

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

FOURTH SECTION

CASE OF PERAK v. SLOVENIA

(Application no. 37903/09)

JUDGMENT

STRASBOURG

1 March 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Perak v. Slovenia,

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

András Sajó, *President*,
Vincent A. De Gaetano,
Boštjan M. Zupančič,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 9 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 37903/09) 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 Marko Perak (“the applicant”), on 6 July 2009.

2. The applicant was represented by Mr N. Grgurevič, a lawyer practising in Maribor. The Slovenian Government (“the Government”) were represented by their Agent, Mr Lucijan Bembič, State Attorney.

3. The applicant alleged under Article 6 § 1 of the Convention that he had not been afforded a fair hearing.

4. On 8 December 2014 his complaint concerning the alleged lack of a fair hearing was communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1963 and lives in Mežica.

6. On 22 August 2003 the applicant brought criminal charges (“criminal action”) for defamation against A.Š., thus undertaking criminal prosecution as private prosecutor. Along with the criminal action, the applicant made a

motion to be awarded compensation for pecuniary and non-pecuniary loss arising from the commission of the criminal offence in question.

7. On 16 November 2006 the Ljubljana District Court handed down its judgment and found A.Š. guilty of the criminal offence of defamation, giving him a suspended sentence of one month in prison and ordering him to pay the costs of the proceedings. In respect of the applicant's claim for compensation, the district court held that the claim was unsubstantiated and directed the applicant to seek compensation in civil proceedings.

8. Both parties appealed against the judgment before the Ljubljana Higher Court. In particular, the applicant alleged that there had been a violation of the Criminal Code and that the punishment imposed on A.Š. had been too lenient. He also complained about the fact that the first-instance court had not ruled on his claim for compensation, despite the fact that there had allegedly been enough material in the case file to enable it to rule on the matter.

9. On 11 March 2008 the Ljubljana Higher Court granted the applicant's appeal in respect of the punishment and increased it to three months of suspended sentence. However, it dismissed the complaint concerning the applicant's unsuccessful claim for compensation, confirming the lower court's view that it had not been substantiated.

10. The applicant did not institute separate civil proceedings for compensation.

11. On 12 May 2008 A.Š. lodged with the Supreme Court a request for the protection of legality (an extraordinary legal remedy whereby to challenge the procedural and substantive legality of final decisions), alleging an incorrect application of the Criminal Procedure Act. In particular, he alleged that the applicant's criminal action had been brought out of time.

12. On 27 May 2008 the Ljubljana District Court notified the applicant's representative that on 12 May 2008 A.Š. had lodged a request for the protection of legality; however, the notification did not include a copy of the said request for the protection of legality.

13. On 4 July 2008, pursuant to Section 423 of the Criminal Procedure Act, the request for the protection of legality was sent to the Supreme State Prosecutor for a response.

14. In that response, the Supreme State Prosecutor agreed that the criminal action had been brought out of time. This response was served on A.Š. and his representatives.

15. However, neither the applicant nor his representative were served with that response; nor were they ever served with the request for the protection of legality.

16. On 28 August 2008 the Supreme Court, without having informed the parties of the date of the deliberation session, deliberated in private and upheld the request for the protection of legality, dismissing the applicant's

action as having been lodged out of time. Further, it ordered the applicant to pay the costs of proceedings including the costs and attorney's fees incurred by A.Š. and a lump sum covering court fees of 600 euros (EUR).

17. Not being aware that the request for the protection of legality had already been decided, on 3 September 2008 the applicant's representative requested the relevant documentation from the Ljubljana District Court.

18. On 5 September 2008 the Ljubljana District Court informed the applicant's representative that the case-file documents had been with the Supreme Court since 30 June 2008. Accordingly, on the same day the applicant's representative requested from the Supreme Court the documentation regarding the request for the protection of legality.

