CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32387/96
by Francesco PERRE
against Italy

The European Court of Human Rights (Second Section) sitting on 21 September 1999 as a Chamber composed of

Mr M. Fischbach, *President*,
Mr B. Conforti,
Mr G. Bonello,
Mrs V. Strážnická,
Mr P. Lorenzen,
Mrs M. Tsatsa-Nikolovska, *Judges*,

with Mr E. Fribergh, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 June 1996 by Francesco Perre against Italy and registered on 23 July 1996 under file no. 32387/96;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 24 June and 4 September 1998 and the observations in reply submitted by the applicant on 11 September 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, Francesco Perre, is an Italian national, born in 1961 in Platí (Catanzaro). He is currently detained in Viterbo, where he is serving a sentence of 24 years' imprisonment.

He is represented before the Court by Mrs Antonietta Denicoló Gigliotti and Mr. Roberto Catanzariti, who are both lawyers, practising respectively in Catanzaro and Rome.

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

A warrant of arrest against the applicant and 39 co-accused was issued at the beginning of 1992 at the request of the public prosecutor of Bolzano following investigations into drug trafficking. While many co-accused were arrested on 11 February 1992, the applicant escaped arrest.

The trial commenced on 19 April 1993 before the Court of Bolzano. During this initial stage of the proceedings the applicant was tried *in absentia*.

The applicant was arrested on 15 November 1993 in Calabria. He was brought to trial with 28 co-accused and was charged with being at the head of an armed criminal organisation dealing with drug trafficking.

At the 13 December 1993 hearing, at which only the applicant's lawyer was present, a co-accused, L.P., participated by means of a video-conference and confirmed the contents of a tape and of some other written documents previously sent by himself to the police. In the statements L.P. asserted that the applicant was at the head of the organisation. He refused to answer any other questions. The applicant's lawyer did not react.

On 22 March 1994 the Court of Bolzano sentenced the applicant to 27 years' imprisonment, the grounds for the decision being:

– the reports of the *Carabinieri* (military corps also carrying out police duties) confirming the applicant's participation in meetings with other members of the organisation ;

– the recordings obtained by tapping the houses of the applicant and of the co-defendants and tapping their telephones, from which it appeared that a drug-trafficking organisation existed and that the applicant had a prominent position in it ;

– the tape-recorded statements made by L.P. (supporting evidence).

The following further elements against the applicant were considered: the fact that, although officially he had a job, he never appeared to be working, thus it was not clear where his income came from; the fact that some relatives of his had already been arrested for drug trafficking; the fact that the co-accused, and, remarkably, those older than him, would address him using "*voi*", a typical form of respect towards those in command in mafia-like organisations.

On 30 July 1994 the applicant filed an appeal with the Court of Appeal of Trento on several grounds, notably:

– that the recorded conversations were in the dialect spoken in Calabria and that the translations from that dialect into Italian were unreliable (the translator was a policeman and therefore, according to the applicant, he could not be considered as an independent expert and furthermore it was not proved that he could understand the dialect); besides, the applicant alleged that the recordings had not been properly transcribed as in several parts they had actually been summarised; the applicant asked for a comparison of voices to ascertain whether his was the same as the one in the recordings;

– that the statements made against him by the co-defendant had been considered evidence even though tape-recorded, i.e. without an actual testimony given in court; therefore the applicant explicitly asked the Court of Appeal to arrange a direct confrontation with his accuser;

– that there was not sufficient evidence for considering the applicant as being at the head of the organisation.

The Court of Appeal of Trento dismissed the applicant's requests for a voice comparison and for a direct confrontation with the co-accused (L.P.).

On 21 January 1995 the Court of Appeal upheld the judgment of the Court of Bolzano, with the exception of one count of aggravation, which led to a sentence of 24 years' imprisonment. The judgment of the Court of Appeal was based mainly on the reports made by the *Carabinieri*. According to these reports, the applicant had been seen by several *Carabinieri* officials taking part in meetings with the other members of the organisation, both at the applicant's apartement and in other places. Besides, electronic surveillance during such meetings had permitted to ascertain that their purpose was closely related to drug trafficking. Thus, during the recorded conversations reference was made *inter alia* to : a previous transfer of cocaine ; the transfer of four guns ; 2 kilos of "stuff" (*roba*) that one of the members would "cut"; the transfer of significant amounts of money ; the criticism against the delay in the delivery of some "stuff", increasing the risk of an arrest. Even though the poor quality of the registrations from the electronic surveillance did not allow to determine to whom each phrase recorded was to be attributed, the Court of Appeal considered that the participation of the applicant in such meetings, eyewitnessed by several *Carabinieri* officials who all recognised the applicant, and their scope, resulting from the electronic surveillance, was sufficient to prove that the applicant was a member of the organisation. Furthermore, the Court pointed out that the testimony by another witness, G.P., concerning the applicant's behaviour, confirmed the leading position of the applicant within the organisation and that the declarations made by L.P. suggested that the organisation became very dynamic after the applicant had joined in.

As to the complaints about the translation and transcription of the recordings, the Court of Appeal held that there was no reason to question the translator's impartiality and his knowledge of the dialect, that he was not alone in carrying out the task, thus others could verify the accuracy of the operations, that the translator was not asked for a proper translation since the main part of the recordings consisted of numbers and short sentences understandable by an Italian-speaking person, the translation being necessary only to comprehend some of the more obscure passages, and that the right of the defendants to ask for a copy of the recordings and to

verify, on their own or through other experts, the exactitude of the translations and transcripts was never restricted.

As to the request for a voice comparison, the Court of Appeal maintained that, the Court of Bolzano having ordered a voice comparison at an early stage of the proceedings and the vast majority of the defendants having refused to cooperate to that end, the refusal of the Court to grant a second voice comparison could not be criticised, also in view of the considerable amount of time it would require.

As far as the complaint related to the accusatory tape-recorded statements by L.P., the Court of Appeal stated that despite the fact that the suspicious behaviour of L.P. called for great caution, the fact that the tape was listened to at a hearing at which L.P. was present - although by means of a video-conference - and that he confirmed his statements, was sufficient as to his credibility, also considering that previous statements made by him had been confirmed in the course of the investigations. The court added that these statements were not considered as the main evidence but only as supporting evidence.

Finally, as to the lack of impartiality of the Court due to the fact that some of the judges who decided his case had also sat on the Court which reviewed the regularity of the detention on remand of some of his co-defendants, the Court of Appeal stated that the relevant provisions of the Code of criminal procedure did not rule out this possibility and added that the Constitutional Court had already considered that no issue in this respect arose in the light of the Constitution. The Court of Appeal added that the situation the applicant complained of was not in breach of Article 6 § 1 of the Convention, given that it limits itself to provide that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ...".

The applicant appealed to the Court of Cassation against the above judgment. He complained *inter alia* about the lack of impartiality of the first instance judges, of the fact that the experts charged with transcribing the results of the telephone tapping and electronic surveillance relied upon the rough notes drafted by the police and also of the fact that the records were "translated" into Italian from the dialect of Calabria by a policeman. The Court of Cassation, in a decision dated 3 November 1995, dismissed the appeal, maintaining that the way in which the Court of Appeal had assessed the evidence was a matter of discretion provided that it was based on logical arguments, which, in the Court of Cassation's view, was the case. As to L.P.'s statements, the Court underlined that the Court of Appeal had not given them an important weight.

Concerning the alleged lack of impartiality of the Court of Bolzano, the Court of Cassation reiterated the arguments put forward by the Court of Appeal, based on the relevant provisions of the Code of criminal procedure as well as on the Constitutional Court's case-law. As far as the recordings were concerned, the Court of Cassation noted that the experts had personally re-listened to the recordings without relying exclusively on the rough notes made by the police. Finally, as to the translation of the records the Court held that apart from the fact that there was nothing suggesting that the police officer was not competent to translate, the applicant had not availed himself of the possibility of checking the translation by requesting copies of the recordings pursuant to article 268 § 8 of the Code of criminal procedure.

