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

FORMER THIRD SECTION

CASE OF DEL SOL v. FRANCE

(Application no. 46800/99)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

In the case of Del Sol v. France,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr L. LOUCAIDES, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 3 April 2001 and 30 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 46800/99) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Ms Marie-Françoise Del Sol ("the applicant"), on 12 November 1998.

2. The applicant, who had been granted legal aid, was represented by Mr J.-M. Hocquard, a lawyer practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs M. Dubrocard, Deputy Head of Human Rights, Legal Affairs Department, Ministry of Foreign Affairs.

3. The applicant alleged that the refusal of her application for legal aid to appeal to the Court of Cassation had infringed her right of access to a court, contrary to Article 6 § 1 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 3 April 2001, the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. By a judgment of 6 October 1995, the Paris *tribunal de grande instance* made a divorce order terminating the marriage of Mr and Mrs Del Sol, ordered the liquidation and partition of the matrimonial property, set the level of maintenance to be paid to the applicant at 1,300 French francs (FRF) monthly and dismissed a claim for damages by the applicant.

9. On 8 December 1995 the applicant appealed against that judgment, stating, *inter alia*, that her husband, the petitioner in the proceedings, had failed to satisfy the conditions set out in the Civil Code, as he had no rights in the assets he had offered to leave her. She argued in the alternative that a divorce would cause her exceptional hardship and that her husband's petition should be dismissed in accordance with Article 240 of the Civil Code, which empowered the court to dismiss a divorce petition if the respondent showed that "the divorce would cause the respondent ... or the children exceptional material or psychological hardship ...". The applicant also sought maintenance in the form of monthly payments of FRF 3,000.

10. On 25 February 1997 the Paris Court of Appeal upheld all the provisions of the impugned judgment, with the exception of the decision relating to maintenance, which was reduced to FRF 1,000 monthly. It held, *inter alia*, that the applicant's husband satisfied all the conditions on which the admissibility of the divorce petition depended, as he had offered to assign to the applicant his rights in property which the couple jointly owned in Italy. It further held that the applicant had failed to show that the divorce would cause her exceptional hardship, either psychologically or materially.

11. On 20 May 1997 the applicant applied to the Legal Aid Office at the Court of Cassation for legal aid to enable her to appeal to that court against the Court of Appeal's decision. Her application was refused on 2 April 1998 on the ground that no arguable ground of appeal could be made out against the impugned judgment. The Legal Aid Office noted, however, that the applicant satisfied the means test for legal aid.

12. On 22 May 1998 the applicant appealed against that decision. By an order of 11 June 1998 the President of the Court of Cassation upheld it, holding that the Legal Aid Office had "found no arguable ground of appeal after assessing the facts of the case in its unfettered discretion".

II. RELEVANT DOMESTIC LAW

13. The French system of legal aid enabling persons of limited means to assert their right through the courts was established by Law no. 91-647 of 10 July 1991 and its implementing Decree no. 91-1266 of 19 December 1991.

Under Article 33 of the decree: "Applications for legal aid ... shall contain the following information: ... the purpose of the application and a brief summary of the reasons".

Applications for legal aid are examined by the legal aid office of the court dealing with the case in respect of which the application is made. The Legal Aid Office at the Court of Cassation is composed of a judge of that court, who acts as its president, the senior registrar who acts as vice-president, two members chosen by the Court of Cassation, two civil servants, two court officers one at least of whom must be a lawyer and a member appointed by the general public (section 16 of the Law).

The Legal Aid Office may refuse an application under section 7(3) of the Law, which provides: "In cases before the Court of Cassation, an application for legal aid shall be refused if no arguable ground of appeal can be made out." An appeal lies against a decision of the Legal Aid Office to the President of the Court of Cassation (section 23 of the Law).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

14. The applicant complained that the Legal Aid Office of the Court of Cassation and subsequently the President of that court had refused her application for legal aid on the ground that no arguable ground of appeal could be made out. She maintained that their decisions had resulted in her case being prejudged and had infringed her right of access to a court as guaranteed by Article 6 § 1 of the Convention in these terms:

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

15. The Government prefaced their remarks by stating that the fact that legal aid was only granted to applicants if their argument had at least some prospect, albeit slight, of succeeding in the Court of Cassation reflected the legislature's concern to reconcile the demands of the proper administration of justice with the right of effective access to a court. That did not mean that the bodies responsible for deciding legal aid applications conducted a

detailed analysis of the merits of the applicant's arguments. On the contrary, their task was confined to eliminating appeals that were based solely on arguments that were incapable of constituting a valid ground of appeal against the impugned decision. Instances of this were to be found, firstly, in cases in which the arguments challenged issues that were within the sole discretion of the tribunals of fact. In that connection, the Government pointed out that appeals to the Court of Cassation were in a special category, as the Court of Cassation decided only issues of law, not fact. Other examples were to be found in cases in which it was immediately apparent from the documents in the file that the argument was seriously flawed or, *a fortiori*, in which the notice of appeal disclosed no ground of appeal.

