



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

SECOND SECTION

CASE OF A.M. v. ITALY

(Application no. 37019/97)

JUDGMENT

STRASBOURG

14 December 1999

FINAL

14/03/2000

In the case of A.M. v. Italy,

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

Mr C.L. ROZAKIS, *President*,
Mr M. FISCHBACH,
Mr B. CONFORTI,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,

And Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 2 December 1999,

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

PROCEDURE

1. The case originated in an application (no. 37019/97) against the Italian Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr A.M. (“the applicant”), on 19 June 1997. The applicant was represented by Mr A. D’Avirro, a lawyer practising in Florence, and the Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza.

2. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicant complained that he had been denied a fair trial as the defendant in criminal proceedings. On 16 April 1998 the Commission (First Chamber) decided to give notice of the application to the Government and to invite them to submit observations in writing on its admissibility and merits.

The Government lodged their observations on 17 July 1998 and the applicant replied on 7 October 1998.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 2 thereof, the application was examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Second Section. The Chamber constituted within that Section included *ex officio* Mr B. Conforti, the judge elected in respect of Italy (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr C.L. Rozakis, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr M. Fischbach, Mr G. Bonello, Mrs V. Strážnická, Mr P. Lorenzen and Mrs M. Tsatsa-Nikolovska (Rule 26 § 1 (b)).

5. On 23 February 1999 the Chamber declared the application admissible¹ and invited the parties to lodge supplementary observations regarding the merits of the application.

The Government filed their supplementary observations on 16 April 1999 and the applicant replied on 24 May 1999.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, an Italian national, was born in 1942 and lives in Florence.

7. On an unspecified date, G., a minor, complained to the County Department of Public Safety in Seattle (United States) that while on holiday in Italy he had been indecently assaulted by the applicant, a caretaker in the halls of residence where he had been staying. Consequently, the Florence public prosecutor's office brought criminal proceedings against the applicant for sexual assault on a minor and gross indecency in a public place.

8. On 16 March 1991 the Florence public prosecutor sent international rogatory letters to the Criminal Division of the King County District Court in Seattle pursuant to the Treaty for Mutual Assistance in Criminal Proceedings between the Government of the Italian Republic and the Government of the United States of America ("the Mutual Assistance Treaty"), which had been ratified by Law no. 224 of 1984. The aim of the rogatory letters was for questions to be put to G., his father (Mr D.) and Miss F., the doctor in whom G. had first confided. The public prosecutor set out in detail the questions which he considered should be put to the witnesses and the manner in which the record of interview should be drafted. He added that no lawyer should be present during the interview.

9. On 6 November 1991 Mr D. was questioned by a Seattle police officer. No lawyer was present at the interview. In essence, he confirmed that his son had said that he had been fondled by the applicant. On 26 May 1992 the Italian Consulate-General in San Francisco (United States) received the record of the interview from the American authorities with two documents containing written statements by G.'s mother (Mrs D.) and Mrs N., a child psychotherapist who was treating G. for the behavioural disorders he presented. In their statements, Mrs N. recited the events that G. had related to her and the traumatic effects they had had, while Mrs D. confirmed her

1. *Note by the Registry.* The Court's decision is obtainable from the Registry.

husband's version of events. The documents were then translated into Italian and sent to the Florence public prosecutor.

10. The applicant was committed for trial before the Florence Criminal Court.

11. On 25 October 1993 the Florence public prosecutor applied to the President of the Criminal Court for permission to summons G., Mr and Mrs D. and Mrs N. to appear at a public hearing on 23 November 1993 for questioning. The case file does not reveal whether that application was granted or whether the witnesses concerned were served with summonses to attend. Whatever the position, none of them appeared at the trial before the Criminal Court and the examination requested by the public prosecutor did not take place.

12. On 23 November 1993 two police officers from Florence were questioned. They indicated that they had received G.'s complaint from the American authorities and gave a description of the hall of residence where the applicant had been working at the material time.

13. At the request of the public prosecutor and despite opposition by the applicant, the Criminal Court ordered that the documents received from the United States, in particular the record of the interview with Mr D. and the statements of Mrs D. and Mrs N., should be read out. That decision was taken pursuant to Article 512 *bis* of the Code of Criminal Procedure (CCP), which provides: "On application by a party and having regard to the other evidence, the judge may order that the records of the statements made by a foreign national living outside the Italian territory be read out if either that person has not been summonsed to appear or, having been so summonsed, has failed to appear." The applicant and the defence witnesses gave evidence that same day.

14. In a judgment of 19 January 1994, which was deposited with the registry on 19 March 1994, the court imposed a two-year suspended sentence on the applicant. That decision was taken on the basis of the complaint lodged by G. with the Department of Public Safety in Seattle and the statements made by Mr and Mrs D. and Mrs N., which the court found to be credible and consistent.

15. On 26 April 1994 the applicant appealed to the Florence Court of Appeal. He argued, *inter alia*, that the acts performed pursuant to the rogatory letters were invalid. In that connection, he noted that G. had never been interviewed and that evidence had been taken from Mrs D. and Mrs N. – whom the Florence public prosecutor had not sought to interview – without authority. Furthermore, they had not been questioned but had merely made written statements. As regards Mr D.'s interview, the American police officer who had conducted it had been acting without authority, given that the international rogatory letters had been sent to the District Court in Seattle. Moreover, no lawyer had been present when the interviews and statements were obtained and the persons concerned had not been asked to take the oath,

which showed that the documents did not constitute “testimony”, but merely “preliminary investigative acts”. As such, they should not have been used by the Florence Criminal Court as evidence of the accused’s guilt. Lastly, the applicant contended that Article 512 *bis* CCP was not applicable in the instant case as that provision referred only to statements made in Italy.

16. In a judgment of 17 May 1996, which was deposited with the registry on 23 May 1996, the Court of Appeal upheld the judgment of the Criminal Court. It observed that by virtue of the *locus regit actum* principle, acts performed under rogatory letters had to be regulated by the law of the foreign State to which the Italian authorities had referred, provided that the foreign law was not incompatible with Italian public order and in particular “defence rights”. In the instant case, the procedure followed by the Seattle authorities could not be regarded as having infringed those rights as Article 512 *bis* CCP allowed statements made in Italy or elsewhere by foreign nationals resident outside the national territory to be read out. As regards the fact that G. had not been questioned, the Court of Appeal considered that it was quite understandable that the American police should have wished to prevent the minor, who had been affected psychologically by the violence he had endured, from suffering any further trauma.

17. On 29 June 1996 the applicant appealed to the Court of Cassation. Referring to the arguments he had raised before the Court of Appeal, he repeated his case that the documents obtained through rogatory letters should not have been used to decide his guilt. He also maintained that Article 431 § 1 (d) CCP, which requires that a record of acts performed outside the Italian territory by rogatory letters be lodged on the judge’s file (*fascicolo per il dibattimento*), was unconstitutional. He considered in particular that that provision was incompatible with Articles 3 and 24 of the Italian Constitution, which respectively guarantee the equality of all citizens before the law and the right to defend oneself at every stage of the proceedings. In that connection, he stressed that he had been given no opportunity to question Mr D., Mrs D. or Mrs N., whose statements had formed the basis of his conviction.

18. In a judgment of 17 January 1997, which was deposited with the registry on 2 April 1997, the Court of Cassation cited the provisions of Article 512 *bis* CCP, which it held to be applicable in the instant case, and declared the issue of constitutionality raised by the applicant irrelevant. Finding that the reasons given by the Florence Court of Appeal on all the issues in dispute had been cogent and correct, it dismissed the applicant’s appeal.

II. RELEVANT DOMESTIC LAW

19. Under the terms of Article 1 of the Mutual Assistance Treaty, the signatory States undertake to afford each other mutual assistance in criminal

investigations and proceedings. Such assistance includes in particular the hearing of witnesses in the territory of the State to which the request is addressed. In that connection, Article 14 of the Mutual Assistance Treaty provides notably:

“A person from whom evidence is sought shall, if necessary, be compelled to appear and testify to the same extent as would be required in criminal investigations or proceedings in the Requested State.

Upon request, the Requested State shall specify the date and place of the taking of testimony.

The Requested State shall permit the presence [at the hearing] of an accused, counsel for the accused, and persons charged with the enforcement of the criminal laws to which the request relates.

The executing authority shall provide persons permitted to be present [at the hearing] the opportunity to question the person whose testimony is sought in accordance with the laws of the Requested State.

The executing authority shall provide persons permitted to be present [at the hearing] the opportunity to propose additional questions and other investigative measures.

Testimonial privileges under the laws of the Requesting State shall not apply in the execution of a request, but such questions of privilege shall be preserved for the Requesting State.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

20. The applicant complained that the criminal proceedings against him had been unfair and that he had not been given an opportunity to examine or have examined Mr and Mrs D. and Mrs N. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which provide:

“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:

...

(d) to examine or have examined witnesses against him ...”

21. The applicant contested the domestic courts’ construction of Article 512 *bis* CCP as meaning that that provision was also applicable to statements made outside Italian territory. He further argued that the acts performed pursuant to the rogatory letters were invalid, alleged that the only items of evidence on which his conviction had been based were the statements of Mr and Mrs D. and Mrs N. and maintained that the fact that they had been read out at his trial before the Criminal Court had denied him any opportunity to examine his accusers.

