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

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Violation of Mr Sperisen's right to a fair trial on account of the lack of impartiality of the president of the appeal-court bench which sentenced him to 15 years' imprisonment

In today's **Chamber** judgment[1] in the case of Sperisen v. Switzerland (application no. 22060/20) the European Court of Human Rights held, by a majority, that there had been:

A violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned criminal proceedings brought against the applicant, who contested the impartiality of the presiding judge of the bench of the Criminal Appeals and Retrial Division ("the CPAR") of the Court of Justice of the Canton of Geneva, which had determined, on appeal, the criminal charge against him.

Finding inadmissible, for failure to exhaust domestic remedies, the applicant's complaint alleging Judge A.C.F.-B.'s lack of impartiality on account of the terms used in her order of 18 July 2017, the Court noted that Judge A.C.F.-B.'s observations of 3 October 2017 had gone beyond the expression of a mere suspicion. It considered that the applicant could reasonably have feared that Judge A.C.F.-B. had had a preconceived idea about his guilt when, several months later, she was required to rule on his case as the presiding judge of the bench of the CPAR of the Court of Justice of the Canton of Geneva which, in its judgment of 27 April 2018, had sentenced him to 15 years' imprisonment. In the Court's view it followed that the appellate court, that is to say, the bench of the CPAR presided over by Judge A.C.F.-B. which had determined the criminal charge against him, had not offered the guarantees of impartiality required by Article 6 § 1 of the Convention.

Principal facts

The applicant, Erwin Johann Sperisen, is a Swiss and Guatemalan national who was born in 1970. He is the former Director General of the Guatemalan National Civil Police (NCP). He is currently imprisoned in Krauchthal (Switzerland).

In 2007, shortly after resigning from his post as head of the NCP, Mr Sperisen left Guatemala and settled in Geneva with his family.

On 20 July 2007 the Communauté genevoise d'action syndicale and various other non-governmental organisations lodged a criminal complaint against the applicant, accusing him of having committed several offences in the course of his employment at the NCP; in particular, they alleged that he had been involved in extrajudicial killings in Guatemala. On 31 August 2012 he was arrested pursuant to a warrant issued by the Geneva public prosecutor's office.

On 3 September 2012 a court ordered that he be placed in pre-trial detention for three months. This detention was regularly extended and the applicant's applications for release were all dismissed in turn.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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In an indictment of 10 January 2014, Mr Sperisen was charged, in substance, with having acted as a co-principal in the killing of six prisoners and having killed a seventh during the "Pavo Real" operation on 25 September 2006 (charge I.1), and with having been a co-principal in the extrajudicial killing of three prisoners during the "Gavilán" operation (charges II.2 and III.3).

In a judgment of 6 June 2014, the Canton of Geneva Criminal Court acquitted the applicant on the charge of murder in connection with the events of 22 October 2005 (charges II.2 and III.3 of the indictment) and convicted him of the same offence in connection with the "Pavo Real" operation of 25 September 2006 (charge I.1 of the indictment).

In a judgment of 12 July 2015, the bench of the Criminal Appeals and Retrial Division ("the CPAR") of the Court of Justice of the Canton of Geneva found Mr Sperisen guilty of murder in respect of the facts set out in charges II.2 and III.3 of the indictment, and upheld the remainder of the first-instance judgment. The applicant lodged a criminal-law appeal.

In a judgment of 29 June 2017, the Federal Supreme Court set aside the judgment of 12 July 2015.

On 12 July 2017 Mr Sperisen applied to be released, arguing that there was insufficient evidence against him. On 18 July 2017 Judge A.C.F.-B., acting as the detention judge, dismissed his request.

On 27 September 2017 Mr Sperisen challenged Judge A.C.F.-B. for the first time; in essence, he accused her of bias, which he alleged had led her on 18 July 2017 to dismiss his application to be released. Having been asked to respond to the applicant's challenge, Judge A.C.F.-B. considered, in her observations of 3 October 2017, that the challenge had been lodged out of time and that, in any case, it ought to be dismissed as unfounded.

On 9 October 2017 Mr Sperisen submitted a second challenge in respect of Judge A.C.F.-B., accusing her of bias, this time on account of certain terms that she had used in her observations of 3 October 2017. In a judgment of 31 October 2017, the CPAR dismissed the applicant's challenges on the grounds that, even supposing they had not been lodged out of time, they were unfounded.

In a judgment of 27 April 2018, the CPAR, sitting as a seven-judge bench presided over by Judge A.C.F.-B., allowed the applicant's appeal in part and set aside the Canton of Geneva Criminal Court's judgment of 6 June 2014. It acquitted Mr Sperisen of the charges set out in points II.2 and III.3 of the indictment, but convicted him of aiding and abetting murder in respect of the charges set out in point I.1. It sentenced him to 15 years' imprisonment, with the time already spent in detention to be deducted from that term.

On 5 September 2018 Mr Sperisen appealed against the judgment of 27 April 2018, complaining that, among other points, Judge A.C.F.-B. had not been impartial.

In a judgment of 14 November 2019, the Federal Supreme Court upheld Mr Sperisen's conviction. With regard to Judge A.C.F.-B.'s alleged lack of impartiality, it held as follows: "... the Federal Supreme Court holds that this ground of appeal is inadmissible, in that the challenge was lodged out of time. It follows that this point, which is outside the scope of the dispute as set out in the referral decision, cannot, moreover, be re-examined, on pain of calling into question a matter that is *res judicata* ..."

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to an impartial tribunal), the applicant alleged that the president of the bench of the CPAR had lacked impartiality on account of certain terms that she had used in the order of 18 July 2017 and in her observations of 3 October 2017. Relying on Article 3 (prohibition of degrading treatment), the applicant submitted that he had been subjected to degrading treatment on account of the conditions of his detention in Champ-Dollon Prison. Lastly, relying on Article 5 § 3

(right to liberty and security), he complained that the length of his detention on remand, preventive detention and house arrest had been unreasonable.

The application was lodged with the European Court of Human Rights on 27 May 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Pere **Pastor Vilanova** (Andorra), *President*,
Jolien **Schukking** (the Netherlands),
Yonko **Grozev** (Bulgaria),
Darian **Pavli** (Albania),
Ioannis **Ktistakis** (Greece),
Andreas **Zünd** (Switzerland),
Oddný Mjöll **Arnardóttir** (Iceland),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 6 § 1

The order of 18 July 2017

The Court noted the applicant's submission to the effect that Judge A.C.F.-B. had lacked impartiality in her order of 18 July 2017. It noted that Article 58 of the Code of Criminal Procedure offered the applicant a remedy, in the form of a challenge which was to be lodged "without delay". However, both in its judgment of 30 January 2018 and in that of 14 November 2019, the Federal Supreme Court held that the applicant had not respected this obligation.

The Court saw nothing arbitrary in the way in which the Federal Supreme Court had established the relevant facts and applied Article 58 of the Code of Criminal Procedure in the circumstances of this case. The applicant had failed to comply with the applicable rules, which was one of the conditions that had to be fulfilled in order to meet the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention.

It followed that the complaint concerning Judge A.C.F.-B.'s alleged lack of impartiality on account of the terms used by her in the order of 18 July 2017 was inadmissible for failure to exhaust domestic remedies.

Judge A.C.F.-B.'s observations of 3 October 2017

The Court observed, firstly, that there was nothing in the case file to indicate that Judge A.C.F.-B. had displayed hostility or ill will towards the applicant for personal reasons. As president of the bench of the CPAR responsible for examining on appeal the criminal case against the applicant, Judge A.C.F.-B. had also acted as a detention judge. In reply to the applicant's challenge after the order extending his preventive detention had been set aside, Judge A.C.F.-B. had repeated, in her observations of 3 October 2017, the words that there was "sufficient evidence" to imply that the applicant's conviction was "likely" and that the material in the criminal case file "continue[d] to argue for the applicant's guilt".

The Court noted that Judge A.C.F.-B.'s observations on the necessity of continuing the applicant's pre-trial detention had not been made at the beginning of the criminal investigation in his case, but when the investigation file had already been completed and finalised. The Court considered that these observations of 3 October 2017 had gone beyond the expression of a mere suspicion; they showed that the line between the assessment of the necessity of extending the applicant's pre-trial detention and the establishment of his guilt at the end of the trial had become very fine. It followed that the applicant could reasonably have feared that Judge A.C.F.-B. had had a preconceived idea

about his guilt when, several months later, she had ruled on his case as a member of the CPAR bench – which in fact she had presided over – which, in its judgment of 27 April 2018, had sentenced him to 15 years' imprisonment.

In consequence, the Court considered that the applicant's fears that Judge A.C.F.-B. lacked impartiality had been objectively justified. It followed that the appellate court, that is to say, the CPAR bench presided over by Judge A.C.F.-B. which had determined the criminal charge against him, had not offered the guarantees of impartiality required by Article 6 § 1 of the Convention.

It followed that there had been a violation of Article 6 § 1 of the Convention in so far as it guaranteed the right to an impartial tribunal.

Other Articles

In view of its finding of a violation of Article 6 § 1 of the Convention, the Court considered that it was not necessary to examine separately the admissibility or merits of the other complaints under Article 6.

With regard to the alleged violation of Article 3 of the Convention, the Court noted, as had the Government, that the applicant had not raised the complaint concerning his conditions of detention before the CPAR. This complaint was therefore inadmissible for failure to exhaust domestic remedies.

With regard to the alleged violation of Article 5 § 3 of the Convention, the Court reiterated that the period of detention to be taken into consideration under Article 5 § 3 of the Convention started when a person was arrested or remanded in custody and ended when he or she was released and/or the charge was determined. In the present case, this period had ended on 27 April 2018, the date on which the CPAR had convicted the applicant after re-examining his criminal case on appeal. The applicant had lodged his application with the Court on 27 May 2020, well outside the six-month time-limit, and his complaint under Article 5 § 3 of the Convention was therefore inadmissible as being lodged out of time.

Just satisfaction (Article 41)

The Court held, unanimously, that the finding of a violation of Article 6 § 1 constituted sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicant, and that Switzerland was to pay him 15,000 euros (EUR) in respect of costs and expenses.

Separate opinion

Judge Grozev expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.