



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

FOURTH SECTION

CASE OF HOOPER v. THE UNITED KINGDOM

(Application no. 42317/98)

JUDGMENT

STRASBOURG

16 November 2004

FINAL

16/02/2005

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 Hooper 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 21 October 2003 and on 26 October 2004,

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

PROCEDURE

1. The case originated in an application (no. 42317/98) against the United Kingdom of Great Britain and Northern Ireland 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 United Kingdom national, Mr Ivan Hooper ("the applicant"), on 16 July 1998.

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

3. The applicant alleged that neither he nor his legal representative were given the opportunity to address the magistrates' court prior to the imposition of a binding over order in respect of which he was later committed to prison for failure to comply with its terms.

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.

6. By a decision of 21 October 2003, the Court declared the application partly admissible.

7. The applicant and the Government each 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

8. On 3 January 1997 the applicant appeared before the magistrates' court, charged with assault occasioning actual bodily harm and failing to answer bail. He was legally represented. The applicant elected to be tried in the Crown Court. The stipendiary magistrate therefore adjourned the proceedings to enable a committal hearing to take place at a later date and proceeded to consider whether the applicant should be granted bail. During the course of that consideration, the applicant "reacted adversely" in court, causing a disturbance which led the magistrate to conclude that there existed a future risk of a breach of the peace by him. The magistrate therefore made an order binding the applicant over to keep the peace and to be of good behaviour under the Justices of the Peace Act 1361.

9. The applicant was "bound over" in his own recognisance of 50 pounds sterling (GBP) together with a surety of GBP 250. The precise terms of the order were found by the Divisional Court (in the later judicial review proceedings) to be unclear. However, the Divisional Court proceeded on the assumption that the order of the magistrates' court had fixed a period of 28 days' imprisonment in default of the applicant's own recognisance and/or a suitable surety. The magistrate did not give any opportunity for the applicant or his representative to make submissions about the terms of the order before it was imposed.

10. It appears that later on the day on which the binding over order was imposed, in the absence of both the applicant and his representative, the surety presented himself to the magistrate, who himself took the recognisance. The magistrate appears to have deemed the proposed surety unsuitable and to have done so on the ground that he did not have any readily available money. The applicant was committed to custody on the same day for 28 days. The Divisional Court later noted that he had remained in custody until 16 January 1997 or a little later.

11. On 2 June 1997 the applicant was granted leave to apply for judicial review of the decision to impose the binding over order.

12. On 20 January 1998 the Divisional Court granted the application for judicial review. The nature of the applicant's case was stated by the Divisional Court to be as follows:

“It is not suggested by Mr. Daniel, for the applicant, that the magistrate had no power under [the Justices of the Peace Act 1361] or common law to impose a binding over order without consent, to require a surety or to impose a sentence of imprisonment in lieu. What is suggested is that there was a breach of natural justice or procedural irregularity in the way in which the magistrate dealt with the matter, without investigating further, or giving specific opportunity to the applicant or his legal representative to make representations about the terms of any binding over order.”

13. The Divisional Court (Lord Justice Simon Brown and Mr Justice Mance) agreed that the binding over order had been procedurally irregular and granted a declaration to that effect. During the course of their judgments, the judges of the Divisional Court held that:

(a) previous domestic case-law had established that there were circumstances where failing to hear a defendant or his representative prior to imposing a binding over order containing a requirement of a recognisance could amount to a breach of the rules of natural justice. Mr Justice Mance quoted, *inter alia*, the headnote of the case of *R. v. Central Criminal Court ex parte Boulding* [1984] 1 QB 813 that:

“... although there was no general obligation upon a court to afford a defendant an opportunity to be heard prior to binding him over, it was a breach of the rules of natural justice, unless the recognisance was of a trivial sum, for a court to bind a person over without inquiring into his means and giving him an opportunity to make representations as to the size of the recognisance.”

(b) the position where there was a requirement for a surety was even clearer. A surety required the separate approval of the court as to his suitability. This was outside the control of the person to be bound over and yet could have drastic consequences for him where, as in the present case, it resulted in his serving a period of imprisonment imposed as an alternative;

(c) in such circumstances, magistrates needed to take particular care lest, in effect, they imposed a binding order which amounted to an automatic sentence of imprisonment without appreciating what they were doing;

(d) a defendant ought not to be put at peril of a prison sentence in default of finding a surety unless he had first been specifically invited to address the magistrates' court upon that point;

(e) the magistrate did not expressly invite or give opportunity for any submissions, or indeed any discussion between the applicant and his representative, about the proposed terms of the binding over order before he imposed it. While the magistrate stated during the course of the judicial review proceedings that he would have been prepared to listen to anything that the applicant's representative would have wished to say, the High Court accepted that the applicant's representative was effectively presented with a “*fait accompli*” of a nature which she had not come across before. In responding to an argument put forward on behalf of the magistrate that an advocate was under a duty to bring any procedural irregularity to the

attention of the court during the hearing and not reserve such matter to be raised on appeal, Mr Justice Mance said:

“That is of course right, but it assumes that the advocate appreciates that what happens does amount to a procedural irregularity and understands at the time the nature of the point. Here [the applicant's representative] does not appear to have had the confidence of whatever belief she had that something was not quite right, she did not raise the matter, and I do not think that the applicant should suffer from any failure, if there was any on her part, to react as another advocate, perhaps more familiar with this area of the law and practice, might have done.”

