

In the case of Di Pede v. Italy (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 B (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr F. Matscher,
Mr C. Russo,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr U. Lohmus,
Mr E. Levits,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 March and 29 August 1996,

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

Notes by the Registrar

1. The case is numbered 83/1995/589/675. 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 of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 September 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 15797/89) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by an Italian national, Mr Francesco Paolo Di Pede, on 3 July 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy 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 of the Convention (art. 6-1) and Article 1 of Protocol No. 1 (P1-1).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31).

3. On 29 September 1995 the President of the Court decided that, in accordance with Rule 21 para. 7 and in the interests of the proper administration of justice, this case and the case of Zappia v. Italy (1) should be heard by the same Chamber. The Chamber to be

constituted for that purpose included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On the same day, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr R. Macdonald, Mr A.N. Loizou, Mr J.M. Morenilla, Mr M.A. Lopes Rocha, Mr L. Wildhaber and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr U. Lohmus and Mr F. Matscher, substitute judges, replaced Mr Macdonald and Mr Walsh, who were unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

1. 85/1995/591/677.

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Italian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's claims for just satisfaction on 8 January 1996 and the Government's memorial on 17 February 1996.

5. On 21 February 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 28 March 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr G. Raimondi, magistrato, on secondment
to the Diplomatic Legal Service,
Ministry of Foreign Affairs, co-Agent;

(b) for the Commission

Mr B. Conforti, Delegate;

(c) for the applicant

Mr G. Marchesini, avvocato, Counsel.

The Court heard addresses by the above-mentioned representatives.

AS TO THE FACTS

I. Circumstances of the case

A. The proceedings on the merits

7. On 14 July 1978 the applicant brought proceedings against Mr V. and Mrs L. in the Matera District Court seeking an order requiring them to demolish a building erected in breach of the statutory provisions on minimum distances from the boundaries of adjacent properties and to remove four trees for the same reason. He also sought restoration of the site to its previous state, so that rainwater could run off without flooding his land, and the payment of damages.

8. The first hearing was held on 13 October 1978. On 2 March and

6 April 1979 Mr Di Pede's lawyer requested an expert opinion. The judge preparing the case for trial appointed an expert on a date which has not been specified. On 1 June he ordered the expert to produce his report within sixty days. A hearing listed for 12 October 1979 was adjourned in order to allow the parties to examine the report which had been filed in the meantime. On 7 June 1980, after four further preparatory hearings, the judge summoned the expert to appear at a hearing on 4 July 1980 to clarify, *inter alia*, the question of the damage caused by the rainwater run-off. On the latter date the expert asked for a further thirty days in order to file an additional report.

9. As this document was not filed until 7 July 1981, despite reminders by the judge on 31 January and 8 May 1981, five hearings (the first on 31 October 1980 and the last on 26 June 1981) had to be adjourned. On 6 November 1981 the defendants' lawyer requested an adjournment in order to examine the above report. The applicant did not object and the judge adjourned the case until 8 January 1982. The next ten hearings (from 15 January 1982 to 11 March 1983) were adjourned at the request of the parties (twice jointly, seven times by the applicant and once by the defendants). On 13 January 1984, after six further hearings, witnesses were heard. On 8 February 1985 the parties presented their final written submissions, after obtaining five further adjournments. Judgment in the case was reserved on 25 February 1986.

10. On 11 March 1986 the Matera District Court found in the applicant's favour, but ruled that new proceedings should be brought to determine the amount of damages to be paid to him. The text of the judgment was deposited in the registry on 7 April 1986.

11. On 24 May 1986 Mr V. and Mrs L. appealed, but the proceedings were terminated because they had omitted to register their notice of appeal with the Potenza Court of Appeal. On 22 December 1987, at Mr Di Pede's request, the registrar of that court certified that the appeal had not been registered.

B. The enforcement proceedings

12. On 10 February 1988 the applicant gave Mr V. and Mrs L. notice to comply with the judgment of 11 March 1986. Then, on 26 April 1988, he applied to the Matera magistrate (*pretore*) for an order specifying what means were to be used to enforce discharge by his neighbours of their obligations.

13. At the first hearing, on 2 July 1988, Mr Di Pede repeated his application. On 1 October 1988 the magistrate appointed a surveyor and a construction firm to oversee and carry out the works ordered in the judgment of the Matera District Court.

14. On 28 December 1988 the surveyor sent the magistrate a report announcing that the works had been partially completed. This was confirmed by the applicant before the European Commission on 23 January 1995.

II. Relevant domestic law

A. The Civil Code

15. Article 2931 of the Civil Code provides:

"In the event of failure to comply with an order to perform a specific act, the person in whose favour the order was made may apply for it to be enforced at the expense of the person against whom it was made in the manner laid down by the Code of Civil Procedure."

