DIRITTIFONDAMENTALI.IT
rivista on-line

E' da ritenersi violato il principio del giusto processo per mancato rispetto del contraddittorio tra le parti
(CEDU, sez. IV, sent. 21 novembre 2017, ric. n. 5769-11)

La Corte di Strasburgo ha ritenuto violato l'articolo 6 (diritto al giusto processo) della CEDU ritenendo che le autorità giudiziarie ungheresi avevano giudicato il caso solo esaminando le memorie di controparte, violando palesemente il principio del contraddittorio. Ciò era accaduto a causa di un errore procedurale relativo al termine per la presentazione delle memorie, privando così il ricorrente del suo diritto di rispondere alle memorie del suo avversario. Ad avviso della Corte, ciò appare inconciliabile con il concetto di un processo equo, che significa anche "l'opportunità per le parti di un processo di ... commentare ... le osservazioni presentate ... al fine di influenzare la decisione della corte".

***

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

FOURTH SECTION

CASE OF SCHESZTÁK v. HUNGARY

(Application no. 5769/11)

JUDGMENT

STRASBOURG

21 November 2017

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 Scheszták v. Hungary,
The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Ganna Yudkivska, President,
Vincent A. De Gaetano,
Faris Vehabović,
Egidijus Kūris,
Carlo Ranzoni,
Georges Ravarani,
Péter Paczolay, judges,
and Marialena Tsirli, Section Registrar,
Having deliberated in private on 11 July, 3 and 10 October 2017,
Delivers the following judgment, which was adopted on the last-mentioned date:
PROCEDURE

1. The case originated in an application (no. 5769/11) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Sándor Zsigmond Scheszták ("the applicant"), on 18 January 2011.
2. The applicant was represented by Ms M. Palásti, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.
3. The applicant alleged, in particular, that the labour law proceedings to which he had been a party had been unfair, in breach of Article 6 § 1 of the Convention, because the Supreme Court had given judgment without awaiting his pleadings.
4. On 14 March 2016 this complaint was communicated 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

5. The applicant was born in 1953 and lives in Ercsi.
6. On 28 February 2007 the applicant filed an action with the Székesfehérvár Labour Court against his former employer, claiming unlawful dismissal. On 6 June 2008 the court found in his favour and obliged the respondent to the action to pay him a severance payment, outstanding wages, a lump sum in compensation, and default interest.
7. On appeal, on 25 February 2009 the Fejér County Regional Court changed the judgment in part. In June 2009 the respondent filed a petition for review.
8. In an order of 2 June 2010 the Supreme Court forwarded the respondent's petition to the applicant and informed him that, within eight days of receiving the order, he could file comments on the respondent's petition and/or request an oral hearing.
9. On 7 June 2010 the applicant received the order, and on 14 June 2010 he dispatched his comments on the petition for review. The document was received by the Supreme Court on 17 June 2010.

10. Meanwhile, on 16 June 2010 the Supreme Court, sitting as a review court, had given a judgment in which it had reversed the previous decisions and dismissed the applicant's action. The court stated that the applicant had not filed any comments on the petition for review.
11. The applicant complained and addressed his complaint of 6 December 2010 to the President of the Supreme Court. The Head of the Civil Division informed him that his comments on the petition for review had been belated.
II. RELEVANT DOMESTIC LAW

12. As in force in the relevant period, section 339(1) of Act no. IV of 1959 on the Civil Code provided as follows:
"Anyone who unlawfully causes damage to another person shall be obliged to pay compensation. He shall be exculpated if he proves that he proceeded in such a manner as could generally be expected in the given situation."

13. Moreover, section 349 of the same Act provided as follows:
"(1) Liability for damage caused by the State administration shall only be established if the damage could not be prevented by means of ordinary legal remedies, or if the person concerned has resorted to ordinary legal remedies appropriate for preventing damage.

...

(3) These rules shall also apply to liability for damage caused by the courts or the prosecution authorities, unless otherwise provided by law."

14. The Government submitted three court decisions illustrating the domestic practice on official liability actions under section 349.
In case no. BDT2008.1817 (in which the official liability action was dismissed) it was emphasised that only an extremely grave mistake in the application or interpretation of law can be conducive to establishing the responsibility of the judicial body applying the law; and that the judicial body will be exculpated if the facts of the case are capable of prompting various different interpretations of the law.
In case no. 1.Pf.20.799/2015/7/II. the plaintiff was awarded a substantial amount of compensation for non-pecuniary damage sustained on account of the respondent court's repeated mishandling of the underlying child access dispute.
In case no. 9.Pf.21.115/2014/6/I. the plaintiff was awarded a substantial amount of compensation for pecuniary damage sustained on account of the respondent Hungarian court's failure properly to transmit a previous final and binding judgment to the Slovakian authorities, as a result of which that judgment, although entitling the plaintiff to a large sum of money, could not be executed.
In a decision postdating the facts of the present application, the Constitutional Court elucidated the nature of official liability actions in the following terms (§ 14 of decision no. 3007/2015. (I. 12.) AB):
"In pursuit of a judicial liability action ... the decisions adopted in the principal litigation cannot be revised or reversed. However ... the eventual unlawfulness of the final and binding decision can be examined as a matter underlying any tort liability..."

THE LAW

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

15. The applicant complained that the procedure before the Supreme Court had infringed his right to a fair hearing, because the judgment had been delivered without taking into account his submissions, which had been filed on time.
He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:
"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

16. The Government argued that the applicant should have brought an official liability action under section 349 of Act no. IV of 1959 on the Civil Code (see paragraph 13 above), which was an effective remedy in the circumstances. Submitting examples of similar and successful claims yielding compensation awards, they explained that there was established case-law in this field, in accordance with which the courts' tort liability was considered well-founded whenever a procedural mistake had a bearing on the merits of a case, that is, when it was consequential. In the present application, the procedural mistake committed was clearly consequential, since the Supreme Court had found against the applicant without awaiting his pleadings although they had been submitted within the time-limit. This irregularity had amounted to a violation of the principle of equality of arms and had been aggravated by the fact that it had occurred before the highest judicial instance without any further remedies available.
17. The applicant contested this argument, asserting that at least two requisite elements of tort liability, namely a causal link and damage sustained, were difficult to prove in his case.
18. The Court reiterates that the obligation under Article 35 of the Convention requires only that an applicant should have normal recourse to remedies which are likely to be effective, adequate and accessible. In particular, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and are at the same time available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory, but also in practice, failing which they will lack the requisite accessibility and effectiveness. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies. Article 35 § 1 of the Convention also provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see Sejdovic v. Italy [GC], no. 56581/00, §§ 45 and 46, ECHR 2006-II).
19. In the context of an official liability action being a potential remedy for a mistake made by the domestic courts, the Court has already held that, while such an action

may produce some pecuniary compensation, it is normally not capable of prompting either the reopening or reinstatement of the impugned procedure, and consequently does not afford adequate redress for the alleged violation of Article 6 § 1. In particular, a very similar situation was contemplated in the case of Leoni v. Italy ((dec.), no. 43269/98, 15 June 1999) where the Court rejected the Government's objection based on the applicant's failure to introduce a claim for compensation against the clerks of the Court of Appeal who had allegedly not forwarded to the Court of Cassation his appeal on points of law concerning a civil case. This case is noteworthy notably because in that application Mr Leoni possessed a certificate proving that he had deposited his appeal on points of law on time and it was admitted by the Court of Cassation that the Court of Appeal clerks had not forwarded – as they were obliged to do – the appeal. Despite these elements plausibly capable of producing a rather strong case for a compensation claim made by Mr Leoni, the Court considered that he was not required to have attempted an official liability action in order to exhaust domestic remedies.
The Court is of the view that the same considerations apply in the present case where the domestic authorities denied any mishandling of the applicant's case.
20. In particular, given that the applicant's grievance in the present application lies in the fact that his action against his former employer for unlawful dismissal was finally adjudicated without his last-instance submissions being taken into account, the Court finds that, by way of an official liability action, he could not have obtained full redress for the damage resulting from the irregularity which allegedly occurred in the Supreme Court's procedure. Such an action, even if successful, could not have led either to the calculation and awarding of the amounts sought by the applicant in his original claim before the Székesfehérvár Labour Court or to the case being examined afresh by the domestic courts in the light of his ignored submissions. The two examples of successful official liability actions (one concerning non-pecuniary damage and the other revolving around the frustration of the execution of an award already adjudicated in a final and binding judgment) submitted by the Government do not demonstrate how the applicant could have obtained the reopening of his case or the fully adversarial adjudication of his claims by the Supreme Court, let alone the awarding of those claims by a court hearing an eventual official liability action (see paragraph 14 above). Therefore, in the particular circumstances of the present case, the Court cannot follow the approach taken in Mihály Kőszegi v. Hungary ((dec.), no. 36830/97, 15 March 2001) where it held that an official liability action was a remedy to exhaust.
21. For the above reasons, the Court is satisfied that the applicant cannot be expected to have brought an official liability action and therefore the Government's objection of non-exhaustion of domestic remedies should be dismissed.
22. Moreover, the Court notes that the 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

23. The applicant asserted that the fact that the Supreme Court had judged his case without waiting for his pleadings had fundamentally undermined the fairness, that is, the adversarial character, of the proceedings.
24. The Government offered no comments as to the merits of the case.

25. The Court observes that, in an order served on 7 June 2010 in the review proceedings, the Supreme Court – already in possession of the submissions of the applicant's adversary – gave the applicant eight days to file his observations. The applicant did so on 14 June 2010, that is, on the seventh day after receiving the order; his submissions arrived at the court on 17 June 2010 (see paragraphs 8 and 9 above).
26. However, the Supreme Court had already decided the case to the applicant's detriment on 16 June 2010 – only one day after the expiry of the time-limit (see paragraph 10 above). Upon the applicant's complaint, the Head of Supreme Court's Civil Division held that the pleadings had been submitted belatedly (see paragraph 11 above).
27. For the Court, this course of action effectively amounted to depriving the applicant of his right to reply to his adversary's pleadings. This is irreconcilable with the concept of a fair trial, which "also means in principle the opportunity for the parties to a trial to ... comment on ... observations filed ... with a view to influencing the court's decision" (see Kress v. France [GC], no. 39594/98, § 74, ECHR 2001-VI, with further references). It is true that the pleadings in question reached the Supreme Court only after the expiry of the time-limit; however, there is nothing in the case file or in the Government's observations which indicates that there was a requirement for the court to receive such pleadings – rather than for the applicant to post them – within the eight-day time-limit. Indeed, the Government conceded that a consequential procedural mistake had been committed (see paragraph 15 above). Therefore, the Court finds no grounds to conclude that the applicant did not demonstrate the requisite due diligence (see, mutatis mutandis, Osu v. Italy, no. 36534/97, §§ 37-40, 11 July 2002).
28. As a result, the Supreme Court judged the case relying only on the adversary's pleadings, a fact which is tantamount to complete disrespect for the principle of adversarial procedure.
29. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.
II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 8,000 euros (EUR) in respect of pecuniary damage (this sum corresponding to the value of the litigation before the Kúria) and EUR 12,000 in respect of non-pecuniary damage.
32. The Government contested these claims as excessive.
33. The Court considers on the one hand that the applicant has not established the existence of a causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that the applicant must have suffered some non-pecuniary damage and awards him, on the basis of equity, EUR 2,800 under this head.

B. Costs and expenses

34. The applicant made no claim for costs. The Court is therefore not called to make any award in this respect.
C. Default interest

35. 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

1. Declares, by a majority, the application admissible;

2. Holds, by four votes to three, that there has been a violation of Article 6 § 1 of the Convention;

3. Holds, by four votes to three,
(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, EUR 2,800 (two thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(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, unanimously, the remainder of the applicant's claim for just satisfaction.
Done in English, and notified in writing on 21 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.
Marialena TsirliGanna Yudkivska
RegistrarPresident

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:
- the joint dissenting opinion of Judges Kūris, Ranzoni and Ravarani.
G.Y.
M.T.

JOINT DISSENTING OPINION OF JUDGES KŪRIS, RANZONI AND RAVARANI

With all due respect to our colleagues, we cannot agree with their findings concerning the non-exhaustion of domestic remedies, more precisely that there was no effective remedy under Hungarian law. We are of course ignorant of Hungarian law and can only rely upon what is contained in the accessible file and the reasoning in the

judgment, but from what was available to us, we have to conclude that there was an effective remedy under Hungarian law which the applicant omitted to exhaust.

The applicant explained that after a dismissal he considered to be unlawful, his subsequent claim was ultimately dismissed by the Supreme Court after having been allowed by the first-instance labour court and the court of appeal and that during the proceedings before the Supreme Court his written complaint had been erroneously overlooked. The Government argued that the applicant should have brought a liability action against the State as provided for by Section 349 of the Civil Code.[1]

The majority are of the opinion that while such an action may produce some pecuniary compensation, it is normally not capable of prompting either the reopening or reinstatement of the impugned procedure and consequently does not afford adequate redress for the alleged violation of Article 6 § 1. They explain, in particular, that the applicant could not have obtained against his former employer full redress for the damage alleged as, even if successful, such action could not have led either to the calculation and award of the amounts sought in the original claim before the labour court or to the case being examined afresh by the domestic courts.

Such an assertion disregards the very nature of a claim in liability.

As to the reopening of the proceedings, one should not lose sight of the fact that the present case is not a criminal case where a conviction obtained in violation of a Convention provision could not be made good by the award of a certain sum of money and where the reopening was the only efficient remedy. The applicant's claim was civil by nature. Following the dismissal by his employer, he had claimed severance pay, outstanding wages, a lump sum in compensation and default interest.[2] Labour-law claims fall under the civil limb of Article 6.[3]

It is in the very nature of a claim in tort and common ground that if anything wrongful has happened and that if some liability is found, the consequent loss has to be repaired in kind, and if this is not possible, it is compensated by equivalent, i.e. the allocation of a sum of money. If the original claim was for money, things are even more straightforward as the pecuniary loss suffered is compensated by an equivalent sum of money. Even if the respective natures of the original claim (it might be, for example, a sum of money contractually stipulated) and the compensation allocated in the liability claim are necessarily different, as such compensation is always legally classified as damages, this does not change the principle of the equivalence of the compensation.

In the present case, the applicant's claim was for money, and the compensation would have been monetary, too. The question remains if the compensation could have entirely made good the alleged losses.

The majority answer that question in the negative. We fail to see why. It is not true that the judge who is called on to assess the tort claim could not "redo" the initial proceedings by calculating the sum to which the applicant would have been entitled if the initial proceedings had been properly conducted. This is the normal task of a court in a liability claim: the judge, with hindsight, considers what ought to have to be done and, if it was done correctly, what loss would have been avoided. The amount of this loss he awards in the form of damages.

If the said system is not applicable in Hungary, the majority should have explained this. Quite to the contrary, it flows from the case-law cited in paragraph 14 of the judgment that under Hungarian law, substantial damages can be awarded to compensate for shortcomings in previous judicial proceedings. This was confirmed in

Mihály Kőszegi v. Hungary[4] where the Court noted that the applicant could have, under Section 349 of the Hungarian Civil Code, sought compensation for any damage he might have suffered on account of the domestic courts' mismanagement of his claims, and that an official liability action was a remedy to be exhausted in similar circumstances.

The majority's judgment attempts to distinguish the present case from Kőszegi by stating, as mentioned before, that the court dealing with the liability case could not calculate the amounts claimed in the original labour-law claim and that the labour-law proceedings could not be reopened. In Kőszegi the applicant had claimed, in addition to his original claim, the payment of certain amounts of lost profit, accrued interest and social security contributions, and had challenged a previous ruling that had allocated him a certain amount based on a technical expert's findings. Before the Court, he claimed that the domestic courts had omitted to take into consideration his supplemental claims. Although a judge dealing with a subsequent tort claim would have had to proceed to assess those claims, involving a series of complicated calculations, the Court nevertheless found that the applicant should have exhausted this remedy before launching his application with the Court. We simply fail to see any difference with the said case, which is, moreover, also Hungarian.

The Court itself has validated the way of ex post calculation based on a probability assessment of what the applicant could have expected to obtain if the first proceedings had been conducted in a correct manner. In the judgment of Leoni v. Italy[5], which predated the Kőszegi decision, the Court applied the mechanism of "lost opportunity" – perte d'une chance – "[w]hilst the Court cannot speculate as to the outcome of the proceedings concerned had there been no violation of the Convention, it considers that the applicant suffered a loss of real opportunity"[6]. Pursuant to the well-known mechanism, once liability is established, in order to assess the consistency of the damage, the judge performs a probability assessment, and if he deems that the probability of success was very high, he can allocate up to 100% of the missed profit in damages.

Things are obviously different if the domestic remedies are unable to compensate the loss. That was the situation in Iatridis v. Greece[7], where the applicant had challenged the illegal dispossession of a cinema. The Court held that as monetary compensation was the only available remedy at the domestic level, whereas the claim was for restitution, the domestic remedy was not effective.

It is not difficult to find a criterion to distinguish between the two situations: one has to establish whether the envisaged remedy is able to fully compensate for the loss sustained: if the claim is for a sum of money and if the domestic remedy provides for monetary compensation, the remedy is effective. If the claim is for something that is not directly monetary and if the domestic remedy only offers monetary compensation, such remedy is not effective.

If one applies this principle to the present case, the conclusion is clear: the applicant had lodged a claim for money (severance payment, outstanding wages, a lump sum in compensation and default interest). A claim in liability against the State could have provided him with the full monetary compensation which he had not obtained in the first round of proceedings.

For all these reasons we believe that, in the present case, the action in tort against the State was an effective remedy and that the application should have been declared inadmissible for failure to exhaust domestic remedies.

The solution adopted by the majority risks to ruin a very important and helpful legal instrument consisting in a tort action against the State in order to compensate losses triggered by the misbehaviour of official authorities, including courts. Moreover, the judgment undermines the subsidiary nature of the Convention system.