COMPLAINTS

1. The applicant complains under Article 6 § 1 of the Convention that he was not granted a fair trial by an impartial tribunal.

In particular, the applicant complains that he was not granted a voice comparison, which would have permitted him to prove his innocence. The applicant stresses that, whereas the Court of Bolzano had previously granted a voice comparison to a co-defendant who was acquitted of that charge as a result, his own request was dismissed.

The applicant also complains, under Article 6 § 3 (d) that not only was he not allowed to examine the only witness against him but this witness was not even examined by the judge, the statements against him resulting from the tape L.P. had sent to the police.

The applicant further claims that the expert who translated the recordings obtained by the phone tapping and listening devices was a policeman and thus could not be considered impartial. Furthermore, his knowledge of the dialect from which he had to translate was insufficient. According to the applicant, in translating the recordings he used previous translations made by other policemen, almost entirely copying them.

2. The applicant also alleges a lack of impartiality of the Court of Bolzano on the ground that some of the judges who decided his case had also sat on the Court which reviewed the regularity of the detention on remand of some of his co-defendants.

3. He finally alleges that elements such as his region of origin and the membership of a certain family, which should not be relevant in criminal proceedings, were taken into consideration in deciding the case.

PROCEDURE

The application was introduced on 11 March 1996 and registered on 23 July 1996.

On 4 March 1998 the European Commission of Human Rights decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 23 June and 4 September 1998. The applicant replied on 11 September 1998.

On 15 September 1998 the Commission granted the applicant legal aid.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

1. The applicant complains under Article 6 § 1 of the Convention that he was not granted a fair trial by an impartial tribunal.

In particular, the applicant complains that he was not granted a voice comparison, which would have permitted him to prove his innocence. The applicant also complains, under Article 6 § 3 (d) that he was not allowed to examine the only witness against him.

The applicant further claims that the expert who translated the recordings obtained by the phone tapping and listening devices was a policeman and thus could not be considered impartial.

Article 6 § 1 and 3 (d) of the Convention provides that :

"In the determination (...) of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)"

"Everyone charged with a criminal offence has the following minimum rights :
(...)
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

The Government maintain that the applicant's conviction was based to a substantial extent on the applicant's participation in the meetings of the organisation, during which it was clear that matters related to drug and the organisational problems of the trafficking were discussed. It appeared therefore superfluous to order a voice comparison, which could have made possible at the most to correct some mistakes in the recordings, given that the presence of the applicant at those meetings had already been proved. As to L.P.'s testimony, the Government stress in the first place that the Court of Appeal rightly pointed out that L.P. had a suspicious behaviour which required great caution. In any case, according to the Government L.P.'s declarations have not been given any weight in the trial. The Government further observe that the applicant's lawyer did not ask, at the hearing of 13 december 1993, to cross-examine L.P.

The applicant stresses *inter alia* that the results of the electronic surveillance are unclear and not one of the conversations refers explicitly to drugs. According to the applicant, the evidence on which the Italian courts have relied has been obtained simply by replacing some words with the word "drug" and by mistaking a meeting of emigrants for a summit of criminals. Besides, only a voice comparison could have ascertained with certainty whether the applicant had effectively taken part to the meetings at which, according to the *Carabinieri*, the applicant was seen.

The Court recalls that the guarantees in paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1. It is therefore appropriate to examine the applicant's complaints from the points of view of paragraphs 1 and 3 of Article 6 taken together (see for example the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 28, § 75).

As a general rule, "it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce" (see the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, § 68; see also, amongst many others, the Ferrantelli and Santangelo v. Italy judgment of 7 August 1996, Reports of Judgments and Decisions 1996-III, p. 949, § 48).

As to the voice comparison, the Court notes that the applicant's conviction relies essentially on the participation of the applicant in the meetings of the organisation, eyewitnessed on several occasions by various *Carabinieri* officials. The Court is not persuaded that a voice comparison was necessary to ensure a fair trial, given the fact that taking account of the decisive weight that the courts have given to the *Carabinieri* reports, the knowledge of which precise phrases had been said by the applicant during the meetings appears to be unimportant.

As to the impossibility for the applicant to cross-examine L.P., the Court recalls that Article 6 § 3 (d) "does not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6" (see the Engel and others v. the Netherlands judgment of 23 November 1976, Series A no. 22, § 91, pp. 38 and 39). However, according to the Court's constant case-law "all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adverserial argument. There are exceptions to this principle, but they must not infringe the rights of the defence ; as a general rule, paragraphs 3 (d) and 1 of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage" (see the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 21, § 47). It follows that a conviction cannot rely solely, or mainly, on a witness' statements that the accused has not had an adequate and proper opportunity to challenge at some stage of the proceedings (see, *mutatis mutandis*, the Doorson v. the Netherlands judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, p. 472, § 76).

The Court recalls that the applicant did not have the opportunity to question directly L.P. and that the Court of Appeal relied on these statements at a certain point of its reasoning. Nevertheless, the Court also recalls that the applicant's lawyer has not raised any objections when L.P. read his statements through a video-conference. Moreover, L.P.'s statements only played a marginal role in the applicant's conviction which was based essentially on the *Carabinieri* reports (see, *a contrario*, Eur. Comm. H.R., Dorigo v. Italy, Report of 9 September 1998, p. 8, § 43).

Finally, as to the applicant's complaint that the expert who translated the recordings was a policeman and thus could not be considered impartial, the Court notes that the applicant never asked for a verification of the translation, as he was entitled to. Moreover, he has not explained why the translation cannot be considered as being reliable.

It follows that there is no appearance of a violation of Article 6 § 1 and 3 (d) in this respect and this part of the application is therefore manifestly ill-founded and must be rejected under Article 35 § 3 of the Convention.

2. The applicant alleges a lack of impartiality of the Court of Bolzano on the ground that some of the judges who decided his case had also sat on the Court which reviewed the regularity of the detention on remand of some of his co-defendants.

The Government maintain that the applicant has not raised this issue either before the Cour of Appeal or before the Court of Cassation.

The Court considers that the Government's exception must be rejected, since it appears from the judgments of the Court of Appeal and the Court of Cassation that the applicant has raised this issue.

The Court notes that the Court of Appeal of Trento has rejected the applicant's argument based on Article 6 § 1 of the Convention by a mere reference to the literal text of that provision, whereas the Convention provisions acquire a scope and significance, through the interpretation given by the Convention organs in their case-law, which go beyond their literal meaning.

In any event, in the present case the judges of the Court of Bolzano had not taken any decision on the applicant's detention prior to the trial. The fact that some of these judges had decided on detention on remand for some of the co-accused cannot be considered to have affected the impartiality of the Court in the applicant's trial (see amongst others, *mutatis mutandis*, the Saraiva de Carvalho v. Portugal judgment of 22 April 1994, Series A no. 286-B, p. 38, § 35, and the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 22, § 50).

In these circumstances, the Court considers that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

3. The applicant finally alleges that elements such as his region of origin and the membership of a certain family, which should not be relevant in criminal proceedings, were taken into consideration in deciding the case.

According to the Government, the elements the applicant refers to have not been given any importance by the Italian judges.

The Court notes that the judgment of the Court of Appeal has not taken into account the elements reffered to by the applicant and recalls that the applicant's conviction relies essentially on the *Carabinieri* reports. It appears then that the applicant has not substantiated his allegations.

This complaint is therefore also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Erik Fribergh
Registrar

Marc Fischbach
President