



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

SECOND SECTION

CASE OF BERGER v. FRANCE

(Application no. 48221/99)

JUDGMENT

STRASBOURG

3 December 2002

FINAL

21/05/2003

In the case of Berger v. France,

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

Mr A.B. BAKA, *President*,

Mr J.-P. COSTA,

Mr GAUKUR JÖRUNDSSON,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 10 July 2001 and on 12 November 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48221/99) against the French Republic lodged with the European Court of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mrs Marie-Thérèse Berger (“the applicant”), on 28 October 1998. The application was registered on 20 May 1999.

2. The French Government (“the Government”) were represented by their Agent, Mrs M. Dubrocard, Head of the Human Rights Section, Ministry of Foreign Affairs.

3. The applicant complained, in particular, of the unfairness of criminal proceedings before the Court of Cassation in which she had been a civil party seeking damages.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 10 July 2001, the Chamber declared the application partly admissible.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. Both the applicant and the Government filed written observations on the merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1932 and lives in Champagny-en-Vanoise (Savoie).

9. On 30 September 1991 she signed a notarial deed by which she entered into a leasing arrangement with a limited company called SOFEBAIL for the renovation and furnishment of a holiday centre. She intended to run the business as a sole trader. As early as the end of 1991 she complained that the company had failed to complete the renovation works stipulated in the contract.

A. The applicant's criminal complaint and application to join the proceedings as a civil party seeking damages

10. On 13 June 1994 the applicant lodged a criminal complaint against the company for fraud, theft and fraudulent breach of trust and sought leave to join the proceedings as a civil party seeking damages.

11. On 5 May 1997 the investigating judge discontinued the proceedings in an order worded as follows:

“It appears, in fact, from the evidence given by the civil parties and the head of SOFEBAIL and from the documents produced by the parties that the leasing arrangement, the mechanism of which has been described as fraudulent by the civil party, does not fall within the ambit of the criminal law. The disputes between [the applicant] and SOFEBAIL are clearly matters governed by civil or commercial law and have, moreover, given rise to various proceedings of this type in the civil or commercial courts.”

12. On 7 May 1997 the applicant appealed against that order.

13. On 10 July 1997 the Indictment Division of the Colmar Court of Appeal upheld the order in question. It found that the applicant's complaints were “manifestly dilatory” and that some of her allegations were “contradictory”, “purely gratuitous” or “entirely unsupported”.

14. On 11 July 1997 the applicant appealed to the Court of Cassation. Her appeal was heard on 24 September 1998. She was represented by counsel. Both parts of the reporting judge's report (the first containing a statement of the facts, the procedure and the grounds of appeal and the second a legal analysis of the case and an opinion on the merits of the appeal) had been sent to the advocate-general prior to the hearing. However, the applicant had not been sent a copy of both parts of the reporting judge's report. In a judgment of the same date the Court of Cassation declared the appeal inadmissible on the following grounds:

“The Court of Cassation is satisfied from the wording of the judgment appealed against that, in upholding the order discontinuing the proceedings, the Indictment Division, after examining all the facts alleged by the appellant and addressing the main arguments in her memorial, stated the reasons for its decision that there was insufficient evidence that anyone had committed the alleged offences of fraudulent breach of trust and fraud or any other offence.

None of the grounds of appeal, which amount to contesting the validity of the judges' findings of fact and of law, corresponds to any of the situations in which a civil party may appeal to the Court of Cassation, under Article 575 of the Code of Criminal Procedure, against a judgment of an indictment division in the absence of an appeal by the prosecution ...”

...

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Article 575 of the Code of Criminal Procedure provides:

“A civil party cannot appeal to the Court of Cassation against judgments of the investigation division unless the prosecution lodges an appeal.

However, an appeal to the Court of Cassation by the civil party alone shall be admissible in the following circumstances:

- (1) where the investigation division has stated in the judgment that there are no grounds for an investigation;
- (2) where the investigation division has declared the civil party's action inadmissible;
- (3) where the investigation division has upheld an objection terminating the criminal proceedings;
- (4) where the investigation division has declared, of its own motion, or on an objection by the parties, that it has no jurisdiction;
- (5) where the investigation division has omitted to rule on a charge;
- (6) where the judgment does not formally satisfy the conditions essential for its legal validity;
- (7) where a breach of personal rights as defined in Articles 224-1 to 224-5 and 432-4 to 432-6 of the Criminal Code has been alleged.”

