

another, unsuccessful, attempt to re-open his case in Turkey.

ECtHR's Findings

As regards the admissibility of his appeal, Article 6(2) safeguards the presumption of innocence until someone is proven guilty according to the law. There are two aspects to the presumption of innocence. First, there is a prohibition against public officials from making premature statements about a defendant's guilt. This acts as a procedural guarantee to ensure the fairness of the criminal trial itself, but also requires that no representative of the State should say that someone is guilty before that has been established by a court, outside the scope of criminal proceedings. The second aspect is that a person's innocence must not be called into question in subsequent proceedings. In the present case. This implies that Article 6(2) applies to the case as it falls within the scope of the first aspect.

As regard the merits of the appeal, Turkey pointed out that the burden of proof in disciplinary proceedings is different than in criminal proceedings. Further, it argued that dismissal was not decided on from a criminal law standpoint. Article 6(2) first and foremost applies within the context of criminal proceedings. There is a distinction between statements about (mere) suspicions and clear declarations about someone's guilt (in the absence of a conviction). Public officials must therefore choose their words carefully, but their words must also be placed in context. In previous, similar cases, the ECtHR has held that Article 6(2) does not prevent authorities vested with disciplinary powers from imposing sanctions for acts which also have been the subject of criminal proceedings, where such misconduct has been duly established. The two sets of proceedings may take place in parallel. Further, exoneration from criminal responsibility does not, as such, preclude the establishment of civil or other forms of liability based on the same facts, albeit based on a less strict burden of proof, unless this would impute criminal liability nonetheless.

In the present case, the ECtHR must determine whether the Turkish (disciplinary and administrative) authorities breached the presumption of innocence by their reasoning or language. It notes that the legal basis for the dismissal was "*shameful and disgraceful conduct incompatible with the civil service*", which as such does not entail any criminal connotations. The two investigators established the facts independently. There is nothing to suggest that the administrative procedure was interfered with by the criminal investigation. Moreover, the disciplinary authorities described the incident as "harassment of a minor", not "sexual abuse" or "sexual assault". The use of "harassment" does not in itself present a problem, as it is used in a wider context than in criminal law alone. While there might have been a

not-entirely-appropriate reference to a statement by someone who had heard rumours about previous indecent behaviour by Mr G (prior to the incident taking place), even the use of unfortunate language can be tolerated, in certain circumstances, bearing in mind the nature of the task of the domestic courts. Also, a civil court's reliance on a statement made, or evidence produced in the criminal proceedings, is not itself incompatible with Article 6(2) as long as reliance on that evidence does not result in the civil court commenting on the defendant's criminal responsibility or drawing inappropriate conclusions. Even if the Turkish court considered Mr G to be guilty, use of this statement alone did not amount to an imputation of criminal guilt.

Ruling

The ECtHR:

- declares the application admissible; and
- holds that there has been no violation of Article 6(2) of the Convention.

ECtHR 23 January 2018, application no. 60392/08, Unfair dismissal, Other fundamental rights

Seven – v – Turkey, Turkish case

Summary

The Turkish Supreme Administrative Court cast doubt on a dismissed police officer's innocence by failing, in an appeal review, to take proper account of the fact that he had been acquitted of rape, in breach of the presumption of innocence contained in Article 6 §2 of the European Convention on Human Rights.

Facts

Hamit Seven is a Turkish national who served as a police officer in Ankara, Turkey. In 2002, a woman filed a criminal complaint against Hamit and a colleague police officer, alleging that she had been taken into a police car and raped. The police officers admitted that they had picked up the woman, while patrolling, but allegedly did this because the woman looked intoxicated, had hailed them, stopped their car and asked for their help to go to a safe place. They had taken the woman to the home of Hamit's colleague allegedly with the inten-

tion to sober her up, when she started taking off her clothes and acting in a sexually provocative way. According to Hamit, the woman seduced him to the point where had to ejaculate in his own hand. However, Hamit claims that there had not been sexual intercourse.