(f) had the applicant or his representative been able to make submissions about the proposed order the magistrate might have been persuaded to impose different terms. Mr Justice Mance stated:

“What Mr Burnett [counsel for the respondent] has submitted is that it cannot be shown that it would have made any difference if the magistrate had given to the applicant [and his counsel] an opportunity to make representations. However, it seems to me certainly not beyond the bounds of possibility, that if a proper opportunity had been given to [the applicant's counsel] to consider and address the matter after brief discussion between herself, the applicant and the friend [the proposed surety] the stringency of the proposed order - particularly in the alternative ... it had of 28 days' imprisonment - would have been one of the points on which she would have focused; the risk and consequences of a suitable surety being found, and in particular, of the friend at court ... not being regarded as suitable might well also have been highlighted.

Mr Burnett did not seek to controvert that. The magistrate might, in such circumstances, have been persuaded to a different result. This is all, of course, speculative, but speculation though it may be, the reason why it is speculation is that the magistrate failed, in my judgment, to give the applicant or, on his behalf, [the applicant's representative] proper time or a proper opportunity to address the terms of the proposed bind over order, particularly so far as they involved a requirement that the applicant produce a surety in the sum of £250.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Binding over

14. Magistrates have powers to bind over at common law and under the Justices of the Peace Act 1361. These powers allow magistrates, at any stage in proceedings before them, to bind over any participant in the proceedings if they consider that the conduct of the person concerned is such that there might be a breach of the peace or that his or her behaviour has been *contra bonos mores*.

B. Compensation claims against magistrates

15. The Justices of the Peace Act 1997 provides, in so far as relevant, as follows:

“51. No action shall lie against any justice of the peace ... in respect of any act or omission of his -

(a) in the execution of his duty -

(i) as such a justice;

...

(b) with respect to any matter within his jurisdiction.

52. An action shall lie against any justice of the peace ... in respect of any act or omission of his -

(a) in the purported execution of his duty -

(i) as such a justice;

...

(b) with respect to a matter which is not within his jurisdiction,

if, but only if, it is proved that he acted in bad faith.”

THE LAW

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3(c) OF THE CONVENTION

16. The applicant complained under Article 6 §§ 1 and 3(c) that neither he nor his legal representative were given the opportunity to address the court before it imposed a binding order. Article 6 reads, in so far as relevant, as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ...

...

3. 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”.

1. The parties' submissions

1. The applicant

17. The applicant averred that the Government had conceded that there had been a breach of Article 6 §§ 1 and 3(c) of the Convention. He disputed that the judgment of the High Court had provided him with sufficient redress. He emphasised that he was precluded from pursuing a claim for compensation in the domestic courts due to the operation of section 52 of the Justices of the Peace Act 1997.

2. The Government

18. The Government submitted that the High Court found, applying common law principles of natural justice, that there had been unfairness in the circumstances which led to the making of the binding over order. In effect, the High Court, applying domestic law, had found in substance that the guarantees contained within Article 6 §§ 1 and 3(c) of the Convention had been violated in that neither the applicant nor his representative had been given an opportunity to address the magistrate in relation to the issue of the availability and suitability of the surety. As such, the Government submitted that the High Court had addressed the complaints of the applicant and sufficient redress had been provided to the applicant in the judgment of the High Court. They pointed out that it was not suggested by the applicant's representative in the High Court that any further relief was required from that court beyond the ruling that the binding over order had been made in a procedurally unfair manner. The Government argued that this equated to the redress which the Court provided to the applicants in *Perks and Others v. the United Kingdom* (nos. 25277/94 and others, 12 October 1999 (“*Perks*”), § 82), where it held that a finding of a violation of Article 6 §§ 1 and 3(c) of the Convention was in itself just satisfaction for non-pecuniary damage.

19. In the above circumstances, the Government maintained that the applicant was no longer a victim under Article 34 of the Convention in relation to his complaints under Article 6 and that there had been no breach of the Convention.

B. The Court's assessment

20. It is not in dispute that the proceedings before the magistrate at which the applicant was bound over fell within the scope of Article 6 §§ 1 and 3(c) of the Convention and that neither the applicant nor his legal representative were given the opportunity to address the court before the order was made. As noted in the Divisional Court, as breach of the order could lead, as in this case, to committal to prison, the magistrates' court needed to take particular care that imposing the order did not effectively amount to an automatic sentence of imprisonment. The Court observes that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (*e.g. Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 738 “*Benham*”, § 61) and for that legal representative to be duly heard.

21. In any event however the Government accepted that the High Court had found that the failure to give the applicant or his representative the opportunity to address the magistrates' court before the order was made was a breach of natural justice and in the circumstances a breach of Article 6 §§ 1 and 3(c). The Court sees no reason to differ.

