CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

AFFAIRE HORNSBY c. GRÈCE

CASE OF HORNSBY v. GREECE

(ARTICLE 50)

(107/1995/613/701)

ARRÊT/JUDGMENT

STRASBOURG

1er avril/ 1 April 1998

Liste des agents de vente/List of Agents

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SUMMARY[1]

Judgment delivered by a Chamber

Greece – just satisfaction claimed by two applicants held by the Court in a previous judgment to have been victims of a breach of Article 6 § 1 of the Convention

ARTICLE 50 OF THE CONVENTION

A. Damage

Relevant date for assessment of alleged loss: date of Supreme Administrative Court's judgment setting aside national authorities' refusal to grant applicants authorisation to open a *frontistirion*.

Not clear what base figure and method of calculation applicants had used in seeking to prove their loss of profits – these were estimates which, by their nature, could only amount to speculation.

Loss of income which it was not, however, possible to assess precisely – applicants' feeling of uncertainty and anxiety as to whether they would be able to carry on their occupation – deep feeling of injustice due to fact that Greek authorities had not complied with judgments of an international court and highest Greek administrative court.

Sum awarded on equitable basis, in respect of all heads of damage taken together.

Conclusion: respondent State to pay applicants specified sum (six votes to three).

B. Costs and expenses

Applicants had been reimbursed their costs for domestic proceedings, had presented their own case before Commission and had not taken part in proceedings before Court.

Conclusion: not necessary to award a sum (unanimously).

COURT'S CASE-LAW REFERRED TO

19.3.1997, Hornsby v. Greece

1. This summary by the registry does not bind the Court.

In the case of Hornsby v. Greece[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr L. WILDHABER,
Mr D. GOTCHEV,

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

Having deliberated in private on 27 January and 28 March 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 December 1995, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 18357/91) against the Hellenic Republic lodged with the Commission under Article 25 by two British nationals, Mr David Hornsby and Mrs Ada Ann Hornsby, on 7 January 1990.

Notes by the Registrar

1. The case is numbered 107/1995/613/701. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In a judgment of 19 March 1997 ("the principal judgment") the Court held that by refraining for more than five years from taking the necessary measures to comply with two final judgments of the Supreme Administrative Court, the Greek authorities had deprived the provisions of Article 6 § 1 of all useful effect (*Reports of Judgments and Decisions* 1997-II, p. 512, § 45, and point 2 of the operative provisions). Furthermore, the Court noted that it did not appear that the applicants had given up their objective of opening a private school (*frontistirion*) for the teaching of English; when they applied to the Rhodes Administrative Court they had sought compensation not only for the damage they alleged they had sustained but also for the damage they would continue to sustain up to the date on which the administrative authorities granted them the authorisation requested (ibid., p. 512, § 44).

The Court reserved the question of the application of Article 50 because proceedings before the Rhodes Administrative Court – by which the applicants sought compensation for the damage they alleged they had sustained – were still pending. It invited the parties to submit their observations on the said question within the forthcoming three months, and, in particular, to inform it of any agreement they might reach (ibid., pp. 512–13, §§ 46–49, and point 3 of the operative provisions).

3. On 11 May 1997 the applicants informed the registry that they had been in contact with the Government but that it appeared that the latter were not willing to take any action in their case until after delivery of the Court's final decision on just satisfaction under Article 50.

4. In a letter to the Court of 5 June 1997 the Government said that they had told the applicants that the judgment of the Court had been communicated to the competent authorities so that the latter could comply with it. The Government asked for an extension of the time-limit until the end of November 1997 (since the Administrative Court had not yet given judgment).

5. On 24 June 1997 the applicants opposed the granting of the extension and complained that the authorities had not yet been in contact with them. On 14 July 1997 they communicated to the registry copies of two letters which they had sent to the Agent of the Government and the Director of Secondary Education, in which they complained that no action had been taken as yet to comply with the judgment of the Court.

6. In the meantime, on 25 June 1997, the President of the Chamber, Mr Bernhardt, decided to grant the Government's request and extended until 5 November 1997 the time-limit for reaching a friendly settlement. He stated that this date would also be the time-limit for filing any further details concerning the damage sustained subsequent to the introduction of the application.

