



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

COURT (CHAMBER)

CASE OF BARAONA v. PORTUGAL

(Application no. 10092/82)

JUDGMENT

STRASBOURG

8 July 1987

In the Baraona case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. Thór VILHJÁLMSSON,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. DE MEYER,
Mr. J. MELO FRANCO, *ad hoc judge*,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 February and 23 June 1987,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Portuguese Government ("the Government") on 28 January and 4 February 1986 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10/092/82) against the Republic of Portugal lodged with the Commission on 6 September 1982 by Mr. Joachim Baraona, a Portuguese national.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Portugal recognised the compulsory jurisdiction of the Court (Article 46) (art. 46), and the Government's application referred to Article 48 (art. 48). Their purpose was to obtain a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

3. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the

* Note by the Registrar: The case is numbered 11/1986/109/157. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included ex officio Mr. J. Pinheiro Farinha, the elected judge of Portuguese nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 19 March 1986, in the presence of the Registrar, the President of the Court drew by lot the names of the other five members, namely Mr. Thór Vilhjálmsson, Mr. B. Walsh, Sir Vincent Evans, Mr. R. Bernhardt and Mr. J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

As Mr. Pinheiro Farinha had withdrawn pursuant to Rule 24 § 2, the Government on 21 April appointed Mr. João Augusto Pacheco e Melo Franco, of the Supreme Court of Portugal, to sit as an ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

Subsequently, Mr. Walsh, who was unable to attend, was replaced by Mr. C. Russo, substitute judge.

5. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the need for a written procedure (Rule 37 § 1). On 4 April 1986, he decided that the said Agent and lawyer should have until 30 June to file memorials and that the Delegate should be entitled to reply in writing within two months.

The Government and the applicant filed their memorials with the registry on 27 and 30 June 1986 respectively; on 22 July, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

6. Having consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the applicant's lawyer, the President directed on 10 December 1986 that the oral proceedings should commence on 24 February 1987 (Rule 38). He subsequently authorised the Agent to use the Portuguese language (Rule 27 §§ 2 and 3).

On 12 February, the Registrar received from the Commission several documents he had requested on the President's instructions.

7. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. I. CABRAL BARRETO, Deputy Procurador-Geral,

Agent,

Mr. J.N. CUNHA RODRIGUES, Procurador-Geral,

Mr. J. FIGUEIREDO DIAS, Professor of Law

in the University of Coimbra,

Mr. J. MIRANDA, Professor of Law

in the University of Lisbon,

Counsel;

- for the Commission

Mr. A.S. GÖZÜBÜYÜK,

Delegate;

- for the applicant

Mr. J. LEBRE DE FREITAS, advogado,

Mr. J. PIRES DE LIMA, advogado,

Counsel.

The Court heard addresses and submissions by Mr. Cabral Barreto, Mr. Figueiredo Dias and Mr. Miranda for the Government, by Mr. Gözübüyük for the Commission and by Mr. Lebre de Freitas and Mr. Pires de Lima for the applicant, as well as their replies to its questions. The Agent of the Government and counsel for the applicant filed several documents.

8. On 6 May 1987, the Delegate of the Commission lodged with the registry his comments on the application of Article 50 (art. 50).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, a Portuguese national born in 1930, is a businessman resident at Vitoria in Brazil.

Until May 1975, he lived with his wife and their five children at Cascais (in Portugal). On 17 May 1975, the chairman of the "Commission for co-ordinating the disbandment of the PIDE/DGS (the International Political Police for the Protection of the State/Directorate-General of Security) and the LP (the Portuguese Legion)" ordered the applicant's immediate arrest on the grounds that he was a "dangerous reactionary" and that it was necessary to "investigate his reactionary activities". At the time, following the attempted coup of 11 March 1975, Portugal was going through a difficult period, which lasted until the adoption of the new Constitution on 25 April 1976.

Having learned that he was about to be arrested, the applicant fled to Brazil with his family and did not return to Portugal until September 1978, after the warrant for his arrest had been revoked.

10. In his absence the employees of his civil-engineering firm took over the company and other assets of his, including his house, furniture and bank accounts. On 31 May 1976, the Cascais District Court declared the applicant's business insolvent. Furthermore, the Cofre da Previdência, a public bank from which the applicant had bought his house, repossessed the house for default on payment and sold it to someone else.

The applicant was later able to reach a friendly settlement and recover possession of the house on payment of certain sums to the bank and to the other person involved.

