



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

SECOND SECTION

CASE OF MOTION PICTURES GUARANTORS LTD v. SERBIA

(Application no. 28353/06)

JUDGMENT

STRASBOURG

8 June 2010

FINAL

08/09/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Motion Pictures Guarantors Ltd v. Serbia,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 11 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 28353/06) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Motion Pictures Guarantors Ltd, a company based in Canada (“the applicant”), on 13 July 2006.

2. The applicant was represented before the Court by Mr P. Samardžija, Mr S. Popović, Ms K. Kostić and Ms L. Tomasović, all lawyers practising in Belgrade. The Serbian Government (“the Government”) were represented by their Agent, Mr S. Carić.

3. The applicant complained that it had been denied a fair and public hearing in the proceedings concerning its request for procedural reinstatement.

4. On 30 March 2009 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was also decided that the merits of the application would be examined together with its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the parties, may be summarised as follows.

6. On 27 February 1995 the applicant filed a civil claim with the Commercial Court (*Trgovinski sud*) in Belgrade, seeking payment of 34,975 Euros by its former business partners.

7. Following three remittals, the Commercial Court scheduled the next hearing for 13 September 2005 at 11 a.m.

8. On the morning in question, the applicant's lawyer was on unrelated business at the Third Municipal Court (*Treći opštinski sud*) in Belgrade. The applicant maintains that at 10.30 a.m. his lawyer took a taxi in order to reach the Commercial Court as soon as possible. Some 700 meters before its destination, however, the taxi broke down and the applicant's lawyer had to continue on foot. He ultimately arrived in court at 11.04 p.m., just in time to see the judge finish the dictation of the minutes in the applicant's case to his secretary. One of the lawyers acting on behalf of the respondents was also present.

9. On an unspecified date thereafter the applicant received the Commercial Court's decision (*rešenje*) dated 13 September 2005, wherein it was stated that neither party had duly appeared before the court, which is why the proceedings had to be terminated (see paragraph 18 below).

10. On 19 September 2005 the applicant requested procedural reinstatement, i.e. restoration of proceedings to *status quo ante* (see paragraph 16 below). It explained why its lawyer had been late and proposed that the taxi driver, as well as the respondents' counsel, be heard.

11. On 26 September 2005, in the absence of an oral hearing, the Commercial Court rejected the applicant's request (*doneo rešenje kojim se odbija predlog*), stating that procedural reinstatement could only be granted in a case of *force majeure*. Moreover, the applicant's lawyer should have acted with greater diligence and left the Third Municipal Court fifteen minutes earlier, which would even have allowed him, after the taxi broke down, to reach the Commercial Court on foot in time for the scheduled hearing.

12. On 3 October 2005 and 7 November 2005 the applicant appealed against the Commercial Court's decisions of 13 September 2005 and 26 September 2005, respectively.

13. On 19 December 2005 the High Commercial Court (*Viši trgovinski sud*), in the absence of an oral hearing, rejected both appeals. In so doing, it upheld the reasoning of the Commercial Court, added that the applicant had not provided relevant evidence to the effect that the taxi had indeed broken down, and noted that, in any event, "a vehicle defect could not be proved by means of witness testimony" but rather by documentary evidence such as repair receipts.

14. The applicant received this decision on 26 January 2006.

15. On 23 April 2009, in response to the Agent's request, Beotaxi, an association of taxi drivers, explained that, given the usual traffic congestion and the location, a replacement taxi would not have been a viable option for

the applicant's lawyer. In any event, the Commercial Court was some 700 metres away, which is why it would have taken their client some 5-7 minutes on foot to reach his destination.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Civil Procedure Act 2004 (Zakon o parničnom postupku; published in the Official Gazette of the Republic of Serbia no. 125/04)

16. Article 111 provides, *inter alia*, that a party who has suffered adverse procedural consequences as a result of a failure to appear at a scheduled hearing shall have the right to file a request for procedural reinstatement, which, if accepted by the trial court as “justified” (*kad postoje opravdani razlozi*), shall lead to the restoration of proceedings to the *status quo ante*.

17. Article 115 §§ 3 and 4 provides that the court shall rule in respect of this request in the absence of an oral hearing, unless one is needed for the “adequate establishment of facts”.

18. Article 296 § 2 provides that, should both parties unjustifiably fail to appear at the main hearing, the plaintiff's “claim shall be deemed to have been withdrawn” and the proceedings shall be terminated.

19. Articles 385 § 1 and 388 provide that a party whose request for procedural reinstatement has been rejected shall have the right to file an appeal to a higher court, but shall not be entitled to an oral hearing before it.

20. Articles 360-363, 373 and 388 provide that the appeals court shall have the competence to examine both legal and factual issues and, in so doing, uphold the impugned judgment, overturn or quash it, and order that the matter be re-examined at first instance.

21. Article 422.10 provides that a case may be re-opened if the European Court of Human Rights has in the meantime rendered a judgment in respect of Serbia concerning the same or a similar legal issue.

B. Relevant domestic case-law as summarised by the Government

22. On 27 December 1999 the High Commercial Court in Belgrade held that a usual traffic jam cannot be reason enough to accept the request for procedural reinstatement in a situation where the plaintiff's lawyer had failed to appear at a scheduled hearing (Pž. 6786/99).

23. On 3 September 2002 the same court held that a procedural reinstatement request should be granted in a case where the plaintiff's lawyer, having taken into account the usual traffic and left his office in time,

had arrived late at a scheduled hearing since his car had broken down (see Pž. 4191/02).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

24. Under Article 6 § 1 of the Convention the applicant complained that it had been denied a fair and public hearing in the proceedings concerning its request for procedural reinstatement.

25. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

“In the determination of his [or her] civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

26. In the Court's view, although the Government have not raised an objection as to the Court's competence *ratione materiae*, the applicability of Article 6 § 1 nevertheless calls for its consideration (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-...). The Court, therefore, observes that the impugned proceedings were directly decisive for the applicant's ability to have determined by a tribunal the merits of his civil claim and, as such, fall within the scope of Article 6 § 1 of the Convention (see *O. and A.K. v. Austria*, no. 13202/87, Commission decision of 15 March 1990; *Gorou v. Greece (no. 2)* [GC], no. 12686/03, § 27, ECHR 2009-...).

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

B. Merits

1. *As regards the absence of a public hearing*

(a) The parties' submissions

28. The Government recalled that Article 6 § 1 of the Convention does not contain an absolute requirement to hold a hearing irrespective of the

specific circumstances of a given matter. In particular, the central question in the present case was whether the applicant's lawyer had left the Third Municipal Court in time to reach the Commercial Court by 11.00 a.m. on the date in question. Since the distances between the courts at issue, as well as the usual traffic conditions in Belgrade, were well-known to everyone there was clearly no need for a hearing to address the matter, or a need to hear the witnesses proposed by the applicant in this respect. The Government thus fully endorsed the reasoning of the domestic courts, adding that the applicant's lawyer had worked in a law firm with several other colleagues who could also have replaced him in the event of a tight schedule.

29. The applicant reaffirmed its complaint.

(b) The Court's assessment

30. The Court first notes that the entitlement to a “public hearing” in Article 6 § 1 implies a right to an oral, adversarial hearing. Indeed, such a hearing constitutes a fundamental principle enshrined in this provision (see *Jussila v. Finland* [GC], no. 73053/01, § 40, ECHR 2006-XIII). However, the obligation under Article 6 § 1 to hold a public hearing is not an absolute one. Thus, it may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary (see, among other authorities, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66; *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58; *Lundevall v. Sweden*, no. 38629/97, § 34, 12 November 2002).

31. A hearing may not be necessary due to the exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations (see, *mutatis mutandis*, *Fredin v. Sweden* (no. 2), judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, pp. 20-21, § 44; *Lundevall v. Sweden*, cited above, § 34).

32. It is further recalled that, in proceedings before a court of first and only instance, there is normally a right to a hearing (see, among other authorities, *Håkansson and Sturesson v. Sweden*, judgment cited above, p. 20, § 64). However, the absence of a hearing before a second or third instance may be justified by the special features of the proceedings at issue, provided a hearing has been held at first instance (see, for instance, *Helmers v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, p. 16, § 36). Accordingly, unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing under Article 6 § 1 implies a right to an oral, adversarial hearing before at least one instance (see *Lundevall v. Sweden*, cited above, § 36).

33. Turning to the present case, the Court firstly notes that the main issue in the impugned proceedings had been whether the lawyer's late appearance at the scheduled hearing before the Commercial Court could be deemed "justified", within the meaning of Article 111 of the Civil Procedure Act (see paragraph 16 above).

34. Secondly, given the relevant domestic case-law, it would appear that a vehicle breakdown could, depending on the circumstances, be deemed a plausible reason for granting procedural reinstatement (see paragraph 23 above).

35. Thirdly, while the distances between the courts at issue may have been well-known to everyone, the specific traffic conditions on the day in question, including the circumstances concerning the breakdown, were not; they thus had to be ascertained, including by means of hearing the taxi driver in person.

36. Lastly, even though the applicant had specifically proposed an oral hearing, no such hearing was held at first or second instance, it being in the Commercial Court's absolute discretion as to whether to hold one, whilst the High Commercial Court could not have done so in view of the applicable domestic legislation (see paragraphs 17 and 19 above).

37. Having regard to the foregoing, without comment as to what the actual outcome of the applicant's request for procedural reinstatement should have been (see, *mutatis mutandis*, *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999- I), the Court cannot find that in the specific circumstances of the present case there were any exceptional elements which could justify the domestic court's failure to hold a public, adversarial hearing. There has accordingly been a violation of Article 6 § 1 of the Convention.

2. *As regards fairness*

38. Having regard to its finding of a violation of Article 6 § 1 of the Convention in respect of the applicant's "right to a public hearing", the Court considers that it is not necessary to examine separately whether, in this case, there has also been a breach of Article 6 § 1 concerning the fairness of the proceedings in question (see, among others, *Emmer-Reissig v. Austria*, no. 11032/04, §§ 30-33, 10 May 2007).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant did not specify its claim in this respect. Accordingly, the Court makes no award under this head. The Court, however, notes that the applicant may chose to make use of Article 422.10 of the Civil Procedure Act (see paragraph 21 above; see also, *mutatis mutandis*, *Vinčić and Others v. Serbia*, nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, § 61, 1 December 2009).

B. Costs and expenses

41. The applicant claimed EUR 540 for the costs and expenses incurred before the domestic courts, as well as EUR 1,350 for those incurred before the Court.

42. The Government contested these claims.

43. 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 were also reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 covering costs under all heads.

C. Default interest

44. 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 6 § 1 of the Convention as regards the absence of a public hearing;
3. *Holds* that there is no need to examine separately the applicant's further complaint under Article 6 § 1 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 1,000 (one thousand euros), plus any tax that may be chargeable to it, in respect of costs and expenses, to be converted into Serbian Dinars at the rate applicable on the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 8 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President