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

COURT (CHAMBER)

CASE OF SARAIVA DE CARVALHO v. PORTUGAL

(Application no. 15651/89)

JUDGMENT

STRASBOURG

22 April 1994

In the case of Saraiva de Carvalho 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 F. GÖLCÜKLÜ,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr F. BIGI,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr J. MAKARCZYK,

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

Having deliberated in private on 25 November 1993 and 23 March 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") on 7 April 1993, 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. 15651/89) against the Portuguese Republic lodged with the Commission under Article 25 (art. 25) by a Portuguese national, Mr Otelo Saraiva de Carvalho, on 10 October 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 object of the request 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

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* Note by the Registrar: The case is numbered 14/1993/409/488. 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.

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 23 April 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr A. Spielmann, Mr S.K. Martens, Mr I. Foighel, Mr F. Bigi and Mr A.B. Baka (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr J. Makarczyk, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Portuguese Government ("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 Government's memorial on 26 August 1993 and the applicant's memorial on 30 August. On 6 September the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 3 November 1993 the Commission produced the documents relating to 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 23 November 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. PEDROSA MACHADO, Professor of Law, University of Lisbon and Portuguese Catholic University,

Miss M.J. PIRES, deputy to the Permanent Representative of Portugal to the Council of Europe, *Counsel*;

- for the Commission

Mr M.P. PELLONPÄÄ, *Delegate*;

- for the applicant

Mr R. FRANCÊS, of the Lisbon Bar, *Counsel*.

The Court heard addresses by Mr Henriques Gaspar, Mr Pedrosa Machado, Mr Pellonpää and Mr Francês. The applicant also addressed the Court.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Born in 1936, Mr Otelo Saraiva de Carvalho is a Portuguese citizen who lives in Oeiras. At the material time he was a lieutenant-colonel in the Portuguese army.

8. On 10 June 1984 he was arrested and held in pre-trial detention on a charge of founding and leading a terrorist organisation, which is an offence under Article 288 of the Criminal Code; he was suspected of being one of the founders and leaders of the "FP 25 de Abril" (Popular Forces 25 April), a group that had claimed responsibility for several bomb outrages, armed attacks and murders.

A. The judicial investigation proceedings

9. On 30 December 1984 the judge of the Lisbon Criminal Investigation Court (tribunal de instrução criminal) to whom the case had been assigned closed the adversarial investigation and sent the file to the public prosecutor's office.

10. On 7 January 1985 the prosecutor delivered his charges (acusação). He accused the applicant and several of his co- defendants of having drawn up a comprehensive plan under which, by means of the "FP 25 de Abril", they would seize power by force and overthrow the State's institutions. He emphasised that Mr Saraiva de Carvalho was one of the instigators of the scheme.

11. In accordance with section 59 of Law no. 82/77 of 6 December 1977 on the administration of justice, section 8 of Legislative Decree no. 269/78 of 1 September 1978 and Article 365 of the Code of Criminal Procedure (see paragraph 26 below), the file was sent, together with the prosecution's submissions, to the Lisbon Criminal Court (tribunal criminal) so that the judge responsible for the case, Mr Antonio Salvado, could issue the despacho de pronúncia or de não pronúncia.

12. On 22 January 1985 Mr Salvado issued a despacho de pronúncia. After noting that there had been no irregularities during the judicial investigation or any other impediment to a trial of the merits, he rejected the prosecution's charges in respect of four of the co-defendants on the ground that the evidence gathered was not sufficient to enable a reliable assessment to be made of the probability of guilt ("a prova indiciária recolhida ... é insuficiente para ... permitir a formulação de um sério juizo de probabilidade sobre a sua culpabilidade"). On the other hand, he accepted the charges relating to Mr Saraiva de Carvalho and seventy-two other defendants and decided to keep all but three of them in pre-trial detention.

The applicant did not appeal against the despacho under Article 371 of the Code of Criminal procedure (see paragraph 26 below).

B. The judicial proceedings

1. In the Lisbon Criminal Court

13. The trial began on 7 October 1985 before the Fourth Division of the Lisbon Criminal Court, which was composed of three judges and was presided over by Mr Salvado. The proceedings took up no fewer than 263 sittings of the court.

14. At the hearing on 8 October the applicant lodged an appeal with the Lisbon Court of Appeal challenging the compatibility of the provisions cited earlier (see paragraph 11 above) which empowered one and the same judge both to issue the despacho de pronúncia and to try the case with Article 32 para. 5 of the Portuguese Constitution and Article 6 para. 1 (art. 6-1) of the Convention.

He argued that in making such an order, the judge formed a view of an accused's guilt in advance that was likely to influence him when giving judgment on the merits.

On the same day, the Criminal Court held the appeal to be admissible and decided to refer it to the higher court together with any appeal against the judgment it would itself be delivering.

15. On 20 May 1987 the Criminal Court held that the applicant was a leading member of the "FP 25 de Abril" but not one of their founders and sentenced him to fifteen years' military imprisonment (presídio militar), of which one year, ten months and fifteen days were immediately remitted under an amnesty. It acquitted sixteen of his co-defendants and sentenced the others and Mr Saraiva de Carvalho jointly and severally to pay the State 1,000 million escudos.

2. In the Lisbon Court of Appeal

16. On 25 November 1987 the Lisbon Court of Appeal (tribunal de relação) dismissed appeals by the prosecution and thirty-seven of the defendants, including Mr Saraiva de Carvalho.

Unlike the Criminal Court, it held that the applicant was also one of the founders of the "FP 25 de Abril". It consequently increased the sentence to eighteen years' military imprisonment, two years and three months of which were immediately remitted under the amnesty. The court upheld the sum to be paid.

17. As regards the complaint based on Article 6 para. 1 (art. 6-1) of the Convention (see paragraph 14 above), the court pointed out that the drafting history showed that the purpose of section 59 of the aforementioned Law

no. 82/77 was precisely to ensure that investigating judges did not give rulings on the offences into which they had to inquire; that was why the legislature had vested in the trial judge and not the investigating judge the power to issue the despacho de pronúncia, which entailed assessing and classifying the offences charged.

3. In the Supreme Court

18. An appeal by Mr Saraiva de Carvalho to the Supreme Court (Supremo Tribunal de Justiça) was dismissed on 22 June 1988. Referring to its case-law, the court held that the provisions complained of by the applicant were not incompatible with Article 32 para. 5 of the Constitution; a judge issuing a despacho de pronúncia was not bound by the view taken at that stage of the proceedings and had complete freedom when giving judgment on the merits, so that his impartiality was in no way jeopardised.

On the other hand the court held that the applicant was only a leader of the "FP 25 de Abril" and accordingly reduced the sentence to seventeen years' imprisonment.

4. In the Constitutional Court

19. Finally, the applicant applied to the Constitutional Court (Tribunal constitucional). Reiterating the submissions he had made in the other courts, he argued in particular that the despacho de pronúncia was the key decision in the prosecution. The fact that it was taken by a judge who subsequently sat on the trial court violated Article 32 para. 5 of the Constitution, which established an absolute separation between judicial investigation, prosecution and trial; it also, he submitted, undermined the court's impartiality, as the judge in question would be prejudiced against the defendant when he came to consider the merits.

20. In its judgment of 15 February 1989 the Constitutional Court emphasised the need to distinguish between the indictment, which was the responsibility of the public prosecutor's office, and the despacho de pronúncia. The latter was designed solely to verify the probability of guilt in order to avoid a trial where there was no prima facie evidence. It was thus a decision on the viability of the indictment and did not entail any prejudice on the part of the judge when the merits were being considered. It consequently served as a filter and a safeguard. Even if his legal classification of the facts was different, a judge did not act as a prosecutor. In the instant case Mr Salvado could not be accused of partiality merely because he had issued the despacho de pronúncia. It would have been different if in his decision he had gone beyond the scope of the prosecution's charges and had made substantial alterations to them. In that case, which was not the one before it, the distinction between the indictment

and the despacho de pronúncia would have been lost as the judge would have encroached on the prerogatives of the public prosecutor.

The Constitutional Court did, however, allow the appeal on another ground, not adduced before the European Court of Human Rights (see paragraphs 27 and 28 below), which related to a lack of reasons in the judgment at first instance. It accordingly remitted the case to the Supreme Court for the appropriate steps to be taken.

21. On 23 February 1989 the prosecution sought clarification of certain passages in the judgment and applied for rectification of clerical errors in it. On 12 April the Constitutional Court ordered the rectifications, allowed one item in the application for clarification and provided the particulars sought.

5. The subsequent proceedings

22. On its rehearing of the case on 17 May 1989 the Supreme Court quashed the Lisbon Court of Appeal's judgment of 25 November 1987 and remitted the case to that court for a fresh assessment of the facts.

The applicant was provisionally released that same day.

23. On 13 September 1989 the Lisbon Court of Appeal delivered a new judgment; the prosecution and several defendants, including the applicant, appealed against it on points of law to the Supreme Court.

On 19 December 1990 the Supreme Court allowed the appeals in part and varied the impugned decision accordingly.

Mr Saraiva de Carvalho and seven of the co-defendants appealed to the Constitutional Court against the Supreme Court's judgment. The outcome of the proceedings is still awaited.

II. RELEVANT DOMESTIC LAW

A. The Constitution

24. Under Article 32 para. 5 of the Constitution,

> "Criminal proceedings shall be accusatorial, the trial and investigative measures laid down by law being governed by the adversarial principle."

B. The Criminal Code

25. Under Article 288 of the Criminal Code,

> "1. Anyone promoting or founding a terrorist group, organisation or association shall be punishable by five to fifteen years' imprisonment.
>
> 2. 'A terrorist group, organisation or association' shall be understood to include any group of two or more persons, who, acting in concert, set out to undermine

national integrity and independence or prevent, change or impair the functioning of State institutions as established by the Constitution; or to force the authorities to do something, refrain from doing something or tolerate something being done; or to intimidate certain persons or groups or the entire population by committing offences

...

(e) which entail the use of bombs, grenades, firearms, explosive substances or devices, incendiary material of any kind or parcel or letter bombs.

...

4. Where [the members of] a group, organisation or association ... are found in possession of one of the items mentioned in sub-paragraph (e) of paragraph 2 with a view to achieving its criminal ends, the sentence within the minimum and maximum limits shall be increased by one-third."

C. The Code of Criminal Procedure

26. The relevant provisions of the Code of Criminal Procedure in force at the time - a new code took effect on 1 January 1988 - were the following:

Article 349

"Where the judicial investigation discloses prima facie evidence of the commission of a punishable offence, of the identity of the person who committed it and of his liability, the public prosecutor's office, if it has the standing (legitimidade) to do so, shall deliver its charges."

Article 365

"Where the prosecution is brought by the public prosecutor's office or, as the case may be, by the assistente, the file shall immediately be submitted to the judge in order that he may issue his despacho de pronúncia or de não pronúncia within eight days."

Article 366

"The despacho de pronúncia shall contain

1. the name, occupation and address, if known, of the defendants or the necessary information to identify them;

2. an exact description of the offences which they are considered to have committed and the capacity in which they acted;

3. any special or general aggravating or extenuating circumstances;

4. an indication of the statute creating the offence and providing for penalties;

5. any decision relating to the accused's provisional release which, in accordance with the law, prolongs or alters the previously existing situation;

6. the information prescribed in Articles 354, 356 and 357, where necessary, and the order to communicate information concerning the accused to the criminal records office;

7. the date and the judge's signature.

..."

Article 371

"The public prosecutor's office, a private prosecutor and the accused may appeal against a despacho de pronúncia. The public prosecutor's office and a private prosecutor may appeal against a despacho de não pronúncia ..."

Section 59 of Law no. 82/77 of 6 September 1977 on the administration of justice provides:

"The Criminal Court shall be competent for the pronúncia, the trial and the subsequent phases in respect of criminal cases, subject to sections 63, 67 and 70."

Article 8 of Legislative Decree No. 269/78 of 1 September 1978 implementing the aforementioned Law provides:

"The judges of the Criminal Court shall be competent for the pronúncia or its equivalent, the trial and the subsequent phases in respect of cases to be tried under the 'de querela' procedure or which are reserved to the court sitting as a bench."

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Saraiva de Carvalho applied to the Commission on 10 October 1989 (application no. 15651/89). He complained of a breach of his right to have his case heard by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention in that the same judge had both initially issued the despacho de pronúncia and subsequently presided over the Criminal Court. He also alleged that he had not had a fair trial on account of inadequate reasoning in the trial court's judgment.

28. The Commission declared the second complaint inadmissible on 17 May 1990 and the first complaint admissible on 19 May 1992. In its report of 14 January 1993 (Article 31) (art. 31), it expressed the opinion by nine votes to eight that there had been no violation of Article 6 para. 1 (art. 6-1).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

29. In their memorial the Government asked the Court to hold that there had been no breach of Article 6 para. 1 (art. 6-1) of the Convention in the case.

AS TO THE LAW

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

30. Mr Saraiva de Carvalho argued that his case had not been heard by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1), which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ..."

In his submission, the Fourth Division of the Lisbon Criminal Court, which on 20 May 1987 had sentenced him to fifteen years' military imprisonment, had not satisfied the requirements of that provision. Its presiding judge, Mr Salvado, had earlier, as the judge in charge of the case, issued the despacho de pronúncia. Such a decision meant that at the outset of the proceedings the judge had already become convinced of the applicant's guilt, a fact that could not fail to affect the conduct of the trial, which was the presiding judge's responsibility.

31. According to the Government, Mr Saraiva de Carvalho's fears could not be regarded as objectively justified. The despacho de pronúncia could not be likened to a committal for trial; nor was it to be confused with the indictment, since it related only to the indictment's "viability". It afforded an accused a double safeguard against having to undergo a public trial when there was no prima facie evidence against him and against being tried for offences not mentioned in the despacho. In accordance with the procedure in force at the material time and with the Supreme Court's case-

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

law, a judge who issued a despacho was not bound by it and enjoyed complete freedom to reach his conclusion on the merits on the basis of the evidence submitted under adversarial procedure at the trial.

32. The Commission accepted this argument in substance.

33. The Court points out that the existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28).

34. As far as the subjective test is concerned, the applicant did not dispute Mr Salvado's personal impartiality.

35. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid., p. 12, para. 30, and the Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 27).

In this connection, the Court has held that the mere fact that a judge has already taken decisions before the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial (see the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 49, and the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, para. 33).

36. In the despacho de pronúncia in question Mr Salvado found, firstly, that there had been no irregularities during the judicial investigation or any other impediment to a trial of the merits. He went on to hold that the evidence was not sufficient to enable a reliable assessment to be made of the probability that four of the co-defendants were guilty, and he consequently rejected the prosecution's charges against them. He admitted the charges in respect of the other defendants, however, including Mr Saraiva de Carvalho, and decided that all but three of the accused should be kept in pre-trial detention.

37. Like the Government, the Court accepts that this intermediate decision is not equivalent to a committal for trial. Under the Portuguese law applicable at the time, the judge in charge of the case, when issuing the despacho, was determining whether the file, including the prosecution's charges, amounted to a prima facie case such as to justify making an individual go through the ordeal of a trial. The issues which the judge has to

settle when taking this decision are consequently not the same as those which are decisive for his final judgment. This may be illustrated by the fact that on 20 May 1987 the Criminal Court division which Mr Salvado presided over acquitted sixteen of the co-accused included in the despacho. Besides, if Mr Saraiva de Carvalho had had any misgivings about the consequences of the order, he could have been expected to appeal against it under Article 371 of the Code of Criminal Procedure (see paragraph 26 above).

38. The instant case differs from the Piersack v. Belgium case (judgment of 1 October 1982, Series A no. 53) and the De Cubber v. Belgium case (judgment of 26 October 1984, Series A no. 86) in the nature of the duties performed by the judges who sat in those cases before the trial of the merits. In producing the despacho, Mr Salvado was acting in his capacity as a judge of the Fourth Division; he took no steps in the investigation or in the prosecution. His detailed knowledge of the case did not mean that he was prejudiced in a way that prevented him from being impartial when the case came to trial. His function in the initial phase of the proceedings was to satisfy himself not that there was a "particularly confirmed suspicion" (see the Hauschildt judgment previously cited, p. 22, para. 52) but that there was prima facie evidence (compare the "serious indications" mentioned in the Nortier case previously cited, p. 16, para. 35). Nor can Mr Salvado’s preliminary assessment of the available evidence be regarded as a formal finding of guilt. That was made only in the judgment of 20 May 1987, on the basis of the evidence adduced and tested orally at 263 sittings and which led the division presided over by Mr Salvado to convict the applicant.

39. As to the decision to leave an accused in pre-trial detention, this could only justify fears concerning a judge’s impartiality in special circumstances. Mr Salvado, however, did not at the time make any fresh assessment capable of having a decisive influence on his opinion of the merits; he did no more than make a cursory examination, which disclosed no factors telling in favour of Mr Saraiva de Carvalho’s release.

40. In conclusion, Mr Salvado’s participation in the adoption of the judgment of 20 May 1987 did not undermine the impartiality of the Criminal Court’s Fourth Division, since the applicant’s fears cannot be regarded as having been objectively justified. There has therefore been no breach of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of Article 6 para. 1 (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 April 1994.

Rolv RYSSDAL
President

For the Registrar
Herbert PETZOLD
Deputy Registrar