11. On 30 July 1981, the applicant brought a civil action in the Administrative Court (*auditoria administrativa*) of Lisbon seeking damages from the State under Legislative Decree no. 48.051 of 21 November 1967 on the State's non-contractual liability for acts of public administration (see paragraph 30 below). He contended that the warrant for his arrest had been illegal as it did not specify an offence and did not have a "proper purpose". The applicant claimed 8,800,000 escudos in compensation for pecuniary and non-pecuniary damage.

The next day, the court registered the originating application (*petição inicial*) and issued a summons to the defendant - represented by State Counsel's Office (*ministério público*) - requesting a reply within twenty days, in accordance with Article 486 § 1 of the Code of Civil Procedure (see paragraph 32 below).

12. On 28 October 1981 and again on 27 January 1982, the Administrative Court granted a three-month extension of time applied for by State Counsel under Article 486 § 3 of the aforementioned Code (see paragraph 32 below).

13. On 26 April 1982, State Counsel again applied for an exceptional thirty-day extension on the ground that he needed more information in order to prepare his submissions in reply (*contestação*). The court granted the application on 28 April 1982. Two further applications for exceptional thirty-day extensions were made by State Counsel on 8 June and 21 July 1982, on the ground that he did not yet have all the material with which to prepare his reply. The court granted these applications on 14 June and 27 July respectively.

14. On 30 July 1982, the applicant complained to the court of this series of extensions and requested copies of some of the documents in the file in order to complain to the Supreme Council of the Judiciary and to the European Commission of Human Rights of a breach of Article 6 § 1 (art. 6-1) of the Convention.

15. On 29 September 1982, he lodged notice of an appeal against an interlocutory order (*de agravo* - "interlocutory appeal") to the Supreme Administrative Court (*Supremo Tribunal Administrativo*) in respect of the Lisbon Administrative Court's decision of 27 July in allowing State Counsel more time. He lodged the appeal with the lower court, with a request that it should be forwarded immediately to the higher court.

On 15 October 1982, the Administrative Court declared the interlocutory appeal admissible but ordered that it should be placed on the file with the main appeal and not separately forwarded to the Supreme Administrative Court straightaway. It added that the interlocutory appeal had no suspensive effect.

16. In his statement of grounds of appeal (*alegações*) dated 26 October 1982, the applicant contended that the Administrative Court had infringed Article 486 § 3 of the Code of Civil Procedure in extending the time

allowed to State Counsel to file his pleadings by more than six months without exceptional cause, and that State Counsel had failed to specify what evidence and information he still needed. Such an extension of time could not be granted by the court arbitrarily, but only on exceptional grounds, and it could not exceed six months. Yet on this occasion more than a year had passed without State Counsel submitting his pleadings or giving valid reasons for not doing so.

17. On 4 November 1982, State Counsel applied for another exceptional ten-day extension on the ground that the Administrative Court had moved into other premises and that for a time this had halted his office's work. When invited by the court on 9 November to comment on this application, the applicant replied - on 15 November - that he considered it unjustified; he further demanded that it should be refused and that the time allowed to State Counsel should be declared to have expired.

18. State Counsel's pleadings were filed with the Administrative Court on 18 November and immediately forwarded to Mr. Baraona by the registrar of the court.

In the belief that the Administrative Court had decided to include these in the file and have a copy served on him, the applicant lodged with that court notice of an interlocutory appeal to the Supreme Administrative Court on 25 November and requested that the appeal should be forwarded immediately to the higher court and should have suspensive effect.

On 30 November, the applicant nevertheless filed his reply (*réplica*) to the pleadings lodged by State Counsel, who made a rejoinder (*tréplica*) on 17 December.

19. On 21 December 1982, State Counsel submitted his observations (*contra-alegações*) on the applicant's interlocutory appeal of 29 September. As grounds for the requested extensions, he alleged the need not only to assemble evidence but more particularly to decide on the general thrust of his pleadings, especially as regards objections. Moreover, there was no requirement under Article 486 § 3 of the Code of Civil Procedure to give detailed reasons for his application; a general justification was sufficient. Admittedly, Article 266 of the Code of Civil Procedure required the court to remove any hindrance delaying the proceedings, but that was a discretionary power which in the present case could not be usefully exercised.

20. On 11 February 1983, the Administrative Court of Lisbon reversed its decision of 27 July 1982 to allow State Counsel more time and instead refused the application. Relying on Article 486 § 3 of the Code, it ruled that an extension of time could only be granted if State Counsel neither had the necessary information nor could obtain it in the time allowed. In addition, he had to specify the subject on which he needed information and the steps he had taken to obtain it. In the present case he had simply said he needed more information, without giving further particulars.

The court accordingly excluded as having been filed out of time all pleadings submitted by the parties after 27 July 1982, that is to say State Counsel's pleadings of 18 November 1982, the applicant's reply of 30 November and the rejoinder of 17 December, and ordered that they be removed from the file.

Noting, lastly, that State Counsel's pleadings had been sent to the applicant by the registrar and not by the court itself, the court refused to entertain the applicant's interlocutory appeal of 25 November 1982, as no appeal lay to the higher court against actions by the registrar, and a complaint should be made to the court itself.

21. On the same day, the court ordered a number of investigatory measures, including a search for the warrant issued for Mr. Baraona's arrest in 1975.

When it became apparent that no trace of the warrant could be found, the Administrative Court gave a preliminary decision (*despacho saneador*) on 30 December 1983 declaring the case admissible and setting out a list of the facts agreed by the parties (*especificação*) and a list of matters to be clarified at the hearing (*questionário*).

22. On 20 January 1984, under Article 511 § 2 of the Code of Civil Procedure, the applicant lodged a complaint against this decision. He argued that, as State Counsel's pleadings had been withdrawn from the case file, all the allegations he had made in his own statement of claim were to be regarded as admitted, since Article 485 sub-paragraph (b) and Article 490 § 4 of the Code of Civil Procedure (see paragraph 32 below) had been abrogated by Article 6 § 1 (art. 6-1) of the Convention, which laid down the principle of equality of arms. Consequently, all the matters which the court had considered needed clarification at the hearing should have been put in the *especificação* as having been conceded.

State Counsel's comments on the complaint were lodged with the court on 27 January.

23. On 2 February 1984, the registrar submitted the file to the court, and on 12 April the judge dismissed the complaint, apologising for the delay caused by his absence abroad on official business from January to March. He acknowledged that the applicant's arguments were lent support by a learned article and by a court decision at first instance; but the latter had been set aside by the Oporto Court of Appeal on 7 June 1983, and he stated his agreement with that court's decision: State Counsel's Office had less opportunity to meet those it represented, particularly where the defendant was a State body. In addition, the law, in order to be fair, sometimes had to treat the parties differently if they were not to be equal on paper only; the principle of equality of arms entailed compensating for initial inequality - for example, by providing legal aid or setting more generous time-limits in the case of persons resident in a distant country or whose whereabouts were unknown.

24. On 8 May 1984, this decision was communicated to Mr. Baraona, who on 10 May 1984 lodged notice of an interlocutory appeal against it to the Supreme Administrative Court.

On 17 May, the Administrative Court decided to forward the appeal to the higher court together with the entire case file and to give it suspensive effect.

In his statement of grounds of appeal dated 5 June, the applicant put forward substantially the same arguments as in the complaint he had made to the Administrative Court of Lisbon on 20 January. On 20 and 24 July 1984, State Counsel and the latter court submitted their observations on the appeal.

25. The file reached the Supreme Administrative Court in October 1984, whereupon State Counsel was asked to submit his opinion, and two judges of the court then drew up their report.

On 21 March 1985, the Supreme Administrative Court dismissed both interlocutory appeals, of 29 September 1982 and 10 May 1984.

With regard to the first appeal, against the Administrative Court's decision of 27 July 1982, the Supreme Court found that on 11 February 1983 the judge below had himself rectified the situation by rescinding the impugned decision and excluding all pleadings submitted after 27 July 1982 as being out of time.

With regard to the second appeal, against the Administrative Court's decision of 12 April 1984, the Supreme Court ruled that, contrary to the applicant's contention, Article 485 sub-paragraph (b) of the Code of Civil Procedure had not been abrogated by Article 6 § 1 (art. 6-1) of the Convention. The State was in any case differently placed from private companies. Accordingly, not all Mr. Baraona's submissions as to the facts were to be regarded as having been conceded; it was for the Administrative Court to consider them in the light of evidence adduced at the hearing.

26. On 8 April 1985, the applicant appealed against this decision (*acórdão*) to the Constitutional Court, asking it to rule whether Article 485 sub-paragraph (b) was still in force.

The Constitutional Court registered the appeal on 16 April 1985. The applicant and State Counsel filed their pleadings on 15 July and 24 October 1985 respectively. State Counsel submitted that the court had no jurisdiction, as no breach of the Constitution had been alleged by the applicant either at first instance or before the Supreme Administrative Court. Mr. Baraona replied on 12 November 1985 that a breach of the principle of equality of arms was contrary both to the Convention and to the Constitution.

