



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

COURT (CHAMBER)

CASE OF PARDO v. FRANCE (REVISION)

(Application no. 13416/87)

JUDGMENT

STRASBOURG

10 July 1996

In the case of Pardo v. France (revision of the judgment of 20 September 1993)*,

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 Rule 58 para. 4 of Rules of Court A** as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr A. SPIELMANN,

Mrs E. PALM,

Mr L. WILDHABER,

Mr G. MIFSUD BONNICI,

Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 26 March, 22 April and 24 June 1996,

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

PROCEDURE

1. The European Commission of Human Rights ("the Commission") submitted to the Court under Rule 58 of Rules of Court A a request for the revision of the judgment delivered on 20 September 1993 in the case of Pardo v. France (Series A no. 261-B - "the original judgment"). The request was lodged on 18 September 1995; it bore the signature of Mr Trechsel, the President of the Commission, and was accompanied by two documents.

2. The Chamber to be constituted to examine the admissibility of that request included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention and Rule 58 para. 4 of Rules of Court A) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21

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

** Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) 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.

para. 4 (b)). On 5 December 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr A. Spielmann, Mrs E. Palm, Mr R. Pekkanen, Mr G. Mifsud Bonnici and Mr K. Jungwiert, (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Mr L. Wildhaber, substitute judge, replaced Mr Pekkanen, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

3. On 26 September 1995 the Registrar communicated the request to the Government of the French Republic ("the Government") and to the applicant and invited them to submit any written comments within the time-limit laid down by the President (Rule 58 para. 3), which was fixed as 31 January 1996.

The Registrar received written comments from the applicant on 24 January 1996 and from the Government on 9 March 1996 after the time-limit initially accorded had been extended to 15 March 1996.

On 14 June 1996 the applicant lodged observations in reply to the Government's comments. On 24 June 1996 the Court decided not to take cognisance of them as they had not been submitted within the time-limit laid down.

4. In the meantime, relying on Rule 24 para. 2, on 30 January 1996 the applicant had requested the Court to declare the drawing of lots effected on 5 December 1995 void and in the alternative challenged all the judges appointed as a result. He had also asked that his request be examined by the plenary Court.

5. On 26 March 1996, the Court decided to reject the applicant's three requests. In respect of the first two, it considered that Rule 24 para. 2 was not directed at the participation of a judge in the examination of a case in which he had been involved at an earlier stage in the procedure before the Court. As regards the third request, it found that the decision whether to relinquish jurisdiction was a discretionary one, except where the condition for compulsory relinquishment was satisfied and that was not the case here.

The Court also decided to dispense with a hearing in the case (Rule 58 para. 3).

THE REQUEST FOR REVISION

6. The case of Pardo v. France originated in an application against France lodged with the Commission under Article 25 of the Convention (art. 25) by a French national, Mr Ernest Pardo. The applicant complained, *inter alia*, of a breach of his right to a fair trial guaranteed under Article 6 para. 1 of the Convention (art. 6-1). He claimed that, as a party in

commercial litigation in the Aix-en-Provence Court of Appeal, he had not had the opportunity to present oral argument on the merits, despite the fact that the President had announced that there would be a further hearing at a later date. In its report of 1 April 1992 (Article 31) (art. 31) the Commission expressed the unanimous opinion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1).

7. On 4 August 1992 the Government brought the case before the Court, which held a hearing on 22 March 1993. Prior to that hearing and in accordance with its usual practice, the registry had, on 16 March 1993, sent by fax to the participants in the proceedings a provisional list of questions that the President of the Court intended to suggest asking at the hearing. At its preparatory meeting preceding the hearing the Chamber approved the list of questions, whose final text, which was handed to those appearing before the Court shortly afterwards, was as follows:

"1. The Court requests the Government to provide copies of the registrar's notes and the record of the hearing of 9 November 1984 in the Aix-en-Provence Court of Appeal (Government's memorial, p. 2; Commission's report, para. 33).

2. Could the applicant produce, if he possesses it, the letter of 25 March 1985 written by Mr de Chessé, to which Mr Davin's attestation refers (Commission's report, para. 21; Government's memorial, p. 2)?

3. ...

4. Giving judgment on the trustee's appeal, the Court of Appeal referred to various documents. Can the Government verify whether documents were lodged with the Court of Appeal by the applicant himself and, if they were, whether they were new documents or documents which had already been communicated to the parties (Government's memorial, p. 3)?

5. ..."

8. In the course of the hearing on 22 March 1993, the Government produced the record of the hearing (plumitif) of 9 November 1984 (question 1; original judgment, p. 31, para. 28). The applicant was not able to supply a copy of the letter that his lawyer, Mr de Chessé, had sent on 25 March 1985 to Mr Davin (question 2; original judgment, p. 26, para. 16, and p. 31, para. 28). As regards question no. 4, the Government stated as follows at the hearing :

"Your Court [asked] us for the fourth question at the beginning of this hearing, whether we could check on the nature of the evidence lodged. Now unfortunately this is not possible for two reasons linked to our procedure, civil procedure in France. Indeed in civil matters, and this obviously does not apply to criminal affairs, the case files are destroyed five years after the final decision and indeed this happened in the Pardo case. But even assuming that this period of time had not elapsed and that we still had the case file, there would be no documents in it because in civil matters all documents are returned to the parties at the end of the proceedings."

(Verbatim Record of the hearing, p. 32, second paragraph)

9. Giving judgment on 20 September 1993, the Court held that there had been no violation of Article 6 of the Convention (art. 6). The judgment gives the following reasoning:

"28. The Court is confronted with a dispute concerning the exact course of the proceedings in the Aix-en-Provence Court of Appeal and must reach its decision on the basis of the available evidence ...

The documents produced by the applicant do not in the Court's view provide sufficient *prima facie* evidence of the accuracy of his version of events ... Mr Davin's letter sheds little light on the course of the hearing because it merely confirms facts described in a letter from Mr de Chessé [of 25 March 1985], a copy of which Mr Pardo was unable to produce ...

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

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

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

10. On 27 January 1994 the applicant made a first approach to the Commission asking it to submit to the Court a request for the revision of the judgment. On 11 March the Commission declined to do so. It took the view that the conditions for making such a request to the Court were not satisfied.

11. The applicant made a further request on 8 June 1995 and this time he was successful. On 18 September 1995 the Commission submitted to the Court the present request for the revision of the judgment of 20 September 1993. The request for revision was expressed in the following terms:

"The applicant submitted to the Commission a request for revision by a letter dated 8 June 1995 [see paragraph 16 below] and posted on 20 June 1995.

The Commission noted that the Court, prior to its hearing on 22 March 1993, had asked the participants in the proceedings to produce certain documents (questions 1.

and 4.). For the reasons given at the hearing, these requests were not complied with. Since then the applicant has been able to obtain certain of these documents and in particular the letter from Mr de Chessé to Mr Davin of 25 March 1985 [see paragraph 15 below] and the list of documents contained in the appeal file [see paragraph 14 below].

The Commission takes the view that, as the Court asked for these documents to be produced, they might by their nature have had a decisive influence on its judgment.

The Commission accordingly considers that the conditions for submitting to the Court a request for the revision of the Pardo judgment are satisfied."

The Commission's request for revision was accompanied by a copy of the letter sent on 8 June 1995 by Mr Kleniec, Chairman of the Aix-en-Provence Bar Association, the applicant's new lawyer, to the Commission (see paragraph 16 below) and a document drawn up by Mr Pardo himself and entitled "application for revision".

12. The circumstances in which the Commission submitted the request are as follows.

13. On 20 September 1994, Mr Kleniec asked the First President of the Aix-en-Provence Court of Appeal for permission to inspect the file. On 27 October 1994 the First President allowed that request.

