



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

COURT (CHAMBER)

CASE OF PARDO v. FRANCE

(Application no. 13416/87)

JUDGMENT

STRASBOURG

20 September 1993

In the case of Pardo v. France*,

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 R. BERNHARDT,

Mr F. GÖLCÜKLÜ,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mrs E. PALM,

Mr A.N. LOIZOU,

Mr A.B. BAKA,

Mr J. MAKARCZYK,

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

Having deliberated in private on 25 March and 23 August 1993,

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

PROCEDURE

1. The case was referred to the Court by the Government of the French Republic ("the Government") on 4 August 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13416/87) against France lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by a French national, Mr Ernest Pardo, on 12 November 1986.

The Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

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

* The case is numbered 25/1992/370/444. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

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

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 September 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr F. Gölcüklü, Mr C. Russo, Mrs E. Palm, Mr A.N. Loizou, Mr B. Repik and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). With effect from 1 January 1993 Mr A.B. Baka, substitute judge, replaced Mr Repik, whose term of office had come to an end owing to the dissolution of the Czech and Slovak Federal Republic (Articles 38 and 65 para. 3 of the Convention and Rules 22 para. 1 and 24 para. 1) (art. 38, art. 65-3).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 13 January 1993 and the Government's memorial on 25 January. On 15 March the Secretary to the Commission informed the Registrar that the Delegate would submit oral observations.

5. On 12 February 1993 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 March 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr B. GAIN, Head of the Human Rights Section

of the Legal Affairs Department, Ministry of Foreign Affairs,

Agent,

Miss M. PICARD, magistrat,

on secondment to the Legal Affairs Department, Ministry of
Foreign Affairs,

Mr G. BITTI, Human Rights Office,

European and International Affairs Department, Ministry of
Justice,

Counsel;

- for the Commission

Mr A. WEITZEL,

Delegate;

- for the applicant

Mr F.-M. WELSCH, avocat,

Counsel.

The Court heard addresses by Mr Gain for the Government, by Mr Weitzel for the Commission and by Mr Welsch for the applicant.

7. On the occasion of the hearing the Government produced various documents.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Pardo lives in Marseilles, where he used to run a business in his own name, "Les Techniques du Son", at the same time as being the de facto manager of the limited company Telec. This state of affairs continued until the two undertakings were compulsorily wound up, on 28 October 1981 for the latter and 27 January 1982 for the former.

9. On an application by the trustee representing the interests of Telec's creditors (le syndic de la liquidation), the Marseilles Commercial Court decided on 27 June 1983 to apply to Mr Pardo Article 99 of Law no. 67-563 of 13 July 1967 (see paragraph 19 below) and ordered him to pay 5,000,000 francs as a contribution to the deficiency in the assets.

10. Mr Pardo, on 26 July 1983, and the trustee, on 12 October, filed appeals. On 7 February 1984 Mr Pardo lodged his final submissions.

11. On 26 October 1984 the judge responsible for preparing the case declared the investigation closed.

12. On 30 October 1984 the applicant requested the Aix-en-Provence Court of Appeal to revoke that decision and to stay the proceedings pending the conclusion of proceedings brought against him for criminal bankruptcy.

13. According to the applicant, at the hearing on 9 November 1984 - the record of which was produced before the Court by the Government - his lawyer confined his pleadings to the request for a stay of the proceedings.

14. The Court of Appeal gave judgment in open court on 15 January 1985 without having held another hearing.

It first rejected the applicant's request on the ground that there was no link between the criminal proceedings and the legal issues raised by the application of the above-mentioned Article 99. It considered that, whatever the outcome of the criminal trial, it would not have any bearing on the question of the applicant's liability qua manager of the company.

On the merits, the Court of Appeal noted, *inter alia*, like the Marseilles court, that the company had aimed to conquer the telecommunications market without having the financial resources to put this ambition into effect and that the applicant had devoted considerable energy to obtaining bank loans, and had unrealistically and imprudently adopted a course of

action which had been bound to aggravate the situation and increase the deficit. It took the view that the applicant had been at fault in blindly pursuing a fanciful objective without the slightest hope of redressing the situation; it confirmed the decision requiring him to make good part of the deficit in the company's assets. The Court of Appeal also ordered Mr Pardo's brother and sister to pay respectively 1,000,000 and 1,500,000 francs as a contribution to the debts; it found that they too bore responsibility, whereas the judgment of 27 June 1983 had exonerated them.

15. In a letter of 24 January 1985 to the First President of the Court of Appeal Mr Pardo criticised this judgment. He explained that at the hearing on 9 November his lawyer "had requested that the proceedings be stayed, on which request ... the President of the 8th Chamber had agreed to deliberate, even envisaging the possibility that, if necessary, a day would subsequently be set aside to hear the case again and to take argument on the merits". On this account he asked the First President to accord him an interview.

The First President replied in a letter of 28 January 1985 that there had been no irregularity in the proceedings and that, in any event, the interview sought by Mr Pardo was not appropriate.

16. The applicant then obtained the testimony of lawyers who had been present at the hearing of 9 November.

His lawyer, Mr de Chesse, wrote to him on 25 March 1985 certifying that the President had stated that the case would be adjourned either to a much later date, if the request for a stay was granted, or to a date in the near future when it would be the only case on the list in view of the number of documents to be examined. According to the lawyer, the court had had before it only his two sets of final submissions, whereas the file of his pleadings had comprised thirteen folders 14cm thick. Mr Davin, the counsel for one of the other directors of the company, also implicated in the case, confirmed, in his reply dated 22 April 1985 to a letter which Mr de Chesse had sent to him on 25 March, a copy of which the applicant was, however, unable to produce, that the hearing in issue had indeed followed the course described by the applicant's lawyer in his letter.

Another lawyer, Mr Roussel, who was not present when the cases were called but who had been due to plead for the applicant, confirmed by a letter of 29 April 1985 that on 9 November 1984, at about 9 a.m., his client had telephoned him to advise him against attending as the case was going to be adjourned.

The applicant twice asked to be sent documents relating to the hearing (record and list of cases), but to no avail.

17. Mr Pardo filed an appeal on points of law. He complained that the Court of Appeal had not answered his submissions on the merits of the case; in addition, he alleged a violation of the rights of the defence inasmuch as the hearing had dealt exclusively with the request for a stay of the proceedings.

18. The Commercial Division of the Court of Cassation dismissed the appeal on 15 July 1986. It found that, in the light of the statements made on the merits of the case and without disregarding the rights of the defence, the Court of Appeal had, in assessing the part of the company's liabilities to be borne by the management, replied to the submissions put forward; the two grounds for appeal were therefore not founded.

II. RELEVANT DOMESTIC LAW

A. The Commercial Code

19. Article 99 of Law no. 67-563 of 13 July 1967 on composition proceedings, compulsory winding-up, bankruptcy and fraudulent bankruptcy, which was in force at the material time, was worded as follows:

"Where the composition proceedings or the liquidation of the assets of a legal person reveal a deficiency in the assets, the court may order, at the request of the trustee, or even of its own motion, that the company's debts be borne, in whole or in part, individually or jointly, by all the persons responsible for managing the company, de jure or de facto, whether openly or secretly, whether remunerated or not, or by some of them.

...

The persons concerned shall not incur liability if they can show that they displayed all the necessary vigour and vigilance in the management of the company's affairs."

As amended by Law no. 85-98 of 25 January 1985, this provision, now Article 180, states as follows:

"Where the composition proceedings or the liquidation of the assets of a legal person reveal a deficiency in the assets, the court may, where negligent management has been a factor in that deficiency, order that the company's debts be borne, in whole or in part, individually or jointly, by all the individuals responsible for managing the company, de jure or de facto, whether remunerated or not, or by some of them.

..."

B. The new Code of Civil Procedure

20. The relevant provisions of the new Code of Civil Procedure in force at the material time are as follows:

Article 542

"The purpose of an appeal is to have a first-instance judgment varied or set aside by the Court of Appeal."

Article 561

"An appeal reopens in the Court of Appeal a case in which judgment has been given so that it can be retried on questions of fact and law."

Article 563

"In order to substantiate on appeal the claims made at first instance, the parties may invoke new submissions, produce new documents or propose to adduce new evidence."

Article 763

"The investigation (instruction) of the case is conducted by a member of the division to which the case has been allotted.

The judge in question has the responsibility of ensuring the proper conduct of the proceedings, in particular that submissions are exchanged and documents communicated in good time.

He may interview the lawyers and communicate to them any documents or information which he considers useful. He may also, if necessary, issue directives to them."

Article 779

"As soon as the investigation is sufficiently advanced, the judge responsible for preparing the case shall refer the case to the court to be pleaded on a date fixed by the president or by himself, if he has been duly delegated to that effect.

The aforementioned judge shall declare the investigation closed. The date of the order closing the investigation shall be as near as possible to the date fixed for the hearing.

He shall remain responsible for the proceedings until the opening of the hearing."

Article 782

"The closure of the investigation ... shall be decided by an order which shall not give reasons and against which no appeal shall lie. A copy of this order shall be communicated to the lawyers."

Article 783

"Once the order closing the investigation has been made, no submission may be filed and no document may be produced at the hearing; any such submissions and documents shall be declared inadmissible by the judge responsible for preparing the case or by the court, of their own motion.

Applications to have the order closing the investigation revoked shall however be admissible ...

..."

Article 784

"The order closing the investigation may be revoked only if a serious reason has come to light since it was adopted ...

...

The order closing the investigation may be revoked either by a reasoned order by the judge responsible for preparing the case or, once the hearing has opened, by decision of the court, on the judge's or the court's own motion or on application by a party."

Article 899

"Except as otherwise provided, the parties are required to appoint lawyers as their compulsory legal representatives (avoués); such appointment also constitutes communication of an address for service."

Article 909

"The final submissions shall be notified and the documents communicated by the lawyer (avoué) of each party to the lawyer of the other; where there is more than one plaintiff or defendant, such submissions and documents must be communicated to the lawyers of all the parties.

A copy of the final submissions shall be filed with the registry with proof of their notification."

Article 910

"The investigation of the case shall be effected under the supervision of a member of the division to which it has been allotted, under the conditions set out in Articles 763 to 787 and in the provisions which follow."

Article 954

"The appeal submissions must formulate expressly the parties' claims and the grounds on which those claims are founded.

A party seeking to have the judgment overturned must set out expressly the grounds relied on and may not simply refer to its submissions at first instance.

A party which, without submitting new grounds, calls for the judgment to be upheld, is deemed to endorse the reasoning set out in the judgment."

PROCEEDINGS BEFORE THE COMMISSION

21. In his application of 12 November 1986 (no. 13416/87), Mr Pardo alleged the violation of his right to a fair trial, guaranteed under Article 6 para. 1 (art. 6-1) of the Convention. He complained that he had not had the opportunity to plead his case on its merits in the Court of Appeal, although the President had said that there would be a hearing. He also claimed to have been the victim of a breach of the principle of the presumption of innocence, laid down in Article 6 para. 2 (art. 6-2), on account of the application of Article 99 of the Law of 13 July 1967 in this case.

22. On 1 March 1991 the Commission declared the second complaint inadmissible on the ground of incompatibility with the provisions of the Convention (Article 27 para. 2) (art. 27-2); on the other hand, it found the first complaint admissible. In its report of 1 April 1992 (made under Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

23. In their memorial the Government requested the Court to "declare the application ... to be ill-founded".

24. The applicant urged the Court:

"- to hold and adjudge that there has indeed been a violation by France of the provisions of Article 6 para. 1 (art. 6-1) of the Convention, with respect to Mr Ernest Pardo in particular,

- to order that this judgment be recorded in the margin of all the unfair judgments which have been given by the French domestic courts,

- to assess the intentional nature of this violation with respect to the facts described and to the case-law of the Court, in order to take this into account when determining on an equitable basis the claim for just satisfaction."

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 261-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

25. Mr Pardo claimed that he had not had a fair trial. He relied on Article 6 para. 1 (art. 6-1) of the Convention, according to which:

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

He had not had the opportunity to present oral argument on the merits in the Aix-en-Provence Court of Appeal, despite the fact that the latter's president had stated that the hearing would be adjourned to a later date. As proof of this the applicant cited attestations obtained from two lawyers who had been present at the hearing on 9 November 1984 and from a third who had been due to attend (see paragraph 16 above). When it had given its ruling, the Court of Appeal had not therefore had at its disposal certain items of evidence which would have been crucial to the decision in the case, in particular documents which the applicant's lawyer, Mr de Chesse, had intended to lodge after the hearing. These documents would have made it possible for the applicant to show that there had been no negligence on his part and to establish that the civil servants were to blame.

26. The Commission accepted this view in substance. The lack in the hearing record (*plumitif*) of any note to the effect that the President of the Chamber had indicated to the parties that the hearing on the merits would be adjourned could not, in its view, constitute a sufficient ground for casting doubt on the truth of the facts as attested to by the two lawyers present at the hearing.

27. According to the Government, the attestations in question, with the exception of that produced by Mr Pardo's lawyer, did not corroborate the applicant's claims. Three arguments combined to refute them. In the first place, the letter "D", which appeared in the record and the significance of which had been confirmed by the registrar of the relevant division of the Court of Appeal, meant that judgment had been reserved in the case. Secondly, one of the grounds of the judgment indicated that documents had in fact been communicated. Finally, no claim had been made in the cassation memorial that the documents in question had not been filed.

In any event, Mr Pardo had had a fair trial. In view of the essentially written nature of the procedure, the oral stage, provided for in Article 779 of the Code of Civil Procedure, was almost symbolic, especially as the parties were not allowed either to add anything or withdraw anything from their written submissions (Article 783). In addition, the procedure in question was one for which the parties had compulsorily to be represented (Article

899), which had not been the position with regard to the procedure in the Commercial Court.

28. The Court is confronted with a dispute concerning the exact course of the proceedings in the Aix-en-Provence Court of Appeal and must reach its decision on the basis of the available evidence (see the Messina v. Italy judgment of 26 February 1993, Series A no. 257-H, p. 104, para. 31).

The documents produced by the applicant do not in the Court's view provide sufficient *prima facie* evidence of the accuracy of his version of events (see, a contrario, the Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 15, para. 30). Mr Davin's letter sheds little light on the course of the hearing because it merely confirms facts described in a letter from Mr de Chesse, a copy of which Mr Pardo was unable to produce (see paragraph 16 above). As regards the statement of Mr Roussel - who did not attend the hearing in person -, it is surprising that as early as 9 a.m., when the hearing had probably not yet begun, his client could have been sure that the hearing would be adjourned. There would seem to have been a misunderstanding, which converted into a certainty a possibility referred to by the president in the course of the interview which he had had with the lawyers immediately after the cases had been called. Such an explanation is substantiated by the word "envisaged" employed by the applicant in his letter of 24 January 1985 to the First President of the Court of Appeal, shortly after the impugned judgment had been delivered. There therefore remains the attestation of Mr de Chesse, Mr Pardo's lawyer; it cannot on its own suffice to establish the facts.

In addition, the record of the hearing, which was produced for the first time before the Court, constitutes a significant element in support of the opinion that judgment was indeed reserved at the conclusion of the hearing on 9 November 1984; in principle that ruled out the possibility of a further hearing. Furthermore, there is nothing to show that in the course of the sole hearing the parties confined themselves to expanding upon their submissions concerning the stay of the proceedings. On the contrary, the Court of Appeal's judgment gives the impression that the trustee's lawyer presented argument on the merits.

As regards the documents which the applicant complained he had not been able to lodge with the Court of Appeal, it should be noted that, as the Government pointed out, the procedure in question was one for which the parties had compulsorily to be represented; consequently, the communication of such documents between the parties had to be effected before the hearing, through the intermediary of Mr Pardo's legal representative (*avoué*) and under the supervision of the judge responsible for preparing the case. One of the grounds of the judgment indicates, furthermore, that, contrary to the applicant's claims, the documents in question were in fact filed in the proceedings before the appeal court.

29. Having regard to these considerations, the Court cannot find a violation of Article 6 (art. 6).

FOR THESE REASONS, THE COURT

Holds by six votes to three that there has been no violation of Article 6 (art. 6).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 September 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the joint dissenting opinion of Mr Bernhardt, Mr Loizou and Mr Baka is annexed to this judgment.

R. R.
M.-A. E.

**JOINT DISSENTING OPINION OF JUDGES BERNHARDT,
LOIZOU AND BAKA**

We do not share the opinion of the majority of the Court that there has been no violation of Article 6 (art. 6) of the Convention. If the parties in a law-suit have, under national law, the right to further develop their arguments on the merits of a case during the oral hearing before the court of appeal, a fair trial requires that they have really been able to do so.

In the present case, there are strong and clear indications that the lawyers of the applicant did not orally plead on the merits before the Aix-en-Provence Court of Appeal, for the sole reason that the President of the competent chamber had indicated that they would have at a later stage an opportunity to do so. They did not, however, have such an opportunity. The Government have not been able to show that the evidence submitted in this respect by the applicant does not correspond to the real event.

For these reasons, we find that the applicant did not have a fair hearing as required by Article 6 (art. 6) of the Convention.