

APPLICATION N° 21072/92

Bruno GESTRA v/ITALY

DECISION of 16 January 1995 on the admissibility of the application

Articles 1 and 6 of the Convention

- a) *Although the Commission is competent to review compliance only with the European Convention on Human Rights and not other international conventions it must nevertheless examine whether the way in which the Contracting States implement international conventions concluded subsequent to the ECHR is compatible with the ECHR*
- b) *In interpreting the ECHR, the Commission may draw on provisions in other international conventions which offer a higher degree of protection. However, the Commission must not lend the terms of the ECHR a meaning which the Contracting Parties clearly intended to exclude*

The right to a fair hearing under Article 6 of the Convention cannot be used to infer, by reference to the Brussels Convention of 25 May 1987 that the principle of ne bis in idem applies on the international level

Competence *ratione materiae* *Neither the Convention nor Article 4 of Protocol No 7 guarantees respect for the principle ne bis in idem in respect of convictions in different States*

THE FACTS

The applicant, an Italian citizen, was born in 1944 in Garzeno (Como). He is a farmer and currently lives in Garzeno.

In the proceedings before the Commission, he is represented by Mr Pierangelo Parravicini, a lawyer practising in Como.

The facts of the case, as submitted by the applicant, may be summarised as follows:

The circumstances of the case

On 12 December 1978 the Criminal Division of Roskilde Court in Denmark sentenced the applicant to three years and six months' imprisonment for his part in smuggling drugs into Denmark between August 1977 and May 1978.

On 9 April 1980, the same court acquitted the applicant on other counts related to the same drug trafficking operation.

Subsequently, the Italian authorities took criminal proceedings against the applicant for his part in the same drug trafficking operation, in so far as the charges related to incidents which had taken place in 1977 and up to June 1978 in Italy, Lebanon, former Yugoslavia and Denmark. In the course of the Italian proceedings he was arrested on 25 July 1983 and was released pending trial on 4 August 1983.

On 21 March 1986 Como Court sentenced the applicant to seven years and six months' imprisonment and ordered him to pay a fine of 24,000,000 Italian lire (ITL).

Subsequently, the applicant was prosecuted for other drug-trafficking activities in Greece, Spain and Bulgaria and was again convicted, on 6 July 1988, by Como Court, which sentenced him to seven years and six months' imprisonment and ordered him to pay a fine of ITL 80,000,000. However, the applicant succeeded in having his custodial sentence reduced by three years and his fine by ITL 3,000,000.

The applicant appealed against the two Italian convictions. Milan Court of Appeal joined the two appeals. By a judgment of 6 June 1989 it upheld the applicant's conviction, sentencing him to ten years' imprisonment and ordering him to pay a fine of ITL 50,000,000.

On 3 October 1989, the applicant appealed on a point of law. On 31 October 1991 he filed grounds of appeal with the Court of Cassation, arguing that the Brussels Convention of 25 May 1987 should be applied to his case. This Convention deals with the application of the *ne bis in idem* principle to relations between the criminal courts of the Member States of the European Communities. It was ratified by Italy on 16 October 1989. Specifically, the applicant argued that he had been convicted in Italy

in respect of the same acts as those for which he had already been tried by the Criminal Division of the Roskilde Court, and that this was contrary to the said Convention.

By a judgment of 13 November 1991, which was deposited at the court registry on 10 April 1992, the Court of Cassation dismissed the applicant's appeal. In particular, the court held that the facts underlying the applicant's conviction in Italy could not be regarded as identical to those considered by the Danish court of Roskilde, despite certain similarities. Given that the above Convention provides that no one should be tried twice in respect of the *same* facts, the Court of Cassation held that it was not applicable to the case in question.

In particular, the Court of Cassation held as follows

"In the instant case, .. even if the Danish judgments refer to dates and quantities which are very close to those on which the present proceedings are based, we cannot be absolutely certain that the two sets of offences were committed in exactly the same places, on exactly the same dates and involved exactly the same accomplices and quantities of drugs, as required by the *ne bis in idem* principle. Accordingly, the requirements for a finding of "no case to answer" are not met, since it does not emerge from the case-file that the facts were absolutely identical. Moreover, the Court of Cassation cannot proceed to make the relevant findings of fact, since it is a tribunal of law only."

Relevant provisions of the Brussels Convention of 25 May 1987

Under Article 1 of this Convention, "A person whose trial has finally been disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a sanction was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State "

Moreover, Article 2 provides that, "a Member State may, at the time of ratification, acceptance or approval of this Convention, declare that it shall not be bound by Article 1 in one or more of the following cases

- (a) if the facts which were the subject of the judgment rendered abroad took place on its own territory either in whole or in part In the latter case this exception shall not apply if those facts took place partly on the territory of the Member State where the judgment was rendered,
- (b) if the facts which were the subject of the judgment rendered abroad constitute an offence directed against the security or other equally essential interests of that Member State;
- (c) if the facts that were the subject of the judgment rendered abroad were committed by an official of that Member State contrary to the duties of his office "

Further, Article 4 provides that, "If a criminal charge is brought against a person in a Member State and the competent authorities of that Member State have reasons to believe that this charge concerns the same facts as those in respect of which his trial has finally been disposed of in another Member State they shall, if they consider it necessary, seek relevant information from the competent authorities of the Member State where the trial took place' (para 1) In this case, "Information thus requested shall be given as soon as possible and shall be taken into account in determining whether the proceedings should be continued (para 2)

Finally, Article 6 provides that, "This Convention shall enter into force 90 days after the deposit of the instruments of ratification, acceptance or approval by all the States which are members of the European Communities at the date on which this Convention is opened for signature (para 2) However, 'Each State may, when depositing its instrument of ratification, acceptance or approval, or at any later date until the entry into force of this Convention, declare that this Convention will apply to it in its relations with other States that have made the same declaration 90 days after the date of deposit" (para 3)

This Convention has not yet come into force as, to date, only four States have ratified it These States include in particular Italy and Denmark, which ratified on 16 October 1989 and 26 July 1989 respectively Furthermore, all four States which have ratified the Convention have made declarations under Article 6 para 3 Accordingly, the Convention is already applicable to relations between Italy and Denmark

COMPLAINT

The applicant complains that the Court of Cassation did not in his case apply the principle of *ne bis in idem* as guaranteed by the Brussels Convention, since it wrongly held that the facts which had come before the courts of the two States in question were not the same He also complains that the Court of Cassation did not, contrary to Article 4 of the Brussels Convention, ask the Danish authorities for information in order to establish the exact nature of the facts in respect of which the applicant had been convicted in Denmark Hence the applicant claims that his right to a fair hearing, as guaranteed by Article 6 para 1 of the Convention, has been violated

THE LAW

The applicant complains that he was convicted by the Italian courts for offences for which he had already been tried and convicted by the Danish courts From this, he infers a violation of the right to a fair hearing guaranteed by Article 6 para 1 of the Convention, in that the principle of *ne bis in idem* enshrined in the Brussels Convention, which both Italy and Denmark have ratified, was allegedly contravened in his case

Article 6 para 1 of the Convention provides, in the determination of () any criminal charge against him, everyone is entitled to a fair () hearing () by (a) () tribunal ()

The Commission recalls firstly that it is competent to apply only the European Convention on Human Rights and it is not competent to ensure the application of other international conventions as such. However, under Article 1 of the European Convention on Human Rights, the Commission is nevertheless bound to ensure that the rights and liberties guaranteed by the Convention are not infringed when the domestic organs of the Contracting Parties apply other international conventions which have been concluded subsequently (see, *mutatis mutandis*, No 13258/87, Dec 9 2 90, D R 64 pp 138, 152)

The Commission accepts that, in interpreting the provisions of the Convention, it may be useful to take into account provisions contained in other international legal instruments which may provide more far reaching protection for fundamental rights than does the Convention. However, there can be no question of lending the provisions of the Convention a scope which the High Contracting Parties expressly intended to exclude - by means of, in this case the provisions of a Protocol, which are to be regarded as additional Articles of the Convention.

The principle of *ne bis in idem* under Article 4, para 1 of Protocol No 7 is intended to apply only where a person has been tried or punished twice in respect of the same facts by the courts of the same State. The fact that the application of this principle is limited to judgments rendered by courts of the same State shows that the High Contracting Parties did not intend this principle to apply to judgments given by courts in two or more States.

Therefore, Article 6 of the Convention cannot be interpreted so as to imply a right which was expressly excluded in the drafting of a Protocol which limited the application of the principle of *ne bis in idem* to the domestic level (see *mutatis mutandis*, Eur Court HR, Johnston and Others judgment of 18 December 1986, Series A no 112, p 25, para 53)

Accordingly, the Commission considers that the application is incompatible *rationae materiae* with the provision of the Convention invoked by the applicant and must be rejected in accordance with Article 27 para 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE