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

COURT (CHAMBER)

CASE OF HORNSBY v. GREECE

(Application no. 18357/91)

JUDGMENT

STRASBOURG

19 March 1997

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

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 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 September 1996 and on 27 January and 25 February 1997,

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 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18357/91) against the Hellenic Republic lodged with the Commission under Article 25 (art. 25) by two British nationals, Mr David Hornsby and Mrs Ada Ann Hornsby, on 7 January 1990. The applicants, who were designated by their initials during the proceedings before the Commission, subsequently consented to the disclosure of their identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Greece recognised the compulsory

[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 A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they did not wish to take part in the proceedings. The British Government, who had been notified by the Registrar of their right to intervene (Article 48 (b) of the Convention and Rule 33 para. 3 (b)) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 29 September 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr A. Spielmann, Mr J.M. Morenilla, Sir John Freeland, Mr L. Wildhaber and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Greek Government ("the Government") and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 13 June 1996 and the applicants' claims under Article 50 (art. 50) on 12 August.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 September 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr V. KONDOLAIMOS, Adviser, Legal Council of State — *Delegate of the Agent,*

Mr V. KYRIAZOPOULOS, Legal Assistant, Legal Council of State, — *Adviser;*

(b) for the Commission

Mr L. LOUCAIDES, — *Delegate.*

The Court heard addresses by Mr Loucaides and Mr Kondolaimos.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. The applications for authorisation to open a private language school

6. Mr David Hornsby and his wife Mrs Ada Ann Hornsby were born in the United Kingdom in 1937 and 1939 respectively. They are graduate teachers of English and live on the island of Rhodes.

7. On 17 January 1984 the second applicant applied to the Ministry of Education in Athens for authorisation to establish in Rhodes a private school (frontistirion) for the teaching of English (see paragraph 29 below). On 25 January the Ministry refused the application on the ground that only Greek nationals could be granted such authorisation by the provincial secondary education authorities.

8. On 12 March 1984 Mrs Hornsby tried to deliver a second application in person at the offices of the Dodecanese Secondary Education Authority, but the responsible civil servant refused to acknowledge receipt. After a complaint had been lodged by Mrs Hornsby's lawyer, the authority informed her on 5 June 1984 that under the Greek legislation in force foreign nationals could not obtain authorisation to open a frontistirion.

9. Mrs Hornsby, considering that making nationality a condition for authorisation to establish a frontistirion contravened the Treaty of Rome of 25 March 1957, applied to the Commission of the European Communities, which referred the case to the Court of Justice of the European Communities. In a judgment of 15 March 1988 (no. 147/86, Commission of the European Communities v. the Hellenic Republic), the Court of Justice held that "by prohibiting nationals of other member States from setting up frontistiria the Hellenic Republic [had] failed to fulfil its obligations under Articles 52 and 59 of the EEC Treaty".

10. On 1 April 1988 Mrs Hornsby made a further application to the Dodecanese Secondary Education Authority and on the same day Mr Hornsby separately sent the authority a similar application. On 12 April 1988 the authority refused both applications for the same reasons as it had given in its reply of 5 June 1984 (see paragraph 8 above).

11. On 15 September 1988 the Director of Secondary Education for the Dodecanese province informed the applicants that the question of granting non-Greeks authorisation to open a frontistirion was being reviewed by the competent authorities.

12. In a letter of 23 November 1988 the applicants requested the Prime Minister to take the necessary steps to ensure compliance with the judgment given by the Court of Justice on 15 March 1988 (see paragraph 9 above).

B. The proceedings in the Supreme Administrative Court

13. On 8 June 1988 each of the applicants had lodged with the Supreme Administrative Court an application to set aside the decisions of the Dodecanese Director of Secondary Education (see paragraph 10 above).

By two judgments of 9 and 10 May 1989 (nos. 1337/1989 and 1361/1989), the Supreme Administrative Court set the decisions aside in the following, identical terms:

> "...
>
> This application seeks annulment of the Dodecanese Director of Secondary Education's decision ... of 12 April 1988 rejecting the request of the applicant, a British national, for authorisation to set up a frontistirion for foreign-language teaching in Rhodes.
>
> Section 68 (1) of Law no. 2545/1940 ... provides: 'Authorisation to set up a frontistirion shall be granted to natural persons possessing the qualifications required for employment as a teacher in a primary or secondary school in the public system, or having equivalent academic qualifications.'
>
> In addition, Article 18 para. 1 of the Civil Servants Code - Article 2 para. 3 of which also applies to secondary and primary teachers - provides: 'No one shall be appointed to a civil service post who does not have Greek nationality.' It appears from these provisions that it is against the law for a non-Greek to be given authorisation to set up a frontistirion for the teaching of foreign languages.
>
> Article 52 of the Treaty of 25 March 1957 instituting the EEC ... proclaims freedom of establishment for the nationals of a member State within the territory of another member State, prohibiting all discrimination on the ground of nationality as regards the right to take up activities as self-employed persons and to set up and run businesses. That provision ... has been 'directly applicable' in Greek law since 1 January 1981, when the Treaty came into force, without it being necessary to amend Greek legislation beforehand to bring it into line with Community law.
>
> The above-mentioned bar preventing non-Greeks from being granted authorisation to set up a frontistirion for the purpose of teaching foreign languages, in so far as it concerns the nationals of the other member States of the European Communities, is contrary to Article 52 of the Treaty (judgment no. 147/86 of the Court of Justice of the European Communities, 15 March 1988, Commission v. the Hellenic Republic), since it has been without legal force, regard being had to the foregoing considerations, since 1 January 1981. Consequently, the impugned decision rejecting the applicant's request - based on the erroneous premiss that the bar complained of continues to apply to all non-Greeks, without any distinction between the nationals of other member States of the European Communities and the nationals of non-member States - is unlawful and must therefore be set aside.

