



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

SECOND SECTION

CASE OF FARHI v. FRANCE

(Application no. 17070/05)

JUDGMENT

STRASBOURG

16 January 2007

FINAL

23/05/2007

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 Farhi v. France,

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

Mr A.B. BAKA, *President*,

Mr J.-P. COSTA,

Mr I. CABRAL BARRETO,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM,

Mrs D. JOČIENĖ,

Mr D. POPOVIĆ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 12 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 17070/05) 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 Moroccan national, Mr Redouane Farhi (“the applicant”), on 6 May 2005.

2. The applicant was represented by Mr H. Leclerc, a lawyer practising in Paris. The French Government (“the Government”) were represented by their Agent, Mrs Edwige Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. On 30 March 2006 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant, who was born in 1968, is currently in custody in Fresnes Prison.

5. In an order of 5 April 2002 an investigating judge at the Versailles *tribunal de grande instance* committed the applicant for trial in the Yvelines Assize Court on counts of rape classified as a repeat offence, unauthorised

entry into the country following expulsion and illegal entry or residence by a foreign national in France.

6. On 23 April 2003 the Yvelines Assize Court found him guilty as charged and sentenced him to twelve years' imprisonment. On the same day the Assize Court ruled on the civil claims and awarded the victim, who had joined the proceedings as a civil party, the sum of 15,000 euros (EUR) in damages. The prosecution was represented by B.

7. Both the applicant and the prosecution appealed.

8. On 23 July 2003 the Criminal Division of the Court of Cassation assigned the appeal to the Hauts-de-Seine Assize Court. The prosecution was once again represented by B.

9. The hearing before the Court of Appeal took place on 1 and 2 June 2004.

10. On 2 June 2004 the hearing was adjourned for the first time between 1.15 p.m. and 2.15 p.m. When it resumed, the President of the Assize Court ordered the photograph album in the case file to be shown to the parties, the jury and the other judges, then announced the questions the court and the jury would have to answer. Counsel for the accused objected to the wording proposed. The President called the civil party, the advocate-general, the defence and the accused, and the court then withdrew to deliberate. The hearing resumed at 2.40 p.m. Counsel for the applicant then filed submissions requesting that the court take formal note that unlawful communication within the meaning of Article 304 of the Code of Criminal Procedure had taken place between certain members of the jury and the advocate-general during the adjournment when the court had withdrawn to deliberate, leaving the jury in the courtroom. The President heard evidence from the applicant's and the civil party's lawyers, the advocate-general and the accused. The court, composed in this instance of only the judges, withdrew to deliberate and then delivered the following judgment:

“The Court, having deliberated without the jury's assistance,

Having regard to the conclusions submitted by Mr G., counsel to Redouane Farhi;

Having regard to Articles 315 and 316 of the Code of Criminal Procedure,

Considering that, as the judges composing the court were not personally in a position to confirm what may have happened in their absence, the court cannot put it on the record;

Further considering that the evidence adduced and discussed *inter partes* has revealed no violation of the provisions of Article 304 of the Code of Criminal Procedure ...”

11. In a judgment of 2 June 2004 the Assize Court of Appeal sentenced the applicant to fifteen years' imprisonment and eight years' social and judicial guidance, with the obligation to undergo treatment and not to

approach the victim, her mother or her brother. Ruling on the civil claims, it ordered the applicant to pay the victim EUR 15,000 in respect of damage suffered prior to 23 April 2003 and EUR 4,000 in respect of damage suffered thereafter.

12. In a subsequent appeal on points of law the applicant relied on Article 6 § 1 of the Convention, asserting that it imposed “an obligation on every national court to check whether, as constituted, it is 'an impartial tribunal' within the meaning of that provision where, as in the instant case, this is disputed on a ground that does not immediately appear to be devoid of merit”, and that “in refusing the defence's request for a formal note to be made in the record that certain jurors had communicated with the advocate-general during an adjournment, without ordering an investigation to establish the facts and, if appropriate, taking the action requested by the defence” the Assize Court had infringed the provisions of that Article.

13. On 16 February 2005 the Criminal Division of the Court of Cassation dismissed the appeal on points of law, holding, *inter alia*:

“The record of the proceedings states that the accused's lawyer filed submissions requesting formal note to be taken that unlawful communication, within the meaning of Article 304 of the Code of Criminal Procedure, had taken place between certain jurors and the advocate-general while the court was adjourned.

The Court refused that request on the grounds that it could not make a record of things alleged to have happened in its absence, and the evidence adduced and discussed *inter partes* had revealed no violation of the provisions of the above-mentioned Article 304.

That being so, there was no ground for appeal.

On the one hand the judges composing the court were not personally in a position to confirm what may have happened in their absence.

On the other hand, considering that the evidence adduced and discussed *inter partes* had revealed no violation of the provisions of Article 304 of the Code of Criminal Procedure, the court used its unfettered discretion without infringing the provisions of the law or the convention on which the accused relied.

It follows that the ground of appeal cannot be accepted. ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Assize Court jury

14. The relevant provisions of the Code of Criminal Procedure provide:

Article 296

“The trial jury shall be formed of nine jurors when the Assize Court rules at first instance and twelve jurors when it rules on appeal.

The court shall make a ruling ordering, before the drawing of the list of jurors and separately from it, the drawing by lot of one or more additional jurors who shall attend the hearing.

Where one or more of the nine jurors are prevented from following the hearing up to the delivery of the Assize Court's judgment, they shall be replaced by the additional jurors.

The replacement shall be made in the order in which the additional jurors were drawn by lot.”

Article 304

“The president shall give the following address to the jurors while they stand bare-headed: 'You shall swear and promise to examine with the most scrupulous attention the charges which will be brought against ...; to betray neither the interests of the accused nor those of society which accuses him, nor those of the victim; to refrain from communicating with anyone until after your finding; to heed neither hatred nor malice, nor fear nor affection; to remember that the accused is presumed innocent and that he has the benefit of the doubt; to decide according to the charges and defence arguments following your conscience and your innermost conviction, with the impartiality and resolution that befit a free man of integrity, and to preserve the secrecy of deliberations, even after the end of your service.'

Each juror being called individually by the president shall answer, raising his hand: 'I swear it'.”

B. Procedural applications or objections during trials and entries in the record

15. Where an event likely to infringe the rights of one of the parties occurs during the trial, the party concerned may ask the Assize Court - composed in this instance of only the judges - to “take formal note” of it. This is the party's only means of having it recorded. The Court of Cassation cannot entertain complaints that have been raised if no application was made to the Assize Court to take formal note of them and they were not entered in the record of the trial (Court of Cassation, Criminal Division, 23 December 1899, *Bulletin criminel (Bull. crim.)* no. 380; 24 July 1913, *Bull. crim.* no. 365; 12 May 1921, *Bull. crim.* no. 211; 31 January 1946, *Bull. crim.* no. 40; 5 May 1955, *Bull. crim.* no. 28; 21 November 1973, *Bull. crim.* no. 427; 22 April 1977, *Dalloz-Sirey* 1978, p. 28).

16. The Assize Court may refuse to take formal note of events that are alleged to have occurred outside the hearing. It has full discretion to decide

whether or not to order an inquiry to establish the facts (Court of Cassation, 16 March 1901, *Bull. crim.* no. 85; 16 January 1903, *Bull. crim.* no. 23; 5 August 1909, *Bull. crim.* no. 422; 8 February 1977, *Bull. crim.* no. 48). In a judgment of 14 January 1988, however, the Court of Cassation held that the content of the impugned judgment should enable it to assess whether the impugned communication was such as to influence the jurors' opinion (Court of Cassation, Criminal Division, 14 January 1988, *Dalloz-Sirey* 1988, p. 206).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LACK OF IMPARTIALITY OF THE ASSIZE COURT OF APPEAL

17. The applicant alleged that his right to a hearing by an impartial tribunal had been violated. He relied on Article 6 § 1 of the Convention, the relevant provisions of which read as follows:

“In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

18. The Government contested that submission.

...

B. Merits

20. First of all the Government submitted that the facts complained of by the applicant's counsel were not such as to shed doubt on the impartiality of the Assize Court. Not only had the court adjourned for a very short time – no more than five minutes according to the Government – but the lawyer had failed to give details of the identity of the jurors who had spoken to the prosecution or what had been said. Accordingly, the Government maintained, the request for formal note to be made had been too vague to establish the impediment and have the jurors concerned replaced, or to reveal whether the impugned communication had been such as to justify legitimate doubts as to the impartiality of the Assize Court. They noted in this connection that, in past cases where the Court had had to reach a decision concerning the impartiality of a court, the comments made had revealed prejudice against the applicant (see *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II; *Gregory v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I; and

Sander v. the United Kingdom, judgment of 9 May 2000, ECHR 2000-V). While admitting that French law placed jurors under the obligation, included in the oath they took, not to talk about the case until after their finding, the Government considered that this obligation was limited to the facts of the case being heard and subject to the condition that the conversation might influence their judgment.

