



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

FIRST SECTION

CASE OF MEŽNARIĆ v. CROATIA

(Application no. 71615/01)

JUDGMENT

STRASBOURG

15 July 2005

FINAL

30/11/2005

*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 Mežnarić v. Croatia,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mr P. LORENZEN,

Ms N. VAJIĆ,

Mrs S. BOTOUCHAROVA,

Mr K. HAJIYEV, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 23 June 2005,

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

PROCEDURE

1. The case originated in an application (no. 71615/01) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Ivan Mežnarić (“the applicant”), on 25 June 2001.

2. The applicant was represented by Mrs S. Rajačić, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agents, firstly Ms L. Lukina-Karajković and subsequently by Ms Š. Stažnik.

3. The applicant alleged a violation of Article 6 § 1 of the Convention in that he did not have a fair trial by an impartial tribunal because his constitutional complaint was decided by a panel of judges that included a judge who had represented the applicant's opponents at an earlier stage in the proceedings.

4. The application was allocated to the First 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. By a decision of 11 December 2003, the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1)

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1954 and lives in Zagreb.

9. On 10 July 1991 M.T. and H.T. (“the plaintiffs”) brought an action in the Zagreb Municipal Court (*Općinski sud u Zagrebu*) against the applicant seeking damages for breach of contract.

10. From 27 November 1991 until 27 January 1992 the plaintiffs were represented by their legal counsel, M.V. and thereafter by his daughter, S.T., who took over her father's law practice.

11. The plaintiffs, but not M.V., attended the first hearing in the case that was held on 11 December 1991. M.V.'s activity in the proceedings was thus limited to filing one set of submissions with the court on 2 December 1991 in which he responded to the applicant's arguments.

12. At the next hearing held on 27 January 1992 S.T. replaced her father as the plaintiffs' counsel.

13. On 28 April 1992 the Municipal Court gave judgment for the plaintiffs. Following an appeal by the applicant, on 9 February 1993 the Zagreb County Court (*Okružni sud Zagreb*) quashed the first-instance judgment and remitted the case to the Municipal Court.

14. In the resumed proceedings, on 6 July 1993 the Zagreb Municipal Court again gave judgment for the plaintiffs. The applicant appealed.

15. On 27 September 1994 the Zagreb County Court reversed the first-instance judgment, only accepting part of the plaintiffs' claim.

16. The applicant then lodged an appeal on points of law (*revizija*) with the Supreme Court (*Vrhovni sud Republike Hrvatske*) in which he argued, *inter alia*, that he had been unable to present his case properly in the Municipal Court.

17. On 8 December 1999 the Supreme Court dismissed the applicant's appeal on points of law.

18. On 28 July 2000 the applicant filed a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*).

19. Following the service of the Supreme Court's decision, on 24 August 2000 S.T. informed the Zagreb Municipal Court that she had ceased to act for the plaintiffs some four years earlier and that the decision should have been served on the plaintiffs directly.

20. On 18 December 2000 the Constitutional Court dismissed the applicant's complaint. It found that the articles of the Constitution on which the applicant sought to rely did not contain any substantive provisions enshrining human rights or fundamental freedoms.

Judge M.V. was a member of the panel of five judges which delivered that decision. The panel was presided over by another judge. The applicant became aware of the composition of the panel when he received the Constitutional Court's decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant part of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/99 – “the 1999 Constitutional Court Act”) as in force at the material time provided as follows:

Section 26 (6)

“A judge of the Constitutional Court may not abstain from voting, unless he has participated in the enactment of a statute or subordinate legislation or the adoption of a decision upon which the Constitutional Court is required to rule.”

Section 33

“Unless provided otherwise by this Constitutional Act, in the proceedings before it the Constitutional Court shall apply *mutatis mutandis* the provisions of the relevant procedural laws of the Republic of Croatia as ancillary rules.”

Section 72 provides that, if a constitutional complaint is successful, the Constitutional Court must quash the impugned decision and remit the matter to the competent authority.

22. The relevant part of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette nos. 53/91, 91/92 and 112/99 – “the Civil Procedure Act”) as in force at the material time provided as follows:

Section 71

“A judge ... shall be disqualified from exercising his functions:

1. if he is... a counsel of the party...;

...

3. if... the party's counsel is his relative in the direct line ...;

...

6. if other circumstances exist to cast doubt on his impartiality.”

The grounds enumerated in section 71 subparagraphs 1-5 are considered absolute grounds for withdrawal in that the judge concerned is automatically disqualified from sitting.

Section 72(1) provides that, from the moment he becomes aware of an absolute ground disqualifying him from sitting, the judge must take no further part in the case and bring the circumstances which disqualify him from sitting to the immediate attention of the president of the court of which he is a member, whereupon the president designates another judge to hear the case.

23. In its decision no. Rev-1104/1999-2 of 24 June 1999 the Supreme Court held that for section 71 to apply it was not necessary for the ground for withdrawal to have existed throughout the proceedings or, in particular, when the decision complained of was delivered; it was sufficient for it to have existed at some point during the proceedings.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. The parties' submissions

1. The applicant

24. The applicant complained that he had been deprived of his right to a hearing by an impartial tribunal because his constitutional complaint had been decided by a panel of judges that included Judge M.V., when both he and subsequently his daughter had previously represented the applicant's opponents. He relied on Article 6 § 1 of the Convention the relevant part of which reads as follows:

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

25. The applicant argued that Judge M.V. should have withdrawn from the case under domestic law. In that connection, he pointed out that, under section 33 of the 1999 Constitutional Court Act read in conjunction with sections 71 and 72 of the Civil Procedure Act, two absolute grounds for withdrawal existed in Judge M.V.'s case. In any event, a judge who had previously represented his opponents, and whose daughter continued to do so, did not appear impartial and thus failed the objective impartiality test.

2. *The Government*

26. The Government submitted that Judge M.V. had been impartial since he had not participated in the rendering of any court decision before the Constitutional Court proceedings. The mere fact that he had previously been involved in the applicant's case did not, in itself, violate Article 6. That circumstance had not influenced his impartiality because he had represented the plaintiffs for just two months almost nine years before the Constitutional Court had been called on to decide the applicant's case. Furthermore, during the period when he represented the applicant's opponents, no significant decision was taken. In any event, under domestic law Judge M.V. was not obliged to withdraw from the case.

Therefore, there was no suggestion of either objective or subjective partiality on Judge M.V.'s part.

B. The Court's assessment

27. The Court notes that the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes for such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. Accordingly, a failure to abide by these rules means that the case has been heard by a tribunal whose impartiality was recognised by national law to be open to doubt. Provided they are not based on arbitrary assumptions, the Court will take such rules into account when making its own assessment whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see, *mutatis mutandis*, *Pescador Valero v. Spain*, no. 62435/00, §§ 24-29, ECHR 2003-VII; *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A no. 227, p. 16, § 36; and *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, pp. 23-24, §§ 50-52).

28. In the instant case the Court notes that specific provisions regarding the withdrawal of Constitutional Court judges were set out in section 26(6) of the 1999 Constitutional Court Act, while the provisions of the relevant procedural law (the Civil Procedure Act) were to be applied *mutatis mutandis* as ancillary rules (see paragraphs 21 and 22 above). Even if it might be argued that the specific provisions on the withdrawal are not particularly clear and precise, the Court points out that its task is not to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant

gave rise to a violation of Article 6 § 1 in the present case (see, *inter alia*, *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 24; and *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 45).

29. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255, p. 12, §§ 27, 28 and 30; *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII). It must be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 794, § 38).

30. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*Wettstein v. Switzerland*, cited above, § 43). In the present case, the applicant adduced no evidence to suggest, and there was nothing to indicate, personal bias on the part of Judge M.V.

31. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. 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 person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein v. Switzerland*, cited above, § 44; and *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 951-952, § 58).

32. In this respect even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 14, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Wettstein v. Switzerland*, loc. cit.; and *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45).

33. The fact that a judge has acted in different capacities in the same case may in certain circumstances compromise a tribunal's impartiality. In *Piersack v. Belgium* (judgment of 1 October 1982, Series A no. 53, pp. 14-16, §§ 30-31) the fact that a judge had presided over a criminal trial after having been the head of the public prosecutor's office in charge of the

prosecution in the case was capable of making the tribunal's impartiality open to doubt, in breach of Article 6 § 1 of the Convention. In *Wettstein* (cited above, § 47) there was an overlapping in time of two sets of proceedings in which R. exercised the function of judge in one case, and that of legal representative of the party opposing the applicant in the other. As a result, the applicant had reason for concern that Judge R. would continue to see him as the opposing party. The Court concluded that this situation could have raised legitimate fears in the applicant that Judge R. was not approaching the case with the requisite impartiality. Further, in *Walston v. Norway* ((dec.), no. 37372/97, 11 December 2001) the time-frame was regarded as relevant when assessing the significance of a judge's previous relationship to the opposing party.

34. The Court notes that in the present case Judge M.V. represented the applicant's opponents at an earlier stage in the proceedings and that, later on, his daughter continued to do so.

It is true that Judge M.V.'s previous involvement was minor and remote, as he represented the applicant's opponents for only two months, almost nine years before the decision of the Constitutional Court of 18 December 2000 (see paragraph 10 above); and his activity was limited to drafting and signing a single set of submissions to the court (see paragraph 11 above). His dual role related to different legal issues: he first dealt with the application of civil-law rules as counsel to the plaintiffs in the principal proceedings, and, subsequently, with the constitutionality of the judgment delivered in those proceedings as a Constitutional Court judge.

35. It is also true that Judge M.V.'s daughter had ceased to represent the applicant's opponents some time in 1996, which was before the Supreme Court gave its decision which was subsequently subjected to constitutional review.

36. However, unlike the cases cited above, the present case concerns the dual role of a judge in a single set of proceedings. This fact, reinforced by the involvement of Judge M.V.'s daughter, created, in the Court's view, a situation which was capable of raising legitimate doubts as to Judge M.V.'s impartiality.

37. In these circumstances the Court finds that there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant sought compensation for pecuniary damage caused by the fact that he had lost his case against M.T. and H.T. before the Constitutional Court. He claimed EUR 50,000 corresponding to the amount he had eventually had to pay to M.T. and H.T. when the County Court's judgment of 27 September 1994 was enforced. He argued that there was a causal link between the Constitutional Court's failure to act impartially and the dismissal of his constitutional complaint.

40. The applicant further claimed compensation for non-pecuniary damage on account of the frustration and suffering that had resulted from the violation and the damage caused to his private and family life and his home by the enforcement of the County Court's judgment. The applicant did not specify the amount sought.

41. The Government disputed both claims. They argued that the applicant's claim for pecuniary damage was unfounded because there was no causal connection between the violation complained of and the alleged pecuniary damage. They submitted that the applicant's claim was based on the assumption that the judgment delivered in the domestic proceedings would have been favourable to him had the alleged violation not taken place. However, it was by no means clear that the outcome of the case would have been different in the absence of the alleged violation.

42. As to the alleged non-pecuniary damage, the Government invited the Court, in the event of a finding of a violation, to assess the amount of just satisfaction on the basis of its case-law in similar cases.

43. The Court observes that an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 § 1. However, the Court cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 of the Convention would have been (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1575, § 82). In the present case the Court sees no causal link between the breach of Article 6 § 1 of the Convention and the alleged pecuniary damage. There is, therefore, no ground for an award under this head.

44. As to compensation in respect of non-pecuniary damage, the Court considers that a finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction in the circumstances.

B. Costs and expenses

45. The applicant further claimed:

(a) EUR 1,940 in respect of costs incurred in the enforcement proceedings following the County Court's judgment of 27 September 1994;

(b) EUR 493 in respect of the costs incurred in the Constitutional Court proceedings;

(c) EUR 1,165 in respect of the costs incurred before the Court.

46. The Government did not accept items (a) and (b) since legal costs were only recoverable in so far as they related to the violation found. They submitted that the costs sought by the applicant were not incurred in order to seek through the domestic legal order prevention and redress of the alleged violation.

47. As to item (c), the Government invited the Court to assess the amount on the basis of its case-law in similar cases.

48. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, on the basis of the information in its possession and the aforementioned criteria, the Court observes that there is no evidence in the file to suggest that the applicant incurred any extra costs and expenses in the domestic courts as a result of the violation of his right to a hearing before an impartial tribunal. The Court therefore rejects the claim for costs and expenses incurred in the domestic proceedings and considers it reasonable to award the sum of EUR 1,165 for the proceedings before the Court, plus any tax that may be chargeable on that amount.

C. Default interest

49. 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 the non-pecuniary damage sustained by the applicant;
3. *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 1,165 (thousand one hundred and sixty five euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the

date of settlement, plus any tax that may be chargeable on the above amount;

(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;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 July 2005 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President