

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

SECOND SECTION

CASE OF KINCSES v. HUNGARY

(Application no. 66232/10)

JUDGMENT

STRASBOURG

27 January 2015

FINAL

01/06/2015

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Kincses v. Hungary,

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

Guido Raimondi, *President,*
András Sajó,
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Egidijus Kūris,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 9 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 66232/10) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr István Kincses ("the applicant"), on 15 October 2010.

2. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged, in particular, that his freedom of expression had been infringed on account of him having been fined for having criticised, as a legal representative, the sitting judge in one of his cases. He also claimed that the length of the disciplinary proceedings conducted against him was incompatible with Article 6 of the Convention.

4. On 5 June 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in Debrecen. He is a practising lawyer and member of the Békés County Bar Association.

6. At the material time the applicant was appearing as the legal representative of a hunting association before the Battonya District Court. On 19 March 2003 he filed with the court a notice of appeal for the attention

of the second-instance Békés County Regional Court, in which he also requested this court to initiate proceedings with a view to examining the first-instance judge's competence to exercise the duties of a judge. In his appeal he wrote, *inter alia:*

> "Of course, we do not assume any professional incompetence on the side of the sitting judge, thus the fact... that he appointed a guardian *ad litem* despite explicit objection...is the first proof of his bias...
>
> Questioning whether or not the general assembly of the respondent was entitled to suspend its session, continue at a later point and call another general assembly is not a question of bias but that of clear-cut professional incompetence ...
>
> Because the judgment reflected the personal opinion of the judge and was not based on any evidence, we cannot but call into question the professional competence of the sitting judge. His conduct was guided either by sympathy for the plaintiff or a dislike for the respondent and this was also represented in the judgment. In a State based on the rule of law where proceedings should be based on the constitutional independence of judges, such judicial bias cannot be permissible.
>
> Based on the above, besides our request for appeal, we also request the County Regional Court to forward our motion to the authority responsible for initiating proceedings to examine the professional [in]competence of the judge."

7. The motion was transferred to the Békés County Regional Court, whose vice-president indicated to the Békés County Bar Association that, in his view, the applicant's submissions should give rise to disciplinary proceedings.

On 11 April 2003 the President of the Bar Association informed the applicant about the opening of disciplinary proceedings.

On 24 April 2003 the applicant submitted his observations, contesting the initiation of the disciplinary proceedings.

8. In the ensuing proceedings, the Szeged Bar Association Disciplinary Board dealt with the case. On 10 June 2004 it fined the applicant 300,000 Hungarian forints (HUF) (approximately 1,000 euros (EUR)) for having committed a serious disciplinary offence. On appeal, on 5 November 2004 the National Bar Association Disciplinary Board upheld this decision in essence.

The applicant sought judicial review. On 19 September 2006 the Budapest Regional Court remitted the case to the disciplinary instances, essentially on procedural grounds.

9. In the resumed disciplinary proceedings, on 11 April 2008 the Disciplinary Board fined the applicant HUF 170,000 (EUR 570) for having committed a deliberate disciplinary offence. The Board was of the opinion that the expressions "of course, we do not assume any professional incompetence on the side of the sitting judge", "this is not a question of bias, but that of clear-cut professional incompetence" and "we cannot but call into question the professional competence of the sitting judge" amounted to disrespecting the court's dignity and to denying the judge the

requisite respect. This was a disciplinary offence consisting of the applicant's breaching the relevant ethical obligations.

10. On 3 November 2008 the National Bar Association Disciplinary Board upheld this decision, endorsing the first-instance Disciplinary Board's position that the tone and language of the impugned statement was unacceptable and prejudicial to the reputation of lawyers.

11. On 2 June 2009 the Budapest Regional Court dismissed the applicant's action challenging the disciplinary sanction. The court did not agree with the applicant's contention that in expressing the impugned statements he had merely exercised his procedural rights, that is, that he had requested the exclusion of the sitting judge for bias. It also found that the statements had accused the court as an institution, and not merely the sitting judge, of circumventing the law.

