



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

FOURTH SECTION

CASE OF INDRA v. SLOVAKIA

(Application no. 46845/99)

JUDGMENT

STRASBOURG

1 February 2005

FINAL

01/05/2005

*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 Indra v. Slovakia,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr J. BORRERO BORRERO,

Mr J. ŠIKUTA, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 11 January 2005,

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

PROCEDURE

1. The case originated in an application (no. 46845/99) against the Slovak 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 a Slovakian national, Mr Zdeněk Indra ("the applicant"), on 14 February 1997.

2. The applicant was represented by Mr T. Kamenec, a lawyer practising in Bratislava. The Slovakian Government ("the Government") were represented by their Agent, Mr P. Vršanský, succeeded by Mr P. Kresák in that function as from 1 April 2003.

3. The applicant alleged, in particular, that in his action for his rehabilitation he had not had a fair hearing before an impartial tribunal as required under Article 6 § 1 of the Convention and that he had not had an effective remedy at his disposal in that respect as required under Article 13 of the Convention.

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 11 May 2004, the Court declared the application partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section IV.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1931 and lives in Bratislava.

10. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Proceedings concerning the applicant's dismissal from work

11. On 17 June 1982 the applicant was served a notice of dismissal from job under Article 46 § 1 (f) of the Labour Code for an especially serious breach of work discipline in that he had been absent from his work for several days without an excuse.

12. On 18 June 1984 the Bratislava III District Court (then *Obvodný súd*, at present *Okresný súd*) rejected the applicant's request for a judicial ruling declaring the dismissal null and void.

13. On 19 November 1985 a three-judge Chamber of the Bratislava City Court (then *Mestský súd*, at present *Krajský súd*) dismissed the applicant's appeal and upheld the judgment of 18 June 1984. The Chamber deciding on the appeal included judge S.

2. Proceedings concerning the applicant's rehabilitation

14. On 12 February 1993 the applicant and his wife took civil proceedings against the legal successor of his former employer before the Bratislava I District Court. They sought the applicant's rehabilitation under the Extra-Judicial Rehabilitations Act (Law no. 87/1991 Coll. - *Zákon o mimosúdnych rehabilitáciách*) in respect of his dismissal in 1982.

15. In a judgment of 27 September 1994, following a hearing held on the same day, the Bratislava I District Court considered that the action aimed at obtaining a judicial order to the defendant to issue a formal confirmation that the applicant had been dismissed in 1982 for politically motivated reasons and in violation of fundamental human rights and freedoms within the meaning of section 21 (1) of the Extra-Judicial Rehabilitations Act. The court rejected the action as being unsubstantiated.

16. On 6 December 1994 the applicant and his wife appealed to the Bratislava City Court and, on 10 January 1995, they supplemented the appeal (*odvolanie*). They argued that the District Court had misinterpreted the action in that it had not been aimed at obtaining a judicial order against the defendant, but at obtaining a declaratory judgment to the effect that the applicant's dismissal had been based on the grounds referred to in section 21 (1) of the Extra-Judicial Rehabilitations Act. They further complained that the District Court had overlooked the fact that the action had also been brought by the applicant's wife.

17. On 28 February 1995 the Bratislava City Court quashed the District Court's judgment of 27 September 1994 and remitted the case to the District Court, holding that the latter had failed to determine the action insofar as it had been brought by the applicant's wife.

18. On 31 October 1995, following a hearing held on the same day, the District Court again dismissed the action after examining testimonies of the parties, the applicant's personal file with his former employer and the case-file concerning the applicant's proceedings in the 1980s. The District Court found it established that the applicant had been dismissed from his work in 1982 for unauthorised absence for several days, i.e. an especially serious breach of work discipline which had had no political subtext. In so far as the applicant relied on section 21 § 1 (c) of the Extra-Judicial Rehabilitations Act, he had failed to prove that his dismissal had been for reasons of political persecution or in violation of generally recognised human rights and freedoms. The District Court finally found that the applicant's wife had no cause of action in the case, in that the dismissal did not directly concern her.

19. On 25 January 1996 the applicant and his wife filed an appeal with the City Court and on 2 February 1996 they submitted further particulars of the appeal. They argued that the District Court had misinterpreted the action, incorrectly interpreted and assessed the facts and arbitrarily dismissed the action.

20. On 11 April 1996, following a hearing of the appeal held on the same day, the City Court upheld the District Court's judgment of 31 October 1995 and granted leave for an appeal on points of law to the Supreme Court. It held that the District Court had adequately established the facts of the case and concurred with its factual and legal conclusions.

21. On 6 August 1996, through his lawyer, the applicant filed an appeal on points of law (*dovolanie*) with the Supreme Court. He argued that the lower courts had erred in their determination of the facts and law in his case.

22. In reply to the appeal on points of law, the defendant filed observations which however the courts did not transmit to the applicant.

