



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

THIRD SECTION

**CASE OF FODALE v. ITALY**

*(Application no. 70148/01)*

JUDGMENT

STRASBOURG

1 June 2006

**FINAL**

***23/10/2006***



**In the case of Fodale v. Italy,**

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

Boštjan M. Zupančič, *President*,

John Hedigan,

Lucius Caflisch,

Corneliu Bîrsan,

Vladimiro Zagrebelsky,

Egbert Myjer,

David Thór Björgvinsson, *judges*,

and Vincent Berger, *Section Registrar*,

Having deliberated in private on 18 November 2004 and 11 May 2006,

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

**PROCEDURE**

1. The case originated in an application (no. 70148/01) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Carmelo Fodale (“the applicant”), on 20 October 2000.

2. The applicant was represented by Mr G. Oddo, a lawyer practising in Palermo. The Italian Government (“the Government”) were represented by their Agent, Mr I.M. Braguglia, and by their deputy co-Agent, Mr N. Lettieri.

3. The applicant alleged that the proceedings for a review of the lawfulness of his detention pending trial had not been fair.

4. The application was allocated to the Third 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 18 November 2004, the Chamber declared the application admissible.

6. The applicant and the Government each filed further observations (Rule 59 § 1).

## THE FACTS

7. The applicant was born in 1947 and lives in Trapani. He is an oil producer.

### **A. The applicant's arrest and his appeals against his deprivation of liberty**

8. On an unspecified date criminal proceedings were brought against the applicant, who was charged with attempted extortion, attempted arson and arson, and (under Article 416 *bis* of the Criminal Code) with being a member of a mafia-type criminal association based in Sicily.

9. By an order of 12 July 1999, the Palermo preliminary investigations judge (*giudice per le indagini preliminari*), considering that there were "substantial indications" of the applicant's guilt, remanded him in custody. As to the existence of special requirements (*esigenze cautelari*) justifying his detention pending trial under Article 274 of the Code of Criminal Procedure, the preliminary investigations judge observed that on account of his involvement in a criminal organisation the applicant had contacts which might enable him to reoffend, abscond, or pervert the course of justice. Moreover, given that the applicant had also been charged with the offence provided for under Article 416 *bis* of the Criminal Code, the requirements referred to in Article 274 of the Code of Criminal Procedure were to be presumed to have been met unless there was proof to the contrary.

10. The applicant appealed against the order of 12 July 1999.

11. By an order of 2 August 1999, the division of the Palermo District Court responsible for reviewing precautionary measures ("the Specialised Division"), finding that the preliminary investigations judge had not correctly assessed the evidence of the applicant's guilt, set aside the order of 12 July 1999 and ordered the applicant's release.

12. The public prosecutor's office appealed on points of law. It alleged in particular that the Specialised Division had given the reasons for its decision in an illogical and contradictory manner.

13. The Court of Cassation set the case down for a hearing on 15 February 2000. No summons to appear was served on the applicant or his lawyer.

14. The hearing was held on the scheduled date.

15. In a judgment of 15 February 2000, the Court of Cassation quashed the order of 2 August 1999, finding it to have been illogical and contradictory. It remitted the case to the Specialised Division, indicating the legal principles to which the Division should adhere.

16. The Specialised Division set the case down for a hearing on 4 April 2000. On that date Mr Oddo sought leave to produce additional evidence. He also argued that the judgment of 15 February 2000 was null and void as

he had not been informed of the date of the hearing. He alleged that Article 627 § 4 of the Code of Criminal Procedure, which provided that grounds of nullity that had not been examined previously could not be submitted before the court to which the case was remitted, breached the rights of the defence. Consequently, he requested that the provision in question be waived.

17. The Specialised Division agreed to the inclusion of the new evidence requested by Mr Oddo. Relying on Article 627 § 4 of the Code of Criminal Procedure, it dismissed the objection that the judgment of 15 February 2000 was null and void.

18. On 13 April 2000 the Specialised Division upheld the preliminary investigations judge's order of 12 July 1999 in respect of two of the charges and set aside the remaining provisions.

19. The applicant was then arrested and remanded in custody.

20. On 15 May 2000 the applicant appealed to the Court of Cassation, again claiming that the judgment of 15 February 2000 was null and void, and alleging that Article 627 § 4 of the Code of Criminal Procedure was unconstitutional and breached the rights of the defence.

21. In a judgment of 11 December 2000, the Court of Cassation, considering that the decision appealed against had been logically and properly reasoned, dismissed the applicant's appeal on points of law. It considered manifestly ill-founded the objection that Article 627 § 4 of the Code of Criminal Procedure was unconstitutional.

## **B. The applicant's trial**

22. In the meantime, in a judgment of 20 July 2000, the Palermo preliminary hearings judge (*giudice dell'udienza preliminare*) had convicted the applicant. The length of the sentence is not known.

23. The applicant lodged an appeal.

24. In a judgment of 17 May 2001, the Palermo Court of Appeal acquitted the applicant on the ground that he had not committed the offences with which he had been charged (*per non aver commesso il fatto*).

25. The public prosecutor at the Palermo Court of Appeal lodged an appeal on points of law, which was dismissed in a judgment of 23 May 2002. The applicant's acquittal thus became final.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

26. The applicant complained that the proceedings for a review of the lawfulness of his detention had been unfair. He alleged that he had not been informed of the date of the hearing before the Court of Cassation and complained about the dismissal of his applications for the judgment delivered by that court on 15 February 2000 to be set aside. He relied on Article 5 § 3, Article 6 §§ 1 and 3 (c) and Article 13 of the Convention.

27. In its admissibility decision, the Court considered that the facts complained of by the applicant fell within the scope of paragraph 4 of Article 5, which affords to persons who have been arrested the right to take proceedings by which the lawfulness of their detention will be decided by a court. According to the Court's case-law, proceedings reviewing the lawfulness of pre-trial detention do not concern the "determination of a criminal charge", and Article 5 § 4 is the *lex specialis* for detention in relation to the more general requirements of Article 13 of the Convention and of Article 6 under its civil head (see *Reinprecht v. Austria*, no. 67175/01, §§ 48 and 53-55, ECHR 2005-XII, and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II).

28. The present application thus needs to be examined exclusively under Article 5 § 4, which reads as follows:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

#### A. The parties' submissions

##### 1. *The Government*

29. The Government argued at the outset that the proceedings referred to in Article 5 § 4 were not indispensable in all cases, and in particular where a decision to detain someone had been taken by a judicial body. Moreover, the provision in question was not applicable to the applicant's case, where the cassation proceedings had been initiated by the public prosecutor's office after the applicant had been released. The Court of Cassation had not therefore been called upon to rule on the lawfulness of a measure of "detention".

30. In any event, proceedings concerning a review of detention did not have to afford all the characteristics of a fully adversarial procedure or ensure compliance with the equality of arms principle. The requirements of

Article 5 in this connection were less stringent than those of Article 6 § 3. In addition, even when Article 6 came into play, the various stages of the proceedings had to be taken into account and examined as a whole.

31. In principle, proceedings concerning pre-trial detention as provided for in Article 5 § 1 (c) of the Convention were conducted in their entirety before judicial authorities which guaranteed the independence and impartiality required by the Convention. Each of those authorities had the power, in line with Convention requirements, to revoke the measure of detention or replace it by a less severe measure.

32. The Government acknowledged that the applicant's counsel had never received the summons to appear at the hearing of 15 February 2000, owing to an error by the competent domestic authorities. As a result, the applicant had been unable to attend the hearing. Article 127 of the Code of Criminal Procedure provided that the date of the hearing should be notified to both parties without distinction. The accused and his counsel were entitled to submit written pleadings and, if they appeared at the hearing, oral argument. The court could decide even in their absence. However, no decision could be taken if the accused and his counsel had not been notified of the date of the hearing. That rule had not been complied with in the present case.

33. The Government considered, however, that the defect which had vitiated the proceedings in the Court of Cassation had not had irreversible consequences for the applicant and had not really undermined the fairness of the proceedings. The Court of Cassation had confined itself to criticising the reasoning given in the order releasing the applicant. It was true that the Specialised Division, on remittal of the case, had then given a decision that was unfavourable to the applicant, but that had not been the necessary or inevitable consequence of the Court of Cassation's judgment. In the later stage of the proceedings, the applicant had been able to exercise his defence rights fully, and the principles of adversarial proceedings and equality of arms had been complied with.

34. In the light of the above, the Government submitted that the Court should dismiss the application or, in the alternative, should find that there was a violation only as a result of an error in the application of domestic law, which itself was in conformity with Convention requirements. They pointed out in this connection that Law no. 128 of 2001 had introduced a provision (Article 625 *bis* of the Code of Criminal Procedure) whereby applications could now be lodged before the Court of Cassation for rectification of errors in its judgments.

## *2. The applicant*

35. The applicant contested the Government's arguments. He contended that he had been unable to participate in the hearing before the Court of

Cassation, which a representative of the public prosecutor's office had attended.

36. In the applicant's submission, this procedural defect had had serious consequences for the defence. The Specialised Division, on remittal of the case, had then ordered his arrest and remanded him in custody. In the proceedings before that Division, his lawyer had argued that the judgment of 15 February 2000 was null and void and, alleging that Article 627 § 4 of the Code of Criminal Procedure breached the rights of the defence, had requested a waiver of that provision. However, those objections had been dismissed.

37. The applicant argued that the domestic law in force at the material time had not allowed him to seek rectification of the error of which he had been the victim. Article 625 *bis* of the Code of Criminal Procedure, cited by the Government, had not been in force at that time.

38. The applicant observed lastly that it was true that the Court of Cassation, in view of its power to rule on questions of law and not of fact, had not been entitled to order his imprisonment. However, it had set aside the order for his release and, on remitting the case, had obliged the court below to adhere to the legal principles set out in its judgment. In applying those principles, the Specialised Division had then remanded him in custody once again.

## **B. The Court's assessment**

39. The Court first reiterates that, under Article 5 § 4 of the Convention, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty (see *Lietzow v. Germany*, no. 24479/94, § 44, ECHR 2001-I). It is true that the provision in question does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release. Nevertheless, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (see, *mutatis mutandis*, *Rapacciuolo v. Italy*, no. 76024/01, § 31, 19 May 2005; *Singh v. the Czech Republic*, no. 60538/00, § 74, 25 January 2005; and *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B).

40. The Court notes that at the time the appeal on points of law was lodged by the public prosecutor's office the applicant was not being held in custody, having been released pursuant to an order of the Specialised Division of the Palermo District Court on 2 August 1999. However, in calling for that decision to be quashed, the public prosecutor's office had sought, through the cassation and remittal procedures, to have the detention order upheld. If the prosecution's appeal was dismissed, the decision to

release the applicant would become final. But if it was allowed, the question whether it was appropriate to remand the applicant in custody would be referred back to the court below, which would be required to adhere to the legal principles laid down by the Court of Cassation. In those circumstances, the Court considers that the outcome of the proceedings in the Court of Cassation was crucial to the decision as to the lawfulness of the applicant's detention. It cannot therefore subscribe to the Government's argument that Article 5 § 4 was not applicable to the proceedings before the Court of Cassation when it ruled on the appeal by the public prosecutor's office.

41. The Court further reiterates that a court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, that is, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151, and *Nikolova*, cited above, § 58).

42. These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001).

43. In the present case, the Court of Cassation set the appeal by the public prosecutor's office down for a hearing on 15 February 2000. However, no summons to appear was served on the applicant or his counsel. The accused was thus unable to file pleadings or to present oral argument at the hearing, in response to the submissions of the public prosecutor's office.

By contrast, a representative of that office was able to do so before the Court of Cassation.

44. In these circumstances the Court is unable to find that the requirements of adversarial proceedings and equality of arms were met.

45. There has therefore been a violation of Article 5 § 4 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed to have sustained serious pecuniary and non-pecuniary damage as a result of being deprived of his liberty. He had been prevented from receiving certain State financing for his oil-production business. In addition, his social and family life had been seriously disrupted.

48. The Government observed that the application pertained exclusively to a failure to notify the applicant or his counsel of the date of a hearing before the Court of Cassation, which had not itself ordered the applicant’s detention. Accordingly, there was no need to compensate him for damage that he claimed was related to being deprived of his liberty. Having been acquitted, he was in fact entitled to seek compensation for “unjust” detention under Article 314 of the Code of Criminal Procedure (see the description of the relevant domestic law in *N.C. v. Italy* [GC], no. 24952/94, §§ 40-41, ECHR 2002-X). As to non-pecuniary damage, a mere finding of a violation would suffice.

49. The Court reiterates that it makes awards by way of just satisfaction under Article 41 when the loss or damage claimed has been caused by the violation found. The State is not, however, bound to make any payment in respect of damage that is not attributable to it (see *Perote Pellon v. Spain*, no. 45238/99, § 57, 25 July 2002, and *Bracci v. Italy*, no. 36822/02, § 71, 13 October 2005).

50. In the present case the Court has found a violation of Article 5 § 4 of the Convention on account of the fact that neither the applicant nor his counsel was informed of the date of the hearing before the Court of Cassation and that they were thus deprived of the possibility of submitting their arguments to it on an equal footing with the public prosecutor’s office. That finding does not necessarily imply that the applicant’s detention was

unlawful or otherwise in breach of the Convention (see, *mutatis mutandis*, *Cianetti v. Italy*, no. 55634/00, § 50, 22 April 2004).

51. Accordingly, the Court considers that no causal link has been established between the violation found and the pecuniary damage complained of by the applicant.

52. As to non-pecuniary damage the Court considers that, in the circumstances of the present case, the finding of a violation constitutes in itself sufficient just satisfaction.

## **B. Costs and expenses**

53. The applicant claimed 3,082.28 euros (EUR) for the costs and expenses he had incurred in the domestic proceedings and EUR 5,000 for costs in respect of the proceedings before this Court.

54. The Government argued that the costs in respect of the domestic proceedings were not related to the violation of the Convention. As to the expenses of the present proceedings, they left the matter to the Court's discretion.

55. According to the Court's case-law, for an applicant to be awarded costs and expenses it must be established that they were actually and necessarily incurred and are reasonable as to quantum. In the present case the Court notes that, prior to the proceedings before it, the applicant had brought an action before the Specialised Division of the Palermo District Court seeking to have the judgment of 15 February 2000 set aside and had lodged an appeal on points of law after the dismissal of that action. The Court thus acknowledges that the applicant incurred certain expenses in seeking redress for the violation of the Convention at the level of the domestic legal system (see *Rojas Morales v. Italy*, no. 39676/98, § 42, 16 November 2000). However, it finds excessive the costs claimed in respect of the proceedings before the Italian courts (see, *mutatis mutandis*, *Sakkopoulos v. Greece*, no. 61828/00, § 59, 15 January 2004, and *Cianetti*, cited above, § 56). Having regard to the information in its possession and to its practice in such matters, the Court considers it reasonable to award EUR 1,500 to the applicant under this head.

56. The Court also finds excessive the amount claimed for costs and expenses in respect of the proceedings before it (EUR 5,000) and decides to award EUR 3,500 under that head.

57. The total award to the applicant in respect of costs and expenses thus amounts to EUR 5,000.

### C. Default interest

58. 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 5 § 4 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 in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable on that 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 1 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger  
Registrar

Boštjan M. Zupančič  
President