



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

FOURTH SECTION

CASE OF HOWARTH v. THE UNITED KINGDOM

(Application no. 38081/97)

JUDGMENT

STRASBOURG

21 September 2000

FINAL

21/12/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subjected to editorial revision before its reproduction in final form.

In the case of Howarth v. the United Kingdom,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Sir Nicolas BRATZA,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 31 August 2000,

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

PROCEDURE

1. The case originated in an application (no. 38081/97) against the United Kingdom 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 a British national, Mr Jeremy Howarth (“the applicant”), on 17 September 1997.

2. The applicant was represented by Mr B. Spiro, a solicitor practising in London. The British Government (“the Government”) were represented by their Agent, Mr H. Llewellyn.

3. The applicant alleged that the delay of two years between his original sentence which was non-custodial and his subsequent custodial sentence, following the Attorney General’s reference of his case to the Court of Appeal for a review of his sentence, amounted to a breach of the “reasonable time requirement” under Article 6 of the Convention and a breach of Article 3.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 14 September 1999 the Chamber declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a British citizen, born in 1945.

8. On 17 March 1993 the applicant was interviewed by officers of the Serious Fraud Office in connection with allegations of market rigging, theft and false accounting, alleged to have taken place in the course of the takeover of one company by the company in which the applicant, a chartered accountant, was involved. The alleged offences took place during the period 1990 to 1991.

9. The applicant was further interviewed on 27 April 1993 and 21 June 1993, and was formally charged on 30 July 1993.

10. The applicant's trial began in October 1994 and on 10 February 1995, after a trial lasting 63 days, the applicant was convicted of conspiracy to defraud and four counts of theft. The proceedings were adjourned for pre-sentence reports, and on 10 March 1995 the applicant was ordered to perform 220 hours community service. He was also ordered to pay compensation of GBP 151,042.36 within two years, with 12 months' imprisonment in default, and was further ordered to pay GBP 20,000.00 towards prosecution costs.

11. The applicant lodged a notice of appeal against conviction on 11 March 1995, and on 5 April 1995, the Attorney General made a reference to the Court of Appeal for a review of the applicant's sentence under Section 36 of the Criminal Justice Act 1988. In May 1995, the applicant was refused legal aid on financial grounds.

12. On 20 September 1995 the applicant, privately represented, submitted perfected grounds of appeal and his response to the Attorney General's reference. Leave to appeal against conviction was granted on 20 December 1995. A request for the legal aid position to be reconsidered was refused by a single judge in March 1996.

13. In October 1996, after a summary of the case had been prepared by the Criminal Appeal Office, the case was sent to the Listing Office, and on 20 January 1997 the hearing dates were fixed with counsel's clerks.

14. On 29 January 1997 the Attorney General served an amended Section 36 reference.

15. The applicant's appeal against conviction was dismissed by the Court of Appeal on 20 March 1997, and on 21 March, the Attorney General's reference was heard by the Court of Appeal. The Court of Appeal found as follows:

“We grant leave in respect of each of these applications, as we consider the sentence imposed by Judge Mota Singh in respect of each of the defendants was unduly lenient. (...)

Much has been said about the delay in this case. It does indeed seem a very long time. But it has to be borne in mind that much of the delay in the hearing of these applications has resulted from the fact that two of the defendants chose, as was their right, to appeal against conviction.

We regard conduct of the sort involved here, that is to say working to create a false market in shares in companies involved in a City takeover, and in order to influence the fate of that takeover, as a very serious matter. Not only may it lead to a fraud on shareholders, but it causes considerable damage to the reputation of the City of London, which is very important to the whole country; and damage to the confidence of the public in its institutions.

We consider it very unlikely, therefore, that when such conduct comes before the courts for sentence that a Community Service Order could ever be sufficient punishment. We have no hesitation in concluding that it was inappropriate, that is to say too lenient, in respect of the conduct in this case. True no actual false market was created, but it was not for want of trying.(...)

Dealing first with [Mr X]. We view him as the instigator and leader of the operation. In our judgment, the right sentence which should have been passed on him by a trial judge upon conviction, additional to compensation and the costs order, was 3 years' imprisonment. We now start by taking into account that he did serve the period of community service that he was called upon to serve, and served it well apparently. Next we deduct from the sentence what has come to be known as the 'discount for double jeopardy'. After those deductions, we arrive at a sentence, to run from today, of 2 years' imprisonment. We further disqualify him from holding a directorship of a public company for a period of 7 years from today.

Turning to [the applicant]. He was an active and powerful second in command. The right sentence in his case, we believe, would have been 30 months' imprisonment. Again we do the discounting that we did in the case of [Mr X]; and we arrive at a sentence of 20 months' imprisonment, starting from today. We disqualify him from holding a directorship in a public company for 5 years.”

