

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

FIFTH SECTION

CASE OF FORTUNAT v. SLOVENIA

(Application no. 42977/04)

JUDGMENT

This version was rectified on 5 July 2013
under Rule 81 of the Rules of Court.

STRASBOURG

18 April 2013

FINAL

18/07/2013

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



In the case of Fortunat v. Slovenia,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 19 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 42977/04) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Zdenko Fortunat ("the applicant"), on 29 November 2004.

2. The Slovenian Government ("the Government") were represented by their Agent.

3. On 10 May 2010 the Court decided to communicate the complaints concerning the length of the proceedings and the lack of remedies in that respect to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1962 and lives in Portorož.

A. First set of criminal proceedings (no. K 51/96)

5. On 4 March 1996 the applicant was taken into custody.

6. On 3 July 1996 after the investigation had been terminated, an indictment was lodged against the applicant before the Nova Gorica District Court. He was charged with fraud, larceny, forgery and abuse of trust.

7. On 8 October 1996 the first hearing was held. Between 8 October 1996 and 20 January 1997 the court held twenty-eight hearings. In 1997 the court held fifty hearings, in 1998 forty-one hearings and in 1999 twenty hearings.

8. On 30 September 1999 the Public Prosecutor modified the indictment.

9. Between December 1999 and March 2001 the court held eleven hearings.

10. On 13 March 2001 the Public Prosecutor modified the indictment for the second time.

11. On 22 October 2001 the case was assigned to a new judge P.G. Under the new judge, the court held twenty hearings. Following several motions for recusal of the judge and an action for damages lodged against him by the applicant, the first judge resigned from the case.

12. On 8 January 2003 the first-instance court decided to try one count of fraud in a separate set of proceedings (K 3/2003).

13. On 3 March 2004 the case was assigned to a new judge, G.K. Following a civil action for damages lodged against the judge P.G., he requested to be removed from the case (see paragraph 11 above). In the course of the proceedings the applicant lodged several criminal complaints and actions for damages against the judges, the president of the court and the president of the Koper Higher Court as well as requests for change of venue.

14. On 27 October 2004 the first hearing under the newly appointed judge was held.

15. On 8 November 2004 the court held a hearing and the applicant lodged a request for recusal of the judge. He also lodged a criminal complaint against him, an action for damages and a constitutional appeal.

16. During the hearing, held on 11 November 2004, the applicant again lodged a request for recusal of the judge and the president of the court.

17. Until the end of 2004 the court held nine more hearings. The applicant, by way of protest, refused to participate at six hearings out of nine.

18. On 10 January 2005 the Nova Gorica District Court after holding over 200 hearings, examining multiple witnesses and appointing one expert, delivered a judgment. The applicant was found guilty of criminal offences concerning fraud and abuse of trust. He was sentenced to six years of imprisonment. Both parties appealed.

19. On 25 October 2006 the Koper Higher Court delivered a judgment. In its decision the appeal court modified in part the first-instance judgment and found the applicant guilty of an additional criminal offence. The sentence was increased to six years and six months of imprisonment.

20. On 22 January 2007 the applicant lodged with the Supreme Court an appeal against the second-instance judgment and a request for protection of legality.

21. On 5 April 2007 the applicant lodged a request for recusal of the Supreme Court judges.

22. On 26 April 2007 the Supreme Court rejected the request for protection of legality. The requests for recusal were also rejected.

23. On 26 June 2007 the Supreme Court decided on the appeal against the second-instance judgment. The appeal was upheld and the second-instance judgment amended. The applicant was sentenced to five years and six months of imprisonment.

24. On 11 October 2007 the applicant's representative lodged a request on protection of legality challenging the decision upon appeal (see paragraph 23).

25. On 7 July 2008 the Supreme Court rejected the request on protection of legality. The applicant lodged a constitutional appeal.

26. On 5 November 2010 the Constitutional Court rejected his appeal.

B. Second set of criminal proceedings (no. K 3/2003)

27. On 30 October 2006, following the decision on separation of proceedings (see paragraph 12 above) the Nova Gorica District Court delivered a judgment. The applicant appealed.

28. On 16 January 2008 the Koper Higher Court rejected the appeal. He lodged an appeal on points of law.

29. On 16 December 2009 the Supreme Court rejected the appeal. He lodged a constitutional appeal.

30. On 10 October 2011 the Constitutional Court rejected the appeal.

II. RELEVANT DOMESTIC LAW

31. For relevant domestic law see *Tomažič v. Slovenia* (no. 38350/02, 13 December 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

32. The applicant complained about the excessive length of the proceedings. He relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

33. In substance, the applicant further complained that the remedies available for excessive legal proceedings in Slovenia were ineffective. Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

34. The Government pleaded non-exhaustion of domestic remedies for both sets of proceedings.

35. As regards the first set of proceedings the Government argued that as the applicant received a settlement proposal under section 25 of the Act on the Protection of the Right to a Trial without undue Delay ("the 2006 Act"), he should have availed himself of the domestic remedies under section 25. Furthermore, they also pleaded non-exhaustion of domestic remedies for the part of the proceedings before the Supreme Court, which were conducted after 1 January 2007, the date when the new legislation became operational.

36. The applicant contested these arguments.

37. The Court observes that the transitional provision of the 2006 Act, namely section 25, provides for the procedure to be followed in respect of applications where the violation of the "reasonable time" requirement has already ceased to exist and which were lodged with the Court before 1 January 2007. As the proceedings to which the applicant was a party continued before the Supreme Court after the new legislation became operational the above provision does not apply to the applicant's case.

