

**APPLICATION N° 23892/94**

**A C R E P v/PORTUGAL**

**DECISION** of 16 October 1995 on the admissibility of the application

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**Article 11, paragraph 1 of the Convention** *A court order dissolving an association constitutes an interference with the exercise of the right to freedom of association*

*Question whether this provision gives an association the right to legal personality (Question unresolved)*

**Article 11, paragraph 2 of the Convention** *Dissolution of an association by court order Interference prescribed by law and considered to be necessary in a democratic society for the prevention of disorder The notion of necessity implies that the interference should correspond to a pressing social need Margin of appreciation of the national authorities*

**Article 26 of the Convention** *A Government which invokes non-exhaustion of domestic remedies cannot present arguments which are incompatible with those which it submitted to the national courts*

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**THE FACTS**

The applicant is an association based in Lisbon and Vicenza (Italy) It no longer carries on any business and the present application concerns its dissolution

The applicant is represented before the Commission by Mr Romeu Francês, a lawyer practising in Lisbon

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

A *The particular circumstances of the case*

An "international association" was formed under the name of A C R E P by way of notarial documents of 18 August and 21 November 1988. Its object was "to study and propagate the culture and history of the constitutional line of the Royal House of Bragança (Casa Real de Bragança). In order to achieve this object, its Memorandum of Association provided, *inter alia*, for it to "promote the study and knowledge of, and respect for, the Monarchical Constitution of 1838", as well as "to put forward the names of persons who have distinguished themselves in the community or in cultural or scientific life to the head of the Portuguese Royal House, Dom Rosario Poidiman, for the award of medals, honours and titles as provided for in laws enacted under the monarchy and revived (represtinas) by means of royal decrees or sovereign acts issued or done by the current representative of the Royal House."

The Attorney General then instituted civil proceedings against the applicant association, seeking to have it dissolved.

On 22 January 1991, the 4th Civil Chamber of Lisbon Court (Tribunal da comarca de Lisboa - 4.º Juízo Cível), in a judgment delivered without a hearing (*saneador-sentença*), dissolved the applicant association. The court based its judgment on two grounds: firstly, the lack of advance authorisation from the Government as required by Decree-Law No. 594/74 of 7 November 1974 for international associations, and secondly, the fact that the association's object and purpose were unlawful.

The applicant association appealed to Lisbon Court of Appeal (Tribunal da Relação). It argued, *inter alia*, that when the Constitution of 1976 entered into force, Decree-Law No. 594/74 had become unconstitutional in that Article 46 of the Constitution guarantees the freedom of association and expressly provides that no advance authorisation is required without distinguishing between national and international associations. As regards the second ground for dissolution, the applicant association argued that its object was not unlawful.

In a judgment of 23 January 1992, the Court of Appeal dismissed the appeal. It emphasised that Decree-Law No. 594/74 was still in force, so that advance authorisation from the Government was required. As regards the second ground for dissolution, the Court of Appeal held that the applicant association's object was legally impossible, contrary to the law and public policy and antagonistic to the reputation of the Portuguese State.

The applicant association appealed to the Supreme Court (Supremo Tribunal de Justiça) It repeated the arguments which it had advanced before the Court of Appeal and emphasised that, in the light of Article 46 of the Constitution, Article 280 of the Civil Code and Article 11 of the Convention, the association's object was in no way unlawful In a judgment of 6 October 1993, the Supreme Court dismissed the appeal

As regards the first ground for dissolution, the Supreme Court emphasised that, although on an initial reading of Article 46 of the Constitution, Decree-Law 594/74 could appear unconstitutional, this was not in fact the case Adopting a purposive interpretation of the relevant provisions, the Court held as follows

(Translation)

"Although the constitutional provision does not distinguish between national and international associations, it is for the body charged with interpreting the provision to make this distinction Article 11 of the Convention, the first paragraph of which guarantees the freedom of association, contains a number of restrictions on the exercise of this right in its second paragraph In Portuguese law, general restrictions are laid down in Articles 158-A and 182 para 2 (d) of the Civil Code As regards international associations, these restrictions are laid down in Article 13 para 2 of Decree-Law No 594/74, which does not contradict Article 46 para 1 of the Constitution . Therefore, international associations are still subject to obtain advance authorisation from the Government "

As regards the second ground for dissolution, the Supreme Court, after recalling that Article 46 para 1 of the Constitution allows associations to be dissolved by court order in the circumstances prescribed by law, proceeded to examine the applicant association's Memorandum in the light of the provisions of Portuguese law and held, *inter alia*

"The Portuguese State is a republic; the object of the relevant association is therefore clearly contrary to the Constitution Articles 158-A and 280 of the Civil Code are applicable in the present case in the sense that the document whereby A.C R E P. was formed is void because it is contrary to the law and to public policy Nor can the relevant association rely on Article 11 para 1 of the Convention However, paragraph 2 [of that provision] does apply to it, in that it does not, and cannot, exist, for reason of, *inter alia*, national security "

On 7 October 1993, the applicant association lodged an appeal with the Constitutional Court (Tribunal Constitucional), alleging that Article 13 of Decree-Law No 594/74 was unconstitutional in the light of the wording of Article 46 of the Constitution In his grounds of appeal submitted on 9 February 1994, the Attorney General's representative at the Constitutional Court raised a preliminary issue, arguing,

on the basis of the practical nature of constitutional law actions, that the appeal served no useful purpose, bearing in mind that the dissolution of the applicant association would in any event stand on the basis of the second ground referred to by the Supreme Court.

The appeal is still pending.

However, that part of the Supreme Court judgment concerning the second ground for dissolving the applicant association has become final.

B *Relevant domestic law*

Article 46 of the Constitution of the Portuguese Republic

(Translation)

"1 Citizens have the right to create associations freely and without the need for any authorisation, provided that such associations are not intended to promote violence and that their object is not contrary to the criminal law.

2 Associations may pursue their objects freely, without interference from the public authorities, and may not be dissolved by the State or have their activities suspended other than by order of a court and in the circumstances prescribed by law ..."

Civil Code

(Translation)

Article 158-A

"The provisions of Article 280, requiring applications for an avoidance order to be made by the Attorney General's Department, apply to the creation of entities having legal personality "

Article 182

"

2 Associations shall also be dissolved, by way of court order

(d) Where their existence is found to be contrary to public policy "

## Article 280

"1. Any act having legal consequences, the purpose of which is physically or legally impossible, contrary to the law or indeterminate, is null and void

2 Any act which is contrary to public policy or prejudicial to moral standards is null and void."

Article 13 para 1 of Decree-Law No 594/74

(Translation)

"Government authorisation is required for the promotion and formation of international associations in Portugal "

## COMPLAINT

The applicant association invokes Article 11 of the Convention, alleging that its dissolution constitutes an interference with its freedom of association

...

## THE LAW

The applicant association claims that its dissolution constitutes an unjustified interference with its freedom of association. It invokes Article 11 of the Convention, which reads as follows:

"1 Everyone has the right to freedom of association with others .

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of State "

The Government have raised a preliminary objection on the basis of non-exhaustion of domestic remedies. According to them, so long as the applicant's constitutional law appeal is still pending before the Constitutional Court, it cannot refer the case to the Commission, since there is no final domestic decision

The applicant disputes this argument. According to it, the appeal pending before the Constitutional Court concerns only the question whether a statutory provision - that is, Article 13 para 2 of Decree-Law No 594/74 - is compatible with the Constitution

The applicant association emphasises that it was also dissolved on the grounds that its existence was allegedly incompatible with Portuguese law and that this part of the Supreme Court judgment has become final, thus constituting a final domestic decision as referred to in Article 26 of the Convention. The applicant association also claims that the Government's preliminary objection is incompatible with the arguments which the Attorney General's Department presented to the Constitutional Court.

The Commission observes that the Government consider that there is no final domestic decision in the present case, since the Constitutional Court has not yet ruled on the applicant's appeal. However, it notes that the Portuguese State, acting through the Attorney General's representative at the Constitutional Court, is, before that court, arguing that the applicant's appeal serves no useful purpose since the association has in any event been definitively dissolved. The Government cannot put to the Commission arguments which are inconsistent with the position they adopted before the national courts (see Eur Court HR, Kolompar judgment of 24 September 1982, Series A no 235-C, p 54, para 32).

Moreover, the Commission notes that the applicant association was definitively wound up on the basis of the second ground referred to by the Supreme Court in its judgment of 6 October 1993 and that this situation cannot be remedied even if the Constitutional Court finds for the applicant. Indeed, the Government do not dispute this. Given that the only domestic remedies which need to be exhausted are those capable of effectively redressing the alleged violation, the Commission is obliged to conclude that the preliminary objection raised by the Government cannot be upheld.

The Government also maintain that Article 11 of the Convention is not applicable in the present case. According to them, this provision does not guarantee a right to legal personality but merely protects the freedom of each individual to associate with others. The Government refer, on this point, to the Commission's decision on the admissibility of Application No 14223/88 (Dec 5 6 91, D R 70 p 218).

The Government then submit that, even assuming that Article 11 of the Convention is applicable to the situation at issue and hence that the dissolution of the applicant association can be regarded as an interference with its liberty of association, this interference would be justified under the terms of paragraph 2 of that provision.

In this context, the Government point out that the relevant interference was prescribed by law, that is, by Articles 158 A, 182 and 280 of the Civil Code and Article 13 para 2 of Decree Law No 594/74, and that it pursued legitimate aims. In particular, the preservation of the reputation of the Portuguese State, the prevention of crime and disorder and the protection of the rights of others.

