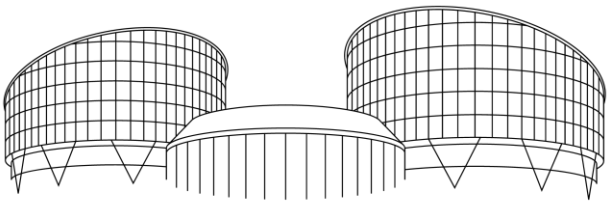

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF KENEDI v. HUNGARY

(Application no. 31475/05)

JUDGMENT

STRASBOURG

26 May 2009

FINAL

26/08/2009

This judgment may be subject to editorial revision.

In the case of Kenedi v. Hungary**,**

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges,*
and Sally Dollé, *Section Registrar,*

Having deliberated in private on 5 May 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 31475/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr János Kenedi ("the applicant"), on 10 August 2005.

2. The applicant was represented by Ms A. Csapó, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicant alleged that the Hungarian authorities' protracted reluctance to grant him unrestricted access to certain documents, authorised by a court order, had prevented him from terminating a professional undertaking, namely, to write an objective study on the functioning of the Hungarian State Security Service in the 1960s. He had been unable to have the court order enforced within a reasonable time.

4. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1947 and lives in Budapest.

6. The applicant, a historian, specialises in the functioning of the secret services of dictatorships, comparative studies of the political police forces of totalitarian regimes and the functioning of Soviet-type States. He has published several works in this field.

7. With a view to publishing a study concerning the functioning, in the 1960s, of the Hungarian State Security Service of the Ministry of the Interior, on 21 September 1998 the applicant requested the Ministry to grant him access to certain documents deposited with it.

8. His request was denied on 10 November 1998; the Ministry made reference to a decision of 29 October 1998 classifying the documents as State secrets until 2048.

9. On 10 December 1998 the applicant brought an action against the Ministry, basing his claim on section 21 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest. Claiming a right of unrestricted access to the documents, he submitted that the data he sought were necessary for the purposes of his ongoing historical research.

10. On 19 January 1999 the Budapest Regional Court found for the applicant, granting him access to the documents for research purposes. It observed that the documents in question had indeed been classified during the Communist era. However, according to section 28(2) of Act no. 65 of 1995 on State and Service Secrets, they would have had to have been characterised as such again before 30 June 1996. Since this characterisation had not taken place, the documents had lost their classified nature *ipso iure* by 1 July 1996, irrespective of the decision of 29 October 1998.

11. On 20 April 1999 the Supreme Court rejected the respondent's appeal as it had been introduced outside the statutory time-limit.

12. On 1 November 1999 the Ministry proposed access to the applicant if he signed a confidentiality undertaking.

13. On 10 October 2000 the applicant requested the enforcement of the judgment, arguing that the respondent's imposition of a condition of confidentiality was unacceptable. On 21 December 2000 the enforcement procedure was initiated and an enforcement order issued. In its reasoning, the Budapest Regional Court observed that the respondent did not have the right to require confidentiality from the applicant as a precondition to the access granted by the enforceable judgment.

14. On 21 November 2001 the Supreme Court upheld on appeal the decision of 21 December 2000 but deleted from the reasoning the confidentiality observation.

15. Meanwhile, on 12 June 2001 the Ministry brought an action with a view to having the enforcement proceedings terminated. On 25 February 2002 the Pest Central District Court dismissed the action, holding that the respondent's proposal of 1 November 1999 was unsatisfactory and that,

therefore, the initiation of enforcement proceedings had been lawful. On 15 October 2002 the Regional Court dismissed the Ministry's appeal.

16. On 29 October 2002 the Ministry issued the applicant with a permit for access to documents, but restricted him from publishing the information thus acquired to the extent that "State secrets" were concerned.

17. In the absence of a permit granting unrestricted access to all the documents concerned, the court found that there had not been compliance with the enforcement order, and on 23 June 2003 the Ministry was fined 100,000 Hungarian forints (HUF) (approximately 400 euros (EUR)).

18. On 18 December 2003 all but one of the documents were transferred to the National Archives and thus became public.

19. A further enforcement fine of HUF 300,000 (approximately EUR 1,200) was imposed on 22 October 2004 in respect of the one remaining classified document. The Ministry filed an objection, arguing that the document was no longer at its disposal since it had been transferred to the Archives of the Ministry of Defence on 6 February 2004.

20. On 26 January 2005 the District Court dismissed the respondent's objection, holding that a change in the physical whereabouts of the document did not exempt the Ministry from its obligation to grant the applicant access.

21. On 10 June 2005 the District Court dismissed the Ministry's request to have it established that the Archives were its successor in the matter.

22. On 24 January 2006 the Regional Court quashed the decisions of 22 October 2004, 26 January 2005 and 10 June 2005, and remitted the case to the first-instance court.

23. On 21 April 2006 the District Court again dismissed the Ministry's request to have it established that the Archives were its successor in the matter. However, on 4 July 2006 it observed that the newly founded Ministry of Local Government and Regional Development was indeed the successor. On 20 October 2006 it rejected the new Ministry's request to have the proceedings interrupted pending the succession arrangements.

24. On 5 June 2007 the Regional Court dismissed the new Ministry's appeals against the decisions of 21 April, 4 July and 20 October 2006. The Ministry's petition for a review by the Supreme Court was to no avail.

25. To date, the applicant has not had unrestricted access to the remaining document in question.

II. RELEVANT DOMESTIC LAW

26. Section 21 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest provides as follows:

> "(1) If an applicant's request for data of public interest is denied, he or she shall have access to a court.

(2) The burden of proof concerning the lawfulness and well-foundedness of the refusal shall rest with the organ handling the data.

(3) The action shall be brought within 30 days from the notification of the refusal against the organ which has denied the information sought.

...

(6) The court shall give priority to these cases.

(7) If the court accepts the applicant's claim, it shall issue a decision ordering the organ handling the data to communicate the information of public interest which has been sought."

27. Section 28(2) of Act no. 65 of 1995 on State and Service Secrets (which entered into force on 1 July 1995) provides as follows:

"The review of the classification of classified documents originating from before 1980 shall be terminated within one year from the entry into force of this Act. Once this time-limit has passed, the documents shall cease to be classified."

THE LAW

I. ADMISSIBILITY

28. The applicant complained of the lengthy non-enforcement of a court judgment authorising his access, for the purpose of professional, historical research, to documents from the 1960s on the Hungarian State Security Service. He invoked Articles 6 § 1, 10 and 13 of the Convention. The Government contested the applicant's allegations.

29. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained about his inability to obtain the enforcement, within a reasonable time, of a final court decision in his favour, in breach of Article 6 § 1 of the Convention, the relevant part of which provides as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

31. The Government submitted that the applicant's conduct – namely his insistence on having unrestricted access to all the documents – had

contributed to the protraction of the proceedings. In their view, the Supreme Court's decision of 21 November 2001 had deprived the applicant of any legal basis for claiming unlimited access to all the documents with a view to publication. In any event, the principal decision of 19 January 1999 had granted the applicant access only for the purposes of research.

32. The applicant contested these views.

A. Applicability of Article 6 § 1

33. The Court observes that the domestic courts recognised the existence of the right underlying the access sought by the applicant. The access was necessary for the applicant, a historian, to accomplish the publication of a historical study. The Court notes that the intended publication fell within the applicant's freedom of expression as guaranteed by Article 10 of the Convention. In that connection, it recalls that the right to freedom of expression constitutes a "civil right" for the purposes of Article 6 § 1. Moreover, the applicability of this latter provision has not been disputed by the parties.

34. The Court is therefore satisfied that the subject matter of the case falls under the civil limb of Article 6 § 1.

B. Compliance with Article 6 § 1

35. The period to be taken into consideration began on 10 November 1998, when the applicant's initial request was denied, and has not ended to date. In this connection, the Court reiterates that the execution of a judgment given by any court must be regarded as an integral part of a "hearing" for the purposes of Article 6 (*Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The period has thus lasted some ten and a half years for three levels of jurisdiction and the execution phase.

36. The Court is not persuaded by the Government's assertion that the applicant's enforcement claim was ill-founded (see paragraph 31 above) and the procedure thus futile. On the contrary, it observes that, subsequent to the Supreme Court's decision of 21 November 2001, the courts dealt with the merits of the claim on numerous other occasions, repeatedly finding in the applicant's favour, and even fining the respondent for non-compliance (see paragraphs 13 to 24 above).

37. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

38. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

39. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present circumstances. Having regard to its case-law on the subject, the Court finds that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicant also complained that the Ministry's protracted reluctance to grant him unrestricted access to the documents in question had prevented him from publishing an objective study on the functioning of the Hungarian State Security Service.

41. The Court considers that this complaint falls to be examined under Article 10 of the Convention which provides as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security ..."

42. The Government conceded that there had been an interference with the applicant's right to freedom of expression. They submitted that the retroactive classification of the documents in question pursued the legitimate aim of national security, in which field States enjoy a certain margin of appreciation. Moreover, it was the applicant's own fault that the study in question had not been accomplished since, intransigently, he had insisted on having completely unrestricted access. The applicant contested these views.

43. The Court observes that the Government have accepted that there has been an interference with the applicant's right to freedom of expression. The Court emphasises that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression (see, *mutatis mutandis*, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, §§ 35 to 39, 14 April 2009).

An interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether the present

interference was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" in order to achieve those aims.

44. The Court reiterates that the phrase "prescribed by law" in the second paragraph of Article 10 alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions "in accordance with the law" and "lawful" found in the second paragraph of Articles 8 to 11. The concept of lawfulness in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 59, ECHR 1999-III).

45. The Court observes that the applicant obtained a court judgment granting him access to the documents in question (see paragraph 10 above). Thereafter, a dispute evolved as to the extent of that access. However, the Court notes that, in line with the original decision, the domestic courts repeatedly found for the applicant in the ensuing proceedings for enforcement and fined the respondent Ministry. In these circumstances, the Court cannot but conclude that the obstinate reluctance of the respondent State's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness. The essentially obstructive character of this behaviour is also manifest in that it led to the finding of a violation of Article 6 § 1 of the Convention (see paragraph 39 above) from the perspective of the length of the proceedings. For the Court, such a misuse of the power vested in the authorities cannot be characterised as a measure "prescribed by law".

It follows that there has been a violation of Article 10 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 10 OF THE CONVENTION

46. Lastly, the applicant complained that he had had no effective remedy at his disposal in respect of his grievance under Article 10, as required by Article 13 of the Convention, which provides 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."

The Government submitted that the remedies of which the applicant had availed himself were effective in the circumstances. The applicant contested this view.

47. The Court reiterates that Article 13 of the Convention guarantees to anyone who claims, on arguable grounds, that his or her rights and freedoms

as set forth in the Convention have been violated, an effective remedy before a national authority. The Court considers that the obligation of States under that Article also encompasses a duty to ensure that the competent authorities enforce remedies when granted (compare Article 2 § 3 (c) of the International Covenant on Civil and Political Rights). For the Court, it would be inconceivable if Article 13 secured the right to a remedy, and provided for it to be effective, but did not guarantee the implementation of remedies used successfully. To hold the contrary would lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, *mutatis mutandis*, *Hornsby*, cited above, § 40).

48. In the instant case, the respondent State body, being itself in the first place bound by the rule of law, adamantly resisted the applicant's lawful attempts to secure the enforcement of his right, as granted by the domestic courts. In these circumstances, the Court considers that the procedure designed to remedy the violation of the applicant's Article 10 rights at the domestic level proved ineffective.

It follows that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant did not wish to claim pecuniary damage for his failed research project, but assessed what may be termed his non-pecuniary damage at 6,000 euros (EUR) for the time and effort he had devoted to pursuing his case before the domestic authorities.

51. The Government did not express an opinion on the matter.

52. The Court considers that the applicant must have suffered some non-pecuniary damage and considers it appropriate to award the full amount claimed.

B. Costs and expenses

53. The applicant claimed EUR 18,000 in respect of legal fees incurred during the domestic proceedings. This sum corresponds to 300 hours of legal work charged at 15,000 Hungarian forints per hour.

54. The Government did not express an opinion on the matter.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 7,000 for the costs and expenses necessarily incurred in the domestic proceedings in an attempt to prevent the violations which the Court has found.

C. Default interest

56. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds* that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:

(i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage,

(ii) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 26 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President