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

CASE OF COMINGERSOLL S.A. v. PORTUGAL

(Application no. 35382/97)

JUDGMENT

STRASBOURG

6 April 2000

In the case of Comingersoll S.A. v. Portugal,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr G. RESS,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr I. CABRAL BARRETO,
Mr W. FUHRMANN,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mrs W. THOMASSEN,
Mr K. TRAJA,
Mr A. KOVLER,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 26 January and 22 March 2000,

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

PROCEDURE

1. The case originated in an application (no. 35382/97) against the Portuguese Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company formed under Portuguese law, Comingersoll – Comércio e Indústria de Equipamentos S.A. ("the applicant company"), on 7 February 1997. The applicant company complained of the length of civil proceedings. It acted through the chairman of its board of directors, Mr J.R. Marques da Costa, and was represented by Mr C. Santos, a lawyer practising in Lisbon. The Portuguese Government ("the Government") were represented by their Agent, Mr A. Henriques Gaspar, Deputy Attorney-General.

2. The Commission (Second Chamber) decided to communicate the application to the Government and the parties lodged their submissions on the admissibility and merits of the application.

3. On 1 November 1998 the application was transferred to the Court after the entry into force of Protocol No. 11 (Article 5 § 2 of Protocol No. 11).

The case was assigned to the Fourth Section (Rule 52 § 1 of Rules of Court). On 8 December 1998 the application was declared admissible[1] by a Chamber within that Section constituted as provided in Rule 26 § 1.

The applicant company lodged its observations on the merits and its claims under Article 41 of the Convention. The Government lodged their comments on that issue.

On 28 September 1999, considering that the instant case gave rise to an issue of principle concerning the application of Article 41 of the Convention and none of the parties having raised any objections thereto, the Chamber decided to relinquish jurisdiction in favour of the Grand Chamber (Article 30 and Rule 72). The Grand Chamber was constituted in accordance with the provisions of Rule 24.

4. As the Grand Chamber had decided that it was not necessary to hold a hearing, the President invited the parties to file supplementary memorials on the merits of the case and the issue of just satisfaction, and they did so. Subsequently, each of the parties submitted comments on their opponent's memorial.

THE FACTS

5. The applicant company is a public company whose registered office is at Carnaxide (Portugal).

6. It had in its possession eight bills of exchange that it had received from the A. Lda company for a total of 6,812,106 escudos. As the bills were not honoured when due, the applicant company issued enforcement proceedings against A. Lda in the Lisbon Court of First Instance on 11 October 1982 to recover the outstanding amounts.

A. Defence to the enforcement proceedings

7. After being ordered on 22 October 1982 to appear before the court of first instance, the defendant company lodged a defence to the enforcement proceedings on 6 December 1982 (*embargos de executado*).

8. On 7 March 1983 the judge gave directions (*despacho saneador*) setting out the matters that had already been established and those that remained outstanding. After instructions had been sent to the Porto, Vila Real and Bragance courts for witnesses to be heard, the case was set down

1. *Note by the Registry.* The Court's decision is obtainable from the Registry.

for hearing on 16 October 1984, but had to be adjourned owing to the failure of the applicant company's lawyer to attend. It was finally heard on 13 November 1984.

9. On 19 June 1986 the court of first instance found in favour of the defendant company. On 8 July 1986 the applicant company appealed against that decision to the Lisbon Court of Appeal (*Tribunal da Relaçao*). On 27 May 1987 the case file was transferred to that court.

10. On 28 February 1989 the court of appeal overturned the impugned decision and decided to reject the defence.

11. On 18 May 1989 when the case file was still with the Lisbon Court of Appeal, A. Lda applied for legal aid for its legal costs. That application was refused by the reporting judge in an order of 19 September 1989. A further application made by A. Lda on 23 October 1989 was likewise turned down on 3 November 1989. On appeal by A. Lda, a three-judge panel of the court of appeal upheld those orders on 3 April 1990. A. Lda appealed on points of law to the Supreme Court (*Supremo Tribunal de Justiça*) on 7 May 1990 and on 5 November 1990 the case file was transferred to that court.

12. In a judgment of 20 December 1990 the Supreme Court dismissed that appeal. On 21 January 1991 A. Lda applied for an order referring the issue to the plenary court (*tribunal pleno*), but the reporting judge dismissed the application. The Supreme Court upheld that decision in a judgment of 26 September 1991. A. Lda then lodged a further appeal which was declared inadmissible by the reporting judge on 6 January 1992. That decision was subsequently upheld by the Supreme Court on 11 March 1992. Then, on 22 June 1992, A. Lda challenged the bill of costs, but on 12 October 1992 the reporting judge ordered the transfer of the case file to the court of first instance on the ground that the challenge was intended solely to delay recovery of the debt.

B. Third-party summons opposing enforcement

13. On 2 February 1984 a company, F. & F. Lda, issued a summons opposing enforcement (*embargos de terceiro*). In an order of 9 November 1984 the judge decided that the enforcement proceedings should be stayed until the third-party summons had been heard. However, on 8 April 1987 the judge stayed the summons until A. Lda's defence to the enforcement proceedings had been heard. On 24 March 1993, in the light of the decision taken in the enforcement proceedings, the judge decided to proceed with the examination of the third-party summons.

14. On 19 November 1997 the judge gave directions setting out the matters that had already been established and those that remained outstanding.

15. The proceedings are still pending before the Lisbon Court of First Instance.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

16. The applicant company complained of the length of the civil proceedings in question. It alleged a violation of Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

17. The Government contested that submission. They argued that the proceedings were highly complex and that the Lisbon Court of First Instance had had an excessive workload.

18. The period to be taken into consideration began on 11 October 1982, when the applicant company issued proceedings in the Lisbon Court of First Instance. Those proceedings are still pending. Consequently, the length of the proceedings to be considered under Article 6 § 1 of the Convention is to date seventeen years and approximately six months.

19. The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute (see, among many other authorities, the Silva Pontes v. Portugal judgment of 23 March 1994, Series A no. 286-A, p. 15, § 39).

20. The Court notes firstly that some aspects of the case were complex. That fact, however, cannot explain why the proceedings have taken so long.

21. Nor, in the Court's view, does the conduct of the applicant company justify the length of the period under review.

22. As regards the conduct of the judicial authorities, the Court notes, firstly, delays of one year and seven months between the hearing of 13 November 1984 and the judgment of the Lisbon Court of First Instance of 19 June 1986, and four years and eight months between the date when the judge decided that the proceedings on the third-party summons should resume (24 March 1993) and the order for directions (19 November 1997). Those delays suffice by themselves to justify the conclusion that the length of the proceedings was unreasonable.

23. Lastly and above all, in the light of the circumstances of the case, which are to be assessed as a whole, the Court considers that a period of seventeen years and five months for a final decision that has yet to be delivered in proceedings issued on the basis of an authority to execute – which by their very nature need to be dealt with expeditiously – cannot be said to have been reasonable (see the Estima Jorge v. Portugal judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 773, § 45).

24. The Court reiterates that it is for the Contracting States to organise their judicial system in such a way that their courts are able to guarantee everyone the right to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time.

25. In the light of the circumstances of the case, the Court thus concludes that the reasonable-time requirement has not been complied with and, consequently, that there has been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

27. The applicant company affirmed that the pecuniary damage resulting from the alleged violation of Article 6 § 1 of the Convention amounted to 20,000,000 escudos (PTE), that being the current value of its claim by its calculations. It alleged that in view of the amount of time that had elapsed, it would be impossible for it to recover the debt in issue.

The applicant company also claimed PTE 5,000,000 for non-pecuniary damage. In its submission, the right to a hearing within a reasonable time was by its nature universal and in that connection there was no reason for a distinction to be drawn between natural persons and juristic persons. The applicant company affirmed that appropriate conclusions had to be drawn regarding compensation for damage caused by a violation of that right in order to ensure equal protection for both natural and juristic persons.

28. The Government submitted that the applicant company could not claim compensation for the amount of the debt. That was an issue solely for the domestic courts to determine, so that the Court should not award anything for pecuniary damage.

The Government contended that the purpose of awarding compensation for non-pecuniary damage for an alleged violation of the right to a hearing within a reasonable time was to provide reparation for anxiety, the mental stress of having to wait for the outcome of the case and uncertainty. They submitted that such feelings were peculiar to natural persons and could under no circumstances entitle a juristic person to compensation.

29. The Court points out at the outset that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to

restore as far as possible the situation existing before the breach (see the Papamichalopoulos and Others v. Greece (*Article 50*) judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

If the internal law allows only partial reparation to be made, Article 41 of the Convention gives the Court the power to award compensation to the party injured by the act or omission that has led to the finding of a violation of the Convention. The Court enjoys a certain discretion in the exercise of that power, as the adjective "just" and the phrase "if necessary" attest (see the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 42, § 114).

Among the matters which the Court takes into account when assessing compensation are pecuniary damage, that is the loss actually suffered as a direct result of the alleged violation, and non-pecuniary damage, that is reparation for the anxiety, inconvenience and uncertainty caused by the violation, and other non-pecuniary loss.

In addition, if one or more heads of damage cannot be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proves difficult, the Court may decide to make a global assessment (see the B. v. the United Kingdom (*Article 50*) judgment of 9 June 1988, Series A no. 136-D, pp. 32-33, §§ 10-12, and the Dombo Beheer B.V. v. the Netherlands judgment of 27 October 1993, Series A no. 274, pp. 20-21, § 40).

30. In the instant case, the Court cannot but observe that the applicant company is unable to claim the value of its debt as compensation for pecuniary damage, especially bearing in mind that the proceedings are still pending and that it is impossible to speculate at this stage on their outcome.

31. It remains to be determined whether the applicant company can claim compensation for non-pecuniary damage.

32. The Court points out in that connection that in the *Immobiliare Saffi* case it did not consider it necessary in the light of the circumstances of the case to examine whether a commercial company could allege that it had sustained non-pecuniary damage as a result of anxiety (*Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 79, ECHR 1999-V).

It observes, however, that that statement does not in any way imply that there is a general exclusion on compensation being awarded for non-pecuniary damage alleged by juristic persons. Whether an award should be made will depend on the circumstances of each case. Thus, in Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, the Court accepted that the first applicant, an association, may have suffered non-pecuniary damage as a result of a violation of Articles 10 and 13 of the Convention (see the judgment of 19 December 1994, Series A no. 302, p. 21, § 62).

Furthermore, in the *Freedom and Democracy Party (ÖZDEP)* case, the Court awarded the applicant, a political party, compensation for non-

pecuniary damage on account of the frustration its members and founders had suffered as a result of a violation of Article 11 of the Convention (see *Freedom and Democracy Party (ÖZDEP)* v. Turkey [GC], no. 23885/94, § 57, ECHR 1999-VIII).

33. Under the former Convention system, the Committee of Ministers, acting on proposals put forward by the European Commission of Human Rights, has in a number of cases awarded compensation for the non-pecuniary damage sustained by commercial companies as a result of the excessive length of proceedings. It is worth noting that the Government themselves have at no stage challenged the Committee of Ministers' power to make such awards in other Portuguese cases in which it has taken such decisions (see Resolution DH(96)604 of 15 November 1996 in the case of Dias & Costa, Lda., and Resolution DH(99)708 of 3 December 1999 in the case of Biscoiteria, Lda.).

34. The Court has also taken into account the practice of the member States of the Council of Europe in such cases. Although it is difficult to identify a precise rule common to all the member States, judicial practice in several of the States shows that the possibility that a juristic person may be awarded compensation for non-pecuniary damage cannot be ruled out.

35. In the light of its own case-law and that practice, the Court cannot therefore exclude the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage.

The Court reiterates that the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective. Accordingly, since the principal form of redress which the Court may order is pecuniary compensation, it must necessarily be empowered, if the right guaranteed by Article 6 of the Convention is to be effective, to award pecuniary compensation for non-pecuniary damage to commercial companies, too. Non-pecuniary damage suffered by such companies may include heads of claim that are to a greater or lesser extent “objective” or “subjective”. Among these, account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team.

36. In the instant case, the fact that the proceedings in issue continued beyond a reasonable time must have caused Comingersoll S.A., its directors and shareholders considerable inconvenience and prolonged uncertainty, if only in the conduct of the company's everyday affairs. The applicant company was in particular deprived of the possibility of recovering its claim earlier – the claim, it will be recalled, was a liquidated one as it was based on bills of exchange – and it remains outstanding today. In this connection, it is therefore legitimate to consider that the applicant company was left in a state of uncertainty that justified making an award of compensation.

37. Ruling on an equitable basis, as provided for by Article 41, the Court awards the applicant company PTE 1,500,000 for the damage sustained.

B. Default interest

38. According to the information available to the Court, the statutory rate of interest applicable in Portugal at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months, PTE 1,500,000 (one million five hundred thousand escudos) in respect of damage;
   (b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 April 2000.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Rozakis joined by Sir Nicolas Bratza, Mr Caflisch and Mrs Vajić is annexed to this judgment.

L.W.
M. de S.

CONCURRING OPINION OF JUDGE ROZAKIS JOINED BY JUDGES Sir Nicolas BRATZA, CAFLISCH AND VAJIĆ

I have voted in favour of finding a violation of Article 6 in this case and of awarding non-pecuniary damage to the applicant company because, in the circumstances of the case, the company may validly claim that the length of the proceedings has adversely affected its reputation and has caused uncertainty in its decision-planning and a disruption in its smooth operation and management.

The Court relied on these considerations when deciding to award compensation for non-pecuniary damage. It has also expanded its reasoning on awarding non-pecuniary compensation by taking into account, "albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team". It is obvious that in so doing the Court relies on the precedent of *Freedom and Democracy Party (ÖZDEP) v. Turkey* ([GC], no. 23885/94, ECHR 1999-VIII) to answer the submission of the Portuguese Government that non-pecuniary compensation in length of proceedings cases "was to provide reparation for anxiety, the mental stress of having to wait for the outcome of the case and uncertainty ... feelings [which] were peculiar to individuals and could under no circumstances entitle a company to compensation".

I am not able to share the approach that by awarding compensation for non-pecuniary damages the Court intends, *inter alia*, to indemnify the company for the anxiety and inconvenience suffered by the members of the company's management team. I think that the application by analogy of the test in the ÖZDEP case to the present one is not correct. In that case, the legal person was a political party (which, by its nature, is a looser organisation) and the protected right in question was the freedom of association of the members of that party who established and organised it. Here the situation is different: the company is an independent living organism, protected as such by the legal order of the State concerned, and whose rights also receive autonomous protection under the European Convention on Human Rights. It should not be forgotten that Article 34 of that Convention specifically refers to the right of non-governmental organisations to claim to be the victims of violations of the Convention and to seek protection, with all the legal consequences implicit in such a right, including the awarding of just satisfaction. Although I accept that a number of provisions of the Convention may be inapplicable to companies or other juristic persons (for example, Articles 2 and 3), the great majority of them apply directly to such persons as autonomous legal entities deserving the protection of the Convention. I do not see why, in matters of compensation, the Court should be obliged to deviate, even partly, from such an approach

and why it should be prevented from accepting, without any reservation, implied or otherwise, that a company may suffer non-pecuniary damage, not because of the anxiety or uncertainty felt by its human components, but because, as a legal person, in the society in which it operates, it has attributes, such as its own reputation, that may be impaired by acts or omissions of the State.