As regards the first of these aims the Government submit that, since the Portuguese State is a republic, an international association - that is, one capable of pursuing its activities abroad - having the aims and object in question would be capable of discrediting the Portuguese State.

As regards the second aim, the Government affirm that the title and the powers which the association and its founder Mr Rosario Poidimani have assumed are capable of constituting the offence of using a false name or description under Article 38 of Law No 12/91 of 21 March 1991

In relation to the third aim referred to, the Government emphasise that the pursuit of the applicant company's aims could affect the rights of the true descendants of the House of Bragança

Lastly, the Government maintain that dissolving the applicant association could be regarded as a measure which was necessary in a democratic society in the light of the margin of appreciation enjoyed by States in this field, with the result that no violation of Article 11 could be found

In the applicant association's view, Article 11 of the Convention is concerned not only with the right to form an association but also with the right to maintain it. The applicant association was dissolved against its will, hence, its freedom of association was affected, and Article 11 is applicable

Secondly, the applicant association submits that it was the victim of an interference which is not justified under paragraph 2 of the provision, disputing the Government's submissions on this point. As regards the reputation of the Portuguese State, the applicant association submits that it represents only its members, and not the State, so that the latter's reputation could not possibly be affected. As regards the prevention of crime and disorder, the applicant argues that the Government have not succeeded in showing how the pursuit of its activities could constitute any criminal offence whatsoever and points out, in this context, that Mr Rosario Poidimani has never been accused of committing the offence cited by the Government. Lastly, in relation to the protection of the rights of others, the applicant emphasises that the Government are effectively taking a stance in favour of one of the lines of succession of the House of Bragança whereas it should remain neutral on this issue. The applicant association claims that it wishes to champion the cause of what it calls the constitutional line of the House of Bragança

The Commission notes, firstly, that the applicant is a non-governmental organisation which is capable of holding and exercising the right to freedom of association (see No 8652/79 Dec 15 10 81, D R 26 p 89 and, *mutatis mutandis*, No 7805/77, Dec 5 5 79, D R 16 p 68)

On the question whether Article 11 of the Convention guarantees a right to legal personality, the Commission recalls that the same issue was left unresolved in Application No 14223/88, cited by the Government

However, the Commission observes that in the present case the applicant was dissolved by virtue of domestic court decisions and, as a result of its dissolution and in contrast to the association in the above-mentioned application - no longer carries on any activity, at least in Portugal. Therefore, the dissolution constituted an interference in the applicant's exercise of its right to freedom of association (see No 8652/79, referred to above)

The interference in this case was based, as far as the second ground for dissolution was concerned, on Articles 158-A, 182 and 280 of the Civil Code, so that it was "prescribed by law" within the meaning of paragraph 2 of Article 11 of the Convention. However, as regards the first ground for dissolution, the Commission considers that it is not necessary to examine whether Article 13 para 2 of Decree Law No 594/74 could also provide a legal basis for the interference in question.

As regards the legitimacy of the aim pursued, the Commission finds that it could be considered that the aim of dissolving the applicant association was to prevent disorder, as the Supreme Court recalled in its 6 October 1993 judgment.

As for whether the measure was necessary in a democratic society, the Commission recalls that this implies the existence of a "pressing social need" and that the States have a certain margin of appreciation in this field (see Eur Court HR, Handyside judgment of 7 December 1976, Series A no 24, p 22, para 48).

In this context, the Commission notes that a large number of the provisions of the applicant association's Memorandum were held to be contrary to the law and to public policy. Admittedly, the applicant association disputes these findings, but that is a question of interpretation of domestic law and the Commission cannot substitute its judgment in this field for that of the domestic courts. Its exclusive task is to examine whether the disputed measures were compatible with the requirements of the Convention and, in particular, whether the grounds on which the domestic courts took those decisions are relevant and sufficient in relation to the criteria set out in Article 11 of the Convention.

In this regard, the Commission notes that it follows from the applicant association's aim as defined in its Memorandum that it claims the power to award medals, honours and titles under what it calls "the revived monarchical laws". The Commission observes that the applicant association is thus claiming prerogatives which are normally the exclusive domain of States. Further, the association intends to carry out this activity under the provisions of the Monarchical Constitution of 1838, without taking account of the present Constitution of Portugal.

The Commission considers that such an aim cannot be considered as compatible with Portuguese public policy.



Taking into consideration the grounds on which the domestic courts based their decisions, in particular those given by the Supreme Court in its judgment of 6 October 1993, and in view of the applicant association's aim as defined by its Memorandum, the Commission considers that the disputed dissolution could also be considered as necessary in a democratic society, taking account of the margin of appreciation which States have in this field

It follows that there is no appearance of a violation of Article 11 of the Convention and the application must therefore be dismissed as manifestly ill founded within the meaning of Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

**DECLARES THE APPLICATION INADMISSIBLE**