22. While the Government argued that the applicant could, however, no longer claim to be a victim as the domestic court had acknowledged the breach, the Court recalls that it rejected this argument in its decision on admissibility (no. 42317/98, (dec.) 21 October 2003) as even if the breach had been acknowledged the applicant had served almost two weeks in prison as a result of the magistrate's order and had no possibility of obtaining an order for compensation. He accordingly remained a victim for the purposes of Article 34 of the Convention.

23. The Court concludes that there has been a breach of Article 6 §§ 1 and 3(c) in this case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

24. 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. Non-pecuniary damage

1. The parties' submissions

a. The applicant

25. The applicant further disputed the contention of the Government that a finding of a violation of Article 6 §§ 1 and 3(c) was sufficient just satisfaction. He argued that, had he had the opportunity to make representations, it was highly improbable that the magistrate would have made the order that was made. The loss of liberty was caused by the breach of his rights.

26. The applicant submitted that he had a history of psychiatric problems and had been an inpatient at a psychiatric hospital on several occasions. At the relevant time he was in receipt of incapacity benefit and on admittance to prison he was transferred to the hospital wing. As in *Perks* it was inconceivable that had he been represented his representative would not have made submissions as to these mental and physical problems in light of which the likelihood that he would have been committed to prison would not have been extremely remote. He accordingly claimed 10,000 pounds sterling (GBP) for his 14 days' detention and an additional GBP 1,000 for the distress caused to applicant by the failure of the court to hear him in his defence.

b. The Government

27. The Government submitted that the applicant had not established that his imprisonment was caused by the alleged violation of Article 6 and that the Court could not speculate as to whether the applicant would have been detained if there had been no violation. They also invited the Court to follow its practice in Article 6 cases in holding that the finding of a violation amounted to sufficient just satisfaction. While as in *Perks* there might, in some individual cases, be exceptional circumstances enabling such a conclusion without engaging in speculation, this was not the case here. The applicant has not submitted any evidence to substantiate his assertions about his medical history and Mr Justice Mance in the Divisional Court proceedings considered it was speculative to suggest that the magistrate would have adopted a different approach had the applicant been represented.

28. Even assuming the Court were to find a causal link, the Government submitted that the claim was excessive and disproportionate when compared with awards in other cases of loss of liberty.

2. The Court's assessment

29. As regards violations of Article 6, the Court's case-law indicates that it will not speculate as to what might have occurred had there been no breach of the procedural guarantees of this provision (the above-cited *Benham* judgment, § 68, and the *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, §§ 84-88) unless it finds special features in the case amounting to a “real loss of opportunity” (*Perks and Others* judgment, cited above, §§ 80-81, and *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, p. 13, § 35).

30. In the *Goddi* case, both the applicant and his representative had been prevented from attending the relevant court hearing where his sentence had been increased, and it was considered that such a loss of real opportunity warranted the award of just satisfaction (§ 35 of that judgment). In *Perks*, the Court saw no reason to disregard the Government's concession that the situation of Mr Perks was exceptional given that the appeal court had found it unlikely that the magistrates' court would have committed him to prison if they had known more about his health problems and personal circumstances, matters to which, the Government had also accepted, a reasonably competent solicitor would have drawn the magistrates' court's attention. An award for non-pecuniary loss was therefore made to Mr Perks.

31. In the present case, Mr Justice Mance, although acknowledging the speculative nature of the exercise, assessed that the magistrate might well have been persuaded to a different result if the applicant's counsel had been able to make representations concerning the order. While this conclusion is not expressed in such strong terms as in *Perks*, the Court considers that it is sufficient to support the applicant's claim that he suffered some loss of opportunity due to the breach in his case.

32. Having regard to awards in other cases and making an assessment on an equitable basis, the Court awards the applicant 8,000 euros (EUR).

B. Costs and expenses

33. The applicant claimed GBP 637.43 for solicitors' costs and GBP for 1057.50 for counsel's fees, making a total of GBP 1,694.93 inclusive of value added tax (VAT).

34. The Government noted that the applicant had been granted legal aid by the Council of Europe and submitted that any claim should be reduced as the applicant's complaints under Article 5 had been rejected as inadmissible. They considered that GBP 850 would be a reasonable amount.

35. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II).

36. While this application concerned a differing factual situation and involved analysis of considerable domestic case-law, the Court considers that the Convention issues were largely dealt with in *Benham* and *Perks*. It also notes that the counsel in this case was involved in other similar applications at the same time and his submissions on behalf of this applicant covered essentially the same ground. The legal aid granted by the Council of Europe was paid to the applicant's former solicitors, the current solicitors having only acted from September 2003 and making no claims in respect of the earlier stage of proceedings. In those circumstances, the Court awards EUR 736 for solicitors' costs and EUR 736 for counsel, making a total of EUR 1472, inclusive of VAT.

C. Default interest

37. The Court considers it appropriate that 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 and 3(c) of the Convention;
2. (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, the following amounts, to be converted into the pounds sterling at the rate applicable at the date of settlement:
 - (i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 1,472 (one thousand four hundred and seventy two euros) in respect of costs and expenses;(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 November 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President