APPLICATION/REQUÊTE N° 12164/86

Félix AGNEESSENS v/BELGIUM

Félix AGNEESSENS c/BELGIQUE

DECISION of 12 October 1988 on the admissibility of the application

DÉCISION du 12 octobre 1988 sur la recevabilité de la requête

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Article 26 of the Convention *: To exhaust domestic remedies the person concerned must have raised before the national authorities, at least in substance, the complaint he puts before the Commission.*

Article 27, paragraph 1 (b) of the Convention *: The continuation of proceedings after rejection of a previous application constitues a new fact which allows the examination of a new application, even though it relates to a complaint already raised in the first application.*

Article 1, paragraph 1 of the First Protocol *:*

a) The claim to a debt may constitute a "possession".

b) A person complaining of an interference with his right to property must show that such a right existed.

Article 26 de la Convention *: Pour avoir épuisé les voies de recours internes, l'intéressé doit avoir fait valoir, au moins en substance, devant les instances nationales le grief qu'il soumet à la Commission.*

Article 27, paragraphe 1, litt. b), de la Convention *: La continuation d'une procédure après le rejet d'une première requête est un fait nouveau qui permet une nouvelle requête, même portant sur un grief déjà soulevé dans la première requête.*

Article 1, paragraphe 1, du Protocole additionnel *:*

a) Une créance peut constituer un « bien ».

b) Celui qui se plaint d'une atteinte à son droit de propriété doit démontrer qu'un tel droit existait.

(TRADUCTION)

THE FACTS

The facts of the case as submitted by the parties may be summarised as follows.

The applicant, a Belgian citizen born in 1935, is a businessman by profession and currently resides in Halle. In the proceedings before the Commission he was first represented by Mr. R. De Vos, a lawyer practising in Pepingen, and is now represented by Mr. P. Mandoux and Mr. F. Rogge, lawyers practising in Brussels.

The application concerns the applicant's alleged claim to a number of Yugoslav banknotes currently held by the Belgian authorities, and the related proceedings.

In a previous application the applicant complained that by refusing to allow him to become a civil party and by denying him access to the file of the criminal proceedings against the persons suspected of producing the counterfeit Yugoslav banknotes and by thus preventing him from arranging for an expert opinion, the Belgian authorities had prevented him from asserting before the courts his claims to the banknotes.

On 9 May 1980 the Commission declared this first application inadmissible (No. 7655/76, Dec. 9.5.80, D.R. 19 p. 172). The Commission held that the complaint foundered on the denial of access to a court, inferred from Article 6 para. 1 of the Convention, was manifestly ill-founded as a civil action was pending at the time. Considering the application in the light of Article 1 of Protocol No. 1, the Commission accordingly rejected it for non-exhaustion of domestic remedies.

As regards the present application, the parties' submissions show certain discrepancies as to the facts of the case. These will be made clear by the following summary.

I. The applicant, who was a boatman at the time, submits that on 17 May 1969, while in the company of another boatman, he discovered a parcel containing Yugoslav banknotes all of 5,000 dinar denomination, the total value of which he placed at some 500 million Belgian francs. After learning of a case of counterfeit Yugoslav currency, he persuaded his companion to come with him and deposit his find at the police station, where they handed in all the banknotes except one which the applicant kept.

The Government submit that as shown in the police report of 17 May 1969, containing the applicant's statement, and in that of 20 May 1969, a parcel containing 12,695 counterfeit Yugoslav banknotes of 5,000 dinar denomination was recovered by a Mr. D., a boatman, from the Willebroek canal near Neder-Over-Hembeek. On 17 May 1969 at 1 p.m. the boatman reported to the Brussels police station, 9th division, stated that at about noon that day he had recovered a parcel of banknotes, and handed over 3,606 Yugoslav banknotes to the police. An hour later, the police went to the scene of the find and discovered bundles of 5,000 dinar notes which the applicant had not picked up in his haste. It also emerged that the boatman D. had given banknotes to various people who had witnessed his find, i.e. 920 to the applicant, 34 to the H. couple and a few bundles to another boatman.

