



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

FOURTH SECTION

CASE OF GAULT v. THE UNITED KINGDOM

(Application no. 1271/05)

JUDGMENT

STRASBOURG

20 November 2007

FINAL

20/02/2008

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 Gault v. the United Kingdom,

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

Mr J. CASADEVALL, *President*,

Sir Nicolas BRATZA,

Mr G. BONELLO,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mrs P. HIRVELÄ,

Mr L. GARLICKI, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 1271/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms Lesley Ann Gault (“the applicant”), on 5 January 2005. Having originally been designated by the initial G., the applicant subsequently agreed to the disclosure of her name.

2. The applicant, who had been granted legal aid, was represented by Mr T. Caher, a solicitor practising in Lisburn, Northern Ireland, assisted Mr J. McCrudden QC and Mr M. Mulholland, counsel. The United Kingdom Government (“the Government”) were represented by their Agent, Ms K. Jones of the Foreign and Commonwealth Office.

3. The applicant alleged that the decision to place her in detention on remand pending her third trial had not been supported by relevant and sufficient reasons. She relied on Article 5 §§ 1 (c) and 3 and Article 8 of the Convention.

4. On 6 February 2006 the President of the Chamber of the Fourth Section of the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

5. The applicant and the Government each filed written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1967 and lives in Lisburn, Northern Ireland.

7. On 19 May 2000 the applicant's husband was murdered. On 18 August 2001 the applicant was charged with aiding and abetting Mr G, her former lover, to murder her husband. She was released on bail pending trial to her home where she lived with her three children, who were 6 years of age at the time (triplets). Neither the police nor the prosecution objected. The trial judge permitted the applicant to remain on bail throughout the trial: no objection was formulated by the prosecution. She continued to reside at home with her children.

8. On 20 November 2002 the jury unanimously convicted Mr G of murder but failed to agree on a verdict on the applicant. The trial judge granted her bail pending the prosecution's decision whether to prosecute her further. The prosecution did not object to bail and she remained at home with her children. Subsequently, the prosecution elected to prosecute the applicant again but did not object to her remaining on bail.

9. The applicant's second trial began on 17 February 2003. The second trial judge also allowed bail, no objection being made by the prosecution. On 20 March 2003 she was, by a majority verdict of the jury, convicted of murder. The trial judge sentenced her to life imprisonment and committed her to custody. The period of imprisonment that the applicant had to serve before she could have been considered for release was set at fifteen years. Leave to appeal was rejected by a single judge of the Court of Appeal of Northern Ireland.

10. On 9 July 2004 the full Court of Appeal allowed her appeal. It found that the second trial judge had misdirected the jury as to the state of mind necessary to make the applicant an accessory to murder. While the prosecution case had been that the applicant had facilitated the killing of her husband by Mr G knowing that he intended to kill and intending that Mr G should do so, that was not the matter put by the second trial judge to the jury: that trial judge had directed the jury as follows:

"If you're satisfied beyond reasonable doubt that [the applicant] participated in a joint venture with [Mr G], realising that in the course of that venture [Mr G] might use force with intent to kill or to cause really serious injury to her husband and Mr G did so, then she would be guilty of murder."

The Court of Appeal found that that ruling effectively opened to the jury the possibility of convicting the applicant for murder on the basis of matters not part of the prosecution case and not canvassed during trial and, notably, on the basis that the applicant had engineered a meeting between her

husband and Mr G without any firm intention that he be killed. The Court of Appeal quashed her conviction and, having heard further submissions, ordered that she be returned upon a fresh indictment for murder before the Crown Court.

11. The applicant applied for bail and the prosecution did not object. The summary form of order of the Court of Appeal of 9 July 2004 indicates that her application was refused and that she was to remain in detention until retrial. In her application form and subsequent observations the applicant stated that there were two grounds for that refusal: she had been convicted by a jury of murder on 20 March 2003 and any retrial would take place soon. In correspondence, she submits that the reasoning of the appeal court was not committed to writing, that her representative's contemporaneous note was mislaid in the Taxing Master's office but that the Belfast Telegraph newspaper had accurately reported the reasons for refusing her bail request. The relevant extract reads as follows:

“Refusing the application the Lord Chief Justice said he had taken her circumstances into consideration. But he said that the situation was now different in that she had been found guilty by the majority verdict of the jury.”

In their written observations, the Government submitted a copy of the contemporaneous notes of the senior law clerk present at the hearing. The final paragraph of her notes reads as follows:

“CS [Counsel for the prosecution]: no opposition to bail – did attend.

