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Meeting: 1324th meeting (September 2018) (DH)

Item reference: Action report (05/09/2018)

Communication from Slovenia concerning the case of FLISAR v. Slovenia (Application No. 3127/09)

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Réunion : 1324e réunion (septembre 2018) (DH)

Référence du point : Bilan d'action

Communication de la Slovénie concernant l'affaire FLISAR c. Slovénie (Requête n° 3127/09)
(anglais uniquement)

REPUBLIC OF SLOVENIA
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Number: 5111-13/2017
Date: 4 September 2018

Mr Fredrik Sundberg, Head of Department a. i.
Department for the Execution of the Judgments
Council of Europe

Subject: Action Report for *Flisar* group of cases v. Slovenia

Dear Mr Sundberg,

Attached please find Action Report for *Flisar* group of cases v. Slovenia that comprises measures adopted for the following seven cases:

Flisar, appl. No. 3127/09, judgment of 29 September 2011, final on 29 November 2011,
Kariž, appl. No.: 24383/12, judgment of 13 November 2014, final on 13 November 2014,
Kastelic, appl. No.: 25326/11, judgment of 19 June 2014, final on 19 June 2014,
Mavrič, appl. No.: 63655/11, judgment of 15 May 2014, final on 15 May 2014,
Mesesnel, appl. No.: 22163/08, judgment of 28 February 2013, final on 28 May 2013,
Milenović, appl. No.: 11411/11, judgment of 28 February 2013, final on 28 May 2013,
Petek, appl. No.:1543/12, judgment of 19 June 2014, final on 19 June 2014.

We hope you will be able to proceed with closure of this group of cases.

Yours sincerely,

REPUBLIKA SLOVENIJA MINISTRSTVO ZA PRAVOSODJE OZ Ljubljana

Tina Brecelj
State Secretary

Attach.: Action Report for Flisar group of cases v. Slovenia

Ljubljana, 4 September 2018

ACTION REPORT

FLISAR GROUP of cases v. Slovenia

Flisar, appl. No. 3127/09, judgment of 29 September 2011, final on 29 November 2011
Kariž, appl. No.: 24383/12, judgment of 13 November 2014, final on 13 November 2014
Kastelic, appl. No.: 25326/11, judgment of 19 June 2014, final on 19 June 2014
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Petek, appl. No.:1543/12, judgment of 19 June 2014, final on 19 June 2014

I CASE DESCRIPTION

1. These cases concern violations of the applicants' right to a fair trial on account of the lack of a hearing in the proceedings in which they were convicted for minor offences solely on the basis of police reports without a possibility to examine relevant witnesses (violations of Article 6§1 in Flisar, Kariž, Kastelic, Milenovič and Petek) or without an opportunity to be present at the examination of the witnesses and to question them (violations of Article 6§§1 and 6§3(d) in Mesesnel and Mavrič).

II INDIVIDUAL MEASURES

2. At the outset, it is recalled the Court indicated in *Flisar* that where an individual has been convicted in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (§47, *Flisar*).

3. To this end, the Government would like to highlight that under section 169 of the Minor Offences Act (hereinafter "MOA") in conjunction with Section 421 of Criminal Procedure Act (hereinafter "CPA"), a request for protection of legality may be lodged by a public prosecutor *ex officio*, or at the motion of a person entitled to appeal against a minor offence judgment issued by a court in the first instance. The domestic legislation therefore ensured that the applicants in the present cases had at their disposal an effective avenue for reviewing their cases following the European Court's judgments.

4. The requests for protection of legality have been lodged by public prosecutors in cases in which the applicants filed a motion to the prosecutor, namely in *Kariž, Mavrič, Milenovič* and *Petek*. The

requests for protection of legality in these cases were granted. As a result, the impugned rulings were quashed and the cases were remitted to the first instance court for retrial.

5. In the reopened proceedings in the above cases, domestic courts decided to discontinue the proceedings due to the statute of limitation. The applicants' convictions were deleted from the minor offence records. The applicants in these cases are therefore no longer suffering any negative consequences due to the violations found.

6. On other hand, the applicants in *Flisar, Kastelic* and *Mesesnel* did not lodge requests for the protection of legality. The authorities would nevertheless want to highlight that pursuant to domestic legislation, the minor offences are automatically deleted upon three years after the date on which the impugned decision in the minor offence procedure became final. The applicants' convictions were thus deleted from the minor offence records in 2011 (Flisar), 2013 (Kastelic) and 2009 (Mesesnel).

7. It is furthermore recalled, that the applicants in *Flisar, Kastelic, Mavrič, Mesesnel* and *Petek* claimed just satisfaction in respect of non-pecuniary damage. The Court however considered that finding of a violation constituted in itself sufficient just satisfaction in these cases. On the other hand, the applicants in *Karič* and *Milenović* did not claim just satisfaction in respect of non-pecuniary damage. There was therefore no call to redress them under this head.

8. The applicants in *Flisar, Karič, Kastelic, Mesesnel, Milenović* and *Petek* also claimed just satisfaction in respect of pecuniary damage, including the sums paid for the fines and the costs incurred in the domestic proceedings complained of. The Court rejected these claims for the lack of any causal link between the violation found and the pecuniary damage alleged (in *Flisar, Karič, Kastelic, Mesesnel* and *Petek*) or as it could not speculate as to the outcome of the proceedings concerned had there been no violation of the Convention (in *Milenović*). The applicant in *Mavrič* did not claim just satisfaction in respect of pecuniary damage. In view of the above, there was no call to redress the applicants under this head.

9. In view of the above, the authorities therefore consider that the violations at hand had ceased and that the applicants were properly redressed for the negative consequences.

III GENERAL MEASURES

10. The violations at hand resulted partly from the deficient legislative provisions and partly from inadequate case-law of domestic courts. The measures have been taken to prevent similar violations. The MOA was amended shortly before the Flisar judgment became final. In response to the Court's findings the Constitutional Court and Supreme Court also operated a change of case-law. These measures are set out below.

A. Legislative measures

11. The Government would like to highlight that on 13 March 2011 Section 65 of the 2002 MOA was amended (Official Gazette of the Republic of Slovenia, no. 9-318/2011 of 11 February 2011). Pursuant to the amendments, courts shall inform the offender of its intention to repeat or supplement the evidence-taking procedure (§14, *Kastelic*). In particular, if a court establishes that the offender was not given the opportunity to give a statement regarding certain facts, it shall

notify the offender thereof. When such facts arise from the description of the facts, it shall transmit to the offender the description and inform him on where and when he can examine the case files; it shall accordingly instruct him pursuant to Article 144 of this Act and define a time limit within which he can submit his indications, suggestions and requirements. If the court decides to repeat or supplement the evidence-taking procedure, it shall notify the offender thereof and inform him that he may be present during production of evidence and that he would be invited to attend procedural acts, provided that he submits a corresponding written proposal to the court within five days following the receipt of the notification. In other words, pursuant to the amended legislation, should the domestic courts decide to examine a witness in the minor offence procedure, the alleged offender will be informed on the right to attend and participate in the questioning of these witnesses.

B. **The change of the case-law of the Constitutional court**

12. It is recalled that the Constitutional Court rejected the applicants' constitutional appeals in the present cases.

13. In response to the European Court's findings in the present cases and following the above amendments of the 2002 MOA, the Constitutional Court changed its case-law with a view to preventing similar violations. In particular, on 7 October 2015 the Constitutional Court issued Decisions No. Up-718/13 and Up-187/13 regarding the right to a defense in minor offence proceedings. In both cases the Constitutional Court established violations of the complainant's right to a defense on account of the fact that the trial court failed to hold an oral (adversarial) hearing. The Constitutional Court pointed out that when the evidence confirming that a minor offence has been committed was not obtained by means of an objective method (e.g. a speed measuring device, breath alcohol test) but the police established that a minor offence has been committed, the right to effectively defend oneself requires that the courts adopts a decision regarding the state of the facts and the individual's responsibility for the minor offence on the basis of taking evidence directly at an oral hearing. The alleged offender will have the right to be present at the oral hearing and to question the possible witnesses. The Constitutional Court reiterated the principles from the above-mentioned decisions also in decision Up-854/14 of 20 April 2017.

C. **The change of case-law of the Supreme court**

14. The Court's findings are also reflected in the subsequent case-law of the Supreme Court. In judgment no. IV Ips 106/2012 of 21 May 2013 the Supreme Court reiterated that the offender in the minor offences procedure is in principle entitled to a hearing before the first and only tribunal examining his case, unless there were exceptional circumstances which justified dispensing with such a hearing. It established, that although the offender challenged certain factual findings of the minor offence authority, based solely on the basis of personal observations of customs officers, the offender was not heard by the local court and the latter did not examine relevant witnesses. Therefore, the Supreme Court concluded, that there has been violation of Articles 22 and 29 of the Constitution and of Article 6 § 1 of the Convention.

15. In several subsequent cases the Supreme Court highlighted the principles established by the Court in the present group of cases. The Supreme Court noted that the question of the public oral hearing as the fundamental principle enshrined in Article 6 § 1 of the Convention, depends on the nature of the question, substantiated in the request for judicial review (judgment no. IV Ips 62/2013 of 4 July 2013). The judge's decision to carry out an oral hearing is not left to his subjective judgment whether the minor offence authority has correctly established the facts in the case and whether it is necessary to supplement or repeat the evidence procedure according to the rules of the regular

court procedure. This assessment is limited by the offender's right to a fair trial, which in certain cases cannot be ensured without direct assessment of the evidence at an oral hearing in the presence of the offender (for example, when the sole basis for punishing the offender is the perception of police officers, and the offender reasonably challenges the credibility of their findings in the request for judicial protection) (judgment no. IV Ips 63/2014 of 16 September 2014).

16. The Supreme Court furthermore highlighted that it is not decisive whether the offender in the request for judicial protection expressly requests the oral hearing or proposes his hearing or direct assessment of the evidence. The Supreme Court highlighted also that in cases where the oral procedure is compulsory due to the nature of the subject matter (in particular when the sole basis for punishing the offender is the observations of police officers, and the offender reasonably challenges the credibility of their findings), it is possible to decide on the basis of the file only if the offender has unequivocally waived his right to a hearing (judgment no. IV Ips 101/2013 of 17 September 2013). The same principles as in the case when the offender challenges the credibility of certain police statements concerning his conduct, apply, when the offender challenges the credibility of other incriminating witnesses (judgment no. IV Ips 26/2016 of 14 July 2016).

17. Accordingly, pursuant to the refined case-law of the Supreme Court, decision of the judge whether to hold an oral hearing in cases, in which the commission of the alleged minor offence is based on the evidence which is not obtained by means of an objective method but was personally observed by the administrative authority and the complainant challenged their factual findings, the domestic court is under an obligation to hold an oral hearing, regardless of the fact whether the complainant expressly requested holding an oral hearing.

D. Publication and dissemination measures

18. The authorities ensured wide publication and dissemination of the Court's judgments with a view to preventing similar violations.

19. To this end, Slovenian translations of the judgments have been published on the website of the State Attorney's Office (http://www2.gov.si/dp-rs/escp.nsf) and therefore made accessible to judges, other legal professionals and public at large.

20. On 3 January 2012 the Ministry of Justice submitted to the Supreme Court of the Republic of Slovenia the translation of the Court's judgment in the *Flisar* case, along with the request to notify it to all competent courts.

21. On 23 January 2012 a summary of the judgment *Flisar* was published in the *Sodnikov informator* newsletter No. 1/12 and on 2 December 2014 a summary of the judgment *Kariž* was published in the *Sodnikov informator* newsletter No. 11/2014.

22. Publication of the *Flisar* judgment and the subsequent Court's judgments of this group triggered a response among the professional public:

- Prekrški v nedavni praksi Evropskega sodišča za človekove pravice (Translation: Minor offences in the recent Court's case-law); in: 7. dnevi prekrškovnega prava, Journal, GV Založba, Ljubljana 2012;

- Ustna obravnava v postopku o prekršku: pravica kršitelja ali (še vedno) diskrecija sodišča? (Translation: Oral hearing in the minor offence procedure: the right of perpetrator or (still) the discretion of the court?). Pravna praksa, no. 39-40/2011, pp. 31-32;

- Prekrški znova pod strasbourškim kladivom: ESČP potrdilo in poglobilo doktrino Flisar-Suhadolc-Berdajs (Translation: Minor Offences under the Hammer of Strasbourg: Courtupheld and deepened the Flisar-Suhadolc-Berdajs doctrine). Pravna praksa, No. 12/2013, p. 27;

- Pravica do ustne obravnave v postopku na podlagi zahteve za sodno varstvo (Translation: The right to an oral hearing in the proceedings on the basis of a judicial protection request). Pravna praksa, no. 35/2013, p. 12);

- Alibi lastnika vozila (Translation: Vehicle owner's alibi). Pravna praksa, no. 27/2012, p. 6;

- Pravice obrambe v Evropi (Translation: The right to defence in Europe). Odvetnik, 2013, no. 59, p. 27.

23. With a view to preventing similar violations the Ministry of Justice included the Court's findings in the training of judges and practitioners working for the minor offence authorities:

- Court's case-law regarding the minor offences procedures is regularly on the agenda of the carried out plenary meetings of all courts of appeal in the Republic of Slovenia for judges, deciding in minor offences procedures at the first instance.
- Trainings at the *Dnevi prekrškovnega prava* seminar (the main Slovenian event devoted to the professional consultation of lawyers and other experts in the field of minor offences) in November 2017 were devoted to the Court's findings in the present group of cases.

24. The above measures ensured that domestic courts are now aware of the Court's findings in this case and the need to comply with the Court's findings and Convention standards in similar cases. To testify the efficiency of the measures taken, the Government would like to highlight that no applications alleging similar violations are pending before the Court.

IV JUST SATISFACTION

25. It is recalled that the Court did not award the applicants just satisfaction.

26. The amounts awarded in *Kariž* and *Petek* in respect of costs and expenses were paid to the applicants on 13 February 2015 and 19 September 2014, respectively. The payments have therefore been made within the timeframe imparted by the Court.

V CONCLUSIONS

27. The authorities of Republic of Slovenia consider that the violations at hand have ceased and that the applicants have been fully redressed for negative consequences.

28. The authorities furthermore deem that the above-mentioned general measures taken are capable of preventing similar violations.

29. It is therefore considered that the Republic of Slovenia has complied with its obligation under article 46 § 1 of the Convention.