16. The compensation and costs orders remained. The applicant had already completed the community service to which he had originally been sentenced.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. In addition to the general regime of appeals against decisions of the Crown Court, the Attorney General may, in certain circumstances and where it appears to him that a sentence of the Crown Court has been unduly lenient, apply to the Court of Appeal for leave to refer the case to it to review the sentence. The principal relevant provisions are to be found in

Section 36 of the Criminal Justice Act 1988. An application for leave must be made within 28 days of the sentence. Where the Court of Appeal grants leave, it will consider a sentence “unduly lenient” where “it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate” (Attorney General’s Reference No. 4 of 1989, Cr. App. R(S) 517). The Court of Appeal has also commented that “before this Court granted an application of this sort, it must be shown that there was some error in principle in the judge’s sentence ... that in the absence of a sentence being altered by this Court, public confidence would be damaged ... the Court should only grant leave in exceptional circumstances, and not in the borderline type of case” (Attorney General’s Reference No. 5 of 1989 11 Cr. App. R(S) 489).

18. Where a person’s sentence is increased, an allowance is made to reflect the additional period of anxiety imposed on an offender awaiting a second sentencing hearing.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

19. The applicant alleges that the delay of two years between his original sentence and the subsequent sentence, following the Attorney General’s reference, amounted to a breach of the “reasonable time requirement” laid down in Article 6 § 1 of the Convention which provides, in so far as relevant as follows:

“In the determination of (...) any criminal charge against him, everyone is entitled to a (...) hearing within a reasonable time by (...) [a] tribunal”.

A. Period to be taken into consideration

20. The Court finds that the proceedings in the present case began on 17 March 1993, when the applicant was first interviewed by officers of the Serious Fraud Squad. They ended on 21 March 1997 when the Attorney General’s reference was finally determined. The total period is thus a little over four years. Of particular concern is the time that elapsed between the applicant first being sentenced on 10 March 1995 and his second sentence on 21 March 1997.

21. The Government note that the case was complex, both in that the context was a disputed corporate takeover battle in which the trial lasted 63 days and generated over 500 pages of transcript, and in that the case was intertwined with the cases of his co-accused, in particular the case of Mr X.

They also note that the applicant's, and his co-accused's, appeals had to be dealt with before the Attorney General's reference could be determined, as had those appeals been successful, the question of the reference would have become redundant. The Government accept that, from the Attorney General's reference in April 1995 until the reference was dealt with in March 1997, the applicant was faced with the uncertainty of not knowing whether his sentence would be increased, but point out that that uncertainty was balanced by the hope that his appeal against conviction would be successful. They further point out, *inter alia*, that the applicant's uncertainty and anxiety were expressly taken into account by the Court of Appeal and served to reduce the sentence which would otherwise have been imposed; that the fact that he had already completed his community service was similarly taken into account, and that as the Court of Appeal later found the sentence to be obviously wrong, the applicant must have known that there was a real possibility of an increased sentence from the lodging of the reference at the latest.

22. The applicant submits that after a lengthy and complex trial, the trial judge was in the best position to assess the applicant's criminality and to pass the appropriate sentence. He also underlines circumstances surrounding the imposition of a second sentence, some two years after the first, namely that he had already completed the Community Service Order imposed upon him by the first sentence and had established himself in a new business enterprise, in the role of Chairman, Financial Director and Company Secretary. He emphasises the stress imposed upon his wife and family by the uncertainty and delay, and the health consequences that they suffered.

23. The applicant refers to the Parliamentary debates which took place when the legislation on prosecution appeals was introduced. He underlines that the Government of the day emphasised the very short, non-extendable time-limit for making an application for leave to make a reference, and that they stated that the Court of Appeal, too, would want any delay to be minimal (HC Deb, 23 October 1988). The Home Office Minister had earlier agreed that it would perhaps be intolerably harsh for the recipient of a non-custodial sentence to have a custodial sentence substituted "some months later ... every effort will be made to arrange the hearings of these cases as soon as possible" (HL Deb, 26 October 1987).

24. The applicant does not accept that the appeal was particularly complex. He notes, in particular, that all the transcripts were available from the moment he lodged his notice of appeal, and all the issues raised in the grounds of appeal had been canvassed at the trial, save the criticisms of the Judge's summing up.

B. Reasonableness of the length of the proceedings

25. According to the Court's case-law, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and the authorities dealing with the case (see, among other authorities, the *Pélissier et Sassi v. France* judgment of 25 March 1999, [to be] published in *Reports of Judgments and Decisions* 1999, § 67).

26. As to the complexity of the case, the Court accepts that the combination of the applicant's appeal, the co-defendants' appeals and the Attorney General's reference rendered the proceedings more complex than they would otherwise have been. It also accepts the logic of dealing with the appeals before dealing with the reference, as, if the applicant's appeal had been successful, the reference would have become redundant. However, by the time the first instance proceedings had ended, the issues in the case had been aired at trial, and the transcripts were ready. Further, the Court of Appeal does not appear to have regarded the Attorney General's reference as giving rise to any particular difficulty as it dealt with the reference by way of a short judgment which left no room for any doubt whatever that the first instance sentence had been wrong.

27. As to the applicant's conduct, the Court finds no indication that the applicant was responsible for the time taken to deal with the appeal, and the Government do not suggest that he was.

28. As to the conduct of the authorities, the applicant's contention that he had performed his non-custodial sentence and was re-establishing himself in society is not strictly relevant to the Court's consideration of the reasonableness of the length of the proceedings. The Court does, however, note the applicant's submission that the case was the longest reference ever made where the original sentence was non-custodial. It also notes that 19 months elapsed between the lodging of the perfected grounds of appeal in September 1995 and the appeal itself, and that the appeal proceedings as a whole, from the applicant's notice of appeal until the reference was determined, lasted a little over two years.

29. The Court finds that no convincing reasons have been given which could justify the period of two years it took to deal with the appeal; in particular, apart from a refusal to reconsider the legal aid position, there was no judicial activity in the case from the grant of leave to appeal in December 1995 until the appeal was heard in March 1997.

30. Accordingly, in all the circumstances of the present case, the Court considers that the length of the proceedings fails to satisfy the "reasonable time" requirement. There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

31. The applicant also refers to Article 3 of the Convention. However, as already noted in the decision on admissibility, the instant case presents no indication of treatment attaining the “minimum level of severity” at which Article 3 becomes relevant. Accordingly there has been no breach of Article 3.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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. Damages

33. The applicant seeks a total sum of GBP 467,605 by way of loss of value in a family company, loss of earnings and the fact that, because he had to live on capital for several years, he has had to realise assets and incur capital gains tax. The applicant also seeks compensation for the suffering and distress caused as a result of the delay suffered between his original sentence and the hearing of the Attorney General’s appeal.

34. The Government submit that the damages claimed by the applicant have arisen as a result of the disqualification order imposed by the court and are thus attributable to the applicant’s criminal conduct. Likewise the Government submit that any distress is attributable to the custodial sentence and disqualification order, which are in turn attributable to the applicant’s criminal conduct and as such, not recoverable.

35. The Court recalls that, according to its case law, compensation is recoverable only to the extent that a causal link is established between the violation of the Convention and the damage sustained. The Court is of the view that there is insufficient causal connection between the losses incurred by the applicant and the delay in sentence. Rather they are due, in essence, to the custodial sentence and the disqualification of the applicant.

36. Accordingly the Court rejects the applicant’s claims for loss of value of shareholdings, for loss of earnings and for losses arising from the sale of capital assets.

37. The Court does, however, accept that the applicant suffered damage of a non-pecuniary nature as a result of the length of the criminal proceedings. Making its assessment on an equitable basis and having regard to the circumstances of the case, including the fact that the Court of Appeal

in sentencing made what it referred to as the “discount for double jeopardy”, the Court awards the applicant the sum of GBP 750 as compensation for non-pecuniary damage.

B. Costs and expenses

38. The applicant claims GBP 19,424.02 for costs incurred in pursuing the present application to the Court, this sum consisting of legal fees of GBP 18,836.52 and accountant’s fees of GBP 587.50. Bills have been submitted to 23 March 2000, with an estimate of a further GBP 2,000 fees for future expenses. In addition the applicant claims personal expenses of GBP 500 for telephone, travel, fax and photocopying incurred in pursuit of the present application.

39. The Government contend that the legal fees claimed are excessive and estimates that the proper total for legal expenses would be GBP 8000 plus VAT. They submit that the claim for pecuniary damage is misconceived and that the accountancy fees claimed be disallowed. The Government further dispute that the claims for GBP 500 personal expenses and GBP 2000 future expenses, are properly made out.

40. According to the Court’s case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum.

41. The Court considers that GBP 8,000 together with any VAT that may be payable is a reasonable sum for legal costs incurred and accordingly awards that sum.

C. Default interest

42. According to the information available to the Court, the statutory rate of interest applicable in United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* unanimously that there has been no violation of Article 3 of the Convention;

3. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, in respect of non-pecuniary damage, GBP 750 (seven hundred and fifty pounds sterling) and, for costs and expenses, GBP 8,000 (eight thousand pounds sterling), together with any value-added tax that may be chargeable;
 - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 21 September 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Cabral Barreto is annexed to this judgment.

G.R.
V.B.

DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

To my great regret, I am not able to share the views of the majority of the Court in this case for the following reasons.

The period under consideration is some four years; there were proceedings at two instances.

Bearing in mind the criteria applied by the Court in similar cases, the period at issue does not appear sufficiently long for me to arrive at the conclusion that the "reasonable time" requirement has been exceeded.

The period of two years referred to in paragraph 29 of the judgment does not affect my opinion as one has to determine the length of the proceedings as a whole.

I see no exceptional circumstances which could call for a departure from the criteria generally applied in this field.