23. On 28 November 1996 a three-judge Chamber of the Supreme Court rejected the appeal on points of law after deliberating *in camera*. As to the defendant's observations in reply to the appeal on points of law, the

Supreme Court noted that the defendant had invited the Supreme Court to reject that appeal as unfounded since the lower courts' decisions had been correct and the appeal had produced no new relevant information. The Supreme Court found that the District Court and the City Court had adequately established the relevant facts and fully endorsed their factual and legal conclusions. The Supreme Court further discerned no procedural or other flaws within the meaning of Articles 237 and 241 § 2 of the Code of Civil Procedure. The Supreme Court Chamber included judge S. who had been a member of the three-judge Chamber of the City Court that, on 19 November 1985, had rejected the applicant's appeal in the proceedings on his dismissal in 1982. No appeal lay against the Supreme Court's judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Extra-Judicial Rehabilitations Act, as amended

24. The purpose of the Rehabilitation Act, as set out in section 1 (1), is to endeavour to mitigate the consequences of certain injustices and property losses occurring between 25 February 1948 and 1 January 1990 by acts falling within the sphere of civil law and labour law, and by administrative acts incompatible with the principles of a democratic society respecting the rights of citizens as enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.

25. Pursuant to section 21 (1), legal acts terminating a person's contract of employment for reasons of political persecution or in violation of generally recognised human rights and freedoms are to be considered void. Under its letter (c) this provision applies, among others, to situations where the person concerned was dismissed under Article 46 § 1 of the Labour Code (Law no. 65/1965 Coll.), as amended by amendment no. 153/1969 Coll., on the ground that he or she had acted in violation of the socialist social order and, therefore, lacked the confidence requisite for continuing in his or her function or position.

26. Section 22 (1) provides that the former employer or its legal successor shall issue, at the request of the person concerned, a certificate that the latter's contract of employment was terminated for reasons mentioned in section 21 (1). Paragraph 3 of this section entitles the person concerned to claim the determination of this issue by a court when the certificate is not delivered within three months.

B. Code of Civil Procedure (Law no. 99/1963 Coll., as amended)

27. The rules concerning disqualification of judges are laid down in Articles 14 to 17. Under Article 14 § 1 judges are disqualified from dealing with a case if there may be doubts about their impartiality in relation to the subject-matter of the case, the parties to the proceedings or the parties' legal representatives.

28. Pursuant to Article 15 § 1, as soon as a judge learns of facts disqualifying him or her from dealing with a case, he or she is to notify the president of the court accordingly without any delay.

29. Under Article 15 § 2, parties to civil proceedings are obliged to inform the court immediately of any facts disqualifying a judge from dealing with their case. It further confers a right on the parties to civil proceedings to state their views if the disqualification of a judge is being considered.

30. A decision on removal of a judge from a case is to be taken by a Chamber of the higher instance court (Article 16 § 1).

31. Legal representation in civil proceedings by a lawyer (*advokát*) is addressed in Article 25. Pursuant to its paragraph 2 the lawyer is obliged to make effective use of all available legal means in the interest of the party whom he or she represents.

32. The procedure in respect of appeals on points of law is defined in Part Four, Chapter Three of the Code. Under Article 236 (1) an appeal on points of law is available against final decisions of a court of appeal if the law so provides.

33. Pursuant to Article 237 an appeal on points of law is admissible against any decision of the appellate court where:

(a) the decision concerns a subject-matter which falls outside the jurisdiction of courts,

(b) a person acting as a party to the proceedings lacked capacity to be a party to court proceedings,

(c) a party to the proceedings lacked procedural capacity and was not duly represented,

(d) the same matter has been earlier determined by a final decision or if other proceedings in the same matter started earlier,

(e) no motion to institute proceedings has been filed despite the fact that such a motion was required by the law,

(f) a party has been prevented, by the appellate court's conduct, from acting before the court,

(g) the case was decided upon by a disqualified judge or the court's composition was incorrect.

34. Legal representation in appeals on points of law is mandatory (Article 241 § 1).

35. In accordance with Article 241 § 2 an appeal on points of law may only be based on the following grounds:

(a) flaws in the proceedings as set out in Article 237 [of the Code of Civil Procedure],

(b) other flaws in the proceedings which resulted in a wrong decision on the merits,

(c) a court's decision made on the basis of a factual finding which, to a substantial extent, is not supported by the evidence taken,

(d) a court's decision based on an erroneous legal assessment of the matter.

36. The scope of the Supreme Court's examination of an appeal on point of law is in principle limited to the grounds of appeal as submitted by an appellant (Article 242 § 1). Except for the flaws listed under Article 237 and flaws that have resulted in an incorrect decision on the merits, the Supreme Court does not review *ex officio* any procedural flaws that have not been complained of by an appellant.

37. When determining an appeal on points of law, the Supreme Court in principle takes no evidence (Article 243a § 2).

38. The Supreme Court dismisses the appeal on points of law if it finds that the decision of the court of appeal is correct. Otherwise it quashes the appellate decision (Article 243b § 1).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

39. In their observations on the merits of 6 July 2004 the Government raised the objection that domestic remedies had not been exhausted as regards the complaint of the lack of impartiality of the Supreme Court judge S. who had taken part in the determination of the applicant's appeal on points of law, on the ground that the applicant had not challenged this judge for bias. They maintained that, despite his assertion to the contrary, the applicant had had a possibility of finding out the composition of the Supreme Court Chamber to which the case had been allocated by a simple inquiry of that court. They considered that doing so had not been an excessive burden for the applicant having regard to the fact that he had been represented by a lawyer whose obligation under Article 25 § 2 of the Code of Civil Procedure had been to use effectively all available legal means to assert the applicant's interests. The Government maintained that the applicant could subsequently challenge the impartiality of judge S. by

ordinary means. They finally asserted that they had already raised this objection “in their first observations”.

40. The Court points out that by Rule 55 of the Rules of Court, “[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application ...”.

41. The Court notes that in their observations on the admissibility and merits of 16 January 2002 the Government submitted that “the applicant [had] exhausted all effective domestic remedies” as regards his “complaint of a lack of a fair and public hearing before an impartial tribunal”. They further stated that all of the applicant’s challenges of bias had been duly entertained and dismissed as being unfounded in the relevant procedure. However, the alleged lack of impartiality of judge S. was addressed neither in these observations nor in the Government’s subsequent submissions of 19 April and 3 June 2002 and 17 April 2003.

42. The court finds that in these circumstances the Government is estopped from raising the objection now (see, among many other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II). Consequently, the Government’s preliminary objection must be dismissed.

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

43. The applicant complained that his action could not be considered as having been determined by an impartial tribunal on the ground that the Supreme Court Chamber which had determined his appeal on points of law had included judge S. who had before been a member of the City Court Chamber that had dismissed his appeal in the proceedings concerning his dismissal of 1982. He also complained that he had not had a fair hearing in his rehabilitation proceedings in that the courts had failed to communicate to him the opposing party’s written observations on his appeal on points of law and in that they had erroneously interpreted and arbitrarily dismissed his action. The applicant relied on Article 6 § 1 of the Convention, the relevant part of which provides as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law.”

A. Alleged violation of the right to a hearing by an impartial tribunal

44. As to the merits of this complaint the Government maintained that it was to be examined according to the objective test. They pointed out that the applicant’s objections in respect of judge S. rested on his alleged bias in respect of the subject-matter of the proceedings. Judge S. was involved in the proceedings concerning the applicant’s dismissal in the 1980s. The

decisive question that was being determined in those proceedings was whether the applicant had or had not been absent from work without an excuse and, consequently, whether he had or had not seriously breached work discipline. In this connection they argued that an unauthorised absence from work was a ground for termination of employment that was well established and recognised in the European legal culture.

45. The Government further argued that in the rehabilitation proceedings the termination of the applicant's employment had been examined from a quite different standpoint. The applicant had claimed that his dismissal had been politically motivated and that it had violated his fundamental human rights and freedoms within the meaning of section 21 (1) (c) of the Extra-Judicial Rehabilitations Act. The latter legal provision however referred to dismissals on grounds (breach of the socialist social order and loss of confidence) other than that which had actually been relied on in the applicant's case (breach of work discipline).

46. The Government concluded that the subject-matters of the proceedings in the 1980s and the rehabilitation proceedings were different and that, consequently, there could be no doubts on the part of an objective observer concerning the impartiality of S.

47. The applicant disagreed and repeated his complaint.

48. The Court reiterates that the question whether a tribunal is impartial for the purposes of Article 6 § 1 of the Convention must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is, by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).

49. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein*, cited above, § 43). Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44).

50. As regards the subjective test of such impartiality, there is nothing to indicate in the present case any prejudice or bias on the part of judge S.

51. As to the objective test, the Court notes that judge S. was a member of the three-judge Chamber of the City Court that on 19 November 1985

rejected the applicant's appeal in the proceedings concerning his dismissal of 1982. She then took part in the determination of the applicant's appeal on points of law in the rehabilitation proceedings concerning that dismissal.

52. It is true that, technically speaking, the subject matter of the original proceedings of the 1980s was different from that of the rehabilitation proceedings.

53. Nevertheless, the Court considers that regard must be had to the fact that both the original proceedings and the rehabilitation proceedings referred to the same set of facts. Furthermore, the examination of the dismissal of 1982 according to the criteria of the Extra Judicial Rehabilitations Act could entail in some way reconsideration of the judicial decisions taken in the original proceedings. This consideration is even reinforced by the political context of the rehabilitations under the Extra-Judicial Rehabilitations Act as expressed in its section 1. It could, in the Court's opinion, have raised legitimate fears in the applicant that judge S. would not approach his case with the requisite impartiality.

54. In the Court's view, these circumstances serve objectively to justify the applicant's apprehension that judge S. of the Supreme Court lacked the necessary impartiality.

55. Consequently, in the present case there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

B. Alleged violation of the right to a fair hearing

56. The Government considered that the guarantees of a fair trial had been respected in the present case. They maintained that the specific issue of the non-communication to him of the defendant's observations in reply to the applicant's appeal on points of law raised mainly a question of equality of arms which had to be answered in the light of the proceedings as a whole. The Government further pointed out that the special character of the proceedings on appeals on points of law had to be taken into account. In particular, they submitted that such proceedings were based on the principle of cassation (Article 243b of the Code of Civil Procedure) and that the scope of the Supreme Court's examination of appeals on point of law was in principle limited to the grounds of appeal as submitted by an appellant and certain aspects which are examined *ex officio* (Article 242 § 1 in conjunction with Article 237 of that Code). Such grounds were restricted to points of law and conformity with procedural requirements (Article 241 § 1 of that Code). Appeals on points of law were determined on the basis of the contents of the case-file and the Supreme Court normally did not take any evidence (Article 243a § 2 of that Code) or consider any newly introduced factual or legal assertions. The Government concluded that the applicant's lack of awareness of the defendant's observations had no detrimental effect

on him and that knowing of them would not have been of any advantage to him. They further added that it had been open to the applicant and his lawyer whose obligation had been to exercise due professional diligence to learn of the observations by inspecting the respective Supreme Court case-file.

57. The applicant disagreed and repeated his complaint.

58. In the light of the above finding under Article 6 § 1 of the Convention as regards the lack of impartiality of the tribunal (see paragraph 55 above), the Court finds that it is not necessary for it to consider separately the complaints of the violation of the further elements of the fair trial relied on by the applicant (see, *mutatis mutandis*, *Findlay v. the United Kingdom*, no. 22107/93, § 80, ECHR 1997-I).

III. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE CONVENTION

59. The applicant alleged that he had had no effective remedy at his disposal as regards the alleged violations of his rights under Article 6 § 1 of the Convention. He relied on Article 13 of the Convention which provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

60. The Court considers, in the light of its conclusions under Article 6 § 1 of the Convention (see paragraphs 55 and 58 above), that it is not necessary to examine the applicant’s complaint under Article 13 of the Convention separately.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant claimed 1,000,000 Slovakian korunas (SKK) in compensation for pecuniary damage and SKK 1,000,000 for non-pecuniary damage.

63. The Government objected that these claims were not substantiated by any evidence, objected that there was no causal link between the

violations alleged and the pecuniary damage allegedly suffered and considered that the claim in respect of the non-pecuniary damage was excessive.

64. Like the Government, the Court fails to see any connection between the alleged pecuniary damage and the violation of the applicant's Convention right found (see paragraph 55 above). There is, therefore, no ground for an award under this head.

65. In view of the circumstances of the case the Court further considers that the finding of a violation in itself affords the applicant sufficient reparation for any non-pecuniary damage suffered.

B. Costs and expenses

66. The applicant claimed SKK 5,300 by way of compensation in respect of the lawyer's fee for legal representation in the appeal on points of law, SKK 2,000 in respect of the court fee for that appeal and SKK 300 for mailing expenses.

67. The Government contended that these costs and expenses had not been incurred to prevent or obtain redress for the violations alleged.

68. 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 (see, among many other authorities, *Arvelakis v. Greece*, no. 41354/98, § 34, 12 April 2001). To be recoverable, the domestic costs and expenses must also be incurred to prevent or obtain redress for the violation found (see *Záborský and Šmáriková v. Slovakia*, no. 58172/00, § 46, 16 December 2003).

69. The Court fails to see any connection between, on the one hand, the legal costs and the court fee which both concerned the applicant's appeal on points of law against the decision of the court of appeal and, on the other, the violation found. Having regard to the elements at its disposal, the Court finds it appropriate to award the applicant EUR 100 for postage and other out-of-pocket expenses which he incurred in the context of filing and pursuing his application.

C. Default interest

70. 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. *Dismisses* the Government's preliminary objection concerning the exhaustion of domestic remedies in relation to the applicant's complaint under Article 6 § 1 of the Convention of the lack of an impartial tribunal;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on the ground of the lack of an impartial tribunal;
3. *Holds* that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention concerning the alleged procedural unfairness;
4. *Holds* that it is not necessary to examine separately the complaint under Article 13 of the Convention;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. *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, EUR 100 (one hundred euros) in respect of expenses, to be converted into Slovakia korunas at the rate applicable at the date of settlement plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 February 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President