



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

1959 · 50 · 2009

SECOND SECTION

CASE OF SÁNDOR LAJOS KISS v. HUNGARY

(Application no. 26958/05)

JUDGMENT

STRASBOURG

29 September 2009

FINAL

29/12/2009

This judgment may be subject to editorial revision.

In the case of Sándor Lajos Kiss v. Hungary,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 8 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 26958/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr Sándor Lajos Kiss (“the applicant”), on 15 July 2005.

2. The applicant was represented by Mr T. Fazekas, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr L. Hóltzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicant alleged that his conviction had been upheld without him or his lawyer attending the session of the appellate court, in breach of Article 6 §§ 1 and 3 of the Convention.

4. On 10 April 2008 the Court decided to give notice of 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

5. The applicant was born in 1976 and lives in Vác.

A. The circumstances of the case

1. The first set of criminal proceedings

6. In January 2002 the Pest Central District Court found the applicant, a recidivist offender, guilty of attempted blackmail and plunder and sentenced him to eight years' imprisonment. On appeal, the Budapest Regional Court, on 15 May 2003, re-characterised his actions as offences of "taking the law into one's own hands", attempted aggravated assault and a violation of personal liberty, but reduced his sentence to five years' imprisonment.

2. The second set of criminal proceedings

7. In February 2003 the applicant was charged with aggravated assault. In the ensuing proceedings the applicant was assisted by court-appointed defence counsel.

8. After holding three hearings, the Pest Central District Court found the applicant guilty as charged on 26 February 2004. The District Court took account of the protraction of the proceedings as a mitigating factor and sentenced him to four years' imprisonment. The District Court relied on documentary evidence, the opinion of a forensic medical expert and the testimony of several witnesses as well as the applicant.

9. The applicant appealed, seeking acquittal on the ground that the judgment was ill-founded. The Budapest Regional Court notified the applicant's lawyer that it would determine the appeal at deliberations *in camera*. In reply, the lawyer put forward his arguments in detail and requested the court to hold a public hearing. He asserted that the court should hear further witnesses in order to establish the facts fully.

10. On 1 February 2005 the Regional Court held deliberations *in camera* and upheld the applicant's conviction. The applicant, his lawyer and the prosecution were not present. The Regional Court reviewed the entirety of the proceedings and upheld their lawfulness. Furthermore, it considered that the findings of fact by the first-instance court were not ill-founded within the meaning of section 351(2) of the New Code of Criminal Procedure, and were thus suitable for appellate review without taking further evidence. This consideration enabled the court to hold deliberations *in camera*, pursuant to

section 360(1) of the Code of Criminal Procedure, without the attendance of either the defence or the prosecution.

B. Relevant domestic law

11. Act no. XIX of 1998 on the [New] Code of Criminal Procedure provides, in so far as relevant, as follows:

Section 346

“... (3) An appeal may concern questions of fact or law.”

Section 351

“(1) The second-instance court shall base its decision on the facts as established by the first-instance court unless the first-instance judgment is ill-founded....

(2) The first-instance judgment is ill-founded if:

- a) the facts have not been explored;
- b) the first-instance court has failed to establish the facts or the findings of fact are deficient;
- c) the findings of fact are in contradiction with the contents of the documents;
- d) the first-instance court has drawn incorrect conclusions from the findings of fact in regard to a further fact.”

Section 353

“... (2) In order to eliminate the ill-foundedness of the first-instance judgment, evidence may be taken if the findings of fact have not been established or are deficient. Evidence shall be taken ... at a hearing.”

Section 360 (as in force until 26 May 2005¹)

“(1) Within 30 days of receiving the file, the president of the panel in charge shall schedule, in order to deal with an appeal, deliberations *in camera* (*tanácsülés*), a public session (*nyilvános ülés*) or a hearing (*tárgyalás*). ...”