On the whole, the facts set out below are not disputed by the parties.

All the banknotes recovered were seized and deposited with the Registry of the Brussels Regional Criminal Court as exhibits in the criminal proceedings relating to a Yugoslav currency counterfeiting case which had been instituted against two brothers suspected of forging some 55,000 Yugoslav 5,000 dinar banknotes.

In a letter dated 6 May 1979, the applicant asked the Minister for Finance for the return of the parcel of banknotes which he claimed to have found, since the time limit of one year and one day from the find was about to expire. On 15 May 1970 he made the same request to the public prosecutor (Procureur du Roi) in Brussels.

The public prosecutor replied on 21 May 1970 that it was not possible to let the applicant have the banknotes seized as forgeries because the investigation of the case was proceeding. The Minister for Finance informed the applicant that after consulting the Prime Minister's office he did not consider himself competent to intervene.

On 3 December 1971 the investigating judge authorised the applicant to join as a civil party the criminal proceedings against the persons suspected of producing the counterfeit Yugoslav banknotes. However, the public prosecutor's office objected and the matter was referred to the court for a decision.

In a decision of 23 March 1972, the "chambre du conseil" of the Criminal Court refused to allow the applicant to join the proceedings as a civil party. He appealed against the decision to the Indictments Chamber of the Court of Appeal, which did not give a decision until 1978 (see below). The public prosecutor's office subsequently refused a request by the applicant to inspect the criminal file.

On 3 May 1973 the applicant secured the permission of the Procureur Général (senior public prosecutor) to consult the opinion in the file lodged by the expert who had examined the banknotes.

The applicant then showed the banknote which he claims to have kept to the "Crédit communal de Belgique", a financial institution. The bank told him on 2 May 1974 that the banknote was not a forgery but belonged to a series withdrawn from circulation on 18 December 1968 and was therefore valueless. At his request the Bank of Belgrade informed him that, although withdrawn from circulation, notes of this type could be exchanged for new ones up to 1 June 1975.

II. On 16 June 1974 the applicant instituted a civil action against the Belgian State before the Court of First Instance in Brussels seeking payment of 100,000 Belgian francs as provisional compensation ; he complained that he had not been allowed to join the criminal proceedings as a civil party and had been able to consult only the expert

report and not the full criminal file. He considered that the judicial authorities had thus prevented him from asserting his claims to his find.

The applicant approached the Procureur Général on several subsequent occasions, seeking permission to examine all the banknotes deposited with the Registry and to inspect the criminal file. On 26 May 1975 he complained that he himself was not able to take any measures to secure the exchange value of the banknotes and requested such measures of the Procureur Général, failing which he and the Minister of Justice would be held responsible for any loss which the applicant might incur.

In May and July 1976 the Procureur Général gave the applicant confirmation that he could not permit him to consult the criminal file because the case was not yet closed. The applicant was nevertheless authorised in March 1976 to examine two documents relating to the circumstances in which the banknotes had been thrown in the canal by the persons prosecuted for the counterfeiting of Yugoslav banknotes.

On 17 May 1977 the Court terminated the criminal proceedings in accordance with the law on prescription. Shortly afterwards, the Procureur Général authorised the applicant to examine the notes seized.

On 19 September 1977 the Procureur Général informed the applicant's counsel that, in the applicant's appeal against the Criminal Court decision of 23 March 1972 not to allow the applicant to join the criminal proceedings as a civil party, he would ask the Court of Appeal to declare the appeal inadmissible for the reasons set out in the Criminal Court's decision.

On 8 February 1978 the Procureur Général altered his argument and submitted that in his opinion it was not possible to allow the applicant to join as a civil party criminal proceedings which had been abandoned.

