



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

COURT (PLENARY)

**CASE OF BARBERÀ, MESSEGUÉ AND JABARDO v. SPAIN
(ARTICLE 50)**

(Application no. 10588/83; 10589/83; 10590/83)

JUDGMENT

STRASBOURG

13 June 1994

In the case of Barberà, Messegué and Jabardo v. Spain*,

The European Court of Human Rights, sitting in plenary session pursuant to Rule 50 of the Rules of Court** and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr L. TORRES BOURSALT, *ad hoc judge*,

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

Having deliberated in private on 24 March and 26 May 1994,

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

PROCEDURE AND FACTS

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Spanish Government ("the Government") on 12 December 1986 and 29 January 1987, respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in three applications (nos. 10588/83-10590/83) against the Kingdom of Spain

* The case is numbered 24/1986/122/171-173. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers refer to the list of the corresponding originating applications to the Commission.

** Former Rule 50 of the Rules of Court; the competent Chamber had decided to relinquish jurisdiction in favour of the plenary Court on 23 September 1987.

lodged with the Commission under Article 25 (art. 25) by three Spanish nationals, Mr Francesc-Xavier Barberà, Mr Antonino Messegué and Mr Ferrán Jabardo, on 22 July 1983.

2. In a judgment of 6 December 1988 ("the principal judgment"), the Court found a violation of Article 6 para. 1 (art. 6-1) of the Convention. In view of the belated transfer of the applicants from Barcelona to Madrid to face trial, the unexpected change in the court's membership immediately before the beginning of the trial, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and in public, the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing (Series A no. 146, pp. 26-39, paras. 51-91, and point 5 of the operative provisions).

3. As the issue of the award of just satisfaction was not yet ready for decision, the Court, in the principal judgment, reserved the whole of this question. It invited the Government and the applicants to submit to it in writing, within three months of the delivery of the judgment, their observations on the matter and in particular to inform it of any agreement reached between them (*ibid.*, pp. 38-39, paras. 92-93 and point 7 of the operative provisions).

4. On 2 March 1989, the Government filed a memorial in which they replied to the claims that the applicants had lodged in 1987 (*ibid.*, p. 38, para. 92) and drew attention, *inter alia*, to the fact that under Spanish law, as it then stood, the proceedings could not be reopened and *restitutio in integrum* was impossible.

In a letter of 4 April 1989 the applicants informed the Registrar that, on 30 March 1989, they had lodged an application with the Audiencia Nacional to have the judgment of that court of 15 January 1982 set aside. They accordingly requested the Court to stay the proceedings concerning the application of Article 50 (art. 50) until the national court had given judgment. On 2 May they submitted observations in reply to the Government's memorial.

On 20 September 1989, after consulting the Agent of the Government and the Delegate of the Commission, the President agreed to stay the proceedings. On several occasions he renewed this decision pending the outcome of the various proceedings brought in Spain with a view to having the judgment of 15 January 1982 set aside. On 3 January 1992 the applicants requested that the Strasbourg proceedings be resumed as the Constitutional Court had quashed their convictions. On 25 June the President requested the Agent of the Government for information on the progress of the domestic proceedings. In the light of that information, on 26 November the Court decided to resume its examination of the question within six months.

5. The domestic proceedings conducted subsequent to the principal judgment included the following decisions:

(a) on 29 June 1989 the Audiencia Nacional decided to transmit the file to the Criminal Division of the Supreme Court after having found that it lacked jurisdiction. It ordered a stay of execution of the sentences imposed on the applicants by the judgment of 15 January 1982 and their immediate release;

(b) on 14 July 1989 the Audiencia Nacional decided to attach conditions to the applicants' release, namely an obligation to report to a judge twice a month and a prohibition on leaving Spanish territory;

(c) on 4 April 1990 the Supreme Court gave a judgment dismissing the applicants' application to have the original judgment set aside and revoking the stay of execution of their sentences;

(d) on 5 April 1990 the Audiencia Nacional ordered that they be returned to prison;

(e) on 20 July 1990 the Constitutional Court gave a judgment staying the execution of the Supreme Court's judgment of 4 April 1990. It ordered that the applicants be released subject to the conditions laid down in the Audiencia Nacional's decision;

(f) on 16 December 1991 the Constitutional Court set aside the judgment of the Supreme Court and allowed the applicants' application of 30 March 1989 (see paragraph 4 above). It ordered the reopening of the trial in the Audiencia Nacional;

(g) on 30 October 1993, in a judgment which has become final, the Audiencia Nacional acquitted the applicants, finding that there was insufficient evidence.

6. On 25 June 1993 the President requested the applicants to submit a memorial summarising and updating their claims for just satisfaction. The Registrar received this memorial on 2 August and the Government's observations in relation thereto on 14 December. On 3 and 4 February 1994 respectively the applicants filed additional observations and the Delegate of the Commission lodged his comments.

7. On 24 March 1994 the Court decided that, in the circumstances of the case, it was not necessary to hold a hearing.

AS TO THE LAW

8. According to Article 50 (art. 50) of the Convention,

"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."

By virtue of this provision the applicants sought compensation for damage and the reimbursement of costs and expenses.

I. DAMAGE

A. The arguments of the participants in the proceedings

1. *The applicants*

9. As regards pecuniary damage, the applicants sought compensation for loss of earnings and of career prospects as a result of their detention.

In their memorial of 6 May 1987, Mr Barberà and Mr Messegué assessed their loss of earnings at 4,230,284 pesetas from 15 January 1982 to 20 February 1987, from which date they were able to work outside prison under an "open-prison" system. Mr Jabardo claimed 2,272,491 pesetas. They calculated these amounts on the basis of the minimum salary for their respective fields of employment. They each sought 1,000,000 pesetas for loss of career prospects.

On 2 April 1993 they updated their claims and adopted a new method of calculation, based on the daily allowance awarded by the Spanish courts in cases of incapacity for work. They assessed this amount at 7,000 pesetas for each day spent in prison and 5,000 pesetas for each day spent by Mr Barberà and Mr Messegué under the "open-prison" system. The total amounts claimed were as follows: 17,806,000 pesetas for Mr Barberà, 17,806,000 for Mr Messegué and 6,937,000 pesetas for Mr Jabardo.

10. In addition, in 1987, Mr Barberà and Mr Messegué had claimed 5,000,000 pesetas each and Mr Jabardo 2,000,000 pesetas in respect of non-pecuniary damage sustained as a result of their detention following their conviction by the Audiencia Nacional and on account of damage to their reputation deriving from their conviction.

When they updated their claims on 2 April 1993, they argued that, on the basis of the Spanish retail-price index, these amounts should be increased by 40.6%, a calculation which gave the following sums: 7,030,000 pesetas for both Mr Barberà and Mr Messegué and 2,812,000 for Mr Jabardo.

2. *The Government*

11. According to the Government, the Court's principal judgment has been executed in Spain in the fullest possible manner. The Constitutional Court's judgment quashing the convictions and ordering that the proceedings in the Audiencia Nacional be reopened (see paragraph 5 above)

represented an innovation for the Spanish legal system, under which previously the finding of a violation by the European Court could not constitute grounds for reopening proceedings. In the subsequent proceedings all the guarantees laid down in Article 6 (art. 6) had been scrupulously complied with and they therefore afforded the most complete restitutio in integrum that could be obtained from the point of view of Article 50 (art. 50). The acquittal by the Audiencia Nacional (see paragraph 5 above) had taken full account of the applicants' interests.

12. Secondly, and in the alternative, the Government contended that the applicants' entitlement to compensation for their term of imprisonment derived from a malfunctioning of the Spanish system of the administration of justice, in respect of which a claim could be brought through domestic channels in accordance with section 292 et seq. of the Judicature Act of 1 July 1985. They added that, in its decisions of 6 July and 1 September 1993 (applications nos. 17553/90 and 17999/91, respectively Prieto Rodríguez v. Spain and V. v. Spain) the Commission had recognised that this remedy was an effective one.

13. Finally, and in the further alternative, the Government maintained that there was no causal connection between the violation found by the Court and the pecuniary and non-pecuniary damage which, according to the applicants, flowed from their imprisonment. In their 1989 memorial, they argued that neither that detention nor the applicants' conviction had been the result of that violation. At a later stage in the proceedings, they observed that, during the second trial, the majority of the witnesses who had given evidence at the first trial had not been present, either because they had died in the meantime - for instance Mr Martínez Vendrell - or because they had been unable to attend.

3. The Delegate of the Commission

14. The Delegate of the Commission expressed the view that the applicants were entitled to compensation for pecuniary and non-pecuniary damage but that they should first have recourse to the remedy available under the Judicature Act.

B. The Court's decision

15. The Court fully appreciates the importance of the Constitutional Court's judgment of 16 December 1991 for the execution of judgments delivered in Strasbourg; the Constitutional Court thereby showed once again its commitment to the Convention and the Court's case-law. Nor does the Court underestimate the efforts made by the Spanish courts, especially the Audiencia Nacional, to ensure that, in the second set of proceedings, the applicants were afforded the necessary guarantees. It observes that the outcome of the domestic proceedings conducted subsequent to the principal

judgment, and in particular the final acquittal, were favourable to the applicants, notably as regards their reputation, and that they were released in 1990 (see paragraph 5 above), even before their acquittal, despite the heavy prison sentences which they were still serving at the time.

16. The Court accepts that, as the Government pointed out, evidence adduced at the first trial, in particular the testimony of witnesses, was not available at the second trial. It notes however that in its principal judgment the finding of a violation of Article 6 para. 1 (art. 6-1) was based above all on "the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public" (Series A no. 146, pp. 37-38, para. 89). Admittedly, the Court cannot speculate as to what the outcome of the 1982 proceedings would have been had the violation of the Convention not occurred.

Nevertheless, the applicants were kept in prison as a direct consequence of the trial found by the Court to be in violation of the Convention. Moreover, in the light of the final judgment of the Audiencia Nacional of 30 October 1993 (see paragraph 5 above), it cannot be assumed that even if the first trial had been conducted in compliance with the Convention the outcome would not have been more favourable to the applicants. In any event, they suffered a real loss of opportunity to defend themselves in accordance with the requirements of Article 6 (art. 6) and thereby to secure a more favourable outcome. There was thus, in the opinion of the Court, a clear causal connection between the damage claimed by the applicants and the violation of the Convention. In the nature of things the subsequent release and acquittal of the applicants could not in themselves afford *restitutio in integrum* or complete reparation for damage derived from their detention (see, *mutatis mutandis*, the *Ringeisen v. Austria* judgment of 22 June 1972, Series A no. 15, p. 8, para. 21).

17. The Court, like the Government and the Delegate of the Commission, notes that there exists under Spanish law a remedy making it possible to obtain compensation in the event of the malfunctioning of the system of justice (see paragraphs 12 and 14 above).

Nevertheless the Court does not consider itself bound to stay the proceedings relating to the applicants' claims. Under Article 50 (art. 50) it may proceed to apply that Article (art. 50) if the internal law of the respondent State "allows only partial reparation to be made" for the consequences of the violation found, as seems to be the case in this instance (see paragraph 16 above). If, after having exhausted domestic remedies without success before complaining in Strasbourg of a violation of their rights, then doing so a second time, successfully, to secure the setting aside of the convictions, and finally going through a new trial, the applicants were required to exhaust domestic remedies a third time in order to be able to obtain just satisfaction from the Court, the total duration of the proceedings

would be hardly consistent with the effective protection of human rights and would lead to a situation incompatible with the aim and object of the Convention (see, *mutatis mutandis*, the *De Wilde, Ooms and Versyp v. Belgium* judgment of 10 March 1972, Series A no. 14, pp. 8-9, para. 16).

18. As regards the amounts claimed in respect of loss of earnings and of career prospects, the Court cannot accept the method of calculation put forward by the applicants in 1993 based on allowances claimed in Spain in cases of incapacity for work (see paragraph 9 above), because such a method has no connection with the circumstances of the case. Despite the lack of supporting documents and the contradictions in the statements made by the applicants regarding their alleged occupations prior to their imprisonment - the Government correctly drew attention to this in their 1989 memorial - the Court considers that it should award them compensation under this head on the basis of the figures submitted by them in 1987.

19. Like the finding of a violation of the Convention by the European Court, the decisions of the Spanish courts subsequent to the principal judgment afforded the applicants a measure of reparation for non-pecuniary damage. They cannot, however, fully redress the damage sustained in this respect.

20. Making an assessment on an equitable basis in accordance with Article 50 (art. 50) and having regard to the circumstances referred to above, the Court awards Mr Barberà 8,000,000 pesetas, Mr Messegué 8,000,000 pesetas and Mr Jabardo 4,000,000 pesetas, to cover all the heads of damage claimed.

II. COSTS AND EXPENSES

A. The arguments of the participants in the proceedings

1. The applicants

21. In their 1987 memorial, each of the applicants sought the reimbursement of 225,000 pesetas in respect of the fees of their lawyers in the appeal proceedings in the Supreme Court and the Constitutional Court. They also claimed the following sums: 1,265,000 pesetas for Mr Barberà, 1,265,000 pesetas for Mr Messegué and 830,000 pesetas for Mr Jabardo, in respect of their lawyers' travel and subsistence expenses for the hearings in Madrid and for the monthly visits to the applicants in Madrid and Lérida prisons.

As regards the proceedings before the Convention institutions, the applicants claimed jointly 1,000,000 pesetas for lawyers' fees, 310,000

pesetas for the travel and subsistence expenses in Strasbourg of Mr Etelin and Mr Gil Matamala, and 20,000 pesetas for photocopying, postal and telephone expenses, less the 5,876 French francs received from the Council of Europe as legal aid.

In 1993 they updated these figures to take account of the retail-price index for the relevant period (an increase of 40.6%).

22. In their observations in reply submitted in 1989, they added to these sums 270,000 pesetas for lawyers' fees, 120,000 pesetas for travel and subsistence expenses and 64,032 pesetas for the cost of translating into Spanish the principal judgment in connection with their application to have their convictions set aside (see paragraph 4 above), a total of 454,032 pesetas.

In 1993 they increased these amounts by 26.7%.

23. Finally, in their 1993 update (see paragraph 6 above) the applicants claimed the following lawyers' fees for the period 1989-1993:

(a) 250,000 pesetas for each of the three lawyers in the proceedings to have their conviction set aside in the Audiencia Nacional and the Supreme Court;

(b) 500,000 pesetas for the three applicants jointly in respect of the amparo appeal to the Constitutional Court;

(c) 150,000 pesetas for the proceedings relating to Article 50 (art. 50).

The sum claimed for this period is therefore 1,400,000 pesetas.

24. The amounts claimed in respect of costs and expenses, taking into account the increases sought in 1993, are as follows: 7,265,476 pesetas (up to 1987), 575,258 pesetas (for the period 1987-1989) and 1,400,000 pesetas (for the period after 1989), a total of 9,240,734 pesetas.

2. The Government

25. The Government regarded a total sum of 4,357,663 pesetas as reasonable; they contested the applicants' claims for reimbursement only on two points.

In the Government's view, of the travel and subsistence expenses incurred on the monthly visits by the lawyers to their clients in prison only 300,000 pesetas, corresponding to the visit of the three lawyers to Madrid for the hearing concerning the appeal on points of law in the Supreme Court, could be taken into account (see paragraph 30 of the principal judgment, Series A no. 146, pp. 16-17).

The Government considered in addition that the increases of 40.6% and 26.7% concerning the sums claimed in 1987 and 1989 respectively were unacceptable because the applicants had themselves requested the stay of the proceedings relating to the application of Article 50 (art. 50). Only an increase of 10% for the period between 16 December 1991 and 30 October 1993 (see paragraphs 4-5 above) was permissible, as the proceedings had remained stayed during that period at the Government's request.

3. *The Delegate of the Commission*

26. The Delegate of the Commission expressed the view that the expenses and fees claimed were from an overall point of view excessive, but left the matter to the discretion of the Court.

B. The Court's decision

27. The Court notes that it is not disputed that the expenses incurred by the applicants were genuinely so incurred. On the other hand, it shares the Government's doubts as to the necessity of the lawyers' monthly visits to their clients in prison, without however ruling all of them out. Finally, it considers the increases applied to the claims submitted at the various stages of the proceedings to be excessive.

Making an assessment on an equitable basis, the Court awards the applicants jointly 4,500,000 pesetas, less the 5,876 French francs already paid by the Council of Europe as legal aid.

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to three that the respondent State is to pay, within three months, for damage, 8,000,000 (eight million) pesetas to Mr Barberà, 8,000,000 (eight million) pesetas to Mr Messegué and 4,000,000 (four million) pesetas to Mr Jabardo;
2. Holds unanimously that the respondent State is to pay, within three months, for costs and expenses, 4,500,000 (four million five hundred thousand) pesetas to the three applicants jointly, less the 5,876 (five thousand eight hundred and seventy-six) French francs already received from the Council of Europe;
3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and notified in writing on 13 June 1994 pursuant to Rule 54 para. 2, second sub-paragraph, of the Rules of Court.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting 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 following separate opinions are annexed to this judgment:

- (a) joint partly dissenting opinion of Mr Matscher and Mr Pettiti;
- (b) partly dissenting opinion of Mr Torres Boursault.

R.R.
H.P.

BARBERÀ, MESSEGUÉ AND JABARDO v. SPAIN (ARTICLE 50)
JUGDMENT
JOINT PARTLY DISSENTING OPINION OF JUDGES MATSCHER AND
PETTITI
JOINT PARTLY DISSENTING OPINION OF JUDGES
MATSCHER AND PETTITI

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(Translation)

By a judgment of the Audiencia Nacional of 15 January 1982 the three applicants were found guilty of having committed, on 9 May 1977, a murder in circumstances which made this crime particularly abhorrent. They were sentenced to long terms of imprisonment. This judgment was partly quashed and partly upheld by the Supreme Court. However, the applicants served only part of their sentence. Indeed they had been released before the retrial had taken place (from 29 June 1989 to 5 April 1990 and then from 20 July 1990).

Following a judgment of the European Court of 6 December 1988 (Series A no. 146), which found that the criminal proceedings had in several respects infringed the rights guaranteed under Article 6 (art. 6) of the Convention, on 16 December 1991 the Constitutional Court set aside the national decisions in question and remitted the case to the Audiencia Nacional for retrial.

By a decision of 30 October 1993 the applicants were acquitted, ultimately for lack of evidence, as can be seen clearly from the relevant judgment. More than fifteen years after the events and in view of the fact that in addition witnesses had either died in the meantime or were prevented from testifying by their state of health, their evidence was no longer available.

In our view, the loss of opportunity which the present judgment found to be a ground for awarding compensation has to be assessed not only with reference to the European Court's judgment on the merits and the decision of the Constitutional Court, but also on the basis of the effect of the applicants' conduct, because the circumstances of the second trial were totally different. Moreover, the Court did not find any breach of the principle of presumption of innocence.

In any case, the exemplary way in which the Spanish authorities gave effect to the European Court's judgment should be particularly stressed.

In these circumstances we consider that, inasmuch as they benefited from a complete retrial, the applicants obtained what they were entitled to under the Convention, so that the finding of the violation, given the consequences which ensued therefrom, constitutes just satisfaction within the meaning of Article 50 (art. 50). It was not therefore necessary to award compensation for pecuniary and non-pecuniary damage.

PARTLY DISSENTING OPINION OF MR TORRES
BOURSAULT, AD HOC JUDGE*(Translation)*

I cannot agree with the majority as regards point 1 of the operative provisions of the judgment. It is not, in my view, consistent with the terms of Article 50 (art. 50) of the Convention, which provides for the award of "just satisfaction" to the party injured by the violation "if the internal law ... allows only partial reparation to be made for the consequences of this decision", a rule which does not require interpretation (*in claris non fit interpretatio*) and which, in any event, may under no circumstances be applied in a way that conflicts with its literal meaning.

1. Following the Court's judgment of 6 December 1988, the Spanish Constitutional Court adopted the first appropriate measure to afford full reparation for the consequences of the judicial decision which was at the origin of the violation of Article 6 para. 1 (art. 6-1) found by the European Court in so far as it ordered a retrial. At that retrial the Audiencia Nacional - this time without committing a breach of the Convention - afforded full reparation in internal law by its acquittal, which has become final. The Court declared that the trial contravened the requirements of Article 6 para. 1 (art. 6-1) of the Convention, but the consequences of the violation found were made good under internal law in so far as a retrial was conducted in strict compliance with the Convention. This was recognised by: the Delegate of the Commission (see letter of 22 October 1993: "The Constitutional Court's judgment of 16 December 1991 makes reparation as far as possible for all the consequences of the violation of Article 6 para. 1 (art. 6-1) of the Convention found by the Court in its judgment"); and the applicants' lawyer (see letter of 1 October 1992: "by declaring void the proceedings which led to the conviction of 15 January 1982, the Spanish Constitutional Court's judgment ... represented the most effective possible execution, by way of *restitutio in integrum* of the European Court's judgment").

If the applicants consider at this stage, in contradiction with their earlier arguments adduced before the Court, that the reparation afforded them is still insufficient, then they should seek compensation through the remedy available to them under Spanish law, namely under sections 292 et seq. of the Judicature Act, deriving from Article 9 para. 3 of the Constitution. To date the applicants have not had recourse to this procedure which would moreover be fully applicable to them and which has already produced results in numerous other cases. In any case, it is clear from Article 50 (art. 50) of the Convention that so long as there exists an adequate means of redress in domestic law, there is an obligation to seek the fullest possible

restitutio in integrum through that means. It is only in the alternative, where the decision proves unsatisfactory for the claimants and, in any event, if the domestic remedies do not exist or are insufficient or ineffective ("if the internal law ... allows only partial reparation" under the terms of Article 50) (art. 50) to obtain the most complete reparation possible that it will be for the Court ("if necessary") - and, I repeat, in the alternative - to determine the matter as the final instance, as indeed was maintained by the Delegate of the Commission.

2. As regards the sum awarded to the applicants for just satisfaction and in compensation for having served part of the prison sentence imposed on them by a judgment of the Audiencia Nacional which was declared to be contrary to the Convention, I must again express my disagreement with the majority. If it falls to the Court to award just satisfaction under Article 50 (art. 50) in the form of compensation, such an amount should be commensurate and proportional, regard being had to all the circumstances of the case assessed on an equitable basis. It should not represent an unjustifiable enrichment for the applicants or be a sum that will be regarded as excessive by public opinion, because of its size in absolute terms and the disproportion between it and compensation awarded in cases of damage of the same nature in other legal systems.