The application under consideration must accordingly be allowed.

For these reasons

...

The Supreme Administrative Court sets aside the Rhodes Director of Secondary Education's decision ... of 12 April 1988.

..."

14. On 3 July 1989 two associations of frontistirion owners and three owners of such establishments in Rhodes lodged a third-party appeal (tritanakopi) against judgments nos. 1337/1989 and 1361/1989 with the Supreme Administrative Court. This appeal was dismissed by the Supreme Administrative Court on 25 April 1991.

15. On 8 August 1989 the applicants lodged two further applications for authorisation with the Dodecanese Secondary Education Authority, enclosing the judgments of the Supreme Administrative Court and emphasising that no further delay in granting authorisation could be justified. However, they received no reply.

On 27 February 1990 the applicants' lawyer again applied to the authority.

C. The proceedings in the Rhodes Criminal Court

16. On 28 March 1990 the applicants brought a private prosecution in the Rhodes Criminal Court against the Dodecanese Director of Secondary Education and any other civil servant responsible, relying on Article 259 of the Criminal Code (see paragraph 24 below).

On 22 October 1993 the Criminal Court gave judgment against the applicants, holding that even supposing the director had been acting unlawfully when he refused authorisation, the intent required by Article 259 for the elements of the offence to be made out had not been established.

D. The proceedings in the Rhodes First Instance Civil Court

17. On 14 November 1990 the applicants brought proceedings in the Rhodes First Instance Civil Court seeking compensation (Articles 914 and 932 of the Civil Code and sections 104 and 105 of the Introductory Law (Isagogikos Nomos) to the Civil Code (see paragraph 26 below)) for the prejudice they alleged had been caused them on account of the administrative authorities' refusal to comply with the judgments of the Supreme Administrative Court (see paragraph 13 above). Mr and Mrs Hornsby claimed 30,025,200 and 41,109,200 drachmas (GRD)

respectively for pecuniary damage and loss of income, and GRD 100,000,000 for non-pecuniary damage.

18. On 30 January 1992 the Rhodes First Instance Civil Court declared the application inadmissible (judgment no. 32/1992) on the ground that the dispute submitted to it came within the jurisdiction of the administrative courts.

E. The proceedings in the Rhodes Administrative Court

19. On 3 July 1992 the applicants brought an action for damages against the State in the Rhodes Administrative Court. They relied, inter alia, on Article 914 of the Civil Code and section 105 of the Introductory Law to the Civil Code. In addition, they argued that the compensation should cover not only the pecuniary and non-pecuniary damage they had already sustained but also the damage they would continue to sustain until the administrative authorities granted them the authorisation they sought.

On 15 December 1995, in judgment no. 346/1995, the Administrative Court accepted that the administrative authorities had unlawfully refused to process Mrs Hornsby's application for authorisation of 12 March 1984 (see paragraph 8 above) and that after publication of the judgments of the Court of Justice and the Supreme Administrative Court (see paragraphs 9 and 13 above) they had failed to comply with them. However, considering that the applicants had not sufficiently proved the damage they claimed to have sustained, it ordered further investigative measures.

F. The applications to the Minister of Education

20. On 20 April 1990 the applicants asked the Minister of Education to intervene. They applied to him again on 14 January and 29 July 1991 and to the Minister responsible for managing Cabinet business on 25 October 1991.

21. On 14 January 1993 the Dodecanese Director of Secondary Education informed the applicants that he had written to the Minister of Education to ask if he could grant the authorisation requested, in the light of the Supreme Administrative Court's judgments of 25 April 1991 (see paragraph 14 above). On 3 May 1993 he informed them that he had again written to the Minister reminding him that two years had already gone by since the above-mentioned judgments of the Supreme Administrative Court and that their application was still pending. He also referred to three previous letters to the Minister which had gone unanswered.

22. A presidential decree (no. 211/1994) published on 10 August 1994 recognised the right of nationals of member States of the European Communities to establish frontistiria in Greece (see paragraph 28 below).

However, those who did not possess a Greek secondary school-leaving certificate had to pass an examination in Greek language and history.

On 20 October 1994 the Minister of Education asked the Dodecanese Director of Secondary Education to resume consideration of the applicants' request in the light of Presidential Decree no. 211/1994 and to keep the Ministry informed of further developments.

On 11 November 1994 the Director sent the applicants a photocopy of the decree and urged them to take the necessary steps. On 7 February 1996 he wrote to them again expressing his surprise that they had not yet taken the examination they needed to pass in order to obtain authorisation to open a frontistirion and to teach in one. He informed them that it was illegal for them to continue working in a frontistirion (belonging to a Greek national) under the relevant new legislation and asked them to regularise their situation if they wished to avoid application of the statutory penalties.

