



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

FOURTH SECTION

CASE OF LOPES GOMES DA SILVA v. PORTUGAL

(Application no. 37698/97)

JUDGMENT

STRASBOURG

28 September 2000

FINAL

28/12/2000

In the case of Lopes Gomes da Silva v. Portugal,

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

Mr G. RESS, *President*,

Mr A. PASTOR RIDRUEJO,

Mr L. CAFLISCH,

Mr J. MAKARCZYK,

Mr I. CABRAL BARRETO,

Mrs N. VAJIĆ,

Mr M. PELLONPÄÄ, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 30 May and 7 September 2000,

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

PROCEDURE

1. The case originated in an application (no. 37698/97) against the Portuguese Republic lodged with the European Commission of Human Rights ("the Commission") on 15 July 1997 under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Mr Vicente Jorge Lopes Gomes da Silva ("the applicant").

2. The applicant alleged, in particular, that his conviction had infringed his right to freedom of expression.

3. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

5. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 13 January 2000, the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 May 2000.

There appeared before the Court:

(a) *for the Government*

Mr A. HENRIQUES GASPAR, Deputy Attorney-General,	<i>Agent,</i>
Mr J. F. DE FARIA COSTA, Professor at the Faculty of Law, University of Coimbra,	<i>Adviser;</i>

(b) *for the applicant*

Mr F. TEIXEIRA DA MOTA, of the Lisbon Bar,	<i>Counsel.</i>
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The Court heard addresses by them.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Portuguese national. He was born in 1945 and lives in Lisbon. He is a journalist and at the material time was the manager of a large-circulation daily called *Público*.

9. An article appeared in the 10 June 1993 issue of *Público* stating that the Popular Party (Partido Popular - CDS/PP) had asked Mr Silva Resende, a lawyer and journalist, to stand in the Lisbon City Council elections. That information had also been published by the Portuguese press agency LUSA.

10. On the same page the applicant published an editorial containing the following passages:

“... [the Chairman of the CDS/PP] has shown himself capable of exceeding even the most vulgar of caricatures ... This is clear from the CDS leadership's unthinkable choice of candidate to head the party's list in the Lisbon City Council elections. One need only read the extracts from recent articles by Mr Silva Resende in the *Jornal do Dia* which we publish in this issue to form an idea of the character being backed by the new Popular Party in the country's main city council elections. As ludicrous and grotesque as this will appear, it is nevertheless true. Not in the oldest or most delapidated ruins of Salazarism could an ideologically more grotesque and more buffoonish [*boçal*] candidate have been dug out: such an incredible mixture of crude reactionaryism [*reaccionarismo alarve*], fascist bigotry and coarse anti-Semitism. Any leading figure of the Salazar regime [*Estado Novo*] or any mayor of Lisbon from the former regime would come across as singularly progressive compared to this brilliant find ... It would all be merely an inconsequential anecdote or a surreal political oversight if it were not revelatory of a hidden facet which the CDS is trying to disguise behind the diaphanous veil of the modern Right. Incapable of finding a credible candidate for the Lisbon City Council, which is already symptomatic of the fragility of a party desirous of presenting itself as a possible party of government, the leadership of the CDS has resorted to a character who represents the most complacent, stale and ridiculous aspects of the Portuguese right-wing. A character who seems

never to have really existed and that no humorist of however dubious taste would have been capable of imagining as the last of the Salazarian *abencérages* [*salazarenta*] in the 1990s. We presume that the young leader [of the CDS/PP] believes he has found, in desperation, someone capable of attracting at least football fans, which is the domain in which Mr Silva Resende has forged a remarkable career. It would appear that the majority of young Turks among the leadership of the CDS have contented themselves with reading Mr Silva Resende's football columns while remaining unaware of the rare pearls of his political beliefs...”.

11. In the same issue of *Público* numerous extracts of recent articles by Mr Resende were published on the same page as the applicant's editorial. The following are a selection of those extracts:

“The bald-headed Jew [Mr L. Fabius] who spends his life, during his public appearances, militating in favour of secularism and the Republic (the two pillars of religious and patriotic impiety are sufficient in themselves to enable any reader of average intelligence to decode his real intentions) concluded after the elections that they [the socialists] were defeated because of their political practice and not because of their ideals.” (*Jornal do Dia*, 6 April 1993)

“The Clintons' past, and above all the style of their campaign for the Whitehouse, were very revelatory of a fresh conspiracy of the Left at its most deviant: war on the property of others, the cult of agnosticism, moral relativism, social hypocrisy, the inhuman secularism of life. To obtain an idea of the forces mobilised to catapult the Clintons to power, one need only mention that the Jewish lobby paid 60% of the electoral expenses whereas it represents only 5% of the electorate.” (*Jornal do Dia*, 16 April 1993)

[on the 25 April 1974 revolution]

“... Americans and Russians reached an agreement to inflict a blow on Portugal in Lisbon. We were betrayed by the United States, we were betrayed by NATO, which has placed a naval fleet at the gates of Lisbon in case their blow should fail.” (*Jornal do Dia*, 21 May 1993)

“It is no coincidence if politicians everywhere are involved in serious corruption. This moral chaos, which threatens to suffocate the world and leads to generalised perversity and attracts divine punishment, began several years ago when the machinery of ideological poisoning and agents of the propagation of error installed themselves comfortably everywhere, when they perverted youth, converting them to idols; when they tore women from the sanctuary of the home; when they flooded the world with their exhibition of vice; and, lastly, when they infiltrated political parties, placing them at the service of impiety.” (*Jornal do Dia*, 25 May 1993)

“The Masonic Lodge and the Jewish Synagogue, even when not imposing their initiation rights and practices, are always flirting with the owners of power. Sometimes their members even succeed in being appointed to public posts. Le Pen's National Front movement is the only exception to this more or less subtle penetration. “Lepenism” is labelled a racist movement and is persecuted by the most unimaginable means, ranging from assault in broad daylight, sabotaging of meetings and systematic slander to the adoption of iniquitous laws to prevent it from penetrating the social fabric and above all climbing up the steps leading to power. The National Front is certainly not above a number of political sins, but it is the only political force which openly fights for the restoration of a France which proclaims the values of Christian

civilisation opposed to Leftism, which, since 1789, has been plundering national energies and has turned the national flag into a symbol of heresy.” (*Jornal do Dia*, 27 May 1993)

“It pains me to have to broach subjects which exude Satan's breath. However, the city of mankind is made up of all sorts and the Devil is undeniably exerting his influence throughout this world devastated by sin. ... Ten years ago a survey of attitudes to sin was carried out in France. The vast majority of those questioned replied broadly that sin did not exist, but was a taboo invented by medieval obscurantism. The huge setback represented by that response gives us an idea of how decadent we have become and of the abyss into which contemporary society is falling.” (*Jornal do Dia*, 5 June 1993)

“Most people are unaware that Hitler and Mussolini were socialists and that it was in that capacity that they won power in their respective countries using all the tricks and violence supplied them by the canons of the Left.” (*Jornal do Dia*, 8 June 1993)

12. Following publication of the editorial in question, Mr Resende lodged a criminal complaint against the applicant with the Lisbon public prosecutor's department and sought leave to intervene in the proceedings as an assistant of the prosecuting authority (*assistente*). The applicant was subsequently charged with libel through the medium of the press (*abuso de liberdade de imprensa*).

13. In a judgment of 15 May 1995 the applicant was acquitted by the Lisbon Criminal Court. The court held that the expressions used by the applicant could indeed be construed as insults, but that there had not been an intention to defame. In the court's view, the expressions in question should be construed as criticism of Mr Resende's political beliefs and not of his reputation or his conduct. The court added that account also had to be taken of the extracts from articles by Mr Resende and the incisive manner in which he had referred to a number of public figures, even going so far as to attack their physical features.

14. On appeal by Mr Resende and the public prosecutor, the Lisbon Court of Appeal (*Tribunal da Relação*) set aside the decision in a judgment of 29 November 1995. The court weighed up the conflicting interests and considered that certain expressions used by the applicant, such as “grotesque”, “buffoonish” and “coarse”, were plain insults which exceeded the limits of freedom of expression. In the Court of Appeal's opinion, the applicant had recklessly committed the offence of which he had been accused. The applicant was accordingly fined 150,000 Portuguese escudos (PTE) and ordered to pay PTE 250,000 in damages to Mr Resende and, lastly, to pay costs amounting to PTE 80,000.

15. Relying on, *inter alia*, Article 10 of the Convention, the applicant lodged a constitutional appeal with the Constitutional Court (*Tribunal Constitucional*). He submitted that the Court of Appeal's interpretation of the relevant provisions of the Criminal Code and of the Press Act infringed the Constitution.

16. The Constitutional Court dismissed the appeal in a judgment of 5 February 1997 of which the applicant was notified on 10 February 1997. After stressing that both the Constitution and Article 10 of the Convention provided for certain limits on the exercise of freedom of expression, it held that the provisions referred to by the applicant, as construed and applied by the Court of Appeal, were not contrary to the Constitution.

II. RELEVANT DOMESTIC LAW

17. Articles 38 and 26 (as in force at the material time) of the Portuguese Constitution protect the freedom of the press and the right to respect for personal honour and reputation.

18. Article 164 of the Criminal Code at the material time provided:

“1. Anyone who, in addressing a third party, makes an accusation against another, even by merely casting suspicion, or expresses an opinion injuring that person's honour and reputation, or who reproduces such an accusation or opinion, shall be liable to a prison sentence of up to six months and a penalty of up to fifty day-fines.

2. The author of the statement shall not be punishable

(a) if the accusation is motivated by a legitimate public interest or other valid reason; and

(b) if he proves the truthfulness of such an accusation or has serious grounds for believing in good faith that it is true.

3. The defence of good faith shall not be available where the author has not complied with the duty, imposed by the circumstances of the case, to inform himself of the truthfulness of the accusation.

...”

19. Article 167 § 2 of the Criminal Code increased the penalties in question to a maximum of two years' imprisonment and 240 day-fines in respect of offences committed through the medium of the press.

20. Section 25(1) of the Press Act, in the version applicable at the material time (Legislative Decree no. 85-C/78 of 26 February 1978), provided:

“Acts or conduct capable of infringing a legal interest protected by the criminal law and committed through the publication of texts or images in the press shall be considered to be offences committed through the medium of the press.”

21. Section 25 (2) provided that those offences fell within the criminal law. It also provided that an accused who had no previous conviction for the same offence could be sentenced to a fine instead of a custodial sentence.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant complained that his conviction by the Portuguese courts had infringed his right to freedom of expression, guaranteed by Article 10 of the Convention, which provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

23. The parties did not dispute that the conviction in question amounted to an “interference” with the exercise of that freedom. They also both agreed that the interference was prescribed by law – Articles 164 and 167 of the Criminal Code and section 25 of the Press Act (see paragraphs 17-21 above) – and designed to protect “the reputation or [the] rights of others” within the meaning of Article 10 § 2 of the Convention.

The hearing before the Court concerned the issue whether the interference was “necessary in a democratic society” to achieve that aim.

A. The parties' submissions

1. The applicant

24. The applicant pointed out from the outset that, according to the case-law of the Convention institutions, the State's margin of appreciation in respect of the freedom of expression was not unlimited but went hand in hand with a European supervision. On the facts of this case the interference in question was manifestly disproportionate to the legitimate aim pursued.

In the applicant's submission, the article complained of had to be read in context. Its sole aim had been to decry the choice of candidate for election to a very important political position, namely mayor of the City of Lisbon. The applicant considered the choice of candidate reprehensible because, in his opinion, he stood for ideas which were contrary to those of a democratic and pluralistic society. The expressions criticised by the Lisbon Court of

Appeal had thus referred to Mr Resende's ideas and not Mr Resende himself.

25. The applicant admitted that he had been virulent and provocative in his article, but stressed that his approach was justified in view of the equally virulent nature of the political ideology advocated by the individual in question and of his style as a political commentator writing regularly in the press. He stated in that connection that he had taken pains to publish alongside his editorial extracts from articles signed by Mr Resende which were representative of the latter's ideology and written in terms which were equally or even more incisive than those used in his editorial.

26. The applicant therefore contended that his conviction had not met a pressing social need, but had constituted a clear form of intimidation of journalists by judicial means, which was incompatible with Article 10 of the Convention.

2. The Government

27. The Portuguese Government ("the Government") submitted that the applicant's conviction had, on the contrary, been necessary in a democratic society. They maintained that the protection of the right to respect for personal honour and reputation was also a duty of the State. The State had a choice of means by which to ensure the protection of that fundamental right, including by means of the criminal law.

28. The Government stressed that freedom of expression could be exercised vigorously or even virulently without going so far as to injure a person's honour or good reputation. The courts were entitled to punish excessive conduct by a penalty commensurate with the seriousness of that conduct. The Government pointed out in that connection that the penalty in question had been minimal.

29. The Government reiterated that the national courts had established that the expressions used by the applicant in his article could be construed as an attack on the plaintiff himself and not merely on his political ideas. The case in question therefore differed from the cases previously determined by the Court in which the issue had been value judgments about conduct and not about the individuals themselves. They stressed that the Court could not call into question the assessment of the facts made by the Portuguese courts, which had a clearer grasp of the national reality, without running the risk of adopting a fourth-instance approach which would be contrary to the letter and spirit of the Convention.

B. The Court's assessment

1. General principles

30. The Court reiterates the fundamental principles laid down by its case-law on Article 10:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, the *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

(ii) These principles are of particular importance with regard to the press. While it must not overstep the bounds set, *inter alia*, for "the protection of the reputation of others", its task is nevertheless to impart information and ideas on political issues and on other matters of general interest. As to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly (see, *inter alia*, the *Oberschlick v. Austria* (no. 2) judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, pp. 1274-75, § 29).

(iii) Determining whether the interference in question was "necessary in a democratic society" requires the Court to establish whether it corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In determining whether such a "need" exists and which measures should be adopted to meet it, the national authorities have a certain margin of appreciation. It is not, however, unlimited but goes hand in hand with a

European supervision exercised by the Court, which must give the final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Nilsen and Johnsen* cited above, § 43). It is not the Court's task in carrying out its scrutiny to substitute its own view for that of the relevant national authorities, but rather to monitor, under Article 10 and in the light of the whole case, the decisions delivered by the national courts by virtue of their power of appreciation (*ibid.*).

2. Application of the above principles to the instant case

31. In the instant case Mr Lopes Gomes da Silva was convicted of libel through the medium of the press on account of the expressions he had used in his editorial of 10 June 1993 to describe Mr Resende. Unlike the Lisbon Criminal Court, which had acquitted the applicant, the Lisbon Court of Appeal held, *inter alia*, that expressions such as “grotesque”, “buffoonish” and “coarse” were plain insults which exceeded the limits on freedom of expression. The Court of Appeal ruled that those expressions could not be construed to refer exclusively to Mr Resende's political views, but had also been aimed at him personally. The Constitutional Court, in turn, did not find any violation of constitutional principles in the manner in which the Court of Appeal had interpreted and applied the relevant provisions of the Criminal Code and the Press Act.

32. The Court is called upon to analyse the decisions of the Portuguese courts, in particular that of the Lisbon Court of Appeal, in the light of all the facts of the case, including the publication in question and the circumstances in which it was written.

First among those circumstances was the news published by the daily, of which the applicant was the manager, and also by a press agency, that the Popular Party had asked Mr Resende to stand in the Lisbon City Council elections.

In his editorial the applicant had reacted to that news by expressing his views on Mr Resende's political beliefs and ideology, and referring more generally to the political strategy of the Popular Party in choosing him as a candidate.

33. That sort of situation clearly involved a political debate on matters of general interest, an area in which, the Court reiterates, restrictions on the freedom of expression should be interpreted narrowly.

34. Admittedly, the applicant's article and, in particular, the expressions used could be considered to be polemical. They do not, however, convey a gratuitous personal attack because the author supports them with an objective explanation. The Court points out in that connection that, in this field, political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society. Accordingly, the applicant expressed an opinion

shaped by the political persuasions of Mr Resende, who is himself a regular commentator in the press. Were there no factual basis, such an opinion could, admittedly, appear excessive, but in the light of the established facts that is not so here. Lastly, it should be reiterated that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the *Prager and Oberschlick v. Austria* judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

35. The Court points out in that connection that the opinions expressed by Mr Resende and reproduced alongside the impugned editorial are themselves worded incisively, provocatively and at the very least polemically. It is not unreasonable to conclude that the style of the applicant's article was influenced by that of Mr Resende.

Furthermore, in printing alongside the editorial in question numerous extracts from recent articles by Mr Resende, the applicant, who was the manager of the daily *Público* at the time, acted in accordance with the rules governing the journalistic profession. Thus, while reacting to those articles, he allowed readers to form their own opinion by placing the editorial in question alongside the declarations of the person referred to in that editorial. The Court attaches great importance to that fact.

36. Contrary to the Government's affirmations, what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all (see the *Jersild* judgment cited above, pp. 25-26, § 35). The journalist's conviction was not therefore reasonably proportionate to the pursuit of the legitimate aim, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

37. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

39. Mr Lopes Gomes da Silva stated that he was not claiming any sum for non-pecuniary damage. He did, however, claim 480,000 Portuguese escudos (PTE) in damages for the sum he had been fined by the Portuguese courts, the damages he had paid to Mr Resende and the court costs.

40. The Government did not raise any objection to paying the sums claimed in the event of a violation of the Convention being found.

41. The Court considers it appropriate to award the applicant all the sums claimed, the finding of a violation in the present judgment constituting, moreover, just satisfaction for the non-pecuniary damage.

B. Costs and expenses

42. The applicant claimed PTE 258,297 in reimbursement of the travel and subsistence expenses incurred by counsel's appearance at the Strasbourg hearing. He also claimed an amount in counsel's fees, but left it to the discretion of the Court to determine the amount in question.

43. The Government also left the matter to the Court's discretion.

44. The Court considers it appropriate to reimburse all the costs claimed. In respect of the fees, it decides, on an equitable basis, to award the applicant PTE 1,500,000.

C. Default interest

45. According to the information available to the Court, the statutory rate of interest applicable in Portugal at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, PTE 480,000 (four hundred and eighty thousand Portuguese escudos) for pecuniary damage and PTE 1,758,297 (one million seven hundred and fifty-eight thousand two hundred and ninety-seven Portuguese escudos) for costs and expenses;
 - (b) that simple interest at an annual rate of 7% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;
3. *Holds* that the present judgment constitutes in itself just satisfaction for non-pecuniary damage.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 September 2000.

Vincent BERGER
Registrar

Georg RESS
President