

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

FIFTH SECTION

DECISION

Application no. 10390/09
Božo BERDAJS
against Slovenia

The European Court of Human Rights (Fifth Section), sitting on 27 March 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 10 February 2009,

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 Božo Berdajs, is a Slovenian national who was born in 1978 and lives in Šmartno Pri Litiji. He is represented before the Court by Mr L. Poljanec, from Slovenska Bistrica. The Slovenian Government ("the Government") are represented by their Agent, Mrs T. Mihelič Žitko, State Attorney.

A. The circumstances of the case

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

The applicant was born in 1978 and lives in Šmartno pri Litiji.

On 14 April 2007 the applicant was driving a truck near Ivančna Gorica. He was stopped by the police on suspicion of having loaded the cargo in breach of applicable road traffic rules. The police asked the applicant to weigh the truck but he then started to unload it, explaining that he had been so instructed by his superior. The police found that the applicant had committed a minor offence under section 242 §§ 1 and 3 of the Road Traffic Safety Act on account of his non-compliance with police instructions to weigh the truck, and they imposed a fine of 2,503 euros (EUR). On 9 August 2007 written notice of the payment order issued by the police was sent to the applicant, who received it on 16 August 2007.

On 23 August 2007 the applicant lodged a request for judicial review which read as follows:

> "Grounds for request
>
> My request is based on the principle of the presumption of innocence as provided in Section 7 of the Minor Offences Act and Articles 3, 26, 26, 27 and 29 of the Constitution.
>
> Explanation
>
> Section 7 of the Minor Offences Act states the following: a person who is accused of a minor offence shall be presumed innocent until their guilt is established by a final decision. The Constitution in its Article 27 states the same. In my case there was no final judgment and therefore the second payment order issued has no legal value. I will soon have a whole collection of payment orders and decisions by which mistakes were corrected.
>
> The police cannot and should not be a body deciding on minor offences (see Article 3 of the Constitution). The charges of a criminal offence can, in accordance with Article 23 of the Constitution, be decided only by a judge.
>
> A time-limit for appeal or a request for judicial review is not compatible with Article 29 of the Constitution. It should also be indicated whether the time-limit concerns working or calendar days. An appropriate time would be thirty calendar days, since the State also needs up to thirty days to send you documents if you request them.
>
> You are charging me with an offence which you have not specified or explained clearly and about whose consequences you have submitted no evidence. As a citizen, I am not required to know the paragraphs and articles of the Road Traffic Safety Act. In any event, I do not know what I am charged with. You should present evidence concerning the consequences. I claim that I was driving in accordance with the regulation. The accuser must submit clear material or written evidence, therefore I request you to do the following:
>
> - submit documents concerning the measuring device and the evidential method required by the law on standardisation (a-tests, measuring sheets, a judicial decision proving that the results obtained by this device can be used as evidence);

- submit a judicial decision proving that the results obtained with this device or with this measuring or evidential method can be used as evidence in court;
- submit documents proving that the person that handled the measuring device is authorised and publicly certified to do the measuring or use the evidential method;
- provide evidence proving material or any other damage resulting from the incriminated offence;
- findings of the police are not evidence.

The payment order has been issued and signed by an authorised person – a police officer.

The Constitution states in Article 23 that only the judge can adjudicate.
I am interested in the following:
- is the person employed at the Ministry for Justice
- has he completed a legal education
- does he have a bar exam
- is he a judge.

If he does not fulfil the above conditions, his activities are not in compliance with Article 23 of the Constitution. Since the police belong to the executive branch of power (Article 3 of the Constitution) they cannot and should not punish and cannot act as an authority in respect of a minor offence, since this is not recognised by the Constitution.

The Constitution in its Article 29 clearly regulates the proceedings concerning these charges. Since the proceedings so far have not complied with the Constitution, I have to inform you about Article 26 of the Constitution.

Under section 30 of the Police Act the police shall operate in accordance with the Constitution.

Since the present case also concerns a violation of fundamental human rights and freedoms, I request you to properly examine this request.

Request

I propose that the payment order be annulled and that the proceedings be conducted in accordance with the Constitution."

On 20 August 2008 the Ljubljana Local Court rejected the applicant's request. The court found at the outset that the applicant had lodged "a standardised request for judicial review" in which he had made only general accusations and alleged that provisions of the Constitution had been breached. In particular, the court found that the applicant had not clearly stated why the police's findings were false and had not indicated that he had not committed the alleged offence. His generalised statements did not raise any doubts as to the facts as established by the police. The court then summarised the findings by the police, which it found had been correctly established. As regards the alleged procedural violations, the court, referring to the relevant provisions of the Minor Offences Act ("MOA"), noted, *inter alia*, that the police were authorised to decide on the minor offence in question by applying summary proceedings and the police officers had

authority to conduct the proceedings. It also noted that the time-limit for lodging a request for judicial review was provided for in the legislation. The court also noted that the applicant, who possessed a driving licence, should have been aware of the regulations contained in the Road Traffic Safety Act. Lastly, the court found that the police had correctly applied the law to the facts of the case and imposed a fine prescribed by law. The applicant was ordered to pay EUR 100 for the costs of the proceedings.

On 16 September 2008 the applicant lodged a constitutional appeal, alleging a violation of fair trial guarantees – in particular, that any fine should be imposed by a judicial and not by a police procedure; that he had been charged and convicted by the police; and that the guarantees enshrined in Articles 23 (right to judicial protection), 24 (right to public trial) and 29 (defence rights) of the Constitution had not been provided to him. In addition, he complained that no ordinary appeal lay against the Local Court's judgement.

On 24 September 2008 the Constitutional Court dismissed the constitutional appeal. It relied on point three of the first paragraph of section 55b read together with point four of the second paragraph of section 55a of the Constitutional Court Act. The decision was served on the applicant on 1 October 2008.

B. Relevant domestic law

For the relevant domestic law and practice see *Suhadolc v. Slovenia* (dec.), no. 57655/08, 17 May 2011.

In addition, section 242 of the Road Traffic Safety Act (Official Gazette no. 3/2004, implemented on 1 January 2005) reads as follows:

> "(1) A police officer can order that a vehicle be weighed if he suspects that the load which it carries has been loaded in breach of the regulation concerning road traffic. The driver must allow the vehicle to be weighed ...
>
> (2) A fine of no less than 100,000 Slovenian tolars (SIT) shall be imposed on a driver who acts in breach of the police order mentioned above.
>
> (3) A fine of no less than 600,000 SIT [EUR 2,503] shall be imposed on a company or an individual entrepreneur, if the driver acts in breach of the police order mentioned in the first paragraph of this section, the person in charge should be punished by a fine of no less than 60.000 SIT."

THE LAW

A. Lack of an oral and public hearing under Article 6

The applicant complained that he had not had an oral and public hearing before a court, in breach of his right to a fair trial as provided for in Article 6 § 1 of the Convention, which, as far as relevant, reads as follows:

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

1. The parties' arguments

The Government argued that Article 6 was not applicable to the present case. Firstly, the offence in question was set out in the Road Traffic Safety Act, and not in the Penal Code. The proceedings were governed by the MOA, and not the Criminal Procedure Act. Secondly, the sanction was not a punishment but was aimed at preventing the applicant from reoffending. There was no possibility of imprisonment in the present case. Finally, the Government submitted that the offence in question was of a general nature and concerned an undefined group of people.

The Government further pleaded non-exhaustion of domestic remedies, submitting that the applicant had not advanced relevant arguments in his constitutional appeal to indicate that his case was of constitutional importance, which was one of the admissibility grounds.

Lastly, the Government argued that a hearing had not been held because there had been no need for an oral presentation of the applicant's arguments. In his request for judicial review, the applicant seemed not to have been complaining about the minor offence in question but about an offence of improper driving. Since his conviction concerned only the fact that he had not allowed the officers to weigh his truck, his allegations concerning the measuring method and device did not need to be assessed by the court. The remaining arguments concerned only points of law. The Government further submitted that the police officer had conducted an oral procedure at the time of the incident, thus the applicant had been immediately informed of the charges against him. The summary proceedings had been conducted as stipulated in the MOA. The applicant had not challenged the officers' establishment of facts, the legal qualification of the offence, or the sanction, nor had he requested to examine witnesses.

The applicant submitted that Article 6 should be applicable to the proceedings in question as he had been charged and convicted of an offence.

The applicant argued that he had been charged and convicted by the same body, namely the police, and that the judicial review of the process had been inadequate, in particular as it did not afford him a hearing.

2. The Court's assessment

As regards the Government's objection concerning the applicability of Article 6, the Court notes that it has already been rejected in *Flisar v. Slovenia* (no. 3127/09, §§ 25-26, 29 September 2011). It sees no reason to reach a different conclusion in the present case. Article 6 should therefore apply to the proceedings concerned.

As to the objection concerning exhaustion of domestic remedies, the Court likewise notes that such objection has been rejected in the *Flisar v. Slovenia* judgment (§ 27). Having regard to the fact that the arguments on which the Government relied in the aforementioned and in the present case are the same, the Court finds no reason to depart from its findings in *Flisar* (ibid.) and therefore rejects this objection.

The Court notes that the principles regarding the requirement of an oral hearing in proceedings concerning minor offences were set out in *Suhadolc v. Slovenia* ((dec.), no. 57655/08, 17 May 2011) and *Flisar* (cited above, §§ 33-35). It observes in particular that in this kind of case an oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him (see *Flisar*, ibid., and *Jussila v. Finland* [GC], no. 73053/01, §§ 41-42, 47-48, ECHR 2006-XIII).

Turning to the present case, the Court notes that it concerns a minor offence under the Road Traffic Safety Act, which, as such, does not belong to the traditional categories of criminal law (see, *mutatis mutandis*, *Suhadolc*, cited above; *Kammerer v. Austria*, no. 32435/06, § 28, 12 May 2010; and *Öztürk v. Germany,* 21 February 1984, § 51, Series A no. 73). The Court further notes that, unlike the case of *Suhadolc* (cited above), which concerned evidence obtained by means of an objective method, namely the use of a speed-measuring device and an alcohol test, the present case concerns an offence which was personally observed by the officers and where those officers' observations were the sole basis for the applicant's conviction. The Court notes that in such cases an oral hearing may have been essential for the protection of the accused person's interests in that it could put to the test the credibility of the police officers' findings. It observes, however, that despite having an opportunity to dispute the police findings in his request for judicial review, the applicant lodged what was referred to by the judge as "a standardised request for judicial review". This request contained no arguments with respect to the material elements of the offence (see, by contrast, *Flisar*, cited above, § 39). It included an assertion that the applicant had been driving in accordance with the rules, but without specific details, criticism of general regulations concerning summary proceedings conducted by the police, and an objection to some unspecified measuring device and method.

The Court would point out in this connection that it has already assessed the provisions of the MOA concerning summary proceedings and found that, having regard to the fact that the accused has the opportunity to present arguments in favour of a hearing in his request for judicial review, a system that leaves the decision as to the need to hold an oral hearing to the judge's discretion is not *per se* incompatible with the guarantees enshrined in Article 6 (see *Suhadolc*, cited above). In this kind of case, i.e. cases concerning summary proceedings under the MOA, the need for an oral hearing will therefore depend not only on the nature of the offence but also on the arguments presented in the request for judicial review (see, *Flisar*, cited above, § 39).

Regard being had to the content of the applicant's request for judicial review, in which he failed to challenge before the local court any of the facts established by the police, the Court finds force in the Government's argument that the local court was able to adequately resolve the case on the basis of the file.

Accordingly, the Court concludes that the judge's discretion was in the present case exercised in a manner that was compatible with the requirements of Article 6 and that the absence of an oral hearing was therefore justified. This conclusion also applies by implication to the applicant's complaint concerning the lack of a public hearing.

This part of the application is thus manifestly ill-founded and should be rejected under Article 35 §§ 3 (a) and 4 of the Convention.

B. Remaining complaints

Relying on Articles 6 and 13 of the Convention, the applicant complained that the Constitutional Court had declined to deal with his constitutional appeal and had merely referred to section 55a of the Constitutional Court Act, which had entered into force after the events concerned in his appeal had taken place. He argued that this decision of the Constitutional Court had denied him the right of access to court and had retroactively interfered with his rights.

In addition, the applicant complained that the judgment had been based solely on the police file, that no examination of witnesses had been carried out, that there had been a breach of his right to the presumption of innocence and that, contrary to Articles 6 and 13 of the Convention, no appeal against the Local Court's judgment had been possible. Finally, the applicant complained that the police had interfered with his right to liberty, as he had been stopped without any warning.

Having examined the above complaints, the Court finds, in the light of all the material in its possession and in so far as the matters complained of are within its competence, that they do not disclose any appearance of a violation of the Articles relied on by the applicant. It follows that this part of

the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President