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

COURT (CHAMBER)

CASE OF ISGRÒ v. ITALY

(Application no. 11339/85)

JUDGMENT

STRASBOURG

19 February 1991

In the Isgrò case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court***, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr J. DE MEYER,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 September 1990 and 21 January 1991,

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

PROCEDURE

1. The case was referred to the Court on 16 February 1990 by the European Commission of Human Rights ("the Commission"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11339/85) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by an Italian national, Mr Salvatore Isgrò, on 12 September 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the

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* The case is numbered 1/1990/192/252. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Protocol No. 8, which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). On 19 March 1990 the President of the Court granted him leave to use the Italian language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 March 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr J. De Meyer, Mrs E. Palm, Mr I. Foighel and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Italian Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the Registrar received the Government's memorial on 31 July 1990. On 25 July and 14 September Mr Isgrò's lawyer and the Commission's Delegate informed the Registrar that they would submit their observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President, on 3 August 1990, set down the hearing for 24 September 1990 (Rule 38).

6. On 21 August the applicant filed his claims for just satisfaction. On 31 August and 5 September the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr G. RAIMONDI, magistrato,
seconded to the Diplomatic Legal Service of the Ministry of Foreign Affairs, *Co-Agent*,

Mr M. GUARDATA, magistrato,
seconded to the legislative bureau of the Ministry of Justice, *Counsel*;

- for the Commission

Mr E. BUSUTTIL, *Delegate*;

- for the applicant

Mr G. PISAURO, avvocato, *Counsel*.

The Court heard addresses by the above-mentioned representatives.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The prosecution and the investigation

8. Mr Salvatore Isgrò was born at Messina. When the Court last received information concerning his whereabouts, he was in detention at the prison of Porto Azzurro (Livorno).

9. On 11 November 1978 the Monza public prosecutor's office ordered Mr Isgrò's arrest together with that of a number of other persons. They were suspected of involvement in the kidnapping and death of a young man, G., who had been kidnapped on 9 November 1978 and who, on the following day, had been found dead from an overdose of chloroform. The public prosecutor's decision was based on the statements of a certain Mr D., who had been asked by the organisers of the kidnapping to assist them by keeping watch over the victim, but had decided to co-operate with the carabinieri.

10. When interviewed by the carabinieri on 11, 13 and 16 November 1978 and by the public prosecutor on 14 November, Mr D. provided information on the preparation of the kidnapping and on the contacts which he claimed to have had at the time with Mr Isgrò and one Mr L. He also alleged that he had been threatened because he had not wanted to participate in the crime.

11. On 16 November 1978, in the course of an examination by the public prosecutor, the applicant admitted knowing Mr D., but denied having asked him to take part in the offence. He also rejected the suggestion that there was any enmity between them.

12. Before the investigating judge, who questioned him on 23 February 1979, he referred to disputes with Mr D.; he added that the latter had asked him to take part in a kidnapping, but that he had refused to do so.

On 10 April 1979 the same judge interviewed Mr D., who confirmed his earlier statements and gave various details concerning his conversations with Mr Isgrò and Mr L., including a meeting on 10 November 1978 with Mr Isgrò.

13. Again on 10 April 1979 the investigating judge confronted Mr D. with the applicant who, in accordance with the provisions in force at the time (see paragraph 23 below), was not assisted by his lawyer. Each of them

repeated his own version of events. The record of the confrontation reads as follows (translation from the Italian):

"... D. to Isgrò ...: I confirm the statements made to the carabinieri and to the investigating judge. I confirm in particular that at the beginning of October you asked me to take part in a kidnapping. Before, a few months ago, you had talked generally about the possibility of earning a bit of money.

Isgrò ... to D.: You're not telling the truth, it's not true that I proposed to you to take part in a kidnapping. It was exactly the opposite which happened. You came to my place - I don't remember exactly when - and you proposed that I guard a kidnap victim. I didn't even want to listen to you and I threw you out.

D. to Isgrò ...: That's all lies, what I said before is true.

Isgrò ... to D.: You're saying what you've just said because you've been angry with me ever since, when your aunt M. asked me, I stopped a fight between you and a certain N.

D. to Isgrò ...: I also confirm that I met you, the day of the kidnapping, in the ... bar of Malnate. On that occasion you explained to me what I would have to do during the detention of the kidnap victim and in particular how I should get him to write the messages to his family. You also told me that I should be seen out and about as usual.

Isgrò ... to D.: In the days before my arrest, I did go once to the ... bar in Malnate with my family and an aunt whom I had taken to Switzerland for a trip. If I remember correctly it was in fact on 9 November, I don't remember the time. I had accompanied my aunt who was to telephone to Sicily, but I don't remember at all having seen you and even less having spoken to you.

D. to Isgrò ...: I repeat what I stated before, I saw you shortly before twelve o'clock.

Isgrò ... to D.: It's not true, I was not in the bar at that time, I don't remember exactly where I was, but I remember that I only went to the bar in the afternoon.

D. to Isgrò ...: I confirm that you know the L. brothers and in particular that I saw P. L. go to your house.

Isgrò ... to D.: It's absolutely untrue that I knew the L. [brothers]. You're lying.

D. to Isgrò ...: I repeat that you yourself told me that a few years ago you used to go to the Pizzeria ... in Malnate with the L. [brothers].

Isgrò ... to D.: That's all lies. You want to destroy me because you've never forgiven me for not helping you in your crooked deals.

...

D. to Isgrò ...: I myself have seen you in the company of the L. [brothers] at the Pizzeria ... in Malnate.

...

Isgrò ... to D.: I repeat that that's not true. I've never seen the L. [brothers].

..."

On the same day the investigating judge organised a confrontation between Mr D. and another accused, namely one of the L. brothers.

14. On 31 May 1979 the investigating judge questioned for one last time Mr D., who maintained his allegations.

15. On 9 January 1980 the judge committed Mr Isgrò and nine co-accused for trial in the Monza District Court.

B. The trial

16. At the public prosecutor's request, the President of the District Court ordered Mr D. to be called as a witness at the hearing on 19 February 1980. On being informed, on 14 February, that it had been impossible to trace the person concerned for several months, he ordered that inquiries be made immediately. These inquiries were conducted in four separate places, but they were unsuccessful although Mr D. telephoned the carabinieri on 1 March and the investigating judge on 3 March.

17. The trial was spread over twelve hearings from 18 February to 4 March 1980. The court heard, among others, the applicant, his wife and a number of witnesses. However, it refused to call a person who had already been questioned by the investigating judge: counsel for Mr Isgrò sought to have this witness called in connection with evidence concerning Mr D.'s conduct on the day of the kidnapping, of which the person in question had informed Mrs Isgrò according to the latter's statements before the court; but in the court's view the evidence available to it deprived this testimony of any importance.

As Mr D. remained impossible to trace, the records of each of his interviews and of the confrontation of 10 April 1979 (see paragraph 13 above) were read out on 26 February. This had been ordered by the court in pursuance of Article 462, first paragraph, sub-paragraph 3, of the Code of Criminal Procedure (see paragraph 24 below), notwithstanding the objections of the lawyers of two of the applicant's co-accused.

18. On 29 February and 3 March, the applicant's lawyer indicated that his client's wife had seen Mr D. in the street at Malnate, where he had been staying for several days at his mother's house. The President of the District Court ordered that the police be informed of this immediately.

19. On 5 March 1980 the District Court sentenced Mr Isgrò to thirty years' imprisonment. In the grounds of its judgment, it relied on Mr D.'s statements rather than the applicant's denials.

20. The applicant appealed and sought to have Mr D. called as a witness. The Milan Court of Appeal directed that the latter appear on 25 November 1981 - two days after its first hearing -, but further searches effected in two

places, one of which had been indicated, once again, by Mrs Isgrò, were to no avail.

21. On 1 December 1981 the court upheld the verdict of guilty but reduced the sentence to twenty years. It based its decision in particular on the earlier statements by Mr D. In its view, he was in hiding for fear of reprisals, a fear which it considered to be fully justified.

22. Mr Isgrò appealed on points of law. He complained that he had been convicted on the basis of testimony obtained during the investigation, without his lawyer having had the opportunity to examine the witness in question on his statements, and challenged the use of such evidence in the trial proceedings.

The Court of Cassation dismissed the appeal on 23 March 1984 on the ground that it was intended to contest the assessment of evidence made by the lower courts, which assessment was not open to appeal.

II. THE RELEVANT PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

23. Article 304 bis of the Code of Criminal Procedure in force at the time enumerated the steps in the investigation at which an accused's lawyer could be present; it did not mention confrontations between the accused and a witness.

24. Article 462 provided a list of the statements which the trial courts were authorised, subject to certain conditions, to have read out at the trial; they included statements obtained by an investigating judge during a confrontation between a witness and an accused.

Under sub-paragraph 3 of the first paragraph, such statements might be read out where, inter alia, a witness could no longer be traced.

PROCEEDINGS BEFORE THE COMMISSION

25. Mr Isgrò applied to the Commission on 12 September 1984. He complained that he had been convicted on the basis of statements by a witness who could not be traced during the trial and whom his lawyer had never had the opportunity to examine. He relied on paragraphs 1, 2 and 3 (d) of Article 6 (art. 1, art. 6-2, art. 6-3-d) of the Convention.

26. The Commission declared the application (no. 11339/85) admissible on 9 November 1988. In its report of 14 December 1989 (Article 31) (art. 31), it expressed the opinion by ten votes to three that there had been a violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention. The full text of the Commission's opinion and of the two

dissenting opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

27. At the hearing on 24 September 1990 the Government confirmed the submission put forward in their memorial, in which they requested the Court to hold "that there has been no violation of the Convention in the present case".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

28. The Government stressed that neither Mr Isgrò nor his lawyer had objected to the reading out at the trial of Mr D.'s statements made to the investigating judge. They developed two arguments from this: in the first place, that the applicant had failed to exhaust the domestic remedies; secondly, that he could not claim to be a "victim" within the meaning of Article 25 (art. 25) of the Convention.

29. The first submission, which had already been raised before the Commission, is unfounded because an objection of the kind referred to would not have constituted in this instance a sufficient and effective remedy, since the Monza District Court had dismissed similar objections formulated by two of the applicant's co-accused (see paragraph 17 above).

As regards the second preliminary objection, the Government are estopped from relying thereon because they did not first raise it before the Commission. As nothing prevented them from raising that objection at the outset, it is immaterial that it was founded on a fact which was also adduced in order to plead the failure to exhaust domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 6 (art. 6)

30. The applicant complained that the Monza District Court and the Milan Court of Appeal had convicted him on the basis of the statements

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* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 194-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

made to the investigating judge by the witness Mr D., who had been untraceable during the trial and whom his lawyer had never had the opportunity to examine. On this account they had, he alleged, infringed Article 6 (art. 6), according to which:

> "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:
>
> ...
>
> (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;
>
> ... "

The Commission subscribed to this view, while the Government disputed it.

31. The admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see, as the most recent authority, the Delta judgment of 19 December 1990, Series A no. 191-A, p. 15, para. 35).

As this is the fundamental point at issue and since the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1), the Court will consider the complaint under the two provisions taken together (ibid., p. 15, para. 34).

32. The Commission accepted that the Italian authorities had tried to establish the whereabouts of Mr D. with the aim of securing his attendance in Court as a witness.

In their memorial the Government stressed that the thoroughness of the searches carried out by the authorities was not in doubt. The applicant did not file a memorial but at the hearing his counsel criticised the way in which those searches had been conducted.

The evidence before the Court does not, however, disclose any negligence in this respect. In deciding whether the applicant had a fair trial, the Court must accordingly proceed on the basis that it was not possible to obtain Mr D.'s presence at the trial.

33. The applicant also maintained that Mr D. had been involved in the crime and became a witness with regard to Italian law only subsequently. Although Mr D. did not give evidence in person either at first instance or on appeal, the Court takes the view that, for the purposes of Article 6 para. 3

(d) (art. 6-3-d), he should be regarded as a witness - a term to be given an autonomous interpretation (see, inter alia, the above-mentioned Delta judgment, Series A no. 191-A, p. 15, para. 34) - because the national courts took account of his statements, which were read out at the trial.

34. All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings (see the Kostovski judgment of 20 November 1989, Series A no. 166, p. 20, para. 41, and the above-mentioned Delta judgment, Series A no. 191-A, p. 16, para. 36).

35. It is therefore necessary to determine whether Mr Isgrò had such opportunity. In this respect the present dispute differs from other cases heard by the Court (the Kostovski judgment, cited above, Series A no. 166, p. 20, paras. 42-43; the Windisch judgment of 27 September 1990, Series A no. 186, pp. 10-11, paras. 27-29; the Delta judgment, cited above, Series A no. 191-A, p. 16, paras. 36-37).

In the first place the witness was not anonymous: Mr D.'s identity was known both to the defence and to the investigating judge as well as to the first-instance and appeal courts. In particular, the investigating judge had questioned him several times on matters concerning the applicant and the co-accused; he had also organised two confrontations intended to compare the earlier statements of Mr D. with those respectively of Mr Isgrò and a co-accused.

Secondly, the confrontation of 10 April 1979 enabled the applicant to put questions directly to Mr D. and to discuss his statements, thus providing the investigating judge with all the information which was capable of casting doubt on the witness's credibility. Mr Isgrò was also able to repeat in person his claims before the first-instance court and the Court of Appeal.

Finally, although the District Court and the Court of Appeal were unable, despite their efforts, to take evidence from Mr D. in person (see paragraph 32 above), that does not mean that they based their decision solely on the statements made by him to a judge, whose impartiality has not been contested. They also had regard to other testimony, including that of the applicant's wife, and to the observations submitted by the applicant during the investigation and at the trial.

36. It is indeed true that the applicant's lawyer did not attend the confrontation in question, and was prevented from so doing by Article 304 bis of the Code of Criminal Procedure (see paragraph 23 above), but the public prosecutor was likewise absent. In the case under examination the

purpose of the confrontation did not render the presence of Mr Isgrò's lawyer indispensable; since it was open to the applicant to put questions and to make comments himself, he enjoyed the guarantees secured under Article 6 para. 3 (d) (art. 6-3-d) to a sufficient extent.

The Court draws attention to the fact that during the trial the applicant's lawyer was able to carry out his brief with knowledge not only of Mr D.'s allegations, but also of his identity; he could thus challenge the accuracy of those allegations and the credibility of the witness himself.

37. In sum, any limitations which may have been imposed on the rights of the defence were not such as to deprive him of a fair trial. It follows that there has been no violation of paragraph 3 (d) of Article 6, taken in conjunction with paragraph 1 (art. 6-3-d, art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that the objection of a failure to exhaust domestic remedies is unfounded;

2. Dismisses, on the ground of estoppel, the objection that the applicant lacked the status of "victim";

3. Holds that there has been no violation of paragraph 3 (d) of Article 6 of the Convention, taken in conjuncton with paragraph 1 thereof (art. 6-3-d, art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar