

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

FIFTH SECTION

DECISION

Application no. 31767/13
Marian KHALIFA
against the Czech Republic

The European Court of Human Rights (Fifth Section), sitting on 24 November 2022 as a Committee composed of:

Mārtiņš Mits*, President*,
María Elósegui,
Kateřina Šimáčková*, judges*,

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 31767/13) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 14 May 2013 by a Czech national, Mr Marian Khalifa, who was born in 1959 and lives in Prague ("the applicant") who was represented by Mr T. Sokol, a lawyer practising in Prague;

the decision to give notice of the complaint concerning an alleged violation of the right to a fair trial within the meaning of Article 6 § 1 of the Convention to the Czech Government ("the Government"), represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The application concerns the applicant's conviction for domestic violence on the basis of allegedly unlawful evidence acquired through an allegedly unlawful search at his home and on the basis of an allegedly unlawful and biased expert report. The applicant relied on Article 6 § 1 of the Convention.

2. The applicant is married to J.K. On 31 May 2010 J.K. lodged a criminal complaint accusing the applicant of domestic violence. At that time, she had been allegedly receiving counselling from an association that supported victims of domestic violence – the White Circle of Safety (*Bílý kruh bezpečí*).

3. On 1 June 2010 the police charged the applicant with abusing a person living under the same roof under aggravated circumstances. He was arrested on the same day and on 3 June 2010 his detention was ordered. On 4 June 2010 the police ordered an expert report from L.Č., a psychologist. She was asked to assess J.K.'s credibility and to determine whether she manifested the signs of a victim of abuse. L.Č. was also asked to determine whether the conduct of the applicant towards J.K. could be described as domestic violence and, if so, of what type and with what potential consequences for the victim.

4. On 22 June 2010 the police carried out an inspection *in situ* (namely, the applicant's and J.K.'s home) without a court-issued search warrant but with J.K.'s consent and in her presence. The respective lawyers of both the applicant and J.K. were also present. The police took several photographs and seized leather handcuffs, two leather collars and a coil of rope.

5. In her report of 7 July 2010, L.Č. concluded that (i) J.K. was credible, not detecting any inclination to manipulate intentionally and purposely her statements about her relationship with the applicant, (ii) J.K. showed acute symptoms of victimisation, and (iii) on the basis of J.K.'s statement, the married life of the couple showed signs of domestic violence that could be described as mental torment combined with sexual violence. Accordingly, the psychologist could not reach a conclusion because J.K. was in the process of piecing together her recollections of the traumatic events in question.

6. In August 2010 the applicant was officially indicted.

7. On 12 November 2010 the latter complained of the unlawfulness of L.Č.'s expert report. Relying on Article 107 of the Code of Criminal Procedure (hereinafter "the CCP"), he argued that the manner in which the police had requested the expert to assess the evidence had been unlawful, and that she had assessed the evidence in a biased manner. As to the conclusion that J.K. had shown signs of being a victim of domestic violence, the applicant noted that the expert had violated the presumption of innocence. He requested the court not to rely on this piece of evidence.

8. The court heard L.Č. on 31 January and 28 February 2011 respectively. The applicant and his lawyer posed several questions to the expert, mostly with the aim of questioning her credibility and her ties to other persons.

9. On 23 February 2011 the applicant, in a written submission to the court, argued again that the expert had been biased and asked the court not to rely on the expert report. He noted that L.Č. had been working, together with J.K.'s lawyer, for the White Circle of Safety and that they had a close professional relationship. Moreover, L.Č. had been lengthy affiliated with that organisation, had counselled women working for the organisation about domestic violence, and had been a member of its board.

10. On 3 June 2011 the Prague 8 District Court (*obvodní soud*) found the applicant guilty as charged and sentenced him to two years' imprisonment, suspended for three years. The court adduced a vast body of evidence, including testimony from numerous people, two expert reports, medical reports concerning J.K. and a report on the inspection *in situ*. While the applicant pleaded not guilty, the court did not consider his assertions credible, and based its judgment in particular on the testimony of J.K., whose credibility was confirmed by L.Č.'s expert report and testimony; moreover, J.K.'s testimony was corroborated, *inter alia*, by a report of the Psychosocial centre Acorus dated 12 June 2006, a medical report that J.K. was suffering from mental bulimia as a consequence of the difficult situation at home, a report by a child psychologist who had interviewed J.K. and the applicant's daughter who had described the atmosphere of fear within the family, and by statements of J.K.'s colleagues.

11. The applicant appealed, challenging, *inter alia*, the lawfulness of the inspection of the crime scene and of L.Č.'s expert report.

12. On 9 November 2011 the Prague Municipal Court (*městský soud*) dismissed his appeal and upheld the conclusions of the District Court. The court did not find any flaws in L.Č.'s report and, having regard to her detailed testimony before the District Court, did not consider the report unreliable. The court also emphasised that J.K.'s credibility had been ultimately assessed by the District Court itself – not by the expert, who had only commented on it. Regarding the inspection *in situ*, the court observed that, although it had not constituted a house search (as defined by the CCP), it had been carried out with J.K.'s consent; moreover, its results could not have altered or influenced the status of evidence to the applicant's disadvantage, with the main evidence consisting of the applicant's and J.K.'s testimony and the expert reports.