20. The Court of Cassation has confirmed that Article 575 is compatible with Article 6 of the Convention. In a recent judgment the Criminal Division reiterated that there was no incompatibility between the two foregoing provisions, “since the victim had a remedy in the civil courts by which to exercise his or her rights” (Court of Cassation, Criminal Division

(*Cass. crim.*), 23 November 1999, *Société Besnier Charchigne*, *Bulletin criminel (Bull. crim.)* no. 268).

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained of unfairness in the criminal proceedings against SOFEBAIL which she had joined as a civil party seeking damages. She submitted that there had been an infringement of her right of access to a court on account of the Court of Cassation's decision to declare her appeal inadmissible in the absence of an appeal by the prosecution. She further alleged that there had been a breach of the principle of equality of arms because the two parts of the reporting judge's report had not been sent to her lawyer. The applicant relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

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

A. Inadmissibility of the applicant's appeal to the Court of Cassation

1. Arguments before the Court

23. The applicant maintained that the general scope of application intended by Article 6 of the Convention could not be ignored or reduced. In her submission, the restrictive effect of Article 575 of the Code of Criminal Procedure on a civil party's right to appeal to the Court of Cassation was unfair in a democratic country. She complained that the dismissal of her appeal had seriously damaged her interests because, had the Court of Cassation acknowledged the merits of her claim, she could have saved her possessions.

24. The Government observed at the outset that, irrespective of the possibilities available to civil parties under the rules of criminal procedure, the primary purpose of the criminal law was not to compensate their loss, but to prosecute and punish criminal offenders. That was the principle underlying the provisions of Article 575 of the Code of Criminal Procedure. The restrictive effect of that provision on a civil party's ability to appeal to

the Court of Cassation derived both from the nature of the judgments of indictment divisions and from the role accorded to a civil action in a criminal trial.

25. The Government maintained, in particular, that indictment divisions (now called investigation divisions) did not rule on the merits of the case. They did not decide whether or not a defendant was guilty, but ensured that the investigation was conducted properly. In doing so, they determined how the criminal proceedings should proceed, that is, whether the case should be referred to a trial court or discontinued.

26. A civil action was merely ancillary to the public prosecution, which was in principle brought by the public prosecutor. Accordingly, if the public prosecutor did not consider it necessary to appeal against the investigation division's judgment it was not deemed to be in the general interest to give the civil party the option as well, unless the decision seriously harmed his or her interests. If the civil party had an unlimited right of appeal against judgments of the investigation division – and, particularly, as in this case, against decisions to discontinue the proceedings – even though the public prosecutor (who represents the prosecuting authorities) had considered that there was no need to appeal, there would be a risk of exposing the accused to dilatory proceedings or to an abuse of process despite the statutory presumption of innocence in his or her favour. The Government stressed that, in any event, the civil party did still have the possibility of bringing an action in the civil courts claiming compensation for his or her loss.

27. The Government also noted that the Criminal Division of the Court of Cassation had interpreted the sixth circumstance set out in the second paragraph of Article 575 of the Code of Criminal Procedure liberally by extending the notion of “conditions essential” for the legal validity of the judgment to the reasoning. The Court of Cassation had accordingly held that an appeal by the civil party alone was possible if the judgment was not properly reasoned, omitted to address the main arguments of the civil party's memorial, contained no statement of the facts or did not give adequate reasons in respect of the charges laid in the complaint and civil party application.

28. With regard to the present case, the Government noted that, in appealing to the Court of Cassation, the applicant had not raised any ground of appeal in her supplementary memorial justifying an examination of the merits of her appeal in the absence of an appeal by the prosecution. The Criminal Division considered that the grounds of appeal submitted by the applicant amounted to “contesting the validity of the judges' findings of fact and of law” and did not come within the ambit of any of the situations listed in the second paragraph of Article 575 of the Code of Criminal Procedure. Before concluding that the appeal was inadmissible, the Criminal Division had first satisfied itself that the judgment appealed against complied with the applicable legal rules. Accordingly, the applicant's appeal to the Court of

Cassation had clearly not been deprived of all useful effect since the Court of Cassation had examined the applicant's substantive complaints – at least summarily – and satisfied itself that the decision complained of had been properly reached. Lastly, the Government pointed out that the applicant's complaint had previously been examined by two successive courts that had reached the same conclusion.

29. The Government maintained that the application of Article 575 of the Code of Criminal Procedure in the instant case had not infringed the applicant's right of access to a court and had not breached the principle of equality of arms. In that connection they stressed that the civil party could not be regarded as the prosecution's opponent, since it was in both their interests that there be a prosecution and trial in respect of events that had allegedly caused damage to the victim where these were a matter of criminal law. In any event, the prosecution could not appeal against all judgments of the investigation divisions. An appeal by the prosecution was admissible only if the decision in question affected the general interest rather than merely private interests (*Cass. crim.*, 3 May 1994, *Bull. crim.* no. 161). The respective roles of the civil party and the prosecution in criminal trials explained the scope of their power to appeal against judgments of investigation divisions.

2. *The Court's assessment*

30. The Court reiterates that the “right to a court”, of which the right of access is one aspect (see, in particular, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36), is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *Levages Prestations Services v. France*, judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1543, § 40). However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 78-79, § 59, and *Bellet v. France*, judgment of 4 December 1995, Series A no. 333-B, p. 41, § 31).

31. In the instant case the applicant wanted to appeal against a judgment of the indictment division upholding the order of the investigating judge discontinuing the proceedings and ruling that the facts complained of did not fall within the ambit of the criminal law. As the prosecution did not consider it necessary to appeal, the applicant had to show that the judgment

fell within the ambit of one of the situations listed in Article 575 of the Code of Criminal Procedure. In accordance with that provision, other than in the seven exhaustively listed situations, the civil party alone cannot appeal to the Court of Cassation against a judgment of the indictment division if the prosecution does not appeal. The applicant's appeal was declared inadmissible on the ground that her submissions did not fall within the ambit of any of the situations listed in the second paragraph of the aforementioned provision.

32. In order to satisfy itself that the very essence of the applicant's "right to a court" was not impaired by the declaration that her appeal was inadmissible, the Court will firstly examine whether the procedure to be followed for an appeal to the Court of Cassation could be regarded as foreseeable from the point of view of a litigant and whether, accordingly, the penalty for failing to follow that procedure did not infringe the proportionality principle (see *Levages Prestations Services*, cited above, p. 1543, § 42).

33. The Court notes at the outset that the applicant could have acquainted herself with the rules governing appeals to the Court of Cassation by reading Article 575 of the Code of Criminal Procedure.

34. It thus remains for the Court to examine whether, in the circumstances of the case, the inadmissibility decision – while being foreseeable – nonetheless infringed the applicant's right to a court on account of its nature or consequences.

35. The Court notes that an appeal to the Court of Cassation on points of law is a special form of appeal. The Court of Cassation does not re-examine the merits of cases submitted to it, but can only penalise an error of law by partly or fully setting aside the decision appealed against. Under the criminal law, an appeal to the Court of Cassation is open to any party to criminal proceedings who has an interest in appealing on a point of law. Although the admissibility of an appeal by the civil party is – other than in the seven exhaustively listed situations – conditional on the existence of an appeal by the prosecution, this limitation derives from the nature of judgments given by the investigation divisions and the role accorded to civil actions in criminal proceedings. The Court agrees with the Government that civil parties should not have an unlimited right to appeal to the Court of Cassation against judgments discontinuing the proceedings (see paragraph 26 above).

36. Furthermore, in the present case the applicant's appeal to the Court of Cassation was heard after her case had been examined by the investigating judge and the Indictment Division. The Court also notes that the Criminal Division delivered its inadmissibility decision in this case after satisfying itself, in accordance with its usual practice, that the judgment had been given in accordance with the applicable legal rules regarding essential formalities. Thus, although it declared the appeal inadmissible, the Court of

Cassation did nonetheless examine it in order to ensure that the decision appealed against had been properly reached (see, *mutatis mutandis*, *Bennour v. France* (dec.), no. 48991/99, 13 September 2001).

37. Lastly, the Court notes that the applicant was able to sue the company in question in the civil courts and did in fact make use of that remedy by bringing an action in the Strasbourg *tribunal de grande instance* where her claims were dismissed both at first instance and on appeal.

38. In conclusion, the applicant's right to a court as guaranteed by Article 6 § 1 of the Convention was not infringed as a result of the conditions imposed on her for the admissibility of her appeal to the Court of Cassation. Having regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution, the Court cannot accept that the equality-of-arms principle has been infringed in the instant case. In that connection the Court agrees with the Government that a civil party cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.

39. Accordingly, there has not been a violation of this provision.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the ruling that the applicant's appeal to the Court of Cassation was inadmissible under Article 575 of the Code of Criminal Procedure;

...

Done in French, and notified in writing on 3 December 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President