LCJ [Lord Chief Justice]: on bail before trial, course of trial, honoured all condits [conditions] prosecution doesn't oppose. Material difference here – found guilty by jury quashing material irregularity on charge. Doesn't sound directly an issue on bail. Be a prompt retrial. Refused.

In her application to the Court of Appeal for leave to appeal against the refusal of bail to the House of Lords, the applicant argued, *inter alia*, that the reasons for refusing bail on 9 July 2004 were not relevant, sufficient or lawful within the meaning of Article 5 of the Convention. On 22 July 2004 the Court of Appeal refused leave.

12. The applicant remained in custody until 6 September 2004 when she was granted bail by the third trial judge, during which period of time her children were cared for by her elderly and infirm parents.

13. She remained on bail throughout the third trial. On 8 October 2004 she was acquitted and released.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. The grant of bail in Northern Ireland is governed by common law rather than statute. There is a discretion to grant bail in any case but the court is obliged to pay regard to certain considerations before doing so and may not do so if satisfied of other matters. The grounds on which bail may

be refused include: where there are good reasons for believing that the defendant will not turn up for his or her trial; where there is a serious likelihood that the defendant will interfere with witnesses or evidence or otherwise obstruct the course of justice; and when the defendant is likely to commit further offences if set at liberty. In deciding whether there are good reasons for believing that the defendant will not turn up for his or her trial, the relevant factors to be taken into account by the court include: the nature and seriousness of the alleged offence; the probable method of dealing with the defendant in the event of a conviction; and the strength of the evidence against the defendant. The attitude of the prosecution is one factor to be taken into account by the court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

A. The parties' submissions

1. The applicant

15. The applicant submitted that the Court of Appeal did not provide relevant and sufficient reasons for her detention between 9 July 2004 and 6 September 2004 contrary to Article 5 § 3 of the Convention, which provides:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

She submitted that it was illogical, unreasonable and in conflict with the presumption of innocence for the court to rely on a verdict which the same court had just found to be unsafe. She also noted her special family circumstances (the needs of three young children, the absence of any parent and the age and infirmity of her own parents who were obliged to care for the children while she was detained). She pointed out that the prosecution had not objected to her being granted bail and that the refusal followed her separation from her children for a considerable period of time as a result of an unsafe verdict. She had complied with all bail conditions during her previous two trials and, indeed, she fully complied with all bail conditions

later imposed by the third trial judge. She further argued that the prosecution did not at any time in the domestic proceedings consider that she was at risk of absconding. Therefore, the respondent Government could not argue that the risk of absconding was a relevant and sufficient consideration for the purposes of Article 5 § 3. Moreover, the applicant maintained that the case against her was at its weakest before the third trial, so little weight could be attached to the strength of the case against her in deciding whether or not to refuse bail. The fact that the Court of Appeal opted to order a retrial could never be a consideration in refusing bail since consideration of whether or not to grant bail only arose after the decision to order a retrial: if the Court of Appeal had discharged her instead then there would have been no need to consider the question of bail. It appears that the applicant further submitted that the basis on which her conviction had been quashed was of little importance to the bail decision. Nor was it relevant that the applicant knew that if convicted in the third trial she would face a very lengthy period of imprisonment since the third trial was no different from the previous two trials in this respect. Finally, the Court of Appeal had not considered other means such as requiring a surety for bail before refusing bail.

2. The Government

16. The Government submitted that particular considerations applied in a case where the Court of Appeal quashed a conviction, ordered a retrial and then considered whether to grant bail to the defendant. They submitted that in such circumstances it was appropriate for the Court of Appeal to take into account the following factors: the previous conviction of the defendant; the apparent strength of the case against the defendant; the fact that the court had opted to order a retrial of the defendant rather than discharge him or her; the basis on which the defendant's earlier conviction was quashed; the nature and seriousness of the offence; the fact that the defendant had been in custody since the earlier conviction; and the fact that the defendant would be given a very lengthy period of imprisonment if convicted again.

17. The Government submitted that when the bail decision was made, the Court of Appeal was fully apprised of the facts and circumstances of the applicant's case. It took into account that the applicant had been on bail prior to her conviction and had honoured her conditions of bail. However it also took into account the applicant's conviction and subsequent detention. It also considered the fact that the conviction had been quashed due to a material irregularity in the trial judge's direction to the jury and that a prompt retrial was envisaged. It was significant that the applicant had been convicted by a jury since this suggested the case against her was a strong one and she knew that if convicted at the retrial she faced a sentence of life imprisonment with a likely minimum period of fifteen years' imprisonment. In addition there was a persistence of a reasonable suspicion that the

applicant had committed a serious offence and she had also been in custody for 17 months prior to the bail hearing. In the Government's view, these factors were sufficient to provide good reason to believe the applicant might abscond if granted bail. It was irrelevant that the third trial judge granted bail since the Court of Appeal made its decision on the basis of the facts before it at the time. Equally, it was irrelevant that the prosecution did not object to bail since according to Article 5 § 3, the decision to grant or refuse bail was for a 'judge or other officer'. The Court of Appeal had therefore properly exercised its discretion and correctly concluded that there were relevant and sufficient reasons to justify the applicant's detention pending her retrial.

B. Admissibility

18. The Court notes at the outset that while it cannot be excluded that the case could be more appropriately examined under Article 5 § 1 of the Convention, like the parties the Court will examine the facts of the case from the standpoint of Article 5 § 3. It notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

19. The Court's review of whether the reasons given by the domestic court were relevant and sufficient for the purposes of Article 5 § 3 is hampered by the fact that there is a lack of clarity as to what the reasons were. It would certainly have been desirable for the Court of Appeal to have recorded more detailed reasoning as to the grounds for the applicant's detention (*Van der Tang v. Spain*, judgment of 13 July 1995, Series A no. 321, § 60; *Sardinas Albo v. Italy*, no. 56271/00, § 89, 17 February 2005). Nonetheless, the Court is satisfied that reasons were given and observes that the parties have confined their observations to the relevance and sufficiency of those reasons. In this respect, the Court recalls that in general it is essentially on the basis of the reasons given in the domestic courts' decisions that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (*Khudobin v. Russia*, no. 59696/00, § 108, ECHR 2006-... (extracts); *Jablonski v. Poland*, no. 33492/96, § 79, 21 December 2000). It is not the Court's task to establish such facts and take the place of the national authorities who ruled on the applicant's detention (*Ilijkov v. Bulgaria*, no. 33977/96, § 86, 26 July 2001). Similarly, the Court will confine itself to the reasons actually given by the domestic courts and not consider new reasons advanced by the respondent Government (*Trzaska v. Poland*, no. 25792/94, § 66, 11 July 2000; and

Khudobin, cited above, § 108). The Court will therefore examine the reasons given by the Court of Appeal, to the extent that they can be discerned from the materials before it. The Court notes that the two reasons given by the Court of Appeal were, firstly, that the re-trial would be prompt and, secondly, that there was a material difference between the applicant's third trial and her first and second trials, thereby justifying refusing bail pending the third trial although granted pending the first and second trials.

20. In respect of the first reason, the Court recalls that the matter of when the trial or, in the present case, re-trial will occur is not a relevant reason for the purposes of Article 5 § 3: the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial (*McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-....). Therefore insofar as the promptness of the re-trial was a reason for refusing bail and not simply an additional observation by the Lord Chief Justice, the Court considers that it cannot be said to be a relevant reason for the purposes of Article 5 § 3 of the Convention.

21. In respect of the second reason advanced by the Court of Appeal, the Court first recalls that the persistence of reasonable suspicion is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices (*Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV). However, the Court also recognises that the present case must be distinguished from the more common situation where an accused person is placed in detention on remand pending a first trial. In the present case, the applicant had been convicted by a jury. That conviction had been quashed as a result of the improper direction of the trial judge. The Court of Appeal, having heard argument from both parties, quashed the conviction but ordered an immediate re-trial. Having full knowledge of the case the Court of Appeal could be said to have concluded on the basis of the facts before it that there was still a case for the applicant to answer and one sufficient to warrant a re-trial. The persistence of reasonable suspicion may therefore be said to have derived from the same basis as the decision to order a re-trial: indeed the question of bail was considered immediately after the Court of Appeal had implicitly concluded that there was a reasonable suspicion.

22. However, it cannot be said that this was in itself a relevant and sufficient reason for the refusal of bail. As a matter of domestic law, the Court of Appeal may have been entitled to conclude that there was a material difference between the third trial and the first two trials. Nonetheless, the Court is not persuaded by the Government's argument that in drawing this material difference, it can be inferred that the Court of Appeal had concluded that there was a greater risk of the applicant's absconding before the third trial than had been the case before the previous two trials. In this respect, it is of some significance that the prosecution had

made no submission to this effect even though it was open to them to do so. Nor is the Court persuaded that in the circumstances of the case the risk of the applicant absconding was amplified by the length of the sentence she faced following the second re-trial. In this connection, the Court recalls that the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced by the applicant (*Muller v. France*, judgment of 17 March 1997, *Reports of Judgments and Decisions* 1997-II, § 43) and in any event, the severity of the sentence the applicant faced did not change throughout the proceedings against her.

23. Having therefore examined the reasons given by the Court of Appeal, the Court finds that these cannot be considered relevant and sufficient reasons for the purposes of Article 5 § 3. Accordingly there has been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicant further complained that her detention on remand had violated her right to respect for her private and family life guaranteed under Article 8 of the Convention.

25. Article 8 of the Convention provides as relevant:

“1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of... public safety or for the prevention of disorder or crime....”

26. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible

27. However, given its reasoning leading to a violation of Article 5 § 3, the Court does not consider that this complaint gives rise to any separate issue under Article 8 (see *D.G. v. Ireland*, no. 39474/98, § 107, ECHR 2002-III).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. 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

29. The applicant did not allege any pecuniary damage. However, she argued that she had suffered non-pecuniary damage as a result of her unlawful detention on remand. This was exacerbated by her separation from her three young children during the annual school holidays who were instead cared for by her elderly parents. This was made more difficult by her previous detention. With reference to Northern Irish case-law on unlawful detention, she submitted that appropriate compensation would be GBP 5,000 for the first day's detention, decreasing by GBP 1,000 each day for the next four days and then GBP 1,000 for each subsequent day in detention. This scale, for fifty-four days in detention, resulted in a total figure of GBP 69,000 (approximately EUR 100,883).

The Government considered that this claim was excessive and that domestic case-law was of limited relevance when considering just satisfaction. They nonetheless gave examples of domestic cases where much lower sums of compensation had been awarded. They also referred to *Trzaska v. Poland*, no. 25792/94, 11 July 2000 and *Muller*, cited above, as examples of cases where this Court has recognised that for a breach of Article 5 § 3, the mere finding of a violation constitutes just satisfaction. However, if the Court considered that non-pecuniary damage should be awarded then they submitted that this should not exceed GBP 5,000 (approximately EUR 7,310).

30. The Court takes note of the parties' submissions on similar awards in domestic law. However, it agrees with the Government that domestic case-law is of limited relevance to the question of non-pecuniary damage in proceedings before it (see, *mutatis mutandis*, *Salah v. the Netherlands*, no. 8196/02, § 74, ECHR 2006-... (extracts)). Having regard to the relevant principles for an award of non-pecuniary damage for a violation of Article 5 § 3 of the Convention (see *inter alia*, *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 105, ECHR 2003-IX (extracts)), the Court, ruling on an equitable basis, awards the applicant EUR 7,500.

B. Costs and expenses

31. The applicant originally claimed a total of GBP 6,580 in legal costs and expenses (inclusive of value-added tax (VAT)) which is approximately EUR 9,623. This claim comprised the costs and expenses of the applicant's solicitor in the amount of GBP 2,937.50, senior counsel's fees in the amount of GBP 2,761.65 and junior counsel's fees in the amount of GBP 881.25.

32. The Government submitted that since these costs had not been itemised it was not possible to comment on their reasonableness and invited the Court to reject the claims in whole or in part. If the Court decided to make an award, the Government submitted that 50% would be a reasonable proportion.

33. Subsequent to the Government's observations, the applicant submitted a statement of the work done by senior counsel, detailing his fees of GBP 2,761.65 (approximately EUR 4,039) for nearly 40 hours work. No other itemised statement was received by the Court. The Government considered excessive the time for which counsel had billed and submitted that 50 % would be a reasonable proportion. In respect of the other fees claimed by the applicant, the Government maintained their original observations.

34. The Court recalls that in order for costs and expenses to be recoverable under Article 41 of the Convention, it must be established that they were actually and necessarily incurred, and reasonable as to quantum (see, among other authorities, *D.G. v. Ireland*, cited above, § 128). The Court notes that no itemised statements were provided in relation to the costs and expenses of the applicant's solicitor or junior counsel. Consequently, it makes no award under these heads. As to the costs and expenses of senior counsel, the Court agrees with the Government that the number of hours for which counsel charged appears to be excessively high. Considering the above, and making its assessment on an equitable basis, the Court awards the applicant EUR 2,020 inclusive of VAT, less EUR 850 already received in legal aid from the Council of Europe.

C. Default interest

35. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that no separate issue arises under Article 8 of the Convention;
4. *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 7,500 (seven thousand five hundred euros) in respect of non-pecuniary damage, together with any tax that may be applicable, to be converted into pounds sterling at the rate applicable at the date of settlement;
 - (b) 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 2,020 (two thousand and twenty euros), inclusive of value-added tax, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable on the date of settlement, less EUR 850 (eight hundred and fifty euros); and
 - (c) 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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Josep CASADEVALL
President