12. On 20 April 2010 the Supreme Court rejected the applicant's petition for review, endorsing the Regional Court's reasoning. It dismissed the applicant's argument that the disciplinary measure had infringed his procedural right, exercised in his capacity as defence counsel, to lodge a motion for bias. Reiterating the Regional Court's findings, the Supreme Court held that, contrary to what the applicant had argued, his notice – submitted following the closing of the first-instance proceedings (see paragraph 6 above) – could not possibly serve the purpose of seeking the exclusion of the sitting judge for bias. It further found that, in as much as the applicant's request could be interpreted as initiating proceedings to have the judge's professional competence examined, the reason for which he had been subjected to a disciplinary measure was not the very request, but its tone.

II. RELEVANT DOMESTIC LAW

13. Act no. XI of 1998 on Attorneys at Law provides as follows:

Disciplinary offence

Section 37

"A disciplinary offence is committed by an attorney:

a) who wrongfully breaches the obligations arising from the exercise of the practice of his profession or the duties specified in the code of ethics for attorneys, or

b) whose culpable conduct not performed as part of his attorney activities diminishes the prestige of attorneys as a group."

14. Regulation no. 8/1999. (III.22.) MÜK of the National Bar Association on the ethical rules and expectations pertaining to attorneys' profession provides as follows:

> "12.1. Attorneys are to maintain the dignity of official proceedings, in particular the dignity of court hearings ... attorneys are bound to respect the dignity of the court.
>
> 15.2. In hearings and proceedings attorneys shall behave towards members of the courts and other authorities in compliance with the traditions of the profession, by showing and demanding due honour and respect."

15. Section 38 of the Act on Attorneys at Law and section 30(1) of Regulation no. 3/1998 (VI.27.) MÜK of the National Bar Association provide for the following disciplinary penalties: a reprimand, a fine not exceeding double the amount of the fine imposed for minor offences, and removal from the Bar roll.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

16. The applicant complained that his right to express himself freely in his capacity as an attorney had been violated in that he had been fined for a disciplinary offence, for infringing the dignity of the judiciary. He relied on Articles 6 § 1, 10, 13 and 17 of the Convention.

The Court considers that this complaint falls to be examined under Article 10 alone, the relevant part of which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and ... to impart information and ideas without interference by public authority.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

17. The Government contested that argument.

A. Admissibility

18. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

19. The Government admitted that imposing a fine for a disciplinary offence amounted to an interference with the applicant's freedom of speech. However, they argued that the interference had been in accordance with the law, pursued a legitimate aim and been necessary in a democratic society. In particular, the decision to fine the applicant had been based on section 37 (a) of the Act on Attorneys at Law and meant to maintain the authority of the judiciary.

20. The Government also considered that the interference had been proportionate to its aim for the following reasons.

21. They first emphasised that the domestic courts had solved the conflict between the applicant's right to freedom of expression and the protection of the court's dignity by weighing the relevant interests at stake in a manner reconcilable with the principles embodied in Article 10 of the Convention. According to the Government, the applicant had overstepped the limits of freedom of expression by using a tone and language disrespectful to the court's dignity and by referring to the professional unfitness of the sitting judge. In their view, the applicant's statements had also suggested that the court as a whole assisted in the circumvention of the law.

22. The Government also submitted that the applicant could have used a different manner to express his dissatisfaction. When filing his motion for bias, he could have applied expressions not injurious to the court's dignity.

23. The Government further argued that the nature and severity of the imposed sanction was a factor to be taken into consideration in assessing the proportionality of the interference. In the present case, the applicant had sustained a fine of HUF 170,000, an amount which could not be considered disproportionate.

24. The applicant submitted that his remarks had been expressed in a motion for bias in exercise of his procedural rights under the Code on Civil Procedure. He had only intended to call attention to the performance of the sitting judge in a particular case, and his motion had contained all relevant reasons to substantiate his statements.

2. The Court's assessment

25. The Court reiterates that Article 10 is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see, for example, *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts)). Furthermore, freedom of expression protects not only the substance of the ideas and information

expressed but also the form in which they are conveyed (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 174, ECHR 2005-XIII; and *Mariapori v. Finland*, no. 37751/07, § 62, 6 July 2010).

26. It is not disputed between the parties – and the Court sees no reason to hold otherwise – that fining the applicant for a disciplinary offence amounted to an interference with his freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

27. The Court notes that freedom of expression is subject to exceptions, set out in Article 10 § 2 of the Convention. It observes that the interference with the applicant's freedom of expression was based on sections 37 (a) and 38 of Act no. XI of 1998. It was thus "prescribed by law". Moreover, it is undisputed that it pursued the legitimate aim of maintaining the authority of the judiciary, within the meaning of Article 10 § 2.