On 5 March 1986, the Constitutional Court dismissed the objection and proceeded to consider the question of the principle of equality of arms. In a judgment on 19 November 1986, it dismissed the appeal, and the applicant

immediately challenged the judgment as being null and void; but it was confirmed on 14 January 1987.

27. The proceedings in the Administrative Court of Lisbon have since resumed and are at the preliminary stage.

II. LAW GOVERNING THE STATE'S NON-CONTRACTUAL LIABILITY

28. Following the revolution of 25 April 1974, the "Armed Forces Movement" promulgated Law no. 3/74, of 14 May, which upheld the existing schedule of basic rights and freedoms in the 1933 Constitution and also laid down fundamental principles concerning judicial independence and defence rights. Article 8 § 17 of the 1933 Constitution recognised "the right to reparation for actual infringements of rights"; as to non-pecuniary damage, statutory provision could be made for financial compensation.

Most of the existing provisions of civil and criminal law were retained, in particular Legislative Decree no. 48.051 of 21 November 1967 on the State's non-contractual liability.

By Legislative Decree no. 36/75 of 31 January 1975, the powers of the "Commission for co-ordinating the disbandment of the PIDE/DGS and the LP" - a commission which had been set up pursuant to an order (despacho) issued by the Army Chief of Staff on 7 June 1974 - cover the preparation of proceedings against individuals who belonged to the relevant police forces or collaborated with them (Article 2 § 3); the chairman of the Commission had the same powers as those conferred on commanding officers of the military regions under the Military Criminal Code (Article 2 § 4).

29. By Article 21 of the Constitution of 25 April 1976:

"1. The State and other public bodies shall be jointly and severally liable in civil law with the members of their agencies, their officials or their agents for actions or omissions in the performance of their duties, or caused by such performance, which result in violations of rights, freedoms or safeguards or in prejudice to another party.

2. Wrongly convicted persons shall have a right to retrial and to compensation for damage sustained, on conditions to be laid down by law."

The Constitution was amended by Constitutional Law no. 1/82 of 27 September 1982, Article 22 of which reproduces the foregoing Article 21 § 1 unchanged, however.

30. The Civil Code of 1966, which is still in force, deals with the State's civil liability but only in respect of acts of "private administration" (Article 501). As regards acts of "public administration", Legislative Decree no. 48.051 of 21 November 1967 contains provisions on the non-contractual liability of the State and other public bodies for acts due to negligence, abuse of authority or deceit by their agencies or officials. The most important of these are as follows:

"Article 2

1. The State and other public bodies shall be liable to third parties in civil law for such breaches of their rights or of legal provisions designed to protect the interests of such parties as are caused by negligent acts (actos ilícitos culposamente praticados) of their agencies or officials in the performance of their duties or as a consequence thereof.

2. Where any compensation is paid pursuant to the previous paragraph, the State and other public bodies shall have a right of recourse against the members of the agency or the officials at fault if they failed to act with proper diligence.

Article 3

1. Members of the agency and officials of the State and other public bodies shall be liable to third parties in civil law for unlawful acts in breach of their rights, or of legal provisions designed to protect the interests of such parties, where they have exceeded their powers or if they acted with wrongful intent in exercising them.

2. The public body shall always be jointly liable with the members of the agency or the officials concerned for acts performed with wrongful intent.

Article 4

1. The negligence (culpa) of the members of the agency or of the officials concerned shall be assessed in accordance with Article 487 of the Civil Code.

2. Where more than one person is liable, Article 497 of the Civil Code shall apply.

Article 5

1. The right to compensation under the foregoing provisions shall be time-barred after expiry of the periods laid down in the Civil Code.

2. Limitation of actions by the State to enforce its right of indemnity is likewise governed by civil law.

..."

31. Under the Administrative Code, actions for damages in respect of liability of public authorities come within the jurisdiction of the administrative courts (auditores - Articles 815 and 820). With the exception of certain rules regarding locus standi and limitation (Articles 824 and 829), Article 852 explicitly refers to the provisions governing ordinary civil procedure.

Decisions of administrative courts are subject to appeal as to the merits, interlocutory appeal and complaint (Article 853). Certain interlocutory appeals have a suspensive effect and must be referred forthwith to the Supreme Administrative Court, in particular those made against a decision to dismiss a complaint against a preliminary decision (Article 859 sub-

paragraph (d)), while others must be forwarded with the case file when the final decision is appealed, and have no suspensive effect (Article 860).

32. The procedure in question must therefore comply with the rules in the Code of Civil Procedure.

Article 484 § 1 of the Code provides that "if the defendant fails to submit pleadings in reply notwithstanding the proper issue of a summons ..., the facts as pleaded by the plaintiff shall be deemed to have been admitted".

Article 485 lays down certain exceptions to this principle, however; in particular, sub-paragraph (b) states that the rule does not apply where the defendant is a legal person.

Under Article 486 § 1 the defendant has twenty days in which to reply to the claim, but paragraph 3 of the same Article provides:

"State Counsel shall be granted more time when he needs information he cannot obtain within the time-limit or when he is awaiting a reply from a higher authority. The extension may not exceed six months unless exceptional cause is shown."

Article 490 § 1 of the Code of Civil Procedure stipulates that "the defendant shall reply clearly to each item of fact in the originating application; items not expressly (especificadamente) disputed shall be regarded as agreed between the parties except where obviously inconsistent with the defence as a whole, or not capable of being admitted, or provable only by written document".

By paragraph 4, however, this provision applies neither to defence counsel assigned by the court nor to State Counsel.

Under Article 511 § 2, once the parties have been informed of the preliminary decision they may make "any complaints they wish about the list of the facts agreed by the parties or the list of matters to be clarified at the hearing on grounds of procedural irregularity (deficiência), irrelevance (excesso), complexity or obscurity".

PROCEEDINGS BEFORE THE COMMISSION

33. In his application of 6 September 1982 to the Commission (no. 10092/82), the applicant complained of the length of the proceedings instituted by him on 30 July 1981 in the Administrative Court of Lisbon, which were still pending at first instance. He relied on Article 6 § 1 (art. 6-1) of the Convention.

34. The Commission declared the application admissible on 5 October 1984. In its report of 8 October 1985 (made under Article 31) (art. 31), it unanimously held that there had been a violation of Article 6 § 1 (art. 6-1). The full text of the Commission's opinion is reproduced as an annex to this judgment.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

35. The applicant complained of the length of time taken to try the action he brought against the State in the Administrative Court of Lisbon on 30 July 1981; he alleged a breach of Article 6 § 1 (art. 6-1) of the Convention, which provides:

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

A. Applicability of Article 6 § 1 (art. 6-1)

36. The Commission and the applicant were of the view that this provision was applicable in that the action was for compensation for damage a public servant caused by an act which infringed the applicant's rights - in particular his right to liberty and his right of property.

37. The Government contended, on the contrary, that Article 6 § 1 (art. 6-1) was not material. In their submission, the impugned measure - the warrant issued on 17 May 1975 for Mr. Baraona's arrest (see paragraph 9 above) - had no basis in Portuguese law at that time. Accordingly, it could not give rise to liability on the part of the State or entail any civil obligations on it independent of the obligations of the chairman of the "Commission for co-ordinating the disbandment of the PIDE/DGS and the LP", who had signed the warrant.

The position in the instant case, they claimed, was that an act had been carried out against the background of a revolution. The damage which flowed from it could not therefore be looked at in the context of the general doctrine of the State's non-contractual liability; it came within the ambit of public-law relations between the victim and the State.

In short, the respondent State did not deny all responsibility for excesses committed during the period of the revolution, but considered that the problem had to be approached from a different angle. It maintained that in the absence of any special law on the subject, it had not yet decided on the necessary measures to compensate victims of such excesses.

The Government thus seemed to be denying not only that the right was a "civil" one but even that the right existed at all in domestic law.

1. Existence of a dispute ("contestation") over a right

38. That there is a dispute is not open to question. The dispute is over whether or not Mr. Baraona has any right at all to recover financial

compensation for the damage flowing from the warrant for his arrest issued in 1975 (see paragraphs 9-11 above).

39. The respondent Government recognised that two "attitudes" to the matter are "conceivable" (memorial to the Court, section III, paragraph 1.5).

On the first view, which the Government take, the democratic State founded on the rule of law, which was established by the Constitution of 25 April 1976, cannot be held liable for excesses during the period of the revolution.

On the second view, taken by the applicant, the fundamental rights set forth in the 1933 Constitution were confirmed by Law no. 3/1974, promulgated by the "Armed Forces Movement" on 14 May 1974; furthermore, Legislative Decree no. 48.051 of 21 November 1967, which contains provisions on the non-contractual liability of the State and other public bodies for acts of "public administration", has never ceased to be in force.

On the basis of this second argument, the applicant considers that the impugned arrest warrant, which was issued by a public servant (the chairman of the "Commission for co-ordinating the disbandment of the PIDE/DGS and the LP") acting as such, gave rise to civil liability on the part of the Portuguese State.

40. There is no doubt that the return to democracy from April 1974 onwards caused Portugal to reorganise its social and political structure in difficult circumstances unequalled in other European countries, and tribute must be paid to the efforts made by the Portuguese people to consolidate democracy (see, *mutatis mutandis*, the *Guincho* judgment of 10 July 1984, Series A no. 81, p. 16, § 38).

However, it is not for the Court to assess either the merits of the applicant's claim under Portuguese legislation or the influence that the revolutionary situation resulting from the events of April 1974 may have had on the application of that legislation; such questions fall within the exclusive jurisdiction of the Portuguese courts.

41. It is sufficient for the Court to note that the applicant could claim on arguable grounds to have a right that is recognised under Portuguese law as he understands it (see, among other authorities, the *James and Others* judgment of 21 February 1986, Series A no. 98, p. 46, § 81).

In this connection, it points out, as the Commission did, that the Administrative Court of Lisbon gave a preliminary decision on 30 December 1983 declaring the case to be admissible (see paragraph 21 above) and that State Counsel did not appeal.

2. Whether the right is a civil right

42. As to whether the right is a "civil" right, the Court refers to its established precedents, which the Government, moreover, did not challenge (see, among other authorities, the *König* judgment of 28 June 1978, Series

A no. 27, pp. 31-32, §§ 91-95; the Sporrang and Lönnroth judgment of 23 September 1982, Series A no. 52, pp. 29-30, §§ 79-80; and the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 10, § 22).

From these precedents it emerges among other things that the concept of "civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law (see the König judgment previously cited, Series A no. 27, pp. 29-30, §§ 88-89) and that Article 6 § 1 (art. 6-1) applies irrespective of the status of the parties, as of the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter; it is enough that the outcome of the proceedings should be "decisive for private rights and obligations" (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, § 94).

43. It is therefore not decisive that, with regard to the State's civil liability, Portuguese law distinguishes between acts of "private administration" covered by Article 501 of the Civil Code and acts of "public administration" dealt with in Legislative Decree no. 48.051 of 1967 (see paragraph 30 above); or that disputes concerning the latter come within the jurisdiction of the administrative courts (see paragraph 31 above). In any case, the Portuguese State's liability for acts of "public administration" is based on the general principles of civil liability set out in the Civil Code, and the administrative courts follow the Code of Civil Procedure in the matter (see paragraphs 30 and 31 above).

44. The right to compensation asserted by the applicant is a private one, because it embodies a "personal and property" interest and is founded on an infringement of rights of this kind, notably the right of property (see, *mutatis mutandis*, the Zimmermann and Steiner judgment previously cited, Series A no. 66, p. 10, § 22). The arrest warrant complained of caused Mr. Baraona to flee to Brazil with his family, abandoning his house, all his property and his business, which was eventually declared insolvent (see paragraphs 9-10 above).

Article 6 § 1 (art. 6-1) of the Convention accordingly applies.

B. Compliance with Article 6 § 1 (art. 6-1)

45. It remains to be ascertained whether the case has been heard within a "reasonable time".

The applicant and the Commission submitted that it had not been; the Government disagreed.

1. Period to be considered

46. The action in the Administrative Court of Lisbon was brought by the applicant on 30 July 1981 (see paragraph 11 above), and that court has

still not determined the merits of the case. The proceedings have therefore already lasted six years, which seems a considerable length of time in view of the preliminary nature of the decisions taken so far; a review of the way the proceedings were conducted is accordingly called for under Article 6 § 1 (art. 6-1).

2. Criteria to be used in assessing the reasonableness of the time taken

47. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the behaviour of the applicant and the conduct of the relevant authorities (see, among other authorities, the Zimmermann and Steiner judgment previously cited, Series A no. 66, p. 11, § 24).

48. The impugned proceedings were governed by the provisions of the Portuguese Code of Civil Procedure, under which it is for the parties - in the instant case, the applicant and State Counsel - to take the initiative. This did not, however, absolve the Administrative Court from ensuring that the proceedings made proper headway (see the Guincho judgment previously cited, Series A no. 81, p. 14, § 32, and the Capuano judgment of 25 June 1987, Series A no. 119, § 24). It should furthermore be noted that Mr. Baraona protested against the extensions of time granted by the court (see paragraphs 14-17 above).

(a) Complexity of the case

49. The Government prayed in aid the fact that the case was a very complex one; they claimed that State Counsel had been obliged to seek a succession of extensions because he had had trouble obtaining the necessary documents, as the facts of the case went back to the time of a revolution; to that were added difficult legal issues and State Counsel's need to adopt a common policy for similar cases.

50. The Court considers, as the Commission did, that the case involved points of fact and law of some complexity. In particular, the applicant's interlocutory appeal (of 10 May 1984) raised a difficult question, which was dealt with at three levels of jurisdiction over a period of nearly three years, namely equality of arms in the proceedings complained of (see paragraph 24 above).

Even so, the procedural steps taken hitherto by the Administrative Court, such as the decision of 30 December 1983 (see paragraph 21 above), have been of a preliminary nature and thus do not justify the time that has elapsed.

(b) Behaviour of the applicant

51. Mr. Baraona did not complain of the various extensions of time granted to State Counsel until 30 July 1982, almost a year after State Counsel had been asked to file his pleadings (see paragraph 14 above). In his submission, however, it would have been pointless to take such a step any earlier, as the said extensions were based on domestic law (see paragraph 32 above).

In this connection, the Court notes that the Administrative Court of Lisbon did not set aside the decision of 27 July 1982 until 11 February 1983 (see paragraph 20 above), nearly three months after State Counsel had finally submitted his pleadings.

52. In the Government's view, the fact that the court had still not determined the merits of the case was attributable to the parties, who had availed themselves of their procedural rights.

53. The actions of State Counsel cannot be blamed upon the applicant but can certainly be held against the State, as they were taken by one of its agencies (see paragraphs 54-56 below).

For his part, Mr. Baraona lodged two interlocutory appeals. The first of these, on 29 September 1982, did not have any suspensive effect and did not therefore prolong the proceedings (see paragraph 15 above).

The same is not true of the second interlocutory appeal, which was lodged on 10 May 1984 (see paragraph 24 above) and halted the proceedings for nearly three years. Mr. Baraona contended in his appeal that once State Counsel's pleadings were excluded from the file (see paragraph 20 above), all the facts pleaded in his own statement of claim had to be presumed to have been admitted by State Counsel in virtue of the principle of equality of arms enshrined in Article 6 § 1 (art. 6-1) of the Convention, which he argued had abrogated Article 485 sub-paragraph (b) and Article 490 § 4 of the Code of Civil Procedure (see paragraph 32 above).

A decision in the applicant's favour could therefore have had an influence on the outcome of the proceedings, since it would have simplified the Administrative Court's task. Such a step was in any case necessary if Mr. Baraona wished to exhaust domestic remedies in order to bring the issue of equality of arms before the Convention institutions (see the Commission's decision of 5 October 1984 on the admissibility of the application, Decisions and Reports no. 40).

This interlocutory appeal and the subsequent action to have the Constitutional Court's decision set aside (see paragraph 26 in fine above), although both justified, nevertheless complicated the proceedings to some extent (see paragraph 50 above).

(c) Conduct of the relevant authorities

54. In the Commission's view, the main cause of delay lies in State Counsel's five applications for an extension of time.

The Court notes that on 31 July 1981 the Administrative Court of Lisbon issued a summons to State Counsel requesting him to reply within twenty days, in accordance with Article 486 § 1 of the Code of Civil Procedure (see paragraph 11 above). State Counsel did not in fact file his pleadings until 18 November 1982, having secured several extensions of time pursuant to Article 486 § 3 (see paragraph 32 above). On 11 February 1983, however, the Administrative Court revoked the extension of time granted on 27 July 1982, because State Counsel's application was too vague. It consequently decided to exclude as having been filed out of time all pleadings submitted by the parties after that date, including State Counsel's (see paragraph 20 above). After a year and a half, therefore, the proceedings were back where they had started.

The Administrative Court subsequently ordered the original of the arrest warrant to be produced (see paragraph 21 above), but to no effect. It did not give its preliminary decision until 30 December 1983, after awaiting production of the warrant for ten months.

On 20 January 1984, Mr. Baraona lodged a complaint against this decision. It was forwarded to the judge on 2 February, but he did not dismiss it until two months afterwards, on 12 April, explaining that he had been abroad (see paragraphs 22-23 above).

While the subsequent proceedings in the Supreme Administrative Court and the Constitutional Court are not open to any criticism, the three periods the Court has just indicated amount to more than two years, and could be justified only by very exceptional circumstances (see the *Guincho* judgment previously cited, Series A no. 81, p. 15, § 36).

55. In the Government's submission, the impugned applications for extensions of time were legitimate in view of the complexity of the case and were based on Portuguese legislation, so that the time which elapsed on account of them could not be taken into consideration in a review of the length of the proceedings.

56. The Court has already considered the complexity of the case (see paragraph 50 above). As to the Government's other argument, the Court finds it equally unconvincing. The fact that domestic legislation allows State Counsel to seek an extension of time does not exclude the State's responsibility for resultant delays; State Counsel could have refrained from making such applications, or the Administrative Court could have refused them - as it in fact did on 11 February 1983.

3. Conclusion

57. In short, neither the complexity of the case nor the applicant's behaviour had any marked influence on the length of the proceedings, which resulted mainly from the way in which the relevant authorities conducted the case.

The "reasonable time" referred to in Article 6 § 1 (art. 6-1) of the Convention has accordingly been exceeded.

II. APPLICATION OF ARTICLE 50 (art. 50)

58. Article 50 (art. 50) of the Convention provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

59. Mr. Baraona claimed 8,000,000 Portuguese escudos in interest for delay, at the rate of 23%, on the amount of the compensation sought by him from the Government in the pending national proceedings and on the basis of the five years these proceedings had already lasted.

He also sought 5,000,000 escudos in respect of pecuniary and non-pecuniary damage, claiming that the fact that the Portuguese courts had not yet given a decision in his civil action had prevented him from resettling in Portugal after having lost all his assets there as a result of the arrest warrant complained of.

60. The Government pointed out that interest for delay could be obtained in the domestic courts, which moreover took account of inflation and currency erosion when determining the amount of compensation. Furthermore, the length of the proceedings, they claimed, had not caused the applicant any pecuniary damage, as he had settled permanently in Brazil.

61. As regards interest for delay, the Court agrees with the Commission: the Portuguese courts will have to award such interest if they find in favour of Mr. Baraona. At all events, the Court cannot prejudge the outcome of the pending proceedings (see, among other authorities, *mutatis mutandis*, the *Bönisch* judgment of 2 June 1986, Series A no. 103, p. 8, § 11).

As to the alleged pecuniary damage, it does not flow from the failure, found in the present judgment, to hear the case within a "reasonable time": the alleged impossibility of returning to Portugal stems from the arrest warrant which caused the applicant to flee to Brazil and leave all his property in Portugal. This, however, is precisely the subject-matter of the action in the Administrative Court of Lisbon, on whose outcome the Court cannot speculate.

On the other hand, the applicant has undeniably suffered non-pecuniary detriment. After six years, he is still living in uncertainty as to the outcome of the litigation in question and, accordingly, as to the possibility of

resettling in Portugal as he wishes. Assessing these factors on an equitable basis as required by Article 50 (art. 50), the Court awards him 500,000 escudos.

B. Costs and expenses

62. Mr. Baraona also claimed reimbursement of 1,000,000 escudos in respect of costs and expenses incurred for his representation by two lawyers before the Convention institutions, the sum being made up of 500,000 escudos for fees, 470,000 escudos for travel and subsistence and 30,000 escudos for sundry expenses.

Relying on principles adopted in the matter by the Court in previous cases (see, among many other authorities, the *Bönisch* judgment previously cited, Series A no. 103, p. 9, § 15), the Government considered that it was not necessary for two lawyers to be instructed.

63. The Government acknowledged that the case raised important issues. In the Court's view, these could justify the attendance of two lawyers at the hearing. The amount of the expenses occasioned by their appearance in the proceedings before the Commission and the Court and of the sundry expenses appears reasonable. On the other hand, the Court finds that a sum of 400,000 escudos for fees is sufficient in the circumstances of the case.

The applicant is thus entitled to be reimbursed a total of 900,000 escudos for costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 § 1 (art. 6-1) of the Convention is applicable in the instant case;
2. Holds that there has been a breach of that Article (art. 6-1);
3. Holds that the respondent State is to pay the applicant 500,000 (five hundred thousand) escudos for non-pecuniary damage and 900,000 (nine hundred thousand) escudos for costs and expenses;
4. Rejects the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1987.

Rolv RYSSDAL
President

For the Registrar
Jonathan L. SHARPE
Head of Division in the registry of the Court