CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF OSU v. ITALY

(Application no. 36534/97)

JUDGMENT

STRASBOURG

11 July 2002

FINAL

11/10/2002

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 Osu v. Italy,

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

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr L. FERRARI BRAVO,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr E. LEVITS,
Mr A. KOVLER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 5 April 2001 and on 27 June 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36534/97) against the Italian Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Afolabi Osu ("the applicant"), on 10 July 1996.

2. The applicant was represented before the Court by Mr Alan Simmons, a lawyer practising in London. The Italian Government ("the Government") were represented by Mr U. Leanza, Agent, and by Mr V. Esposito, Co-agent.

3. The applicant alleged that he was unable to challenge a finding of guilt made in his absence (Articles 6 and 13 of the Convention).

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. On 5 April 2001 the Court declared the application admissible.

7. Following the general restructuring of the Court's Sections as from 1 November 2001 (Rule 25 § 1 of the Rules of Court), the application was assigned to the newly composed First Section of the Court (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Between 1982 and 1989 the applicant used to live in a rented apartment located in the area of Terontola, in the province of Perugia. He was housing a Nigerian national whom the authorities maintain is the applicant's cousin, whereas the applicant alleges he is only a friend.

9. On 23 February 1988 a criminal complaint was filed against the applicant and against the person who was sharing the apartment with him for membership of a drug-trafficking ring.

10. On an unspecified date a search warrant was issued against the applicant's friend/cousin. On 13 November 1988 the applicant's apartment was searched. The police found a certain amount of drugs, partly in the house and partly in a nearby barn. On the same date the applicant was arrested and charged with illegal possession of drugs.

11. During his police interrogation the applicant chose the family home of a couple of close friends, Mr and Mrs C., as the address for service of communications relating to the case, as provided for by Section 171 of the former Italian Code of Criminal Procedure. The applicant was subsequently committed for trial before the Arezzo District Court on the charge of illegal possession of drugs.

12. On 7 December 1988 the Arezzo District Court acquitted the applicant on the ground of lack of evidence (*insufficienza di prove*). The court however found the applicant's friend/cousin guilty of possessing drugs and sentenced him to seven years' imprisonment.

13. Following his acquittal the applicant again elected Mr and Mrs C.'s family home as his address for service. However, shortly after his acquittal the applicant moved to Germany where he obtained employment. The applicant did not inform the Italian authorities of this change of address as required by Italian law.

14. On an unspecified date the Public Prosecutor attached to the Arezzo District Court appealed against the judgment acquitting the applicant. On 10 July 1989 the President of the Florence Court of Appeal issued a summons for the applicant to attend the appeal hearing set for 6 October 1989. On 2 August 1989 the bailiff (*ufficiale giudiziario*) completed a form stating that he could not serve the summons on account of the fact that the applicant was no longer living there and that it appeared that he had left the country (“*non potuto notificare perchè il notificando non è piu' domiciliato presso la famiglia in questione ma pare sia ritornato all'estero”*). On 16 August 1989 the bailiff completed a report stating that he had served the summons on the applicant by depositing it at the registry of the Florence Court of Appeal.

15. On 6 September 1989 the registry of the Florence Court of Appeal issued a notice to Mr D., the applicant's officially-appointed lawyer (*avvocato d'ufficio*), which stated that, as it had not been possible to serve the summons on the applicant, it had been filed with the court registry. On 25 September 1989 the bailiff served this notice on Mr D.

16. On 6 October 1989 the Florence Court of Appeal reversed the first-instance judgment concerning the applicant and sentenced him to seven years' imprisonment for illegal possession of drugs. The applicant, who had had no notice of the appeal proceedings, was not present at the hearing.

17. On 3 January 1990 the bailiff wrote a report stating that the attempt to serve notice of the judgment on the applicant at the old address had failed, the applicant no longer being domiciled there, as declared by Mr C. On 29 January 1990 the bailiff completed a report (*relata di notifica*) stating that he had served notice of the judgment on the applicant by filing it with the registry of the Florence Court of Appeal. The applicant did not receive any notice of the appeal judgment or of the prison sentence passed on him.

18. On 19 August 1995 the applicant was arrested when entering Italy on his return from a holiday. He was immediately imprisoned in compliance with the Florence Court of Appeal judgment of 6 October 1989.

19. On 22 September 1995 the applicant made an application to the Court of Cassation seeking leave to make a "late appeal" (*restituzione nel termine*).

20. By a decision (*ordinanza*) of 30 January 1996, which was deposited in the court's registry on 13 March 1996, the Court of Cassation rejected the applicant's request. It noted that the applicant had had knowledge of his conviction *in absentia* upon his arrest on 19 August 1995, whereas he had lodged the request for the late appeal on 22 September 1995, thus failing to comply with the ten-day time-limit set out in Article 175 of the Code of Criminal Procedure.

