



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

FORMER FOURTH SECTION

CASE OF MAGALHÃES PEREIRA v. PORTUGAL

(Application no. 44872/98)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

In the case of Magalhães Pereira 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 14 June 2001 and 30 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 44872/98) against the Portuguese Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Portuguese national, Mr Joaquim Magalhães Pereira (“the applicant”), on 3 April 1997.

2. The applicant alleged, in particular, that he had not had a remedy satisfying the conditions of Article 5 § 4 of the Convention, and complained, relying on Article 5 §§ 1 and 4, of inadequacies in his legal assistance and of the excessive length of the review of the lawfulness of his continued detention.

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

5. By a decision of 14 June 2001, following a hearing on admissibility and the merits (Rule 54 § 4), the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicant and the Portuguese Government (“the Government”) each filed written observations on the merits of the case (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Fourth Section.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 June 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr A. HENRIQUES GASPAR, Deputy Attorney-General, *Agent,*

(b) *for the applicant*

Mr J. PIRES DE LIMA, Lawyer, *Counsel.*

The Court heard addresses by them.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a Portuguese national, born in 1940. He was a lawyer and is currently detained in the Santa Cruz do Bispo secure psychiatric unit in Matosinhos (Portugal).

A. The applicant's detention

10. The applicant, who was suspected of fraud, was arrested on 1 March 1996 and placed in pre-trial detention.

11. During the proceedings against him the applicant was examined by a psychiatrist. In his report of 22 July 1996 the psychiatrist concluded that the applicant was suffering from residual schizophrenia and should be given long-term psychiatric treatment.

12. In a judgment of 11 November 1996 the Oporto Criminal Court held that, on account of his mentally disturbed state, the applicant was not criminally responsible (*inimputável*) and was dangerous. It accordingly ordered that he be detained for a maximum period of eight years.

13. On 4 December 1996 the applicant was transferred to the Santa Cruz do Bispo secure psychiatric unit.

14. In an order of 24 January 1997 a judge of the Oporto Criminal Court decided that, in accordance with the relevant legislation, the mandatory

periodic review of the applicant's detention should take place on 1 March 1998.

B. Review of the lawfulness of the continued detention

15. The applicant's file was transmitted to the Oporto Sentence-Supervision Court (*Tribunal de Execução das Penas*). On 19 February 1997 the judge of that court assigned a lawyer to represent the applicant, who had not chosen one himself. He also asked the staff of the Santo Cruz do Bispo secure unit to prepare an initial report on the applicant's condition.

16. In a letter of 19 March 1997 Dr M.S.C. informed the judge that the applicant was “clinically balanced”. He added that his behaviour “[was] adequate and he [could] be released on probation [*liberdade para prova*] if he agree[d] to accept psychiatric support outside and [took] his medication”.

17. In an order of 7 April 1997 the judge decided to await the expiry of the time-limits provided for in Article 504 of the Code of Criminal Procedure.

18. On 2 July 1997 the applicant personally lodged an application for release, relying on Dr M.S.C.'s favourable opinion. On 4 July 1997 the judge marked the file as “seen” (*visto*).

19. On 7 January 1998 the judge asked the Institute for Social Rehabilitation, in accordance with the relevant legislation, to submit its opinion on the applicant's social situation and asked the Oporto Institute of Forensic Medicine (“the IFM”) to carry out a medical examination.

20. The Institute for Social Rehabilitation submitted its report on 18 May 1998, concluding that the applicant's circumstances were such that he could be released on probation. A medical examination was carried out on 28 April 1998. The IFM filed a report also on 18 May 1998 concluding that the applicant remained a danger to society.

21. On 2 June 1998 the applicant personally lodged a further application for release, relying on, *inter alia*, Article 5 § 4 of the Convention.

22. On 1 July 1998 the applicant was examined by the judge. As the applicant's officially assigned lawyer was not present, the judge appointed an officer from the Santa Cruz do Bispo secure psychiatric unit as his defence counsel. The applicant stated, among other things, that he considered himself to have recovered and that the medicines which he was still taking were unnecessary.

