



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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 44438/08
by Attila VAJNAI
against Hungary

The European Court of Human Rights (Second Section), sitting on 18 January 2011 as a Chamber composed of:

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria,

Kristina Pardalos,

Guido Raimondi, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to the above application lodged on 9 September 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Attila Vajnai, is a Hungarian national who was born in 1963 and lives in Budapest. He was represented before the Court by Mr G. Magyar, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr L. Hölzl, Agent, Ministry of Public Administration and Justice.

A. The circumstances of the case

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

On 22 March 2007 the applicant, at the material time Vice-President of the Workers' Party (*Munkáspárt*), a registered left-wing political party, was convicted by the Pest Central District Court under section 269/B (1) of the Criminal Code of the offence of having worn a totalitarian symbol in public. The court observed that the applicant had worn a five-pointed red star and a sickle-and-hammer logo on several occasions of public appearance.

The applicant was sentenced to a criminal fine of 120,000 Hungarian forints¹ (HUF) and ordered to pay another HUF 45,000² in criminal costs.

On 10 June 2008 the Budapest Regional Court upheld this judgment.

On 8 July 2008 the European Court of Human Rights adopted a judgment in a case introduced by the applicant on account of a previous conviction similar in nature (*Vajnai v. Hungary*, no. 33629/06, 8 July 2008). The Court held that prosecution for having worn a red star amounted to a violation of the applicant's freedom of expression enshrined in Article 10 of the Convention. In pursuit of this judgment, on 10 March 2009 the Supreme Court acquitted Mr Vajnai in review proceedings holding that his incriminated act no longer represented danger to society.

B. Relevant domestic law and practice

Act no. IV of 1978 on the Criminal Code provides:

Section 10 (Definition of a criminal offence)

“(1) A criminal offence is an act perpetrated intentionally or – if the law also punishes negligent perpetration – by negligence, which represents a danger for society and for which the law orders the infliction of punishment.

(2) An activity or omission shall be an act dangerous to society if it violates or endangers the constitutional, social or economic order of the Republic of Hungary, or the person or rights of citizens.”

Section 269/B (The use of totalitarian symbols)

“(1) Any person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle-and-hammer or a five-pointed red star, or a symbol depicting any of them, commits an offence – unless a more serious crime has been committed – and shall be sentenced to a fine.

(2) The conduct prescribed under paragraph (1) is not punishable if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.

¹ 430 euros (EUR)

² EUR 160

(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force.”

Act No. XIX of 1998 on Criminal Procedure provides:

Section 416

“(1) [...] Review proceedings may be initiated ... if ... (a) a person ... was convicted ... in breach of the substantive provisions of criminal law ...”

Section 419 (Review proceedings)

“(1) The rules of third-instance proceedings (Chapter XV) shall be applicable to the conduct of the review proceedings ...”

Chapter XV – Section 398

“(1) The third-instance court may reverse the second-instance court’s judgment and adopt a lawful decision if the second-instance court gave its judgment in breach of the [substantive] provisions of criminal law ... provided that the findings of fact are well-founded or their deficiency could be rectified before the third-instance court.”

In case no. Bhar.II.2/2010/4 (judgment of 5 March 2010) which concerned the prosecution of a Mr F. for having displayed a red star, the Pécs Court of Appeal examined in detail whether or not Mr F.’s conduct represented any danger to society – an element inherent in the notion of a crime within the meaning of section 10 of the Criminal Code (see above) – and this in particular in the face of the *Vajnai* judgment cited above.

COMPLAINT

The applicant complained under Article 10 of the Convention that his conviction had been a breach of his right to freedom of expression.

THE LAW

The Government submitted that the complaint raised by the applicant in the present case is, in terms of domestic law, an issue of substantive criminal law, the question being whether the display of the incriminated symbols can, in particular in view of the intervening *Vajnai* judgment, be regarded any longer as dangerous for society – which is an inherent element of a criminal offence under section 10 of the Criminal Code. The Regional Court’s findings on this point could have been challenged by the applicant before the Supreme Court under section 416 of the Code of Criminal Procedure, which had the power to reverse the lower courts’ decision under section 398. Having failed to do so, the applicant had not exhausted domestic remedies.

The applicant contested this view.

The Court shares the Government's view that the crucial issue in the case was whether or not the applicant's conduct represented danger for society in the face of the *Vajnai* judgment. The Regional Court held that his act had indeed constituted a crime, given its danger to society, under section 10 § 2 of the Criminal Code. The applicant had the possibility to challenge this interpretation of the substantive criminal law before the Supreme Court, under section 416 of the Code of Criminal Procedure. For its part, the Supreme Court, if it would disagree with the lower courts and establish a breach of substantive criminal law, having regard to the Court's conclusions in the *Vajnai* judgment, had power to reverse the second-instance judgment under section 398 of that Code (see above). For the Court, nothing indicates at this stage that this legal avenue is not an effective remedy in the circumstances. Since the applicant has not availed himself of this possibility which is still open to him, he has not exhausted domestic remedies, as required by Article 35 § 1 of the Convention (see also *Ferenc Tóth v. Hungary* (dec.), no. 19942/02, 6 December 2005). It follows that the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stanley Naismith
Registrar

Françoise Tulkens
President