On 8 June 1978 the Indictments Chamber of the Court of Appeal decided that it could not rule on the civil party question as it was not required to deal with the criminal case, abandoned due to prescription. The Court further stated that it did not have jurisdiction to order the disclosure of the full criminal file to the applicant or the handing over to the applicant of the banknotes therein. It considered that it could only recommend that he apply to a civil court in order to pursue his arguments.

On 12 May 1979 the applicant again approached the Ministry of Justice and proposed a settlement. In his reply of 18 May 1979, the Minister found it inappropriate to consider such a proposal as the applicant had meanwhile lodged an application with the European Commission of Human Rights.

III. In 1980 the applicant re-opened the proceedings instituted in 1974 before the Court of First Instance. The banknotes, even if genuine, now had no monetary value

and so the applicant no longer laid claim to them; however, he claimed compensation representing the full or partial equivalent in Belgian francs of the nominal value of his find i.e. 63,175,000 dinars, worth 250 million Belgian francs. He also demanded the return of the banknotes, though solely for the purpose of an analysis. In submissions filed on 16 April 1982, he lastly requested the appointment of a court expert to ascertain the authenticity of the Yugoslav banknotes.

On 13 September 1982 the Court of First Instance declared the application admissible but ill-founded in so far as it sought to secure compensation from the State or to have an expert examination of the bank notes ordered. However, the Court declared inadmissible the request to obtain exhibits forming part of the criminal file in the case against the counterfeiters. The Court observed that the fundamental question was whether or not the State had been at fault in preventing the applicant from asserting his claims to his find in due time and to some purpose (since the banknotes could no longer be exchanged after 1 June 1975). The Court then examined the complaints raised by the applicant.

As to the refusal to allow the applicant to become a civil party, the Court held that he could not in fact join in the criminal case against the counterfeiters because he could in no way claim to be a victim of the actions of the accused. It further observed that the conduct of a criminal investigation formed no impediment whatsoever to the applicant's right to bring an action in the civil courts.

As to the errors which the applicant alleged existed in the expert's report and as to the retention of the seized banknotes, the Court held that it was normal practice for the prosecution, being already engaged in a counterfeiting case, to seize a large quantity of identical banknotes recovered from the canal. Their retention was warranted, the Court held, as there had been an expert's report to the effect that the aforesaid banknotes were identical to the forgeries seized from the counterfeiters. The Court observed that although the expert's opinion that the banknotes were counterfeit had been known to the applicant since 3 May 1973, in his action introduced in 1974 he did not seek the return of the banknotes but rather the payment of compensation. It further noted that although the applicant had known at least since early August 1974 that genuine 5,000 dinar banknotes would no longer be exchanged after 1 June 1975, the files lodged established that not until a fortnight before that date did he take the first official step, namely the registered letter to the Minister of Justice dated 13 May 1975.

As to the one-sidedness of the file of expert evidence, the Court held this to be a normal circumstance in that the file had been compiled in the course of a criminal investigation to which the applicant was not a party. The Court observed that the applicant had made no move to dispute the findings of the report at any time before 1 June 1975, the date on which real banknotes were to lose their exchange value. The Court observed that for the purposes of the litigation before it, any fact arising after 1 June 1975 was irrelevant since the sole question was whether the

State had been at fault in preventing the applicant from taking measures to secure the banknotes before 1 June 1975. The Court nevertheless observed that in the civil proceedings the applicant had failed to ask the Court in due time to compel the State, in accordance with Articles 871 and 877 of the Judicial Code, to share the burden of proof and so arrange for expert evidence to be taken on behalf of both parties, such a request having been made for the first time in the submissions of 16 April 1982, although the applicant had left the proceedings in abeyance for eight years and the possibility of exchanging the banknotes had lapsed over seven years before.

The applicant appealed, asking the Court of Appeal to annul the judgment of 13 September 1972 and order the State to pay compensation for the loss which he had suffered.