23. On 9 July 1998 the applicant personally lodged a further application for release. On 14 and 24 July 1998 he filed pleadings criticising the IFM's medical report.

24. On 9 November 1998 the Prison Service asked the Sentence-Supervision Court for a copy of the latest decision relating to the periodic review of the applicant's detention. On 10 November 1998 the judge indicated that no decision had yet been taken.

25. The applicant absconded during prison leave between 1 and 3 April 1999. He was captured on 11 November 1999 when the police authorities found him at his family home.

26. In a decision of 20 January 2000 the Sentence-Supervision Court decided to keep the applicant in detention. The judge based his decision on the IFM's report of 18 May 1998 first, before stressing that it was clear that the applicant, who had absconded during prison leave, was not in a position to prove himself worthy of the trust that the prison system had placed in him. Lastly, the judge considered that, on account of the applicant's mentally disturbed state, the applications for release he had lodged personally did not have to be examined.

27. The applicant personally appealed against that decision to the Oporto Court of Appeal (*Tribunal da Relação*). However, in an order of 4 February 2000 the judge of the Sentence-Supervision Court decided not to examine his appeal, noting that the applicant had been admitted to a secure psychiatric unit and was represented by officially assigned counsel, and that the President of the Criminal Division of the Supreme Court had delivered a decision on 5 January 2000 in habeas corpus proceedings to the effect that no other request for habeas corpus submitted by the applicant himself would be examined on account of his mentally disturbed state.

28. On an unknown date the applicant personally appealed against that order to the Court of Appeal. However, the judge of the Sentence-Supervision Court made an order on 1 March 2000 stating that he would not examine the appeal and referring to the reasons stated in his order of 4 February 2000.

29. On 8 November 2000 the applicant lodged, through Mr Pires de Lima, an application with the Oporto Court of Appeal challenging the judge of the Sentence-Supervision Court dealing with his case. In a judgment of 7 January 2001, the Oporto Court of Appeal granted his application, a new judge being appointed.

30. On 29 January 2001 the public prosecutor requested the applicant's release since he presented no further danger. In a decision of 30 January 2001 the judge dismissed that request and decided to review the situation at the next periodic review (scheduled for 20 January 2002). The public prosecutor appealed against that decision to the Oporto Court of Appeal.

31. In a judgment of 20 June 2001 the Court of Appeal dismissed the appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. The relevant provisions of the Criminal Code, as amended by Legislative Decree no. 48/95 of 15 March 1995, are as follows:

Article 20 § 1

“Persons suffering from a mental disorder who are incapable at the material time of appreciating the unlawful nature or the consequences of their actions shall not be held criminally responsible for those actions.”

Article 91

“1. A person who commits a punishable offence and who is found not to be criminally responsible within the meaning of Article 20 shall be ordered to be detained in an asylum, hospital or secure unit, if there is reason to believe, in view of his mental illness and the nature and seriousness of his offence, that he may commit further serious offences.

2. Where the offence committed by a person found not to be criminally responsible is an offence against the person or a crime punishable by more than five years' imprisonment, he shall be ordered to be detained for a minimum period of three years, save where his release is not incompatible with the protection of the legal system and public order.”

Article 92 § 1

“Without prejudice to the provisions of paragraph 2 of the preceding Article, detention shall cease when the court finds that the justification for the detention no longer exists because the detainee is no longer criminally dangerous.”

Article 93

“1. The court may at any time hear an application relying on a ground for the cessation of the detention measure.

2. The court shall, of its own motion, regardless of whether any application has been made, review the detention two years after it began or after the decision extending it.

...”

33. The Code of Criminal Procedure and Legislative Decree no. 783/76 of 29 October 1976 setting up sentence-supervision courts lay down the appropriate procedure to be followed. Articles 503 and 504 of the Code of Criminal Procedure provide:

Article 503

“1. A personal file shall be opened in the establishment in which the person is to be detained in which shall be registered or placed all documents received from or sent to the court together with periodic reports on the effects of the treatment on the dangerousness of the detainee.

2. The governor of the establishment shall send the periodic reports to the sentence-supervision court annually and when justified by the circumstances or requested by the court.”

Article 504

“1. Up until two months prior to the date scheduled for the mandatory review of the detainee's situation, the sentence-supervision court shall order

(a) a psychiatric or character report, if possible in the establishment where the detainee is detained, which must be submitted to the court within thirty days;

(b) of its own motion, or at the request of the public prosecutor, the detainee or the lawyer, measures likely to assist it in reaching a decision.

2. Up until the same date the social rehabilitation services shall send a report on the detainee's family and professional environment.

3. The mandatory review of the detainee's situation shall be conducted after hearing submissions from the public prosecutor, the lawyer and the detainee; the latter must be present, save where his state of health renders such hearing purposeless or impossible.

...”

34. Article 62 § 2 of the Code of Criminal Procedure, which applies as an alternative provision in proceedings before the Sentence-Supervision Court, provides – exceptionally – in urgent cases, where it is not possible to find a member or trainee member of the Bar, that the judge may officially assign an appropriate person without legal qualifications to represent the accused. In judgment no. 59/99 of 2 February 1999 (*Boletim do Ministério da Justiça* no. 484, p. 48), the Constitutional Court held that the appointment of a court-registry official as the accused's defence counsel did not infringe the rights of the defence, as guaranteed by Article 32 of the Constitution.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION

35. The applicant complained that the examination of the lawfulness of his continued detention had been improperly conducted and had taken too long. He also complained that he had not had effective legal assistance during those proceedings. He relied on Article 5 §§ 1 and 4 of the Convention, which provides, *inter alia*:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Review of the lawfulness of the continued detention

36. The applicant submitted that, under the domestic law, the first periodic review of the lawfulness of his detention should have been carried out before 1 March 1998, which was not done. The review was not carried out until 20 January 2000; the judge then based his decision on a report drawn up in 1998, which was also in breach of domestic law. Lastly, the judge had not dealt with the application for release lodged by the applicant on 2 July 1997. In the applicant's submission, there had therefore been a breach of Article 5 §§ 1 and 4 of the Convention.

37. The Government asserted that the domestic procedure for the review of the lawfulness of the detention had been complied with. No breach of Article 5 § 1 could be found because the initial decision to detain the applicant justified the total length of time for which he was deprived of his liberty, as decided by the Oporto Criminal Court, which had ordered the applicant to be detained for a maximum period of eight years.

38. In the Government's submission, the only provision under which the issue could be examined was Article 5 § 4. The Government submitted that there had not been a breach of that provision because the domestic procedure for the periodic review of the lawfulness of the detention had been complied with even if there had been some delay. They stressed that the applicant had ultimately benefited from a review of his situation at regular intervals, as required by Article 5 § 4. They noted in that connection that it should not be forgotten that the applicant had absconded from 3 April to 11 November 1999.

39. The Court considers it more appropriate to examine these complaints under Article 5 § 4 first.

1. Alleged violation of Article 5 § 4

40. The Court notes at the outset that the parties did not dispute that the applicant's detention fell within the scope of application of Article 5 § 1 (e) because he had been deemed to have committed a serious offence but not to have been criminally responsible. According to the Court's case-law, a person detained in such conditions is entitled under Article 5 § 4 to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his or her detention, inasmuch as the reasons initially warranting confinement may cease to exist (see *Musiał v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II).

41. Such a review must comply with both the substantive and procedural rules of the national legislation and, moreover, be conducted in conformity with the aim of Article 5, namely to protect the individual against arbitrariness. The latter condition implies not only that the relevant courts must decide "speedily", but also that their decisions must follow at reasonable intervals (see *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 24, § 75).

42. The Court observes first that the procedure prescribed by the relevant Portuguese legislation is a periodic and automatic review by a court of the grounds for detention similar to the one at issue in *Herczegfalvy*, cited above. Furthermore, the detainee can at any time request the lifting of the detention order and his or her release.

43. In the instant case the applicant lodged an application for his release on 2 July 1997, basing his request on a medical report by one of the doctors from the Santa Cruz do Bispo secure psychiatric unit. On 4 July 1997 the judge of the Oporto Sentence-Supervision Court marked the file as "seen".

The Court observes that that annotation cannot be regarded as an examination of the application lodged by the applicant, and still less a decision on the grounds for the detention.

44. As the judge of the Oporto Criminal Court had indicated in his order of 24 January 1997, the first mandatory periodic review of the applicant's detention was to be carried out on 1 March 1998, which was two years after the applicant had been placed in pre-trial detention. No review was carried out on that date, however.

45. The first review of the grounds for the detention was not ultimately carried out until 20 January 2000, which was two years, six months and eighteen days after the applicant lodged his first application for release. The Court notes at the outset that at first sight this period appears excessive and incompatible with the concept of speediness within the meaning of Article 5 § 4 unless there are exceptional grounds justifying it.

46. In the Government's submission, this period was not excessive. Account had to be taken of the fact that the applicant had absconded for seven months.

47. The Court is not convinced that the period of seven months during which the applicant was not at the secure psychiatric unit needs to be subtracted from the total period to be taken into consideration. It notes that the police authorities finally found the applicant at his family home, the address of which had been known to them right from the beginning of the criminal proceedings in 1996, and where the applicant was under an obligation to reside while on leave. The question therefore arises whether the authorities were justified in letting seven months elapse before finding the applicant at the address which he had himself given.

48. In any event, the period in question remains excessive and the Court cannot find any exceptional reasons to justify it under Article 5 § 4. That reason alone is sufficient to warrant the conclusion that this provision was breached.

49. The Court further notes that the Sentence-Supervision Court, in deciding, on 20 January 2000, that the applicant's detention should continue, relied, *inter alia*, on a medical report drawn up on 18 May 1998. It therefore reached its decision on the basis of medical evidence that had been obtained a year and eight months beforehand and did not necessarily reflect the applicant's condition at the time of the decision. The Court considers that a delay of that length between the preparation of a medical report and the subsequent decision is in itself capable of running counter to the principle underlying Article 5 of the Convention, namely the protection of individuals against arbitrariness as regards any measure depriving them of their liberty (see *Musiał*, cited above, § 50).

50. Lastly, the Court points out that, as the Government themselves appear to acknowledge in their reference to a “certain delay” in “complying” with the relevant provisions, the Oporto Sentence-Supervision Court failed to comply with the procedural rules of the domestic legislation on the mandatory periodic review of the grounds for detention; the time-limit provided for in Article 93 § 2 of the Criminal Code, which is unequivocal in this regard, was not complied with (see paragraph 32 above).

51. In short, there has been a violation of Article 5 § 4 of the Convention.

2. *Alleged violation of Article 5 § 1*

52. The applicant alleged that the domestic legal provisions concerning the review of the lawfulness of continued detention were not complied with, which was also contrary to Article 5 § 1.

53. The Court has already examined this complaint under Article 5 § 4 (see paragraph 50 above). Having regard to the conclusion it has reached, the Court considers that it is not necessary to examine it under paragraph 1 as well (see *Herczegfalvy*, cited above, p. 22, § 68 *in fine*).

B. Legal assistance

54. The applicant maintained that the trainee barrister appointed by the judge of the Sentence-Supervision Court took no part whatsoever in the proceedings and did not attend the hearing on 1 July 1998. He therefore considered that it was not until October 2000, when Mr Pires de Lima started defending him, that he had the benefit of proper legal assistance, whereas the State was obliged to provide him with such assistance on account of his mental condition. The applicant alleged that this amounted to a breach of Article 5 § 4 of the Convention.

55. The Government submitted that the legal assistance in question was sufficient. With regard to the hearing on 1 July 1998, in particular, the Government stressed that there was no legal issue or point of procedure to determine, so the judge had dispensed with the presence of an officially assigned lawyer.

56. The Court reiterates its case-law according to which Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. The judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22).

57. It follows from the foregoing that where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences but for which he could not be held responsible on account of mental illness, he should – unless there are special circumstances – receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what is at stake for him – personal liberty – taken together with the very nature of his affliction – diminished mental capacity – compel this conclusion (see *Megyeri*, cited above, p. 12, § 23).

58. It is not disputed that the applicant suffered from a mental disability which prevented him from conducting court proceedings satisfactorily despite his legal training. That was, moreover, the conclusion of the order of 5 January 2000 by the President of the Criminal Division of the Supreme Court, who decided not to take any further account of the applications

lodged by the applicant, given his mentally disturbed state (see paragraph 26 above).

59. The circumstances of the case therefore required a defence lawyer to be appointed to assist the applicant in the proceedings relating to periodic review of the lawfulness of the detention.

60. The Court notes that at the very beginning of the proceedings, in accordance with the law, the judge of the Sentence-Supervision Court appointed a trainee barrister as the applicant's defence counsel. However, the barrister took no part whatsoever in the proceedings. As the Court has held on a number of occasions in respect of Article 6 § 3 (c), assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see, among other authorities, *Daud v. Portugal*, judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, pp. 749-50, § 38).

61. This lack of effective legal assistance was glaringly apparent at the hearing of 1 July 1998. The Government maintained that the judge dispensed with the presence of an officially assigned lawyer, given that there were no legal issues to determine. The Court cannot accept that argument. It notes, firstly, that the purpose of the hearing in question, under Article 504 of the Code of Criminal Procedure, was to enable the judge to decide whether the applicant should be kept in detention. It is self-evident that legal issues may arise during such a hearing. Secondly, the judge does not appear to have decided that it was unnecessary for the applicant to be represented, since he appointed for this purpose an official from the prison in which the applicant was detained. Even though that appointment appeared to be valid under domestic law and consistent with the case-law of the Constitutional Court, it cannot, in the Court's view, be regarded as adequate representation for the applicant.

62. Having regard to the foregoing, the inescapable conclusion is that the proceedings for review by a court of the lawfulness of the applicant's continued detention did not offer sufficient guarantees, seeing as the applicant did not have adequate legal assistance until October 2000.

63. There has therefore been a breach of Article 5 § 4 of the Convention under this head as well.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant claimed 10,000,000 Portuguese escudos (PTE), that is 49,879 euros (EUR), for non-pecuniary damage.

In the Government's view, the mere finding of a violation sufficed to compensate for any non-pecuniary damage sustained by the applicant.

66. The Court considers that the applicant undoubtedly suffered non-pecuniary damage on account of the length and lack of fairness of the proceedings by which he sought to secure his release, damage which cannot be compensated by the mere finding of a violation. Having regard to the circumstances of the case and ruling on an equitable basis, as required by Article 41, it awards him EUR 6,000 under this head.

B. Costs and expenses

67. The applicant pointed out in this connection that the sum paid by the Council of Europe in legal aid was insufficient to cover half the expenses already incurred by his counsel, including the fees.

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

68. The Court reiterates that an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum (see *Musiał*, cited above, § 61).

69. It notes that the applicant has not quantified the costs in excess of the amounts awarded in legal aid. It appears from the file, however, that the applicant must have incurred some costs for instructing his lawyer to submit the case to the Court (see, in this connection, *Labita v. Italy* [GC], no. 26772/95, § 210, ECHR 2000-IV, and *Demiray v. Turkey*, no. 27308/95, § 70, ECHR 2000-XII).

Ruling on an equitable basis, the Court considers it reasonable to award the applicant EUR 5,000 under this head, less EUR 1,779 paid by the Council of Europe in legal aid.

C. Default interest

70. 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 5 § 4 of the Convention;
2. *Holds* that it is unnecessary to determine whether there has been a violation of Article 5 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 6,000 (six thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), less EUR 1,779 (one thousand seven hundred and seventy-nine euros), in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 February 2002.

Vincent BERGER
Registrar

Georg RESS
President