

Resolution CM/ResDH(2011)62¹

Execution of the judgments of the European Court of Human Rights Zielinski and Pradal and Gonzalez and others, Aubert and autres and 8 other cases, Cabourdin, Achache, De Franchis, Ducret, Lecarpentier and others, Saint-Adam and Millot, Vezon, Arnolin and autres and 24 other cases, Chiesi S.A. and SCM Scanner de l'Ouest Lyonnais and others and Javaugue against France

Zielinski and Pradal and Gonzalez and others, joint applications Nos. 24846/94 and 34165/96 to 34173/96, judgment of 28 October 1999, final on 28 October 1999;

Saint-Adam and Millot, application No. 72038/01, judgment of 2 May 2006, final on 2 August 2006;

Lecarpentier and others, application No. 67847/01, judgment of 14 February 2006, final on 14 May 2006;

SCM Scanner de l'Ouest lyonnais and others, application No. 12106/03, judgment of 21 June 2007, final on 21 September 2007

Aubert and others and 8 other cases, applications Nos. 31501/03, 31870/03, 13045/04, 13076/04, 14838/04, 17558/04, 30488/04, 45576/04 and 20389/05, judgment of 9 January 2007, final on 23 May 2007;

De Franchis, application No. 15589/05, judgment of 6 December 2007, final on 6 March 2008;

Cabourdin, application No. 60796/00, judgment of 11 April 2006, final on 11 July 2006;
Vezon, application No. 66018/01, judgment of 18 April 2006, final on 13 September 2006;
Achache, application No. 16043/03, judgment of 3 October 2006, final on 3 January 2007;
Chiesi S.A., application No. 954/05, judgment of 16 January 2007, final on 16 April 2007;
Ducret, application No. 40191/02, judgment of 12 June 2007, final on 12 September 2007;
Javaugue, application No. 39730/06, judgment of 11 February 2010, final on 11 May 2010;
Arnolin and others, applications Nos 20127/03, 31795/03, 35937/03, 2185/04, 4208/04, 12654/04, 15466/04, 15612/04, 27549/04, 27552/04, 27554/04, 27560/04, 27566/04, 27572/04, 27586/04, 27588/04, 27593/04, 27599/04, 27602/04, 27605/04, 27611/04, 27615/04, 27632/04, 34409/04 and 12176/05, judgment of 9 January 2007, final on 9 April 2007.

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights (hereinafter “the Convention” and “the Court”);

Having regard to the judgments transmitted by the Court to the Committee once they had become final;

Recalling that the violations of the Convention found by the Court in the cases of Zielinski and Pradal and Gonzalez and others, Cabourdin, De Franchis, Ducret, Saint-Adam and Millot, Vezon, Arnolin and others and 24 other cases, Aubert and others and 8 other cases, Chiesi S.A. and SCM Scanner de l'Ouest Lyonnais and others and Javaugue concern breaches of the right to a fair trial due to the application of legislative provisions which definitively and retroactively settled the merits of pending proceedings in disputes before

¹ Adopted by the Committee of Ministers on 8 June 2011 at the 1115th Meeting of the Ministers' Deputies

domestic courts without being justified by any “compelling grounds of the general interest” (violations of Article 6, paragraph 1) (see details in Appendix);

Recalling that the violations of the Convention found by the Court in the cases of Achache and Lecarpentier and others concern disproportionate breaches of the applicants’ right to the peaceful enjoyment of their possessions due to the “abnormal and exorbitant burden” placed on the applicants by the application of legislative provisions which definitively and retroactively settled the merits of pending proceedings before domestic courts (violations of Article 1 of Protocol No. 1);

Recalling that the case of Zielinski and Pradal and Gonzalez and others also concerns the excessive length of certain civil proceedings before the Colmar Court of Appeal (violation of Article 6, paragraph 1);

Having invited the government of the respondent state to inform the Committee of the measures taken to comply with its obligation under Article 46, paragraph 1, of the Convention to abide by the judgments;

Having examined the information provided by the government in accordance with the Committee’s Rules for the application of Article 46, paragraph 2, of the Convention;

Having satisfied itself that the respondent state had paid the applicants the just satisfaction provided in the judgments,

Recalling that a finding of violations by the Court requires, over and above the payment of just satisfaction awarded in the judgments, the adoption by the respondent state, where appropriate, of

- individual measures to put an end to the violations and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and
- general measures preventing similar violations;

DECLARES, having examined the measures taken by the respondent state (see Appendix) that it has exercised its functions under Article 46, paragraph 2, of the Convention in these cases and

DECIDES to close the examination of these cases.

Appendix to Resolution CM/ResDH(2011)62

Information on the measures taken to comply with the judgments in the cases of Zielinski and Pradal and Gonzalez and others, Aubert and others and 8 other cases, Cabourdin, Achache, De Franchis, Ducret, Lecarpentier and others, Saint-Adam and Millot, Vezon, Arnolin and others and 24 other cases, Chiesi S.A., SCM Scanner de l'Ouest Lyonnais and others and Javaugue against France

Introductory case summary

These cases concern the application of legislative provisions which definitively and retroactively settle the merits of pending proceedings to which the applicants were parties before domestic courts (“validatory legislation”).

In the cases of Zielinski and Pradal and Gonzalez and others, Cabourdin, De Franchis, Ducret, Saint Adam and Millot, Vezon, Arnolin and others and 24 other cases, Aubert and others and 8 other cases, Chiesi S. A., SCM Scanner de l'Ouest Lyonnais and others and Javaugue, such intervention was not justified by any “compelling grounds of the general interest” and thus violated the applicants’ right to a fair trial (violations of Article 6, paragraph 1).

In the Achache and Lecarpentier and others cases, the legislative intervention placed an “abnormal and exorbitant burden” on the applicants through disproportionate breaches of their right to the peaceful enjoyment of their possessions (violations of Article 1 of Protocol No. 1).

The legislative provisions at issue were the following:

- Article 85 of the Law of 18 January 1994 “establishing the method for calculating compensation to be paid to officials of the social security funds of the Departments of Haut-Rhin, Bas-Rhin and Moselle” in the case of Zielinski and Pradal and Gonzalez and others;
- Article 87 of Law No. 96-314 of 12 April 1996 “containing various economic and financial provisions” in the cases of Cabourdin, Saint-Adam and Millot, Vezon, Lecarpentier and others, Achache, De Fancis and Ducret;
- Article 27 of the Law of 19 December 1997 “on funding social security for 1998” in the case of SCM Scanner de l'Ouest Lyonnais and others;
- Article 29 of the Law of 19 January 2000 added to an act concerning another matter, i.e. “the negotiated reduction of working hours” (subsequently known as the “second Aubry Law or the “35-hour” Law) in the cases of Arnolin and others and 24 other cases and Aubert and others and 8 other cases;
- Article 20 of the Law of 18 December 2003, “finance law for 2004” in the Chiesi S.A. case;
- Article 136 of the Law of 30 December 2004 “modifying Article L.24 of the Civil and Military Retirement Pensions Code” in the Javaugue case.

The case of Zielinski and Pradal and Gonzalez and others also concerns the excessive length of civil proceedings before the Colmar Court of Appeal (three years, eight months and eight days) (violation of Article 6, paragraph 1).

I. Payment of just satisfaction and individual measures

(a) Just satisfaction

The just satisfaction granted by the European Court in each case was paid under conditions accepted by the applicants.

(b) Individual measures

In all these cases except the Chiesi S.A. case, the Court granted just satisfaction in respect of pecuniary damage and, where appropriate, non-pecuniary damage. In Chiesi S.A., the Court granted just satisfaction in respect of non-pecuniary damage sustained but rejected the applicant's claim in respect of pecuniary damage, there being no causal link between the violation found and the alleged material loss, which the Court considered to be hypothetical.

In the case of Zielinski and Pradal and Gonzalez and others, the proceedings whose length was found to be excessive have been closed.

Accordingly, no further individual measure was considered necessary by the Committee of Ministers.

II. General measures

The European Court's judgment in Zielinski and Pradal and Gonzalez and others was sent out to all courts concerned and to the *Conseil constitutionnel*. In addition it was published in the *Revue française de Droit administratif* (No. 2 edition 2000, p 289). The Strasbourg Administrative Tribunal rejected an appeal by others concerned by the same legal provision on the grounds that their appeals should have been directed against the social security funds. This question was ultimately resolved by an out of court agreement.

The French authorities consider that there is now convergence between domestic and European case-law concerning such "validatory legislation" provisions with regard to ensuring their conformity with Article 6, paragraph 1 of the Convention and Article 1 of Protocol No. 1. They point out that, since 2001 and 2004 respectively, the *Cour de cassation* and the *Conseil d'Etat* have adopted the criterion of "compelling grounds of the general interest" as the sole justification for validatory legislation which conflict with rights protected by the Convention. Examples are the judgment of the social chamber of the *Cour de cassation* of 24 April 2001 in Association *Etre enfant au Chesnay* against Terki or the opinion given by the *Conseil d'Etat* in its judgment of 27 May 2005 in the case of Provin. In relation to the latter, the European Court underlined that, "following this opinion, and in other cases, the *Conseil d'Etat* has excluded the new provisions flowing from Article 136 of the Law of 30 December 2004 when they intervene during proceedings (see, for example, 26 September 2005, No. 255656, Barritault)" (§21 of the judgment in Javaugue).

The authorities also point out that the *Conseil constitutionnel* rejects any law which revalidates a law annulled by judicial decision which fails to respect the *res iudicata* principle and which does not satisfy the criterion of sufficient motivation in the public interest or is not proportionate to the objective pursued (see, for example, Decision No. 458 DC of 7 February 2002 or No. 2004-509 DC of 13 January 2005 (rejections)). This has also been observed by academic doctrine (see E. Mignon, *Chronique de la R.J.F.* 2/00 p. 97 and *Conclusions au B.C.D.F* 5/01, No. 72, p. 65, B. Mathieu, *Chronique de la RFDA* No. 2/2000, pp. 295 and 296).

The authorities further indicate that recent developments in the case-law of the *Conseil d'Etat* concerning the action for liability deriving from law provisions indicate a concern to align with the case-law of the European Court. They quote as an example the Gardedieu judgment of 8 February 2007 in which the *Conseil d'Etat* applied this notion of responsibility in respect of a retroactive validatory legislation and ordered the state to compensate the appellants (this judgment was cited by the European Court in its judgment in Lilly France No. 2 against France, Application No. 20429/07, judgment of 25 November 2010, final on 25 February 2011, § 23).

Moreover on 9 March 2009 the Director of Legal Affairs of the Ministry for Foreign and European Affairs sent a note to the legal directorates of all ministries, to the *Conseil d'Etat* and to the Secretariat General of the government which ensures inter-ministerial co-ordination concerning draft legislation. This detailed note recapitulates the European Court's decisions concerning validatory legislation to raise awareness among all administrators concerned of the criteria laid down by the Court in this respect. This note was aimed at the most appropriate categories within the administration, with the requisite influence over the government's initiative in the legislative process.

With regard to bills coming from the Parliament, now less numerous, the Parliament has a legal service fully informed of the development of the European Court's case-law (see, for example, a note of 10 February 2006 by the Legal Studies Department of the Senate on "the legal regime of validatory legislation" which includes an analysis of the European Court's case-law: http://www.senat.fr/ej/ej_validation/ej_validation_mono.html).

The Parliamentary chambers may also be informed as appropriate by the executive which is always present when laws are enacted and may provide any explanations needed.

Finally, with regard to reducing the time required to deal with civil case, reference should be made to the measures taken to avoid excessive length of civil proceedings (see Final Resolution CM/ResDH(2008)39 in the case of C.R. and 9 other cases of excessive length of civil proceedings). It should also be noted that Article L. 781-1 of the Code of Judicial Organisation provides an effective remedy of compensation in case of excessive length of proceedings before civil courts.

III. Conclusions of the respondent state

The government considers that no further individual measure is required in these cases, apart from the payment of the just satisfaction, that the general measures adopted will prevent similar violations and that France has thus complied with its obligations under Article 46, paragraph 1, of the Convention.