As to the possibility of seeking examination of the witnesses under the Mutual Assistance Treaty, the applicant contended that the rogatory letters had been issued without his knowledge and that, as a result, he had been unable to exercise the rights and liberties afforded by Article 14 of that Treaty.

22. The Government explained that under the Italian legal system all evidence must in principle be given at an adversarial hearing before the court having jurisdiction. However, in order to enable that court to establish the facts of the case, it was possible in some circumstances and subject to compliance with the conditions laid down by law, to use evidence acquired during preliminary investigations as a basis for the decision, in particular where such evidence could not be “repeated” at trial. Under Article 512 *bis* CCP the court could order that statements made by a foreign national be read out provided they did not constitute the only evidence against the accused.

In the instant case, the applicant – who had raised a number of objections aimed at having the statements made in the United States declared inadmissible in evidence (*inutilizzabili*) – had not requested the examination of Mr and Mrs D. and Mrs N. in the presence of his lawyers, as permitted by Italian law and the provisions of the Mutual Assistance Treaty.

Furthermore, the Government pointed out that the use of depositions taken during the initial investigative phase was not in itself contrary to the Convention and that the rights relied upon by a witness in order to avoid appearing before the court should not result in the proceedings being halted. They accordingly considered that the applicant had had a “fair trial”, especially as his conviction had been based on other items of evidence gathered by the national authorities.

23. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under Article 6 §§ 1 and 3 (d) taken together (see, among many other authorities, the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 711, § 49).

24. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the

Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, the Van Mechelen and Others judgment cited above, p. 711, § 50, and the Doorson v. the Netherlands judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67).

25. In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see the Van Mechelen and Others judgment cited above, p. 711, § 51, and the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, § 49). In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see the Van Mechelen and Others judgment cited above, p. 712, § 55; the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; and the Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33).

26. The Court notes that in convicting the applicant in the instant case the domestic courts relied solely on the statements made in the United States before trial and that the applicant was at no stage in the proceedings confronted with his accusers.

27. As to the fact that the applicant could have requested the examination of the witnesses under the Mutual Assistance Treaty, it should be noted that in his international rogatory letters of 16 March 1991, the Florence public prosecutor informed the American authorities that no lawyer was to be allowed to attend the requested examinations. In addition, the Government have not produced any court decision showing how the Treaty is applied. Accordingly, the Court considers that it has not been established that the procedure offered the accessibility and effectiveness required by Article 14 of the Mutual Assistance Treaty.

28. Under these circumstances, the applicant cannot be regarded as having had a proper and adequate opportunity to challenge the witness statements that formed the basis of his conviction. He therefore did not have a fair trial and there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant said that he had lost his job as a caretaker as a result of his conviction. His health had also deteriorated. As a result, he alleged pecuniary damage resulting from the violation of the Convention of 1,022,000,000 Italian lire (ITL). He also sought ITL 300,000,000 for non-pecuniary damage.

31. In the Government’s submission, the applicant had not duly established any pecuniary damage. As to non-pecuniary damage, a judgment finding a violation of Article 6 would constitute sufficient just satisfaction.

32. Whilst the Court cannot speculate as to the outcome of the proceedings concerned had there been no violation of the Convention, it considers that the applicant suffered a loss of real opportunity (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). It also finds that the applicant suffered actual non-pecuniary damage. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, it decides to award him the sum of ITL 50,000,000.

B. Costs and expenses

33. The applicant also sought reimbursement of ITL 4,000,000 for sundry costs incurred in the proceedings before the domestic courts and ITL 837,900 for costs incurred before the Commission and the Court.

34. The Government left the matter to the Court’s discretion.

35. The Court observes that on several occasions during the domestic proceedings the applicant had submitted that he was entitled to examine the prosecution witnesses. It therefore considers that the costs incurred before the domestic courts were incurred in order to remedy the violation that has been found and that those costs must be reimbursed (see, for a case decided differently on the facts, *Serre v. France*, no. 29718/96, § 29, 29 September 1999, unreported). It is also appropriate to award him the sum claimed for the proceedings before the Commission and the Court. Consequently, the Court decides to award the applicant the amount claimed (ITL 4,837,900).

C. Default interest

36. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 2.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 50,000,000 (fifty million) Italian lire for damage, and 4,837,900 (four million eight hundred and thirty-seven thousand nine hundred) Italian lire for costs and expenses;
 - (b) that simple interest at an annual rate of 2.5% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 14 December 1999, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President