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

FOURTH SECTION

CASE OF CUSCANI v. THE UNITED KINGDOM

(Application no. 32771/96)

JUDGMENT

STRASBOURG

24 September 2002

FINAL

24/12/2002

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 Cuscani v. the United Kingdom,

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

Mr M. Pellonpää, *President*,
Sir Nicolas Bratza,
Mr A. Pastor Ridruejo,
Mrs E. Palm,
Mr R. Maruste,
Mr S. Pavlovschi,
Mr L. Garlicki, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 3 September 2002,

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

PROCEDURE

1. The case originated in an application (no. 32771/96) against the United Kingdom of Great Britain and Northern Ireland 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 an Italian national, Santo Annino Tommaso Cuscani ("the applicant"), on 19 March 1996.

2. The applicant, who had been granted legal aid, was represented before the Court first by Mr S. Earl, a lawyer practising in Newcastle upon Tyne (England) and, following the Court's decision on admissibility, by Mr M. Purdon, a lawyer also practising in Newcastle upon Tyne. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Mandal, Agent.

3. The applicant alleged that he did not receive a fair trial on account of the absence of interpretation at his hearing on sentencing.

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 originally allocated to the Third Section of the Court, which declared it admissible on 26 June 2001.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). The application was allocated to the new Fourth Section of the 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.

7. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant formerly managed "The Godfather Restaurant" in Newcastle upon Tyne, which was operated by a company of which the applicant was a director. Following an inquiry by the Inland Revenue and Customs and Excise in 1988 into the restaurant and the applicant, the company went into liquidation and ownership of the lease of the restaurant was transferred to a new company controlled by the applicant. However, the restaurant was run by a succession of management companies under short-term management contracts. The various companies were all registered for Value Added Tax ("VAT") purposes but failed to make any VAT payments or returns to the Customs and Excise authorities. In addition, wages were paid to employees in cash and were not declared to the Inland Revenue. The resulting loss of VAT was assessed at approximately 460,000 pounds sterling ("GBP") and the accumulated losses in respect of Income Tax and National Insurance contributions were assessed at GBP 360,000. In September 1994 the applicant was declared bankrupt as a result of civil proceedings brought by the Inland Revenue to recover unpaid tax.

9. On 25 November 1994 the applicant was arrested and on 26 November 1994 charged with various offences of fraudulently evading VAT. He was remanded in custody. His applications for bail on 12 April 1995, 13 June 1995 and 7 December 1995 were refused.

10. The applicant was granted legal aid on 1 March 1995. The legal aid order covered both the committal hearings and the actual trial. The applicant was represented throughout the proceedings by a Queen's Counsel ("QC"), who was also a Recorder, a very experienced junior counsel and two different firms of solicitors.

11. On 3 March 1995 the Newcastle upon Tyne Magistrates' Court committed the applicant for trial before the Crown Court at Newcastle.

12. Preliminary hearings were held on 10 April 1995 and 2 June 1995. At the hearing of 16 June 1995 the applicant was indicted with two others on two counts of being knowingly concerned in the fraudulent evasion of VAT (between 22 May 1989 and 25 July 1994) and of taking steps with a view to the fraudulent evasion of VAT (between 25 July 1994 and 24 November 1994). The applicant pleaded not guilty.

13. At none of these hearings did either the applicant or his legal team request the provision of an interpreter, nor suggest to the court that the applicant required the services of an interpreter.

14. At the trial on 4 January 1996, the applicant, on the advice of counsel, changed his plea to guilty. He was also indicted on another count of cheating the public revenue and pleaded guilty to that charge too. The court was informed that the applicant disagreed on the *quantum* of the sums which formed the basis of the plea with the consequence that further discussion was needed on this matter with the prosecution. Defence counsel informed the court for the first time that the applicant had:

> "considerable difficulty in communicating, save in very simple concepts, in English. Now for the purpose of consultation we can get by, but one of the difficulties is that his English is very poor and his Italian is very Southern".

15. Counsel invited the court to direct that an interpreter be present at the subsequent hearing, given that at either a hearing or indeed a plea:

> "... certain complicated matters might well have to be put before the court, and which he should understand as they are being put".

16. The court granted this request and adjourned for reports to be written and for the parties to reach agreement on the issue of *quantum*, after convicting the applicant of all charges.

17. At the following hearing concerning sentence held on 26 January 1996, the court noted that no professional interpreter was present despite its earlier direction. The applicant's counsel stated that:

> "... it appears that no arrangements have been made, in which case I think that we shall have to make do and mend. It may require an occasional adjournment if something needs to be explained. It has been discussed extensively and obviously already with the [applicant] and, although he may not follow the detail of the proceedings, he certainly knows the outline of what the prosecution will say. I imagine that their case will very much follow the summary, and he knows the burden of what I intend to say."

18. The trial judge asked whether anyone in court who knew the applicant was fluent in both English and Italian and could provide interpretation for the applicant. The applicant's counsel, without consulting his client, pointed out that the applicant's brother was present, and the court agreed to make use of him, if need be. The applicant's brother was never requested to translate any statement during the course of the hearing.

19. The applicant was sentenced to a total of four years' imprisonment and disqualified from being a company director for ten years.

20. On 14 May 1996 the applicant applied to the Court of Appeal Criminal Division seeking leave to appeal against sentence. In his application, the applicant was represented by the same legal team that had defended him at trial. In a letter to the Court of Appeal, the applicant stated that he had been sentenced on the basis, which was incorrect, that he had pleaded guilty to frauds totalling GBP 800,000 and that the real amount of

the fraud was GBP 140,000. The applicant did not maintain in his application that he had been unable to understand the proceedings at the trial or to communicate effectively in court; nor did he allege in his application that he should have been provided with the services of an interpreter.

21. Leave to appeal was refused by the Single Judge on 3 May 1996 and by the full Court of Appeal on 15 July 1996.

22. On 2 September 1996 the applicant sought advice from the President of the Law Society on what action to take against his defence lawyers but did not receive any reply.

23. On 3 September 1996 the applicant wrote to the Home Secretary, admitting that he had not declared GBP 2,000 per week for staff wages due to the recession, and claiming that the real amount of the fraud was GBP 140,000 and not GBP 800,000. He further complained that his counsel had failed to secure him the services of an interpreter at the trial on 26 January 1996 and that this was of "paramount importance" for the purposes of the plea in mitigation. The applicant further observed that his QC had misled the trial court by stating that his brother would be able to act as a translator, when his brother was unable either to speak or write in English.

24. The Home Secretary forwarded the applicant's case to the Criminal Case Review Commission ("the Commission"). The applicant himself applied to the Commission, claiming *inter alia* that his lawyers should not have allowed him to plead guilty to the GBP 800,000 fraud, as he had only intended to accept guilt in respect of GBP 140,000. Furthermore, his lawyers had failed to ensure the presence of an interpreter both at conferences in preparation for the trial and in court. He maintained that his brother did not speak English well enough and that he had not understood the charges or the legal process. He complained about his counsel, who, he claimed, did not understand Italian but nevertheless did not insist on an interpreter being present at conferences; renounced the presence of a professional interpreter in court; did not understand the case; told him to plead guilty only at the trial, without explaining the consequences to him in detail and gave the court the wrong information that the applicant had accepted liability in respect of the total amount.

25. The Commission noted that it had interviewed the applicant via an Italian interpreter and that it was apparent from telephone conversations between the applicant and the Commission that he did not have a very good command of English. The Commission observed that the applicant's solicitor and counsel at trial did not accept that he lacked understanding either of the language or of the nature of the case against him. However, the Commission went on to note, *inter alia*, that

a) in the course of the proceedings the applicant's solicitor had stated in counsel's brief that the applicant "has a grasp of English but is not very easily understood. At times, he says he wants an interpreter";

b) the trial judge had seen fit to order the presence of an interpreter;
c) on appeal, the applicant's junior counsel had informed the court that the applicant did not have much of a command of English;
d) the applicant's counsel told the Commission that he would have wanted an interpreter present had there been a trial on the basis of a not guilty plea.

26. The Commission accepted that the applicant would have been able to understand the generality of the prosecution case but expressed the view that an interpreter ought to have been present when the prosecution case was explained to the applicant by his own representatives, given the complex nature of the evidence. Furthermore, he should have had the benefit of an interpreter when it came to considering the matter of changing his plea to guilty.