On 12 June 1984 the Court of Appeal upheld the judgment on appeal. It considered that the applicant was the owner of the banknotes which were to be regarded as *res derelicta*. It declared that the seizure of items in criminal proceedings was only a temporary measure and that there was no reason not to consider that the applicant had remained the owner of the items in question. Noting that the applicant's action was aimed at securing compensation for loss incurred through allegedly wrongful conduct by the State, the Court of Appeal held that it must first be established whether there had been fault on the part of the State. Invoking the International Convention for the Suppression of Counterfeiting Currency concluded in Geneva on 20 April 1929 and ratified by Belgium, the Court nevertheless found that the State, being compelled by the aforesaid international convention to seize forged foreign currency, had not been at fault as long as the authenticity of the banknotes was not proven. The Court laid strong emphasis on the applicant's negligence in failing to contest the seizure before the investigating judge and to request a second expert opinion in due time. The Court held that the notice given in May 1975 to the Procureur Général and to the Minister for Justice made no difference, those authorities having refrained from considering this request for the protection of private interests since an investigating judge was responsible for the case. The Court found that in view of the lack of appropriate action by the applicant, the State incurred no liability. In conclusion, the Court of Appeal accordingly discerned no fault in the conduct of the State, whether regarding the seizure of banknotes or regarding their retention, and declared any verification of the banknotes to be pointless.

The applicant appealed against the above judgment to the Court of Cassation on 21 December 1984. Reiterating that the purpose of his action was to obtain compensation for the loss incurred through the conduct of the Belgian authorities, he submitted firstly that the Court of Appeal had erroneously applied the Geneva Convention of 20 April 1929. He alleged that the Convention did not apply to banknotes withdrawn from circulation and that Yugoslav banknotes of the type which had been recovered in 1969 had lost all exchange value as from 1 June 1975. He

further alleged that the Court of Appeal had erroneously applied the rules of civil liability in its examination of the facts from which it had concluded that there was no fault on the part of the State.

The Court of Cassation dismissed the appeal in a judgment of 8 November 1985. Concerning the applicant's submission that the State no longer had the right or obligation to withdraw the banknotes in question from circulation when they were no longer legal tender and could no longer be exchanged, it noted that the allegation related solely to the period following 1 June 1975, the closing date for exchange of 5,000 dinar notes of the same type as those recovered from the canal. Further observing that well before 1 June 1975 the applicant had confined his request to the payment of compensation, the Court of Cassation held that even if the obligation set forth in the Geneva Convention was inapplicable in the present case, this fact could not affect the object of his civil action for damages. The Court accordingly held that even if the applicant's complaint was founded, it could not justify the quashing of the decisions challenged. As to the applicant's second complaint, the Court deemed it partly inadmissible for absence of a legitimate interest and, for the remainder, manifestly ill-founded in that the Court of Appeal had correctly applied the rules of liability.

On 11 August 1986, at the applicant's request, the Procureur Général again refused to return the banknotes, on the ground that they were exhibits forming an integral part of the criminal file.

COMPLAINTS

1. The applicant complains that Belgium, which recognises his claim to ownership of the banknotes in question, nevertheless denies him the enjoyment of his property by refusing to restore to him the Yugoslav notes which he found in 1969. In this respect, he firstly submits that the State prevented him from taking the necessary steps to preserve his property. He further complains that the State failed to take measures on its own initiative to safeguard the value of the banknotes, does not recognise its liability and refuses to redress the wrongs committed. He invokes Article 1 of Protocol No. 1.

2. The applicant complains in addition that he cannot make use of the exhibits in the criminal file, namely the banknotes which in any case are his property, to prove the merits of his action for damages against the Belgian State, although an expert examination of these exhibits appears to be the only source of evidence in the civil proceedings which he has instituted.

Lastly, he complains that the Belgian authorities denied him the possibility of asserting his rights by joining as a civil party the criminal proceedings against the counterfeiters, and that the Indictments Chamber refrained from ruling on his objection to the decision by the "chambre du conseil" until after the prescription of the criminal proceedings, so as to obviate a decision on the merits of his application.

As for these two complaints, he invokes Article 6 para. 1 of the Convention.

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THE LAW

1. The applicant complains that Belgium, which recognises his claim to ownership of the Yugoslav banknotes, nevertheless denies him the enjoyment of his property by refusing to restore to him the banknotes which he found in 1969. In this respect, he submits that the State prevented him from taking the necessary steps to preserve this property. He further complains that the State failed to take measures on its own initiative to safeguard the value of the banknotes, does not recognise its liability and refuses to redress the wrongs committed. He invokes Article 1 of Protocol No. 1.

The Commission recalls that the Government raise two objections to the admissibility of this complaint, firstly that the present application is essentially the same, within the meaning of Article 27 para. 1 (b) of the Convention, as that introduced on 29 July 1976 and examined by the Commission on 9 May 1980 and secondly, invoking Article 26 of the Convention, that at no stage did the applicant invoke Article 1 of Protocol No. 1 before the national courts.

Concerning the objection to admissibility under Article 27 para. 1 (b) of the Convention, the Commission observes that the complaint regarding the violation of Article 1 of Protocol No. 1 has already been raised by the applicant in his previous application No. 7655/76 and was declared inadmissible for non-exhaustion of domestic remedies, on the ground that the civil action instituted by the applicant on 16 June 1974 was still pending before the Court of First Instance. The Commission finds, however, that the applicant has continued this action before the Belgian national courts and that the Court of Cassation gave a judgment at final instance on 8 November 1985. The Commission regards this as a new fact within the meaning of Article 27 para. 1 (b) of the Convention. It can accordingly re-open the examination of this complaint when a new application is introduced.

Consequently, the applicant's complaint cannot be rejected pursuant to Article 27 para. 1 (b).

a. The Commission has begun by examining the applicant's first complaint that Belgium denies him the enjoyment of his property by refusing to restore to him the banknotes found in 1969, and prevents him from taking the necessary steps for their preservation.

However, the Commission is not required to decide whether the facts alleged by the applicant disclose any appearance of a violation of this provision. Under the terms of Article 26 of the Convention, "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law".

For this condition to be fulfilled, it is not sufficient for the applicant merely to have presented his case to the various courts competent to deal with it. The complaint made before the Commission must also have been raised, at least in substance, during the proceedings in question. On this point, the Commission refers to its constant case-law (cf., for example, No. 1103/61, Dec. 12.3.62, Yearbook 5 pp. 169, 187; No. 5574/72, Dec. 21.3.75, D.R. 3 pp. 10, 15 ; No. 10307/83, Dec. 6.3.84, D.R. 37 pp. 113, 120).

In the present case, the applicant's complaint before the Commission was not raised either formally or even in substance during the proceedings before the Brussels Court of Appeal and the Court of Cassation. Before the Brussels Court of Appeal, the applicant made no request for the return of the banknotes found in 1969, but rather sought payment of compensation for the loss which he allegedly incurred through the conduct of the Belgian authorities (as in fact he confirmed in his memorial before the Court of Cassation dated 21 December 1984: Zoals blijkt uit de laatste conclusie van eiser voor het hof van beroep genomen (neergelegd op 28 februari 1984), strekt de uiteindelijke vordering ertoe verweerder te horen veroordelen tot het betalen van een schadevergoeding ...: (1)). Furthermore, regarding the impossibility of taking steps to preserve the property in question, the Commission observes that the Court of Appeal had found a lack of appropriate steps by the applicant and had laid strong emphasis on his negligence in failing to present the investigating judge with his objections to the seizure and to request a second expert opinion in due time.

In addition, the examination of the case has disclosed no circumstance which, according to the generally recognised principles of international law, might have exempted the applicant from raising this complaint during the aforementioned proceedings.

It follows that the applicant has not fulfilled the requirement of exhaustion of domestic remedies in respect of this complaint, and that it must be rejected in accordance with Article 27 para. 3 of the Convention.

b. The Commission has next examined the second complaint by the applicant that the State failed to take measures on its own initiative to safeguard the value of the banknotes seized, that it does not acknowledge its liability and refuses to redress the wrongs which it has thereby done the applicant, contrary to Article 1 of Protocol No. 1.