16. Thus, the Government submitted that the test used by the members of the Legal Aid Office of the French Court of Cassation was very different from that which had been censured by the Court in *Aerts v. Belgium* (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, pp. 1964-65, § 60), in which similar bodies had determined whether the applicant's appeal was "[currently] well-founded", that is to say whether it was founded. The latter test was therefore stricter than that used in the French system, in which legal aid was only refused for grounds of appeal that were unsustainable. On that subject, the Government said that following the Court's judgment in *Aerts*, the Belgian legislature had amended the provisions on legal aid, which now provided, in wording similar to that of the French statute, that only "manifestly ill-founded applications shall be refused".

17. The Government added that the composition of the Legal Aid Office at the Court of Cassation meant that it was immune to any accusation of bias. The Legal Aid Office was composed of judges, lawyers, civil servants and members of the public. That diversity ensured that it had due regard to the demands of the proper administration of justice and the rights of the defence, in particular to free access to a court. The suggestion that the decisions of the Legal Aid Office reflected a policy of unfairly depriving applicants for legal aid of access to the courts was untenable. The right of appeal to the President of the Court of Cassation against decisions of the Legal Aid Office, which was afforded by section 23 of the Law of 10 July 1991, guaranteed an objective scrutiny of the proposed grounds of appeal to the Court of Cassation. It enabled applicants for legal aid to contest the Legal Aid Office's assessment of the validity of their arguments and, if applicable, to demonstrate that it was ill-founded. The Government consequently submitted that the system used by the Legal Aid Office of the Court of Cassation and the President of that court for examining legal aid applications, pursuant to the Law on legal aid, did not in itself contravene the guarantees of Article 6 § 1 of the Convention.

18. As regards the present case, the Government said that the decisions of the Legal Aid Office of the Court of Cassation and the President of that

court were based on section 7(3) of Law no. 91-647 of 10 July 1991, which laid down that an applicant had to be refused legal aid if "no arguable ground of appeal [could] be made out". That criterion was "objective" and was applied without any examination of the merits of the appeal. Its purpose was to avoid legal aid being granted in cases where the appeal was manifestly bound to fail. Thus, in the instant case, the letters sent by the applicant to the Legal Aid Office showed that she had at no stage set out her reasons for appealing to the Court of Cassation or, *a fortiori*, any ground of appeal on points of law, despite the fact that Article 33 of the decree of 1991 required applicants for legal aid to set out "the purpose of the application and a brief summary of the reasons". Quite obviously, the authorities responsible for examining the application for legal aid were obliged in the absence of any indication of the ground of appeal on points of law to rule that there were no arguable grounds of appeal. In any event, the applicant's letters to the registry of the Court showed that her complaints against the Court of Appeal concerned its refusal to allow her to rely on the "exceptional hardship" clause contained in Article 240 of the Civil Code. However, it was the settled case-law of the Court of Cassation that the issue of exceptional hardship lay within the sole discretion of the tribunals of fact. Consequently, even if the applicant had relied on a violation of Article 240 of the Civil Code as a ground of appeal to the Court of Cassation, it would have carried no weight before the Court of Cassation and could not be regarded as an arguable ground of appeal. The Government submitted in conclusion that the application was manifestly ill-founded.

19. The applicant contended that the refusal of her application for legal aid was tantamount to a denial of access to the Court of Cassation. She said that, when they submitted their applications, applicants for legal aid, who were of limited means and lay persons, were incapable of formulating their arguments, which in cases before the Court of Cassation had to comply with strict rules that warranted almost systematic recourse to a member of the *Conseil d'Etat* and Court of Cassation Bar. Accordingly, there was a danger that the Legal Aid Office's examination would result in grounds of appeal being discounted, when review by a lawyer may have rendered them viable.

20. The Court points out at the outset that there is no obligation under the Convention to make legal aid available for all disputes (*contestations*) in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which makes no reference to legal assistance.