II. RELEVANT DOMESTIC LAW

A. The Constitution

23. Article 95 para. 5 of the 1975 Constitution provides:

> "The administrative authorities shall be under an obligation to comply with judgments of the Supreme Administrative Court setting aside their decisions. Breach of that obligation shall engage the responsibility of any authority in breach, according to the provisions of statute law."

B. The Criminal Code

24. Article 259 of the Criminal Code provides:

> "Breach of an official duty
>
> A civil servant who deliberately breaches an official duty with the intention of unlawfully obtaining a pecuniary advantage for himself or another or who causes prejudice to the State or a third party shall be punished by up to two years' imprisonment, save where the offence is punishable pursuant to another provision of criminal law."

C. The Civil Code

25. The relevant Articles of the Civil Code read as follows:

Article 57

"Personal rights

Any person whose personal rights are unlawfully infringed shall be entitled to bring proceedings to enforce cessation of the infringement and restraint of any future infringement. Where the personal rights infringed are those of a deceased person, the right to bring proceedings shall be vested in his spouse, descendants, ascendants, brothers, sisters and testamentary beneficiaries. In addition, claims for damages in accordance with the provisions relating to unlawful acts shall not be excluded."

Article 59

"Reparation for non-pecuniary damage

In the cases provided for in the two preceding Articles, the court may, in the judgment it gives on the application of the person whose right has been infringed, and regard being had to the nature of the infringement, also order the infringer to make reparation for the plaintiff's non-pecuniary damage. Such reparation shall consist in the payment of a sum of money, publication of the court's decision and any other measure appropriate in the circumstances of the case."

D. Introductory Law to the Civil Code

26. The following provisions of the Introductory Law (Isagogikos Nomos) to the Civil Code (Law no. 2783/41) are relevant:

Section 104

"The State shall be liable in accordance with the provisions of the Civil Code concerning legal persons, for acts or omissions of its organs regarding private-law relations or State assets."

Section 105

"The State shall be under a duty to make good any damage caused by the unlawful acts or omissions of its organs in the exercise of public authority, except where the unlawful act or omission is in breach of an existing provision but is intended to serve the public interest. The person responsible shall be jointly and severally liable, without prejudice to the special provisions on ministerial responsibility."

E. Application for judicial review in the Supreme Administrative Court

27. Sections 45 and 50 of Presidential Decree no. 18/1989 codifying the legislative provisions on the Supreme Administrative Court, of

30 December 1988/9 January 1989, govern applications for judicial review of acts or omissions by the administrative authorities:

Section 45

"Acts which may be challenged

1. An application for judicial review alleging ultra vires or unlawful action is available only in respect of enforceable decisions of the administrative authorities and public-law legal persons and against which no appeal lies to another court.

...

4. Where the law requires an authority to settle a specific question by issuing an enforceable decision subject to the provisions of paragraph 1, an application for judicial review is admissible even in respect of the said authority's failure to issue such decision.

The authority shall be presumed to refuse the measure either when any specific time-limit prescribed by the law expires or after three months have elapsed from the lodging of the application with the authority, which is required to issue an acknowledgment of receipt ... indicating the date of receipt. Applications for judicial review lodged before the above time-limits shall be inadmissible.

An application for judicial review validly lodged against an implied refusal [on the part of the authorities] is deemed also to contest any negative decision that may subsequently be taken by the authorities. Such decision may however be challenged separately.

..."

Section 46

"Time-limit

1. Except as otherwise provided, an application for judicial review must be made within sixty days of the day following the date of notification of the impugned decision or the date of publication ..., or, otherwise, of the day following the day on which the applicant acquired knowledge of the decision. In the cases provided for in paragraphs 2, 3 and 4 of section 45, time begins to run when the time-limits prescribed in those provisions have expired.

..."

Section 50

"Consequences of the decision

1. The decision allowing an application for judicial review shall declare the impugned measure void, which entails its general nullity, whether it is a general or individual measure.

...

3. In the case of failure to take action, where the Supreme Administrative Court allows the application, it shall refer the case back to the relevant authority so that it can take the action incumbent on it.

4. In discharging the obligation imposed on them by Article 95 para. 5 of the Constitution, the administrative authorities must comply with the judgments of the Supreme Administrative Court in the light of the circumstances of each case, either by taking positive measures to that end or by refraining from any action contrary to the Supreme Administrative Court's decision. Failure to do so may entail, in addition to the criminal penalties laid down by Article 259 of the Criminal Code, personal liability in damages.

5. Judgments of the plenary court or the divisions allowing or refusing applications to set aside shall constitute binding authority in respect of the parties to a particular case and also in respect of each case or dispute pending before the judicial or other authorities where the administrative issue determined by the Supreme Administrative Court is decisive for the outcome."

F. Presidential Decree no. 211/1994

28. The presidential decree of 10 August 1994 on "bringing Greek legislation concerning the setting up and running of frontistiria ... into conformity with Articles 7, 48, 52, 58 and 59 of the Treaty instituting the European Economic Community" provides:

Section 1

"The purpose of the present decree is to bring Greek legislation concerning the setting-up and running of frontistiria ... into conformity with Articles 7, 48, 52, 58 and 59 of the Treaty instituting the European Economic Community, by abolishing all forms of discrimination on the ground of nationality."

Section 2

"In addition to what is provided in section 68 (1) of Law no. 2545/1940 on private schools, frontistiria and boarding-schools, authorisation to set up a frontistirion shall also be granted to nationals of the member States of the European Union, providing that they have the qualifications required by law for such authorisation to be granted to a Greek national. European Union nationals shall be required to produce similar

documentary evidence and the certificate prescribed by section 14 (10) of Law no. 1566/1985, which shall be applicable by analogy."

Section 14 (10) of Law no. 1566/1985 provides:

"If the applicants ... do not have a Greek secondary school-leaving certificate, they shall be required to produce a certificate attesting that they understand Greek and speak it fluently and have a knowledge of Greek history. In order to obtain such a certificate, applicants must take an examination under regulations laid down by the Minister for Education and Religious Affairs."

G. Law no. 2545/1940 on private schools, frontistiria and boarding-schools

29. Section 63 of Law no. 2545/1940 defines a frontistirion as "the organisation in one place of courses for groups of more than five persons, or, regardless of the composition of the groups, for more than ten persons in total per week, which have as their purpose, either to supplement and consolidate instruction forming part of the curriculum for primary, secondary and higher education (the latter whether or not preparatory to university entrance), or to teach foreign languages or music or to provide general training in extra-curricular activities, for not more than three hours a day per group consisting of the same persons".

Section 68 of the same Law provides that the setting up of a frontistirion is subject to authorisation which may be granted only to natural persons who hold the qualifications required for employment in the civil service as a teacher in the public-education system. Those qualifications include, according to Article 18 of the Public Servants Code, the possession of Greek nationality.

According to Law no. 284/1968, frontistiria for foreign languages may be administered only by persons holding the statutory qualifications; for a definition of those qualifications, reference is made to Law no. 2545/1940, which requires, in particular, the possession of Greek nationality.

Greek nationality is also required in the case of all persons teaching in a frontistirion of whatever kind. The only exception to that rule was laid down by Decree no. 46508/1976 of the Minister for Education and Religious Affairs. That decree, which, however, applies only to frontistiria engaged in the teaching of foreign languages, provides:

"Each frontistirion may employ only one foreign national if it does not employ more than four foreign-language teachers of Greek nationality. If it employs more than four Greek nationals, it shall be authorised to employ more foreign nationals in the proportion of one foreign national to five Greek nationals."

PROCEEDINGS BEFORE THE COMMISSION

30. Mr and Mrs Hornsby applied to the Commission on 7 January 1990. They alleged a violation of Article 6 para. 1 of the Convention (art. 6-1) on account of the authorities' refusal to comply with two judgments of the Supreme Administrative Court.

31. The Commission declared the application (no. 18357/91) admissible on 31 August 1994. On 11 April 1995 it rejected a new request in which the Government asked it to declare the application inadmissible in accordance with Article 29 of the Convention (art. 29). In its report of 23 October 1995 (Article 31) (art. 31), it expressed the opinion by twenty-seven votes to one that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

32. In their memorial the Government asked the Court "to dismiss the application lodged by Ada Ann and David Hornsby in its entirety".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

33. The Government argued as their main submission, as they had before the Commission, that the application was inadmissible for non-observance of the six-month time-limit laid down in Article 26 of the Convention (art. 26) and for failure to exhaust domestic remedies.

A. Non-observance of the six-month time-limit

34. The Government requested the Court to dismiss the application pursuant to Article 26 of the Convention (art. 26), as the applicants had not lodged their application with the Commission within six months of the dates

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-II), but a copy of the Commission's report is obtainable from the registry.

when the Supreme Administrative Court delivered its judgments nos. 1337/1989 and 1361/1989.

35. Like the Commission, the Court notes that the situation complained of by the applicants began with the relevant authorities' refusal to grant them the authorisation they sought - despite the above-mentioned judgments of the Supreme Administrative Court - and continued even after the lodging of their application to the Commission, on 7 January 1990. In April 1990 and in January and July 1991 the applicants wrote to the Minister of Education on the subject (see paragraph 20 above). Moreover, the Supreme Administrative Court dismissed the third-party appeal on 25 April 1991.

This objection must therefore be dismissed.

B. Failure to exhaust domestic remedies

36. The Government submitted that the applicants had not exhausted the remedies available to them under Greek law as Article 26 of the Convention (art. 26) required. In the first place, they had not brought actions for damages in the civil courts under Articles 57 (personal rights) and 59 (reparation for non-pecuniary damage) of the Civil Code (see paragraph 25 above). Secondly, they had not sought judicial review of the administrative authorities' implied refusal to act on the renewed applications for authorisation of 8 August 1989 (see paragraph 15 above). Lastly, the proceedings they had brought in the Rhodes Administrative Court were still pending (see paragraph 19 above).

37. As regards the actions for damages provided for in Articles 57 and 59 of the Civil Code, the Court considers that in this case they cannot be deemed sufficient to remedy the applicants' complaints. Even supposing that the outcome of such actions had been favourable to the applicants, compensation for non-pecuniary damage or an infringement of personal rights would not have been an alternative solution to the measures which the Greek legal system should have afforded them whereby they might remedy the impossibility of their opening a language school despite the judicial decisions which had removed every obstacle in that respect.

As regards judicial review in the Supreme Administrative Court, there is no reason to suppose that the applicants would have obtained the authorisation they sought since, pursuant to section 50 (3) of Presidential Decree no. 18/1989, the Supreme Administrative Court refers such cases back to the relevant authority (see paragraph 27 above). The applicants, however, who had met with that authority's persistent failure to reply - at least until May 1993 (see paragraph 21 above) - to their repeated applications, could not reasonably expect such a remedy to bring them the result they sought.

Lastly, as regards the proceedings in the Rhodes Administrative Court, the Court considers that these are decisive only in connection with the

question of the award of just satisfaction under Article 50 of the Convention (art. 50).

Accordingly, this objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

38. The applicants alleged that the administrative authorities' refusal to comply with the Supreme Administrative Court's judgments of 9 and 10 May 1989 had infringed their right to effective judicial protection of their civil rights. They relied on Article 6 para. 1 of the Convention (art. 6-1), which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

39. The Government did not deny that the proceedings in the Supreme Administrative Court concerned the applicants' civil rights within the meaning of Article 6 (art. 6). They submitted that the Supreme Administrative Court had ruled on those rights in full compliance with the requirements of that Article (art. 6) and had given two judgments in the applicants' favour, the content of which was not contested by the administrative authorities.

However, they maintained that the applicants' complaint did not fall within the scope of Article 6 (art. 6), which guaranteed only the fairness of the "trial" in the literal sense of that term, that is the proceedings conducted before the judicial authority alone. The lodging of the applicants' two applications of 8 August 1989 and the administrative authorities' failure to reply (see paragraph 15 above) had not created a new "dispute" (contestation in the French text) over their civil rights. The administrative authorities' delay in complying with the above-mentioned judgments of the Supreme Administrative Court was an entirely different question from the judicial determination of the existence of those rights. Execution of the judgments of the Supreme Administrative Court fell within the sphere of public law and, in particular, of the relations between the judicial and administrative authorities, but could not in any circumstances be deemed to come within the ambit of Article 6 (art. 6); such a conclusion could not be deduced from either the wording of that Article (art. 6) or even the intentions of those who had drafted the Convention.

Lastly, the Government contested the analogy drawn by the Commission in its report between the Van de Hurk v. the Netherlands case (judgment of 19 April 1994, Series A no. 288) and the Hornsby case. In the former case the Crown's (statutory) power partially or completely to deprive a judgment of its effect rendered the proper administration of justice nugatory. In the

present case, however, the administrative authorities had unlawfully failed to comply with a final judicial decision and could be compelled to do so by any of the numerous remedies afforded by the Greek legal system.

40. The Court reiterates that, according to its established case-law, Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies 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 (see the Philis v. Greece judgment of 27 August 1991, Series A no. 209, p. 20, para. 59). However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, mutatis mutandis, the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (art. 6); moreover, the Court has already accepted this principle in cases concerning the length of proceedings (see, most recently, the Di Pede v. Italy and Zappia v. Italy judgments of 26 September 1996, Reports of Judgments and Decisions 1996-IV, pp. 1383-1384, paras. 20-24, and pp. 1410-1411, paras. 16-20 respectively).

41. The above principles are of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights. By lodging an application for judicial review with the State's highest administrative court the litigant seeks not only annulment of the impugned decision but also and above all the removal of its effects. The effective protection of a party to such proceedings and the restoration of legality presuppose an obligation on the administrative authorities' part to comply with a judgment of that court. The Court observes in this connection that the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 (art. 6) enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.

42. The Court notes that following the judgment of the Court of Justice of the European Communities (see paragraph 9 above) the Supreme Administrative Court set aside the two decisions by which the Director of

Secondary Education had refused the applicants - solely on the basis of their nationality - the authorisation they sought (see paragraphs 7-8 and 13 above). As a result of these judgments the applicants could then assert the right to satisfaction of their requests; in repeating them on 8 August 1989 (see paragraph 15 above) they were merely reminding the administrative authorities of their obligation to take a decision consistent with the legal rules whose breach had led to the setting aside of the impugned decisions. Nevertheless, the authorities did not reply until 20 October 1994 (see paragraph 22 above). Admittedly, the applicants could have made a further application for judicial review of this implied refusal under sections 45 and 46 of Presidential Decree no. 18/1989 (see paragraph 27 above), but in the circumstances of the case the Court considers that they could not reasonably expect such a remedy to bring them the result they sought (see paragraph 37 above).

43. The Court understands the national authorities' concern to regulate, after the above-mentioned judgments of the Supreme Administrative Court, the setting up and operation of frontistiria in a manner which was compatible with the country's international obligations and at the same time calculated to ensure the quality of the instruction provided. Moreover, it is right and proper that the authorities should have a reasonable time to choose the most suitable means to give effect to the judgments concerned.

44. However, from 15 March 1988, when the Court of Justice of the European Communities gave judgment (see paragraph 9 above), and in any event from 9 and 10 May 1989, when the Supreme Administrative Court gave its ruling on the applicants' case (see paragraph 13 above), until the adoption of Presidential Decree no. 211/1994 on 10 August 1994 the Greek legislation in force laid down no particular condition for nationals of European Community member States who wished to open a frontistirion in Greece apart from the condition imposed on Greek nationals also, namely possession of a university degree, which the applicants satisfied (see paragraphs 6 and 29 above).

Furthermore, it does not appear that the applicants have given up their objective of opening a frontistirion; when they applied on 3 July 1992 to the Rhodes Administrative Court they 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 (see paragraph 19 above).

45. By refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision in the present case the Greek authorities deprived the provisions of Article 6 para. 1 of the Convention (art. 6-1) of all useful effect.

There has accordingly been a breach of that Article (art. 6-1).

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

46. The applicants made various claims under Article 50 of the Convention (art. 50), which provides:

> "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."

47. At the hearing the Government informed the Court that, if it were to find a violation, it would be possible under the Greek legal system for the applicants to obtain compensation in full. Indeed, in the proceedings they had brought in the Rhodes Administrative Court (see paragraph 19 above), which were still pending on the day of the hearing, the sums sought corresponded to a large extent to the sums claimed under Article 50 of the Convention (art. 50).

48. The Delegate of the Commission made no comment.

49. The Court considers that the question of the application of Article 50 (art. 50) is not ready for decision, and that it must be reserved, due regard being had to the possibility of an agreement between the respondent State and the applicants (Rule 54 paras. 1 and 4).

FOR THESE REASONS, THE COURT

1. Dismisses by eight votes to one the Government's preliminary objections;

2. Holds by seven votes to two that Article 6 para. 1 of the Convention (art. 6-1) is applicable in the case and has been breached;

3. Holds unanimously that the question of the application of Article 50 of the Convention (art. 50) is not ready for decision;
   accordingly
   (a) reserves it;
   (b) invites the Government and the applicants 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;
   (c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 March 1997.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Morenilla;

(b) dissenting opinion of Judge Pettiti;

(c) dissenting opinion of Judge Valticos.

R. B.
H. P.

CONCURRING OPINION OF JUDGE MORENILLA

1. I voted with the majority for the finding that there was a violation of Article 6 para. 1 of the Convention (art. 6-1) in the present case. In the following paragraphs I express my point of view separately.

2. In my opinion this case opens a new, dynamic stage in the development through case-law of the concept of the "right to a court" in a field - administrative proceedings - which has very deep historical roots in the legal systems of many European States influenced by French administrative law. The specific features which distinguish administrative proceedings from civil proceedings are mostly based on the existence of a decision on the part of the respondent public authority which has directly harmed someone's personal rights or legitimate interests.

3. The applicants alleged that the administrative authorities' refusal to comply with the judgments of the Supreme Administrative Court setting aside the decisions refusing them the authorisation they had sought to open an English-teaching school in Rhodes on the sole ground that they did not have Greek nationality, when they were nationals of another member State of the European Communities, had infringed their right to effective judicial protection of their civil rights. The Court concluded (see paragraph 45): "By refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision in the present case the Greek authorities deprived the provisions of Article 6 para. 1 of the Convention (art. 6-1) of all useful effect."

4. The present case therefore raises the question of the scope of the judgments given by the Supreme Administrative Court in connection with the applicants' applications to set aside the above decisions of the competent administrative authorities refusing the authorisation sought. The same question might arise, mutatis mutandis, in other systems based on the French model of administrative proceedings.

5. The French Conseil d'Etat has succeeded in turning administrative proceedings into a safeguard for the individual against excesses on the part of the public authorities by making them similar to civil proceedings, with just one difference: the review of the lawfulness of the administrative decision in issue carried out by the administrative courts. That difference was a decisive factor in the creation of an independent procedure within the jurisdiction of the administrative courts, with the Conseil d'Etat at the top of the hierarchy as the supreme organ responsible for scrutiny of the administrative authorities.

6. Because of the way the system has developed over the course of time, its primary purpose is to review the lawfulness of the impugned decision (particularly by means of an application to set aside). In such proceedings the administrative court, in setting aside the unlawful decision, exhausts its powers. "Thus the judge can only set aside the unlawful administrative

decision, otherwise he would infringe the principle of the separation between administrative authorities and administrative courts. He cannot, by his own judicial decisions, try to fill in the vacuum created by the decision to set aside" (see Debbasch-Ricci, Contentieux administratif, Paris, 1990, p. 833).

7. That was the historical-legal context in which, on 9 and 10 May 1980, the Greek Supreme Administrative Court delivered the judgments which were not implemented by the administrative authorities, a failure on their part which was considered by the majority to constitute an infringement of the applicants' right to a court.

8. In the present case Mrs Ada Hornsby applied in 1984 (after Greece joined the European Communities) for authorisation to set up a private English-teaching school. The administrative authorities rejected this application on the sole ground that such authorisation could be granted only to Greek nationals. The Court of Justice of the European Communities held that there had been a failure by Greece to comply with the requirements of Articles 52 and 59 of the EEC Treaty, which conferred on the nationals of one member State the freedom to settle in the territory of another while at the same time prohibiting all discrimination on the ground of nationality as regards the right to take up activities as self-employed persons and to set up and run businesses.

9. The Supreme Administrative Court's (identical) judgments mention the qualifications required pursuant to section 68 (1) of Law no. 2545/1940 for authorisation to open a frontistirion; such authorisation "shall be granted to natural persons possessing the qualifications required for employment as a teacher in a primary or secondary school in the public system, or having equivalent academic qualifications". They also refer to Article 18 para. 1 of the Civil Servants Code - Article 2 para. 3 of which also applies to secondary and primary teachers - which provides: "No one shall be appointed to a civil service post who does not have Greek nationality", and conclude: "It appears from these provisions that it is against the law for a non-Greek to be given authorisation to set up a frontistirion for the teaching of foreign languages."

After mentioning Article 52 of the EEC Treaty and citing judgment no. 147/86 of the Court of Justice of the European Communities, of 15 March 1988 (Commission v. the Hellenic Republic), the Supreme Administrative Court went on to say: "Consequently, the impugned decision rejecting the applicant's request - based on the erroneous premiss that the bar complained of continues to apply to all non-Greeks, without any distinction between the nationals of other member States of the European Communities and the nationals of non-member States - is unlawful and must therefore be set aside. The application under consideration must accordingly be allowed. For these reasons ... [t]he Supreme Administrative Court sets aside the Rhodes

Director of Secondary Education's decision ..." (see paragraph 13 of the judgment).

10. According to section 50 (1) of Presidential Decree no. 18/1989 codifying the legislative provisions on the Supreme Administrative Court, "The decision allowing an application for judicial review shall declare the impugned measure void, which entails its general nullity, whether it is a general or individual measure." Section 50 (4) provides: "In discharging the obligation imposed on them by Article 95 para. 5 of the Constitution [see paragraph 23 of the judgment], the administrative authorities must comply with the judgments of the Supreme Administrative Court in the light of the circumstances of each case, either by taking positive measures to that end or by refraining from any action contrary to the Supreme Administrative Court's decision. Failure to do so may entail, in addition to ... criminal penalties ..., personal liability in damages."

11. According to that legislation, the Supreme Administrative Court's judgments were final decisions allowing Mr and Mrs Hornsby's applications to set aside and determined the specific issue. The refusal of authorisation to open a frontistirion was set aside as being contrary to Article 52 of the Treaty instituting the European Economic Community, which was directly applicable in Greece at the time when the applications for authorisation were made. Admittedly, the judgments did not set aside the administrative authorities' refusal on account of any other illegalities which might have vitiated it - relating, for example, to the question whether the applicants had the qualifications required of Greek nationals by the legislation then in force. In their operative provisions they did no more than set aside the refusal of authorisation without ordering that the authorisation sought should be granted. As a result, in spite of further requests for execution of the Supreme Administrative Court's judgments, the Greek administrative authorities have still, eight years later, not granted the authorisation to which the applicants were entitled under the Greek law in force at the time.

12. That being the case, the rigidity - and indeed formalism - of administrative proceedings to set aside cannot justify this denial of justice nor require further procedural steps to be taken to obtain a new court decision on a case where the applicants' rights had been determined by the highest administrative court. Nevertheless, the opinion of the majority is consistent with our case-law, which interprets Article 6 para. 1 of the Convention (art. 6-1) in accordance with the principles established in its Preamble and in Article 3 of the Vienna Convention on the Law of Treaties, that is to say in a teleological, autonomous and evolutive manner, adapted to social needs. In the Golder judgment of 21 February 1975 (Series A no. 18, p. 17, para. 35) the Court held: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle

of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles."

13. That unitary view of judicial proceedings, in which disputed personal rights are the subject of detailed argument between the parties before a judge who must later make a final determination of them, seems to be opposed to a rather abstract idea of justice in which the individual is obliged to go to a court, as if he were responsible for law enforcement, to contest the lawfulness of an administrative decision, though that decision is prejudicial to his personal rights. Even if his application to set aside is allowed, such a procedure cannot bring him redress for the injury done to him because the court remits the case to the administrative authorities for them to recommence the proceedings.

14. The Court has already expressed its views on the effectiveness of such proceedings "by instalments" in the following terms: "Even supposing that the Supreme Administrative Court had allowed [the applicants'] application, there is nothing to indicate that they would have obtained the authorisation sought, as the authorities did not in practice always comply with the decisions of the Supreme Administrative Court" (see the Manoussakis and Others v. Greece judgment of 26 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1359, para. 33). Likewise, in the Scollo v. Italy judgment of 28 September 1995 (Series A no. 315-C, p. 55, para. 44), the Court held: "the inertia of the competent administrative authorities engages the responsibility of the Italian State under Article 6 para. 1 (art. 6-1)."

15. Consequently, in spite of the difficulties of adapting it to a now outdated concept of historical administrative law (see Garcia de Enterria-Fernandez Rodriguez, Curso de Derecho Administrativo, Madrid, 1986, vol. II, pp. 36-54), on the effectiveness of the fundamental right of access to a court I agree with the majority's finding of a violation. This element is becoming essential for the administration of justice in a democratic society and a firm enunciation of the principle seems to me as timely as it is necessary. In short, I see this as a step towards harmonisation of the safeguards required in administrative proceedings and civil proceedings in order to ensure more effective protection of the rights of individuals in their dealings with administrative authorities. Administrative decisions are ceasing to occupy the dominant position in administrative proceedings and becoming merely the reason for their existence. The object of administrative proceedings is formed solely by the originating application, from which the legal situations of the individuals concerned are derived.

DISSENTING OPINION OF JUDGE PETTITI

I voted with the minority for non-violation, on account of the reasoning and the legal stance adopted by the majority, whose arguments did not, in my opinion, take sufficient account of the specific features of the present case.

It was not a question of the general application of Article 6 (art. 6) by the courts of the member States of the Council of Europe, whether or not members of the European Union, or of refusal to comply with a judicial decision which had become "final and enforceable" in respect of a particular litigant.

Before that stage it was, above all, a dispute over Community law between a litigant who was a national of a Community member State and a State which was a member of the European Union.

On 15 March 1988 the Court of Justice of the European Communities held that the Hellenic Republic had failed to comply with its obligations under Articles 52 and 59 of the EEC Treaty by prohibiting EEC nationals to set up frontistiria (language schools).

The European Court of Human Rights should therefore draw a distinction between review of the lawfulness of the impugned decision and the adoption of legal decisions designed to fill the vacuum created by the decision to set aside.

On this point, I endorse that part of Judge Morenilla's concurring opinion which reads:

> "According to that legislation, the Supreme Administrative Court's judgments were final decisions allowing Mr and Mrs Hornsby's applications to set aside and determined the specific issue. The refusal of authorisation to open a frontistirion was set aside as being contrary to Article 52 of the Treaty instituting the European Economic Community, which was directly applicable in Greece at the time when the applications for authorisation were made. Admittedly, the judgments did not set aside the administrative authorities' refusal on account of any other illegalities which might have vitiated it - relating, for example, to the question whether the applicants had the qualifications required of Greek nationals by the legislation then in force. In their operative provisions they did no more than set aside the refusal of authorisation without ordering that the authorisation sought should be granted. As a result, in spite of further requests for execution of the Supreme Administrative Court's judgments, the Greek administrative authorities have still, eight years later, not granted the authorisation to which the applicants were entitled under the Greek law in force at the time."

Irrespective of the specific remedies and actions against the State for breaches of Community law, and looking at the case purely from the standpoint of Article 6 of the Convention (art. 6), it must be considered that the Supreme Administrative Court's judgments did no more than set aside as null and void the decision of 12 April 1988 rejecting the application for

authorisation to open a school, which was contrary to the decision of the Court of Justice of the European Communities.

These judgments did not have any operative provisions obliging the State to grant the applicants authorisation to open a school. The refusal of authorisation which gave rise to the judgments could not therefore, in my opinion (and contrary to what is said in paragraph 45), be held for the purposes of Article 6 (art. 6) to constitute a denial of justice for failure to execute them directly.

But since the applicants had already applied to the administrative and judicial authorities according to the correct procedures it was incumbent upon the State, immediately after the judgments of the Supreme Administrative Court, to make speedy arrangements to control access, including regulations and forms for verifying qualifications, and to organise the qualifying examination. The authorities' failure to do so, in spite of the judgment of the Court of Justice of the European Communities, resulted in deadlock. The control process adopted by the States of the European Union in the matter of the directives relating to practice as a lawyer could have been implemented. If it had been, a finding either that the applicants no longer wished to maintain their request or that the State had refused to apply the law would have permitted the conclusion that there had not been or that there had been a breach of Article 6 (art. 6). The delay by the authorities in fulfilling their administrative obligations under Community law could, to a certain extent, have amounted to a refusal of access and unwillingness to accept a judicial solution, which would, if so, have constituted a violation of Article 6 (art. 6). In that sense, the conclusion adopted in the judgment was not necessary as matters stood.

DISSENTING OPINION OF JUDGE VALTICOS

In the present case there are certainly many criticisms that can be made of Greek legislation, the Greek administrative and governmental authorities and the Greek courts. However, account must also be taken of the time element, more recent measures and the applicants' conduct.

There was incontestably a failure to bring legislation into line with the legal order of the European Communities, or in any event a lengthy delay in doing so. In addition - and this was not the first case of the kind - a long period of time elapsed before the applicants received any reply from the Minister of Education. And when, more than ten years after their initial applications, Presidential Decree no. 211/1994, published on 10 August 1994, finally gave the nationals of member States of the European Community the right to set up frontistiria (private schools in Greece), it was on condition, for those who did not have a Greek secondary school-leaving certificate, that they pass an examination in Greek language and history. Even on that point, while it is quite easy to understand the need to ensure that those concerned have an adequate knowledge of Greek, one might wonder why a knowledge of Greek history should be necessary for those who wish to teach foreign languages, and this requirement is certainly open to criticism.

That, however, is not the issue. The issue is simpler, as matters stand at present. The applicants lodged a complaint which was originally, without a doubt, well-founded. After an admittedly excessive delay the Government brought Greek legislation into line with European law - for the most part, at least - and the violation was remedied, though tardily, I repeat. The applicants were then twice asked to take an examination (see paragraph 22, 3rd sub-paragraph, of the judgment), which, on the whole, may be regarded as a reasonable condition. They did not do so and seem to have abandoned their application for authorisation to open a school, preferring the prospect of substantial compensation to a gamble on their results in such an examination. The essential role of the Court is to ensure the application of the Convention's provisions and to impel the Contracting States to apply it. It is not to condemn retrospectively violations for which redress has been afforded. At the time of delivery of the present judgment it appears, firstly, that the impugned legislation has been brought into conformity with the Convention, on the whole, and secondly that the applicants are no longer pursuing their application to open a school. It is regrettable that this important information was not given in paragraph 45 of the judgment.

In any case, after the - admittedly tardy - measures taken by the Government, it cannot be said that there is, at the present time, a violation of the Convention, as the Court seems to have decided.