21. In a letter dated 20 July 1996 Mr and Mrs C. stated that they had never been served with notification that an appeal had been lodged in respect of the applicant. On or about 31 May 1997 the applicant was released from prison and was expelled to the United Kingdom.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A The possibility of introducing a "late appeal"

22. Section 175 paragraphs 2 and 3 of the Code of Criminal Procedure provides as follows:

> "When a judgment is delivered *in absentia*, an accused who proves that he had no knowledge of the judgment can apply for an extension of the time-limit to lodge an appeal against it provided that the judgment has not already been appealed by his

lawyer and that the fact that he did not have knowledge of the judgment is not attributable to him ....

The request for an extension of the time-limit shall be lodged by the accused within ten days of his actual knowledge of the judgment".

B The suspension of the procedural time-limits

23. Section 1 of Law no. 742 of 7 October 1969 provides as follows:

"The running of procedural time-limits in the ordinary and administrative courts shall be automatically suspended from 1 August to 15 September each year and shall recommence at the end of the suspension period. Should a time-limit start running during this period, the starting-date shall be automatically postponed to the end of such period."

In a judgment (no. 6336) of 25 November 1998, the Court of Cassation stated that the ten-days time-limit set out in Article 175 of the Code of Criminal Procedure is also suspended from 1 August to 15 September pursuant to Section 1 of Law 742/69.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. The applicant complains that he was unable to challenge the finding of guilt made in his absence by the Florence Court of Appeal. He invokes Article 6 §§ 1 and 3 (b), (c) and (d) of the Convention, which, in so far as relevant, reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

1. Submissions of the parties

(a) The Government

25. The Government submit that the notices of the appeal and of the appeal judgment were duly served on the applicant in accordance with the then applicable provisions of the Code of Criminal Procedure. They underline that the applicant had failed to inform the authorities of his change of address.

26. They point out that, as it is stated in the decision of the Court of Cassation of 30 January 1996, the request for lodging a late appeal was filed more than ten days after the applicant had had knowledge of his conviction *in absentia*. They do not make any submissions as regards the suspension, during the judicial vacations, of the time-limit for lodging a late appeal.

(b) The applicant

27. The applicant argues that, even though he had failed to inform the authorities of his change of address, this information was available from Mr and Mrs C. The authorities were aware of his return abroad by at least 2 August 1989, that is to say at least two months prior to the hearing before the Court of Appeal, and yet they did not make any additional enquiries about his whereabouts. Also the service of the judgment of the Court of Appeal was attempted at the old address in spite of the fact that it was by then well-known that the applicant did not reside there any longer. The applicant further submits that his involvement in drug trafficking was assumed by the Court of Appeal on the basis of circumstantial evidence only.

28. As regards the alleged breach of his right of access to a court, the applicant accepts that limitation periods are in principle appropriate for the sound administration of justice; he submits however that a time-limit of ten days only is too short to allow an effective access to the remedy. As regards the suspension of this time-limit during the judicial vacations, which should have postponed its starting point up to 16 September 1995, the applicant underlines that the Government do not make submissions in this respect and maintains that the Court of Cassation erred in not applying Section 1 of Law no. 742 of 7 October 1969, a provision which is apparently clear, precise and ascertainable. Moreover, the Court of Cassation failed to offer any reasons for not applying it.

2. The Court's assessment

29. The Court first observes that the applicant, who left Italy shortly after his acquittal at first instance, failed to inform the authorities of his change of address, as requested by the relevant provisions of national law. The Italian authorities then tried to serve all the acts concerning the appeal proceedings at the address the applicant had elected in Italy. As these

attempts failed, the applicant had no knowledge of the appeal proceedings instituted by the Public Prosecutor attached to the Arezzo District Court.

30. The Court further notes that the applicant was informed of the conviction issued by the Florence Court of Appeal at the latest on 19 August 1995, date of his arrest. On 22 September 1995, he applied to the Court of Cassation seeking leave to lodge a late appeal. However, this request was rejected.

31. The Court reiterates that the right to a court, of which the right of access is one aspect (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36), is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (see the Guérin v. France judgment of 29 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 1867, § 37).

32. The rules on time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy (see the Pérez de Rada Cavanilles v. Spain judgment of 28 October 1998, *Reports* 1998-VIII, p. 3255, § 45).

33. Moreover, the manner in which Article 6 applies to courts of appeal or of cassation must depend on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them (see, for instance, the Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A no. 115, p. 22, § 56, and the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 15, § 31); the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal (Levages Prestations Services v. France judgment of 23 October 1996, *Reports* 1996-V, p. 1544, § 45).

