



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

FIFTH SECTION

CASE OF GACON v. FRANCE

(Application no. 1092/04)

JUDGMENT

STRASBOURG

22 May 2008

FINAL

22/08/2008

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

In the case of Gacon v. France,

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

Peer Lorenzen, *President*,

Snejana Botoucharova,

Jean-Paul Costa,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 29 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 1092/04) 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 French national, Mr Jean-Claude Gacon (“the applicant”), on 23 December 2003.

2. The applicant was represented by Mr X. Vuitton, of the *Conseil d’Etat* and Court of Cassation Bar. The French Government (“the Government”) were represented by their Agent, 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. On 16 October 2006 the Court decided to give notice of the application. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1940 and lives in Saint-Didier-au-Mont-d’Or.

6. On 30 May 1995 the Lyons Central Health Insurance Office (*caisse primaire centrale d'assurance maladie*) filed a criminal complaint stating that an investigation it had carried out in 1993 had revealed that the price charged for prosthetic knee joints by the Clinique du Parc, of which the applicant was the manager, appeared abnormally high, especially in relation to the price charged in the public sector. It added that the prostheses were directly delivered to the operating theatre at the Clinique du Parc but were billed by a company named Clinique Service, also managed by the applicant, with a systematic increase of 15% for the prostheses and 18.5% for the ancillary equipment, the increased price alone being charged to the Health Insurance Office. The Health Insurance Office therefore had doubts about the Clinique Service company, suspecting that its sole activity consisted in overbilling in this way.

7. In the course of the investigation, complaints about similar acts were filed by various other health insurance funds or payment agencies.

8. The preliminary investigation found, among other things, that the Clinique Service company had been established in particular to alleviate cash-flow problems resulting from the delay in reimbursement of health care under the third-party payment system. Under this system, in order to be fully reimbursed by the social security scheme for the health care provided, Clinique du Parc had to wait for the invoice from the prosthesis supplier, which meant a delay of several days, if not weeks.

9. It also transpired that Clinique Service used the same premises and staff as the Clinique du Parc, that its sole customer was the Clinique du Parc and that its manager, the applicant, was also the manager of the Clinique du Parc together with his brother.

10. In an order of 28 August 2000 the applicant and his brother were committed to stand trial in the Lyons Criminal Court, being charged in particular with having deceived the social security scheme and the relevant health insurance offices through fraudulent practices including the operation of a bogus company in order to secure reimbursement.

11. The applicant submitted, as part of his defence, that the offence of professional collusion (*compérage*) was covered by an automatic amnesty and that a prosecution for the same actions characterised as fraud could not succeed, since only the special provisions concerning the characterisation of professional collusion were applicable.

12. In a judgment of 30 March 2001 the Lyons Criminal Court held that the prosecution had lapsed as the offence of professional collusion was covered by an automatic amnesty, and that it lacked jurisdiction to examine the claims of the civil parties (the health insurance offices that had lodged the criminal complaint against the applicant) whose interests had been harmed as a result of the acts covered by the automatic amnesty. It further held that the offence of fraud was not made out. The applicant was accordingly acquitted.

13. Within the ten-day time-limit laid down in Article 498 of the Code of Criminal Procedure, the civil parties appealed against the judgment of 30 March 2001.

14. Although the public prosecutor at the Criminal Court had declined to appeal within the ten-day time-limit laid down in Article 498 of the Code of Criminal Procedure, the Principal Public Prosecutor lodged an appeal against the judgment on 20 April 2001, availing himself of the two-month time-limit granted to him for that purpose by Article 505 of the same Code.

15. The applicant submitted, in particular, that the Principal Public Prosecutor's appeal was inadmissible on the grounds that the time-limit reserved for him was incompatible with the guarantees of Article 6 § 1 of the Convention, in particular the principle of equality of arms.

16. In a judgment of 13 March 2002 the Lyons Court of Appeal dismissed that argument on the following grounds:

“... The provisions of Article 505 of the Code of Criminal Procedure, by which the time granted to the Principal Public Prosecutor for exercising his right of appeal under Article 497 of the same Code is set at two months, are not incompatible with the principle of a fair trial under Article 6 of the European Convention on Human Rights, in so far as the Code secures the right of appeal to defendants, who are given sufficient time in which to make meaningful use of it.

The balance between the rights of each party is not upset by the two-month time-limit accorded to the Principal Public Prosecutor, which is justified by the latter's statutory duty to ensure that the criminal law is applied throughout the area of the Court of Appeal's jurisdiction. ...”

17. The Lyons Court of Appeal also upheld the judgment appealed against in so far as it had declared that the prosecution of the offence of professional conspiracy had lapsed by virtue of an amnesty, but overturned it by finding the applicant guilty of the offence of fraud. The applicant was accordingly sentenced to a suspended term of two years' imprisonment, ordered to pay a fine of 120,000 euros (EUR) and stripped of his civic, civil and family rights for five years. He was also ordered, jointly and severally with his brother, to pay the sum of EUR 442,573.13 in compensation for all the damage found to have been sustained by the civil parties, and EUR 6,800 in respect of the costs incurred by the civil parties.

18. The applicant appealed on points of law, arguing in particular that the time available to the Principal Public Prosecutor for lodging an appeal under Article 505 of the Code of Criminal Procedure was incompatible with Article 6 § 1 of the Convention.

In a judgment of 25 June 2003 the Criminal Division of the Court of Cassation dismissed the applicant's appeal, holding in particular:

“... Article 505 of the Code of Criminal Procedure, which sets a two-month time-limit for an appeal by the Principal Public Prosecutor, is not in breach of Article 6 § 1 of the Convention in so far as the defendant also has a right of appeal and sufficient time in which to make meaningful use of it. ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. The relevant provisions of the Code of Criminal Procedure read as follows:

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 ...”

20. Other relevant information can be found in paragraphs 17-20 of *Ben Naceur v. France* (no. 63879/00, 3 October 2006).

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 the Criminal Court's judgment. 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. Admissibility

22. The Government contended that the applicant did not have victim status. As he had been acquitted at first instance, he had had no interest in appealing. He had not even lodged a cross-appeal against the main appeal by the civil parties. That being so, the extended time granted to the Principal Public Prosecutor had been of no practical consequence and the alleged "breach of equality" was purely hypothetical; an examination of the complaint as submitted by the applicant would require the Court to assess the legislation in the abstract.

23. The applicant disputed that argument. Although he had been acquitted at first instance and the public prosecutor at the Criminal Court had not lodged an appeal, the Principal Public Prosecutor at the Court of Appeal had subsequently appealed, and this had led to his conviction. The fact that he had been acquitted at first instance did not render the damage or the right merely notional. The argument as to his lack of interest in appealing was irrelevant: the fact remained that the procedural rules that had allowed him to be convicted on appeal amounted in themselves to a violation of the Convention.

24. The Court observes that the appeal lodged by the Principal Public Prosecutor under Article 505 of the Code of Criminal Procedure significantly altered the outcome of the proceedings against the applicant, who can therefore claim to be a "victim" within the meaning of Article 34 of the Convention.

25. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

26. The applicant submitted that the function of the prosecution service and the importance of its role did not require it to enjoy a dual right of appeal; an appeal by the public prosecutor at the Criminal Court would be sufficient in itself. Above all, this role did not justify setting a more favourable time-limit for the prosecution than for the other parties to the proceedings. The most recent amendment to Article 505 of the Code of Criminal Procedure dated back to 1960; while it was conceivable that it could have taken a considerable time to forward the case file to the Principal Public Prosecutor at that time, this was no longer the case. The difference in time-limits could therefore not be justified by practical organisational constraints.

27. The applicant added that since he had lodged his application, the Court had delivered the *Ben Naceur v. France* judgment (no. 63879/00, 3 October 2006), in which it had held that despite the opportunity for the applicant to appeal or make further submissions challenging his guilt, the difference in the time granted to the different parties for appealing amounted to a breach of equality of arms. In practice, the two-month time-limit granted to the Principal Public Prosecutor existed purely to allow the prosecuting authorities to circumvent the normal procedural deadline (ten days); the mechanism in Article 505, which allowed one of the parties to redress the error made by failing to appeal in time, and which thereby subjected the other party to differential and unfavourable treatment by not allowing that party the benefit of limitation periods under normal conditions and the legal certainty they entailed, breached the principle of equality of arms. This had already been taken into account by the Government in a different context. The former Article 546 of the Code of Criminal Procedure had entitled the Principal Public Prosecutor to lodge an appeal against any judgments concerning petty offences (*contraventions*), whereas the parties had been denied that right. As a result, the Court of Cassation had found that the relevant provision breached the principle of equality of arms, and the legislature had endorsed that reasoning by repealing the provision in the Law of 23 June 1999. In that particular example, as in the present case, only the prosecution had had an interest in appealing and the fact that the respondent had been acquitted did not make render that right in any way notional. The difference in treatment as to the possibility of appealing and the practical procedure for doing so was sufficient in itself to breach the principle of equality of arms between the parties, even if they did not concurrently exercise their right in every case.

28. Regarding the appeal by the Principal Public Prosecutor, the Government emphasised the latter's importance in pursuing criminal policy. The right to appeal against judicial decisions was inseparable from the role of the prosecution service. In particular, the importance of the Principal

Public Prosecutor's right of appeal in cases concerning serious crimes (*crimes*) had been emphasised by the Court in relation to acquittals (the Government cited *Rosier v. France*, 11 October 2005, and *Guillemot v. France*, 20 December 2005); *a fortiori*, such a right of appeal was justified in relation to acquittals for intermediate offences (*délits*).

The additional time granted to the Principal Public Prosecutor was justified, in the Government's submission, by the fact that he was not a party to the judgment and had knowledge of it at a later stage than the parties did; it reflected the need to coordinate criminal policy across the area of the prosecutor's jurisdiction. The prosecution's right of appeal, and hence the availability of a review, made it possible to perform a regulatory and corrective role, whether this role resulted in conviction or acquittal. Although in formal terms the defendant did not have the right to lodge a cross-appeal following an appeal by the Principal Public Prosecutor, the Court of Appeal was required to examine all aspects of the case, and in particular all of the defendant's arguments (Court of Cassation, Criminal Division, 17 January 1996).

With regard to equality of arms, the Government pointed out that the Court had already had occasion to rule on the compatibility of Article 505 of the Code of Criminal Procedure with Article 6 § 1 (they cited *Guigue and SGEN-CFDT v. France* (dec.), no. 59821/00, ECHR 2004-I). In a subsequent judgment (*Ben Naceur*, cited above) it had admittedly found a violation of the principle of equality of arms on account of the Principal Public Prosecutor's exercise of the right of appeal within a two-month time-limit, but that decision could not be transposed to the present case. Firstly, it related to the circumstances of that particular case; and secondly, the reason why the Court had departed from its finding in *Guigue* was Mr Ben Naceur's status as a "defendant ... convicted at first instance" who had been "deprived of the opportunity to lodge a cross-appeal with the ... Court of Appeal" (citing *Ben Naceur*, §§ 34 and 35).

In the present case, the applicant was a defendant who had been acquitted at first instance and who, regardless of whether the other parties or the Principal Public Prosecutor exercised their right of appeal, had had no interest in lodging an appeal or cross-appeal against his acquittal, and thus no opportunity to do so.

29. The Government lastly submitted that the criticism of the additional time granted to the Principal Public Prosecutor was irrelevant in the present case. The judgment had been delivered on 30 March 2001, and the civil parties had taken the initiative in appealing against it within the ten-day time-limit. In view of that appeal, pursuant to Article 500 of the Code of Criminal Procedure, the time-limit by which any of the other parties could use that remedy had been put back until 17 April 2001. The Principal Public Prosecutor had decided on 12 April 2001 to appeal against the judgment in question, and the applicant had been notified of that decision on 20 April. If

20 April was taken as the date of the Principal Public Prosecutor's appeal, he had had only three additional days. It could therefore not be inferred from that amount of time that the applicant had been placed at a substantial disadvantage *vis-à-vis* his opponents.

30. Lastly, the Government alerted the Court to the need to take into account imperatives linked to legal certainty. They cited the positions taken in *Tejedor García v. Spain* (16 December 1997, *Reports of Judgments and Decisions* 1997-VIII) and *Guigue and SGEN-CFDT* (cited above), in which the Court, at the times under consideration, had not found that the additional time granted to a public prosecutor for appealing against a criminal court judgment raised an issue in terms of equality of arms.

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 v. Belgium*, 24 February 1997, § 53, and *Guigue and SGEN-CFDT*, cited above).

32. With regard to rules of a procedural nature such as time-limits for 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*, cited above, § 31, and *Platakou v. Greece*, no. 38460/97, §§ 47-48, ECHR 2001-I).

33. The Court points out, lastly, that it has found that a defendant convicted at first instance (whose interests are distinct from and opposed to those of the prosecution) whose sentence was substantially increased following an appeal by the Principal Public Prosecutor under Article 505 of the Code of Criminal Procedure was justified in complaining of a violation of Article 6 § 1, given that “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” (see *Ben Naceur*, cited above, § 40).

34. The Court observes that the present case is similar to *Ben Naceur*. After the applicant had been acquitted at first instance, the public prosecutor did not appeal against the Criminal Court's judgment within the ten-day time-limit available to him under Article 497 of the Code of Criminal Procedure. Similarly, when the case was examined on appeal, the first-instance judgment was substantially overturned in respect of the applicant: whereas he had been acquitted at first instance, on appeal he was found guilty of the offence of fraud and given a suspended sentence of two years'

imprisonment, as well as being fined EUR 120,000 and stripped of his civic, civil and family rights for five years.

Furthermore, while the prospects of an appeal having a favourable outcome for the applicant were limited in the *Ben Naceur* case, entailing a substantial risk that his sentence would be increased, the appeal by the Principal Public Prosecutor in the present case exposed the applicant to the even greater risk of having his acquittal overturned. It follows *a fortiori* that in the absence of an appeal either by the applicant, given that he had been acquitted at first instance, or by the public prosecutor at the Criminal Court, Article 505 of the Code of Criminal Procedure had the effect of creating a situation of legal uncertainty for the applicant on account of the difference in the time-limits for appealing. Such an imbalance, resulting from the additional time granted to the Principal Public Prosecutor for lodging an appeal in the present case, placed the applicant at a significant disadvantage *vis-à-vis* the prosecution, in breach of the principle of equality of arms.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed 373,783.54 euros (EUR) in respect of pecuniary damage. The damage stemmed both from the orders made against him by the domestic courts, which would not have been possible if the time granted to the Principal Public Prosecutor for appealing had been limited to the normal period of ten days, and also from the costs incurred in presenting his case before the courts concerned (the Court of Appeal and the Court of Cassation). The claim was broken down as follows: EUR 120,000 for the fine, EUR 221,935.42 for the damages awarded to the civil parties, EUR 8,400 for the costs paid to the opposing parties and EUR 23,448.12 for the fees paid after the acquittal. The applicant also claimed EUR 100,000 in respect of non-pecuniary damage.

38. The Government contested the applicant's claims in respect of pecuniary damage. Even if the Court were to find a violation, such a finding could not be said to concern the cause of the alleged damage – namely, the orders made against the applicant by the Court of Appeal. In any event, the amount awarded in damages to the civil parties (which was unconnected to

the Principal Public Prosecutor's appeal) could not be included as part of such damage. The costs had even been incurred outside the context of an appeal by the Principal Public Prosecutor, since the civil parties had lodged a prior appeal. As to non-pecuniary damage, the Government submitted that this had likewise not resulted from the Principal Public Prosecutor's appeal but from the appeal by the civil parties, and that the applicant's conviction was the consequence of his own actions.

39. The Court considers first of all that the applicant's claim for reimbursement of fees, submitted under the head of pecuniary damage, is to be examined in the section on costs and expenses (see paragraph 43 and 44 below). As to the rest of the claim, in accordance with its case-law (see, for example, *Yvon v. France*, no. 44962/98, ECHR 2003-V), the Court considers that it cannot speculate as to what the outcome of the proceedings would have been if they had satisfied the requirements of Article 6 § 1. Consequently, no causal link has been established between the violations complained of and the pecuniary damage alleged. However, the Court considers it appropriate to award the applicant EUR 4,500 in respect of non-pecuniary damage (see *Ben Naceur*, cited above, § 45).

B. Costs and expenses

40. The applicant claimed EUR 4,000 for the costs and expenses incurred before the Court.

41. The Government demanded proof of the actual payment of that amount. The applicant subsequently provided a copy of the cheque that had been issued.

42. According to the Court's case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum.

43. The Court also points out that, where it finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before it but also those incurred before the national courts for prevention or redress of the violation (see *Hertel v. Switzerland*, 25 August 1998, § 63, *Reports* 1998-VI).

44. The Court points out, firstly, that the applicant provided relevant documents in support of his claims. It considers, furthermore, that the sums sought in respect of the costs and expenses incurred in the proceedings before it are not excessive; it therefore allows this part of the applicant's claims in full. Lastly, it notes that the applicant specifically raised an argument before the Court of Appeal and the Court of Cassation alleging an infringement of his right to a fair trial on account of the difference in the time-limits available to the defendant and the Principal Public Prosecutor for lodging an appeal against a Criminal Court judgment, and it finds that part of the costs before those courts can be said to have been incurred "for

prevention or redress” of the violation it has found. It considers it reasonable to award the applicant EUR 2,000 under this head.

In conclusion, the Court awards the applicant EUR 6,000 for costs and expenses.

C. Default interest

45. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
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, the following amounts:
 - (i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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;
4. *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in French, and notified in writing on 22 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President