14. On 6 February 1995 the applicant gained access to his file. The head clerk of the Court of Appeal gave him a copy of the record of the hearing of 9 November 1984 (see paragraph 8 above) and a copy of the list of documents in the appeal file drawn up by the clerk of court at the time. The contents of the list which was dated 10 May 1985 were as follows:

"List of documents

date lodged document

Re

1 "case preparation" bundle

2 first-instance file

3 notice of appeal 3 bis " "

4 notice of acting (avoué)

5 " "

6 3.1.84 appellant's submissions

7 10.2.84 appellant's submissions

8 notice of acting (avoué)

9 " "

10 12.3.84 respondents' submissions

11 14.3.84 appellant's submissions

12 " " "

13 5.9.84 respondent's submissions

15 26.10.84 order concluding preparation

16 appellants' submissions

17 15.1.85 copy of judgment [illegible word] on the merits

18 10.5.85 the present list

Aix-en-Provence 10.5.85

Clerk of court

[Signed:] Mary"

15. On 27 February 1995 Mr Davin communicated to Mr de Chessé a copy of their correspondence at the time, including the letter that the latter had sent him on 25 March 1985 and that the applicant had been unable to produce at the hearing before the Court (original judgment, p. 26, para. 16, and p. 31, para. 28; see paragraph 8 above). Mr Davin was replying to a request made by Mr de Chessé on 1 February 1995, who had taken steps to find the correspondence in question and whose own files had been damaged by flooding.

The letter from Mr de Chessé to Mr Davin of 25 March 1985 was worded as follows:

"As you know, the Pardo family has decided to lodge an appeal on points of law in this case, a step which I consider to be particularly necessary in view of the conditions in which judgment was given.

I enclose a copy of the letter I am sending my client. I should be grateful if you would confirm that what happened is as I described it to Mr Ernest Pardo."

Mr de Chessé's letter to which the above-mentioned letter referred and Mr Davin's reply of 22 April 1985 had been communicated to the Court by the Commission on 12 February 1993 (see the original judgment, p. 24, para. 5). The judgment of 20 September 1993 summarised these documents at paragraph 16 as follows:

"... Mr de Chessé, wrote to him on 25 March 1985 certifying that the President had stated that the case would be adjourned either to a much later date, if the request for a stay was granted, or to a date in the near future when it would be the only case on the

list in view of the number of documents to be examined. According to the lawyer, the court had had before it only his two sets of final submissions, whereas the file of his pleadings had comprised thirteen folders 14cm thick. Mr Davin, the counsel for one of the other directors of the company, also implicated in the case, confirmed, in his reply dated 22 April 1985 to a letter which Mr de Chessé had sent to him on 25 March, a copy of which the applicant was, however, unable to produce, that the hearing in issue had indeed followed the course described by the applicant's lawyer in his letter."

16. In his letter (see paragraph 11 above), which was appended to the Commission's request for revision, Mr Klenieć wrote:

"In accordance with Rule 58 of the Rules of Court, I hereby submit to the European Commission of Human Rights a request for the revision of the judgment of 20 September 1993 on account of the prejudicial consequences of that decision for Mr Pardo and his family.

Mr Pardo requested me to discover decisive items of evidence that were unknown to him and to the Court when the judgment was delivered.

...

Following my intervention, the First President of the Aix-en-Provence Court of Appeal, after ten years of difficult negotiations, at last, on 27 October 1994, allowed Mr Pardo access to the documents in his case file, which had in fact been kept in the registry of the Aix-en-Provence Court of Appeal in accordance with an instruction from the Ministry of Justice.

Various copies bearing the signature of the chief clerk of that court were handed over to him on 6 February 1995, in particular:

(a) the record of the hearing (*plumitif*), which, it may be noted, was not certified by the signature of the President of the Chamber or by the secretary, in breach of Article 728, last sub-paragraph, of the New Code of Civil Procedure;

(b) the list drawn up by the clerk present at the hearing (Mrs Mary) mentioning, with the date on which they were filed, all the documents that the parties had lodged for the attention of the Chamber. This list makes no mention of the filing of any of the 959 documents constituting Mr Pardo's file for the case on the merits.

Although the Court requested them to produce these documents, at the hearing on 22 March 1993 the French Government failed to do so, informing the Court that Mr Pardo's file had been destroyed.

The letter from the First President of the Aix-en-Provence Court of Appeal shows this assertion to have been erroneous.

Moreover, when questioned by my colleague, Mr de Chessé, on 1 February 1995, Mr Davin was able to find all the correspondence that he had exchanged with the former concerning the course of the proceedings in the Aix-en-Provence Court of Appeal at the hearing on 9 November 1984.

This correspondence is now produced in full together with Mr Davin's letter of 27 February 1995 in which he reiterates his statement of 22 April 1985, confirming his position in this regard very clearly.

This evidence shows that at the hearing in the Aix-en-Provence Court of Appeal of 9 November 1984, the only matter raised was an application for the stay of proceedings and that the President had clearly indicated to the lawyers present that the case would be adjourned either to a much later date or to a nearer date so that the merits of the case could be examined at a hearing exclusively devoted to it in view of the length and the number of the documents to be examined.

The European Court had asked Mr Pardo to produce this correspondence to which it rightly attached decisive importance.

It was impossible for Mr Pardo to comply with this request, although it was a legitimate one, because it was only made on 15 and 16 March 1993 and he was only informed of it on 17 and 18 March 1993. Mr Pardo therefore lacked sufficient time to request with the request at the hearing on 22 March.

It was this that led the Court to disregard Mr Davin's testimony and then state that that of Mr de Chessé could not in itself suffice to establish the facts.

Mr de Chessé is no longer the only person testifying to these events, which circumstance could produce an entirely different outcome to the proceedings.

Furthermore it should be noted that the evidence of these two lawyers is such as to diminish the importance of the opinion expressed by Mrs Jassaud, senior clerk, who certified in a letter dated 19 March 1993, which was produced unexpectedly, that 'judgment in the case was reserved and the proceedings were not adjourned to a subsequent hearing'.

It may be observed that:

1. Mrs Jassaud was not present at the hearing of 9 November 1984.
2. Her statement, which was not handwritten, set against the testimony of two lawyers, must evidently be discounted.

All the foregoing, considered in the light of the various provisions of the New Code of Civil Procedure, invalidates the entire reasoning of the European Court's judgment and shows that its revision is necessary.

..."

AS TO THE LAW

17. According to Rule 58 of Rules of Court A:

"1. A Party or the Commission may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was

delivered, was unknown both to the Court and to that Party or the Commission, request the Court, within a period of six months after that Party or the Commission, as the case may be, acquired knowledge of such fact, to revise that judgment.

2. The request shall mention the judgment of which the revision is requested and shall contain the information necessary to show that the conditions laid down in paragraph 1 have been complied with. It shall be accompanied by the original or a copy of all supporting documents ...

3. ...

4. The request for revision shall be considered by a Chamber constituted in accordance with Article 43 of the Convention (art. 43), which shall decide whether the request is admissible or not under paragraph 1 of this Rule. In the affirmative, the Chamber shall refer the request to the Chamber which gave the original judgment or, if in the circumstances that is not reasonably possible, it shall retain the request and examine the merits thereof.

5. ..."

18. The Government urged the Court to find that the request was unfounded. The two documents on which it was based - the list of documents in the appeal file and the letter of 25 March 1985 from Mr de Chessé to Mr Davin - did not have the probative value that Mr Pardo ascribed to them.

19. The applicant explained that he had not been able to acquire knowledge of the documents in his file, including the list of documents drawn up by the clerk present at the hearing, until 27 October 1994, after ten years of difficult negotiations. He had not been able to produce the letter of 25 March 1985 at the Court's hearing because of the short notice of the request and because of flood damage to Mr de Chessé's files. This new evidence was capable of establishing the objective proof of the accuracy of his version of events and of undermining the whole basis of the Court's reasoning in its judgment.

20. The Court recalls in the first place that the Commission based its request on two documents to which Mr Pardo did not secure access until after the delivery of the judgment of 20 September 1993: the letter of 25 March 1985, which the Chamber had - in vain - asked the applicant to produce, and the list of documents in the appeal file, a file that the Government wrongly believed to have been destroyed (see paragraphs 7 and 8 above). These documents, which were lodged within the six-month time-limit laid down in Rule 58 para. 1 of Rules of Court A, show, according to the applicant, that the version of events put forward by him at the time was accurate. The documents were unknown to both the Court and the Commission and may themselves be regarded as facts for the purposes of Rule 58 para. 1.

