



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

FIRST SECTION

CASE OF MCGINLEY AND EGAN v. THE UNITED KINGDOM

(Applications nos. 21825/93 and 23414/94)

JUDGMENT
(Revision)

STRASBOURG

28 January 2000

In the case of McGinley and Egan v. the United Kingdom (request for revision of the judgment of 9 June 1998),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs E. PALM, *President*,

Mr J. CASADEVALL,

Mr V. BUTKEVYCH,

Mr T. PANȚÎRU,

Mr A.B. BAKA,

Mr R. MARUSTE, *judges*,

Sir Simon BROWN, *ad hoc judge*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 11 January 2000,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The European Commission of Human Rights (“the Commission”) submitted to the Court, as established under former Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a request under Rule 58 of former Rules of Court A¹ for the revision of the judgment delivered on 9 June 1998 in the case of McGinley and Egan v. the United Kingdom (*Reports of Judgments and Decisions* 1998-III – “the original judgment”). The request was lodged on 17 September 1998 by the Secretary to the Commission and was accompanied by the applicants' revision request and supporting documents.

2. The applicants were represented by Mr I. Anderson, advocate. The United Kingdom Government (“the Government”) were represented by their Agent, Mr M. Eaton, from the Foreign and Commonwealth Office. At the Court's invitation (former Rules 29 § 1 and 58 § 3), the Commission delegated one of its members, Mrs J. Liddy, to take part in the proceedings.

3. On 28 September 1998 Mr R. Bernhardt, the President of the Court at the time, acting through the Deputy Registrar, invited the parties to submit written comments on the revision request (former Rule 58 § 3).

4. Following the entry into force of Protocol No. 11 to the Convention² and in accordance with the provisions of Article 5 § 5 thereof read in conjunction with Rule 102 § 1 of the Rules of Court³, the President of the

Notes by the Registry

1. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

2-3. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

Court, Mr L. Wildhaber, assigned the case to the First Section. The Chamber constituted within that Section in accordance with Rule 102 § 2 included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 102 § 3 (b)), Mrs E. Palm, President of the Section (Rule 102 § 3 (a)), and Mr V. Butkevych and Mr A.B. Baka, the latter two being members of the Chamber that delivered the original judgment (Rule 102 § 3 (c)). The other members designated by the President of the Section to complete the Chamber were Mr J. Casadevall, Mr T. Panțiru and Mr R. Maruste (Rule 102 § 4 (a)). Subsequently Sir Nicolas Bratza, who had taken part in the Commission's examination of the case, withdrew from sitting in the Chamber (Rule 28). The Government accordingly appointed Sir Simon Brown to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 102 § 3 (b)).

5. The Registrar received the applicants' comments on the revision request on 28 November 1998, the Government's comments on 11 January 1999 and the applicants' comments in reply to those of the Government on 23 February 1999. The Delegate of the Commission submitted her comments on 12 March 1999 and on 31 March 1999 the applicants submitted an amendment to their earlier comments in the light of those of the Delegate.

6. The Chamber decided that it was not necessary to hold a hearing in the case.

THE REQUEST FOR REVISION

I. THE COMMISSION'S REPORT

7. The case originated in two applications (nos. 21825/93 and 23414/94) against the United Kingdom of Great Britain and Northern Ireland) lodged with the Commission under former Article 25 of the Convention by two British nationals, Mr Kenneth McGinley and Mr Edward Egan. The applicants had participated in nuclear tests conducted by the United Kingdom at Christmas Island in the Pacific Ocean in 1958 and they complained, *inter alia*, that a lack of access to relevant contemporaneous records of those tests constituted a denial of their access to court in the context of their applications for service disability pensions in violation of Article 6 of the Convention and an unjustifiable interference with their private life within the meaning of Article 8, for which alleged violations the applicants also claimed they had had no effective domestic remedy, contrary to Article 13.

8. The two applications were joined, and declared admissible on 28 November 1995 in so far as they related to the above-mentioned complaints. The admissibility decision records, *inter alia*, in the context of the question of exhaustion of domestic remedies, the Government's submission that the disclosure of the desired records should have been sought through an application to the President of the Pensions Appeal Tribunal ("PAT") pursuant to Rule 6 of the Pensions Appeal Tribunals (Scotland) Rules 1981 ("the 1981 Rules"). The Commission did not consider, even assuming that the President of the PAT would have made such a request, that it would have resulted in the production of documents which the Ministry of Defence had already confirmed could not be traced.

9. Subsequently the Government made submissions on the merits of the complaints under Articles 6 and 8 dealing with, *inter alia*, the operation and effectiveness of the procedure set down by Rule 6 of the 1981 Rules.

10. In their letter to the Commission dated 8 August 1996, the applicants submitted as follows:

"I wish to refer to further documents, recently obtained, which highlight the unavailability of Government records as possible sources of evidence for use by British Veterans in establishing pension claims for radiation linked illnesses and cancers resulting from participation in the UK's nuclear tests programme.

In 1993, for example, Mr Mike Doyle (a Christmas Island veteran claiming a service pension for radiation linked larynx and skin cancer) was informed by the Chairman of the [PAT] that he could request the President of the [PAT] to assist him under Rule 6 of the [1981 Rules] to obtain disclosure of Government held documents which might support his pension claim.

A list of Government held documents was accordingly compiled and sent to the [office of the President of the PAT]. After a considerable delay during which the Ministry of Defence denied receiving the President's request for documents, a reply was given in May 1995..."

The applicants provided a copy of that reply of the Ministry of Defence, a letter dated 4 May 1995, to the PAT, which indicated that certain of the files would be released, one would not be released and one had been temporarily lost. The applicants' letter of 8 August 1996 to the Commission went on to explain that one file subsequently released was later withdrawn and "[was] not available". A second file which was subsequently released lacked a number of documents which had been retained for security reasons as a result of which "no significant or meaningful information could be obtained to support Mr Doyle's pension claim for radiation induced cancer". The applicants also pointed out that "during the process of obtaining" the above-mentioned reply, the Ministry of Defence indicated that at least fourteen files on the nuclear tests were still closed and preserved for national security reasons. However, the Under-Secretary of State for Defence had, according to the applicants, admitted in 1994 that five of those

fourteen files had been destroyed and five could not be traced. The applicants concluded, in this letter to the Commission, that:

“It is clear from the above that the provisions of Rule 6 of the [1981 Rules] have been of no assistance to Veterans attempting to obtain documentary evidence (for pension claim purposes) of the hazardous radiation environment which the UK exposed them to as young men...”

By letter to the Commission dated 12 August 1996, the applicants also submitted a copy of the above-mentioned letter from the Parliamentary Under-Secretary of State for Defence dated 23 May 1994.

11. The Commission's report of 26 November 1996 (former Article 31 of the Convention) referred to the letters of 23 May 1994 and of 4 May 1995 (see paragraphs 70 and 73 of the report). Having found, in the context of Article 6 § 1, that the applicants had a strong and legitimate interest in obtaining access to the relevant records and that the public records system was, for all practical purposes, inaccessible to the applicants, the Commission went on to examine the two avenues suggested by the Government for obtaining access to the relevant records. Having discounted civil proceedings for compensation, the Commission also found the option of an application under Rule 6 of the 1981 Rules not to be feasible, commenting as follows:

“116. ... [T]he Commission notes Rule 6 of the 1981 Rules which deals with access to official documents and information in the context of pensions proceedings. However, where documents are covered by national security, the Secretary of State can refuse to produce such documents and the applicants have provided evidence that requests by the President of the PAT for records in relation to the Christmas Island detonations are refused on the grounds of national security. Furthermore, on receipt of such a refusal from the Secretary of State, the PAT must decide if the absence of such records would prejudice the claimant's case – if not, the PAT has no choice but to continue the examination of the claimant's case without the records and, if so, the PAT must adjourn its consideration of the case for an indefinite period namely, until the national security factor is no longer an issue. ...”

The Commission therefore expressed the unanimous opinion that there had been a violation of Article 6 § 1 of the Convention. By twenty-three votes to three it also found a violation of Article 8, the Commission relying, in this latter context, on the reasoning in paragraph 116 of its report. It also unanimously concluded that it was not necessary to consider the complaint made under Article 13 of the Convention.

II. THE SUBMISSIONS TO THE FORMER COURT

12. The case was referred to the Court by the Commission on 22 January 1997.

13. The Government's memorial to the Court dated 2 October 1997 outlined in detail the procedure they submitted must be followed under Rule 6 of the 1981 Rules. Annex 30 to the Government's memorial

contained, *inter alia*, the two copy letters (of 23 May 1994 and 4 May 1995) which had been submitted by the applicants to the Commission in August 1996, together with a copy of a letter dated 7 April 1995 from the PAT in relation to Mr Doyle's Rule 6 application, to which the letter of 4 May 1995 responded. The Government pointed out that no determination had been made by the PAT that certain of the files requested by Mr Doyle were relevant to his appeal or contained records relevant to his case, and that no direction to produce certain documents had been made by the President of the PAT in Mr Doyle's case, both of which are required steps under Rule 6 of the 1981 Rules. They therefore submitted that the applicants' failure to make an application under Rule 6 of the 1981 Rules constituted a failure to exhaust domestic remedies or, in the alternative, undermined the merits of their complaints about non-disclosure of records upon which their complaints were based.

14. A hearing took place in Strasbourg on 26 November 1997.

15. According to the verbatim record of the oral submissions to the Court (Cour (98) 44), the applicants referred to the Government's written submissions to the Court on Rule 6 of the 1981 Rules, pointing out:

“The question now arises, if you go before the [PAT] and there are classified records which you might want to rely upon, is there a way in which you can obtain them? The Government says that there is a way you can obtain them. Looking at Rule 6 of the [1981 Rules] you can ask the President of the [PAT] to get you these documents. All that has to be done is first to specify which documents you are looking for, then secondly you must be able to tell the [PAT] which Ministry in the Government holds these documents and the third thing you have to show the [PAT] is that you have to know what the contents are, so you can convince the President that these documents will be relevant to your case. If you happen to be a Government Minister you might just be able to fulfil all three of those conditions, but there is certainly no way in which an average serviceman could ever in this world possibly hope to fulfil those conditions.”

16. As to the question whether the applicants had been denied access to any relevant documents which existed, the Government argued that the Commission's conclusions on Rule 6 of the 1981 Rules were wrong, pointing out:

“The relevant question is ... this: what would have happened if the [PAT] had been invited to direct production under Rule 6 of the [1981 Rules]. That Rule ... empowered the [PAT] to direct the production of any document or part of a document, whether or not it was already in the public domain... The Rule 6 procedure was not invoked by the applicants, for reasons which have never been adequately explained. Our submission is that it should have been.”

Turning to Mr Doyle's appeal to the PAT and the letter of 4 May 1995 submitted by the applicants in August 1996, the Government submitted:

“Mr Doyle's case likewise provides no support for any such conclusion. No Rule 6 direction was given in that case by the [PAT]. There is nothing to suggest that the five files in question in that case, and referred to in the Commission's report, contained the radiation level records, or anything like them. On the contrary, it seems clear that they

did not. However, the important point is this. The exchange of letters between the [PAT] and the Ministry of Defence at the end of Annex 30 to our memorial shows that all the files that could be found were reviewed by the [Ministry of Defence] following the request from the [PAT]. Only one file was withheld on national security grounds. The reasons for that withholding were clearly and expressly set out... Thus far from supporting the assertion that radiation level records would not have been produced, those letters in the Doyle case ... are an illustration in practice of the point I made earlier about classification and public availability not being the relevant issue; and that issue rather being the likely response following a review of documents or categories of documents to a request for information by the [PAT] under Rule 6.”

In their rebuttal, the Government later added:

“... That is an allegation that in some way Rule 6 faced applicants with a 'Catch 22' situation: they cannot get their documents unless they can prove their case and they cannot prove their case without getting the documents. That is ... not right. The words of Rule 6 set out the test... What an applicant has to do is to persuade the President on the particular facts of the case that the category of documents which he seeks – and there would have been no difficulty in describing the documents in this case – is 'likely to be relevant to any issue to be determined on the appeal'...”

To take but one example, supposing it had been [one of the applicants. The applicants' representative] says: 'Well, how would he have done it? He could not specify the document. He could not specify the number of the file.' He does not need to. 'He could not specify the Ministry.' He does not need to under Rule 6. 'He could not say what the contents were.' He does not need to under Rule 6. All he needed to do was to go to [the applicant's] statement of case. He could point to the statement in that statement of case that says '[the applicant's] radiation exposure from the United Kingdom nuclear tests was zero' and say: 'Right. I do not agree with that. There is plainly an issue. There is enough there to establish an issue. Produce the documents. They must exist.' Our submission is that he should have asked the question and [that he] failed to do so for no adequate reason...

If [the PAT] is persuaded that a particular document or a category of documents is likely to be relevant – the words in Rule 6 – it makes a Rule 6 direction. Then, whether or not the document is in the public domain and/or classified, it will be reviewed and a decision will be taken on whether or not it should be withheld, whatever its classification, on grounds of national security. I have given you my reasons on why there would be no national security objection to producing these records.”

III. THE ORIGINAL JUDGMENT OF THE COURT

17. The Court gave judgment on 9 June 1998. The Court's judgment recorded the Government's submissions as regards Rule 6 of the 1981 Rules as follows:

“81. [The Government] submitted that Article 6 § 1 did not include any general right of access to information held by public authorities or any State duty to make publicly available all documents which might be relevant to any future civil proceedings which might conceivably be brought. Instead, that provision obliged the

State to make available appropriate procedures for ensuring that civil rights could be determined fairly.

Such a procedure was provided by Rule 6 of the [1981 Rules]... Under this provision, it would not have been necessary for the applicants to have cited the title or file number of the document required. It would, instead, have been sufficient for each of them to have asked for the production of unspecified documents connected, for example, to the MOD's assertion to the DSS that the applicant had been exposed to zero radiation. There would have been no security objection to the production of radiation levels records. Since neither of the applicants had chosen to take advantage of this procedure, it could not be said that they had been denied effective access to court by reason of the non-disclosure of documents.

82. In any case, the Government disputed that certain of the documents about the non-disclosure of which the applicants complained existed, and that any of these documents would have assisted the applicants in their claims before the PAT. Thus, they maintained that the Statements of Case provided [by the Ministry of Defence] to the PAT contained full transcripts of all the military medical records then in existence. ...”

18. The Court also outlined the Commission's conclusions on the applicants' case as follows:

“83. ... [The Commission] did, however, find that contemporaneous records of environmental radiation on Christmas Island had been created and not yet released into the public domain for reasons of national security. Without having had the opportunity to examine these records ..., the Commission formed the view that the applicants had a strong and legitimate interest in obtaining access to them, *inter alia*, for the purposes of their pension claims. Having regard to features of the public records system in the United Kingdom, which would have made it difficult for the applicants to trace the documents concerned, and the power of Secretaries of State to refuse on national security grounds to produce material requested under Rule 6 of the [1981] Rules, the Commission concluded that the applicants had had no feasible means of obtaining the records. In these circumstances, their access to the PAT was more theoretical than real and there had been a violation of Article 6 § 1.”

19. In concluding by six votes to three that there had been no violation of Article 6 § 1 of the Convention, the Court found as follows:

“86. The Court considers that, if it were the case that the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in establishing before the PAT that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6 § 1.

87. According to the applicants, the documents in question were the portions of their military medical records showing that they had suffered from and been treated for radiation-related conditions shortly after the test detonations, and other records, such as those of the health physics controller, from which it would have been possible to assess the degree of their personal exposure to radiation...

88. With regard to the former category, the Court, like the Commission, is not satisfied that, even if it could be concluded from the applicants' submissions that

medical records were created in respect of treatments administered to them for health complaints sustained as a result of the test detonations, these records were still in existence at the date of the United Kingdom's Articles 25 and 46 declarations...

