



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

FIRST SECTION

CASE OF HANŽEVAČKI v. CROATIA

(Application no. 17182/07)

JUDGMENT

STRASBOURG

16 April 2009

FINAL

16/07/2009

This judgment may be subject to editorial revision.

In the case of Hanževački v. Croatia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 26 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 17182/07) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a[n] Croatian national, Mr Davor Hanževački (“the applicant”), on 28 March 2007.

2. The applicant was represented by Mr Z. Novaković, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. On 27 June 2008 the President of the First Section decided to communicate the complaints concerning the applicant’s right to a fair hearing and to defend himself through legal assistance of his own choosing to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1968 and lives in Daruvar.

5. On 11 December 2002 the Daruvar State Attorney’s Office (*Općinsko državno odvjetništvo u Daruvaru*) filed a bill of indictment against the applicant in the Daruvar Municipal Court (*Općinski sud u Daruvaru*) charging him with violation of copyrights in that he had used various items of computer software without the consent of the holders of the relevant licence. In the proceedings the applicant was represented by legal counsel of

his own choosing. At a hearing held on 10 March 2003 the applicant gave his evidence. At a hearing held on 28 April 2003 the Municipal Court heard evidence from the witnesses nominated by the defence and gave a judgment acquitting the applicant of all charges. However, this judgment was quashed on 10 July 2003 by the Daruvar County Court, upon an appeal lodged by the prosecution.

6. In the resumed proceedings before the Daruvar Municipal Court an expert opinion was obtained. At the first hearing held on 6 October 2003 the applicant again gave his evidence, in the presence of his chosen counsel. The next hearing, scheduled for 29 December 2003, was adjourned on a request by the applicant's counsel who explained, in a submission filed on 24 December 2003, that he had already planned a journey on that date. The hearing scheduled for 4 February 2004 was adjourned on account of the illness of the presiding judge.

7. According to the applicant, before a hearing scheduled for 9 March 2004 his counsel contacted the Municipal Court by telephone and asked for an adjournment on account of his sudden illness.

8. At the beginning of the hearing the applicant asked that the hearing be adjourned and informed the court that he did not wish to defend himself in the absence of his counsel. The presiding judge, however, decided to hold the hearing. A counsel for the prosecution was also absent. The applicant, who had already given evidence at the previous hearings, gave additional evidence. The applicant's request that further witnesses be heard was dismissed. The applicant then gave his closing arguments. The hearing was concluded and a judgment was pronounced. The applicant was found guilty of using various items of computer software without the consent of the holder of the relevant licence. He was given a suspended sentence of three months' imprisonment with a one-year probation period.

9. In an appeal lodged on 21 April 2004 the applicant complained, *inter alia*, that the hearing of 9 March 2004 had been held in the absence of his counsel although there had been a good reason for the latter's absence. He asserted that on the morning of 9 March 2004 his counsel had contacted the Daruvar Municipal Court by telephone. His call had been answered by an usher and the counsel had asked to speak to the presiding judge. However, the judge had not answered the call. Therefore, the counsel had asked the usher, M.R., to inform the presiding judge about his inability to attend the hearing owing to his sudden illness. The usher had done so. The counsel's request that the hearing be adjourned on account of his sudden illness had not been noted in the minutes of the hearing. The applicant enclosed a medical certificate for his counsel, of 8 March 2004, indicating that he had been given sick leave as of that date.

10. On 24 June 2004 the Bjelovar County Court (*Županijski sud u Bjelovaru*) upheld the first-instance judgment. It found that the presence of the applicant's counsel at the hearing held on 9 March 2004 had not been necessary. The relevant part of the appellate judgment reads as follows:

“The ground for appeal raised by the defendant that the first-instance court had made a grave breach of the rules of the Code of Criminal Procedure, Article 367(3), when it held a hearing in the absence of the defendant’s counsel, this court finds unfounded. The facts established in the minutes of the hearing held on 9 March 2004 lead to the conclusion that, although the defendant requested the adjournment of the hearing on account of the justified absence of his counsel, the first-instance court assessed that the counsel’s absence was not detrimental to the defence and therefore held a hearing and on the same day adopted a first-instance judgment. The conduct of the first-instance court has to be viewed in the light of a [possible] violation of the defence rights and an assessment of its effect on the judgment adopted [by the first-instance court] has to be made. The new facts presented by the defendant at that hearing, on account of which he asked for an adjournment claiming that his counsel was in possession of fresh evidence in connection with the purchase and the price of the “Autocad” software, could not have been of decisive importance for the crime [at issue] as such. That is because the [first-instance] court found the defendant guilty of the principal criminal offence under Article 230(1) of the Criminal Code in respect of which it is not relevant whether it resulted in significant financial gain or significant damage. Exactly for that reason the absence of the defence counsel at the hearing could not have been of influence for the adoption of the impugned judgment and its legality.”

11. The applicant’s subsequent constitutional complaint was dismissed on 28 September 2006 by the Constitutional Court (*Ustavni sud Republike Hrvatske*) as being ill-founded.

