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

SECOND SECTION

Application no. 66529/11
N.K.M.
against Hungary
lodged on 19 October 2011

STATEMENT OF FACTS

THE FACTS

The applicant, Ms N.K.M., is a Hungarian national who was born in 19... and lives in Budapest. She was represented before the Court by Mr D. Karsai, a lawyer practising in Budapest.

A. The circumstances of the case

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

The applicant, civil servant for thirty years, had been in the service of a government ministry. On 28 May 2011 she was dismissed, with effect from 28 July 2011. On dismissal, she was statutorily entitled to two months' salary for June and July 2011 during which time she was exempted from working, in addition, to severance pay amounting to 8 months' salary, as well as to an unspecified sum corresponding to unused leave of absence. These benefits – in so far as they did not represent compensation for unused 2011 leave of absence – were subsequently taxed at 98% in their part exceeding 3.5 million Hungarian forints (HUF)[1]. The exceeding part was HUF 2.4 million[2].

B. Relevant domestic law

On 22 July 2010 Parliament adopted Act no. XC of 2010 on Certain Economic and Financial Issues. The Act, which was published in the Official Gazette on 13 August 2010, introduced *inter alia* a new tax on

[1] Approximately EUR 12,000
[2] Approximately EUR 8,300

certain payments for employees of the public sector whose employment was terminated. Consequently, severance pay and other payments related to the termination of employment (such as compensation for unused leave of absence) exceeding HUF 2 million became subject to a 98% tax. However, income tax and social security contributions already paid could be deducted from the tax. Notwithstanding the limit of HUF 2 million, the statutory provisions on the sum of severance payments – in some cases amounting to twelve months' remuneration – were not modified. The bill preceding the Act justified the tax with reference to public morals and the unfavourable budgetary situation of the country.

The Act entered into force on 1 October 2010; however, the tax was to be applied to the relevant revenues as from 1 January 2010. Simultaneously, the Constitution was also amended in order to ensure the constitutionality of retrospective tax liability in respect of the given tax year concerning "any remuneration against good morals" paid in the public sector.

The Act was challenged before the Constitutional Court within the framework of an abstract *ex post facto* control. This court found the relevant provisions unconstitutional in decision no. 184/2010(X.28.)AB on 26 October 2010. According to the Constitutional Court, revenues earned solely on the basis of relevant statutory provisions (that is, the overwhelming majority of the revenues concerned by the disputed legislation) could not be regarded as being against good morals, and therefore not even the constitutional amendment justified a retroactive 98% tax. The Constitutional Court pointed out that it reviewed the rate or amount of taxes only exceptionally; however, it held that a pecuniary burden was unconstitutional if it was of a confiscatory nature or its extent was clearly exaggerated, i.e. was disproportionate and unjustified. Considering also the "fifty-percent rule" (*Halbteilungsgrundsatz*) set out by the German Federal Constitutional Court – according to which the overall tax load on assets must be limited to 50-60% of the yield on those assets – the court found that the 98% tax was excessive and punitive, yet it equally applied to severance revenues earned in a fully untainted manner. The tax was levied on or deducted from the revenues concerned even if their morally doubtful origin could not be established. The Constitutional Court annulled the relevant provisions retroactively, that is, from the day of the Act's entry into force. It relied on the above arguments, rather than on considerations about the protection of property, to which its scrutiny did not extend in the case.

Upon a new bill introduced on the same day as the date of the Constitutional Court's decision, on 16 November 2010 Parliament re-enacted the 98 % tax with certain modifications, according to which this tax applied from 1 January 2005; however, for the majority of those affected (excluding some senior officials) it only applied to revenues above HUF 3.5 million. This new Act was published in the Official Gazette of 16 November and entered into force on 30 December 2010.

At the same time, Parliament again amended the Constitution, allowing retroactive taxation going back five years. Furthermore, the Constitutional Court's powers were limited: the amended articles of the Constitution contained a restriction on the Constitutional Court's right to review legislation on budgetary and tax issues. This restriction – which has been also maintained in the new Basic Law in force from 1 January 2012 –

allows for constitutional review only in respect of violations of the right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion, and the rights related to Hungarian citizenship.

Upon a petition for an abstract *ex post facto* control, on 6 May 2011 the Constitutional Court annulled – notwithstanding its limited powers – the five-year retroactive application of the 98% tax in decision no. 37/2011(V.10.)AB, relying on the right to human dignity. However, the reasoning of the decision underlined that only the taxation of revenues gathered before the 2010 tax year constituted a violation of the right to human dignity. The Constitutional Court did not find unconstitutional as such the Act's presumption that the relevant revenues infringed good morals; however, it ruled that this presumption should be susceptible to a legal challenge.

On 9 May 2011 Parliament again re-enacted the retrospective application of the 98% tax. The amendment of Act no. XC of 2010 was published in the Official Gazette on 13 May and entered into force on 14 May 2011. It provided that only relevant revenues earned after 1 January 2010 should be subject to the tax. The amended legislation did not contain any remedy available to those affected.

COMPLAINTS

The applicant complains under Article 1 of Protocol No. 1 – read alone and in conjunction with Article 13 – that the imposition of the 98% tax constituted unjustified deprivation of property, or else taxation at an excessively disproportionate rate, with no remedy available.

Moreover, she argues under Article 8 that the legal presumption of the impugned revenues contravening good morals amounts to an interference with her right to good reputation.

She also argues that Article 14 read in conjunction Article 1 of Protocol No. 1 was violated because only those dismissed from the public sector are subjected to the tax and because the threshold of HUF 3.5 million of the Convention is applicable to only a group of those concerned.

QUESTIONS TO THE PARTIES

1. Has the applicant been deprived of her possessions in breach of Article 1 of Protocol No. 1 read alone or in conjunction with Article 14 of the Convention?

2. Alternatively, was the measure complained of a control of use of property applied in the general interest and necessary to secure the payment of taxes?

3. Did that deprivation or control of use impose an excessive individual burden on the applicant (see *Immobiliare Saffi v. Italy,* [GC], no. 22774/93, § 59, ECHR 1999-V)?

4. Did the applicant have at her disposal an effective domestic remedy for her complaint under Article 1 of Protocol No. 1, as required by Article 13 of the Convention?