CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39404/98
by Robert Charles ASHBY
against Spain

The European Court of Human Rights (Fourth Section) sitting on 5 October 1999 as a Chamber composed of

Mr G. Ress, *President*,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 27 October 1997 by Robert Charles ASHBY against Spain and registered on 17 January 1998 under file no. 39404/98;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 7 April 1999 and the observations in reply submitted by the applicant on 25 June 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1919 and resident in Torquay, Devon (United Kingdom). He is represented before the Court by Mr Luis Bertelli, a lawyer practising in Madrid.

A. The particular circumstances of the case

The facts, as they have been presented to the Court by the parties, may be summarised as follows.

On an unspecified date, the applicant introduced at the court of first instance Nº 4 of Marbella an action for the payment of a sum of money against a public limited company. On 31 October 1994, the court of first instance dismissed the applicant's claim on the ground that the applicant had not proved the debt he claimed. The applicant presented an appeal to the *Audiencia provincial* of Málaga. In the proceedings, he was represented by a lawyer, Mr Bertelli. The hearing before the *Audiencia provincial* took place on 20 December 1995. The applicant asserts that at the beginning of the hearing, a few minutes after his counsel, Mr Bertelli, started his submissions, the president of the court asked him to conclude and deprived him of the right to speak, preventing the applicant's lawyer from presenting whatever arguments he might deem appropriate in defence of his interests. The applicant's counsel objected to this breach of his right to speak and his objection was officially registered by the court.

By a judgment of 27 December 1995, the *Audiencia provincial,* after setting out in broad terms the allegations submitted by the applicant, upheld the impugned judgment on the ground that the applicant had not adduced sufficient evidence to establish the debt he claimed. The applicant lodged an appeal on points of law to the *Tribunal Supremo* invoking a lack of impartiality of the *Audiencia provincial* since two of the three magistrates composing the court had been challenged by the applicant's counsel in another case and therefore should have withdrawn. The applicant also complained of the violation of the right of defence since the conduct of the president of the court during the hearing, depriving the applicant's counsel of his right to address the court, had prevented him from explaining the arguments in support of his claim.

By a decision of 17 September 1996, the *Tribunal Supremo* rejected the appeal. With regard to the allegation of lack of impartiality, the court declared that neither at the beginning of the hearing nor previously, had the applicant's counsel submitted any ground of challenge against the judges composing the *Audiencia provincial*. Concerning the alleged violation of the right of defence due to the deprivation of the counsel's right to address the court during the hearing before the *Audiencia provincial*, the court stated that, according to Article 331 et seq. of the Spanish Code of Civil Procedure, the president of the court was authorised to prevent the lawyer making further intervention; consequently, in order to raise this complaint the applicant should have elaborated upon the reasons of his claims of violation and not limited his allegation to a simple assertion.

The applicant lodged an *amparo* appeal with the Constitutional Court, relying on the right to a fair hearing, as his lawyer had been deprived of the right to speak at the hearing, preventing him from stating the legal argument in support of his claim, and a lack of impartiality of the *Audiencia provincial,* since two of the judges had been challenged by the applicant's counsel previously. He invoked Article 24 of the Spanish Constitution (right to a fair hearing).

By a decision of 23 June 1997 the Constitutional Court dismissed the appeal on the ground that it had no constitutional relevance, observing that the examination of the judgment of the *Audiencia provincial* showed that the refusal to let the applicant's lawyer continue his address to the court had not entailed any material prejudice to the defence of the applicant and that Articles 331 and 332 of the Code of Civil Procedure authorised the president of the court to take this measure.

B. Relevant domestic law

Code of Civil Procedure

Article 330 :

"The hearings will start with a concise explanation by the registrar of the proceedings in the case ... and afterwards the parties' lawyers will present their submissions in order. They will take the floor for a second time, with the permission of the president, to rectify facts or legal concepts ..."

Article 331 :

" The parties to the proceedings may, with the permission of the president, state orally whatever they consider appropriate to their case at the end of the hearing, before the conclusion of the hearing ...

