

In the case of *Gea Catalán v. Spain* (1),

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 Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr F. Gölcüklü,
Mr R. Macdonald,
Mr A. Spielmann,
Mr J. De Meyer,
Mr I. Foighel,
Mr J.M. Morenilla,
Mr M.A. Lopes Rocha,
Mr B. Repik,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 28 October 1994 and 26 January 1995,

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

Notes by the Registrar

1. The case is numbered 10/1994/457/538. 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.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, 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. 19160/91) against the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) by a Spanish national, Mr Francisco Gea Catalán, on 14 October 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Spain 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. 3 (a) (art. 6-3-a) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The President of the Court gave the lawyer in question leave to use the

Spanish language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, 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 J. De Meyer, Mr I. Foighel, Mr M.A. Lopes Rocha and Mr B. Repik (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 Spanish 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 27 July 1994. The applicant submitted his claims for just satisfaction in a letter which reached the registry on 19 October 1994. On 22 September 1994 the Secretary to the Commission had informed the Registrar that the Delegate would submit his observations at the hearing; prior to that date he had produced various documents as requested by the Registrar on the President's instructions.

5. In accordance with the decision of the President, who had also given the Agent of the Government leave to use the Spanish language (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 26 October 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Borrego Borrego, Head of the Legal Department
for Human Rights, Ministry of Justice and
of the Interior,

Agent;

(b) for the Commission

Mr F. Martínez,

Delegate.

Mr C. Soliva Hernández, the applicant's lawyer, informed the Registrar that he was unable to attend. The Court heard addresses by Mr Borrego Borrego and Mr Martínez.

6. On 26 October 1994 the Chamber decided to dismiss the applicant's claims for just satisfaction as out of time (Rule 50 para. 1).

AS TO THE FACTS

I. Circumstances of the case

7. Mr Francisco Gea Catalán, who is a Spanish national, lives in Barcelona.

8. In the first months of 1985, taking advantage of his position as an employee of the Bank of Fomento, he caused the bank to discount in his favour a number of bills of exchange that he had himself drawn using false names. Once the deception was discovered, the bank laid a complaint against him. It also dismissed two other employees for failure to

exercise proper supervision and filed an application to join the criminal proceedings brought against Mr Gea Catalán, as a civil party seeking damages.

9. In a decision of 1 July 1986 Barcelona investigating judge no. 21 found that the facts established by him disclosed, *inter alia*, the offence of obtaining property by deception as provided for in Articles 528 and 529 para. 7 of the Criminal Code (see paragraph 17 below). He ordered the applicant's committal for trial in the Barcelona Audiencia Provincial.

10. In his pre-trial submissions (*conclusiones provisionales*), the public prosecutor classified the acts of which the applicant was accused as, *inter alia*, obtaining property by deception within the meaning of Article 528 with the especially aggravating ("*muy cualificada*") circumstance provided for in paragraph 1 of Article 529 of the Criminal Code (see paragraph 17 below).

As civil party, the bank lodged submissions which essentially reproduced those of the public prosecutor.

11. At the hearing the public prosecutor and the civil party confirmed their earlier submissions (*conclusiones definitivas*).

12. In a judgment of 22 January 1988 the Audiencia Provincial sentenced the applicant to, *inter alia*, two years and four months' imprisonment on a count of obtaining property by deception. It found that the offence had involved a sum of 5,610,150 pesetas, that it had damaged the reputation of the bank and that it had resulted in the dismissal of two other employees. The court therefore based the sentence on paragraph 7 of Article 529 of the Criminal Code, finding that there had been an especially aggravating circumstance.

13. Mr Gea Catalán lodged an appeal on points of law. He relied on Article 24 para. 2 of the Constitution (see paragraph 16 below), his complaint being essentially directed at the fact that the aggravating circumstance provided for in Article 529 para. 7 had been applied to him, without his being given prior notice. In this connection he pointed out that both the public prosecutor and the civil party had referred in their submissions solely to paragraph 1 of that Article; this discrepancy had infringed his defence rights.

14. On 7 November 1990 the Supreme Court (*Tribunal Supremo*) dismissed his appeal. The discrepancy complained of by Mr Gea Catalán had resulted from a mere clerical error that had been easy to understand and to correct simply as a matter of common sense and logic, given the absurdity of applying paragraph 1 of Article 529 to the facts in issue.

15. The applicant filed an *amparo* appeal in the Constitutional Court (*Tribunal Constitucional*) on the ground that the rights of the defence had been infringed. This appeal was dismissed on 6 May 1991 as not raising any constitutional issue. The typing error that had resulted in the reference to paragraph 1 of Article 529 rather than paragraph 7 had altered neither the charge nor the facts constituting the alleged offences. It followed that the clerical error had had no effect on the rights of the defence.

II. Relevant domestic law

1. The Constitution

16. According to Article 24 of the Constitution,

"1. Everyone has the right to effective protection by the judges and courts in the exercise of his rights and his legitimate interests and in no circumstances may there be any denial of defence rights.

2. Likewise, everyone has the right to be heard in a court of ordinary jurisdiction, as determined by law, to defend himself and be assisted by a lawyer, to be informed of the charge against him, to have a public trial without undue delay and attended by all the safeguards, to adduce the evidence relevant to his defence, not to make incriminating statements, not to confess himself guilty and to be presumed innocent.

..."

2. The Criminal Code

17. Two provisions of the Criminal Code are relevant to the present case:

Article 528

"Anyone who, with a view to pecuniary advantage, engages in dishonest practices in order to deceive another person into transferring property to the latter's detriment or to the detriment of a third party shall be guilty of the offence of obtaining property by deception.

A person convicted of this offence shall be liable to a term of imprisonment (arresto mayor) [from one month and one day to six months] if the sum involved exceeds 30,000 pesetas. If there are found to be two or more of the aggravating circumstances provided for in Article 529 below or one especially aggravating circumstance, the person convicted shall be sentenced to a term of imprisonment (prisión menor) [from six months and one day to six years] ...

Where only one of the aggravating circumstances referred to in Article 529 is found to be established, the term of imprisonment shall be in the range of the maximum sentence available (grado máximo) [from four months and one day to six months]."

Article 529

"The following circumstances shall be deemed to be aggravating circumstances for the purposes of the preceding Article:

1. Where the deception is practised by altering the nature, quality or quantity of staple goods, dwellings or any other goods of recognised social utility.

...

7. Where the deception is particularly serious in terms of the sum involved."

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Gea Catalán applied to the Commission on

14 October 1991. Relying on Article 6 para. 3 (a) (art. 6-3-a) of the Convention, he complained that he had not been informed of a component of the charge against him. He also maintained that he had not had a fair hearing within a reasonable time and that there had been a breach of the principle of the presumption of innocence and of the prohibition on imprisonment for debt (Article 6 paras. 1 and 2 of the Convention and Article 1 of Protocol No. 4) (art. 6-1, art. 6-2, P4-1).

19. On 30 March 1993 the Commission declared the application (no. 19160/91) admissible in respect of the first complaint but inadmissible for the rest. In its report of 30 November 1993 (Article 31) (art. 31) it expressed the unanimous opinion that there had been a violation of Article 6 para. 3 (a) (art. 6-3-a). The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment (1).

1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 309 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

20. At the hearing, the Government requested the Court to strike the case out of its list because of the applicant's implied withdrawal and, in the alternative, to hold that the facts of the case "could not amount to a violation of the European Convention".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

21. According to the Government, the applicant's inactivity was tantamount to an implied withdrawal. After having indicated that he wished to take part in the proceedings before the Court, Mr Gea Catalán had neither lodged a memorial nor appeared at the hearing and had submitted a claim for just satisfaction well after the expiry of the time-limit laid down in Rule 50 para. 1 of Rules of Court A. Such an attitude should lead the Court to strike the case out of the list.

22. The Delegate of the Commission did not express a view on this question.

23. Under Rule 49 para. 2:

"When the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary, the Parties, the Delegates of the Commission and the applicant, strike the case out of the list.

The same shall apply where the circumstances warrant the conclusion that the applicant does not intend to pursue his complaints or if, for any other reason, further examination of the case is not justified."

24. The Court notes that Mr Gea Catalán expressed the wish to take part in the proceedings (see paragraph 2 above) and that he submitted, albeit belatedly, a claim for just satisfaction (see paragraph 6 above). It cannot therefore be

inferred that he did "not intend to pursue his complaints".

In addition, there has been neither a friendly settlement, nor arrangement nor other fact of a kind to provide a solution of the matter, so that the first sentence of Rule 49 para. 2 is not applicable either (see the Bunkate v. the Netherlands judgment of 26 May 1993, Series A no. 248-B, p. 30, para. 19).

The objection must accordingly be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 para. 3 (a) (art. 6-3-a) OF THE CONVENTION

25. Mr Gea Catalán alleged a violation of Article 6 para. 3 (a) (art. 6-3-a) of the Convention, which provides as follows:

"Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, ... and in detail, of the nature and cause of the accusation against him;"

The violation derived from the fact that he had been sentenced on the basis of paragraph 7 of Article 529 of the Criminal Code and not on the basis of paragraph 1 of that Article, which had been relied on by the prosecuting authority and the civil party.

26. The Commission shared that view. It considered that a person charged with a criminal offence was entitled to be informed not only of the material facts alleged against him but also of their legal classification. Even if reference to the aggravating circumstance provided for in paragraph 1 of Article 529 could appear absurd, that would not automatically entail the application of paragraph 7.

27. The Government affirmed, on the other hand, that the applicant had been fully aware of all the components of the charge against him, in particular because the facts cited by the public prosecutor and the civil party had been identical to those established by the investigating judge. Logically only paragraph 7 could apply to those facts.

28. Like the Government, the Court considers that the discrepancy complained of was clearly the result of a mere clerical error, committed when the prosecution submissions were typed and subsequently reproduced on various occasions by the prosecuting authority and the civil party (see paragraphs 10 and 11 above). Indeed that was also the view taken by the Supreme Court and the Constitutional Court in dismissing the applicant's appeal on points of law and his amparo appeal (see paragraphs 13-15 above).

29. Having regard to the clarity of the legal classification given to the findings of fact set out in the investigating judge's committal order of 1 July 1986 (see paragraph 9 above), the Court fails to see how Mr Gea Catalán could complain that he had not been informed of all the components of the charge, since the prosecution submissions were based on the same facts (see paragraph 10 above). Furthermore in the instant case it would, as the Supreme Court rightly noted (see paragraph 14 above), have been absurd to have applied paragraph 1 of Article 529 of the Criminal Code, whereas the inference that it was paragraph 7 that applied, although not an automatic conclusion, could at any event have

been arrived at through minimal recourse to logic.

30. In sum, the Court holds the applicant's complaint to be unfounded and therefore finds that there has been no breach of Article 6 para. 3 (a) (art. 6-3-a).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;
2. Holds that there has been no breach of Article 6 para. 3 (a) (art. 6-3-a) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 February 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar