APPLICATION N° 27266/95

M P M L v/SPAIN

DECISION of 21 October 1996 on the admissibility of the application

---

Article 6, paragraph 1 of the Convention *An attorney, even if officially appointed, cannot be regarded as a State organ, and his acts or omissions cannot save in special circumstances, incur the liability of the State*

In this case, the alleged negligence of an officially appointed attorney (procurador) *who it is claimed, infringed the applicant's right to effective legal assistance is not such as to incur the direct and immediate liability of the State as the applicant could have sued the attorney for damages*

Article 6, paragraph 1, and Article 26 of the Convention *In Spain, a constitutional appeal to the Constitutional Court during the proceedings and a claim for compensation once the proceedings have terminated, must be brought by an applicant who complains about the length of civil proceedings*

Article 8, paragraph 1, and Article 14 of the Convention *Proceedings to establish paternity Allegations of infringement of the right to respect for private and family life and of the principle of non discrimination on the ground of birth, following the appellate court's refusal to allow biological evidence of paternity complaints about the consequences of the negligence of an officially appointed attorney, which do not incur the liability of the State*

Article 26 of the Convention *Regarding the length of civil proceedings in Spain, an appeal must be lodged with the Constitutional Court during the proceedings, and a claim for damages once the proceedings have terminated (sections 292 et seq of the Judicature Act)*

Competence *ratione personae* *An attorney even if officially appointed does not save in special circumstances incur the liability of the State under the Convention*

THE FACTS

The applicant is a Spanish national, born in 1950, and lives in Madrid

A *Particular circumstances of the case*

The facts, as submitted by the parties, may be summarised as follows

In 1980, the applicant, a mother of two children born in 1974 and 1977 respectively, instituted proceedings against P, who had died a few months earlier and his heirs for a declaration that P was the father of her two children

At the outset of the proceedings, the applicant made a successful application for legal aid, whereupon she was assigned a lawyer (*abogado*) and an attorney (*procurador*) by the respective professional associations In this regard, the Government maintain, referring to information obtained from Madrid Bar Association to support their contention, that from October 1985, the lawyer acting for the applicant had been freely chosen by her and had not therefore been officially appointed The applicant, however, claims that the lawyer had also been officially appointed

The applicant submits that, between 1981 and 1989, she was assigned four different lawyers and two different attorneys and that her case was dealt with by four different judges

Proceedings in Madrid Civil Court no 1

According to the applicant, numerous interlocutory applications were made in the proceedings between 1982 and 1990, including various applications by the defendants to the action, that is, P's heirs, raising objections which were *dilatorias* (designed to delay the proceedings) and were all dismissed by the civil courts she also alleges that the defendants were repeatedly late in filing their observations

In those proceedings, the applicant proposed to adduce various items of evidence, including paternity tests The court of first instance agreed to all her proposals, save her request for P's body to be exhumed and for P's wife and legitimate children to undergo biological tests The accepted proposals consisted of a report from a hospital in Madrid on P's blood group and Rhesus factor and an expert report requested from the Head of the Biology Department of the National Toxicology Institute In order to enable him to prepare his report, the Head of that Department sent a note on 29 April 1986 requesting the court to send him details of P's blood group

and Rhesus factor and at the same time to make enquiries of a Paris hospital regarding the results of medical tests undergone by P in 1980. A new judge dealing with the case sent letters rogatory to the French authorities in an order of 23 October 1990 seeking the requested information from the Paris hospital.

The only biological evidence filed with the court was a report by a Madrid hospital on P.'s blood group and Rhesus factor.

On 29 January 1991 the applicant sent a letter to the General Council of the Judiciary, complaining about the length of the proceedings.

In a judgment of 22 March 1991, Madrid Civil Court no. 1 dismissed the applicant's claim on the ground that she had not adduced sufficient evidence to prove that P. was the father of her children. The court held in substance that it had been impossible to order the biological evidence necessary to dispose of the case, firstly because P.'s relatives would have had to submit to tests and, secondly, because the results of the hospital tests carried out on P. in France in 1980 were not attached to the case file and as stated in a note of 29 April 1986 from the Toxicology Institute, biological evidence could not be provided without those results. The court judgment specified that the applicant could renew her application for biological evidence to be admitted on appeal should she decide to appeal against the decision.

As regards the request for information from the Paris hospital, according to the report of 10 December 1993 noting the hospital's failure to comply with the letters rogatory, the Director of the Paris hospital stated that he was prevented on the ground of professional secrecy from disclosing the type of information requested, but that P.'s medical file could be sent to the court by the doctor in charge of the relevant department, the family doctor or a court appointed doctor.

Proceedings before Madrid *Audiencia provincial*

The applicant appealed to Madrid *Audiencia provincial*. She was given leave to appeal on 11 April 1991 and was assigned a new attorney, Mr S.S. On 17 July 1991 the court served notice on the applicant's officially appointed attorney that the period for filing proposals to adduce evidence had started running. In an order of 26 September 1991, the *Audiencia provincial* noted that the period available to the appellant for filing proposals to adduce evidence had expired without her having made any proposals, so that the officially appointed lawyer, Mr S.S., could not now file any proposals.

On 3 April 1992 the applicant's lawyer informed the court that the officially appointed attorney had failed to inform the applicant or her lawyer that the period for filing proposals to adduce evidence had started running and therefore requested the court to set aside retroactively all procedural measures undertaken hitherto and up to the date of appointment of the attorney for the appeal proceedings. The officially appointed attorney sent the *Audiencia provincial* a note on 30 July 1992 stating that,

owing to a series of errors in communication of the procedural documents, he had not had access to the various notices sent by the *Audiencia* registry and therefore requested either communication of all the procedural documents to date or a special extension of the time allowed for filing proposals to adduce evidence.

On 16 September 1992 the *Audiencia provincial* made an order noting that the period granted to the applicant's attorney for filing proposals to adduce evidence on appeal had expired on 26 September 1991 without any proposals having been made.

In the applicant's written pleadings filed with the *Audiencia provincial*, she requested it, in addition to overturning the judgment of the lower court, to order by means of a *diligencia para mejor proveer* (order for further and better evidence) the biological evidence admitted at first instance. The respondents objected to her request on the ground that, according to transitional provision no. 7 under Law 11/1981, the applicable legislation on the admissibility of evidence to establish affiliation was that in force at the time of P.'s death. That legislation did not provide for biological evidence

In a judgment of 4 March 1993, Madrid *Audiencia provincial* dismissed the applicant's appeal and upheld the judgment of the court of first instance The court allowed the respondents' objections and dismissed the applicant's request for the biological evidence to be ordered by means of a *diligencia para mejor proveer*. The court held further that, pursuant to Article 53(3) of the Constitution, the principles set forth in the chapter of the Constitution containing Article 39, which provides that all children are equal, could not be relied on unless provision was made therefor in the relevant implementing laws. According to transitional provision no. 7 under Law 11/1981, proceedings to establish affiliation were governed by the previous legislation if the putative father or the child had died when that Law came into force The court held further that neither the documentary evidence nor the witness evidence was sufficient to prove that P. was the father

Appeal on points of law before the Supreme Court

The applicant appealed on points of law to the Supreme Court In the pleadings in support of her appeal, the applicant complained that the officially appointed attorney's negligence had prevented her from arguing her case and had therefore deprived her of the possibility of effective legal protection, contrary to Article 24 of the Constitution

The Supreme Court dismissed her appeal on 16 June 1994 The court held that, following the appointment of an attorney in the appeal proceedings, the applicant had let the time-limit for filing her proposals to adduce evidence expire. Furthermore, she had not appealed against either the order noting that the time-limit in question had expired or the order of 16 September 1992. The court specified that the proposals to adduce evidence and the submissions concerning the application of provision no 7

under Law 11/1981 should have been dealt with during the preparatory stage of the appeal proceedings and noted that the applicant had not availed herself of any of the remedies at her disposal for rectifying the irregularity of which she complained

The court added that the *Audiencia provincial*'s dismissal of the request which had been submitted out of time was not a ground for quashing that court's decision, as the appellate court had a discretion to decide whether or not to grant that request and a refusal could not form the basis of an appeal to the Court of Cassation

Amparo appeal before the Constitutional Court

The applicant filed an *amparo* appeal with the Constitutional Court, alleging a violation of Articles 24 (right to a fair trial) and 14 (principle of non-discrimination) of the Constitution

In a decision (*auto*) of 30 January 1995, the Constitutional Court dismissed the appeal on the ground that it was manifestly ill founded The court noted that the applicant s attorney had been informed that the period for filing proposals to adduce evidence in the appeal proceedings had started running Furthermore, and without prejudice to any proceedings which the applicant might take against the attorney, the court recalled its case law to the effect that while the courts may be liable for an alleged violation of the rights of the defence, irregularities imputable to the parties themselves could not be taken into consideration

The Constitutional Court found further that the applicant had failed to exercise due care as she had allowed the time limit for filing her proposals to adduce evidence on appeal to expire She had also failed to appeal against the decision of the *Audiencia provincial* which had dismissed her request for investigative measures on the ground that it was time barred Thus she had not availed herself of any of the possibilities of having the evidence necessary to her case admitted on appeal The court held, lastly that the fact that Madrid *Audiencia provincial* had dismissed her application to have the evidence admitted on appeal did not contradict the previous ruling in so far as the appellate court was free to grant or refuse that request, and its decision could not be submitted for scrutiny by the Constitutional Court

B *Relevant domestic law*

Provisions concerning legal aid and the relations between attorneys and lawyers

Under Section 13 et seq of the Code of Civil Procedure, free legal aid is granted by the court dealing with the case (s 20) Once legal aid has been granted, that court immediately requests the Bar Association and the Attorneys Association to appoint one of their members (s 33)

As regards the relations between attorneys and lawyers, sections 855 and 857 of the Code of Civil Procedure provide that, in appeal proceedings, the procedural documents are sent by the Court of Appeal registry to the attorney, who, in turn, sends them to the lawyer for him to examine them and, among other things, request the opening of the period for filing proposals to adduce evidence (sections 860 and 862 of the Code of Civil Procedure)

La diligencia para mejor proveer (order for further or better evidence)

The *diligencia para mejor proveer* is governed by various provisions of the Code of Civil Procedure (sections 340, 341, 342, 507 and 874) It allows the courts, both at first instance and on appeal, to order of their own motion the production of further or better evidence after the time for producing evidence has expired, where they consider such an order necessary in order to give judgment

The Judicature Act

Section 442

"1 Lawyers and attorneys incur civil, criminal and disciplinary liability, as the case may be, in the exercise of their profession

2 The respective professional associations shall, in accordance with their respective Articles of Association pronounce disciplinary liability against any member who engages in professional misconduct Any such declaration shall, in all cases, comply with the usual guarantees secured to the defence in any punitive proceedings "

Former Section 117 of the Civil Code

"In the absence of a birth certificate, a formal document, a final court judgment or factual enjoyment of status as a legitimate child, legitimate affiliation may be proved by any means, provided that there is some written proof from both parents, either jointly or separately "

Spanish Constitution of 1978

Article 39 para 2 (Chapter 3)

"The public authorities shall also afford full protection to children, who are equal before the law regardless of affiliation, and to their mother, regardless of her marital status The law shall allow actions to establish paternity "

Article 53 para 3

Recognition, respect and protection of the principles recognised in the Third Chapter shall guide positive legislation, judicial practice and actions by public authorities They may not form the basis of a claim before the ordinary courts unless provision is made therefor in the relevant implementing laws

Transitional provision no 7 under Law 11/1981 of 13 May

Lawsuits to establish affiliation shall be governed exclusively by the previous legislation where the progenitor or the child has died at the time this Law enters into force

COMPLAINTS

Without invoking expressly any provision of the Convention, the applicant makes the following complaints

Referring to Article 24 of the Constitution, the applicant complains in substance that she was not given a fair hearing owing to the refusal by Madrid *Audiencia provincial* to accede to her request for the production of biological evidence in the proceedings to establish paternity which she had brought on behalf of her children She complains in particular, about the conduct of her officially appointed attorney in the appeal proceedings stating that he let the time limit for filing proposals to adduce evidence expire without informing either her lawyer or herself

She complains further that the national decisions constitute an infringement of her right to respect for her private and family life in so far as she considers that her children are entitled to know who their father was She considers that she has been the victim of discrimination in so far as the Spanish courts refused to apply retroactively Law 11/1981 of 13 May 1981 which authorises the production of biological evidence in all disputes relating to the establishment of paternity in accordance with Article 39 of the Spanish Constitution of 1978 which proclaims the principle that all children are equal, regardless of affiliation

She complains about the length of the proceedings, pointing out that the proceedings at first instance were spread out over eleven years

THE LAW

1 The applicant complains in substance that she did not have a fair hearing as Madrid *Audiencia provincial* rejected her request for the production of biological evidence in the proceedings to establish paternity which she had brought on behalf of

her children. She complains, in particular, about the conduct of the attorney assigned to represent her on appeal, on the ground that he let the time-limit for filing proposals to adduce evidence expire without informing either her lawyer or herself

The Commission has examined this complaint from the standpoint of a right to a fair trial guaranteed by Article 6 para 1 of the Convention which provides that

> "1. In the determination of his civil rights and obligations .., everyone is entitled to a fair .. hearing within a reasonable time by an independent and impartial tribunal established by law .. "

The respondent Government point out, first of all, that the special guarantees required with regard to the rights of the defence in criminal proceedings cannot be requested in the same terms in civil proceedings such as these As regards legal representation of a litigant under Spanish law, the Government specify that this is provided both by an attorney, who represents the litigant before the courts, and by a lawyer, who advises on questions of law and, consequently, should, in theory, sign all pleadings filed with the court As regards free legal aid, Spain has a legal aid scheme to assist impecunious litigants. The Government stress that even if a litigant is granted legal aid to retain both a lawyer and an attorney, they frequently use it only for one, usually the attorney, and choose the second themselves, usually the lawyer

As regards the applicant's request on appeal for production of the biological evidence admitted at first instance, the Government indicate that, in appeal proceedings, the Code of Civil Procedure makes no provision for a written pleadings stage unless the parties to the dispute request leave from the court and the court agrees

The applicant, for her part, points out that in Spanish proceedings two law officers are involved: an attorney, who is responsible for the litigant's legal representation and has the task of performing all the necessary procedural measures in the required form and the required time, and a lawyer, who decides on the legal strategy to be adopted in the case The intervention of both these law officers is compulsory in Spanish proceedings The applicant adds that her legal aid award as an impecunious litigant covered both an officially appointed lawyer and an officially appointed attorney.

As regards the proceedings at first instance, the applicant submits that all the proposals made by her lawyer in 1985 to adduce evidence, in particular paternity tests, were accepted by the investigating judge in his order of 5 December 1985, other than the request for P 's body to be exhumed The applicant states that the only evidence filed with the court was the report by a hospital in Madrid on P 's blood group and Rhesus factor, as no order was made for the other evidence Furthermore, as regards

the expert report requested from the Head of the Biology Department of the National Toxicology Institute the latter had requested the court in writing on 29 April 1986 to send him details of P s blood group and Rhesus factor and had at the same time asked for the results of the medical tests undergone by P in 1980 to be obtained from a Paris hospital Although the proposals to adduce evidence were accepted by the court of first instance, it is not known whether the evidence was ordered The applicant notes also that a new judge appointed to deal with the case requested the French authorities by letters rogatory in an order of 23 October 1990 to obtain the information from the Paris hospital, but did not agree to order P 's wife and legitimate children to submit to biological tests That decision was upheld by the court on 11 January 1991 and on appeal on 24 March 1992

As regards the appeal proceedings before Madrid *Audiencia provincial*, the applicant stresses that the various attorneys and lawyers who dealt with her case throughout the proceedings had been officially assigned to her as a legally aided litigant As regards the conduct of the officially appointed attorney in the appeal proceedings, Mr S S , the applicant notes that he failed to collect the procedural documents sent to him upon his official appointment as the applicant's attorney on 17 July 1992 and took no action until 31 July 1992 when he requested communication of the documents and a supplementary period for filing proposals to adduce evidence, the latter request being dismissed Mr S S acknowledged in his letter that a mistake had been made in communication of the procedural documents

The applicant submits that the only conclusion to be drawn from this is that the officially appointed attorney failed to collect the procedural documents and forward them to the lawyer which meant that she was fully prevented from arguing her case All her lawyer could do therefore was ask the appellate court to order by means of a *diligencia para mejor proveer* (order for further and better evidence), pursuant to section 874 of the Code of Civil Procedure, the evidence which had been proposed and admitted at first instance The appellate court then dismissed that request Had it agreed to her request for a *diligencia para mejor proveer*, it could have remedied the situation by securing her a fair trial as guaranteed by Article 24 of the Constitution

The applicant submits that the officially appointed attorney who failed to comply with his obligations, and the appellate court, which failed to remedy the situation as it had power to do, are fully liable for the negligent handling of the appeal proceedings and the dismissal of her appeal She submits, in conclusion, that she was not given a fair hearing within the meaning of Article 6 para 1 of the Convention

The Commission recalls that, under Article 25 of the Convention, the Commission may receive petitions from any person claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention By the term "High Contracting Parties" is understood their official organs An attorney, even if he is officially appointed, cannot be regarded as a State organ His acts or omissions are not, in theory, directly attributable to a State authority and, as such, cannot, other than in special circumstances, incur the latter's liability under the Convention (see, *mutatis mutandis*, Eur Court HR, Artico v Italy judgment of 30 May 1980, Series A no. 37, p 18, para 36 and Kamasinski v Austria judgment of 19 December 1989, Series A no. 168, pp. 32-33, para 65 and Comm Report 5 5 88, p 55, para. 155) The Commission considers that, on the facts, although the applicant may have a claim against the officially appointed attorney in damages on the ground that her right to effective legal assistance was infringed as a result of his professional negligence, the State is not directly or immediately liable. Having regard to the foregoing, the Commission considers that this part of the application must be rejected as manifestly ill-founded pursuant to Article 27 para 2 of the Convention.

2 The applicant also complains that the application by the Spanish courts of the legal provisions governing proceedings to establish paternity constitutes in this case an infringement of her right to respect for her private and family life and a violation of the principle of non-discrimination on the ground of birth.

The Commission has examined this complaint from the standpoint of the right to respect for the applicant's private and family life and the principle of non-discrimination on the ground of birth guaranteed by Articles 8 and 14 of the Convention which provide respectively:

Article 8

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

language, religion, political or other opinion, national or social origin association with a national minority, property, birth or other status '

The Government point out that transitional provision No 7 under Law 11/81 of 13 May 1981, which modified the provisions of the Civil Code on affiliation, provided that proceedings to establish affiliation would be governed by the previous legislation where the progenitor or child had died at the time of entry into force of that Law In this case, P died in 1980, that is, before the said Law came into force According to the version of the Civil Code prior to the 1981 reform, biological evidence was not authorised in any circumstances, regardless of affiliation Madrid *Audiencia provincial*, applying the constitutional principle of non discrimination on the ground of birth, ruled that biological evidence was inadmissible, even for the purpose of establishing legitimate affiliation The Government consider that the Spanish courts cannot be accused of any violation of Article 8 in conjunction with Article 14 of the Convention

The applicant considers that in refusing to admit biological evidence the *Audiencia provincial* made a distinction on the ground of birth The fact that the putative father died before biological evidence could lawfully be admitted cannot constitute a ground for refusing to admit that evidence given the wording of Article 39 para 2 of the Spanish Constitution and of Articles 8 and 14 of the Convention She considers that the negligence on the part of the officially appointed attorney does not exonerate the *Audiencia provincial* from its liability for refusing to admit biological evidence despite its power to do so by means of a *diligencia para mejor proveer* She claims that, in failing to make that order, the *Audiencia provincial* violated not only Article 6 para 1 of the Convention but also Articles 8 and 14 of the Convention

The Commission observes that these complaints concern the consequences of the officially appointed attorney's negligence They are based on the same facts as the applicant's complaints under Article 6 para 1 of the Convention Having regard to the conclusion reached by the Commission concerning those complaints, it considers that this part of the application must also be rejected as manifestly ill-founded pursuant to Article 27 para 2 of the Convention

3 The applicant complains about the length of the proceedings, pointing out that at first instance they were spread out over eleven years

The Commission has examined this complaint under Article 6 para 1 of the Convention which guarantees the right to a fair trial within a reasonable time

However, the Commission notes that the applicant failed to submit her complaint to the Constitutional Court during the proceedings and that, once those proceedings had terminated, she did not apply for damages under section 292 et seq of the Judicature

Act She has not therefore exhausted domestic remedies in accordance with Article 26 of the Convention Thus this part of the application must be rejected pursuant to Article 27 para 3 of the Convention (No 17553/90, Dec 6 7 93, unpublished)

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE