (c) (art. 6-3-c).

FOR THESE REASONS, THE COURT

Holds by seven votes to two that there has been no violation of Article 6 para. 3 (c) (art. 6-3-c).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 February 1994.

Rolv RYSSDAL
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 joint dissenting opinion of Mr Ryssdal and Mr De Meyer is annexed to this judgment.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL AND
DE MEYER

We agree with the opinion of the Commission that there has been a breach of Article 6 para. 3 (c) (art. 6-3-c) in this case.

It is not in dispute that, on account of the rest which his doctor had prescribed for him on 15 November 1985, the lawyer briefed by the applicant to present her case in the Court of Cassation was unable for a legitimate reason to appear before that court on 6 December and that he had, on 18 November 1985, requested the Court of Cassation to postpone the hearing for that reason to a later date¹.

The Court of Cassation left it until 6 December 1985 before deciding to reject the lawyer's request and proceeded to dispose of the case forthwith in the presence of the representative of the prosecuting authority but in the absence of the applicant's lawyer.

The latter can hardly be criticised for failing to take any action², when his doctor had, on 15 November 1985, prescribed "total rest" for him. The Court of Cassation had been informed of this three days later³.

Similarly, it can scarcely be held against the applicant that she failed to adduce any of the grounds which could still have been raised at the hearing⁴, when she was denied the opportunity of participating in the oral proceedings either in person or through her lawyer. Moreover, there is nothing to indicate that she was aware that her lawyer was unable to attend.

Against this background we consider that the rights of the defence were not adequately respected.

¹ Paragraph 16 of the judgment.

² Paragraph 30 of the judgment.

³ Paragraph 16 of the judgment.

⁴ Paragraph 28 of the judgment.