



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

COURT (CHAMBER)

CASE OF SILVA PONTES v. PORTUGAL

(Application no. 14940/89)

JUDGMENT

STRASBOURG

23 March 1994

In the case of Silva Pontes v. Portugal*,

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 A. SPIELMANN,

Mr S.K. MARTENS,

Mrs E. PALM,

Mr A.N. LOIZOU,

Mr J.M. MORENILLA,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

Mr J. MAKARCZYK,

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

Having deliberated in private on 28 October 1993 and 22 February 1994,

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 by the Government of the Portuguese Republic ("the Government") on 19 February and 5 April 1993 respectively, 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. 14940/89) against Portugal lodged with the Commission under Article 25 (art. 25) by a Portuguese national, Mr Virgílio da Silva Pontes, on 16 January 1989.

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); the Government's application referred to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether the facts of the case disclosed a

* Note by the Registrar: The case is numbered 6/1993/401/479. 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.

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

3. The Chamber to be constituted included ex officio Mr M.A. Lopes Rocha, the elected judge of Portuguese nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993 Mr R. Bernhardt, the Vice-President of the Court, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr A. Spielmann, Mr S.K. Martens, Mrs E. Palm, Mr A.N. Loizou, Mr J.M. Morenilla, Mr L. Wildhaber and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

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 3 May 1993 and the Government's memorial on 17 June. On 28 June the Secretary to the Commission informed the Registrar that the Delegate would address the Court at the hearing. On 22 July the applicant's lawyer lodged his client's claims under Article 50 (art. 50) of the Convention.

On 7 July 1993 the President had granted Mr Silva Pontes legal aid (Rule 4 of the Addendum to the Rules of Court).

5. On 15 September 1993 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President - who had given the applicant's lawyer leave to use the Portuguese language (Rule 27 para. 3) -, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 October 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr A. HENRIQUES GASPAR, Deputy Attorney-General
of the Republic,

Agent,

Mr M.H. MESQUITA, Professor
at the Law Faculty of Coimbra University,

Counsel;

- for the Commission

Mr H. DANELIUS,

Delegate;

- for the applicant

Mr A. AMADO RODRIGUES,

Counsel.

The Court heard addresses by the above-mentioned representatives and also their answers to the questions of one judge.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr Virgílio da Silva Pontes, a Portuguese national born in 1917, was at the material time a bank employee. He lives in Évora.

8. On 12 November 1975 the car he was driving, in which Mr José Gonçalves Martins Moreira was a passenger, was in collision with another vehicle, belonging to Mr António dos Reis and driven by Mr Francisco Techana.

As a result of his injuries Mr Silva Pontes remained in hospital until 31 May 1976. He underwent several operations, including one in London in December 1978. Since the accident he has one leg 5cm shorter than the other and suffers from a 58% permanent disability, which has made it impossible for him to return to work.

9. The Public Prosecutor's Department at the Évora Court of First Instance was notified of the accident by the local police and instituted criminal proceedings against both drivers for unintentionally causing physical injury. The file on the case was closed in 1976 following an amnesty under a legislative decree.

1. The declaratory proceedings

(a) In the Court of First Instance

10. On 20 December 1977 Mr Silva Pontes and Mr Martins Moreira ("the plaintiffs") brought a civil action in the Évora Court of First Instance against Mr Techana, Mr dos Reis, the Gestetner company, on whose behalf the journey was made, and the insurance company "Imperio", whose liability was contractually limited to 200,000 escudos, ("the defendants"). The applicant sought compensation of 536,345 escudos, together with various amounts to be calculated during the enforcement proceedings (liquidação em execução de sentença) in respect of future expenses stemming from the accident.

Pursuant to Article 68 of the Road Traffic Code, the action fell to be heard under a summary procedure, which entailed shorter time-limits (Articles 783 to 792 of the Code of Civil Procedure and see the Guincho v. Portugal judgment of 10 July 1984, Series A no. 81, p. 8, para. 10).

11. On the conclusion of the preliminary proceedings and the hearing (for a detailed description of the proceedings see the *Martins Moreira v. Portugal* judgment of 26 October 1988, Series A no. 143, pp. 8-13, paras. 11-29), the Évora Court of First Instance gave judgment on 1 October 1982. It declared the action brought by Mr Silva Pontes and Mr Martins Moreira well-founded in part and ordered the defendants, jointly and severally, to pay the applicant compensation of 540,000 escudos - 140,000 for pecuniary damage, taking into account inflation, and 400,000 for non-pecuniary damage.

The court reserved for the subsequent enforcement proceedings, in accordance with Article 661 para. 2 of the Code of Civil Procedure (see paragraph 20 below), the question of the transport costs incurred by the plaintiffs to enable them to receive treatment after the accident.

(b) In the Évora Court of Appeal

12. On 13 October 1982 the applicant and Mr Martins Moreira appealed from that judgment to the Évora Court of Appeal. They did not dispute the facts as established by the first-instance court, but they complained that the sums awarded were inadequate.

13. Their appeals and that of the Gestetner company were declared admissible on 19 October 1982. On 30 May 1985 the Court of Appeal dismissed Mr Silva Pontes's appeal, whereas it increased the sum awarded to his co-plaintiff.

(c) In the Supreme Court

14. On 13 June 1985 the defendant company, Gestetner, appealed on points of law to the Supreme Court (Supremo Tribunal de Justiça). The plaintiffs lodged a "secondary" appeal ("recurso subordinado") with the same court on 11 July.

15. The Supreme Court gave judgment on 5 February 1987. Taking into account the permanent disability from which the plaintiffs suffered after the accident, it found in their favour on this point and awarded them additional compensation, to be determined in the enforcement proceedings, for the damage flowing from their reduced capacity to work and diminished ability to move, damage which it had not been possible to assess at first instance. Its judgment was notified to the applicant on 9 February.

2. The enforcement proceedings

16. On 28 October 1987, since the defendants refused to make a payment of their own accord, the applicant and Mr Martins Moreira asked the Évora court to enforce payment of the part of the damages that had already been calculated, "without prejudice to the remainder once the details necessary for its calculation have been established (Article 810 of the Code

of Civil Procedure)" ("sem prejuízo de logo que recolhidos os necessários elementos, deduzirem liquidação da restante (artº 810º do C.P. Civil)"). They listed the attachable assets of the Gestetner company. However, a writ issued for service in Lisbon ordering the attachment of the goods in question proved impossible to execute; on 18 January 1988 the court found that the company was subject to insolvency proceedings.

17. On 23 December 1988 the applicant indicated to the judge at the Évora court the attachable assets of Mr dos Reis and asked him to make a formal request to the Vila Franca de Xira court for the seizure of assets situated within its jurisdiction.

On 4 January 1989 the same judge ordered the seizure of movable goods and a building situated within the jurisdiction of the Évora court; this took place on 8 March and 17 March 1989. He also made the formal request to the Vila Franca de Xira court.

18. On 30 March 1989 Mrs dos Reis, whose marriage was subject to the rules on community of property (comunhão geral de bens), requested the judge, in accordance with Article 825 para. 3 of the Code of Civil Procedure (see paragraph 20 below), to order the separation of her assets from those of her husband. She further sought to have the proceedings stayed until the couple's property had been divided up.

19. The process of dividing up the property continued until 19 December 1989, on which date the applicant and Mr Martins Moreira concluded an out-of-court settlement with the defendants, pursuant to which Mr dos Reis paid to them 8,500,000 escudos as full compensation.

II. THE RELEVANT DOMESTIC LAW

20. A translation of the main provisions of the Code of Civil Procedure referred to in this case is set out below:

Article 2

(Correspondence between the right and the action)

"For each right, except as provided otherwise, there is a corresponding action whose purpose is to secure judicial recognition of the right in question or to enforce it, accompanied by measures to ensure the effectiveness of the action."

Article 4

(Classification of actions according to their purpose)

"1. There are two types of actions: declaratory actions (declarativas) and enforcement actions (executivas).

2. Declaratory actions may have as their purpose (a) a mere assessment, (b) an order or (c) the creation of a right (constitutivas). They seek to obtain respectively:

- (a) a mere declaration as to whether a right or fact exists;
 - (b) an order, presupposing or aimed at preventing the violation of a right, for the handing over of an article or the accomplishment of an act;
 - (c) the authorisation for a modification of an existing legal situation.
3. Enforcement actions are those by which the plaintiff seeks adequate measures to secure effective reparation for the right infringed."

Article 661

(Limits of the action for an order)

"1. ...

2. If insufficient information is available to determine the nature or the amount [of the reparation], the court shall make its order in respect of a sum to be fixed in subsequent enforcement proceedings, without prejudice to its power to make an immediate order in respect of the part of the award already calculated."

Article 806

(Calculation by the court)

"1. Where the damages have not been calculated and their calculation is not merely a matter of simple arithmetic, the plaintiff must mention in his application instituting the enforcement proceedings the sums which he considers to be included in the damages owed and submit a final claim for a specific amount.

2. ..."

Article 810

(Rules applicable where part of the damages has been calculated and the rest not)

"1. If part of the damages awarded has not been calculated, but the rest has, the order in respect of the calculated damages shall be immediately enforceable.

2. Where the enforcement proceedings concern solely the part of the award which has been calculated, the payment of the remaining damages, if it is sought while the enforcement proceedings are in progress, shall be requested by an interlocutory application; where an appeal is lodged, a certified copy of the enforcement decision must be attached together with, if the enforcement is founded on a judgment, the memorials and submissions of the parties."

Article 825

(Attachment of half the assets of a couple)

"1. ...

2. ... the common property may be attached immediately provided that the creditor has included the goods in question in the list of attachable assets and has asked that the debtor's spouse be summoned so that he or she may, if they wish, seek the division of the assets.

3. Within ten days of being summoned, the spouse must request the division of the property or submit a certificate proving that such division has already been requested in connection with other proceedings pending, failing which the attachment order shall be enforced in respect of the goods in question.

4. Once that request has been made or the relevant certificate lodged, enforcement shall be suspended until the division of the property has been effected ..."

PROCEEDINGS BEFORE THE COMMISSION

21. The applicant lodged his application with the Commission on 16 January 1989. He complained of the length of the civil proceedings which he had instituted on 20 December 1977 in the Évora Court of First Instance, considering it to be contrary to Article 6 para. 1 (art. 6-1) of the Convention.

22. The Commission declared the application (no. 14940/89) admissible on 19 May 1992. In its report of 1 December 1992 (Article 31) (art. 31), it expressed the opinion, by eighteen votes to one, that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

23. The Government requested the Court to hold:

"1. that the application to review the length of the declaratory proceedings is inadmissible on the ground of the applicant's failure to comply with the limitation period prescribed in Article 26 (art. 26) of the Convention;

2. that the purpose of enforcement proceedings is not to determine disputes as to civil rights and obligations within the meaning of Article 6 para. 1 (art. 6-1) of the Convention;

3. that in any event, Article 6 para. 1 (art. 6-1) of the Convention has not been violated in the present case".

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 286-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

24. The applicant asked the Court to hold:

"in accordance with the opinion of the Commission and the judgment of the Court in the Martins Moreira case, the issues and facts of which are the same as in this case ..., that there has been violation of Article 6 para. 1 (art. 6-1) of the Convention".

AS TO THE LAW

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

25. The applicant maintained that the time taken to hear the civil action brought by himself and Mr Martins Moreira in the Évora court had exceeded a "reasonable time" within the meaning of Article 6 para. 1 (art. 6-1), according to which:

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

The Commission agreed with this view in substance, whereas the Government contested it.

A. The Government's preliminary objection

26. As they had done before the Commission, the Government contended that the application was out of time in so far as it concerned the length of the declaratory proceedings. The judgment of the Supreme Court of 5 February 1987 (see paragraph 15 above) constituted the "final decision" for the purposes of Article 26 (art. 26) in fine of the Convention. The enforcement proceedings could not be regarded as a second stage of the declaratory proceedings. On the contrary, they were new and separate proceedings. Accordingly, the six-month period laid down in Article 26 (art. 26) in fine had begun to run as soon as the judgment in question had been delivered and the applicant had failed to comply with that time-limit inasmuch as he had lodged his application on 16 January 1989.

27. Mr Silva Pontes argued that his action for damages could not reach a conclusion until he had secured payment through the enforcement proceedings.

28. In its decision on admissibility, the Commission found that in any event the application had been lodged less than six months after the end of the enforcement proceedings and reserved for its examination of the merits of the case the question whether the period to be taken into consideration should include the declaratory proceedings.

29. It is not for the Court to express a view on the difference of opinion among legal writers as to whether under Portuguese law enforcement proceedings are autonomous. As the Delegate of the Commission observed at the hearing, the moment at which there was a "determination" of a civil right and therefore a final decision within the meaning of Article 26 (art. 26) has to be ascertained with reference to the Convention and not on the basis of national law.

30. If the national law of a State makes provision for proceedings consisting of two stages - one when the court rules on the existence of an obligation to pay and another when it fixes the amount owed - it is reasonable to consider that, for the purposes of Article 6 para. 1 (art. 6-1), a civil right is not "determined" until the amount has been decided. The determination of a right entails deciding not only on the existence of that right, but also on its scope or the manner in which it may be exercised (see, among other authorities, the *Pudas v. Sweden* judgment of 27 October 1987, Series A no. 125-A, p. 14, para. 31), which would evidently include the calculation of the amount due.

31. In the present case, at the stage of the declaratory proceedings, the Évora court awarded Mr Silva Pontes damages of 540,000 escudos and, in accordance with Article 661 para. 2 of the Code of Civil Procedure (see paragraph 20 above), reserved for the subsequent enforcement proceedings the matter of the reimbursement of the transport costs incurred in order to receive medical treatment after the accident (see paragraph 11 above). The Évora Court of Appeal dismissed the applicant's appeal (see paragraph 13 above), but the Supreme Court awarded him an additional sum, likewise to be determined in the course of the enforcement proceedings, for damage resulting from his disability (see paragraph 15 above).

32. As the Government pointed out, when he instituted the enforcement proceedings, Mr Silva Pontes requested the court to order the payment of the part of the damages already calculated. Nevertheless he added to his request a rider formulated as follows: "without prejudice to the remainder once the details necessary for its calculation have been established" (see paragraph 16 above).

33. The Court accordingly takes the view, like the Commission, that the "enforcement" proceedings were not intended solely to enforce an obligation to pay a fixed amount; they also served to determine important elements of the debt itself, as is moreover shown by the size of the out-of-court settlement on which the parties agreed (see paragraph 19 above). Those proceedings must therefore be regarded as the second stage of the proceedings which began on 20 December 1977 (see the *Guincho v. Portugal* judgment of 10 July 1984, Series A no. 81, p. 13, para. 29, and the *Martins Moreira v. Portugal* judgment of 26 October 1988, Series A no. 143, p. 16, para. 44). It follows that the dispute (contestation) over the

applicant's right to damages would only have been resolved by the final decision in the enforcement proceedings.

34. As Mr Silva Pontes complained of the length of the proceedings taken as a whole and not of a flaw affecting only the first stage, the out-of-court settlement concluded on 19 December 1989 denotes the final domestic decision. The preliminary objection must therefore be dismissed.

B. The merits of the complaint

1. Applicability of Article 6 para. 1 (art. 6-1)

35. The Government did not dispute that the declaratory proceedings concerned civil rights and obligations within the meaning of Article 6 (art. 6), but contended that that provision did not apply to the enforcement proceedings. Under Portuguese law the purpose of the latter proceedings was not to settle a dispute over such rights and obligations, since such proceedings presupposed the existence of a right.

36. There can be no doubt that Article 6 (art. 6) applies to the first stage of the proceedings and, having regard to its reasoning in relation to the preliminary objection, the Court is of the view that the same must be true of the second stage.

2. Compliance with Article 6 para. 1 (art. 6-1)

37. It remains to ascertain whether a "reasonable time" was exceeded. The applicant and the Commission considered that it was; they cited the grounds of the above-mentioned Martins Moreira judgment (pp. 17-21, paras. 48-61). The Government confined their argument to the enforcement proceedings and invoked procedural steps which proved necessary and Mr Silva Pontes's conduct, which had been on occasions negligent.

38. In the instant case the period to be taken into consideration did not begin to run when the action was first brought before the relevant court on 20 December 1977 (see paragraph 10 above), but only on 9 November 1978, when the Convention entered into force with regard to Portugal (see the *Moreira de Azevedo v. Portugal* judgment of 23 October 1990, Series A no. 189, p. 17, para. 70). It ended on 19 December 1989, the date on which the out-of-court settlement was concluded (see paragraph 19 above and, *mutatis mutandis*, the Martins Moreira judgment cited above, p. 16, para. 44). It therefore lasted eleven years and one month.

39. The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, *inter alia*, the *X v. France*

judgment of 31 March 1992, Series A no. 234-C, p. 90, para. 32). In connection with the latter point, special diligence is called for in determining compensation for the victims of road accidents; this is moreover recognised by Portuguese law (see paragraph 10 above and the Martins Moreira judgment, cited above, p. 17, para. 46).

40. As regards the declaratory proceedings, the Court notes the similarity, acknowledged by the Government, between the applicant's position and that of Mr Martins Moreira, his co-plaintiff in those proceedings. In the present case, it sees no reason to depart from the considerations set forth in its judgment of 26 October 1988 (pp. 17-19, paras. 48-54). The length of the declaratory proceedings was accordingly in itself already excessive.

41. The period subsequent to the decision of the Supreme Court of 5 February 1987 only made the proceedings even longer. Accordingly, the Court does not consider it necessary to examine it in detail.

42. In conclusion, there has been a violation of Article 6 para. 1 (art. 6-1).

II. APPLICATION OF ARTICLE 50 (art. 50)

43. Under Article 50 (art. 50),

"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."

The Delegate of the Commission considered that the Court should award just satisfaction on the same basis and according to the same principles as in the Martins Moreira case, but did not express a view on the applicant's claims.

A. Damage

44. Mr Silva Pontes assessed the pecuniary damage at 2,000,000 escudos. The protracted character of the proceedings had prevented him from securing in good time payment of the compensation awarded by the court. In addition, the smallness of the sum paid by the Imperio company - whose liability was limited to 200,000 escudos (see paragraph 10 above and the above-mentioned Martins Moreira judgment, p. 22, para. 63) - and the insolvency of the Gestetner company had meant that at the time he had not been able to obtain the medical treatment necessitated by his state of health. In order to meet the costs of such treatment he had had to take out loans, at

very high rates of interest, and sell off personal possessions which he had valued highly.

The applicant also claimed 4,000,000 escudos for non-pecuniary damage. He had lived for a long time in a state of uncertainty and anxiety as regards the outcome of the proceedings and this had had a detrimental effect on his health.

45. In the Government's contention, the compensation that the applicant had already received justified a different approach to that adopted in the Martins Moreira case. In addition, there was no causal connection between the delays complained of - complaints which were manifestly baseless in the case of the enforcement proceedings - and the pecuniary damage alleged.

The non-pecuniary damage related solely to the road accident itself except in so far as it stemmed from doubts as to the outcome of the proceedings.

46. The Court notes that the applicant's position was very similar to that of Mr Martins Moreira. Like the latter, Mr Silva Pontes suffered a loss of opportunity as a result of the long delay, in breach of Article 6 (art. 6), found in the present judgment. The fact that he accepted an out-of-court settlement is not decisive. This agreement was concluded between the plaintiffs and the defendants (see paragraph 19 above), in other words between private persons, and it concerned the consequences of the road accident and not those, for which the State could be held responsible, flowing from the failure to comply with the reasonable time requirement. Having regard to its approach in the Martins Moreira judgment (pp. 22-23, paras. 65-67) and the other relevant factors, and making an assessment on an equitable basis, the Court awards the applicant 1,500,000 escudos for pecuniary and non-pecuniary damage.

B. Costs and expenses

47. Mr Silva Pontes also sought 200,000 escudos by way of reimbursement of the costs of the proceedings and the travel expenses incurred in Portugal. With regard to the proceedings before the Convention institutions, he requested the payment of his lawyer's fees and his own travel and accommodation expenses for his trip to Strasbourg, but gave no figures for these amounts.

The Government did not express a view.

48. Making an assessment on an equitable basis and in the light of the criteria it applies in this field, the Court awards the applicant 200,000 escudos to cover all the costs and expenses claimed, in addition to the 16,699.68 French francs paid by the Council of Europe as legal aid.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;
2. Holds unanimously that Article 6 para. 1 (art. 6-1) is applicable to this case;
3. Holds by eight votes to one that it has been violated;
4. Holds by eight votes to one that the respondent State is to pay the applicant, within three months, 1,500,000 (one million five hundred thousand) escudos for damage and 200,000 (two hundred thousand) escudos for costs and expenses;
5. Dismisses unanimously 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 23 March 1994.

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 dissenting opinion of Mr Morenilla is annexed to this judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE MORENILLA

(Translation)

1. To my regret I must record my disagreement with the finding of a violation of Article 6 para. 1 (art. 6-1) of the Convention in this case and the reasoning on which that finding was based.

2. The majority reached the conclusion that there had been a violation of Mr Silva Pontes's right to have his case heard within a reasonable time by applying to the present case the Court's case-law as laid down in the *Guincho v. Portugal* judgment of 10 July 1984 (Series A no. 81, p. 13, para. 29) and more specifically in the *Martins Moreira v. Portugal* judgment of 26 October 1988 (Series A no. 143, p. 16, para. 44). The similarity of the facts and the legal issues in this case to those in the *Martins Moreira* case - noted by the majority (paragraph 40 of the judgment) -, as a result of the fact that the two cases concerned the same compensation proceedings in which the applicants, as victims of the same road accident, were co-plaintiffs, led the majority to make an identical finding of a violation of Article 6 para. 1 (art. 6-1) of the Convention, on the basis of the delays attributable to the Portuguese judicial authorities in the proceedings brought by the applicant.

3. In my opinion, however, the present case, notwithstanding the above-mentioned circumstances, is clearly distinguishable from the earlier cases. Unlike Mr Martins Moreira and Mr Guincho, who had applied to the Commission during the declaratory proceedings, Mr Silva Pontes complained to the Commission two years after the decision of the Portuguese Supreme Court which concluded the declaratory proceedings and exhausted the domestic remedies. By virtue of Articles 26 and 27 (art. 26, art. 27) of the Convention, the applicant's complaint that his case had not been heard within a reasonable time could therefore only refer to the enforcement proceedings which were then pending and which had been instituted eight months after the above-mentioned decision of the Supreme Court.

4. However, the majority appears to disregard this fact, which goes to the essence of the Convention system. Ultimately, like the Court in the *Martins Moreira* judgment moreover, they take sides - apparently despite themselves (see paragraph 29) - in a century-old academic dispute as to whether declaratory proceedings and enforcement proceedings relating to a civil action for damages are parts of one and the same set of proceedings. The diversity of the legal systems in Europe - and even the practice of the European Court when applying Article 50 (art. 50) of the Convention - reveals the heterogeneity of the approaches taken and shows that it is unrealistic to refer to the Convention as if it were a monolithic system of precedent-based law. I consider that this variety in the procedural solutions adopted, which are, in my opinion, compatible with the Convention

inasmuch as they seek to achieve a more effective and less protracted system of justice, precludes adopting inflexible positions, which may in addition lead to dangerous simplifications in view of the great number of different situations which may arise in the context of enforcement proceedings.

5. Furthermore, when Mr Silva Pontes instituted the enforcement proceedings, he limited the scope of his action to the part of the damages that had already been calculated in the final judgment. He did so expressly (paragraph 16 of the judgment) as is shown by the rider, likewise formulated in express terms, reserving the right to claim the remainder "once the details necessary for its calculation have been established" in accordance with Article 810 of the Portuguese Code of Civil Procedure. I cannot therefore share the contrary view put forward by the majority (paragraph 33 of the judgment). Accordingly the question of the nature of the proceedings concerning the determination - to be effected at the enforcement stage - of the damages that had not been calculated, did not arise (paragraph 31 of the judgment). In the present case the applicant's complaint before the Commission, based on the excessive duration of the proceedings, could only, as has been stated, refer to the enforcement proceedings then pending and could not relate to the declaratory proceedings, which had reached a final conclusion and in respect of which Mr Silva Pontes had not previously - throughout the long proceedings and for two years after the judgment - filed any complaint concerning their length. It is my view that the Convention institutions' jurisdiction to examine the length of declaratory proceedings, for the purposes of Article 6 para. 1 (art. 6-1), cannot extend beyond the time-limit laid down in Article 26 (art. 26) of the Convention solely because the applicant decides to seek the enforcement of a final judgment where one of the debts arising thereunder, having not been calculated, has been left for the enforcement proceedings.

The majority's approach, which in fact "resuscitates" the question of delays in the declaratory proceedings, is, I believe, contrary to legal certainty and to the generally recognised principles of international law (Article 26 (art. 26) of the Convention). As the Commission stated (decision of 9 June 1958 in the De Becker case, application no. 214/56, see G. Cohen-Jonathan, *La Convention européenne des Droits de l'Homme*, Paris 1989, p. 132), referring to the travaux préparatoires, "the two rules contained in Article 26 (art. 26) concerning the exhaustion of domestic remedies and concerning the six-month period are closely interrelated".

6. As regards the length of the enforcement proceedings in issue (from 28 October 1987, when the applicant instituted them, until 19 December 1989, the date of the settlement concluded between the applicant and Mr dos Reis), the facts of the case show (see paragraphs 16-19) that the delays which occurred were not attributable to the Portuguese judicial authorities,

who displayed due diligence in conducting the enforcement proceedings, which were of some complexity as a result of the incidents which arose during them. The applicant himself contributed to the delay by taking almost eleven months, from 29 January 1988 until 23 December 1988, to list the attachable goods of Mr dos Reis, once the Lisbon court has established that it was impossible to attach the assets of the Gestetner company. In addition, the enforcement proceedings were stayed on 5 April 1989 following the request for the separation of the assets of Mrs dos Reis until the settlement was concluded. In the light of the criteria laid down by the Court in this field, there has therefore been no violation of the Convention in this case.