SECOND SECTION

**CASE OF FERREIRA ALVES v. PORTUGAL (No. 3)**

*(Application no. 25053/05)*

JUDGMENT

STRASBOURG

21 June 2007

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Ferreira Alves v. Portugal (No. 3),

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

 Françoise Tulkens, *President,* András Baka, Ireneu Cabral Barreto, Mindia Ugrekhelidze, Vladimiro Zagrebelsky, Antonella Mularoni, Danutė Jočienė, *judges,*
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 31 May 2007,

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

PROCEDURE

1.  The case originated in an application (no. 25053/05) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Portuguese nationals, Mr Jorge de Jesus Ferreira Alves (“the applicant”) and his daughter, Miss Rita Duarte Ribeiro da Mota Ferreira Alves, on 5 July 2005. Following the Chamber decision of 11 April 2006 in which the complaints raised by Rita Duarte Ribeiro da Mota Ferreira Alves were declared inadmissible (see paragraph 4 below), examination of the case continued in respect of the applicant Jorge de Jesus Ferreira Alves only.

2.  The applicant was represented by Mr M. Brandão, a lawyer practising in Matosinhos (Portugal). The Portuguese Government (“the Government”) were represented by their Agent, Mr J. Miguel, Deputy Attorney-General.

3.  In his application Mr Ferreira Alves complained, in particular, that in the context of civil proceedings to which he had been a party, various documents in the proceedings, and notes sent by the judge, had not been communicated to him. He alleged a violation of Article 6 § 1 of the Convention on that account.

4.  On 11 April 2006 the Court declared the application partly inadmissible and decided to give notice to the Government of the applicant’s complaint concerning the failure to communicate to him certain documents in the proceedings. In accordance with Article 29 § 3 of the Convention, it decided to examine the admissibility and merits of the case at the same time.

THE FACTS

I.  THE CIRCUMSTANCES OF THE CASE

5.  The applicant was born in 1953 and lives in Matosinhos.

6.  When the applicant and his wife, H., separated, the Oliveira de Azeméis District Court, in a judgment of 10 July 1996, awarded parental responsibility for the couple’s daughter Rita to the child’s mother. The applicant was granted contact rights.

7.  On 19 October 1998 H. brought proceedings before the Oliveira de Azeméis District Court seeking to have the applicant’s contact rights withdrawn. She alleged, in particular, that Rita did not wish to see her father and that since July 1998 she had shown signs of emotional distress after each visit to the applicant. The applicant objected to the request.

8.  On 17 February 1999 the public prosecutor, acting in the child’s interests as required by the law, requested the judge to order a social inquiry report regarding Rita’s parents and a medical examination of the child. In an order of 22 February 1999 the judge acted on the prosecutor’s recommendation and asked the Institute for Social Reintegration (“the Institute”) to carry out the social inquiry. The judge refused a request by the applicant for H. to undergo a psychiatric expert examination, taking the view that it was not “appropriate”. On 11 March 1999 the applicant lodged an appeal against that decision. The judge decided to adjourn consideration of the appeal until the court gave its final judgment. The applicant then lodged a complaint with the President of the Oporto Court of Appeal seeking to have his appeal considered immediately. In a note dated 12 April 1999 which he addressed, in accordance with the law, to the President of the Court of Appeal, the judge of the Oliveira de Azeméis District Court confirmed his earlier decision to adjourn consideration of the appeal. The applicant was informed of this note on 14 April 1999. On 26 May 1999 the President of the Court of Appeal rejected the complaint.

9.  On 17 February 2000 the applicant objected to the participation, as the representative of the public prosecution service, of the public prosecutor attached to the Oliveira de Azeméis District Court. He submitted that the official concerned had been removed from the case concerning the award of parental responsibility by his superior, the Oporto Regional Attorney‑General. In the applicant’s view, he should therefore withdraw from the current proceedings.

10.  The judge requested the Regional Attorney-General to take a decision in that regard. On being informed of the request, the public prosecutor indicated in a document dated 3 March 2000 that he did not wish to comment on the matter, preferring to await the recommendation of the Regional Attorney-General. The applicant was not informed of the public prosecutor’s position.