The president will give them the floor as far as they restrict their intervention to the facts and respect due decorum."

Article 332 :

"The president will draw the attention of a lawyer who clearly transgress from the case in his address or wastes time with inappropriate and unnecessary digressions and, if the lawyer persists after two warnings, the president will order him to end his address."

COMPLAINT

The applicant complains that during the hearing before the *Audiencia provincial* his lawyer was prevented by the president of the court from addressing the court, seriously infringing the right of defence and causing him undeniable prejudice. He invokes Article 6 § 1 of the Convention.

PROCEDURE

The application was introduced on 27 October 1997 before the European Commission of Human Rights and registered on 17 January 1998.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

On 12 January 1999, the Court decided to communicate the applicant's complaint concerning the refusal to allow the applicant's lawyer to continue his address to the court during the hearing before the *Audiencia provincial* (Article 6 § 1 of the Convention) and to declare inadmissible the remainder of the application ;

The Government's written observations were submitted on 7 April 1999. The applicant replied on 25 June 1999.

On 3 May 1999, the Court granted the applicant legal aid.

THE LAW

The applicant complains that during the hearing before the *Audiencia provincial* his lawyer was prevented by the president of the court from addressing the court seriously infringing the right of defence and causing him an undeniable prejudice. He invokes Article 6 § 1 of the Convention, which provides as relevant:

> " In the determination of his civil rights ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

The Government point out that according to the information provided by the registry of the *Audiencia provincial*, during the hearing the president of the Court warned the applicant's lawyer to limit his address to the matter of dispute. The applicant's lawyer protested and asked for his protest to be recorded. As he persisted in not concentrating his address on the relevant issues, the president, after having warned him up to three times, ordered him to withdraw. His protests were recorded in the minute by the registry of the Court. Furthermore, the Government adds that the applicant's lawyer at the beginning of his address presented the allegations in support of his appeal and that these allegations appear faithfully transcribed in the judgement of the *Audiencia provincial*. In conclusion, therefore, the applicant's lawyer made all the allegations he considered useful to the appeal. It was only when he argued about facts outside the dispute that the president of the Court denied him the right to continue to speak.

The applicant contests the Government's thesis. He insists on the fact that his lawyer was illegally deprived of the right to speak and that the judge refused to have his protest put on record. He points out that his lawyer was interrupted only minutes after beginning his statement and consequently was unable to complete his pleadings.

The Court recalls that the right to a fair hearing implies that the interested party be able to present his case under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent (see Dombo Beheer B.V. v. the Netherlands, Series A n° 274, p. 19,

§ 33 ; no. 9938/82, Dec. 15.7.86, D.R. 48, p. 21). In the present case, the only point at issue is to determine if the withdrawing of the floor from the applicant's lawyer during his address to the *Audiencia provincial* was made in such conditions that it affected substantially the right to a proper defence guaranteed by Article 6 § 1 of the Convention. On this point, the Court recalls that, in accordance with Articles 330 to 332 of the Spanish Code of Civil Procedure, the president of the court leads the hearing and to that effect is entitled to order the end of an address when the lawyer clearly transgress from the case or wastes time with inappropriate and unnecessary digressions. Those provisions appear to be reasonable and in conformity with a good administration of justice. In the present case, the Court observes that, after having given three warnings to the applicant's lawyer to focus his address on the questions submitted with the appeal, the president of the *Audiencia provincial* ordered him to end his address as he persisted with digressions clearly beside the point of the appeal. Moreover, the Court notes that the judgment of the *Audiencia provincial* sets out in broad terms the allegations of the applicant and gives a reasoned answer to them. In these conditions, the Court does not consider that anything in the files discloses an appearance of violation of the right to a fair hearing. It follows that the application must be rejected as being manifestly ill-founded pursuant to Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES INADMISSIBLE the remainder of the application.

Vincent Berger
Registrar

Georg Ress
President