27. The Commission also accepted that the applicant's brother was not an adequate interpreter, but considered that the lack of an interpreter at the trial was "of much less significance than it was at the earlier stage". Further, the Commission found that too little time had been spent by the applicant's lawyers explaining the case to him.

28. The Commission concluded that there were grounds for finding that the plea was uninformed in that the applicant had not fully understood the nature of the case to which he was pleading, partly because of his inadequate understanding of the language, and because of the inadequate explanation of the case given to him by his legal representatives.

29. However, the Commission noted that the Court of Appeal no longer had the power to allow an appeal against conviction if it did not think the conviction was unsafe but was dissatisfied in some way with the trial process, since there was no longer room for the separate notion of an "unsatisfactory" conviction. In the view of the Commission, whilst the applicant's conviction was arguably unsatisfactory, it could not be said to be unsafe. Since the Commission did not consider that there was a real possibility that, if referred to the Court of Appeal, the conviction and sentence would not be upheld, it decided not to make such reference.

30. In the meantime, the applicant was released from prison on licence on 25 November 1996.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. The leading domestic authorities on the provision of a interpreter are the cases of *Lee Kun* ([1916] 11 CrAppR 293) and *Kunnath v the State* ([1993] 1 WLR 1315).

32. In *Lee Kun* Lord Reading CJ, speaking on behalf of the Court of Appeal, set out the following statement of principle (pp. 301-302):

> "We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be

> interpreted to him, except when he or counsel on his behalf expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission; the judge should not permit it unless he is of the opinion that by reason of what has passed before the trial, the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases, and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the accused's interest which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it."

33. Lord Reading's judgment in *Lee Kun* was reinforced in the more recent case of *Kunnath v the State* in 1993. Speaking on behalf of the Privy Counsel, Lord Jauncey stated:

> "Their Lordships have no doubt that the course advocated by Lord Reading CJ in *Rex v Lee Cunn* is a highly desirable one and should be followed wherever a foreign defendant, not fully conversant with the language of the proceedings, is represented by counsel."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 3(e) OF THE CONVENTION

34. The applicant complained that the fairness of his trial had been undermined on account of the failure to provide him with an interpreter with the result that he could not understand and follow the trial proceedings and appreciate the consequences of his plea of guilty. The applicant invokes Article 6 of the Convention, which provides as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

35. The Government rejected the applicant's allegations. In their submission, the applicant's command of English was adequate to understand the proceedings and to participate effectively in the trial process. No evidence had been adduced by the applicant to controvert this view and at no stage of the pre-trial, trial or appeal proceedings did the applicant ever make a complaint to that effect. On the contrary, he only disputed his understanding of the extent of the charge to which he pleaded guilty.

36. The Government drew attention to the fact that the applicant's legal team never suggested to the trial court either on 4 January 1996 or on 26 January 1996 that the absence of an interpreter would prevent the applicant from broadly understanding the proceedings. The applicant's QC, for example, when confronted with the absence of an interpreter at the hearing on 26 January 1996, indicated that “we shall have to make do and mend”. At the earlier hearing on 4 January 1996, the applicant's QC admitted that “for the purposes of consultation we can get by.” Had the applicant's lawyers felt during the trial that the applicant was unable to understand what was being said in court, they would have been bound by their codes of conduct to bring this to the court's attention. Significantly, the Criminal Cases Review Commission concluded that the applicant's failure to understand fully the nature of the case was due only partly to language difficulties. It was also due to the inadequate explanation of the case given to him by his legal representatives. Accordingly, Article 6 § 3(e) could not be said to have been engaged in the circumstances of the applicant's case.

37. The applicant disputed the Government's arguments. In his principal submission, he contended that the trial judge had been clearly informed by counsel that the applicant had a “very poor” command of English (see paragraph 14 above). The judge in consequence directed that the applicant be assisted by an interpreter. However, the interpreter failed to appear at the hearing on 26 January 1996. The applicant argued that, at the very least, the trial judge should, given the turn of events, have made proper enquiries so as to ensure that it was the applicant's clear wish that his counsel proceed in the absence of an interpreter. In the event, the judge failed to hear the applicant's point of view.

38. The Court observes that the applicant's alleged lack of proficiency in English and his inability to understand the proceedings became a live issue for the first time on 4 January 1996 when the trial court was informed by his legal team that the applicant wished to enter a guilty plea to the charges brought against him. At the request of the applicant's counsel, the trial judge directed that an interpreter be present at the hearing on sentence to be held on 26 January 1996 (see paragraphs 15 and 16 above). The judge was thus put on clear notice that the applicant had problems of comprehension. However, notwithstanding his earlier concern to ensure that the applicant could follow the subsequent proceedings it would appear that the judge allowed himself to be persuaded by the applicant's counsel's confidence in his ability to “make do and mend” (see paragraph 17 above). Admittedly, the trial judge left open the possibility of the applicant having recourse to the linguistic assistance of his brother if the need arose. However, in the Court's opinion the verification of the applicant's need for interpretation facilities was a matter for the judge to determine in consultation with the applicant, especially since he had been alerted to counsel's own difficulties in communicating with the applicant. It is to be noted that the applicant had

pleaded guilty to serious charges and faced a heavy prison sentence. The onus was thus on the judge to reassure himself that the absence of an interpreter at the hearing on 26 January 1996 would not prejudice the applicant's full involvement in a matter of crucial importance for him. In the circumstances of the instant case, that requirement cannot be said to have been satisfied by leaving it to the applicant, and without the judge having consulted the latter, to invoke the untested language skills of his brother.

39. It is true that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme as in the applicant's case or be privately financed (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, pp. 32-33, § 65; the Stanford v. the United Kingdom judgment of 23 February 1994, Series A 282-A, p. 11, § 28). However, the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant. It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case, judges are required to treat an accused's interest with "scrupulous care" (see paragraphs 32 and 33 above).

40. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3(e).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 6 § 3(b) and (c) OF THE CONVENTION

41. In his submissions on the merits the applicant stated that did not pursue his arguments under Article 6 § 3 (b) and (c) as separate points. He requested the Court to have regard to the relevance of the matters dealt with under these provisions in addressing his principal complaint under Article 6 § 1 taken together with Article 6 § 3(e). The provisions alluded to by the applicant read:

> "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;"

42. The Government reiterated that the applicant was served by a very experienced legal team paid for out of legal aid. Any shortcomings in the legal assistance provided to the applicant engaged the responsibility of his

lawyers and could not be attributed to the authorities solely on account of the fact that his defence was publicly funded.

43. Having regard to its finding on the applicant's complaint under Article 6 § 1 taken in conjunction with Article 6 § 3(e) and to the applicant's wish not to pursue these issues on their own, the Court considers that it is unnecessary to examine them separately.

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. Pecuniary damage

45. The applicant maintained that he suffered financial loss through being imprisoned for a substantially longer period than would have been the case had he been sentenced for a fraud of 140,000 pounds sterling ("GBP"). He requested the Court to award him just satisfaction calculated on an equitable basis.

46. The Government considered the applicant's claim to be highly speculative. In their view, any finding of a breach of the Convention would, in the circumstances, constitute sufficient justification.

47. The Court considers that it cannot speculate on the level of sentence which would have been imposed on the applicant had he benefited from the services of an interpreter at the sentencing hearing. It therefore disallows the applicant's claim for pecuniary damage.

B. Costs and expenses

48. The applicant claimed the sum of GBP 2,056.25 inclusive of value added tax ("VAT") for work carried out by counsel on the drafting of observations on the merits of the applicant's complaints. The applicant received 205 euros ("EUR") by way of legal aid from the Council of Europe.

49. According to the Government, in the absence of a breakdown of the hourly rate charged by counsel at the merits stage, it was not possible to form a view of the acceptability of the amount claimed.

50. Deciding on an equitable basis, and bearing in mind that the applicant's claim only relates to the post-admissibility stage of the Convention proceedings and that he received the amount of 205 euros by

way of legal aid from the Council of Europe, the Court awards the applicant EUR 2,200.

C. Default interest

51. The rate of the default interest will be based on a rate equal to the marginal lending rate of the European Central Bank during the default period to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], application no. 28957, § 124, to be published in ECHR 2002-).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3(e) of the Convention;

2. *Holds* that it is not necessary to examine the applicant's complaints under Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b) and (c) of the Convention;

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, EUR 2,200 (two thousand two hundred euros) in respect of costs and expenses, together with any value added tax that may be chargeable, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (b) that simple interest on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 September 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE — Registrar

Matti PELLONPÄÄ — President