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THE FACTS

The applicant, Mr José Daniel Nunes Dias, is a Portuguese national, who was born in 1947 and lives in Carnaxide (Portugal). He was represented before the Court by Mr M. Reis Cunha, a lawyer practising in Algés.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The main proceedings

In 1984 two individuals brought an action for damages against the applicant in the Oeiras District Court. They claimed compensation for the loss resulting from a road traffic accident which had led to the death of a member of their family.

The judge summoned the applicant to appear before him. However, the applicant, who in the meantime had moved house, could not be traced at the address given by the plaintiffs. On 13 February 1985 the police informed the court that the applicant's address was unknown.

By an order of 25 February 1985, the judge ordered that the applicant be summoned to appear by public notice (*citação edital*). Notices were accordingly published in a national newspaper on 29 and 30 April 1985, informing the applicant that an action for damages against him was pending before the Oeiras District Court.

In the absence of any intervention by the applicant in the proceedings, the judge appointed State Counsel's Office as the applicant's representative by an order of 14 October 1985, in accordance with the legislation.

A hearing took place on 28 October 1986 at which the applicant was not present.

By a judgment of 12 July 1989, the court granted the claim and ordered the applicant to pay the plaintiffs a sum equivalent to 26,186 euros, plus interest. As State Counsel's Office did not appeal against this judgment, the decision became final.

The applicant claimed not to have learnt of this judgment and the existence of these proceedings until 2 February 2000. He submitted that he had been served, at his current residence, with notice of proceedings against him in 1999 in the Oeiras District Court to enforce the judgment concerned. He then instructed a lawyer, who consulted the case file of the proceedings on the above-mentioned date.

On 11 February 2000 the applicant appealed against the judgment delivered by the Oeiras District Court on 12 July 1989. In particular, he alleged that he had never been aware of the existence of the proceedings complained of; furthermore, the summons by public notice was null and void, the judge having neglected to ask the administrative authorities and the police beforehand for information regarding his address.

By an order of 29 February 2000, the judge at the Oeiras District Court declared the appeal inadmissible on the ground that the judgment in question was undoubtedly final and that, consequently, no appeal could lie against it. He emphasised that the applicant should lodge an application to reopen the proceedings under Article 771 of the Code of Civil Procedure.

The applicant lodged a complaint against this decision with the President of the Lisbon Court of Appeal, arguing that the appeal ought to have been declared admissible and examined on the merits.

By a decision of 19 October 2000, the President of the Court of Appeal dismissed the complaint, referring to the reasons given in the order appealed against.

The applicant also lodged an application for interpretation of this decision, which was rejected by the President of the Court of Appeal on 20 December 2000.

2. The objection to the enforcement

On 14 February 2000 the applicant lodged an objection (*embargos*) to the application for enforcement submitted by the plaintiffs to the Oeiras District Court. In particular, he relied on the nullity of the summons in the main proceedings. The applicant argued that the Oeiras District Court ought to have contacted the administrative authorities, as had been the case regarding the enforcement proceedings, in which he had been lawfully summoned to appear. In this connection, he emphasised that, as early as 1984, he had communicated his new address to the national tax authorities, the road traffic authorities and the Lisbon centre for civil and criminal identification. Finally, the notice had been published in a daily newspaper with a limited circulation, which had, moreover, been declared bankrupt soon after 1985. The applicant also contested the amount of interest claimed by the opposing party.

By a decision of 6 June 2000, the court allowed the applicant's objection with regard to the interest sought by the plaintiffs but rejected the rest of the objection.

The applicant appealed to the Lisbon Court of Appeal which, by a judgment of 2 October 2001, dismissed the appeal.

The applicant appealed on points of law to the Supreme Court, alleging, in addition to the nullity of the summons, a breach of Article 20 of the Constitution concerning access to the courts and the principle of a fair trial.

By a judgment of 19 March 2002, the Supreme Court dismissed the appeal.

The applicant then lodged a constitutional appeal with the Constitutional Court.

By a judgment of 2 December 2002, the Constitutional Court dismissed the appeal. It held in particular:

> "... The legislation concerning civil proceedings contains detailed provisions regarding the summons of a defendant to appear before a court. It seeks to guarantee that recourse is had to a summons by public notice only when the court is satisfied that it is impossible to trace the person who is to be summoned. For the most part, there have been no substantial changes to the provisions. At the material time, the provisions stated that the court had power to seek information from the administrative authorities ... Nothing was stated regarding an alleged **duty** [in bold in the original] which would oblige the court to request such information from specific bodies, in particular those indicated by the [applicant].
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> [Article 239 § 3 of the Code of Civil Procedure] required the court to be satisfied of the impossibility of tracing the defendant before ordering that he be summoned to appear by public notice; the court had to be **certain**[1] of this impossibility and could to this end use those methods that it deemed necessary or appropriate. There was in this no gratuitous act of free will or unfettered discretion; if a discretionary power was involved, it was limited to the court's choice of methods to be used or, more particularly, the choice of authorities to be contacted. However, once the court was certain that it was impossible to trace the defendant, the relevant provision obliged it – and indeed continues to oblige it – to pursue the proceedings by means of summons by public notice.
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> It is necessary to strike a balance between the various principles and interests at stake, particularly those relating to the adversarial principle and the obligatory presence of the defence and those of promptness and legal certainty, which are also protected by the Constitution.
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> Once the court has used all methods, in particular those that are found to be the most appropriate, in order to trace the defendant, and is satisfied [that it is impossible to trace the defendant], it must pursue the proceedings but without allowing them to be prolonged indefinitely on account of long and exhaustive searches or allowing such searches to be repeated at any stage of the proceedings, which would have untoward consequences and might prevent justice being done.
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> ..."

B. Relevant domestic law and practice

Under Article 239 of the Code of Civil Procedure, in the wording in force at the material time, summons by public notice was ordered when the defendant could not be traced at the address indicated by the plaintiff. Under paragraph 3 of this provision, the court had to be certain of the impossibility of locating the defendant and could, to this end, gather information from the administrative authorities and the police.

Notices containing basic information about the proceedings in question were to be published in a newspaper. In addition, three other notices were to be posted, one at the court dealing with the case, one on the door of the defendant's last known residence, and one at the town hall of the municipality in which this residence was located. From the expiry of a given period (thirty days in the present case), the defendant had ten days in which to file his submissions in reply. Failing this, the proceedings would continue and the defendant would be represented by State Counsel's Office.

Article 771 (f) of the Code of Civil Procedure provides for the possibility of requesting that the proceedings be reopened where a party has taken no part in them whatsoever. The interested party must then demonstrate that the summons to appear was not served in accordance with the law. However, Article 772 § 2 states that any such request to reopen the proceedings must be submitted within five years of the date on which the decision in the proceedings in question becomes final.

Article 813 (d) of the Code of Civil Procedure also enables the interested party to file an objection to the enforcement proceedings based on the nullity of the summons to appear served in the main proceedings.

COMPLAINT

Relying on Article 6 § 1 of the Convention, the applicant complained that he had not received a fair trial, since it had been impossible for him to make submission in adversarial proceedings during the main proceedings, which had taken place without his knowledge.

THE LAW

The applicant complained that he had not received a fair trial that complied with the guarantees of Article 6 § 1 of the Convention, which provides, in particular:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

He alleged that his non-participation in the main proceedings had irremediably deprived him of the guarantees provided for in this provision. He pointed out that he had not had an opportunity to reply to the opposing party's arguments, and that the relevant courts had not redressed this situation.

In application no. 2672/03, the applicant complained that the courts before which the objection to the enforcement proceedings had been filed had failed to remedy the fact that he had not participated in the main proceedings.

At the outset, the Court notes that the two applications concern the same problem, namely the applicant's total lack of participation in the main proceedings, in which he had been ordered to pay the damages sought by the plaintiffs. Accordingly, under Article 43 of the Rules of Court, it is appropriate to join the applications and examine them simultaneously.

The Court reiterates that Article 6 § 1 of the Convention enshrines the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, this right is not an absolute one: it may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see *De Geouffre de la Pradelle v. France*, judgment of 16 December 1992, Series A no. 253-B, p. 41, § 28).

For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights (see *Bellet v. France*, judgment of 4 December 1995, Series A no. 333-B, p. 42, § 36; see also *Cañete de Goñi v. Spain*, no. 55782/00, § 34, ECHR 2002-VIII).

Finally, one of the elements of a fair hearing within the meaning of Article 6 § 1 is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, *inter alia*, *Mantovanelli v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 436, § 33).

With regard to the presence of the accused in criminal proceedings, the Court has already found that the interested party must be able to attend and participate in his trial. Equally, to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, and vague and informal knowledge cannot suffice (see *T. v. Italy*, judgment of 12 October 1992, Series A no. 245-C, p. 42, § 28).

Although this case-law concerns criminal proceedings, the Court considers that it is equally valid, *mutatis mutandis* and in certain

circumstances, in civil proceedings, notwithstanding the greater latitude enjoyed by the Contracting States in the area of civil litigation (see *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, p. 108, § 28).

In the present case, the applicant did not have an opportunity to take part effectively in the main proceedings, in which he was ordered to pay damages. In accordance with the domestic legislation concerning summonses to appear, the court decided to summon the applicant by means of public notice so that the proceedings could be pursued.

In that connection, the Court points out that the rules relating to the procedures and time-limits to be observed in bringing proceedings are designed to ensure the proper administration of justice and compliance, in particular, with the principle of legal certainty (see *Cañete de Goñi*, cited above, § 36).

The rules on summonses to appear which were applied in the present case are specifically designed to ensure the proper administration of justice. As the Constitutional Court pointed out, it is necessary to find a balance between the different interests concerned. To extend proceedings indefinitely in order to trace the address of one of the persons involved might prove to be incompatible with the principle of legal certainty and the proper administration of justice. The right of access to a court does not therefore prevent the Contracting States from making provision in their legislation for a procedure to apply in a situation of this type, provided that the rights of those concerned are properly protected.

The Court considers, in the light of the circumstances of the case and the applicable rules, that this was the situation in the present case. The District court ordered the summonses by public notice only when it was satisfied, after making enquiries of the police, that the applicant's address could not be found.

Furthermore, defendants in the same situation as the applicant are not totally without remedies against such decisions. Firstly, Article 771 (f) of the Code of Civil Procedure provides for the possibility of challenging the validity of a summons by public notice even if, in the present case, the applicant was unable to avail himself of this possibility since the five-year period fixed by Article 772 § 2 of the same Code had expired. Secondly, the applicant was able to challenge the validity of a summons by public notice in the enforcement proceedings which followed the main proceedings. He was thus able to submit arguments to the effect that that type of summonses should not have been ordered, albeit unsuccessfully. The domestic courts found that the validity of a summons by public notice was unaffected by the grounds put forward by the applicant. In this regard, the Court reiterates that it is primarily for the national courts to interpret the rules concerning procedure. In the instant case, the national courts' interpretation was neither arbitrary nor unreasonable.

In view of the above, the Court finds that there has been no breach of the very substance of the applicant's right of access to a court.

It follows that the applications are manifestly ill-founded and must be rejected, pursuant to Article 35 § 3 de la Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.