Section 361

“(1) The second-instance court shall hold a public session, if – the first-instance judgment being ill-founded – the complete and/or correct findings of fact may be established from the contents of the file or through drawing factual conclusions, or if

¹ On that date the Constitutional Court annulled this provision as being unconstitutional.

the defendant must be heard in order to clarify the circumstances relevant for imposing the sentence.

(2) The second-instance court shall summon to the public session those persons whose hearing it deems necessary ...”

Section 362

“(1) The second-instance court shall notify the public prosecutor and – if they are not summoned – ... the defendant and his lawyer of the public session. ...”

Section 363

“(2) In order to take evidence, a hearing (*tárgyalás*) ... shall be scheduled.”

Section 405

“(1) The court’s final decision on the merits is susceptible to a [Supreme Court] review (*felülvizsgálat*) if ...

c) the decision has been adopted amidst procedural irregularities within the meaning of section 373(1) subparagraphs II to IV.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION (ABSENCE OF A PUBLIC HEARING)

12. The applicant complained that during the second set of criminal proceedings his conviction had been upheld by the appellate court sitting *in camera* without him or his lawyer being present, in violation of his defence rights guaranteed by Article 6 §§ 1 and 3 of the Convention. Article 6 provides, in so far as relevant:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public 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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

13. The Government contested that argument.

A. Admissibility

14. The Court notes that the 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

15. The applicant stressed that his right to a fair trial had been impaired by the fact that the second-instance court had upheld his conviction sitting *in camera*.

16. The Government maintained that the second-instance proceedings were carried on in accordance with the Code of Criminal Proceedings, as in force in the relevant time. Therefore, both the principle of adversarial procedure and that of ‘equality of arms’ were observed in the case, since the applicant and his defence counsel had had the opportunity to study the statements and evidence submitted by the public prosecutor and to address the witnesses and the experts. All in all, he had not been deprived of the procedural means which were also available to the prosecution.

17. Referring in particular to the *Constantinescu v. Romania* judgment (no. 28871/95, § 55, ECHR 2000-VIII), the Government emphasised that the first issue to be addressed was whether the Regional Court was to try questions of law or fact, that is whether it reviewed the case against the applicant in its entirety. The appellate court’s reformatory powers are limited in that it decides on the basis of the facts as established by the first-instance court and does not take evidence, unless the first-instance judgment is ill-founded and its factual shortcomings can be remedied without extensive evidence being taken. If, however, the latter is necessary, the appellate court quashes the first-instance judgment and instructs the lower court to resume the proceedings and complete the findings of fact, or to take evidence anew.

18. The Government emphasised that in the present case the Regional Court had neither considered the first-instance judgment ill-founded nor found it necessary to take evidence or to hear the applicant. The applicant’s case had not presented any special circumstances requiring the defendant to be heard by the appellate court, unlike other cases with which the Court has dealt with (cf. *Constantinescu v. Romania*, *op. cit.*, § 58; *Botten v. Norway*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I,

§ 50). Neither the character of the offence nor the nature of the evidence had imperatively required the applicant to be heard by the appellate court: his credibility had not been decisive in assessing the evidence. Lastly, the Government pointed out that the appellate court, unlike the above-mentioned cases where the second-instance court had found the defendants guilty the first time, had simply reviewed the first-instance judgment already convicting the applicant. In these circumstances it had not been necessary to hold a public hearing.

19. The applicant maintained that, even if the proceedings had been formally in line with the provisions of the Code of Criminal Proceedings, this did not automatically mean that the principle of ‘equality of arms’ had been observed in the case. In his view, the fact that neither he nor the prosecution had been present at the second-instance proceedings did not render the proceedings fair as a whole, since the Regional Court was entitled to decide in both question of facts and law. The applicant referred to the Court’s case law in this respect requiring the same safeguards to be implemented during the appellate trial as during the first-instance proceedings, in particular the obligation to hold a public hearing.

20. The Court has constantly held that an oral and public hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 79) and where an applicant has an entitlement to have his case “heard”, with the opportunity, *inter alia*, to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.

21. The Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma (see *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-...).

22. However, the Court is of the view that, in the determination of criminal charges, the hearing of the defendant in person should be nevertheless the general rule. Any derogation from this principle should be exceptional and subjected to restrictive interpretation. The absence of an oral hearing at second instance has led to violations in several criminal cases (see *Ekbatani v. Sweden*, 26 May 1988, § 25, Series A no. 134; *Helmers v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, §§ 31–32; *Kremzow v. Austria*, judgment of 21 September 1993, Series A no. 268-B, §§ 58–59; *Botten v. Norway*, 19 February 1996, § 39, *Reports of Judgments*

and Decisions 1996-I; *Belziuk v. Poland*, judgment of 25 March 1998, Reports 1998-II, §§ 38 to 40; *Constantinescu*, cited above; *Sigurþór Arnarsson v. Iceland*, no. 44671/98, § 30, 15 July 2003; and *Csikós v. Hungary*, no. 37251/04, ECHR 2006-... (extracts)).

23. It is true that in the case of *Fejde v. Sweden* (judgment of 29 October 1991, Series A no. 212-C, § 33), no violation of the applicant's defence rights was found, although no oral hearing had taken place before the appellate court. However, in the Court's view, this was a justified exception from the above general rule, considering the minor character of the offence with which he had been charged and the prohibition against increasing his sentence on appeal.

24. The Court is however convinced that the present application does not concern the exceptions set out in the cases of *Fejde* and *Jussila* and that the general rule obliging the second-instance courts to hold a hearing must be applied. It takes this view notably because the charges against the applicant – aggravated assault – indisputably belong to the core criminal law. Furthermore, what was at stake for the applicant was imprisonment, and he was actually sentenced to a four-year term, which obviously carried a significant degree of stigma.

25. Moreover, since on appeal the applicant had sought acquittal, for the Court the importance of credibility also arose in view of the nature of the offence in question. Consequently, the considerations relied on by the Regional Court were capable of raising issues going to such matters as the applicant's personality and character, therefore hearing him directly should have been necessary (see *Kremzow*, cited above, § 67). The Court also observes that the applicant expressly requested the holding of a public oral hearing before the appellate court.

26. The Court notes that the Regional Court made a full review and had to determine the applicant's guilt anew. It is irrelevant in this respect that, as a result of this complete reconsideration, the Regional Court came to the same conclusion as the first-instance court and upheld its judgment without changing it on the merits. In sum, the Court is not persuaded that dispensing with a hearing at second instance had been in compliance with the requirements of a fair trial.

27. Accordingly, there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

28. The applicant also complained that during the first set of criminal proceedings his conviction had been upheld by the appellate court sitting *in camera* without him or his lawyer being present, in violation of his defence rights guaranteed by Article 6 §§ 1 and 3 of the Convention. The Court notes that the final judgment in this case was given on 15 May 2003.

However, the application was lodged only on 15 July 2005, i.e. more than six months later. It follows that this aspect of the application has been introduced outside the six-month time-limit prescribed by Article 35 § 1 and must be rejected, pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant claimed 3,000 euros (EUR) for non-pecuniary damage as just satisfaction.

31. The Government considered the applicant’s claim excessive.

32. The Court considers that the applicant must have suffered some non-pecuniary damage. Accordingly, on the basis of equity, it awards him EUR 1,500 under this head. Moreover, it notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, §§ 207-210, ECHR 2005-IV).

B. Costs and expenses

33. The applicant also claimed EUR 1,000 for the costs and expenses incurred in the proceedings before the Court. He submitted an itemised statement of the hours billable by his lawyer, corresponding to ten hours of work (three hours for client consultations, one hour for studying the file, three hours for case-law research and three hours for the preparation of submissions) spent by his lawyer on the case, charged at an hourly rate of EUR 100.

34. The Government found the applicant’s claim excessive.

35. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award the sum claimed in its entirety.

C. Default interest

36. 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 complaint concerning the second set of criminal proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) 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 according to Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one 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 English, and notified in writing on 29 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President