



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

FOURTH SECTION

CASE OF GALLARDO SANCHEZ v. ITALY

(Application no. 11620/07)

JUDGMENT

STRASBOURG

24 March 2015

This judgment is final.

In the case of Gallardo Sanchez v. Italy,

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

Päivi Hirvelä, *President*,

Guido Raimondi,

George Nicolaou,

Ledi Bianku,

Nona Tsotsoria,

Paul Mahoney,

Krzysztof Wojtyczek, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 March 2015,

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

PROCEDURE

1. The case originated in an application (no. 11620/07) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Venezuelan national, Mr Manuel Rogelio Gallardo Sanchez (“the applicant”), on 7 March 2007.

2. The applicant was represented by Mr S. Koulouroudis, a lawyer practising in Athens. The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora.

3. The applicant alleged that the length of his detention pending extradition entailed a violation of Article 5 § 3 of the Convention.

4. It was decided that this complaint would instead be examined under Article 5 § 1 (f). On 2 May 2013 notice of the application was given to the Government.

5. On 16 December 2013 a copy of the Government’s observations was sent to the applicant’s representative, inviting him to file with the Court his observations in reply and his claims by way of just satisfaction. In spite of the interest manifested by the applicant in pursuing the examination of the case, his representative did not file any observations within the time-limit fixed for such purpose.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. The applicant, Mr Manuel Rogelio Gallardo Sanchez, is a Venezuelan national who was born in 1965 and lives in Cape Town (South Africa).

8. On 19 April 2005 the applicant, who had been accused of arson by the Greek authorities, was taken into custody pending extradition by the Rome police on the basis of an arrest warrant issued by the Athens Court of Appeal on 26 January 2005 under the European Convention on Extradition of 13 December 1957.

9. On 22 April 2005 the L'Aquila Court of Appeal validated the applicant's arrest and ordered his detention.

10. On 26 April 2005 the Ministry of Justice asked the Court of Appeal to extend his detention.

11. At the hearing of 27 April 2005, the President of the Court of Appeal, ruling under Article 717 of the Code of Criminal Procedure (see paragraph 25 below), established the applicant's identity and asked if he gave his consent to his extradition. He did not consent.

12. On 9 June 2005 the Ministry of Justice informed the Court of Appeal that, on 25 May 2005, the Greek authorities had sent a request for extradition together with all the requisite supporting documents.

13. On 21 June 2005 the public prosecutor's office asked the Court of Appeal to grant the extradition request.

14. The hearing was scheduled for 15 December 2005. At the request of the applicant's representative, it was postponed until 12 January 2006.

15. Without any prior investigation the Court of Appeal approved the extradition by a decision of 12 January 2006, deposited on 30 January 2006. It verified the conformity of the extradition request with the European Convention on Extradition and its compliance with the *ne bis in idem* and double-criminality principles, and it ruled out the possibility that the proceedings had been brought for any discriminatory or political reasons.

16. On 3 March 2006 the applicant appealed on points of law, arguing in particular that the request for his extradition had been sent by the Greek authorities after the forty-day time-limit provided for in Article 16 § 4 of the European Convention on Extradition, which meant in his view that his detention had been unlawful. He further argued that the charges laid against him by the Greek authorities were not based on serious indications of guilt. He submitted that he should therefore be released.

17. In a judgment of 11 May 2006, deposited with the registry on 18 September 2006, the Court of Cassation dismissed the appeal with only one page of reasoning, in particular because it found that the extradition

request had been received within the time-limit provided for in the European Convention on Extradition and that it did not have jurisdiction to examine whether serious indications of guilt had been adduced.

18. In the meantime, on three occasions between June and September 2005, the applicant had applied to the Rome Court of Appeal, unsuccessfully, requesting his release. In its last decision of 27 October 2005, adopted in private in compliance with the adversarial principle, and without any prior investigation, the Court of Appeal found that there was no reason to depart from its two previous decisions, having regard to the ongoing risk that the applicant might abscond, even though the authorities had taken away his passport, and to the State's obligation to comply with its international commitments.

19. On 9 October 2006 the Minister of Justice signed the extradition order.

20. On 26 October 2006 the applicant was extradited to Greece.

II. RELEVANT INTERNATIONAL INSTRUMENT

21. The European Convention on Extradition, signed in Paris on 13 December 1957 and ratified by Italy by Law no. 300 of 30 January 1963, came into force in respect of Italy on 4 November 1963. It was amended by the Second Additional Protocol to the European Convention on Extradition, signed on 17 March 1978, which came into force in respect of Italy on 23 April 1985. The relevant provisions, as amended, read as follows.

Article 8 – Pending proceedings for the same offences

“The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.”

Article 9 – *Non bis in idem*

“Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.”

Article 12 – The request and supporting documents

“1. The request [for extradition] shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties.

2. The request shall be supported by:

(a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the

same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

(b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

(c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.”

Article 16 – Provisional arrest

“1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

2. The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.

3. A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.

5. Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.”

III. RELEVANT DOMESTIC LAW AND PRACTICE

22. As regards the application of precautionary measures, Article 715 of the Code of Criminal Procedure (CCP) provides that, at the request of a foreign State, the Court of Appeal may order the provisional arrest of an individual for the purposes of extradition proceedings. The request may be accepted (a) if the foreign State is acting pursuant to an enforceable judgment of conviction or an arrest warrant and intends to send an extradition request; (b) if the foreign State has provided a description of the relevant acts in support of the extradition request, indicated the offence with which the wanted person is charged, and provided a description of that person; (c) if there is a risk that the person might abscond. Notification of the application of the measure is given by the Minister of Justice to the

authorities of the foreign State. The precautionary measure will be discontinued if the foreign State does not send the extradition request and supporting documents, within forty days following that notification, to the Ministry of Foreign Affairs and the Ministry of Justice.

23. Under Article 716 § 3 of the CCP, the President of the Court of Appeal must confirm the provisional arrest within ninety-six hours and order the application of a custodial measure.

24. Under Article 716 § 4 of the CCP, the precautionary measure will be discontinued if the Ministry of Justice does not ask the Court of Appeal, within ten days from the date of the confirmation of the arrest, to order the individual's retention in custody.

25. Under Article 717 of the CCP, where the domestic authorities have ordered a custodial measure, the President of the Court of Appeal will schedule a hearing in order to identify the individual concerned and establish whether the latter gives his or her consent to extradition.

26. In accordance with Article 714 of the CCP, the length of the custodial measure may not exceed one year and six months. It may, however, be extended for a total period not exceeding three months.

27. Under Article 718 of the CCP, the custodial measure may, at the request of one of the parties or spontaneously, be discontinued by the Court of Appeal or the Court of Cassation, sitting as a court of first instance. The Court of Appeal deliberates in private after hearing the parties. The decision of the Court of Appeal may be appealed against before the Court of Cassation in so far as the grounds of appeal are based on a violation of statute law. In that connection the Court of Cassation has, on several occasions, established that it does not have jurisdiction to examine appeals on points of law in which the appellant is seeking release on the ground that the risk of his or her absconding, which was initially the justification for the custodial measure, has ceased to exist (see, for example, Court of Cassation, judgment no. 33545 of 7 September 2010, deposited with the registry on 13 September 2010; more generally, on the lack of jurisdiction to examine grounds based on arbitrariness in the reasoning of the Court of Appeal's decisions, see Court of Cassation, judgment no. 37123 of 24 September 2012, deposited with the registry on 26 September 2012).

28. As regards the judicial phase of the extradition, as provided for in Article 704 of the CCP, the Court of Appeal rules in private having heard the parties, gathered the relevant information and carried out the necessary verifications. It must establish whether the conditions laid down by domestic and international law have been satisfied: in addition to the rules of the European Convention on Extradition, Article 705 of the CCP requires the courts to verify whether the person concerned has been charged with a political offence, whether he or she risks being tried according to procedures which do not guarantee the protection of fundamental rights, or whether, once extradited, he or she risks being subjected to treatment that is inhuman,

degrading or discriminatory, or to any action that may breach one of the person's fundamental rights. Under the same Article, where the European Convention on Extradition applies, the courts are not entitled to examine whether or not there are serious indications of guilt (*gravi indizi di colpevolezza*).

29. Under Article 706 of the CCP, that decision may be challenged, on the facts and on points of law, before the Court of Cassation, which will rule in accordance with the procedure laid down in Article 704 of the CCP.

30. Article 708 of the CCP provides that the Minister of Justice must decide, within a period of forty-five days following the depositing of the Court of Cassation's decision approving the extradition, whether the individual is to be extradited. If the Minister fails to issue a decision, or decides to reject the extradition, the custodial measure must be discontinued.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (f) OF THE CONVENTION

31. The applicant complained of the length of his detention pending extradition. He submitted that there had been a violation of Article 5 § 3 of the Convention.

32. The Court, being master of the characterisation to be given in law to the facts of the case (see, among other authorities, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), finds that the application should be examined under Article 5 § 1 (f) of the Convention (see *Quinn v. France*, 22 March 1995, Series A no. 311; *Chahal v. the United Kingdom*, 15 November 1996, *Reports* 1996-V; and *Bogdanovski v. Italy*, no. 72177/01, 14 December 2006), which reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

A. Admissibility

33. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

34. The applicant argued that the length of the extradition proceedings had been excessive having regard to the fact that the case, in his view, was not a complex one.

35. The Government contested the applicant's allegations. They argued that the detention in question had been ordered in compliance with the extradition rules, as the Italian courts had found, and that its sole purpose had been for the applicant to be surrendered to the courts of the requesting State. They added that the applicant had not given his consent to the extradition, pointing out that consent would have accelerated the proceedings, and that the delay in the scheduling by the Court of Appeal of a hearing on the merits could be explained by the three applications for release that the applicant had filed within a period of three months. Lastly, they took the view that the proceedings in question, which had led the Italian authorities, both judicial and administrative, to authorise the extradition, had been conducted within the time-limits provided for by the rules of domestic and international law.

2. The Court's assessment

(a) Conformity of the detention with domestic law

36. In order to ascertain whether the detention in question was compatible with Article 5 § 1 (f) of the Convention, the Court must verify that the deprivation of liberty, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), was "lawful". It reiterates that, where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

37. In the present case, the Court would observe that, being better placed than the Convention organs to verify compliance with domestic law, the domestic courts found, when called upon by the applicant or when domestic law so required, that the detention measure was lawful in its initial phase and in terms of its purpose. At the outset, the L'Aquila Court of Appeal

confirmed the applicant's arrest; subsequently, the Court of Appeal and the Court of Cassation verified that the extradition request had been sent by the Greek authorities within the forty-day period laid down in Article 16 § 4 of the European Convention on Extradition (see paragraphs 15, 17 and 21 above). Lastly, on three occasions, the courts established that the adoption and maintaining of the precautionary measures were justified by the requirement to comply with the State's international commitments and by the existence of a risk that the applicant might abscond (see paragraph 18 above).

38. In those circumstances, the Court does not discern any evidence to suggest that the detention pending extradition pursued an aim other than that for which it was ordered or that it did not comply with domestic law.

(b) Whether the detention was arbitrary

39. The Court would observe that, contrary to what the Government alleged, compliance with the time-limits provided for in domestic law cannot be regarded as automatically bringing the applicant's detention into line with Article 5 § 1 (f) of the Convention (see *Auad v. Bulgaria*, no. 46390/10, § 131, 11 October 2011). Article 5 § 1 (f) requires, in addition, that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Amuur v. France*, 25 June 1996, § 50, Reports 1996-III; and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1, and the notion of "arbitrariness" in Article 5 § 1 extends beyond a lack of conformity with national law, such that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus incompatible with the Convention (see *Saadi*, cited above, § 67, and *Suso Musa v. Malta*, no. 42337/12, § 92, 23 July 2013).

40. The Court would further reiterate that any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as extradition proceedings are in progress and that, if those proceedings are not prosecuted with due diligence, the detention will cease to be permissible (see *Quinn*, cited above, § 48, and *Chahal*, cited above, § 113).

41. The Court thus has the task not of assessing whether the length of the extradition proceedings was reasonable as a whole, as it would do more specifically in length of proceedings cases under Article 6, but of establishing, regardless of the overall duration of the proceedings, whether the length of the detention exceeded that reasonably required for the purpose pursued (see *Saadi*, cited above, §§ 72-74). Where there have been periods of inaction on the part of the authorities, and therefore a lack of expedition, the maintaining of the detention measure will cease to be justified. In conclusion, the Court must assess, on a case-by-case basis,

whether or not, during the detention period in question, the domestic authorities remained inactive at any time (see, for a similar finding in a deportation case, *Tabesh v. Greece*, no. 8256/07, § 56, 26 November 2009).

42. In the present case, the Court observes that the applicant was detained pending extradition to enable the Greek authorities to prosecute him. In that connection the Court finds it necessary to distinguish between two forms of extradition in order to clarify the level of promptness required for each one: first, where extradition is requested for the purpose of enforcing a sentence and, second, where extradition will enable the requesting State to try the person concerned. In the second situation, the criminal proceedings are still pending and the person detained pending extradition must be presumed innocent; in addition, at that stage, the possibility for that person to exercise his or her defence rights during the criminal proceedings in order to prove his or her innocence is considerably limited, or even non-existent; lastly, the requested State's authorities are not entitled to examine the merits of the case (see paragraph 28 *in fine* above). For all these reasons, the protection of the rights of the person concerned and the smooth running of the extradition proceedings, including the requirement that an individual be prosecuted within a reasonable time, oblige the requested State to act with particular expedition.

43. The Court has already had occasion to find excessive, on account of unjustified delays on the part of the domestic authorities, detention periods of one year and eleven months pending extradition (see *Quinn*, cited above) and of three months pending deportation (see *Tabesh*, cited above).

44. It notes that in the present case the applicant's detention pending extradition lasted about one year and six months (from 19 April 2005 to 26 October 2006).

45. It finds that major delays occurred at the various stages of the extradition proceedings.

46. Firstly, the first hearing of the Court of Appeal was scheduled for 15 December 2005, six months after the extradition request had been sent to the Court of Appeal and eight months after the applicant had been taken into custody pending extradition.

47. The Court cannot agree with the Government when they argue that the remedies used by the applicant in order to obtain his release during that period (see paragraph 18 above) may, in themselves, justify the delay in the proceedings. The proceedings in question comprised two parts with different objects and purposes, consisting on the one hand of ascertaining whether the formal requirements for extradition had been met, and on the other of examining whether the criteria justifying the adoption of the precautionary measure remained valid and sufficient. The fact that domestic law has entrusted the same appellate court with this two-fold task constitutes a legitimate choice on the part of the State, but a choice which cannot be relied upon to justify considerable delays in examining the merits

of the case. In any event, the Court fails to see how the applicant's repeated requests, which were justified in principle, since his detention was extended in the absence of any hearing on the merits, prevented the Court of Appeal from scheduling such a hearing at an earlier date (see, *mutatis mutandis*, *Quinn*, § 48). The Court of Appeal's decisions were based exclusively on the documents at its disposal, were adopted in private in compliance with the adversarial principle (see paragraph 27 above) and mainly concerned the examination of the requirement of maintaining the applicant in custody on account of the risk of his absconding (see paragraph 18 above).

48. The Court further notes that the case was not a complex one (contrast *Bogdanovski*, cited above, where the applicant had sought political-refugee status and the extradition proceedings had been suspended at the request of the United Nations High Commissioner for Refugees and the Court itself, following the application of Rule 39 of the Rules of Court). The Court of Appeal's task was confined to verifying that the extradition request had been submitted in accordance with the European Convention on Extradition; that the *ne bis in idem* and the double-criminality principles had been complied with; and that the criminal proceedings were not motivated by discriminatory or political reasons. The court was not entitled by law to assess whether there were any serious indications of guilt (*gravi indizi di colpevolezza* – see paragraph 28 *in fine* above) and no inquiries or investigative activity were necessary (see paragraph 15 above).

49. Secondly, the Court is struck by the fact that the Court of Cassation, after ruling within two months on the applicant's appeal, then took more than four months to deposit with its registry a one-page judgment merely stating that the extradition request had been sent by the requesting State in accordance with the proper procedure and that it did not itself have jurisdiction to call into question the charges laid against the applicant by the Greek authorities (see paragraph 17 above). The Government did not adduce any evidence capable of justifying that delay.

50. Lastly, as to the Government's argument that the applicant could have accelerated the proceedings by not opposing his extradition, the Court finds that, while such opposition may in principle justify an extension of custody as it would have to be examined by a court, this cannot relieve the State of its responsibility for any unjustified delay during the judicial phase.

51. Consequently, having regard to the nature of the extradition proceedings, whose aim was to ensure that the prosecution of the applicant would be pursued in another State, and the unjustified delays in the Italian courts, the Court finds that the applicant's detention was not "lawful" within the meaning of Article 5 § 1 (f) of the Convention and that there has therefore been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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.”

53. The applicant did not submit a claim for just satisfaction (see paragraph 5 above). Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 (f) of the Convention.

Done in French, and notified in writing on 24 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Päivi Hirvelä
President