21. Admittedly, the right of access to a court guaranteed by Article 6 § 1 is "practical and effective", not "theoretical or illusory". A Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6 (see, among other authorities, *Tolstoy Miloslavsky v. the United*

Kingdom, judgment of 13 July 1995, Series A no. 316-B, pp. 78-79, § 59). However, it is for the Contracting States to decide how they should comply with the obligations arising under the Convention. The Court must satisfy itself that the method chosen by the domestic authorities in a particular case is compatible with the Convention.

22. In the instant case, the applicant, who did not have the means to retain the services of a lawyer, complained that the refusal to grant her legal aid had deprived her of all access to the Court of Cassation.

23. The Court notes, firstly, that the reason relied on by the Legal Aid Office and the President of the Court of Cassation for refusing the applicant's application for legal aid – namely the lack of an arguable ground of appeal on points of law – is expressly contemplated in Law no. 91-647 of 10 July 1991 and was undoubtedly intended to meet the legitimate concern that public money should only be made available to applicants for legal aid whose appeals to the Court of Cassation have a reasonable prospect of success. As the European Commission of Human Rights has said, it is obvious that a legal aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it (see, among other authorities, its decisions of 10 July 1980 in *X v. the United Kingdom*, no. 8158/78, Decisions and Reports 21, p. 95, and of 10 January 1991 in *Garcia v. France*, no. 14119/88, unreported).

24. It is true that in *Aerts*, the Court found a violation of Article 6 § 1 after noting that by "refusing the application [for legal aid] on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal" (judgment cited above, pp. 1964-65, § 60).

25. However, the Court considers it important to have due regard to the quality of a legal aid scheme within a State.

26. The scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness. The Legal Aid Office of the Court of Cassation is presided over by a judge of that court and also includes its senior registrar, two members chosen by the Court of Cassation, two civil servants, two members of the *Conseil d'Etat* and Court of Cassation Bar and a member appointed by the general public (section 16 of the Law of 10 July 1991 cited above). Moreover, an appeal lies to the President of the Court of Cassation against refusals of legal aid (section 23 of the Law). In addition, the applicant was able to put forward her case both at first instance and on appeal.

27. In the light of the foregoing, the Court holds that the Legal Aid Office's refusal to grant the applicant legal aid to appeal to the Court of Cassation did not infringe the very essence of her right of access to a court.

Consequently, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

L. LOUCAIDES
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mrs Tulkens and Mr Loucaides is annexed to this judgment.

L.L.
S.D.

JOINT DISSENTING OPINION OF JUDGES TULKENS AND LOUCAIDES

(Translation)

We are unable to agree with the majority that "the ... refusal to grant the applicant legal aid to appeal to the Court of Cassation did not infringe the very essence of her right of access to a court" (see paragraph 27 of the judgment).

1. Article 6 § 1 guarantees to litigants an effective right of access to the courts. Admittedly, as the Court said in 1979, the States have a free choice of the means to be used towards this end and are not compelled to provide for the assistance of a lawyer unless such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26). That was the position in the present case. The applicant complained under Article 6 § 1 that the Legal Aid Office of the Court of Cassation and subsequently the President of that court had refused her application for legal aid, despite acknowledging that she satisfied the means test, on the ground that "no arguable ground of appeal [could] be made out".

2. In its judgment of 19 September 2000 in *Gnahoré v. France* (no. 40031/98, § 41 *in fine*, ECHR 2000-IX) the Court, referring to *Aerts v. Belgium* (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V), in which it had found a violation of Article 6 § 1 of the Convention, noted that "there is no doubt that the fact that Mr Aerts was required to have legal representation [by a member of the *Conseil d'Etat* and Court of Cassation Bar] was decisive". Indeed, the Court explained that the reason for this was that litigants in cases concerning educative assistance measures were exempted from the requirement of representation by a member of the *Conseil d'Etat* and Court of Cassation Bar and that the refusal of legal aid did not *ipso facto* prevent them from pursuing their appeal (*Gnahoré*, cited above, § 39). However, in the instant case, it is common ground that the applicant was required to be represented by a member of the *Conseil d'Etat* and Court of Cassation Bar and could not therefore conduct her appeal without the assistance of a specialised lawyer. The Court's finding that there has been no violation of Article 6 of the Convention therefore quite clearly marks a departure from its previous case-law. We find it surprising that a Chamber should thus decline to follow two previous decisions (*Airey* and *Aerts*), as such a major change to the case-law is within the sole province of the Grand Chamber.

3. The Court observes that the lack of an "arguable ground of appeal on points of law" is a ground for refusing legal aid under section 7(3) of Law no. 91-647 of 10 July 1991 and considers that that provision was "intended to meet the legitimate concern that public money should only be made available to applicants for legal aid whose appeals to the Court of Cassation have a reasonable prospect of success" (see paragraph 23 of the judgment). It is not for the Court, whose task is to ensure compliance with the rights guaranteed by the Convention and their implementation, to determine the inherent validity or not of choices made by the national legislatures and in a number of decisions concerning, notably, length-of-proceedings cases it has declined to take the budgetary implications of a finding a violation into account.

4. When the Court, adopting the Commission's case-law, states: "a legal aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it" (see paragraph 23 of the judgment), it is not immediately apparent that such a scheme may result in inequality between litigants. However, that is clearly the position in the present case, since only the least well-off litigants, those who have to apply for legal aid, are subjected to a prior scrutiny of the merits of their ground of appeal to the Court of Cassation. Unless there is an "objective and reasonable justification" for it, such difference in treatment may amount to discrimination. No system may impair the essence of the right of a particular class of litigant to a court, as guaranteed by Article 6 of the Convention, and the existence of safeguards, even substantive ones, against abuse of the system intended, as the present judgment notes, to afford protection from arbitrariness, will not suffice to compensate for any such impairment (see paragraph 26 of the judgment).

Although one of the objectives of restricting legal aid is to help filter appeals to the Court of Cassation, it is our view that that system is no longer necessary, as section 27 of Institutional Law no. 2001-539 of 25 June 2001, amending Article L.131-6 of the Judicature Code, which applies indiscriminately to all litigants, enables a three-member committee of the Court of Cassation to declare appeals on points of law inadmissible or, in cases where there is an arguable ground of appeal, unfounded.

5. Far from being neutral, the reason given for refusing legal aid, namely "the lack of an arguable ground of appeal on points of law", necessarily has an adverse affect on the prospects of success of an appeal to the Court of Cassation. Even though not of direct relevance to the present case, it is worth observing that where, as in *Gnahoré*, appellants are permitted to pursue their proceedings in the Court of Cassation despite being refused legal aid, the court will necessarily have a "preconception" of the merits of the grounds of appeal, putting such appellants at a disadvantage in comparison to appellants who have not applied for legal aid. In addition, even in cases in which parties are permitted to pursue proceedings before

the Court of Cassation without representation by a specialised lawyer, the real prospects of their being able to do so on equal terms needs to be put into its proper perspective for, as the President of the French Court of Cassation has observed: "Statistically, the prospects of success of an appeal to the Court of Cassation are far higher if the appellant is assisted by such an officer of the court." [G. Canivet, "The system of justice and fair trials", *Juris-classeur périodique*, Study, I 361, no. 46, 14 November 2001, p. 2089]

6. One of the arguments raised by the Government ultimately amounts to consigning litigants to a vicious circle. The Government state that the letters sent by the applicant to the Legal Aid Office showed that she had at no stage set out her reasons for appealing to the Court of Cassation or, *a fortiori*, any ground of appeal on points of law, despite the fact that Article 33 of the decree of 1991 required applicants for legal aid to set out "the purpose of the application and a brief summary of the reasons". The Government concluded: "Quite obviously, the authorities responsible for examining the application for legal aid were obliged in the absence of any indication of the ground of appeal on points of law to rule that there were no arguable grounds of appeal" (see paragraph 18 of the judgment). Unless one considers the drafting of an arguable ground of appeal on points of law to be within the grasp of all litigants, *quod non*, it seems perverse to suggest that the applicant, who was unassisted by counsel, was to blame for her inability to formulate an arguable ground of appeal to the Court of Cassation. It is precisely the technical and highly specialised nature of proceedings in the Court of Cassation that justifies, in our view, requiring appellants to seek the assistance of members of the *Conseil d'Etat* and Court of Cassation Bar.

These, in essence, are the reasons why we are unable to share the opinion of the majority and consider that there has been a violation of Article 6 § 1 of the Convention in the present case. We believe that the time has now come for the Court to make a fuller commitment, pursuing the liberal line it first took in 1979 in *Airey*, to securing full and complete access to the law, and therefore to justice, for society's least well-off members.