



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

SECOND SECTION

CASE OF BEN NACEUR v. FRANCE

(Application no. 63879/00)

JUDGMENT

STRASBOURG

3 October 2006

FINAL

03/01/2007

This judgment is final but it may be subject to editorial revision.

In the case of Ben Naceur v. France,

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

András Baka, *President*,

Jean-Paul Costa,

Rıza Türmen,

Mindia Ugrekhelidze,

Elisabet Fura-Sandström,

Danutė Jočienė,

Dragoljub Popović, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 12 September 2006,

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

PROCEDURE

1. The case originated in an application (no. 63879/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Tunisian national, Mr Laïfa Ben Naceur (“the applicant”), on 13 September 2000.

2. The French Government (“the Government”) were represented by their Agent, Mr R. Abraham, and his successor, Ms E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged that the additional time granted to the Principal Public Prosecutor for appealing against a judgment of the Criminal Court amounted to a breach of the principle of equality of arms as enshrined in Article 6 § 1 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

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

6. In a decision of 29 November 2005 the Chamber declared the application admissible.

7. Neither the Government nor the applicant filed further written observations on the merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1951 and is currently detained in Muret Prison (Haute-Garonne).

9. On 22 February 1999 the Lyons Criminal Court sentenced the applicant, who had been represented by counsel at trial, to seven years' imprisonment and ordered his permanent exclusion from French territory for drug trafficking while classified in law as a recidivist.

10. Neither the applicant nor the public prosecutor appealed against the judgment within the ten-day time-limit laid down in Article 498 of the Code of Criminal Procedure.

11. On 8 March 1999 the public prosecutor asked the Principal Public Prosecutor at the Lyons Court of Appeal to lodge an appeal; the Principal Public Prosecutor did so in a notice of appeal served on 16 March 1999 in accordance with Article 505 of the Code of Criminal Procedure, by which the Principal Public Prosecutor has two months from the date of delivery of the Criminal Court judgment in which to lodge an appeal.

12. Before the Court of Appeal, the Principal Public Prosecutor – the only appellant – submitted that the applicant should be sentenced to fifteen years' imprisonment and permanently excluded from French territory.

13. The applicant filed submissions urging the Court of Appeal to declare the appeal inadmissible for non-compliance with Article 6 § 1 of the Convention and the principle of equality of arms in that it had been lodged outside the time-limit applicable to the public prosecutor at the Criminal Court and to himself. He also challenged the finding as to his guilt.

14. On 1 July 1999 the Lyons Court of Appeal upheld the judgment as to the issue of guilt and the permanent exclusion from French territory, and increased the sentence to twelve years' imprisonment, with a minimum term of two-thirds of the sentence. Addressing the applicant's plea of inadmissibility, the Court of Appeal held:

“Under Article 505 of the Code of Criminal Procedure, the Principal Public Prosecutor may lodge an appeal within two months from the date of delivery of the judgment. This opportunity granted to the Principal Public Prosecutor is not at variance with the provisions of Article 6 of the aforementioned Convention where, as in this instance, the right of appeal is also available to the defendant. The appeal by the Principal Public Prosecutor must be declared admissible.”

15. The applicant appealed on points of law and filed additional submissions in which he reiterated his argument that Article 505 of the Code of Criminal Procedure did not comply with the principle of equality of arms enshrined in Article 6 of the Convention. He also relied on the case-law of the Criminal Division of the Court of Cassation, which had ruled that Article 546 of the Code of Criminal Procedure infringed Article 6 of the

Convention in that it afforded only the Principal Public Prosecutor the right to appeal against certain judgments concerning petty offences (*contraventions*).

16. In a judgment of 15 March 2000 the Criminal Division of the Court of Cassation dismissed the appeal on points of law, holding as follows:

“In declaring the appeal by the Principal Public Prosecutor admissible, the Court of Appeal stated that the opportunity granted to the latter to lodge an appeal within two months from the date of delivery of the judgment, in accordance with Article 505 of the Code of Criminal Procedure, was not at variance with the provisions of Article 6 of the European Convention on Human Rights where, as in this instance, the right of appeal was also available to the defendant.

In so holding, and in so far as Article 505 of the Code of Criminal Procedure does not deprive the defendant of a remedy that could be used by the Principal Public Prosecutor but simply subjects him to different formal conditions and time-limits from those applicable to the Principal Public Prosecutor, the judges applied the law correctly ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure

Article 496

“An ordinary appeal may be lodged against judgments of the criminal courts. ...”

Article 497

“The following persons have a right of appeal:

- (1) the defendant;
- (2) the person liable under the civil law, in respect of civil interests only;
- (3) the civil party, in respect of his or her civil interests only;
- (4) the public prosecutor;
- (5) the public authorities, in cases where they have brought the prosecution;
- (6) the Principal Public Prosecutor at the Court of Appeal.”

Article 498

“Save in the case provided for in Article 505, an appeal shall be lodged within ten days from the delivery of a judgment given in the presence of both parties. ...”

Article 500

“Where one of the parties appeals during the above-mentioned periods, the other parties shall have an additional five days in which to lodge an appeal.”

Article 505

“The Principal Public Prosecutor shall lodge an appeal, by service either on the defendant or on the person civilly liable for the offence, within two months from the date on which judgment is delivered.”

Article 509

“The case shall be referred to the Court of Appeal to the extent determined by the notice of appeal and by the applicant’s capacity as stated in Article 515 ...”

Article 515

“The Court of Appeal, on an appeal by the prosecution authorities, may either uphold the judgment or overturn it entirely or in part, to the defendant’s advantage or disadvantage.

Where only the defendant, the person liable under civil law, the civil party or the assurer of one of the aforementioned persons has appealed, the court may not worsen the appellant’s situation ...”

B. Case-law of the Court of Cassation

17. In relation to judgments concerning petty offences, the Court of Cassation has held that Article 546 of the Code of Criminal Procedure infringed Article 6 of the Convention in that it afforded only the Principal Public Prosecutor the opportunity to appeal against any such judgments, whereas the defendant and the public prosecutor were entitled to do so in only three specific situations (see Court of Cassation, Criminal Division, 6 May 1997, *Bull. crim.* no. 170, *Dalloz* 1998, p. 223; 21 May 1997, *Bull. crim.* no. 191; and 17 June 1998, *Bull. crim.* no. 196). Law no. 99-515 of 23 June 1999 repealed the final paragraph of Article 546 of the Code of Criminal Procedure, abolishing the general right of appeal enjoyed by the Principal Public Prosecutor, who is now subject to the same restrictive conditions for appealing as the defendant and the public prosecutor .

18. Appeals in cases concerning intermediate criminal offences (*délits*) have the automatic effect of transferring all the factual and legal issues they raise to the Court of Appeal. Under Article 509 of the Code of Criminal Procedure, the notice of appeal defines the scope of the case referred to the Court of Appeal, which may be restricted to certain parts of the judgment only. Where this is the case, a cross-appeal (Article 500 of the same Code) allows the other party to extend the scope of the case referred to the Court of Appeal beyond the points raised in the main appeal.

19. In assessing the compliance of Article 505 of the Code of Criminal Procedure with Article 6 § 1 of the Convention, the Court of Cassation has confirmed the approach adopted in the present case in several subsequent judgments, holding that the additional time granted to the Principal Public Prosecutor for lodging an appeal was not in breach of Article 6 § 1 of the Convention in so far as the defendant also had a right of appeal and

sufficient time in which to make meaningful use of it (see Court of Cassation, Criminal Division, 27 June 2000, *Bull. crim.* no. 243; 24 October 2001; 9 January 2002; and 25 June 2003).

20. Where the Principal Public Prosecutor lodges an appeal within the two-month time-limit, no cross-appeal is available (Court of Cassation, Criminal Division, 29 February 2000, *Bull. crim.* no. 86). Nevertheless, even without having the status of appellant, the defendant may, as the respondent, submit arguments seeking to have the judgment convicting him at first instance overturned to his advantage, as provided by Article 515, paragraph 1, of the Code of Criminal Procedure. This principle was reiterated by the Criminal Division of the Court of Cassation in a judgment of 17 January 1996 (appeal no. 95-80854, published in *Bull. crim.*).

C. Recommendation Rec(2000) 19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system (adopted on 6 October 2000)

“... Functions of the public prosecutor

1. ‘Public prosecutors’ are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

...”

THE LAW

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

21. The applicant complained of a breach of the principle of equality of arms on account of the additional time granted to the Principal Public Prosecutor for appealing against a Criminal Court judgment and the fact that no cross-appeal could be lodged where the Principal Public Prosecutor had made use of that opportunity, as in the present case. He relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. The parties’ submissions

22. The applicant submitted that the approach adopted by the Court in *Guigue and SGEN-CFDT v. France* ((dec.), no. 59821/00, ECHR 2004-I), in which it had held that a similar complaint concerning the compliance of

Article 505 of the Code of Criminal Procedure with Article 6 § 1 of the Convention was inadmissible, could not be transposed to the present case as the application in that case had not been lodged by a defendant but by a civil party. In that case, however, the Court's decision to reject the application had also been based on the fact that a civil action was independent of a public prosecution. Thus, in the absence of an appeal concerning the civil-law provisions of the judgment at first instance, the appeal by the Principal Public Prosecutor had had no bearing on the final nature of those provisions, regardless of the outcome of the appeal for the defendant. In the present case, on the contrary, the appeal by the Principal Public Prosecutor had resulted in a rehearing of the criminal case to the applicant's detriment.

23. Next, the applicant submitted that criticism could be levelled at both the principle of the appeal available to the Principal Public Prosecutor and the procedural rules governing it. He argued that while a comparable provision was in place for the Principal Public Prosecutor at the Court of Cassation, with the similar aim of harmonising the case-law across the area of territorial jurisdiction, the "appeal in the interests of the law" which he or she could lodge did not affect the parties' situation as resulting from the decision appealed against (Article 621 of the Code of Criminal Procedure). The applicant further submitted that an additional time-limit of two months for appealing undermined legal certainty and was disproportionate to the ten-day time-limit available to the other parties. In addition, he contended that this "second chance" afforded to a public prosecutor or civil parties who had missed their own deadline for appealing was unacceptable in terms of the principle of equality of arms.

24. Lastly, the applicant submitted that the fact that he was unable to lodge a cross-appeal following an appeal by the Principal Public Prosecutor had put him in a position of inferiority breaching the principle of equality of arms. He argued that, notwithstanding the terms of Article 515 of the Code of Criminal Procedure, the prospect of having the conviction at first instance overturned in the defendant's favour on appeal was theoretical and illusory, since the fact that the defendant had not considered it necessary to appeal would lead the Court of Appeal to assume that he accepted the decision convicting him at first instance.

25. The Government noted by way of introduction that according to the Court's case-law, the principle of equality of arms was not absolute and did not require States to ensure strict equality between the parties (citing *De Haes and Gijssels v. Belgium*, 24 February 1997, *Reports of Judgments and Decisions* 1997-I, and *APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, ECHR 2000-X).

26. As to the difference in the time-limits for the defendant and the Principal Public Prosecutor, the Government submitted that the applicant's situation in the present case had to be distinguished from the situation where, prior to the reform introduced by the Law of 23 June 1999, the

Principal Public Prosecutor alone had had the possibility of appealing in the case of certain petty offences under former Article 546 of the Code of Criminal Procedure. In the present case, the applicant, as a defendant, had had the right to appeal against the Criminal Court's judgment. He had therefore not been denied an appeal but had simply been subject to different formal conditions and time-limits from those applicable to the Principal Public Prosecutor.

27. The Government accordingly submitted that the approach adopted by the Court in the case of *Guigue and SGEN-CFDT* (cited above), where a similar complaint had been brought by a civil party in the domestic proceedings, should be extended *mutatis mutandis* to the present case and that, as in that case, the applicant's complaint should be declared manifestly ill-founded. Furthermore, in the Government's submission, the different time-limits were justified by the role conferred on the Principal Public Prosecutor by Article 35 of the Code of Criminal Procedure in ensuring that the criminal law was applied throughout the area of the Court of Appeal's jurisdiction, as recognised by the Committee of Ministers of the Council of Europe in Recommendation Rec(2000)19 of 6 October 2000 (Article 1).

28. Lastly, the Government emphasised that the proceedings in the present case had been fair overall as required by Article 6 § 1 of the Convention, since the Court of Appeal had properly reviewed the issue of the applicant's guilt after the applicant had presented his case with the assistance of counsel, and it could either have upheld the judgment or overturned it to the applicant's advantage or disadvantage.