19. On 12 September 2008 the Supreme Court informed the applicant's representative that A.Š. had lodged a request for the protection of legality which had been upheld on 28 August 2008.

20. On 22 September 2008 the Supreme Court's judgment was served on the applicant's representative.

21. On 20 November 2008 the applicant lodged a constitutional complaint. Citing Articles 14, 22 and 23 of the Constitution, the applicant claimed that he had not been afforded equality before the law and that his right to judicial protection and his right to equal protection had been violated as he had not been given the opportunity to participate in the proceedings before the Supreme Court. He also alleged violations of the Convention, citing Articles 6 and 14 and Article 1 of Protocol No. 1, the latter in respect of the fact that he had been ordered to pay the opposite party's costs of the proceedings.

22. On 5 January 2009 the Constitutional Court rejected the applicant's complaint.

II. RELEVANT DOMESTIC LAW

23. The following provisions of the Constitution of the Republic of Slovenia are relevant to the present case:

Article 14 (Equality before the Law)

"In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance.

All are equal before the law."

Article 22 (Equal Protection of Rights)

"Everyone shall be guaranteed equal protection of rights in any proceeding before a court and before other state authorities, local community authorities and bearers of public authority that decide on his rights, duties or legal interests."

Article 23 (Right to Judicial Protection)

“Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law.

Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual.”

24. Under the rules of domestic criminal law, certain criminal offences are not prosecuted by the State Prosecutor’s Office; instead, it is the injured parties themselves who are entitled to undertake criminal prosecution against the alleged perpetrators of those offences. By virtue of section 178 of the Criminal Code, as in force at the material time, the prosecution of certain criminal offences against honour and reputation including defamation is initiated upon a private action.

25. The relevant provisions of the Criminal Procedure Act read as follows:

Section 19

“(2) In cases involving offences liable to prosecution ex officio, the public prosecutor shall be the authorised prosecutor. In cases involving offences liable to private prosecution a private prosecutor shall be the authorised prosecutor ...”

Section 423

“(2) The Supreme Court shall ... send a copy of a request [for the protection of legality] to the adverse party who may reply thereto within fifteen days of receipt of the request ...”

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION**

26. The applicant complained that he had not been afforded a fair hearing. In particular, he submitted that the opposite party’s request for the protection of legality had never been served on him or his representative and that he had thus not been able to participate in the proceedings before the Supreme Court.

27. Article 6 § 1 of the Convention reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

1. *The parties' submissions*

28. The Government raised an objection in respect of the Court's competence *ratione materiae*, arguing that Article 6 § 1 of the Convention did not apply in the present case since the prosecution initiated by the applicant had not been covered by this provision.

29. In this connection they pointed out that in the criminal proceedings at issue, the applicant had merely sought the defendant's conviction. Although he had also made a claim for compensation, the Ljubljana District Court had not ruled on it; rather, it had directed the applicant to seek compensation in civil proceedings, as the claim had been unsubstantiated. They also claimed that the applicant had not shown that he had instituted civil proceedings in this regard.

30. The Government relied on the decision in the case of *X v. the Federal Republic of Germany* (no. 7116/75, Commission decision of 4 October 1976, Decisions and Reports 7), which ruled that while the right to enjoy a good reputation constitutes a "civil right" within the meaning of Article 6 § 1 of the Convention, private prosecution proceedings seeking redress against alleged attacks on the applicant's honour do not fall within the scope of this provision, and that the right of access to the courts does not include the right to bring criminal proceedings against a third person.

31. The applicant disputed the Government's arguments, claiming that Article 6 § 1 of the Convention was applicable under its civil limb as he had claimed non-pecuniary damages in the criminal proceedings.

2. *The Court's assessment*

32. The Court reiterates that the Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence. For it to fall within the scope of the Convention, such a right must be indissociable from a victim's exercising the right under domestic law to bring civil proceedings, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (see *Gorou v. Greece* (no. 2) [GC], no. 12686/03, §§ 24-26, 20 March 2009).

33. It is true that in the case of *X v. the Federal Republic of Germany* relied on by the Government, criminal proceedings instituted by a private individual were not held to entitle the latter to procedural protection under Article 6 § 1. However, since that case the focus of examination has shifted from the type of proceedings chosen to protect one's rights to the substance of what is sought to be protected in any particular proceedings. Indeed, the Court has considered it conceivable that Article 6 may be applicable even in the absence of a claim for financial reparation: it suffices if the outcome of the proceedings is decisive for the "civil right" in question (see *Perez*

v. France [GC], no. 47287/99, § 65, ECHR 2004-I). Accordingly, this provision has been held by the Court to apply both to those situations in which an applicant has joined criminal proceedings as a civil party to protect his or her civil interests (see *Perez*, cited above, §§ 57-75), and to those in which the applicant pursued a private criminal prosecution to the same end (see *Helmerts v. Sweden*, 29 October 1991, §§ 27-30, Series A no. 212-A). In *Helmerts*, the Court found Article 6 § 1 applicable to the case because the outcome of the applicant's private prosecution and his claim for compensation depended on the decision regarding whether or not his good reputation had been unjustly harmed.

34. The Court notes that the main features of the present case are similar to those of *Helmerts* in that the applicant brought a private criminal prosecution for defamation, joined by a claim for compensation, both of which were dismissed by the domestic courts. Hence, whether or not the applicant's claim for compensation proved to be unsubstantiated and whether or not he were subsequently to initiate separate civil proceedings, in the criminal proceedings at issue the domestic courts were called to rule on whether the applicant's reputation had been damaged by the defendant's actions. Therefore, as in *Helmerts*, the outcome of the applicant's criminal action was decisive in respect of his right to a good reputation.

35. Having regard to the foregoing, the objection of the Government must be dismissed.

36. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

37. The Government acknowledged that a copy of the request for the protection of legality had not been served on the applicant's representative. This was due to a flaw in the workflow routine of the registry and of the judge rapporteur of the Supreme Court; it was not the result of a legal strategy designed to deny the applicant the right to participate in the proceedings.

38. They further submitted that the applicant's representative had been informed by the Ljubljana District Court on 28 May 2008 that a request for the protection of legality had been lodged, but had failed to point out that it had not been served on him until 8 September 2008. In the Government's opinion it is the duty of all participants in criminal proceedings to draw attention to any possible errors, even if such errors have not been made by them.

39. Lastly, they argued that, in view of the fact that the Supreme Court had issued a procedural decision dismissing the applicant's action as having been lodged out of time, there was no causal link between the fact that the applicant and his representative had not been able to reply to either the request for the protection of legality or the Supreme Court's decision.

40. The applicant maintained that he had not been afforded a fair hearing as he had been excluded from the proceedings before the Supreme Court, contrary to Section 423 of the Criminal Procedure Act.

2. *The Court's assessment*

41. The Court reiterates that the concept of a "fair hearing" implies the right to adversarial proceedings, under which parties must have the opportunity not only to have made known any evidence needed for their claims to succeed, but also to have knowledge of, and the opportunity to comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (see *Nideröst-Huber v. Switzerland*, 18 February 1997, § 24, *Reports of Judgments and Decisions* 1997-I, and *K.S. v. Finland*, no. 29346/95, § 21, 31 May 2001).

42. In the present case the request for the protection of legality lodged by the defendant was not communicated to the applicant. He was thus not afforded the opportunity to express his views on the arguments made by the defendant; those arguments were ultimately accepted by the Supreme Court and resulted in the overturning of the lower courts' judgments and precluding the applicant's criminal action on procedural grounds.

43. In this connection, it is undisputed that under domestic law – specifically, Section 423 of the Criminal Procedure Act – the Supreme Court should have sent a copy of the request to the applicant and invited him to reply thereto. As the Court has frequently observed, procedural rules are designed to ensure the proper administration of justice and compliance with the principle of legal certainty, and litigants are entitled to expect those rules to be applied (see, *inter alia*, *Cañete de Goñi v. Spain*, no. 55782/00, § 36, ECHR 2002-VIII, and *Miholapa v. Latvia*, no. 61655/00, § 24, 31 May 2007).

44. While the Government acknowledged that the failure to communicate the defendant's request for the protection of legality to the applicant resulted from a mistake on the part of the Supreme Court, they also pointed out that the applicant's representative had been informed that said request had been lodged about three months before the documentation relating to it had been requested. The Government took the view that that information had afforded the applicant sufficient opportunity to acquaint himself with the contents of the request. The Court, however, cannot accept that argument. As it has found on a number of occasions, regardless of whether or not the applicant had a theoretical right of access to the documents which the authorities had failed to communicate to him, the onus

was on the Supreme Court to ensure his full participation in the proceedings, including by communicating all documents on file, and thus to afford him an opportunity to comment on the defendant's request (see, *mutatis mutandis*, *Gaspari v. Slovenia*, no. 21055/03, § 53, 21 July 2009; *Milatová and Others v. the Czech Republic*, no. c, § 65, ECHR 2005-V; and *H.A.L. v. Finland*, no. 38267/97, § 45, 27 January 2004).

45. Finally, as to the Government's objection that there was no causal link between the fact that the applicant could not reply to the request for the protection of legality and the Supreme Court's decision, it is noteworthy that the Court has held on many occasions that it does not need to be determined whether a failure to forward a document constitutes actual prejudice against the applicant in question; rather, the existence of a violation is conceivable even in the absence of any prejudice. In the present case, it was for the applicant to assess whether or not the documentation in question required him to comment (see, among other authorities, *Gaspari*, cited above, § 52; *Milatová and Others*, cited above; § 65 and *H.A.L.*, cited above, § 47).

46. Having regard to the above, the Court finds that the procedure followed in the present case did not enable the applicant to participate in the proceedings before the Supreme Court and thus deprived him of a fair hearing within the meaning of Article 6 § 1 of the Convention. There has therefore been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed EUR 20,000 in respect of non-pecuniary damage.

49. The Government, taking the view that the application was inadmissible, argued that this claim was unjustified.

50. The Court, however, considers that the applicant suffered non-pecuniary loss arising from the breach of the Convention found in this case. Therefore, ruling on an equitable basis, it awards the applicant EUR 2,500 in that respect. Moreover, while the Slovenian legislation does not explicitly provide for reopening of civil proceedings following a judgment by the Court finding a violation of the Convention (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 27, ECHR 2015), the Court has already stated that

the most appropriate form of redress in cases where the applicant was deprived of a fair hearing on account of his inability to participate in the proceedings before a national court would be for the legislature to provide for the possibility of reopening the proceedings and re-examining the case in keeping with all the requirements of a fair hearing (see *Gaspari v. Slovenia*, no. 21055/03, § 80, 21 July 2009).

B. Costs and expenses

51. The applicant also claimed EUR 745.38 for court fees and EUR 2,900 for attorney's fees incurred by the defendant in the domestic proceedings.

52. The Government maintained their position that the application was inadmissible.

53. 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, regard being had to the documents in its possession, in particular the cost orders of 6 June 2008, 7 October 2008 and 17 April 2009 issued by the Ljubljana District Court, and the above criteria, the Court awards the full amount claimed by the applicant, that is to say EUR 3,645.38.

C. Default interest

54. 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 complaint under Article 6 § 1 of the Convention concerning the fairness of the criminal proceedings admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *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, the following amounts:

- (i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (ii) EUR 3,645.38 (three thousand six hundred and forty-five euros thirty-eight cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 1 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.



Fatoş Aracı
Deputy Registrar



András Sajó
President