CASE OF FRATANOLÓ v. HUNGARY
(Application no. 29459/10)
JUDGMENT
STRASBOURG
3 November 2011
In the case of Fratanoló v. Hungary,
The European Court of Human Rights (Second Section), Delivers the following judgment,

THE FACTS
I. THE CIRCUMSTANCES OF THE CASE
5. The applicant was born in 1952 and lives in Pécs.
6. On 6 March 2008 the applicant, at the material time a member of the Hungarian Workers' Party 2006 (*Munkáspárt 2006*), a registered left-wing political party, was convicted by the Pécs District Court under section 269/B (1) of the Criminal Code of the offence of having displayed a totalitarian symbol in public. The court observed that the applicant had publicly worn a five-pointed red star while participating in a demonstration on 1 May 2004 celebrating Hungary's accession to the European Union and, at the same time, the International Workers' Day. As a sanction, the court issued a reprimand.
7. On appeal, on 23 September 2008 the Baranya County Regional Court reversed this judgment and acquitted the applicant. In holding that his act had represented in fact no danger to society, the Regional Court made reference *inter alia* to a judgment of the European Court of Human Rights, adopted on 8 July 2008, which had been introduced by another individual on account of a conviction similar in nature (*Vajnai v. Hungary*, no. 33629/06). In that judgment the European Court of Human Rights held that prosecution for having worn a red star amounted to a violation of that applicant's freedom of expression enshrined in Article 10 of the Convention.
8. In pursuit of the prosecution's further appeal, on 5 March 2010 the Pécs Court of Appeal reversed the second-instance judgment and upheld the applicant's conviction. It confirmed the reprimand and ordered the applicant to pay 7,500 Hungarian forints in criminal costs.
II. RELEVANT DOMESTIC LAW
Section 269/B of the Criminal Code (The use of totalitarian symbols)
"(1) Any person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle-and-hammer or a five-pointed red star, or a symbol depicting any of them, commits an offence – unless a more serious crime has been committed – and shall be sentenced to a fine.
(2) The conduct prescribed under paragraph (1) is not punishable if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.
(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force."
THE LAW
I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION
10. The applicant complained that his conviction was a breach of his right to freedom of expression, enshrined in Article 10 of the Convention, which reads as follows:
"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 ...
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 ... for the prevention of disorder ... [or] ... for the protection of the ... rights of others ..."

B. Merits

1. Where there has been an interference, whether it was “prescribed by law” and whether it pursued a legitimate aim

13. It has not been in dispute between the parties that there has been an interference with the applicant’s rights enshrined in Article 10 § 1 of the Convention; and the Court finds no reason to hold otherwise. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve those aims.

14. The parties have not addressed the legal basis of the interference or the legitimate aim it pursued. The Court observes that the restriction on the use of totalitarian symbols is prescribed by law, an Act of Parliament, which is sufficiently clear and met the requirements of foreseeability. It is therefore satisfied that the interference was indeed prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aims of the prevention of disorder and the protection of the rights of others.

2. “Necessary in a democratic society”

(b) The Court’s assessment

i. General principles

20. The test of “necessity in a democratic society” requires the Court to determine whether the interference complained of corresponded to a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

21. The Court’s task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

22. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient”, and whether the measure taken was “proportionate to the legitimate aims pursued” (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

23. The Court further reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society” (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII). Although freedom of expression may be subject to exceptions, they “must be narrowly interpreted” and “the necessity for any

restrictions must be convincingly established" (see, for instance, Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216).

24. Furthermore, the Court stresses that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on the debate of questions of public interest (see *Feldek v. Slovakia*, no. 29032/95, § 74, ECHR 2001-VIII; and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). In the instant case, the applicant's decision to wear a red star in public must be regarded as his way of expressing his political views. The display of vestimentary symbols falls within the ambit of Article 10.

ii. Application of those principles to the present case

25. The Court has outlined its approach to the application of the above principles in the context of the display of the five-pointed red star in the case of *Vajnai v. Hungary* (no. 33629/06, §§ 48 to 58, July 2008). It held that, for a restriction on the display of that symbol to be justified, it was required that there was a real and present danger of any political movement or party restoring the Communist dictatorship. However, the Government had not shown the existence of such a threat prior to the enactment of the ban in question. The Court perceived a risk that a blanket ban on the use of that symbol might also restrict its use in contexts in which no restriction would be justified. It therefore considered that the ban in question was too broad in view of the multiple meanings of the red star: it could encompass activities and ideas which clearly belonged to those protected by Article 10, and there was no satisfactory way to sever the different meanings of the incriminated symbol. Indeed, the relevant Hungarian law did not attempt to do so. Moreover, even if such distinctions had existed, uncertainties might have arisen entailing a chilling effect on freedom of expression and self-censorship. The Court furthermore stressed that even the potential propagation of Communist ideology could not be the sole reason to limit the display of the red star by way of a criminal sanction. However, in any case, a symbol which might have several meanings in the context of the case of *Vajnai*, where it had been displayed by a leader of a registered political party with no known totalitarian ambitions, could not be equated with dangerous propaganda.

26. The Court is satisfied that the present application does not substantially differ from the *Vajnai* case and that the considerations underlying that judgment are equally valid in the present context. Just like Mr Vajnai, the applicant wore the symbol in question as a member of a registered political party and at a lawful demonstration. That display formed therefore part of his political expression and as such enjoyed the protection of Article 10. Indeed, the only element which may distinguish the present application from the *Vajnai* case is the Government's submission that the applicant's conduct represented danger to society because it symbolised his identification with totalitarian ideas (see paragraph 15 above). However, the Court considers that it is not called upon to examine the purported justification for the interference in question from this perspective, since the Government admitted (see paragraph 16 above) that the sanction had been applied merely on account of the display itself, without any judicial scrutiny of its dangerousness having taken place. For the Court, the applicant has thus been subjected to the same indiscriminate restriction as Mr Vajnai.

27. The Court has already established that, for the interference to be justified, the Government must show that wearing the red star exclusively means identification with totalitarian ideas, especially in view of the fact that the applicant did so at a lawfully organised, peaceful demonstration. However, the position of the Court of Appeal (see paragraph 8 above) expressly denies the necessity of an examination of the context in which the impugned expression appears. Therefore, no meaningful distinction can be made between those shocking forms of expression which are protected by Article 10, and unjustifiably offensive ones which forfeit their right to tolerance in a democratic society. The Court would note in particular that the Court of Appeal did not even analyse if the

expression had resulted in intimidation (cf. the above-mentioned *Vajnai* judgment, § 53). In the absence of a scrutiny of the proportionality of the interference, as precluded by the interpretation of the Court of Appeal, the Court cannot find that the Government have proven that the restriction corresponded to a "pressing social need".

28. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *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 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,400 (two thousand four hundred 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;

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

Done in English, and notified in writing on 3 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.