Case No.: Up-124/04

Date: 15 November 2006

THE DISSENTING OPINION OF JUDGE DR. CIRIL RIBIČIČ IN CASE Up-124/04

1. I cannot agree with the decision of the Constitutional Court on the dismissal of the constitutional complaint which was lodged by A. A. The complainant alleges several violations of his rights in the criminal proceedings in which he was sentenced to seven months' imprisonment, as he had allegedly committed the criminal offence of fraud. According to the complainant, the court of first instance should not have tried him *in absentia*. In his opinion, statutory conditions for a trial *in absentia* were not fulfilled, as he was not examined at the main hearing but only in the investigation stage in which the charge had not yet been known, and as such he could not answer it. Consequently, he could not oppose the charge before the court. He draws attention to the fact that he was not informed of the examination of the witnesses in the investigation and that this violation, which entails the violation of the explicit provision of the third paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), cannot be remedied by summoning the defendant to the main hearing. In addition, the complainant points out that the charge against him was modified several times after he had been examined in the investigation. Finally, he alleges that the court refused to consider any of his motions to present evidence to his benefit.

2. In the decision by which the Constitutional Court dismissed the constitutional complaint it did stress the special importance of the right of anyone charged with a criminal offence to be present at his trial (the second indent of Article 29). The aforementioned right is underlined also by the International Covenant on Civil and Political Rights and the Convention. On the other hand, the Constitutional Court found that the aforementioned right of the complainant was not violated, as it was allegedly enough that he was examined in the investigation on “the completely identical offence” (paragraph 10 of the reasoning), or that it was “the same alleged offence” (paragraph 15 of the reasoning). According to the Constitutional Court, it is enough that the complainant was duly summoned to the main hearing. If he had attended the main hearing, the court would have examined him, and he would have had the opportunity to examine the incriminating witnesses which “generally repeated the statements they had made in the investigation”.

3. In the present case the issue is not whether the constitutional complainant was justifiably absent from the main hearing (he claimed that he was not informed of what he was charged with), but whether the court acted in accordance with the Constitution, as it held the only main hearing *in absentia* of the complainant, wherein it sentenced him. My answer to this question is negative. The court should not have held the main hearing *in absentia* of the defendant. Such position is supported by several reasons: the first is that the complainant had not yet been examined at the main hearing but only in the investigation. The argumentation of

the Constitutional Court that the examination in the investigation “is in terms of content completely identical to the examination of the defendant in the main hearing” is in my opinion not convincing.

4. First of all, the complainant was examined before the charging instrument was filed against him. In addition, the charging instrument was changed, not insignificantly, mostly regarding the classification of the alleged criminal offence. This is also evident from the Constitutional Court decision, which reads that at the main hearing, which the defendant failed to attend, “the District State Prosecutor modified the charging instrument, which until then had still been termed an indictment in a manner such that she termed it an information, reclassified the offence as the completed criminal offence of fraud (and not an attempt) determined in the first paragraph of Article 217 of KZ, and modified some wording in the factual description of the criminal offence” (paragraph 14 of the reasoning). As regards the above-cited, I cannot agree with the evaluation according to which the charge against the complainant “remained the same in terms of content”. And even if it remained the same, the examination before an investigating judge cannot substitute for the examination before a judge at the main hearing.

5. The Constitutional Court separately, apart from the question of a trial *in absentia*, considered the complainant's allegation that he was not summoned to the examination of the incriminating witnesses in the investigation, which entails, as established by the Constitutional Court in Decision No. Up-719/03 of 9 March 2006, a violation of the right to a defense determined in Article 29 of the Constitution. The right to examine incriminating witnesses is expressly determined in item d) of the third paragraph of Article 6 of the Convention and thus it is more emphasized than in the Slovene Constitution. Therefore, the complainant's allegation that he could not examine the incriminating witnesses cannot be convincingly answered only by stating that he had been summoned to the main hearing, at which he could have questioned the incriminating witnesses.