21. Nevertheless it is also necessary that such facts "might by [their] nature have a decisive influence". In this connection, it should be noted that,

under the terms of the second sentence of Rule 58 para. 4, the Chamber may only determine the admissibility of the Commission's request. It must, accordingly, confine itself to examining whether, *prima facie*, the facts submitted are of the kind referred to in Rule 58 para. 1. The task of considering whether they actually have a "decisive influence" lies in principle with the Chamber which gave the original judgment (Rule 58 para. 4). A decision on the admissibility of the request therefore in no way prejudices the merits of the request.

However, in carrying out its examination the Court must bear in mind that, by virtue of Article 52 of the Convention (art. 52), its judgments are final. Inasmuch as it calls into question the final character of judgments, the possibility of revision, which is not provided for in the Convention but was introduced by the Rules of Court, is an exceptional procedure. That is why the admissibility of any request for revision of a judgment of the Court under this procedure is subject to strict scrutiny.

22. In order to establish whether the facts on which a request for revision are based "might by [their] nature have a decisive influence", they have to be considered in relation to the decision of the Court whose revision is sought. It should be noted in this connection that a request to those appearing before the Court for documents to be produced is not in itself sufficient to warrant the conclusion that the documents in question "might by [their] nature have a decisive influence". Such a request for documents, which corresponds to consistent practice, shows no more than that the Court attaches to those documents some interest, the full extent of which it will only be in a position to determine during its deliberations following the hearing.

23. In the present case the Court recalls that the original Chamber was confronted with a dispute concerning the exact course of the proceedings in the Aix-en-Provence Court of Appeal and in particular the hearing on 9 November 1984. Mr Pardo complained that he had not had the opportunity to present oral argument on the merits in the Court of Appeal despite the fact that, so he maintained, the President of that court had announced that the hearing would be adjourned to a later date. The Commission essentially accepted the applicant's claims, whereas the Government contested them (see paragraph 6 above; original judgment, p. 30, paras. 25-27). Faced with this dispute, the Chamber considered that it had to reach its decision on the basis of the available evidence (see paragraph 9 above; original judgment, p. 31, para. 28). After examining various documents produced by the participants in the proceedings - including Mr de Chessé's letter to the applicant of 25 March 1985, Mr Davin's letter to Mr de Chessé of 22 April 1985 and the record of the hearing -, it arrived at the conclusion that it could not find a violation of Article 6 of the Convention (art. 6).

24. The two documents that the Commission submitted in support of its request for revision relate to the hearing in the Aix-en-Provence Court of

Appeal. One of them, Mr de Chessé's letter of 25 March 1985 to Mr Davin, Mr Pardo had not been able to produce, a fact to which express reference was made in the judgment of 20 September 1993 (p. 31, para. 28). In these circumstances, the Court cannot exclude the possibility that the documents in question "might by [their] nature have a decisive influence". It falls to the Chamber which gave the original judgment to determine whether these documents actually cast doubt on the conclusions it reached in 1993.

25. The Commission's request is accordingly admissible.

FOR THESE REASONS, THE COURT

Holds by five votes to four that the request for revision is admissible and refers the request to the Chamber which gave the original judgment.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 July 1996.

For the President
Alphonse SPIELMANN
Judge

For the Registrar
Paul MAHONEY
Deputy Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the joint dissenting opinion of Mr Gölcüklü, Mr Pettiti, Mrs Palm and Mr Jungwiert is annexed to this judgment.

A.S.
P.J.M.

**JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ,
PETTITI, PALM AND JUNGWIERT**

As the judgment of the Court points out, revision is an exceptional procedure and the admissibility of any request for revision of a judgment of the Court under this procedure must be subject to strict scrutiny.

Against this background we do not think that in the circumstances of the case the request for revision can be considered admissible.