SECOND SECTION

CASE OF FERENCNÉ KOVÁCS v. HUNGARY

(Application no. 19325/09)

JUDGMENT

STRASBOURG

20 December 2011

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 Ferencné Kovács v. Hungary,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 29 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 19325/09) against the Republic of 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, Ms Ferencné Kovács ("the applicant"), on 14 April 2009.

2. The applicant was represented by Mr T. Fazekas, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicant complained under Article 5 § 1 (c) of the Convention that her pre-trial detention had not been ordered lawfully.

4. On 5 July 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1925 and lives in Budapest.

6. The applicant was prosecuted for having assaulted an official on 8 March 2001. Between 21 March 2003 and 20 October 2008 she failed to attend, without a due excuse, seven hearings scheduled in the case. Several bench warrants were consequently issued, but in vain.

7. Eventually, on 5 March 2009 the Tatabánya District Court ordered her pre-trial detention in her absence, implicitly relying on section 281(6) of the Code of Criminal Procedure. It is not clear whether this act took place at a hearing (*tárgyalás*) or a session (*ülés*). The applicant's appeal against her detention to the Komárom-Esztergom County Regional Court was to no avail.

8. On 17 March 2009 the applicant was apprehended. On 17 April 2009 her detention was terminated.

II. RELEVANT DOMESTIC LAW

9. Section 281(6) of the Code of Criminal Procedure (Chapter 13: The first-instance court hearing), as in force until 7 March 2007, provided as relevant:

"If a bench warrant has been issued in the procedure due to the non-attendance of the accused, an arrest warrant shall be issued or pre-trial detention ordered, provided that the offence in question is punishable with imprisonment."

10. By decision no. 10/2007. (III.7.) AB, the Constitutional Court deleted the phrase "pre-trial detention ordered" from the above provision. The Constitutional Court reasoned in essence that the impugned provision, in its original form, constituted a basis for a disproportionate measure: the accused's mere non-attendance after the issuance of a bench warrant, caused by any reason, led to the assumption of wrongful omission on his/her side, entailing, without any further examination, the ordering of pre-trial detention. The Constitutional Court went on to conclude as follows:

"[T]he Constitution ... prescribes as a statutory guarantee in the procedure with a view to deciding [on pre-trial detention] that the accused must be heard. To hear the accused is part of the [constitutional] requirement of due process which is relevant in every stage of the proceedings. There is no such constitutional interest or aim which would allow a limitation on the accused's [constitutional] right to be heard by a court, without a breach of the latter's right to a due process."

11. In reply to further arguments challenging the constitutionality of the remainder of section 281(6), the Constitutional Court nevertheless upheld the provision in its part allowing for an arrest warrant to be issued, holding that such a measure was still within the boundaries of proportionality, as opposed to the ordering of pre-trial detention which is the most stringent coercive measure in this field. It argued that once the absconding or unavailable accused was arrested, the court would be in a position to examine the merits of those circumstances which might require the imposition of pre-trial detention.

12. Consequently, from 7 March 2007 and at the material time, section 281(6) read as follows:

"If a bench warrant has been issued in the procedure due to the non-attendance of the accused, an arrest warrant shall be issued, provided that the offence in question is punishable with imprisonment."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

13. The applicant complained that her pre-trial detention had had no legal basis in the domestic law, in breach of Article 5 § 1 of the Convention, which reads as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ..."

14. The Government contested that argument.

A. Admissibility

15. The Court notes that the application 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

16. The Government argued that the impugned measure had been necessitated by the applicant's unavailability for the proceedings. Moreover, they submitted that section 281(6) only concerned pre-trial detention ordered at a hearing, whereas the measure imposed on the applicant was ordered at a session.

17. The applicant submitted that it was unclear whether the impugned measure had been applied at a hearing or a session. In any case, the Constitutional Court ruling gave clear guidance to the effect that the imposition – whether at a hearing or a session – of pre-trial detention in the circumstances, merely on account of the accused's non-attendance, amounted to a deprivation of the constitutional right to be heard by a court before incarceration.

18. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed (*Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III). Moreover, any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *Chahal v. the United Kingdom*, 15 November 1996, § 118, *Reports of Judgments and Decisions* 1996-V).

19. In the present case, the Court notes that the applicant's pre-trial detention was ordered because she had made herself unavailable for the proceedings, despite bench warrants in place. It is true that such a measure had been allowed under the original wording of section 281(6). However, the Constitutional Court removed the phrase "pre-trial detention ordered" from that provision (see paragraph 10 above) as of 7 March 2007, that is, well before the relevant events. For the Court, it is immaterial whether the impugned measure was applied at

a ‘hearing’ or a ‘session’, since it is evident from the reasoning of the Constitutional Court decision that the possibility of imposing pre-trial detention on an absent accused was removed with regard to the constitutional requirement of securing an oral hearing before such a stringent measure is applied. The Court would also note that, notwithstanding this change, the authorities had at their disposal the power to issue an arrest warrant so as to consider properly the necessity of pre-trial detention and the personal circumstances of the accused (including those underlying her having missed the previous hearings), once the latter is apprehended and a hearing can be put in place.

20. The foregoing considerations are sufficient to enable the Court to conclude that section 281(6) of the Code of Criminal Procedure, as in force at the material time, did not provide a legal basis for the ordering of the applicant’s pre-trial detention *in absentia*.

There has accordingly been a violation of Article 5 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

21. 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

22. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

23. The Government contested this claim.

24. The Court considers that the applicant must have suffered some non-pecuniary damage and awards the full sum claimed.

B. Costs and expenses

25. The applicant also claimed EUR 1,500 for the costs and expenses incurred before the Court. This sum corresponds to the fee billable by her lawyer in respect of twelve hours of legal work charged at an hourly rate of EUR 125.

26. The Government contested this claim.

27. 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 and the above criteria, the Court considers it reasonable to award the full sum claimed.

C. Default interest

28. 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 5 § 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, to be converted into Hungarian forints at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred 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.

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Françoise Tulkens
Registrar President

FERENCNÉ KOVÁCS v. HUNGARY JUDGMENT