28. Therefore, the only question for the Court to determine is whether that interference was "necessary in a democratic society". In so doing the Court must ascertain whether the national authorities applied standards which were in conformity with the principles embodied in Article 10, that they based themselves on an acceptable assessment of the relevant facts (see, among many other authorities, *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298) and that a fair balance was struck between, on the one hand, the need to protect the authority of the judiciary and, on the other hand, the protection of the applicant's freedom of expression (see *Žugić v. Croatia*, no. 3699/08, § 42, 31 May 2011).

29. According to the Court's well-established case-law, the adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

30. The scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 § 2. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in the area of 'authority' of the judiciary. This is reflected in a number of provisions of the Convention, including Article 6. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation (see The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 59, Series A no. 30).

31. The Court further reiterates that the phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and

confidence in the courts' capacity to fulfil that function (see The Sunday Times, cited above, § 55).

32. The work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks. However, the courts, as with all other public institutions, are not immune from criticism and scrutiny (see *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003). Therefore, while parties are certainly entitled to comment on the administration of justice in order to protect their rights, their criticism must not overstep certain bounds (see *Saday v. Turkey*, no. 32458/96, § 43, 30 March 2006).

33. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (see *Skałka*, loc. cit.).

34. Moreover, the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar (see *Casado Coca v. Spain*, 24 February 1994, § 54, Series A no. 285-A).

The role of counsels to defend their clients' interests involves their choice on the relevance and usefulness of an argument. They can find themselves in the delicate situation where they have to decide whether or not they should object to, or complain about, the conduct of the court, keeping in mind their client's best interests. They might for instance feel constrained in their choice of pleadings, procedural motions, etc., during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. It follows that any "chilling effect" of even a relatively light penalty is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice (see *Kyprianou v. Cyprus* [GC], cited above, § 175).

35. Turning to the facts of the present case, the Court notes that in its decision of 2 June 2009 the Budapest Regional Court found that the applicant's statements made in his notice of appeal were insulting both to the sitting judge and the court as an institution (see paragraph 11 above) This finding was endorsed by the Supreme Court in its decision of 20 April 2010, adding that the reason for the disciplinary measure was not the applicant's challenging the sitting judge's professional conduct as such but the tone of his submissions (see paragraph 12 above).

36. The Supreme Court took into consideration whether the disciplinary fine actually affected the applicant's rights as counsel (see paragraph 34

above). It found that his right to express his disagreement with the first-instance decision and the conduct of the sitting judge had not been restricted. It established that, since it had been lodged after the conclusion of the first-instance proceedings, the remarks contained in the notice of appeal could not be considered as a motion for bias against the first-instance judge, but only as the applicant's personal opinion. Furthermore, according to the domestic courts, the applicant was not fined for having challenged the first-instance judge's competence to serve as a judge but for having used a tone for his criticism which had been injurious to the dignity of the judiciary (see paragraph 12 above).

37. The Court notes that the present case bears similarities to *Meister v. Germany* (nos. 25157/94 and 30549/96, Commission decisions of 18 October 1995 and 10 April 1997, respectively (unreported)), where counsel had made insulting statements about judges and other persons whom he regarded as having decided or acted incorrectly in the context of, or in relation to, court proceedings; to *W.R. v. Austria* (no. 26602/95, Commission decision of 30 June 1997 (unreported)), where counsel had described the opinion of a judge as "ridiculous"; to *Mahler v. Germany* (no. 29045/95, Commission decision of 14 January 1998 (unreported)), where counsel had asserted that the prosecutor had drafted the bill of indictment "in a state of complete intoxication"; to *A. v. Finland* ((dec.), no. 44998/98, 8 January 2004), where the applicant had been issued with a warning for his statements of a disparaging nature submitted in a written appeal concerning the presiding judge; to *Saday* (cited above), where the accused had described the Turkish judiciary as "executioners dressed in gowns"; and to *Žugić* (cited above), where the applicant's notice of appeal had used a langue implying that the judge as a person was arrogant and incompetent to exercise the duty of a judge.

38. The Court reiterates in this context that while lawyers are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession (see *Schmidt v. Austria*, no. 513/05, § 36, 17 July 2008).

39. In the present case, the applicant acted as the legal representative of a client in civil proceedings. In the written submissions, which he prepared acting in that capacity, he accused the sitting judge of professional incompetence. It follows that in the circumstances of the present case the requirement of protection of the interest of the proper administration of justice and the dignity of the legal profession is not to be weighed against the interest in the open discussion of matters of public concern or freedom

of the press (see, *mutatis mutandis*, *Nikula v. Finland*, no. 31611/96, § 48, ECHR 2002-II).

40. The Court also notes that the impugned statements were not only a criticism of the reasoning in the judgment, but, as found by the Disciplinary Board and the domestic courts, amounted to belittling the sitting judge's professional capacities and implied that the court in question had circumvented the law. Having regard to the impugned remarks themselves, in part sarcastic, in part overtly insulting (see paragraph 9 above), the Court does not find this assessment unreasonable. Furthermore, there is nothing to suggest that the applicant could not have raised the substance of his criticism of the reasoning in the decision without using the impugned language (see, *mutatis mutandis, Steur v. the Netherlands*, no. 39657/98, ECHR 2003-XI, where the applicant lawyer's criticism of a police officer in court did not amount to a personal insult and was strictly limited to the officer's actions relevant to his client's case as distinct from criticism of his general professional or other qualities).

41. Moreover, the fine complained of was imposed on the applicant by the Bar Association for the breach of the ethical rules of the legal profession. The Court notes that the applicant, as a lawyer, was bound by the rules of professional conduct, and finds it legitimate to expect him to contribute to the proper administration of justice, and thus to maintain public confidence in it (see *Schöpfer v. Switzerland*, 20 May 1998, § 29, *Reports of Judgments and Decisions* 1998-III).

42. Finally, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV). In this respect, the Court notes that the applicant was merely fined, in an amount not excessive, in the course of disciplinary proceedings, which were not made public and had no consequences on his right to exercise his profession. The present case can thus be distinguished from the case of *Nikula* (cited above) in which a criminal sanction, albeit a lenient one, was imposed on the applicant.

43. Having regard to the foregoing, the Court considers that the reasons advanced by the Disciplinary Board and the domestic courts were sufficient and relevant to justify the interference and that the sanction imposed on the applicant was not disproportionate to the legitimate aim pursued. The interference can thus reasonably be considered necessary in a democratic society to protect the judiciary within the meaning of Article 10 § 2.

Consequently, there has been no violation of Article 10 of the Convention.

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

44. The applicant further complained that the length of the proceedings was incompatible with the "reasonable time" requirement of Article 6 of the Convention.

45. The Government did not contest that argument.

46. The period to be taken into consideration began at the latest on 24 April 2003 when the applicant contested the initiation of disciplinary proceedings (see *Philis v. Greece (no. 2)*, 27 June 1997, § 46, *Reports of Judgments and Decisions* 1997-IV) and ended on 20 April 2010 when the Supreme Court gave a final decision. The period thus lasted some seven years for the proceedings before the Bar and for two judicial instances.

In view of such lengthy proceedings, this complaint must be declared admissible.

47. 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).

48. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

49. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present circumstances. Having regard to its case-law on the subject, the Court finds that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicant claimed 4,241 euros (EUR) in respect of pecuniary damage and 10,000 euros in respect of non-pecuniary damage.

53. The Government left the matter to the discretion of the Court.

54. The Court notes that it has found a violation only in respect of the length of proceedings. Any compensation should therefore reflect that fact. The Court considers that the applicant must have suffered some non-pecuniary damage on account of the violation of his rights under Article 6 § 1 of the Convention and awards him, on the basis of equity, EUR 1,500 under this head.

B. Costs and expenses

55. The applicant also claimed EUR 1,073 for the costs and expenses incurred exclusively before the domestic courts.

56. The Government contested this claim.

57. 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 are reasonable as to quantum. In the present case, the Court notes that the costs incurred in the domestic proceedings have no connection with its finding of a violation of the "reasonable time" requirement of Article 6 § 1. Furthermore, the Court notes that the applicant, who was not represented by a lawyer in the proceedings before the Court, has not submitted any claims in connection with the Convention proceedings. Consequently, the Court rejects the applicant's costs claim.

C. Default interest

58. 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, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 10 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 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at 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 27 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi President