



## **TEAM AUSTRIA**

**vs.**

## **TEAM FRANCE II**

### Case of M. L.

The applicant was born in 1966. In 2009 the applicant was serving a prison sentence.

On 8 March 2009 he applied for a stay of the execution of his sentence. On 8 June 2009 a penitentiary judge, E.O., refused the application. On 18 June 2009 the applicant lodged an interlocutory appeal against that decision. In his appeal, the applicant referred to a paragraph in the decision in which the judge had referred to his wife's situation instead of his mother's. The relevant part of the applicant's appeal read as follows:

“As to page 3 of the reasoning of the decision, I claim that E.O. must have drafted it under the influence of intoxicating substances, for instance alcohol or other narcotic substances. (...) [H]is mental functions being impaired, I therefore request the Court of Appeal to examine the capacity of that judge to decide cases.”

On 24 June 2009 his appeal was rejected for failure to comply with the relevant time-limit.

On 26 June 2009 Judge E.O. gave a decision imposing on the applicant, as a punishment for his accusation contained in the letter of appeal, twenty-eight days' solitary confinement, referring to section 49 of the Act on Common Courts.

On 28 June 2009 the applicant appealed against that decision, complaining that the judge had lacked impartiality. He submitted that he had been penalised for exercising his right to freedom of expression and requested the court to stay the execution of the punishment until his appeal had been examined.

On the same date the applicant lodged a further appeal against the court's decision of 24 June 2009 to reject his appeal. He submitted that the decision of 8 June 2009 with its reasoned grounds had been served on him late and therefore the seven-day time-

limit for lodging an appeal should have been counted from the date of delivery of that decision.

On 9 July 2009 Judge E.O. refused to grant a stay of the execution of the decision concerning the applicant's detention in solitary confinement.

On 22 July 2009 the Court of Appeal quashed the decision of 26 June 2009, holding that it had been unlawful. The court observed that section 49 of the Courts Act conferred on a judge the power to immediately apply measures necessary to ensure the peaceful conduct of a hearing in a courtroom, including the power to order immediate imprisonment as a penalty for contempt of court or for disturbing order in the courtroom. However, the case-law of the Supreme Court, established in a resolution adopted by a seven-judge bench of that court, had made it clear that these powers could not be used in situations where insults or disparaging statements about a judge or a court had been made in writing, in a context different from that of maintaining order in a courtroom. The Court of Appeal further observed that the applicant had already served the period of detention in solitary confinement imposed by the impugned decision.

On the same date the Court of Appeal dismissed the applicant's appeal against the order of 24 June 2009, finding that it was not open to doubt that the applicant had submitted his appeal against the refusal to stay the execution of his sentence outside the seven-day time-limit, which under the applicable provisions of procedural law had started to run from the date on which the court had read out its decision to the applicant.

The applicant later repeatedly complained about Judge E.O.'s conduct and requested that he be excluded from the composition of the penitentiary court dealing with his case in the future.

In its reply of 19 August 2009 the President of the Regional Court stated that Judge E.O. felt offended by the allegations made in the applicant's letter and that he was envisaging bringing criminal proceedings against the applicant for defamation punishable under Article 212 of the Criminal Code.

In its reply dated 29 September 2009, the Court of Appeal stated that it had not found any grounds to discipline the judge. It was true that the judge had mistakenly referred to the applicant's non-existent "wife" in one paragraph of his initial decision instead of his mother, on whose situation the applicant had relied in his application, but that did not suffice to pursue disciplinary proceedings against him.

## **ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION**

The applicant argued that he had not received a hearing by an impartial tribunal within the meaning of Article 6 § 1 of the Convention, the relevant parts of which provide:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

**Team AUSTRIA** will present all possible allegations of the applicant before the European Court

**Team FRANCE II** will present the position of the Government before the same Court

## RELEVANT DOMESTIC LAW

Section 49 (1) of the Law on Common Courts 2001 reads:

“In case of contempt of a judicial order or insulting a court ... that court is empowered to impose a penalty by fining the person in contempt the amount of up to twice the minimum wage established by law or by depriving that person of [his or her] liberty for a period of up to seven days; in the case of persons already deprived of [their] liberty by either a final judicial decision or [who are in] pre-trial detention, the court is empowered to impose on them the penalties provided for by the provisions governing, respectively, the execution of prison sentences or pre-trial detention.”

Article 142 § 1 of the Code of Execution of Sentences provides that solitary confinement can be imposed on a prisoner for a maximum period of 28 days.

Article 417 § 1 of the Civil Code provides:

“The State Treasury, or [as the case may be] a self-government entity or other legal person responsible for exercising public authority, shall be liable for any damage (*szkoda*) caused by an unlawful act or omission [committed] in connection with the exercise of public authority.”

In decision of 24 June 2010 the Supreme Court held:

“Unlawfulness of a decision, in order to give rise to the State’s compensatory liability, must amount to a manifest breach of law. A decision based on a choice of one of [a number of] possible interpretations of the applicable provisions cannot be regarded as unlawful [for the purposes of Article 417 of the Civil Code], even where that interpretation was subsequently found to be incorrect. Unlawfulness of a final decision can only originate in obvious errors committed by a court, caused by a flagrant breach of the principles of interpretation or application of law. ... Hence, the unlawfulness, in order to give rise to the State’s civil liability, must be of a qualified, fundamental and manifest character: only in such cases can it be said that the court acted unlawfully ..