National proceedings

Disciplinary and criminal proceedings were begun simultaneously following allegations that Hamit had raped the woman while on duty, abusing his authority as a police officer. In November 2002, the Supreme Disciplinary Council found Hamit guilty of abuse of his authority as a police officer and of sexually assaulting the woman. Hamit appealed but the Ankara Administrative Court endorsed the reasoning of the prior disciplinary decision in its judgment of July 2003. By that time, the criminal proceedings were still pending.

It was not until September 2005 that the Ankara Assize Court acquitted Hamit in criminal proceedings of all charges, holding that there was no evidence of force on the woman's body (which is one of the constituent elements of the offences of rape and unlawful detention). Hamit then appealed in the administrative proceedings to the Supreme Administrative Court, but this Court refused to annul his dismissal, and endorsed the reasoning of the Ankara Administrative Court. Hamit submitted a request to rectify the Supreme Administrative Court's decision, arguing that the fact that he had been acquitted in the criminal proceedings and been found not guilty of the allegations of rape had not been taken into account in the Supreme Court's decision. The Supreme Administrative Court however, dismissed this request.

Relying on Article 6 §2 (right to presumption of innocence), Hamit complained about being dismissed while the criminal proceedings were still pending and about the Administrative Court's refusal to revise its previous decision once he had been cleared of the charges.

ECTHR findings

Article 6 §2 safeguards the right to be "*presumed innocent until proved guilty according to law*." There are two aspects to the presumption of innocence:

1. A procedural aspect relating to the conduct of a criminal trials prohibiting public officials from making premature statements about a defendant's guilt. This acts as a procedural guarantee of the fairness of the criminal trial itself. But not only that: the presumption of innocence may be infringed not only in the context of a criminal trial, but also in separate civil, disciplinary or other proceedings that are conducted simultaneously with the criminal proceedings.

2. A second aspect, which aims to ensure respect for a not guilty finding in the context of subsequent proceedings, where there is a link with criminal proceedings and those have ended with no conviction. This requires that the person's innocence vis-à-vis the criminal offence must not be called into doubt in subsequent proceedings.

The present case concerns both aspects. The first aspect comes into play because of a statement made during the course of the disciplinary proceedings while the criminal proceedings arising out of the same facts were still pending. The question is whether the reasoning adopted in the disciplinary proceedings before the final decision in the criminal proceedings violated Hamit's right to be presumed innocent.

In prior case law, the ECtHR has emphasised the importance of the choice of words used by public officials in their statements before a person has been tried and found guilty of a criminal offence. Where, as in the present case, the disciplinary and criminal proceedings end at different times and come to conclusions that appear to be contradictory, there is a need for the authorities to maintain a distinction between disciplinary and criminal liability in the language they use.

In Hamit's case, the lines between disciplinary and criminal liability were blurred from the very beginning of the disciplinary investigation. The Administrative Courts had referred to Hamit as "the accused" in their decision to dismiss him and described his conduct as "sexual assault" without any wording to limit what they were saying to the disciplinary sphere. The ECtHR therefore found they violated Hamit's right to be presumed innocent before the pending criminal proceedings. Moreover, the Administrative Court's judgment of July 2003, upholding the reasoning of the disciplinary authorities, described the applicant's conduct as "having intercourse with the woman without her consent". In the ECtHR's opinion, this amounted to pronouncing the applicant guilty of rape and therefore breached Article 6 §2 of the Convention.

In terms of the second aspect, the ECtHR needed to consider whether the Supreme Administrative Court's decision following the final decision in the criminal proceedings complied with the requirement to respect the presumption of innocence. The Supreme Administrative Court's appeal review made no additional comments concerning Hamit's disciplinary or criminal liability, even though Hamit explicitly argued that he had been acquitted of all charges. The ECtHR considered that the Supreme Administrative Court needed to explain why it regarded that the reasoning employed by the disciplinary authorities and the first instance court could continue to be in accordance with the law, although the applicant had been acquitted in the meantime in the criminal proceedings. That was the only way it could have avoided the situation complained of by Hamit, namely that he was left with two contradictory judgments. By keeping

silent on that point, it missed the opportunity to rectify the previous reasoning, which the ECtHR found incompatible with the presumption of innocence under Article 6 §2. Thus, the ECtHR concluded that there had also been a violation in relation to the second aspect.

ECtHR 27 February 2018, application no. 1085/10, Unfair dismissal, Freedom of expression

Guja – v – The Republic of Moldova (No. 2),
Moldavian case

Summary

Dismissal after re-instatement of employment following an ECtHR judgment found an infringement of freedom of speech.

Facts

Mr Guja served as Head of the Press Department of the Prosecutor General's Office. In January 2003, he had disclosed two letters to a newspaper, which contained information about the separation of powers, improper conduct by a high-ranking politician, and the government's attitude towards police brutality. He was then fired by his employer for having violated the internal regulations of the Press Department. The Moldavian courts found in favour of the employer, on the grounds that Mr Guja had breached his duty of confidentiality by disclosing the letters and that he had failed to consult other heads of departments. In its judgment of 12 February 2008, the ECtHR held that Mr Guja's dismissal had infringed his right to freedom of expression guaranteed by Article 10 of the Convention (*Guja – v – Moldova*, no. 14277/04). After the ECtHR judgment, Mr Guja applied to the domestic courts to have the judgments confirming his dismissal set aside. The Supreme Court of Justice ordered his reinstatement on 28 May 2008, on which date Mr Guja lodged an application for reinstatement with his former employer.

According to Mr Guja, on 29 May 2008 the Prosecutor General asked him to resign, and upon his refusal, threatened to force him to. On 5 June 2008, the Prosecutor General issued an employment order. On the same day, he started initiated action to terminate the employment contract (and was soon granted the necessary approval of the trade union) based on a provision which enabled a new Prosecutor General to fire prior

staff. Between 6 June 2008 and 16 June 2008, Mr Guja was an employee but got no access badge (and had to wait to be let in by his superiors), no office (and worked in the library) and no tasks. On 16 June 2008, he was dismissed, effective 10 June 2008. The subsequent proceedings, up to the Supreme Court, centred around the provision used to dismiss Mr Guja, not paying attention to Mr Guja's arguments that he had in fact been punished again for the incident of 2003 and that, in fact, his re-instatement and subsequent dismissal had been a fake set-up. Having no success, Mr Guja applied to the ECtHR again.

Mr Guja also informed the Department for the Execution of Judgments of the European Court of Human Rights about the described developments. Following the procedure of Article 46 of the Convention, this issue is still ongoing before the Committee of Ministers.

ECtHR findings

As for the admissibility of the case, the Moldavian Government had argued that the ECtHR was not competent to deal with allegations of non-enforcement of its 2008 judgment, because this task was within the competence of the Committee of Ministers of the Council of Europe. The ECtHR held that it was competent to investigate new issues in relation to its previous judgment. Therefore, Mr Guja's application was admissible.

As to the merits of the case, Mr Guja had argued that the dismissal was an illegitimate interference of his right to freedom of expression, as guaranteed by Article 10 of the Convention. In particular, the clause which was the main reason for dismissal, had never been used before. Further, he argued that the Prosecutor General had never intended to abide by the ECtHR Judgment of 12 February 2008. The Moldavian government disagreed with it, arguing that the dismissal was wholly unrelated to the 2003 incident. Moreover, the statements of Mr Guja about the events in May and June 2008 were untrue.

The ECtHR first of all quoted much of its 2008 judgment, in which it had held that Article 10 of the Convention had been infringed. In addition, it held that the central issue in the case at hand was whether or not Mr Guja had received the treatment he complained of as a result of his whistle-blowing in 2003. The Court held that the provision that Mr Guja's dismissal had been based on, which had given a newly-appointed Prosecutor General grounds to dismiss existing staff, was being used for the first time in his case, whilst between 2003 and 2008 two new Prosecutor's General had been appointed. It also noted that the dismissal was initiated on the very day the reinstatement was ordered. Further, it held that the Moldavian Government should have provided at least some evidence in support of its position that Mr Guja's arguments about the events of May