



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

FIRST SECTION

CASE OF KLIBA v. CROATIA

(Application no. 30375/16)

JUDGMENT

STRASBOURG

18 April 2019

This judgment is final but it may be subject to editorial revision.

In the case of Kliba v. Croatia,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Aleš Pejchal, *President*,

Tim Eicke,

Jovan Ilievski, *judges*,

and Renata Degener, *Deputy Section Registrar*,

Having deliberated in private on 26 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 30375/16) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Slobodan Kliba (“the applicant”), on 24 May 2016.

2. The applicant was represented by Ms V. Drenški Lasan, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

3. On 12 July 2018 notice of the complaint concerning the fairness of the criminal proceedings was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1954 and lives in Vodnjan.

5. The facts of the case, as submitted by the parties, may be summarised as follows.

6. On 9 July 2010 the applicant was indicted before the Pula-Pola Municipal Court (*Općinski sud u Puli-Pola*) on charges of indecent behaviour.

7. He was tried in summary proceedings (*skraćeni postupak*). During the proceedings before the first- and the second-instance courts he was represented by a lawyer, M.K.

8. On 11 October 2011 the Pula-Pola Municipal Court found the applicant guilty as charged and sentenced him to one year’s imprisonment.

9. On 7 November 2011 the applicant lodged an appeal with the Pula-Pola County Court (*Županijski sud u Puli-Pola*), challenging the factual and legal grounds for his conviction and sentence. He did not ask that he or his lawyer be invited to the session of the appeal panel.

10. On an unspecified date in 2011, the Pula-Pola County Court, acting as the court of appeal, forwarded the applicant's appeal and the Pula-Pola Municipal Court's case file to the Pula-Pola County State Attorney's Office (*Županijsko državno odvjetništvo u Puli-Pola*) for their examination and opinion.

11. On 7 December 2011 the Pula-Pola County State Attorney's Office returned the case file to Pula-Pola County Court accompanied by a submission which read as follows:

“In the criminal case against Slobodan Kliba, accused of the criminal offence referred to in Article 193 § 2 in conjunction with Article 192 § 1 of the Criminal Code, the defence lodged an appeal against the judgment of the Pula Municipal Court No. K-344/10 of 11 October 2011 complaining about errors of facts, alleging that the Criminal Code had been violated and challenging the sanction as well as the decision concerning costs and expenses.

I consider the appeal unfounded, therefore I propose that it be dismissed as in my opinion the facts in the criminal proceedings in question were duly established. The Criminal Code was not violated and the sanction inflicted is appropriate, considering the type and seriousness of the criminal offence of which the accused was found guilty. The costs of proceedings were properly estimated and can be borne by the accused, regard being had to his financial status.”

The submission in question was not forwarded to the defence.

12. On 20 January 2012 the Pula-Pola County Court held a session which the parties did not attend. On the same day it dismissed the appeal as unfounded and upheld the first-instance judgment.

13. On 13 March 2012 the applicant, represented by lawyer V.D.L., lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) complaining, *inter alia*, that his right to a fair trial had been violated because the submission of the Pula-Pola County State Attorney's Office had not been communicated to the defence.

14. On 14 January 2016 the Constitutional Court dismissed the applicant's constitutional complaint as unfounded. It held that the fact that the Pula-Pola County State Attorney's Office submission of 12 July 2013 had not been forwarded to the applicant had not breached his constitutional rights, having regard to the content of the submission, the fact that he had been tried in summary proceedings and that he had not asked that he or his lawyer be invited to the session of the appeal panel.

15. The decision of the Constitutional Court was served on the applicant's representative on 2 February 2016.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant domestic law in force at the material time, concerning the forwarding of a reasoned submission of the State Attorney's Office in the course of appeal proceedings to the defence is set out in the cases of *Zahirović v. Croatia*, (no. 58590/11, §§ 23 and 25, 25 April 2013), and *Lonić v. Croatia*, (no. 8067/12, §§ 36 and 37, 4 December 2014).

THE LAW

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

17. The applicant complained that he had not had a fair trial in that the submission of the State Attorney's Office to the appellate court in the criminal proceedings against him had not been communicated to the defence. He relied on Article 6 § 1 of the Convention, which in the relevant part reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law. ...”

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' arguments

19. The applicant maintained that there had been a violation of his right to a fair trial.

20. The Government contended that the Pula-Pola County State Attorney's Office's submission contained only general statements, and that it was not substantiated by the analysis of either factual or legal issues of the case. It could not have influenced the Pula-Pola County Court's decision in any manner. There had therefore been no reason to communicate the submission in question to the defence.

21. They further submitted that, in the proceedings before the first- and the second-instance courts, the applicant had been represented by an experienced lawyer, M.K., who ought to have known that the appeal

submitted by the defence and the first-instance case file would be forwarded to the competent State Attorney's Office for examination and opinion. The lawyer could therefore have asked to be granted access to the second-instance case file, and for the State Attorney's submission to be communicated to the defence. Moreover, neither the applicant nor his lawyer had asked to be present at the session of the appeal panel. Had they done so, they could have learned about the State Attorney's submission and replied to it.

2. *The Court's assessment*

22. In the cases of *Zahirović* (cited above, §§ 44-50) and *Lonić v. Croatia* (no. 8067/12, §§ 83-86, 4 December 2014), the Court found a violation of the principle of equality of arms and the right to adversarial proceedings under Article 6 § 1 of the Convention on the grounds that a submission of the competent State Attorney's Office to the appellate court had not been forwarded to the defence.

23. As in *Zahirović*, under the relevant domestic law applicable at the material time, in the present case there was no obligation on the part of the courts to forward the opinion of the competent State Attorney to the defence (see paragraph 16 above, with further references to §§ 23 and 25 of the *Zahirović* judgment, in particular Article 373 of the 1997 Code of Criminal Procedure).

24. Referring to the Government's argument that the prosecution's submission in question contained only general statements and that it could not have influenced the appellate court's decision in any manner (see paragraph 20 above), the Court notes that the submission constituted a reasoned opinion on the merits of the case, aiming to influence the appellate court's decision by calling for the appeal to be dismissed (see paragraph 11 above). The Court reiterates that the principle of equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality. It is a matter for the defence to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence (see *Zahirović*, cited above, §§ 43 and 48; *Lonić*, cited above, § 84, and *Bulut v. Austria*, 22 February 1996, § 49, Reports of Judgments and Decisions 1996-II).

25. As to the Government's argument that the applicant's lawyer ought to have known that the appeal submitted by the defence and the first-instance case file would be forwarded to the competent prosecutor for examination and opinion, and could therefore have asked to be granted access to the second-instance case file and for the prosecution's submission to be communicated to the defence (see paragraph 21 above), the Court reiterates that it was for the domestic courts to inform the applicant that the opinion had been filed and that he could, if he so wished, comment on it in writing (see, for example, *Göç v. Turkey* [GC], no. 36590/97, § 57,

ECHR 2002 V). To require the applicant's lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file would amount to imposing a disproportionate burden on him and would not necessarily have guaranteed a real opportunity to comment on the opinion (*ibid.*, and *Milatová and Others v. the Czech Republic*, no. 61811/00, § 61, ECHR 2005 V).

26. Lastly, the Government argued that had the applicant or his lawyer asked to be present at the session of the appeal panel they could have learned about the State Attorney's submission and replied to it (see paragraph 21 above). The Court does not share this view since accepting that argument would in effect mean that the question of whether or not the defendant would be informed of the fact that observations regarding the merits of his case have been filed by the prosecution would entirely depend on the presence of the defence at the session of the appeal panel. This, in the Court's assessment, would likewise amount to imposing a disproportionate burden on the defence and would render meaningless the right of the defence to have knowledge of, and to comment on, the prosecution's submission in the appeal proceedings.

27. Against the above background, the Court concludes that the principle of equality of arms and the right to adversarial proceedings have not been respected in the present case.

28. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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

30. The applicant claimed 2,500 euros (EUR) in respect of non-pecuniary damage.

31. The Government deemed this claim excessive and unsubstantiated.

32. Having given due consideration to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

33. The applicant also claimed 10,000 Croatian kunas (HRK) (approximately EUR 1,345) for the costs and expenses incurred before the domestic courts and EUR 1,200 for those incurred before the Court.

34. The Government contested these claims.

35. 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 were reasonable as to quantum.

36. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 850 for costs and expenses incurred in the proceedings before the domestic courts and EUR 1,000 for those incurred before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

37. 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*
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,850 (one thousand eight hundred and fifty euros), 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 amounts 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 18 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Deputy Registrar

Aleš Pejchal
President