As far as documents showing the extent of each applicant's exposure to radiation are concerned, it is clear that no personal records existed, since no individual monitoring of servicemen such as the applicants took place during the tests. The applicants have accepted that the records of environmental radiation on Christmas Island would not have assisted them in their claims... The Court notes the applicants' assertion that other, relevant, records must have been produced at the time of the tests and are still being retained by the State, but it observes that this assertion has not been substantiated and is thus no more than speculation.

89. Moreover, even if could be established that, at the times of the applicants' appeals, there was in the possession of the State material relevant to the issues before the PAT, the Court observes that, under Rule 6 of the [1981] Rules, it was open to the applicants to apply to the President of the PAT for a direction requesting the disclosure by the State of any relevant document... The Government have asserted that in invoking this procedure it would not have been necessary for the applicants to identify any specific document required, but only to request in general terms, for example, documentary evidence relating to the MOD's claims that each of them had been exposed to zero radiation. Furthermore, it is the Government's submission that, had the President of the PAT made a Rule 6 direction for disclosure of radiation levels records, there would have been no security reason for withholding such records under Rule 6(2)(b)...

There is no evidence before the Court to cause it to doubt these assertions, particularly in view of the fact that neither of the applicants, for reasons which have not been explained, attempted to make use of the Rule 6 procedure.

90. The Court considers that, in these circumstances, where a procedure was provided for the disclosure of documents which the applicants failed to utilise, it cannot be said that the State prevented the applicants from gaining access to, or falsely denied the existence of, any relevant evidence, or that the applicants were thereby denied effective access to or a fair hearing before the PAT."

20. In concluding by five votes to four that there had been no violation of Article 8 of the Convention, the Court found as follows:

"101. ... given the applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court considers that a positive obligation under Article 8 arose. Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

102. As regards compliance with the above positive obligation, the Court recalls its findings in relation to the complaint under Article 6 § 1, that Rule 6 of the [1981] Rules provided a procedure which would have enabled the applicants to have requested documents relating to the MOD's assertion that they had not been dangerously exposed to radiation, and that there was no evidence before it to suggest

that this procedure would not have been effective in securing disclosure of the documents sought (see paragraph 89 above). However, neither of the applicants chose to avail themselves of this procedure or, according to the evidence presented to the Court, to request from the competent authorities at any other time the production of the documents in question.

For these reasons the present case is different from that of Gaskin (cited ... above, p. 9, § 14), where the applicant had made an application to the High Court for discovery of the records to which he sought access.

103. The Court considers that, in providing the above Rule 6 procedure, the State has fulfilled its positive obligation under Article 8 in relation to these applicants. It follows that there has been no violation of this provision.”

IV. THE APPLICANTS' REQUEST TO THE COMMISSION

21. By letters dated 11 July, 5 August and 28 August 1998 to the Commission, the applicants requested the revision of the original judgment of the Court pursuant to Rule 58 of former Rules of Court A. The applicants took issue with the assertions made by the Government in their memorial of October 1997 and during the hearing of November 1997 about the operation and effectiveness of Rule 6 of the 1981 Rules. They submitted documents which they claimed to have obtained after the delivery of the original judgment and which undermined those submissions of the Government and, consequently, the Court's judgment.

22. The documents submitted by the applicants comprised seventeen letters dated between 19 May 1993 and 15 June 1995 which had been exchanged mainly between Mr Doyle's representative, Mr Reid, and the PAT and between the PAT and the Ministry of Defence in relation to Mr Doyle's application to the President of the PAT pursuant to Rule 6 of the 1981 Rules. Two of these letters had been submitted already to the Commission by the applicants in August 1996 (see paragraph 10 above and paragraphs 70 and 73 of the Commission's report) but the letter of 7 April 1995 (see paragraph 13 above), which had been submitted by the Government to the Court with its memorial of October 1997, was not included in this series of correspondence. The applicants also submitted a statement of Mr Reid dated 25 August 1998 which described, by reference to the correspondence submitted, the progress of Mr Doyle's Rule 6 application to the PAT and the circumstances in which he came to contact the applicants in 1996 and 1998.

V. THE COMMISSION'S REQUEST FOR REVISION

23. On 14 September 1998 the Commission decided that the conditions for submitting a request for the revision of the Court's original judgment

under Rule 58 of former Rules of Court A were satisfied. By letter dated 15 September 1998, the Secretary to the Commission submitted the revision request to the Court, the Commission's reasons being follows:

“... The Commission has had regard, in particular, to the statement of Mr Reid attaching a series of correspondence which related to an application of Mr Doyle (who was represented by Mr Reid) for a disability pension and which outlines Mr Doyle's application under Rule 6 of the [1981 Rules].

Apart from the letters dated 23 May 1994 and 4 May 1995 (see paragraphs 70 and 73 of the Commission's report), this correspondence did not come to the Commission's attention at any point during the proceedings leading up to the Court's judgment. The written and oral submissions of the Government to the Court as regards those two letters previously submitted are noted together with the evidence of Mr Reid as to his illness in 1997 and 1998. Accordingly, the Commission considers the correspondence now submitted as 'new facts'. The Commission also accepts that these new facts, relating as they do to individuals not party to the Convention proceedings, were unknown to the applicants at the time of the proceedings before the Convention institutions. It also accepts that it was not reasonable to expect the applicants to attempt to research the detailed experience of other individuals with the [PAT] prior to the Government's making the submissions recorded at para. 81 of the judgment and that it was not possible for them to introduce these new facts at an earlier date.

As to the merits of the revision request, the Commission is of the view that the series of correspondence now submitted (and, in particular, the letter of 1 December 1994) casts doubt on the acceptance of the Government's assertion to the effect that Rule 6 did not require the identification of any specific document but merely a request in 'general terms' for 'documentary evidence', recorded at para. 89 of the Court's judgment.

The Commission notes that the acceptance of the Government's assertion in this respect was relied upon by the Court in the context of the applicants' complaints under Articles 6 and 8 of the Convention. The Commission has had particular regard to the Court's conclusion in paras. 101-102, as regards Article 8, as to the nature of the positive obligation identified and as to compliance with that obligation by way of the procedure provided for under Rule 6 of the 1981 Rules. In so concluding, the Commission observes that the Court relied directly on its conclusions as to the Rule 6 procedure in para. 89 of its judgment.

In such circumstances, the Commission considers that the new facts invoked in support of the applicants' request for revision might have had a decisive influence on the Court's judgment had they been known to the Court at the time...”

THE LAW

24. Rule 80 § 1 of the Rules of Court reads as follows:

“A party 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 to the Court and could not reasonably have been known to that party, request the Court,

within a period of six months after that party acquired knowledge of the fact, to revise that judgment.”

25. The applicants contended that the correspondence, which related to Mr Doyle's unsuccessful application to the President of the PAT under Rule 6 of the 1981 Rules and which was submitted with the revision request, constituted facts which were discovered by them, and which could not reasonably have been known to them prior to the delivery of the original judgment of 9 June 1998. They accepted that two letters in this series of correspondence had been submitted by them to the Commission in August 1996 following their contact with Mr Doyle's representative, Mr Reid.

As to how they came to submit the balance of this correspondence after the delivery of the original judgment, the applicants claimed that the Government's written and oral submissions of October and November 1997 to the Court raised new and unforeseeable issues in relation to Rule 6 of the 1981 Rules. They had attempted to contact Mr Reid on receipt of the written submissions of the Government, but Mr Reid was taken ill in 1997, had surgery in November 1997 and was too incapacitated to afford any assistance to them. It was only when Mr Reid returned from convalescence abroad in June 1998 that he obtained a copy of the original judgment, contacted the first applicant and furnished the balance of the correspondence which formed the basis for the request for revision to the Commission.

26. The applicants also contended that the correspondence would have had a decisive influence on the original judgment of the Court. Information which could be gleaned from the correspondence as to the operation and effectiveness of Rule 6 of the 1981 Rules undermined the Government's written and oral submissions to the Court in those respects. They submitted that the Court's reliance on these submissions of the Government was central to its conclusion on the operation and effectiveness of the Rule 6 procedure, which conclusion was, in turn, a key element in the Court's findings that there had been no violation of Articles 6 or 8 of the Convention.

27. The Government argued that the Commission's request for revision was unfounded. They questioned the applicants' claim that they had had no knowledge prior to the delivery of the original judgment of the correspondence submitted with their revision request, referring, *inter alia*, to the applicants' contact with Mr Doyle's representative, Mr Reid, in 1996. In any event, according to the Government, this correspondence could not, for detailed reasons outlined by them in their observations, have had a decisive influence on the original judgment.

28. The Commission considered that the applicants had submitted facts of which neither they, the Commission nor the Court were aware, and of which the applicants could not reasonably have been aware at the time of the proceedings before the Convention institutions. It was of the view,

moreover, that these facts might have had a decisive influence on the original judgment had they been known to the Court at the relevant time.

29. The Court observes that the revision request relates to a judgment of the former Court and that it was submitted to that Court under Rule 58 of former Rules of Court A. However, pursuant to Rule 102 of the present Rules of Court, which have been in force since 1 November 1998, such a request falls to be considered by this Court in accordance with Rule 80.

Although Rule 80 introduces a different procedure for the examination of revision requests compared to Rule 58 of former Rules of Court A, the Court considers that the substantive requirements set out in both Rules are the same notwithstanding the more specific wording in Rule 80 § 1, in particular, the phrase “could not reasonably have been known to that party”. The express mention of this objective element in Rule 80 § 1 accords, in the Court's view, with the meaning likely to have been given to the word “unknown” in Rule 58 of former Rules of Court A. Indeed this appears to conform to the Commission's reading of the Rule as indicated in the revision request (see the second paragraph of the request quoted in paragraph 23 above).

30. The Court notes the embodiment of the principle of the finality of judgments in the present Article 44 of the Convention and recalls that, in so far as it calls into question the final character of judgments of the Court, the possibility of revision is considered to be an exceptional procedure. Requests for revision of judgments are therefore to be subjected to strict scrutiny (see the *Pardo v. France* judgment of 10 July 1996 (*revision – admissibility*), *Reports of Judgments and Decisions* 1996-III, pp. 869-70, § 21, and the *Gustafsson v. Sweden* judgment of 30 July 1998 (*revision – merits*), *Reports* 1998-V, p. 2095, § 25).

31. It is not disputed that the series of correspondence submitted by the applicants with the revision request can be regarded as “facts”. It is also noted that, apart from two letters previously submitted by the applicants to the Commission in August 1996 (see paragraph 10 above), this correspondence was not previously submitted to the Commission or to the Court. It is noted, in this respect, that the letter of 7 April 1995 submitted by the Government to the former Court with its memorial (see paragraph 13 above) was not included in the series of correspondence submitted with the revision request. In addition, given the submissions of Mr Reid in his statement of 25 August 1998, the Court is prepared to accept that the revision request was made to the former Court within six months of the applicants' actually obtaining copies of the correspondence from Mr Reid.

32. It nevertheless remains to be decided whether the facts were “unknown” or “could not reasonably have been known” to the applicants, within the meaning of the above-mentioned Rule 80, prior to the delivery of the original judgment.

33. In this respect, the Court notes that the Government raised the failure by the applicants to make an application under Rule 6 of the 1981 Rules in the context of both the admissibility and merits of their application to the Commission (see paragraphs 8 and 9 above). The applicants accept that they were in contact with Mr Reid in August 1996, who informed them that he had unsuccessfully made a Rule 6 application on Mr Doyle's behalf and gave them copies of the letters dated 23 May 1994 and 4 May 1995. Accordingly, in August 1996 the applicants wrote to the Commission submitting that Rule 6 of the 1981 Rules was an ineffective method for obtaining test-related records held by the Government, citing and describing Mr Doyle's unsuccessful Rule 6 application. They submitted the two copy letters in question indicating that both letters related to Mr Doyle's Rule 6 application (see paragraph 10 above).

Both of these copy letters form part of the series of correspondence upon which the revision request is based. It is immediately clear from the text of these two copy letters that they were written in response to other letters and that there were, therefore, more than two letters created in relation to Mr Doyle's Rule 6 application.

34. Moreover, it is evident from the text of the applicants' letter of 8 August 1996 to the Commission that Mr Reid gave the applicants further and detailed information about developments which took place between 1993 and August 1996 in Mr Doyle's Rule 6 application (see paragraph 10 above).

In particular, the applicants were informed by Mr Reid that Mr Doyle was claiming a service disability pension for larynx and skin cancer; that Mr Doyle was made aware in 1993 of the possibility of using Rule 6; that a list of "Government held" documents was completed for that purpose; that that list was then sent in the context of a Rule 6 application to the President of the PAT; that there had been considerable delay in the progress of that application; that the Ministry of Defence had denied receiving the request for the documents by the President of the PAT; and that the eventual reply of the Ministry of Defence was contained in the copy letter of 4 May 1995. The applicants were also informed of the outcome of the examination of files which were released by the Government subsequent to the letter from the Ministry of Defence to the PAT of 4 May 1995, the applicants pointing out that one file subsequently released was then withdrawn and "[was] not available" and that certain documents were missing from a released file as a result of which "no significant or meaningful information could be obtained to support Mr Doyle's pension claim for radiation induced cancer" (see paragraph 10 above).

35. Accordingly, the Court is satisfied that the applicants had sufficiently detailed knowledge in August 1996, from information and copy letters provided to them at that stage, about the developments in Mr Doyle's Rule 6 application which had taken place during the period between 1993

and August 1996, for it to have been clear to them that a significant amount of correspondence and documentation had been created prior to that date in relation to that Rule 6 application. In fact, all the correspondence submitted with the revision request already existed in August 1996 (see paragraph 22 above).

36. In such circumstances, the Court concludes that, while copies of the correspondence upon which the revision request was based may not have been actually obtained by the applicants until after the delivery of the original judgment on 9 June 1998, they manifestly were on notice in August 1996 of the existence of the correspondence.

Consequently, whether or not the correspondence “might by its nature have a decisive influence” on the original judgment, the Court finds it established that these facts “could reasonably have been known” to the applicants prior to the delivery of the original judgment. The request for revision is, accordingly, rejected.

FOR THESE REASONS, THE COURT

Dismisses by five votes to two the request for revision.

Done in English, and notified in writing on 28 January 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Casadevall joined by Mr Maruste is annexed to this judgment.

E.P.
M.O'B.

DISSENTING OPINION OF JUDGE CASADEVALL
JOINED BY JUDGE MARUSTE

(*Translation*)

1. Without expressing an opinion on the merits of the request for revision, I consider that it should not have been refused.

2. I have difficulties in accepting the majority's reasoning as regards the applicability of Rule 80 of the new Rules of Court (see paragraph 29 of the judgment). In my opinion, former Rule 58 applied to this request, for the following two reasons.

(a) Although the principle of *tempus regit actus* normally applies where rules of procedure are concerned, allowance must always be made for exceptions on a case-by-case basis and, in particular, for transitional situations as in the instant case, the more so where the application of a procedural rule may jeopardise the exercise of a substantive right.

(b) The request for revision was submitted to the Court by the Commission, and, for obvious reasons, could only be based on the former Rules. Former Rule 58 clearly refers to the discovery of a fact which, when the judgment was delivered, “was unknown both to the Court and to [the] Party or [as in this instance] the Commission”, whereas the new wording of Rule 80, for the same obvious reasons, no longer refers to the Commission but to the “parties” and to a fact which, when a judgment was delivered, “could not reasonably have been known to [the requesting] party” (currently the applicant or respondent).

It follows that in the present judgment the Court dismissed the Commission's request for revision on the basis not of a knowledge of the facts by the latter but of the idea that the applicants could reasonably have known them – a quite different matter.

3. While recognising the exceptional nature of a request for revision and the caution that must be exercised before accepting one, I am also of the opinion that, since this was the first such application before the new Court, and in view precisely of the exceptional nature of such a procedure, the Chamber, if only by analogy with the possibility introduced by Protocol No. 11 of referring a case to the Grand Chamber, should have relinquished jurisdiction in favour of the Grand Chamber. Although the Rules are not explicit on this point, I consider that Article 30 of the Convention indisputably allows such a step.