11.  On 30 March 2000 the Regional Attorney-General informed the judge of the Oliveira de Azeméis District Court that he had initially removed the prosecutor attached to that court from the case concerning the award of parental authority because criminal proceedings had been instituted against him following a complaint by the applicant. As the criminal proceedings had been terminated in the meantime, he had seen no further reason to keep the official concerned off the case concerning Rita. For that reason he had annulled his earlier decision. The Regional Attorney‑General appended several documents to his information note. The applicant was not informed either of the note or of the appended documents.

12.  By an order dated 16 May 2000 the judge, referring to the information note from the Regional Attorney-General, rejected the applicant’s request for the prosecutor to withdraw. The applicant appealed against the order and requested that his appeal be considered at the same time as a possible appeal by him against the judgment.

13.  On an unspecified date the applicant, relying on Article 6 of the Convention, asked to be informed of the various actions taken by the prosecution service in the proceedings.

14.  In an order dated 6 June 2000 the judge refused the request, stating, *inter alia*, as follows:

“No rule exists requiring or recommending that the parties be informed of the actions taken by the prosecution service. The Portuguese judicial system does not permit such a step. The public prosecution service is neither a sovereign body nor an ordinary party to the proceedings. It possesses a separate status, enshrined in the Constitution. Citizens must respect the sovereignty of the Portuguese State and the legal and constitutional system in force, even if they challenge the system; this is a requirement of democracy [and] the rule of law.”

15.  The applicant appealed against that decision on 23 June 2000. In an order of 28 June 2000 the judge declared the appeal inadmissible, taking the view that the impugned order related simply to the conduct of the proceedings (*despacho de mero expediente*) and was therefore not amenable to appeal. The applicant lodged a complaint against the new order with the President of the Oporto Court of Appeal, who rejected it on 23 January 2001.

16.  On 9 June 2000 the public prosecutor commented on the content of the medical reports concerning Rita. He considered that the case was ready for trial and requested the judge to summon the two experts who had prepared the reports to attend the hearing. The applicant was not informed of the document submitted by the public prosecutor.

17.  In an order of 13 June 2000 the judge set the case down for hearing on 22 and 23 November 2000. On the recommendation of the public prosecutor he decided to summon the two medical experts to appear.

18.  As counsel for H. and Rita was absent, the hearing did not take place on 22 and 23 November 2000. On 31 January 2001 the judge issued an order in which he decided to adjourn the hearing until all the expert reports were available. Some of the expert examinations had had to be postponed several times owing to the absence of the applicant and H. They were conducted in May 2001 and March 2002 and the corresponding reports were added to the file on 24 and 28 June 2002.

19.  In an order of 8 July 2002 the judge requested the Institute to carry out a further social inquiry concerning Rita. The corresponding report was added to the file on 13 December 2002. In a reversal of an earlier decision of 22 February 1999, the judge decided that the forthcoming hearing would not be tape-recorded. On 16 September 2002 the applicant appealed against that decision. On 11 July 2003, in accordance with the law, the judge of the Oliveira de Azeméis District Court addressed a note to the judges of the Court of Appeal reaffirming his decision. The applicant did not receive a copy of the note. In a judgment of 23 October 2003 the Oporto Court of Appeal dismissed the appeal of 16 September 2002.

20.  On 2 July and 15 September 2003 the public prosecutor, referring to the findings of the Institute’s report, proposed to the judge that the applicant be granted provisional contact rights allowing him to meet Rita once a week in a public place. On 1 October 2003 the applicant, when invited to comment, stated that he had not been informed of the Institute’s report; he alleged a violation of Article 6 of the Convention on that account.

21.  On 17 November 2003 the judge ordered that copies of all the medical and social reports be sent to the parties. He also awarded the applicant provisional contact rights. On 7 January 2004 the applicant appealed against the order, and more specifically against the conditions attached to his contact rights. In a judgment of 3 June 2004 the Court of Appeal dismissed his appeal.

22.  Hearings took place on 24 May and 14 June 2004 and the court delivered its judgment on 15 July 2004. Basing its decision in particular on the deposition made by Rita, which it considered enlightened and persuasive, it allowed H.’s application in part and, while not withdrawing the applicant’s right of contact altogether, restricted it to two hours a week. The applicant appealed against that judgment to the Oporto Court of Appeal.

23.  In a judgment of 9 June 2005 the Court of Appeal dismissed all the appeals lodged by the applicant during the proceedings and upheld the impugned judgment in its entirety. With particular reference to the appeal against the order of 16 May 2000, the Court of Appeal stressed that the prosecution service, while it could become an objective ally or adversary of the parties, had no power of decision, that power being reserved for the judge. It considered that there had been no breach of Article 6 § 1 of the Convention.

II.  RELEVANT DOMESTIC LAW AND PRACTICE

24.  Article 744 of the Code of Civil Procedure, in its relevant part, reads as follows:

“1.  On expiry of the time allowed to the parties to submit their respective memorials, the registry shall add any memorials that have been received to the case file, together with authenticated copies (*certidões*) and annexes, and shall submit them all to the judge to enable him to confirm his decision (*sustentar o despacho*) or rectify it (*reparar o agravo*).

2.  If the judge confirms his decision, he may order that further authenticated copies be added to the file, which shall then be forwarded to the higher court.

...”

25.  If the judge decides to confirm his decision, he must address a note to the competent court informing it of his position. This note is not communicated to the parties; the Evora Court of Appeal gave a judgment in which it considered that communicating the note served no purpose as it was not capable of conferring any rights on the parties or withdrawing such rights (judgment of 29 March 1979, published in *Colectânea de Jurisprudência*, 1979, Vol. II, p. 383).

THE LAW

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

26.  The applicant alleged that the failure to communicate to him several documents submitted by the prosecution service, and the notes sent by the judge of the Oliveira de Azeméis District Court to the Oporto Court of Appeal, had been in breach of the principle of a fair hearing set forth in Article 6 § 1 of the Convention, which provides, *inter alia*:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

27.  The Government disputed this argument.

A.  Admissibility

28.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

29.  The applicant, referring to the Court’s case-law and, in particular, the case of *Nideröst-Huber v. Switzerland* (18 February 1997, *Reports of Judgments and Decisions* 1997‑I), considered that the fact that several documents in the proceedings had not been communicated to him was incompatible with the requirements of a fair hearing.

30.  The Government contested that argument. With regard to the documents submitted by the prosecution service, they pointed out at the outset that the instant case concerned a particular type of proceedings, in which the interests of the child were paramount. In the Government’s view, this could provide grounds for greater involvement on the part of the prosecution service. Arguing that, in any event, the two documents to which the applicant referred, namely those submitted on 3 March and 9 June 2000, had not worsened his procedural position, the Government took the view that the impugned proceedings had not infringed his right to a fair hearing.

31.  As to the notes sent by the judge to the Court of Appeal, the Government contended that these had simply reiterated the reasons for the impugned decisions without adding anything new, and had not resulted in a worsening of the applicant’s position. Lastly, they considered that the judges of the Court of Appeal had been unlikely to be influenced by the content of the notes.

32.  The Government concluded that there had been no violation of Article 6 § 1 of the Convention. In their view, that conclusion did not run counter to the Court’s case-law, as demonstrated by the use of the expression “in principle” in the *Lobo Machado v. Portugal* judgment (20 February 1996, § 31, *Reports* 1996‑I). Given that the notes in question had not contained anything new and had not led to a worsening of the applicant’s position, the fairness of the proceedings was not open to question.

2.  The Court’s position

33.  The Court points to its settled case-law, according to which the concept of fair trial implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed (see the *Lobo Machado* judgment cited above, ibid.; *Vermeulen v. Belgium*, 20 February 1996, § 33, *Reports* 1996‑I; *Nideröst-Huber*, cited above, § 23; and, more recently, *Spang v. Switzerland*, no. 45228/99, § 32, 11 October 2005).