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(1) "As appears from the applicant's final submissions presented to the Court of Appeal (lodged on 20 February 1984), the purpose of the final action is to have the defendant ordered to pay compensation ...".

Article 1 of Protocol No. 1 is worded as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The question may arise whether, in his appeal to have the Court of Appeal judgment of 21 December 1974 quashed, the applicant put this complaint in sufficiently explicit terms and thus exhausted domestic remedies. However, the Commission does not find it necessary to go into this question since the complaint must be rejected as manifestly ill-founded.

The Commission has indeed examined whether the dismissal of the applicant's official liability action against the Belgian State was tantamount to deprivation of his property within the meaning of Article 1 of Protocol No. 1.

The Commission has already acknowledged that a debt can constitute a possession within the meaning of Article 1 of Protocol No. 1 (cf., for example, No. 3039/67, Dec. 29.5.67, Collection 23 p. 66; No. 7742/76, Dec. 4.7.78, D.R. 14 pp. 146, 168) but that there can be no deprivation of possessions if a conditional claim lapses as a result of the non-fulfilment of the condition (No. 7775/77, Dec. 5.10.78, D.R. 15 p. 143, 151).

The Commission nevertheless observes that although in the present case the applicant has probably long entertained the hope of being awarded compensation, he has given no evidence of ever having held a claim to payment on any basis whatsoever against the Belgian State. The action instituted against the State before the civil courts did not create any claim to payment of a debt for the applicant, merely the possibility of securing such payment. Consequently, since a liability action cannot be regarded either as a possession or as a debt, the decisions by the Belgian courts dismissing his action could not have the effect of depriving him of a possession which he owned.

Thus there is no appearance of a violation of Article 1 of Protocol No. 1 in the present case and the application is therefore manifestly ill-founded on this point, within the meaning of Article 27 para. 2 of the Convention.

2. The applicant further complains that he cannot make use of the exhibits in a criminal file, namely the banknotes which are in any case his property, to provide evidence of the merits of his action for damages against the Belgian State, although an expert examination of these exhibits is apparently the only source of evidence in the civil proceedings which he has instituted.

Lastly, he alleges that the Belgian authorities denied him the possibility of asserting his rights by joining as a civil party the criminal proceedings against the counterfeiters, and that the Indictments Chamber refrained from ruling on his objection to the decision by the "chambre du conseil" until after the prescription of the criminal proceedings so as to obviate a decision on the merits of his application.

As for these two complaints, he invokes Article 6 para. 1 of the Convention.

Under Article 6 of the Convention, in the determination of his civil rights and obligations everyone is entitled to a fair hearing by an independent and impartial tribunal.

The Commission recalls at this juncture that the Belgian Government have raised two objections to the admissibility of this complaint, one concerning Article 27 para. 1 (b) and the second relating to the provisions of Article 26.

As to the application of Article 27 para. 1 (b), the question may be asked whether the complaint, i.e. the part thereof concerning refusal of permission to become a civil party, which relates to facts and events dating back to before 1980, is essentially the same as that which the Commission rejected on 9 May 1980 as manifestly ill-founded. However, the Commission does not find it necessary to examine this question, as the complaint must be rejected for non-exhaustion of domestic remedies.

On this point the Commission, referring to its reasoning in paragraph 1 (a) above, observes that the applicant did not raise during the proceedings before the Court of Cassation, either formally or in substance, the complaints which he is now making before the Commission under Article 6 para. 1. Furthermore, an examination of the case has not disclosed any circumstance which might have exempted the applicant, according to the generally recognised principles of international law, from raising this complaint during the aforementioned proceedings.

It follows that with regard to these complaints the applicant has not fulfilled the condition regarding exhaustion of domestic remedies and that his application must accordingly be rejected in pursuance of Article 27 para. 3 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.