II. RELEVANT DOMESTIC LAW

12. The relevant part of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003) provides as follows:

Article 5

“(1) The defendant has the right to defend himself or herself in person or through a legal counsel of his or her own choosing among the members of the Bar ...

...”

CLOSING ARGUMENTS

Article 343

“After the evidence has been heard the president of the chamber shall allow the parties, the victim and defence counsel to present their closing arguments ...”

Article 346

“(1) Defence counsel or the defendant personally shall present in their closing arguments the [main points of] the defence and may reply to the arguments of the [prosecution] and the victim.

...”

13. Pursuant to Article 430 of the Code of Criminal Procedure, where the defendant requests an amendment of a final judgment following a finding of a violation of, *inter alia*, the right to a fair trial, by the European Court of Human Rights, the rules governing a retrial shall apply.

14. Article 230(1) of the Criminal Code (*Kaznenei zakon Republike Hrvatske*, Official Gazette nos. 110/1997, 28/1998, 50/2000, 129/2000, 51/2001, 11/2003 and 105/2004) proscribes the criminal offence of unauthorised use of an authorship, carrying a punishment of a fine or imprisonment for a term not exceeding three years.

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION**

15. The applicant complained that the hearing of 9 March 2004 had been held in the absence of his counsel. He relied on Article 6 §§ 1 and 3(c) of the Convention, the relevant part of which reads as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...”

16. The Government contested that argument.

A. Admissibility

17. The Court notes that this part of the application 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

18. The applicant argued that his right to a fair trial and in particular his right to be represented by a legal representative of his own choosing in the criminal proceedings against him had been violated in so far as the trial court conducting the proceedings had denied his request that the concluding hearing be adjourned on account of the sudden illness of his counsel. He explained that his counsel had fallen ill a day before the hearing and that he had duly informed the trial court about it on the morning of the hearing by telephone. He argued that according to the relevant provisions of the Croatian Code of Criminal Procedure the trial court was under duty to adjourn a hearing when the defence counsel informed that court about his inability to attend for a good reason. The applicant further emphasised the importance of the concluding hearing in the criminal proceedings as it was the only opportunity for the defence to orally present their view of the results of the proceedings before a trial court and to present their own conclusions and arguments as regards the evidence of the case. He also stressed that the case had concerned complex issues of law, in particular whether his acts could be seen as illegal, and that such arguments could only have been adequately presented by a qualified lawyer.

19. The Government maintained that there was no duty on the part of the trial court to adjourn the hearing in question since all the evidence had already been presented before the concluding hearing and that there had been no special circumstances which would require the presence of the applicant's counsel at the concluding hearing. They stressed that the applicant's counsel had fallen ill a day before the hearing and could have informed the trial court about it that very day by means of a telefax. Therefore, the applicant had been deprived of legal representation for reasons entirely imputable to his defence counsel.

20. The Court firstly observes that its task is not to give an answer to the parties' disputing arguments on whether the Daruvar Municipal Court was, according to the relevant provisions of the Croatian Code of Criminal Procedure, obliged or not to adjourn the concluding hearing in the criminal proceedings against the applicant on account of the justified absence of his defence counsel. The Court's task is rather to make an assessment whether, from the Convention point of view, the applicant's defence rights were respected to a degree which satisfies the guarantees of a fair trial under Article 6 of the Convention. In this connection the Court reiterates at the outset that the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1 (see, among other authorities, *Balliu v. Albania*, no. 74727/01, § 25, 16 June 2005). On the whole, the Court is called upon to examine whether the

criminal proceedings against the applicant, in their entirety, were fair (see, among other authorities, *Imbrioscia v. Switzerland*, 24 November 1993, Series A no. 275, § 38; *S.N. v. Sweden*, no. 34209/96, § 43, ECHR 2002-V; and *Vanyan v. Russia*, no. 53203/99, § 63-68, 15 December 2005).

21. The Court reiterates that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). A person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A no. 80, § 99; *d Pakelli v. Germany*, 25 April 1983, Series A no. 64, § 31; and *Whitfield and Others v. the United Kingdom*, nos. 46387/99, 48906/99, 57410/00 and 57419/00, § 48, 12 April 2005).

22. The Court notes that the applicant in the present case was constantly represented by a lawyer of his own choosing in the criminal proceedings against him, save for the final hearing held before the trial court. Before that hearing the applicant had given his evidence as had all witnesses nominated by the defence. The Court notes further that at the final hearing before the trial court the applicant asked for an adjournment on account of the absence of his defence counsel who had suddenly fallen ill. However, this request was denied. The applicant then gave his further evidence and presented his closing arguments.

23. The Court is aware of the requirement of efficiency of the conduct of the criminal proceedings. However, that requirement cannot run contrary to the protection of the defence rights to a degree incompatible with the guarantees of a fair trial under Article 6 of the Convention. In this connection the Court notes that it is true that the applicant's counsel asked for the adjournment of the hearing scheduled for 29 December 2003 on account of a previously planned journey. However, in view of the date of that hearing falling so close to a public holiday and the fact that the counsel had informed the trial court of his inability to attend in advance, the Court considers that these circumstances do not indicate that the applicant or his counsel acted in bad faith or tried to unnecessarily delay the proceedings.

24. As to the circumstances surrounding the request for the adjournment of the final hearing, the Court notes that in his appeal the applicant's counsel explained in detail that he had suddenly fallen ill a day before the hearing and on the morning of the hearing contacted the trial court by telephone. He gave the name of the usher who had received the call and who had gone to inform the trial judge about his inability to attend. He also enclosed a medical certificate showing that he had been on sick leave as of 8 March 2004. The appellate court made no comments on these circumstances and instead concluded that the counsel's presence was not necessary in view of the evidence hitherto already presented before the trial court and the features of the crime held against the applicant.

25. The Court cannot endorse the views of the appellate court for the following reasons. The Court notes that one of the most important aspects of a concluding hearing in criminal trials is an opportunity for the defence, as well as for the prosecution, to present their closing arguments, and it is the only opportunity for both parties to orally present their view of the entire case and all the evidence presented at trial and give their assessment of the result of the trial. The Court considers that the choice made by the prosecution not to attend the concluding hearing in the case against the applicant cannot have any effect on the right of the accused to be represented by a lawyer of his own choosing.

26. In the Court's view the absence of the applicant's counsel gave good cause for the hearing of 9 March 2004 to be adjourned, in view of the significance of the concluding hearing in the criminal proceedings against the applicant (see paragraph 25 above).

27. This defect was not remedied either in the County Court or the Constitutional Court, since these courts did not hold hearings.

28. Having regard to the purpose of the Convention, which is to protect rights that are practical and effective, and to the prominent place the right to a fair administration of justice holds in a democratic society within the meaning of the Convention, the Court considers that any restrictive interpretation of Article 6 would not correspond to the aim and the purpose of that provision (see, *mutatis mutandis*, *Delcourt v. Belgium*, 17 January 1970, Series A no. 11, § 25, and *Ryakib Biryukov v. Russia*, no. 14810/02, § 37, ECHR 2008-...).

29. In these circumstances, the Court finds that the applicant was not able to defend himself through legal assistance of his own choosing to the extent required under the Convention. There has accordingly been a violation of Article 6 § 1 taken together with Article 6 § 3(c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

30. The applicant also complained under Article 6 § 1 of the Convention about the assessment of evidence and the outcome of the criminal proceedings against him and under Article 7 of the Convention that the acts he had committed did not amount to a criminal offence. Lastly, he invoked Article 17 of the Convention.

31. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed 100,000 Croatian Kuna (HRK) in respect of non-pecuniary damage.

34. The Government deemed the sum claimed excessive.

35. The Court considers that the finding of a violation together with the possibility open to the applicant under national law to seek a fresh trial (under Article 430 of the Croatian Code of Criminal Procedure) constitutes in itself sufficient just satisfaction in the circumstances of the present case.

B. Costs and expenses

36. The applicant also claimed HRK 39,550 for costs and expenses incurred before the Court and before the domestic courts.

37. The Government left it to the Court to assess the necessity of the costs incurred.

38. Under the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 5,400 in respect of costs and expenses plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

39. 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

1. *Declares* unanimously the complaint concerning the applicant's right to a fair hearing and to defend himself through legal assistance of his own choosing admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention;
3. *Holds* by six votes to one
 - (a) that the finding of a violation together with the possibility under national law to seek a fresh trial constitute sufficient just satisfaction;
 - (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 5,400 (five thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (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;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Jebens is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE JEBENS

I respectfully disagree with the majority that there has been a violation of Article 6 in this case. For the reasons set out below, I am of the opinion that the applicant was afforded a fair trial at the Municipal Court.

I note firstly that the applicant's defence counsel was present at the previous hearings, including the hearing on 6 October 2003, when the applicant gave evidence. He also assisted the applicant at the examination of all witnesses which were heard at the previous hearings. Furthermore, he had ample opportunity to present his views on the facts of the case and all pertaining legal issues in written submissions before the final hearing. During the final hearing no further witnesses were heard. However, the applicant himself was heard once more at that hearing and he also gave the closing arguments.

It is also in my opinion relevant for the assessment of the complaint that the applicant was represented throughout the proceedings before the appellate Court and the Constitutional Court. The applicant's counsel thus had a further opportunity to present his views on the case both in an appeal against the first instance judgment and in a constitutional complaint.

More important is, however, in my opinion the fact that the appellate Court carefully examined whether the absence of the defence counsel could possibly have affected the outcome of the case. It answered that question in the negative, and explained it in a concrete and convincing manner, see the quotation in para 10. I see no reason to doubt the validity of the conclusion reached by the appellate Court, bearing in mind also the principle of subsidiarity, with regard to assessment of questions of fact.

Summing up, a scrutiny of the proceedings as a whole leads me to conclude that the applicant was not denied a fair trial (see, *mutatis mutandis*, *Imbrioscia v. Switzerland*, 24 November 1993, § 44, Series A no. 275). In the circumstance of the present case I find that the applicant was able to defend himself through legal assistance to the extent required under the Convention. There has therefore in my opinion not been a violation of Article 6 § 1 taken together with Article 6 § 3 c of the Convention.