38. As regards the application of other provisions of the 2006 Act, in particular its section 19, the Court notes that the proceedings in the present case had been finally resolved before the 2006 Act became operational and have subsequently continued before the Supreme Court. Having regard to the 2006 Act as in force at the material time (see by contrast, *Žurej v. Slovenia, (dec.),* no. 10386/03, § 17, 16 March 2010), the applicant had no possibility to claim compensation for the delays incurred in the proceedings (see *mutatis mutandis*, *Tomažič v. Slovenia*, no. 38350/02, §§ 41-45, 13 December 2007 and *Lesjak v. Slovenia,* no. 33946/03, §§ 54-55, 21 July 2009).

39. The Government's objection concerning the exhaustion of domestic remedies as regards the first set of proceedings should therefore be dismissed.

40. The Court further notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

41. As to the second set of proceedings the Court notes they were pending at second instance on 1 January 2007 and have continued for more than three months. Following the Court's findings in the cases *Grzinčič v. Slovenia* (no. 26867/02, § 110, 3 May 2007) and *Nezirovič v. Slovenia* (no. 16400/06, (dec.), §§ 27-42, 18 November 2008) the complaints under Articles 6 and 13 must be declared inadmissible in accordance with Article 35 §§ 1 and Article 35 §§ 3 and 4 of the Convention, respectively.

B. Merits

1. Article 6

42. The period to be taken into consideration began on 4 March 1996, the date when the applicant was taken into detention, and ended on 5 November 2010, when the Constitutional Court's decision was issued. The proceedings thus lasted fourteen years and seven months at four levels of jurisdiction.

43. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

44. The Court notes that the case concerned criminal proceedings dealing with several criminal offences, which can be considered as complex.

45. Examining the applicant's behaviour, the Court observes that he lodged repeated requests for the recusal of judges as well as criminal complaints and compensation claims against them, which resulted in three judges stepping down from the case. In this respect the Court recalls that while the applicant is entitled to make use of his procedural rights, he must bear the consequences when his exercise leads to delays (see, *inter alia*, *Malicka-Wąsowsa v. Poland* (dec.), no. 41413/98, 5 April 2001, and *Peryt v. Poland*, no. 42042/98, 2 December 2003). In the circumstances of this case the Court finds that the applicant's conduct had an adverse affect on the length of the proceedings.

46. Notwithstanding the applicant's contribution to the delays and the complexity of the case, the Court cannot ignore the fact that it took the first-instance court nine years to deliver its judgement. The longest periods of inactivity being in the period when the case had been reassigned to new judges (see paragraphs 11-13 above).

47. Having regard to the foregoing and to its case-law on the subject (see *Rumpf v. Germany*, no. 46344/06, §§ 41-46, 2 September 2010, *Tomažič v. Slovenia*, no. 38350/02, §§ 54-61, 13 December 2007, *Jazbec v. Slovenia*, no. 31489/02, §§ 64-69, 14 December 2006), the Court considers that in the

instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

2. Article 13

48. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI).

49. In the present case the Court is not persuaded that the applicant could have had access to the compensation claim and finds the remedies of the 2006 Act ineffective (see paragraphs 37-38 above). As regards the remedies available prior to the implementation of the 2006 Act, the Court sees no reason to take a different approach to that taken in earlier cases in which those remedies were considered ineffective (see *Lukenda v. Slovenia*, no. 23032/02, 6 October 2005).

50. Accordingly, the Court considers that in the present case there has been a violation of Article 13 on account of the lack of a remedy under domestic law whereby the applicant could have obtained a ruling upholding his right to have his case heard within a reasonable time, as set forth in Article 6 § 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

51. Lastly, the applicant complained under Article 6 that the domestic proceedings were unfair and the judges arbitrary and incompetent. He complained *inter alia* that he was tried in absentia, he did not have the adequate time to prepare his defence, that the indictment was unlawfully broadened, that the evidence-taking was unfair and to his detriment, since most of his requests were rejected. He further complained that the courts were biased, the judgments ambiguous and that his conviction was based on illegally obtained evidence.

52. Having examined the above complaints, the Court finds, in the light of all the materials 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 applicants. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. 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

54. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

55. The Government contested the claim.

56. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards award him EUR 6,720 under that head.

B. Costs and expenses

57. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court.

58. The Court notes that he had not itemised or substantiated his claims. The Court therefore makes no award under this head.

C. Default interest

59. The Court considers it appropriate that the default interest rate 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

1. *Declares* by a majority the complaint concerning the excessive length of the first set of proceedings and lack of an effective remedy admissible;

2. *Declares* unanimously the remainder of the application inadmissible;

3. *Holds* by six votes to one that there has been a violation of Article 6 § 1 and Article 13 of the Convention;

4. *Holds* by six votes to one
   (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,[1] EUR 6,720 (six thousand seven hundred and twenty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pejchal is annexed to this judgment.

M.V.
C.W.

[1] Rectified on 5 July 2013: "from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention," has been inserted.

DISSENTING OPINION OF JUDGE PEJCHAL

I disagree with the majority's finding of a violation of the applicant's right to a fair trial within "a reasonable time" for the reasons given already in my separate opinion in the case *Podbelšek Bračič v. Slovenia*, no. 42224/04.