B. The Code of Civil Procedure

16. The following two provisions of the Code of Civil Procedure are relevant:

Article 612

"Any person wishing to enforce a court order in the event of failure to comply with an obligation to perform a specific act ... must apply to the magistrate for the means of enforcement to be determined.

The magistrate shall rule on the application after hearing submissions from the person against whom the order was made. In his order he shall designate a bailiff to enforce compliance and the persons responsible for ensuring the completion of any unfinished work ..."

Article 613

"The bailiff may request the assistance of the police and must request the magistrate to take the necessary measures to overcome any difficulties which arise in the course of the enforcement process. The magistrate shall give his ruling in the form of an order [decreto]."

PROCEEDINGS BEFORE THE COMMISSION

17. Mr Di Pedé applied to the Commission on 3 July 1989. He complained of (1) the length of civil proceedings followed by enforcement proceedings (Article 6 para. 1 of the Convention) (art. 6-1); (2) infringement of his right to peaceful enjoyment of his possessions caused by the alleged length of the enforcement stage (Article 1 of Protocol No. 1) (P1-1); and (3) infringement of the principle of equality of arms on account of the obligation to pay a sum by way of an advance on the experts' fees (Article 14 of the Convention taken in conjunction with Article 6) (art. 14+6).

18. On 2 March 1995 the Commission declared the application (no. 15797/89) admissible in so far as it concerned the first two complaints and the remainder inadmissible. In its report of 6 July 1995 (Article 31) (art. 31) it expressed the opinion that there had been a violation of Article 6 (art. 6) (twenty-three votes to six) but that it was not necessary to examine whether there had been a violation of Article 1 of Protocol No. 1 (P1-1) (twenty-five votes to four). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-IV), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

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

19. The applicant complained of the length of civil proceedings followed by enforcement proceedings and relied on Article 6 para. 1 of the Convention (art. 6-1), which provides:

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

by [a] ... tribunal ..."

A. The Government's preliminary objection

20. Without contesting the applicability of Article 6 (art. 6) to the enforcement proceedings, the Government argued, as they had before the Commission, that in so far as the application concerned the length of the proceedings on the merits, it was out of time. For the purposes of Article 26 in fine of the Convention (art. 26), the judgment of 11 March 1986 (see paragraph 10 above) was the final decision. The enforcement proceedings could not therefore be regarded as a second stage of the proceedings complained of; on the contrary, they were new, separate proceedings. The "natural extension" argument put forward by the Commission disregarded the specific features of the Italian legal system. There were three aspects which distinguished the two types of proceedings from each other. Firstly, the authority to execute, without which no enforcement proceedings could take place, was not necessarily derived from proceedings on the merits of a claim, but could be derived from another source, as in the case of debts (*debiti pecuniari*). Secondly, the parties to enforcement proceedings might not be the same as the parties to the proceedings on the merits. Lastly, the two stages were conducted concurrently where, for example, a judicial decision was provisionally enforceable.

It followed that the six-month period referred to in Article 26 (art.26) in fine had begun with the deposit in the registry, on 7 April 1986, of the judgment in question, and the applicant had not complied with the six months' rule since he had lodged his application on 3 July 1989.

21. Like the applicant's lawyer, the Delegate of the Commission argued that the two sets of proceedings complained of were indissociable and that any delay imputable to the applicant as regards the commencement of enforcement had to be assessed in the light of his conduct during the proceedings.

22. The Court considers that it does not have to express a view on the difference of opinion among legal writers as to whether under Italian law enforcement proceedings are autonomous; it is with reference to the Convention and not on the basis of national law that the Court must decide whether, and if so when, the right asserted by Mr Di Pede on 14 July 1978 (see paragraph 7 above) actually became effective. It is that moment which constitutes determination of a civil right, and therefore a final decision within the meaning of Article 26 (art. 26) (see the *Silva Pontes v. Portugal* judgment of 23 March 1994, Series A no. 286-A, p. 13, para. 29).

23. In the present case, on 11 March 1986 the Matera District Court ordered the defendants to demolish a building, remove some trees and restore the site to its previous state. On 24 May 1986 Mr V. and Mrs L. appealed against this decision to the Potenza Court of Appeal, but omitted to register their notice of appeal, which entailed the termination of the proceedings. In February 1988 Mr Di Pede, who had learned of this on 22 December 1987, gave his neighbours notice to comply with the judgment of 11 March 1986. Then, on 26 April 1988, he applied to the Matera magistrate for an order specifying what means were to be used to enforce compliance with the court's order.

In a report of 28 December 1988 the surveyor instructed to oversee the restoration of the site to its former state informed the magistrate that the works had been partially completed (see paragraphs 10-14 above).

Faced with the inertia of the judge responsible for enforcement, the applicant lodged an application with the European Commission of Human Rights on 3 July 1989.

24. The Court considers that the enforcement proceedings must be regarded as the second stage of the proceedings which began on 14 July 1978 (see, among other authorities, the previously cited *Silva Pontes* judgment, p. 14, para. 33); it emphasises that, to date, no final decision within the meaning of Article 26 in fine of the Convention (art. 26) has been given. The Government's assertion that the case has been discontinued is not borne out by the file.

The objection must accordingly be dismissed.

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

25. It remains to be decided whether a reasonable time was exceeded. The Commission and the applicant maintain that it was. The Government disagreed.

26. The period to be taken into consideration began on 14 July 1978 when proceedings were brought against Mr V. and Mrs L. in the Matera District Court. The relevant period has not yet ended (see paragraph 24 above).

27. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among many other authorities, *mutatis mutandis*, the *Ausiello v. Italy* judgment of 21 May 1996, Reports of Judgments and Decisions 1996-III, p. 722, para. 19).

28. The Government pleaded the applicant's conduct. In the proceedings on the merits, they argued, Mr Di Pede had been responsible for more than twenty adjournments, either because he had requested them himself or because he had not objected to requests by the defendants. As for the enforcement proceedings, the only ones which, in the Government's submission, should be taken into consideration, these had ended with the discontinuation of the case. In any event, the applicant had omitted to ask the judge responsible for the enforcement proceedings to fix a date for a new hearing and if necessary replace the firm which had partially completed the works.

29. Mr Di Pede argued that he could not be criticised for sometimes agreeing to adjournments, as his attitude had been prompted by the hope of settling the case in a climate of "mutual cooperation".

30. The Delegate of the Commission considered that the applicant's conduct alone could not explain the length of the proceedings. During the first stage (the judgment on the merits), one year elapsed before an additional expert report was filed with the registry and a further year passed between the hearing for the presentation of final written submissions and the hearing for oral argument. As regards the second stage, the Delegate pointed out that Mr Di Pede had the right to have the works completed.

31. The Court observes that the two reminders to the expert issued by the judge preparing the case for trial - the first of which, moreover, came more than five months after expiry of the one-month limit given on 4 July 1980 (see paragraphs 8 and 9 above) - did not have the desired effect and that the expert should therefore have been replaced. In addition, while it is true that the applicant bears responsibility for part of the period he now complains of, the Court cannot understand why so many hearings were necessary, particularly during the proceedings on the merits, for a case which was of no particular complexity.

Lastly, the Government's contention that the case has been discontinued cannot be accepted; it is hard to understand how the case could have been discontinued while part of the works had still not been

carried out.

32. Consequently, a period of more than eighteen years, for most of which the authorities dealing with the case bear responsibility, cannot be regarded as reasonable.

There has therefore been a breach of Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

33. Mr Di Pede also complained of an infringement of his right to the peaceful enjoyment of his possessions on account of the failure to complete the works ordered by the Matera District Court. He relied on Article 1 of Protocol No. 1 (P1-1), which provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions (P1-1) shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

34. The Government made no observation.

35. Like the Commission, the Court does not consider it necessary, in view of the circumstances of the case and the conclusion in paragraph 32 above, to determine whether there has been a breach of Article 1 of Protocol No. 1 (P1-1) (see the *Zanghi v. Italy* judgment of 19 February 1991, Series A no. 194-C, p. 47, para. 23).

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

36. Under Article 50 of the Convention (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

37. The applicant complained of the Italian authorities' incapacity to enforce the judgment of 11 March 1986 and the anxiety due to the length of the proceedings. He claimed 1,000,000,000 Italian lire (ITL) for pecuniary and non-pecuniary damage and an additional sum of ITL 375,904,000, corresponding in substance to the damage caused to the building on his land.

38. The Government submitted that if the Court found a violation of the Convention, that finding would constitute sufficient just satisfaction for the non-pecuniary prejudice alleged. The applicant had not proved the existence of pecuniary loss.

39. The Delegate of the Commission left the matter to the discretion of the Court, which, making an assessment on an equitable basis, and having regard to the information in its possession and its case-law on the question, decides to award Mr Di Pede ITL 15,000,000

for damage.

B. Costs and expenses

40. The applicant did not seek reimbursement of the costs and expenses incurred before the Italian courts and the Commission. In respect of his costs for the proceedings before the Court, he applied for and obtained legal aid amounting to a total of 9,392 French francs.

C. Default interest

41. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 10% per annum.

FOR THESE REASONS, THE COURT

1. Dismisses by eight votes to one the Government's preliminary objection;
2. Holds by eight votes to one that there has been a breach of Article 6 para. 1 of the Convention (art. 6-1);
3. Holds unanimously that it is not necessary to consider the case from the standpoint of Article 1 of Protocol No. 1 (P1-1);
4. Holds by eight votes to one that the respondent State is to pay the applicant, within three months, 15,000,000 (fifteen million) Italian lire for damage, and that simple interest at an annual rate of 10% shall be payable from the expiry of the above-mentioned three months until settlement;
5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 September 1996.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the dissenting opinion of Mr Morenilla is annexed to this judgment.

Initialled: R. B.

Initialled: H. P.

DISSENTING OPINION OF JUDGE MORENILLA

1. I regret that I cannot agree with the opinion of the majority in this case, and refer in that connection to my dissenting opinions in the *Silva Pontes v. Portugal* (1) and *Zappia v. Italy* (2) judgments.

1. Judgment of 23 March 1994, Series A no. 286-A.

2. Judgment of 26 September 1996, Reports of Judgments and Decisions 1996-IV.

2. To explain my position correctly, I persist in maintaining that

in the present case the correct approach, unlike what the majority have done, is to "dissociate" for the purposes of Articles 26 and 6 para. 1 of the Convention (art. 26, art. 6-1) the declaratory and enforcement phases of civil procedure, which should be regarded as two clearly separated and autonomous stages. Although enforcement proceedings are a consequence of the judicial decision on the merits and although in a number of legal systems, especially those derived from Roman law, it is the courts which have jurisdiction to ensure execution of their own decisions on the merits, one type of proceedings follows the other and each has its own specific legal features. A party in whose favour judgment has been given is free to bring enforcement proceedings or not, to reach a friendly settlement in the case or to wait for an extra-judicial solution which suits him. In addition, the varied nature of the acts required to be performed to ensure the effective exercise of the contested right means that judicial enforcement proceedings also vary in type. In this case there was an obligation to perform a specific act, which by its very nature requires the assent of the party seeking enforcement, who may ask the court to specify the means of enforcement. The present case is therefore a good example of the scope of the initiative accorded to the plaintiff in civil proceedings, in both of their procedural phases.

3. As regards the Government's objection concerning the late submission of the application (Article 26 of the Convention) (art. 26), I consider that the complaint relating to the excessive length of the proceedings on the merits falls outside the jurisdiction of the Strasbourg institutions because those proceedings, which were declaratory in nature, had ended with a final judgment of the Matera District Court, deposited in the registry on 7 April 1986, allowing the applicant's claims. That judgment became final because no appeal in due form had been lodged; at Mr Di Pede's request, the court's registrar certified that no notice of appeal had been registered (see paragraph 11 of the present judgment). Mr Di Pede applied to the Commission on 3 July 1989, that is more than two and a half years after expiry of the six-month limit laid down by Article 26 (art. 26) for lodging an admissible application concerning his complaints of procedural defects during the stage when the merits of his claim were being considered.

On the other hand, the complaint concerning the excessive length of the enforcement proceedings, brought by the applicant - and so late - in order to obtain enforcement of the judgment against the defendants Mr V. and Mrs L., was admissible for the purposes of Article 26 of the Convention (art. 26) because those proceedings are still pending. Accordingly, the Government's objection must be rejected only in part, because in my opinion it should be limited to the declaratory stage of the proceedings.

4. On 26 April 1988 Mr Di Pede asked the pretore to specify the means of enforcement of the judgment by which the defendants were ordered to demolish a building, remove some trees and restore the site in issue to its former state. The judge subsequently appointed a surveyor and a construction firm. Nine months later the work had been partially completed. There is nothing in the file to show what Mr Di Pede thought of this work, the report on which was sent to him, at his request, on 2 October 1989, nor that he applied to the bailiff or the judge for measures "to overcome any difficulties which arise in the course of the enforcement process" (Article 613 of the Italian Code of Civil Procedure).

This long procedural passivity after the decision of the judge responsible for enforcement was the decisive factor leading to the situation the applicant complained of. Italian law relating to obligations to perform a specific act, where it is a strict rule that the parties must take the initiative, requires the party seeking enforcement to ensure that the judgment is complied with and to request the courts to take the necessary steps to deal with any difficulties

which might arise in the enforcement process (see Articles 612 and 613 of the Code of Civil Procedure, paragraph 16 of the judgment). "[T]he hope of settling the case in a climate of 'mutual cooperation'" which Mr Di Pede's lawyer advanced as an explanation (see paragraph 29 of the judgment), while entirely understandable, is incompatible with a complaint of violation of a fundamental right which, because of its absolute character, does not allow of exceptions to accommodate the personal preferences of the alleged victims of the State authorities' actions.