13. On 2 December 2012 the applicant lodged an appeal on points of law, which was rejected by the Supreme Court (*Nejvyšší soud*) on 11 July 2012. The court considered unreasonable the applicant's assertion that it had been the expert who had evaluated the evidence instead of the court. The expert report had indeed described J.K.'s personal characteristics on the basis of her psychological examination; however, it had been the court itself that had subsequently assessed those characteristics and found that they made it possible for J.K.'s witness testimony to be considered as credible. The court also agreed with the lower courts' conclusion to attach only minor importance to the evidence gathered by the police in a manner criticised by the applicant.

14. On 24 September 2012 the applicant lodged a constitutional complaint asserting, *inter alia*, that the search of his home had been conducted without his knowledge and without a court order. He also raised objections against the expert report and the expert herself, arguing that the report was biased. On 22 November 2012 the Constitutional Court (*Ústavní soud*)

(II. ÚS 3863/12) dismissed his complaint as manifestly ill-founded, finding no unconstitutional flaws in the lower courts' conclusions.

THE COURT'S ASSESSMENT

15. The applicant complained of a violation of his right to a fair trial under Article 6 § 1 of the Convention, alleging that his conviction had been largely based on unlawful evidence acquired through an unlawful search of his home and an unlawful and biased expert report.

16. The Government maintained that the domestic courts had considered that the conclusions reached during the inspection of the applicant's home could not have changed or influenced the quality, quantity and amount of the evidence, to the detriment of the applicant. Regarding the expert report, the Government pointed to its consistency with the District Court's findings regarding other evidence. According to the Government, the applicant had failed to provide objective proof in support of his complaint that the expert had not been impartial. Moreover, the courts had commented in great detail on his objections regarding the expert's lack of impartiality and had given proper reasons for their decisions.

17. The applicant maintained his complaints.

18. The Court reiterates that its duty, under Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Ćwik v. Poland*, no. 31454/13, § 70, 5 November 2020). Moreover, it is not its role to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question that must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question (see *Duško Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 10718/05, § 42, 24 April 2014).

19. Regarding the allegedly unlawful search of the applicant's home, the Court notes that the judgments of both the District Court and the Municipal Court were thoroughly reasoned. The Court refers notably to the Municipal Court's reasoning, which stressed that the results of the search could not have altered or influenced the status of evidence to the applicant's disadvantage (see paragraph 12 above). As stated above, it is not for the Court to assess the evidence or to decide which provision of domestic law should be applied by the national authorities in the case at hand. Nor should it substitute its own

assessment for the assessment made by the national courts, unless a right protected by the Convention is infringed. Since the Court did not find any manifest error in the national courts' decisions, the Court sees no grounds to depart from their assessment.

20. As to the expert report, the Court reiterates that the appointment of experts is relevant in assessing whether the principle of equality of arms has been respected. The Court has already held that the mere fact that experts whose reports were used in proceedings were appointed by one of the parties – accused persons or prosecutors – does not suffice to render those proceedings unfair. Although this fact may give rise to apprehension as to the neutrality of such experts, such apprehension, while having a certain importance, is not decisive. What is decisive is the position occupied by the experts throughout the proceedings, the manner in which they performed their functions and the way the judges assessed the expert opinion (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 94, 12 May 2016).

21. In the present case, the Court notes that even though the District Court relied on the expert's assessment of J.K.'s reliability, it was not the main aspect on which it based its finding of the applicant's guilt. Indeed, the expert's findings merely constituted supporting evidence that confirmed J.K.'s credibility and the truthfulness of her statements; the veracity of those statements remained for the court to assess. Furthermore, the applicant had the opportunity to challenge the expert's credibility through adversarial proceedings before the national courts. He was able to ask her questions directly at the hearing before the District Court (see paragraphs 8 and 9 above) and also to raise his doubts concerning the expert's impartiality before the higher courts (see, by contrast, *Danilov v. Russia*, no. 88/05, § 111, 1 December 2020). Moreover, the national courts examined the expert's report and her credibility, as it flowed from the Municipal Court's reasoning, which explained in great detail why it had no doubts about the quality of the expert's report and its findings (see paragraph 12 above; see also *Ziberi and Others v. the former Yugoslav Republic of Macedonia* (dec.), nos. 52874/10 and others, §§ 34-36, 23 May 2017).

22. Consequently, the Court does not consider the claims raised by the applicant to be objectively justified. Nor was it able to find any inconsistencies in the present case with the principle of equality of arms. It therefore concludes that the overall fairness of the criminal proceedings before the national courts was not infringed, since they provided the applicant with sufficient safeguards against the alleged bias of the expert and her report, as well as against the alleged unlawfulness of the evidence obtained.

23. Given the above-noted considerations, the Court finds that the application is manifestly ill-founded within the meaning of Article 35 §§ 3 (a) and 4 and must therefore be declared inadmissible.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 15 December 2022.

Martina Keller Deputy Registrar	Mārtiņš Mits President