34.  As the applicant complained of the failure to communicate to him a number of documents and notes, the Court must first of all determine what elements should be taken into account in considering whether the adversarial principle was observed. In that regard, the Court considers it necessary to examine the documents submitted by the prosecution service on 3 March, 30 March and 9 June 2000 and the note sent by the judge of the Oliveira de Azeméis District Court on 11 July 2003.

(a)  The documents submitted by the prosecution service

35.  The Court notes that in the documents in question the prosecution service addressed important substantive as well as procedural issues. Thus, in the documents submitted on 3 and 30 March 2000 – the second of which was submitted by the Regional Attorney-General, that is, the superior of the public prosecutor attached to the court examining the case – the prosecution service commented on a request for the prosecutor to withdraw, and appended several documents. In the document of 9 June 2000 the public prosecutor requested the judge to summon certain experts to attend the hearing.

36.  None of these documents was communicated to the applicant. Admittedly, as pointed out by the Government, the prosecution service, represented by independent legal officers, could not be said to have been a party to the proceedings in the instant case. It is also true that the proceedings related to issues concerning parental authority and rights of contact with a minor, a delicate area in which the interests of the child are unquestionably of paramount importance.

37.  The fact remains, however, that the right to adversarial proceedings for the purposes of Article 6 § 1, as construed by the case-law, “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision” (see *J.J. v. the Netherlands*, 27 March 1998, § 43 *in fine*, *Reports* 1998‑II).

38.  Seen from this standpoint, it is irrelevant whether the prosecutor is or is not regarded as a “party”, since he is in a position, above all by virtue of the authority conferred on him by his functions, to influence the court’s decision in a manner that may be unfavourable to the person concerned (see *Martinie v. France* [GC], no. 58675/00, § 50, ECHR 2006‑...).

39.  These considerations are sufficient for the Court to conclude that there has been a violation of Article 6 § 1 under this head.

(b) The judge’s note

40.  The Court observes that in his note the judge of the Oliveira de Azeméis District Court reiterated the reasons for the impugned decision, albeit without adding anything new. The fact remains that the judge commented in the note on the merits of the appeal lodged by the applicant, suggesting, if only implicitly, that the higher court should dismiss it. In any event, the note in question was certainly aimed at influencing the decision of the Oporto Court of Appeal.

41.  Admittedly, the note did not set out any new facts or arguments which had not already appeared in the impugned decision. That being said, and as the Court has reiterated on numerous occasions, only the parties to a dispute may properly decide whether or not a document calls for their comments. What is particularly at stake here is litigants’ confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file. Similarly, the effect the note actually had on the judges of the Oporto Court of Appeal is of little consequence (see *Nideröst-Huber*, cited above, §§ 27 and 29).

42.  While it is possible to imagine exceptional circumstances in which some documents from the case file might not be disclosed to the parties, because, for instance, they are confidential or are related to State security – hence the expression “in principle” used in the *Lobo Machado* judgment – this certainly does not apply to a note such as the one addressed in the present case by the judge of the first-instance court to the appeal court.

43.  In the instant case, observance of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention required that the applicant be informed of the note in question and given an opportunity to comment on it. As this was not the case, there has been a violation of that provision.

II.  APPLICATION OF ARTICLE 41 OF THE CONVENTION

44.  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

45.  The applicant claimed 5,000 euros (EUR) in respect of the pecuniary damage he had allegedly sustained. He also claimed an amount of EUR 10,000 for non-pecuniary damage.

46.  The Government contested the claims.

47.  The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. Furthermore, it considers that the finding of a violation of Article 6 § 1 constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B.  Costs and expenses

48.  The applicant also claimed EUR 39,193.93 for costs and expenses incurred before the domestic courts and the Court.

49.  The Government considered the sum excessive, particularly in view of the nature of the proceedings at the domestic level.

50.  According to the Court’s case-law, an applicant may recover costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum. In the instant case, bearing in mind the information in its possession and the above-mentioned criteria, the Court considers it equitable to award the applicant an aggregate amount of EUR 2,500 in respect of costs and expenses.

C.  Default interest

51.  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 the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4.  *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, EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable;

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

5.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

 Done in French, and notified in writing on 21 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

 Sally Dollé Françoise Tulkens
 Registrar President