7. On 7 September 1997, the applicants communicated to the registry a copy of the letter which they had received from their British MEP (Mrs G. Kinnock), who had tried to help them by writing directly to the Greek authorities. This reply to Mrs Kinnock read as follows:

> "Dear Mrs Kinnock,
>
> Further to my letter of 24 July 1997, I write to inform you that we have now heard from the appropriate Greek authorities concerning the case of your constituents Mr and Mrs D. Hornsby who wish to set up an English Language School in Rhodes. The reply received was as follows:
>
> 'In accordance with the resolutions of the European Court of Justice regarding the establishment of foreign language schools in Greece, Presidential Decree no. 211 was issued in 1994, in order to permit the set up of such schools and to allow the employment by them of EU nationals as teachers.
>
> At that point, the European Commission initiated a new procedure against Greece for indirect non-compliance with the principle of equal treatment between Greeks and EU nationals. This procedure was based on the inclusion in the above Presidential Decree of the condition of "full knowledge and proficient use of the Greek language and knowledge of the Greek history" as a prerequisite for setting up a foreign language school and being employed as a teacher by one.
>
> At the moment, the Ministry of Education is working for the promulgation of a new Presidential Decree which has already reached the stage of legislative technical preparation by the State's Council. The new decree will provide for changes in the above prerequisites, in that it will only require proof of knowledge and ability to use the Greek language by those employed by foreign language schools as teachers.'"

The applicants stressed that the above-mentioned presidential decree includes "those employed by foreign language schools as teachers", which did not cover their position because they wished to be self-employed.

In a letter received at the registry on 29 September 1997 the applicants informed the Court of an announcement which had appeared in the two main local newspapers during the registration period for the new academic year (1997/98). The relevant passage of the letter read as follows:

> "Although [the announcement] does not name us, much of it is quite clearly aimed at us, and would be understood to refer to us by the local community, as we are the only non-Greek foreign language school in Rhodes, and the only one to which the section about exams could refer.

> The section marked * states that one *frontistirion* (foreign language school) does not have the legal requirements to obtain licences from the Ministry of Education. Because of the Greek government's continued refusal to issue us with the licences we requested, we were unable to claim that we DO have such licences. This is the first time that such a claim against us has appeared in a newspaper and it has certainly been effective because the number of students registering for the new academic year has dropped for the first time ever since we opened under the name of our Greek partner in 1985.
>
> We shall therefore be submitting a further claim for compensation when we have been able to estimate more accurately the financial loss caused, which has been considerable."

8. The applicants and the Government submitted their memorials on the application of Article 50 of the Convention on 29 October and 4 November 1997 respectively. The judgment of the Rhodes Administrative Court – which had in the meantime been delivered on 30 June 1997 – was annexed to the memorials. The observations of the Delegate of the Commission on these memorials were received on 5 December 1997.

AS TO THE FACTS

9. On 30 June 1997, the Rhodes Administrative Court allowed in part the applicants' claims in the action for damages against the State, brought on 3 July 1992 (see paragraph 19 of the principal judgment). It held *inter alia*:

> "It appears from the documents in the file and particularly from the accounts … of the limited partnership 'D. and A. Hornsby and Co' that during the whole of the period concerned the plaintiffs … were running a private foreign language school, despite the defendant's refusal to grant them the relevant authorisation. It is therefore not possible to prove the damage they alleged they had sustained in the form of loss of profit, particularly the school fees they would have expected to receive had it not been for the defendant's unlawful conduct, since they were in fact carrying on the activity for which the relevant administrative authority had refused a licence…
>
> Regard being had to the above considerations, neither the alleged damage nor the existence of any loss of profit can be proved. For these reasons, the action must be dismissed as unfounded…
>
> On the other hand, the Administrative Court considers that the defendant's repeated unlawful refusals to grant the plaintiffs' legitimate request – which amounts to a flagrant breach of the provisions of European Community law – and the refusal to comply with the judgments of the Court of Justice of the European Communities and

the Supreme Administrative Court caused the plaintiffs stress over a long period. It therefore considers it appropriate to award each of them 400,000 drachmas in respect of non-pecuniary damage, to which sum is to be added interest at the statutory rate from the commencement of the action, that is from 3 December 1990, when notice of the plaintiffs' application to the civil courts was served on the defendant… Lastly, the plaintiffs' request for the present judgment to be made immediately enforceable must be rejected because the conditions laid down in Article 70 § 2 of Presidential Decree no. 341/1978 have not been satisfied in the present case."

10. By an application lodged with the Court of Justice of the European Communities on 26 April 1994, the Commission of the European Communities had brought an action under Article 169 of the EC Treaty for a declaration that, by maintaining in force the provisions of Article 70 of Law no. 2545/1940 and Decree no. 46508/1976 of the Minister for Education and Religious Affairs (as subsequently amended), the State had failed to fulfil its obligations under Community law, in particular the provisions on movement of workers within the Community. In its judgment of 1 June 1995 the Court of Justice held:

"The above-mentioned Greek provisions impose, in respect of recruitment of teachers in private foreign-language schools, more stringent conditions on foreigners, including nationals of other Member States, than they do on Greek nationals.

Decision no. 46508 thus provides that the recruitment of foreign teachers requires authorisation by the Director of Private Education and Religious Affairs following submission of certain documents specified in the decision. Renewal of authorisation is also subject to the submission of several documents, including a medical certificate.

Furthermore, paragraphs (1), (2) and (4) of Article 70 of Decree-Law no 2545/1940 provide that only persons possessing the qualifications required of teachers within public education may teach in a private school. The competent Minister may, however, decide that the qualifications of Greek nationals who do not satisfy that condition are adequate.

…

The Hellenic Republic does not deny that the disputed rules are incompatible with Community law. It does, however, point out that a Presidential Decree making the recruitment of nationals of other Member States subject to the same conditions as those required for employment of Greek nationals will be published shortly and that consequently the proceedings will serve no purpose.

That argument cannot be accepted. It is settled case-law … that amendments of national legislation are irrelevant for the purposes of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion.

A declaration of failure to fulfil obligations must therefore be made in the terms sought by the Commission."

11. The European Commission has decided to refer Greece to the Court of Justice of the European Communities, requesting it to impose financial penalties for failure to apply two judgments concerning infringements of EC rules on the recognition of qualifications, namely the requirement that persons wishing to open private foreign-language schools, or to become directors of or teachers in such schools, must pass an examination in Greek language and history.

AS TO THE LAW

12. Under Article 50 of the Convention,

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

A. Damage

13. The applicants alleged that they had suffered pecuniary and non-pecuniary damage.

They admitted that they were unable to furnish conclusive proof of the pecuniary damage, which took the form of a loss of profits, but asserted that there were objective indications – which the Rhodes Administrative Court had not taken into account (see paragraph 9 above) – of its scale. They maintained that the authorities' refusal to grant them authorisation to open their own *frontistirion* had obliged them to set up a company managed by a Greek national, which, for a time at least, had made it seem that they were not truly responsible for the teaching they provided. They had also been victims of a whispering campaign in the local press, which published rumours to the effect that their *frontistirion* was to be closed down at any moment because it was being operated illegally; in 1997 this campaign had gone a stage further, taking the form of open defamation on the part of their competitors. As a result, not only were new pupils put off registering but the number of existing pupils, and therefore the receipts of their establishment, fell. In addition, they maintained that they had made a deliberate decision not to take the examination required by Greek legislation (see paragraph 28 of the principal judgment) because that would have implied that they accepted that this was a legitimate condition for access to the profession.

Lastly, they emphasised that the purpose of their application was to obtain the licence to which they were entitled, not damages; they asserted that the issue of this licence alone had always been one of their conditions for a friendly settlement of the case.

With regard to non-pecuniary damage, the sum of 800,000 drachmas awarded by the Rhodes Administrative Court did not in any way reflect the distress, uncertainty and humiliation they had suffered.

More precisely, the applicants summarised their claims as follows:

(a) for the period 1984–90: 169,962,400 drachmas;

(b) for the period 1990–96: 223,535,000 drachmas, of which

118,335,000 were for loss of profits;

5,000,000 were for the damage caused by the authorities' refusal to renew their residence permits;

100,000,000 were for the non-pecuniary damage caused by the harassment the Dodecanese Secondary Education Authority had subjected them to; and

200,000 were for the time they had spent writing letters;

(c) for the period 1996–97: 184,630,000 drachmas, of which

173,630,000 were for loss of profits;

1,000,000 were for the authorities' persistent refusal to renew their residence permits; and

– 10,000,000 were for the non-pecuniary damage caused by the harassment they had continued to suffer at the hands of the Ministry of Education.

14. The Government maintained that the applicants were not entitled to any compensation for the alleged damage. They observed that they had had the opportunity to lay their claims in respect of pecuniary damage before the Rhodes Administrative Court, which had ordered a further investigation and had then ruled that such damage, and in particular a loss of profits, had not been established and awarded each of them 400,000 drachmas for non-pecuniary damage, a sum which was sufficient under that head. They pointed out that it was open to the applicants to appeal against that judgment or to bring a fresh action against the State seeking damages for the alleged loss since 1990.

15. The Delegate of the Commission submitted that the Court should award compensation for the pecuniary damage sustained by the applicants on account of the authorities' persistent refusal to grant them the authorisation to open a *frontistirion* and for that part of the non-pecuniary damage not covered by the sum awarded by the Rhodes Administrative Court.

16. In order to calculate the amount of their loss, the applicants took as their base-line the year 1984, when they were first refused authorisation to open a *frontistirion* (see paragraph 7 of the principal judgment).