29. As to the fact that it was impossible to lodge a cross-appeal following an appeal by the Principal Public Prosecutor, the Government submitted that the applicant had provided no justification that this had put him at a disadvantage in relation to the Principal Public Prosecutor when the case had been examined by the Court of Appeal. In addition, the Government pointed out that in the applicant's case the Principal Public Prosecutor had not limited the scope of the appeal to certain parts of the judgment. Accordingly, assuming that the applicant was complaining that, in the absence of a cross-appeal, he had had no opportunity to influence the scope of the case referred to the Court of Appeal, the Government observed that such a situation had not arisen in his case. Seeing that the Court could not decide *in abstracto*, the complaint, interpreted in this way, should therefore be declared inadmissible *ratione personae*, since the applicant had not been a "victim".

30. In the alternative, the Government submitted that in any event, as the applicant had chosen not to appeal, he could not complain that he had been unable to influence the scope of the appeal.

B. The Court's assessment

31. The Court reiterates that, according to its case-law, the principle of equality of arms – which is one of the aspects of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, *De Haes and Gijssels*, cited above, § 53). Furthermore, a violation of that principle does not depend on further, quantifiable unfairness flowing from a procedural inequality (see *APEH Üldözötteinek Szövetsége and Others*, cited above, § 42, and *Guigue and SGEN-CFDT*, cited above).

32. With regard to rules of a procedural nature such as time-limits for filing documents and lodging appeals, the Court reiterates that such rules form an integral part of the concept of a fair trial and that it is primarily for the national authorities, especially the courts, to interpret and apply domestic law. The Court will not substitute its own interpretation for theirs unless their interpretation is arbitrary or places the applicant at a substantial disadvantage *vis-à-vis* the State (see, *mutatis mutandis*, *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports 1997-VIII*, and *Platakou v. Greece*, no. 38460/97, §§ 47-48, ECHR 2001-I).

33. The Court notes, first of all, that it has already examined a similar complaint to the one submitted by the applicant – alleging a breach of the principle of equality of arms on account of the difference in the time-limits for appealing granted to the Principal Public Prosecutor and the civil parties under Article 505 of the Code of Criminal Procedure, and the fact that the civil parties were unable to lodge a cross-appeal in such cases – in *Guigue and SGEN-CFDT* (cited above), in which the Court declared the complaint in that regard manifestly ill-founded, for the following reasons:

“The Court ... observes that, although the ten-day time-limit for lodging an appeal was short, it was not so short as to deprive the applicants of the possibility of making meaningful use of that remedy. The fact that that time-limit is notably shorter for private parties than for the Principal Public Prosecutor – whose position, moreover, is different – cannot, in the Court's opinion, place the former at a ‘substantial disadvantage’ *vis-à-vis* the latter within the meaning of *De Haes and Gijssels*, cited above, even accepting that the Principal Public Prosecutor may be regarded as their ‘opponent’ within the meaning of that judgment.

Furthermore, it appears, as shown by the domestic courts, that although an application to bring proceedings as a civil party triggers the public prosecution, the civil action brought by the applicants remains an action for damages for the loss incurred as a result of the offence, and any appeal that they might have lodged concerns only civil interests. This type of action is fundamentally distinct from the one brought by the Principal Public Prosecutor, who is vested with public authority and responsible for defending the general interest, which necessarily concerns only criminal provisions.

It follows that the applicants had a reasonable opportunity to present their case on appeal regarding the civil interests and that they cannot claim that the admissibility of

the Principal Public Prosecutor's appeal unlawfully placed them in a substantially disadvantageous position *vis-à-vis* him."

34. However, the Court observes that the situation in the present case differs substantially from that examined in *Guigue and SGEN-CFDT*. In the latter case, the applicants were civil parties, whose interests could not be affected by the appeal lodged by the Principal Public Prosecutor against the criminal provisions of the judgment at first instance. In the present case, the applicant is a defendant who, following the appeal, had his prison sentence increased. Having regard to what was at stake for the applicant in the appeal and reiterating that in the sphere of criminal law the requirements of a "fair hearing" are stricter than in civil proceedings (see, *mutatis mutandis*, *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 32, Series A no. 274), the Court finds that its conclusion in *Guigue and SGEN-CFDT* (cited above) cannot be transposed *mutatis mutandis* to the present case. In particular, while it is true that the civil party and the prosecution are not "opponents" (see *Guigue and SGEN-CFDT*, cited above, and also *Berger v. France*, no. 48221/99, § 38, ECHR 2002-X (extracts)), the same cannot be said of a defendant who has been convicted at first instance and the prosecution, who have distinct and opposing interests.

35. In the present case, the Court notes that although the public prosecutor at the Criminal Court did not appeal within the statutory time-limit, he asked the Principal Public Prosecutor to lodge an appeal with the manifest aim of increasing the applicant's sentence. After the Principal Public Prosecutor had acceded to this request, the applicant was deprived of the opportunity to lodge a cross-appeal with the Lyons Court of Appeal.

36. The Government alleged that the unavailability of a cross-appeal had not put the applicant at a disadvantage *vis-à-vis* the prosecution, seeing that he had had a further opportunity to challenge the finding as to his guilt before the Court of Appeal.

37. The Court acknowledges that the applicant had the issue of his guilt reviewed under Article 515 of the Code of Criminal Procedure and that the lack of a cross-appeal did not hinder the right to such a review.

38. However, the Court considers that, as the applicant argued, the possibility on appeal of securing an acquittal or simply a more favourable sentence than the one imposed at first instance was largely theoretical and illusory in the circumstances of the case. In particular, the very fact that the applicant did not appeal within the statutory ten-day time-limit available to him appears to indicate that he considered that he had little prospect of having his conviction at first instance varied in his favour on appeal.

39. Furthermore, the Court is not persuaded by the Government's argument, analysed in paragraph 28 above, that the Court of Appeal could have overturned the judgment to the applicant's advantage. Without denying the existence of such a possibility, the Court would simply observe that, in

the event, the Court of Appeal increased the applicant's prison sentence from seven to twelve years, thus substantially worsening his situation.

40. Accordingly, the additional time available to the prosecution for appealing, combined with the fact that it was impossible to lodge a cross-appeal, placed the applicant at a substantial disadvantage *vis-à-vis* the prosecution, in breach of the principle of equality of arms. Ruling *in concreto*, the Court finds that this principle has been infringed.

41. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant left it “to the Court's discretion” to determine the amount that could be awarded to him by way of just satisfaction.

44. Observing that the applicant had not submitted a quantified claim, the Government submitted that the finding of a violation of Article 6 § 1 of the Convention would in itself constitute sufficient and appropriate just satisfaction.

45. The Court observes that the applicant has not shown that he has sustained any pecuniary damage on account of the alleged violation. It cannot therefore award him any sum under that head. As to non-pecuniary damage, the Court considers that the applicant has necessarily suffered anxiety and distress. Making its assessment on an equitable basis, it awards him 4,500 euros (EUR) under this head.

B. Costs and expenses

46. The applicant likewise did not submit a precise claim in respect of just satisfaction under this head. He observed that the lawyer who had represented him before the Court until February 2006 had not been given sufficient time for the applicant himself to be able to provide the relevant supporting documents. However, he did not ask for an extension of the time allowed. He also left it “to the Court's discretion” to determine the amount that could be awarded to him under this head.

47. Having regard to the circumstances of the case, the Government submitted that a sum of EUR 500 could be awarded to the applicant in respect of costs and expenses.

48. The Court observes that it has no information about the costs and expenses incurred by the applicant in the domestic proceedings, during which he alleged a breach of Article 6 § 1 of the Convention (that is, before the Court of Appeal and the Court of Cassation). As to the expenses incurred by the applicant in connection with his representation before the Court, it notes that he was represented by a lawyer from the time of his application until February 2006, when he withdrew his representative's authority after the latter had failed to reply to a request from the Court concerning just satisfaction. Having regard to the circumstances of the case, and notwithstanding the fact that the applicant did not produce any supporting documents, the Court considers that he necessarily incurred expenses in relation to his defence. It therefore awards him EUR 1,500 under this head, covering all costs and expenses.

C. Default interest

49. The Court considers it appropriate that the default interest rate 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*
 - (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 4,500 (four thousand five hundred euros) in respect of non-pecuniary damage and EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses, 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 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*, unanimously, the remainder of the applicant's claim for just satisfaction.

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

Sally Dollé
Registrar

András Baka
President