21. Secondly, the Government argued that the Assize Court had made sure that the events complained of were not capable of casting doubt on that court's impartiality. It observed in that connection that, whereas in the case of *Remli v. France* (cited above), in which the Court had found a violation of Article 6 § 1, the Assize Court had justified its decision simply by the fact that it had not itself witnessed the alleged communication, that had not been the case in this instance because an inquiry had been held, in the form of an adversarial hearing, and the President of the court and the other two judges had expressly based their finding that there had been no violation of Article 304 of the Code of Criminal Procedure on the outcome of that inquiry.

22. The applicant, on the other hand, submitted that Article 304 of the Code of Criminal Procedure required jurors "to refrain from communicating with anyone until after [their] finding". While accepting that this prohibition concerned only communications relating to the case before the jurors, he submitted that when there was a possibility that such communication had taken place, efforts should be made to establish what had been said, to determine whether it fell within the scope of the prohibition. Furthermore, the nature of the advocate-general's task in stating the case for the prosecution could not fail, he argued, to give rise to doubt as to the impartiality of the jurors when he had talked to them in the absence of the accused or his counsel. A simple inquiry would have sufficed to establish with certainty whether the conversation had actually taken place and which jurors had been involved. The *inter partes* hearing was not sufficient, in the applicant's submission, to establish whether the alleged events were capable of casting doubt on the jurors' impartiality. He submitted that it was not possible, simply by asking the parties for their opinion, to determine whether the conversation had taken place and what had been said, and the judgment had not mentioned whether the advocate-general and the jurors had admitted that the conversation had taken place. He further submitted that the vagueness of the facts complained of did not change the fact that it had been the duty of the Assize Court to make sure that there was no danger of the communication giving rise to doubt as to the jurors' impartiality. To support that argument, he referred to the Court's position in the *Remli* case (cited above), in which it had held that it was not called upon to rule on the evidential value of a written statement concerning racist remarks attributed to a member of the jury.

23. The Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end it has constantly stressed that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view (see, among many other authorities, *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 792, § 30).

24. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *Remli*, cited above, § 46; *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 73; *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, § 71; and *Grievies v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII).

25. The Court observes that in the *Remli* case (cited above), it pointed out that Article 6 § 1 of the Convention imposed an obligation on every national court to check whether, as constituted, it was “an impartial tribunal” within the meaning of that provision where this was disputed on a ground that did not immediately appear to be manifestly devoid of merit.

26. As to the role played by the representative of the prosecuting authorities in criminal proceedings, the Court considers that while it is true that the civil party and the prosecution are not “opponents” (see, for example, *Berger v. France*, no. 48221/99, § 38, ECHR 2002-X), the same cannot be said of the accused and the prosecution, whose interests are both different and opposed.

27. The Court notes that in the instant case the applicant's counsel applied for formal note to be taken of what he alleged was unlawful communication between the prosecutor and certain members of the jury. The Court considers that because the advocate-general represents the prosecution in criminal proceedings, such an allegation is sufficiently serious for the President of the Assize Court to order an inquiry to ascertain the truth of the matter. It also observes that in French law (Article 304 of the Code of Criminal Procedure – see paragraph 14 above) jurors must refrain from communicating with anyone during the trial.

28. The Court points out in that connection that, unlike in the *Remli* case, where the Assize Court rejected the application to take formal note simply because the alleged events had taken place in its absence, in the instant case the President of the Assize Court decided to organise an adversarial hearing on the incident. On that occasion the President and the other judges heard counsel for the applicant and for the civil party, the advocate-general, and then the accused. However, the Government have not stated how that hearing might have helped to determine the content of the

communication or to identify the jurors concerned. It was the duty of the domestic court to use all the means in its power to dispel any doubts as to the reality and nature of the alleged events.

29. The Court considers, in particular, that only a hearing of the jurors would have been likely to shed any light on the nature of the remarks exchanged and the influence they might have had, if any, on their opinions.

30. Furthermore, the interlocutory decision as drafted by the Assize Court did not enable the Court of Cassation, much less this Court, to determine the effectiveness of the verification carried out by the Assize Court, or to decide whether there was a violation of the Convention provision relied upon. It simply stated that an adversarial hearing had taken place and that no violation of the provisions of Article 304 of the Code of Criminal Procedure had been found, without providing details of any evidence obtained as a result of the hearing.

31. That being so, the Court considers that the verification made in the instant case cannot be considered effective as it deprived the applicant of the possibility of effective appeal to the Court of Cassation.

32. That finding is sufficient for the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

...

Done in French, and notified in writing on 16 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President