



Failure to comply with principles of impartiality and presumption of innocence in case concerning social-security fraud

The case of [Kaya v. Belgium](#) (application no. 10089/18) concerned criminal proceedings in which the applicant was convicted of social-security fraud. The applicant submitted that the principles of impartiality and the presumption of innocence had not been complied with in those proceedings.

In today's **Chamber** judgment¹ the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights. The Court considered that Judge A.B.'s participation as a trial judge in the proceedings before the criminal court, and his subsequent participation as a judge in the proceedings before the Court of Cassation, could have raised objectively justified doubts as to his impartiality and could therefore have called into question the impartiality of the Court of Cassation itself in examining the applicant's appeal on points of law.

A violation of Article 6 § 2 (presumption of innocence) of the Convention. The Court found that the statements made in the press by D.M., a public prosecutor who had been responsible for the proceedings against the applicant before the criminal court, had incited the public to believe that the applicant was guilty in the proceedings then pending on appeal, and had infringed his right to the presumption of innocence.

Principal facts

The applicant is a Belgian national who was born in 1965 and lives in Belgium.

In 2010 the applicant was summoned to appear before the Ghent Criminal Court by D.M., a public prosecutor. He was charged with social-security fraud, relating, in particular, to the illegal secondment of labour to third parties, operating an agency which seconded labour, failure to pay social-security contributions and non-payment of an employee's wages.

In December of the same year, the Ghent Criminal Court, presided over by Judge A.B., found the applicant guilty of all the offences, and sentenced him to one year's imprisonment and a fine of 5,500 euros (EUR). Both the applicant and the prosecution appealed.

In 2011, while the appeal proceedings were pending, a financial daily newspaper published an article containing statements attributed to D.M. (the public prosecutor) about the applicant, citing his name and that of his company.

In 2012 the Ghent Court of Appeal acquitted the applicant of the offence of illegal secondment of labour, finding that his right to a fair trial had been irretrievably prejudiced by D.M.'s comments in the press and noting that D.M. had shown clear bias against him. However, it sentenced the applicant to a fine of EUR 2,750 in respect of the other offences, namely, failure to pay social-security contributions and non-payment of an employee's wages.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In 2013 the Court of Cassation quashed that judgment, on the grounds that it could not be concluded merely from the fact that a public prosecutor had infringed an accused's right to the presumption of innocence that criminal proceedings were no longer possible. The case was remitted to the Brussels Court of Appeal.

In 2016 the Brussels Court of Appeal found the applicant guilty on all counts, finding that there had been no breach of his rights to the presumption of innocence and to a fair trial. He was sentenced to four months' imprisonment and a fine of EUR 6,000. He appealed on points of law.

In 2017 the Court of Cassation, sitting as a bench of five judges, including Judge A.B., allowed the appeal in part and quashed the part of the 2016 judgment concerning the calculation of the fine, without remitting the case. It rejected the argument that the applicant's right to the presumption of innocence had been infringed.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial) of the Convention, the applicant complained of a lack of impartiality on the part of the Court of Cassation, arguing that one of the judges (A.B.) who examined his appeal on points of law in 2017 had been president of the division within the first-instance criminal court which had ruled in 2010 on the merits of the charges against him and had convicted him.

Relying on Article 6 § 2 (presumption of innocence) of the Convention, he complained about the statements made to the press during the appeal proceedings by D.M., the prosecutor who had been responsible for the proceedings against him before the criminal court.

The application was lodged with the European Court of Human Rights on 22 February 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Ivana Jelić (Montenegro), *President*,
 Erik Wennerström (Sweden),
 Raffaele Sabato (Italy),
 Frédéric Krenc (Belgium),
 Alain Chablais (Liechtenstein),
 Artūrs Kučs (Latvia),
 Anna Adamska-Gallant (Poland),

and Liv Tigerstedt, *Deputy Registrar*.

Decision of the Court

Article 6 (right to a fair trial)

The Court noted that the specificity of this complaint lay in the participation of a judge (A.B.), first as a trial judge and subsequently as a Court of Cassation judge, in the same case and in respect of the same individual (the applicant). This was the first time that it had been called upon to examine such a situation in a criminal case.

It observed that A.B. had clearly played a not insignificant role within two judicial formations which had delivered unfavourable decisions in respect of the applicant. In that connection, it noted that the Court of Cassation, notwithstanding the specific review it was called upon to conduct, also had to determine the "well-foundedness" ("*bien-fondé*" in the French) of a "criminal charge" within the meaning of Article 6 of the Convention. The term "*bien-fondé*" referred not only to the accusation being well-founded in fact but also to its being well-founded in law.

The Court further noted that the Government had not disputed the applicant's argument that Article 292 of the Judicial Code prohibited the concurrent exercise of different judicial functions, as had occurred in the present case.

Nor had the Government disputed the applicant's argument that there was no internal supervisory mechanism in the Court of Cassation capable of preventing a judge from sitting in a case or enabling the parties to be informed of a particular judge's prior involvement in the same case. In this connection, it pointed out that it was incumbent on the respondent State to organise its judicial system in such a way as to render the rights guaranteed by Article 6 of the Convention effective, including the right to an impartial tribunal.

Lastly, it reiterated that a restrictive interpretation of Article 6 § 1 – notably in regard to observance of the fundamental principle of the impartiality of the courts – would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention.

In those circumstances, the Court considered that Judge A.B.'s participation in the proceedings before the Court of Cassation could have raised objectively justified doubts as to his objective impartiality and could therefore have called into question the impartiality of the Court of Cassation itself in examining the applicant's appeal on points of law.

There had accordingly been a violation of Article 6 § 1 of the Convention.

Article 6 § 2 (presumption of innocence)

The Court pointed out that members of the public prosecutor's office were required to respect the presumption of innocence guaranteed by Article 6 § 2 of the Convention when expressing themselves outside the context of their official functions.

It reiterated that, at the appeal stage, the presumption of innocence continued to apply in full, notwithstanding a conviction at first instance, and could not be merely theoretical. Where a public prosecutor agreed to speak to the press as part of or in connection with a criminal case, he or she had therefore to exercise particular caution. Where the case was pending before the national courts, he or she could not incite the public to believe that the person "charged" with an offence within the meaning of Article 6 of the Convention was guilty, as this would infringe the presumption of innocence, a fundamental guarantee of the right to a fair trial.

In the present case, given the manner in which he had portrayed the applicant, D.M. had not confined himself merely to providing information about an ongoing criminal case. He had expressed certain opinions about the applicant, in particular by describing him, without nuance or reservation, as a "crooked fraudster who knew the tricks of the trade". This was, undoubtedly, a – very negative – personal opinion.

Assessed as a whole, the prosecutor's remarks had implied to the general public that the applicant had committed the offences with which he had been charged in the ongoing criminal proceedings.

The Court emphasised in this connection the importance of the duty of discretion incumbent on judges and prosecutors, including members of the public prosecutor's office. While the latter were not bound by the principles of independence and impartiality within the meaning of Article 6 § 1 of the Convention, they nonetheless remained obliged to exercise caution in publicly expressing their views outside the courtroom with regard to an ongoing criminal case, given the importance of the presumption of innocence in a democratic society.

It therefore considered that D.M.'s remarks to the press had incited the public to believe that the applicant was guilty in the appeal proceedings that were then pending, and had infringed his right to the presumption of innocence.

There had accordingly been a violation of Article 6 § 2 of the Convention.

The Court held that Belgium was to pay the applicant EUR 6,000 in respect of non-pecuniary damage and EUR 4,754.39 in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.