The Court observes that the judgment of the Court of Justice of the European Communities declaring the relevant Greek legislation contrary to European Community law was delivered on 15 March 1988 (see paragraph 9 of the principal judgment), and that of the Supreme Administrative Court setting aside the above-mentioned refusal on 10 May 1989 (see paragraph 13 of the principal judgment). It considers that the latter date must be taken as the starting-point for its assessment of the alleged loss, because it was from that point on that the applicants could justifiably hope to obtain authorisation.

17. The applicants, in seeking to prove their loss of profits, gave a detailed estimate of the new pupils and additional fees they would have hoped to receive if authorisation had been granted during the period in question. However, the Court notes that it is not clear what base figure and method of calculation the applicants used for that purpose. These were estimates which, by their nature, could only amount to speculation, and the Rhodes Administrative Court made that very point.

18. Admittedly, the applicants ran from 1985 onwards, through a Greek national who had the required qualifications, the limited partnership "D. and A. Hornsby and Co"; but the fact that they were unable to manage their *frontistirion* on their own account or advertise it properly and their pupils' uncertainty as to whether the school was operating legally – which was created by the authorities' refusal to grant a licence – may have caused the applicants over a number of years a loss of income which it is not, however, possible to assess precisely. To the above must be added a feeling of uncertainty and anxiety as to whether they would be able to carry on their occupation and a deep feeling of injustice due to the fact that the Greek administrative authorities had not complied with the judgments of an international court and the highest Greek administrative court.

In that connection the Court considers it useful to point out that by a judgment of 10 July 1997 the Court of Justice of the European Communities held that a member State was liable for the late transposition of a Directive into the national legal system and that it was under an obligation to make good any pecuniary losses sustained by the beneficiary of the Directive.

19. Having regard to the above considerations, the Court awards the applicants, on an equitable basis, 25,000,000 drachmas, in respect of all their claims for damage taken together.

B. Costs and expenses

20. The applicants claimed 690,000 drachmas for miscellaneous costs and 400,000 drachmas for lawyers' fees in respect of the proceedings before the Greek authorities.

21. The Government declared that they were prepared to reimburse reasonable costs which had been necessarily incurred and of which evidence had been duly supplied.

22. The Delegate of the Commission submitted that the costs of the proceedings before the Supreme Administrative Court and in the Rhodes Administrative Court – in so far as the applicants had not yet recovered them – and those of the proceedings before the Convention institutions should be reimbursed.

23. The Court notes that the applicants were reimbursed their costs in the Supreme Administrative Court and part of their costs in the Rhodes Administrative Court; they presented their own case to the Commission and did not participate in the proceedings before the Court. It therefore considers that it does not have to award any sum under this head.

C. Default interest

24. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to three
   (a) that the respondent State is to pay the applicants, within three months, 25,000,000 (twenty-five million) drachmas for pecuniary and non-pecuniary damage;
   (b) that simple interest at an annual rate of 6% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;

2. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and notified in writing on 1 April 1998 pursuant to Rule 55 § 2, second sub-paragraph, of Rules of Court A.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinion of Mr Valticos, joined by Mr Pettiti and Mr Morenilla, is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE VALTICOS, JOINED BY JUDGES PETTITI AND MORENILLA

(*Translation*)

In the judgment on the merits I expressed my disagreement with the Court's finding of a breach of the Convention since the national authorities had, albeit belatedly, taken the necessary steps to ensure compliance with the Convention in the present case.

Now, with regard to Article 50, the Court has reached a finding which I consider wrong, and I can only – again – mark my disagreement with it, for more reasons than one.

In the first place, the Court now refers to a judgment of the Court of Justice of the European Communities, and is wrong to do so in explaining the reasons for its decision.

The decision in question cannot in any way be taken to constitute *res judicata*. The court concerned was different, as was the legal rule at issue (the case was about European Community rules), and a substantive analysis of the reasoning adopted by the Court of Justice would even reveal points which are open to criticism, though it would be unseemly to speak of those here. In any event, it is wholly inappropriate for the Court to base its findings concerning the alleged damage on the judgment of the Luxembourg Court.

But the problem in the present case is precisely the question of damage. The applicants, who, I might point out, chose not to appear before the Court, claimed fabulous sums, although the 800,000 drachmas awarded by the Rhodes Administrative Court were not a negligible sum. But no serious evidence of the damage they allegedly sustained has been adduced, whereas, in spite of the lack of authorisation, they have continued to operate their establishment through a sleeping partner and there is no proof that the loss of income they complained of was caused by their administrative difficulties rather than by other factors which spring naturally to mind.

I cannot therefore associate myself with the Court's unjustifiably generous award of public funds.