34. The Court notes that in the instant case the applicant's request for leave to lodge a late appeal was declared inadmissible on the ground that it had not been filed within the ten-days time-limit provided for by Article 175 of the Code of Criminal Procedure.

35. In order to satisfy itself that the very essence of the applicant's "right to a tribunal" was not impaired by the declaration that the appeal was inadmissible, the Court will firstly examine whether the calculation of the running period of the time-limit made by the Court of Cassation could be regarded as foreseeable from the point of view of a person convicted *in absentia* and whether, therefore, the penalty for failing to respect that delay

did not infringe the proportionality principle (see, *mutatis mutandis*, the Levages Prestations Services quoted above, p. 1543, § 42).

36. In this respect, the Court observes that Section 1 of Law no. 742 of 7 October 1969 provides that the running of procedural terms is automatically suspended from 1 August to 15 September each year and that, should a term start running during this period, the starting-date is automatically postponed until the end of such period. The applicant in fact filed his request on 22 September, i.e. within the ten-days time-limit starting on 16 September 1995.

37. However, the Court of Cassation did not apply the provisions of Law no. 742 and rejected the applicant's request as being lodged out of time. There is no explanation in the decision of the Court of Cassation or in the observations from the Government why the clear wording of Section 1 of Law no. 742 was not applied in the applicant's case. In a later judgment (see paragraph 23) the Court of Cassation stated that Section 1 of Law no. 742 also applied to the time-limit in Article 175 of the Code of Criminal Procedure. However, this judgment does not indicate whether this was a change of practice or a confirmation of the wording of Section 1 of Law no. 742.

38. In the light of the foregoing, the Court considers that the applicant could have reasonably expected that the suspension of procedural time-limits be applied in his case, and that under the relevant domestic legislation, the Court of Cassation's decision of 30 January 1996 was not foreseeable.

39. By introducing his request for leave to lodge a late appeal seven days after the end of the suspension period the applicant cannot be considered to have acted negligently. In these circumstances, the Court considers that failure to apply Section 1 of Law 747/69 without any reasons therefore deprived the applicant of the right of access to a court to challenge his conviction *in absentia*.

40. There has therefore been a violation of Article 6 § 1.

41. In the light of the above, the Court considers that it is not necessary to examine the matter under the provisions of paragraph 3 of Article 6 of the Convention, or to ascertain whether the judgment of the Florence Court of Appeal was duly served on the applicant, and whether the time-limit of ten days provided for by Article 175 of the Code of Criminal procedure guarantees an effective access to the remedy of late appeal.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

42. The applicant also complains that the rejection of his request for leave to lodge a late appeal against his conviction *in absentia* amounts to a violation of Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

43. The Court notes that the complaint under Article 13 arises out of the same facts as those it examined when dealing with the complaint under Article 6 of the Convention. Having regard to its decision on Article 6 § 1, the Court considers that it is not necessary to examine the case under Article 13 since its requirements are less strict than, and are here absorbed by those of Article 6 § 1 (see, notably, the following judgments: Sporrong and Lönnroth of 23 September 1982, Series A no. 52, p. 32, § 88, and *C.G. v. United Kingdom*, n° 43373/98, § 53, unreported).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. Relying on the Colozza v. Italy judgment (see the judgment of 12 February 1985, Series A no. 89, p. 17, §§ 35-38), the applicant claims 3,170 British pounds (£) for pecuniary and non-pecuniary damage.

46. In the Government's submission, the applicant had not duly established any pecuniary damage. As to non-pecuniary damage, a judgment finding a violation of Article 6 would constitute sufficient just satisfaction.

47. Whilst the Court cannot speculate as to the outcome of the proceedings concerned had there been no violation of the Convention, it considers that the applicant suffered a loss of opportunity (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). It also finds that the applicant suffered some non-pecuniary damage. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, it decides to award him the amount claimed, which corresponds to approximately 4,937 euros (EUR).

B. Costs and expenses

48. The applicant also sought reimbursement of £ 6,261 for costs incurred before the Commission and the Court. He has presented a detailed bill of the working hours necessary for the preparation of his case

(57 lawyer hours and 20 paralegal hours) as well as of any additional cost and legal fee incurred.

49. The Government left the matter to the Court's discretion.

50. The Court considers it appropriate to award the applicant the sum claimed for the proceedings before the Commission and the Court. Consequently, the Court decides to award the applicant the amount claimed which corresponds to approximately 9,752 EUR.

C. Default interest

51. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that the applicant's complaint under Article 13 of the Convention do not give rise to any separate issues;
3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 4,937 (four thousands nine hundreds and thirty-seven euros) in respect of material and non-pecuniary damage;
      (ii) EUR 9,752 (nine thousands seven hundreds and fifty-two euros) in respect of costs and expenses;
   (b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English, and notified in writing on 11 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President