



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

FOURTH SECTION

CASE OF KANSAL v. THE UNITED KINGDOM

(Application no. 21413/02)

JUDGMENT

STRASBOURG

27 April 2004

FINAL

10/11/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kansal v. the United Kingdom,

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

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr J. CASADEVALL,
Mr S. PAVLOVSKI,
Mr J. BORRERO BORRERO,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 September 2003 and on 6 April 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 21413/02) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Yash Pal Kansal ("the applicant"), on 21 May 2002.

2. The applicant, who had been granted legal aid, was represented by Mr A. Barone, a solicitor practising in Bovington. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott of the Foreign and Commonwealth Office, London.

3. Insofar as the case was declared admissible, the applicant alleged that the statements obtained under compulsion in bankruptcy proceedings should not have been admitted in criminal proceedings against him. He invoked Article 6 § 1 of the Convention.

4. 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.

5. On 28 January 2003, the Court communicated the applicant's complaint about self-incrimination to the respondent Government and declared inadmissible the remainder of the application. By a decision of 23 September 2003, the Court declared the remainder of the application admissible.

6. The applicant but not the Government filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1947 and lives in Oldham.

8. From 1977, the applicant ran a company which operated 20 chemist shops. Following financial problems, the company went into liquidation in February 1987. On 20 May 1987, a bankruptcy petition was presented against the applicant and on 11 March 1988, a bankruptcy order was made.

9. On 29 July 1988, the applicant was publicly examined by the official receiver. Under section 291 of the Insolvency Act 1986, the applicant was obliged to answer the questions put to him by the official receiver and if he failed to comply without reasonable excuse, he would have been guilty of contempt of court and liable to punishment by a fine or imprisonment.

10. On 16 March and 23 March 1988, a building society advanced 150,000 pounds sterling (GBP) and GBP 116,250 respectively to the applicant. On 23 March 1988, the applicant's wife collected part of the advance, GBP 104,000, and took it to India in a bin liner.

11. The applicant was subsequently charged with two offences of obtaining property by deception contrary to section 15(1) of the Theft Act 1968 on the grounds that he had misled the building society into advancing money by false representations regarding his income, his debts and the bankruptcy proceedings against him. He was also charged with two offences of removing property required to be delivered to the official receiver and failing to account for the loss of property while bankrupt contrary to section 354(2) and (3) of the Insolvency Act 1986.

12. At the applicant's trial in February 1992, the prosecution introduced as evidence the transcript of the examination of the applicant by the official receiver in the bankruptcy proceedings. The applicant submitted that the transcript was inadmissible under section 31 of the Theft Act 1968 which provides that a statement or admission made by a person answering questions in proceedings for the administration of any property or for an account of any property or dealings with property is not admissible in evidence against that person. However, the trial judge ruled the evidence admissible under section 433 of the Insolvency Act 1986 which provided that statements made in pursuance of a requirement imposed by the Act could be used in evidence against the maker of the statement. The full

transcript was placed before the jury and in his summing up, the judge stated that the transcript “could be very important”.

13. On 18 February 1992, the applicant was convicted of the four offences charged and was sentenced to 15 months' imprisonment. The applicant appealed against conviction and on 12 May 1992, the Court of Appeal dismissed his appeal deciding, *inter alia*, that the transcript of the bankruptcy examination was admissible under section 433 of the Insolvency Act 1986 which abrogated the privilege against self-incrimination. Leave to appeal was refused by the Court of Appeal and by the House of Lords.

14. On 27 June 1995, the Royal Pharmaceutical Society of Great Britain decided to remove the applicant's licence to practise as a pharmacist on the grounds of unfitness due to his involvement in the deception connected with his bankruptcy proceedings and a previous reprimand relating to the cleanliness of his premises.

15. On 27 April 1998, the Criminal Cases Review Commission (“CCRC”) referred the applicant's case back to the Court of Appeal due to changes in the domestic law on obtaining mortgage advances by false statements. On 20 June 2000, the Commission added the ground that, following the decision of the European Court of Human Rights in *Saunders v. the United Kingdom* (judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI) and the introduction of the Human Rights Act 1998, the admission of answers given under compulsion during the bankruptcy examination may have been in breach of Article 6 of the Convention and rendered the applicant's conviction unsafe.

16. On 24 May 2001, the Court of Appeal overturned the applicant's conviction on the grounds that the answers given by the applicant in his examination by the official receiver had been wrongly admitted at trial and in breach of Article 6 of the Convention. The court found that the Human Rights Act 1998 could apply retrospectively. It certified a point of law to the House of Lords as to whether the Human Rights Act 1998 could apply retrospectively in appeals arising from a reference by the CCRC.

17. The Crown appealed to the House of Lords against the decision of the Court of Appeal. On 29 November 2001, the House of Lords allowed the appeal, holding that they were bound to follow the earlier decision of the House in *R v. Lambert* [2001] 3 WLR 206, which had decided that the Human Rights Act 1998 could not apply retrospectively to allow a defendant whose trial took place before the Act came into force to rely on a breach of the Convention in a later appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Compulsion to answer questions during bankruptcy proceedings

18. Section 291(4) of the Insolvency Act 1986 (“the 1986 Act”) provided as follows:

“The bankrupt shall give the official receiver such inventory of his estate and such other information, and shall attend on the official receiver at such times, as the official receiver may for any of the purposes of this Chapter require; ...”

19. Section 291(6) went on to stipulate that:

“If a bankrupt without reasonable excuse fails to comply with any obligation imposed by this section, he is guilty of a contempt of court and liable to be punished accordingly (in addition to any other punishment to which he may be subject).”

20. The Divisional Court would deal with such a contempt of court and the sentence could be a fine or imprisonment for a maximum of two years (section 14 of the Supreme Court Act 1981).

21. Section 290(1) of the 1986 Act provided that the official receiver could apply to the court for the public examination of the bankrupt. Cases such as *Re Paget* (1927) 2 Ch. 85 and *R v. Harris* (1970) 1 WLR1252 established that the bankrupt was not entitled to refuse to answer questions during the public examination on the grounds of self-incrimination.

B. The admission of statements made in bankruptcy proceedings as evidence in criminal trials

22. At the relevant time, section 433 of the 1986 Act provided that:

“In any proceedings (whether or not under this Act) –

(a) a statement of affairs prepared for the purposes of any provision of this Act which is derived from the *Insolvency Act* 1985 and

(b) any other statement made in pursuance of a requirement imposed by or under any such provision or by or under rules made under this Act,

may be used in evidence against any person making or concurring in making the statement.”

23. In contrast, section 31(1) of the Theft Act 1968 stipulated that a statement or admission made by a person answering questions in proceedings for the administration of any property was not admissible in evidence in criminal proceedings relating to an offence under the Act.

24. In *R v. Kansal* (1993) 95 Cr.App.R. 348 (the decision on the first appeal of this applicant), the Court of Appeal held that the Insolvency Rules 1986 (S.I. 1986 No. 1925) made it clear that the privilege against self-

incrimination was abrogated in any public examination of the bankrupt and that, thereafter, section 433 of the 1986 Act rendered the evidence admissible in a criminal trial notwithstanding section 31 of the Theft Act.

25. Following the decision of this Court in *Saunders v. United Kingdom* (cited above) and the planned introduction of the Human Rights Act 1998, section 59 and Schedule 3 of the Youth Justice and Criminal Evidence Act 1999 amended section 433 of the 1986 Act, inserting section 433(2)):

“(2) However, in criminal proceedings in which any such person is charged with an offence to which this subsection applies—

(a) no evidence relating to the statement may be adduced, and

(b) no question relating to it may be asked,

by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.”

This provision was not in force at the time of the applicant's trial.

THE LAW

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

26. Article 6 § 1 provides as relevant:

“In the determination of ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

27. The applicant submitted that the statements which he was compelled to make to the official receiver were a significant part of the prosecution case against him, used in the prosecuting counsel's opening and closing address to the jury and in cross-examining the applicant to demonstrate the inconsistency of his testimony. This rendered his trial unfair contrary to Article 6 § 1 of the Convention.

28. The Government accepted that significant use was made by the prosecution at the applicant's trial of the statements made by him under compulsion in bankruptcy proceedings. As such, the case was not distinguishable from *Saunders v. the United Kingdom* (cited above) and they conceded that the result of the case should be the same.

29. The Court observes that the transcripts of the examination of the applicant by the official receiver, which were obtained under the exercise of compulsory powers, were used in evidence against the applicant during his trial and, the parties are agreed, played a significant part of the case against

him. To this extent the case is indistinguishable from that of the *Saunders* case, where the applicant's statements before the Department of Trade inspectors exercising compulsory powers were used in his trial and found by the Court to disclose an infringement of the applicant's right not to incriminate himself. The Court accordingly finds that there has been an infringement of the right not to incriminate oneself in the present case and on that account this applicant was deprived of a fair hearing in violation of Article 6 § 1 of the Convention.

II. THE APPLICANT'S REMAINING COMPLAINTS

30. The applicant, in his observations on the merits, repeated his complaints under Article 13 of the Convention that he was deprived of an effective remedy in respect of his claims under the Convention. As pointed out to the applicant, this part of the application was rejected in a partial decision on admissibility on 28 January 2003. It therefore falls outside the scope of the Court's examination on the merits and has not been considered further.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicant stated that he came before the Court not primarily to claim money but to seek a remedy. Just satisfaction would consist in his being allowed to start practising again as a chemist or if substantial monetary compensation were to be paid he would suggest a fair sum would be GBP 5,000 for each of the seven years that he was not allowed to practise.

33. The Government submitted that following the *Saunders* case (cited above) they had acted swiftly to prohibit the use of compelled answers in circumstances such as arose in the present case. In that case, and those which followed it, no awards for pecuniary and non-pecuniary losses were made by the Court and they submitted that it was not appropriate for an award to be made in this case either.

34. The Court cannot speculate as to what would have occurred in the present case if the transcripts had not been used. Nor is there any necessary

causal connection between the breach found in this case and the applicant's inability to practise as a chemist. It declines therefore to make any award for alleged pecuniary loss and finds that the finding of a violation constitutes just satisfaction for any non-pecuniary loss.

B. Costs and expenses

35. The applicant stated that he was legally aided throughout the domestic proceedings and that he only claimed costs and expenses relating to the application and proceedings before the Court. He did not however provide any details or figures in this respect despite having been invited to do so in the Registry's letter of 29 September 2003.

36. The Government noted that the applicant had been granted legal aid from the Council of Europe and submitted that no further sums should be payable to him as he had not provided any particulars.

37. The Court observes that the applicant represented himself in the initial stages of its proceedings and that his current representative first contacted the Registry on 21 July 2003. He has duly been paid a sum of legal aid from the fund of the Council of Europe in respect of his submissions on Article 41 and for miscellaneous expenses. Those submissions however fail to provide any detail of any further costs and expenses claimed. The necessity for properly quantifying his claims was drawn to the attention of the applicant's representative. In the circumstances, the Court is unable to make any award under this head.

C. Default interest

38. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 April 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President