6. I cannot agree with the manner of considering constitutional complaints such that the complainants' allegations are first divided into the individual possible violations and thereafter each one of them is dismissed separately. I strive for a different approach which would enable comprehensive review of a case and in which the Constitutional Court would review how the influence of all violations in connection with the complainants' position in criminal proceedings can be evaluated. Thus, I am striving for the Constitutional Court to comprehensively evaluate whether the trial in the complainant's case was fair. The Constitutional Court has defined several times what it considers to be a fair trial: “It is essential for a fair trial that persons whose rights, duties, and legal interests are the subject of judicial proceedings have appropriate and ample opportunities to adopt a standpoint as regards the factual as well as legal aspects of the case and that they are not discriminated against in relation to the opposing party.”[1]

7. The right to a fair trial is comprehensively determined in Article 6 of the Convention. This article determines numerous elements or minimal standards without which a trial cannot be considered to be fair. In the third paragraph of

[1] The Constitutional Court in case No. Up-751/02.

Article 6, which determines the minimum guarantees of the defendant, the Convention inter alia determines that he must be informed in detail of the nature and cause of the accusation against him, that he can defend himself in person or through legal assistance of his own choosing, that he can examine or have examined witnesses against him, etc. Similar guarantees are provided to the defendant also in Article 14 of the International Covenant on Civil and Political Rights, which was adopted by the General Assembly of the UN in 1966, and in the Charter of Fundamental Rights of the EU, which determines that everyone (Article 47) is entitled to a fair hearing by an independent and impartial tribunal. The Convention and the Charter of Fundamental Rights expressly state the notion of a fair trial in the title [of the article], which is a basis for a more comprehensive consideration of this right, regardless of the great importance of the elements which compose the notion of a fair trial, including the right to be present at trial.

8. In spite of the fact that the Convention does not directly refer to the right to be present at trial, this right undoubtedly follows from the judgments of the European Court of Human Rights (hereinafter referred to as the Court). The Court has considered the violation of this right in numerous cases from very different member states, such as France, Italy, Belgium, the Netherlands, Turkey, Sweden, Austria, Poland, Bulgaria, Switzerland, Romania, Russia, Moldova, Malta, Greece, Finland, etc. The importance which the Court attaches to the right to be present at trial is also evident from the case Geyseghem v. Belgium (Application No. 26103/59) and from the concurring opinions of this judgment, which inter alia address the fact that the right to be present at trial cannot be considered an obligation and argue as questionable not only the defendant's absence but also the absence of his legal representative in cases in which disputable points of law are at issue in the hearing.

9. It would be absurd if the Constitutional Court attributed a lesser importance to and put less emphasis on the right to be present at trial, and was satisfied with lower standards of protection of the aforementioned right than the Court does, considering the fact that the Constitution of the Republic of Slovenia is more demanding in this regard than the Convention. The Constitution in the second indent of Article 29 expressly determines as a legal guarantee in criminal proceedings that a defendant has “the right to be present at his trial and to conduct his own defense or to be defended by a legal representative”, whereas the Court constituted the same right without such explicit provision in the Convention.

10. If the Constitution is more precise and binding as regards the right to be present at trial, the Covenant on Civil and Political Rights and the Convention are more binding as regards the examination of incriminating witnesses. Regarding this question, the Constitution in Article 29 merely determines that a defendant has “the right to present all evidence to his benefit”, which according to the interpretation of the Constitutional Court also includes the examination of incriminating witnesses.

11. The right to be present at trial is not a recent development. Of interest in this respect is the position of Dr. Boštjan M. Zupančič, Judge of the European Court

of Human Rights, who emphasizes the right to be present at trial as one of the oldest fundamental achievements of criminal proceedings, as he writes: "… we should never forget the evolutionary primacy of the procedures, the open and fair legal process - over the substantive law. Many jurists do not realize that in 529, when Justinian in what is now Istanbul published the first draft of *Corpus Juris Civilis*, this was not a codification. It was largely a restatement of legal opinions of judges *(praetores)*. How did these specific solutions of real controversies come about in the first place, i.e. what was there before there were substantive legal norms? In turn, the first rule of the Laws of XII Tables had only one message. Every controversy must be submitted to a court of law and the defendant is compelled to attend…"[2]

12. A defendant thus has the right to be tried in his presence, whereas a court has a duty to conduct the trial in a manner such as to ensure its fairness. The latter inter alia entails that both parties – the prosecution and the defense –confront each other before the court. Within this framework, it is not unimportant whether the defendant and his legal representative are present at the main hearing. Otherwise, if the defense is not present, if the court directly hears only a charge which even changes in the defendant's absence, and if the court only examines evidence submitted by the prosecution, we cannot speak of a fair trial. Even more, this is no longer a trial, at least not a real trial, an adversarial trial, a trial whose objective is a fair judgment.

13. I am convinced that in the present case there exists a combination of violations and other circumstances regarding the criminal proceedings due to which these proceedings cannot be regarded as fair. Above all, in the present case a trial *in absentia*, which should be an exception that is only rarely applied, was given a completely different character due to the fact that it was connected to the other violations and special circumstances of the case. In the present case it is the combination of a trial *in absentia* with the violation of the complainant's right to examine incriminating witnesses, as well as the modification of the classification of the criminal offence in the charging instrument. In such case the court should call a new main hearing and ensure the defendant's presence.

14. Where is the connection between both violations? If the complainant was summoned to the examination of the witnesses in the investigation, he would have had an opportunity not only to question the witnesses (which is important because of the fact that the witnesses that are examined for the first time without a defendant present feel an obligation to repeat the same at the main hearing) but also to be informed of what he is charged with and which are the reasons for the modification of the charge. However, due to the fact that the defendant was not summoned to the first examination, the proceedings against him continued at the main hearing in the same manner as in the investigation, thus in his absence. This is questionable from the viewpoint of a fair trail in general and particularly from the viewpoint of the adversary system principle.

[2] O univerzalnosti človekovih pravic (On the Universality of Human Rights), Pravna praksa, No. 39-40/2006, p. 9.

15. It needs to be pointed out that a court may force a defendant to attend a main hearing. The court should not be satisfied with the fact that the defendant was examined in the investigation. Furthermore, it should not be satisfied with hearing only one side (the prosecution) at the main hearing. Especially as this is a case of the criminal offence of fraud and involves the diametrically opposed allegations of the prosecution and the defense regarding the facts of the case. The defendant was not present at the main hearing and at the time he also did not have a legal representative, therefore the arguments of the defense could not be heard at all. The presence of the defense is necessary not only from the viewpoint of the legal issues in connection with the modification of the charging instrument but also in connection with the facts of the case.

16. Examining the defendant before the judge who conducted the main hearing would be of a special importance inter alia due to the fact that the defendant was charged with the criminal offence of fraud. In cases of such criminal offence it is important that the defendant has the opportunity to personally present his version of events, whereas a court has the opportunity to be directly informed of his arguments and to evaluate the defendant's credibility as well as the credibility of his defense. Such can by no means be substituted by the defendant being examined before another judge in the investigation, before the charging instrument was filed.

17. I am particularly concerned with the negative precedent effect of the Constitutional Court decision in the present case. It is namely a case of a restrictive interpretation of defendants' rights, as follow from Article 29 of the Constitution, and a case of a broad application of the provisions which refer to the exceptional possibility of a trial *in absentia*. Personally, I am of the opinion that a trial *in absentia* is by itself not necessarily unconstitutional and I am aware that in certain circumstances it is allowed also by the Court, e.g. in cases in which a defendant waives this right. However, in the present case the decision that the main hearing should be held without the defendant present was erroneous and entails a violation of the constitutional and Convention rights of the defendant. Therefore, the dismissal of the constitutional complaint is contrary to established constitutional review and the standards which follow from the judgments of the Court. Due to the above-mentioned, I had no other alternative but to vote against the dismissal of the constitutional complaint.

Judge
Dr. Ciril Ribičič