

APPLICATION/REQUÊTE N° 11282/84

Albert JAXEL v/FRANCE

Albert JAXEL c/FRANCE

DECISION of 12 November 1987 on the admissibility of the application

DÉCISION du 12 novembre 1987 sur la recevabilité de la requête

Article 6, paragraph 1 of the Convention

- a) *Proceedings before the administrative courts seeking annulment of a decision prohibiting the applicant from carrying on the profession of business agent concern a dispute ('contestation') over a civil right*
- b) *Length of proceedings in an administrative dispute concerning a civil right recap of criteria for assessment (Complaint declared admissible)*

Article 26 of the Convention *When the excessive length of proceedings before a French administrative court is concerned, an action for damages against the State does not constitute an effective remedy*

Article 6, paragraphe 1, de la Convention

- a) *Porte sur une contestation sur un droit de caractère civil une procédure devant les juridictions administratives tendant à faire annuler une décision interdisant au requérant de continuer à exercer la profession d'agent d'affaires*
- b) *Durée d'une procédure de contentieux administratif portant sur un droit de caractère civil rappel des critères d'appréciation (Grief déclaré recevable)*

Article 26 de la Convention *S'agissant de la durée excessive de la procédure devant une juridiction administrative française, l'action en responsabilité de l'Etat ne constitue pas un recours efficace*

(TRANSLATION)

THE FACTS

The facts may be summarised as follows :

The applicant, a French national born in 1924, was formerly Managing Director of the limited company Immobilière Jaxel (SIMJA) and manager of the Albert Jaxel Agency, a limited company, and is now retired and living in Sarrebourg

The applicant has introduced the present application in his own name.

As manager of the Albert Jaxel Agency, the applicant held a trade card for "property management" issued by the Prefecture of Moselle and dated 2 March 1976 to 2 March 1977 with a bank guarantee amounting to 300,000 francs.

The application to renew the trade card was lodged with the Prefecture on 2 March 1977 without certification of the bank guarantee, which was to be raised to 500,000 francs. This new guarantee had been proposed to him by the Société de Caution Mutuelle des Professions immobilières et foncières (Socaf)

On 13 September 1977, the applicant was questioned by the police in connection with an investigation concerning his lack of a trade card and bank guarantee.

As he could not immediately cease his "property management" activities and wished to preserve the four jobs bound up with those activities, he was placed under

judicial supervision. Despite a written request from his lawyer to the Prefect dated 28 September 1977 drawing attention to the company's ethical and professional standards and to its soundness he was apprehended and subsequently incarcerated in Metz remand prison on 18 October 1977.

He was not freed until four days later, when his wife presented an extra-judicial document certifying the definitive closure of the agency and immediate dismissal of the staff.

There was at the time already a very serious dispute between the Prefecture of Moselle and SIMJA.

On 21 February 1974, SIMJA purchased from the Soframap Company in Paris the land and buildings of the former Sarrebourg brewery on the suspensive condition that it obtain from the competent authorities a building permit for a proposed shopping centre to enlarge the one initially planned by Soframap, for which it had obtained building permission on 24 May 1972.

The sale contract further stipulated that the suspensive condition was to be fulfilled by 31 July 1974, a deadline which Soframap extended to 31 December 1974.

In his capacity as owner, the applicant began demolition work and, on 31 May and 18 June 1974, lodged an application to amend the building permit granted to Soframap on 24 May 1972, the validity of which was subsequently extended to 24 May 1974.

On 27 June 1974, the Departmental Public Facilities Directorate (Direction departementale de l'équipement) in Metz acknowledged receipt of the application and set the time-limit for its examination for 24 December 1974. The application was registered. Although it was not necessary under Section 34 of the Act of 27 December 1973 to seek the opinion of the Departmental Commercial Planning Commission, the application was forwarded to the Commission by registered post on 9 December 1974. The Departmental Public Facilities Directorate was notified of this step on the same day by registered letter.

However, on 19 December 1974, the Ministry of Public Facilities suspended the time-limit for the examination on the ground that the application had not been submitted to the Departmental Commercial Planning Commission.

Act No. 74 1115, promulgated on 27 December 1974 following the postal strikes, ordered the suspension of the time-limit for examination of all pending building permit applications.

Section 8 of the Act provided as follows: "The time-limit for examination of building permit applications shall be suspended between 14 October 1974 and 31 December 1974 inclusive. The same shall apply to the applications for permission

provided for in Sections 28 *et seq.* of Act No. 73-1193 of 27 December 1973 on Commerce and Crafts Policy. Contracts entered into for work covered by a permit or tacit authorisation issued during the above-mentioned period shall be deemed to have been concluded subject to a building permit being granted or authorisation being given. Should one of the parties to the contracts referred to in the previous paragraph suffer abnormal and exceptional prejudice, the public authorities shall incur liability."

Thus, in the absence of any decision by the Departmental Public Facilities Directorate and the Commercial Planning Commission within the time-limit stipulated in the said Act, tacit building permission was granted as of 17 March 1975.

SIMJA accordingly applied to the Prefect for the certificate provided for in Article 421-36 of the Town Planning Code.

When the public authorities failed to respond, the applicant instituted proceedings first before the Strasbourg Administrative Court and then before the Conseil d'Etat.

These two appeals concluded with an acknowledgement that, because of the nature and scale of the demolition work undertaken by SIMJA, the original permit had not lapsed but that a further permit was needed for the work envisaged, for which the plans had to be submitted to the Departmental Commercial Planning Commission.

The Strasbourg Administrative Court and the Conseil d'Etat rejected the application for compensation, giving the reason that the plans had not been submitted to the Commercial Planning Commission.

At the initiative of the Ombudsman ("Médiateur") an administrative enquiry was opened to check the authenticity of the evidence produced by the applicant, including the letter from the then Minister for Public Facilities dated 16 March 1977 which specifically acknowledged the submission of the plans. This enquiry is in progress.

By an order dated 23 August 1978, the Prefect of Moselle forbade the applicant from working as a business agent in the Department of Moselle, in pursuance of Section 35 of the local Act of 26 July 1900 on the exercise of professions, that is to say the applicant was forbidden from carrying on the professions covered by this Article, "in particular those involving looking after the legal interests of third parties and handling their business with the authorities, *inter alia* by the preparation of documents pertinent thereto, and those of agent for property or loan transactions in the Department of Moselle".

By this order, the Administration forbade the applicant from carrying on any professional activity in the legal and property field in which he had been in the Department of Moselle

On the ground that the property profession is governed by the Act of 2 January 1970, the implementation of which was determined by the Decrees of 20 July 1972 and 31 December 1974 and not by Section 35 of the local Act of 26 July 1900 on the exercise of professions, the applicant petitioned the Strasbourg Administrative Court on 29 November 1978 requesting that the Prefect's order be set aside and that the State be ordered to pay the sum of 500,000 francs in compensation for the prejudice resulting from the unlawfulness of the administrative decision.

In a judgment dated 5 November 1980 the petition was dismissed. The Court held that Section 35 of the local Act on the exercise of professions was still applicable in the Departments of Alsace and Moselle on the date of the impugned decision, that the Prefect could lawfully order the measure of prohibition and extend it to all the property professions referred to in that section, and that the request for non-pecuniary damages and pecuniary compensation could not be granted.

The applicant appealed against this judgment to the Conseil d'Etat. In its judgment of 27 July 1984, the Conseil d'Etat decided that "the order of 23 August 1978 of the Prefect of Moselle is set aside in so far as it forbade Mr. Jaxel from carrying on in that Department the activities listed in Section 1 of the Act of 2 January 1970; the judgment of 5 November 1980 of the Strasbourg Administrative Court is reversed in so far as it is contrary to this decision; the remaining submissions in Mr Jaxel's petition are dismissed".

In short, this judgment means that the Conseil d'Etat partly set aside the Prefect's order of 23 August 1978 in so far as it forbade the applicant from carrying on in that Department the activities listed in Section 1 of the Act of 2 January 1970.

COMPLAINTS

The complaints may be summarised as follows

The applicant alleges a violation of Articles 3, 5, 6 and 8 of the Convention.

The applicant considers that the proceedings as conducted and, in general, the conduct of the various authorities were tantamount for both him and his wife to real moral torture and inhuman and degrading treatment (Article 3).

The deprivation of his freedom to engage in business has allegedly violated his liberty, security and human dignity. In this respect he relies on Article 5.

He alleges that this hounding of him has infringed respect for his private and family life (Article 8)

Lastly, he alleges a violation of Article 6 in that the proceedings, which ruined him professionally, lasted six years (Prefect's order: 23.8.1978; decision of the Strasbourg Administrative Court 5.11.1980, and, four years later, judgment of the Conseil d'Etat: 16.10.1984).

The applicant considers this situation to be particularly unjust because, in the final analysis, the Conseil d'Etat partly set aside the Prefect's order on the ground that "the Prefect could not lawfully issue such an order in so far as it concerned the activities listed in the Act of 2 January 1970"

In support of his argument, the applicant points out that in the meantime, by a decision dated 11 July 1985, the Strasbourg Administrative Court similarly declared illegal and set aside the order which the Prefect of Bas-Rhin had made against him on 26 March 1980 and awarded the applicant the sum of 40,000 francs plus interest in compensation for the prejudice he had suffered from being deprived of employment as a salaried property adviser

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THE LAW

The applicant complains of the length of the proceedings concerning his petition of 29 November 1978 to the French administrative courts. The Conseil d'Etat terminated the proceedings at issue by a judgment delivered on 27 July 1984.

In this petition, the applicant, who considered that there was no proper legal basis for the order of the Prefect of Moselle of 23 August 1978 forbidding him from carrying on his professional activities as a business agent in pursuance of Section 35 of the local Act of 26 July 1900 on the exercise of professions, requested on the one hand that the order be set aside and on the other that he be awarded compensation for the prejudice allegedly suffered.

The applicant alleges a violation of Article 6 of the Convention on the ground that the length of the proceedings before the French administrative courts did not satisfy the condition of "reasonable time" laid down in paragraph 1 of this provision. He further maintains that he suffered prejudice as a result of the excessive length of the proceedings.

From the outset the Government have maintained that a domestic remedy was available to the applicant, namely an action for damages on the basis of the State's liability for the allegedly excessive length of the proceedings before the administrative courts.

The Government further pleaded that Article 6 of the Convention was inapplicable to the present case, in so far as disputes as to lawfulness submitted to the administrative courts are, by their nature, outside the scope of Article 6. Furthermore, this provision of the Convention requires a direct link between the dispute ("contestation") and the "right" at issue, which link has not been established in the present case.

In the alternative, the Government pleaded that the complexity of the case and the scope of the decision to be made necessitated a thorough examination of the case.

It could not therefore be maintained that the condition as to "reasonable time" had not been respected.

The Commission is required to decide first of all on the applicability of Article 6 para. 1 of the Convention.

In this connection, the first question which arises is whether, in the present case, there was a dispute ("contestation") over a "right" in the light of the principles adopted by the European Court of Human Rights in its case-law (see, in particular, Eur Court H.R., Benthem judgment of 23 October 1985, Series A no. 97, pp. 14-15, para. 32).

Before the Commission, the applicant maintains that the decisions of the administrative courts which heard his petition were decisive for his right to continue to practise his profession, a right which he considers a civil right within the meaning of Article 6 para. 1 of the Convention.

In the Government's view, the applicant, in applying to the administrative courts, confined himself to securing a finding, in an appeal concerning *ultra vires*, that an administrative act, namely the Prefect's order of 23 August 1978, had violated a rule of law. In French law, such an appeal would be an objective one. The court determining whether an act was *ultra vires* would examine the lawfulness of a measure taken by the administrative authority in order to protect the general interest and not to arbitrate between private rights or to impose obligations of a civil nature. Proceedings before the administrative courts to determine the lawfulness of administrative measures would, therefore, by their very nature, lie outside the scope of Article 6 of the Convention. Furthermore, this provision of the Convention could not apply in the present case because the proceedings at issue were not directly decisive for the right which the applicant claimed to practise the professions covered by the Act of 2 January 1970.

In the present case, the Commission observes that the applicant formally requested the setting aside of the administrative measure forbidding him from carrying on his profession on the ground that there was no proper legal basis for the measure, and that he combined his action with an application for compensation. The applicant therefore pursued a primary objective, which was to have the administrative court find that a rule of law had been violated by an administrative measure and to obtain compensation for the prejudice which, he alleges, resulted therefrom. However, in so doing, the applicant also had in view the right to be able to resume his professional activities as a business agent and to do so in accordance with the Act of 2 January 1970, applicable in this case, governing the property profession.

The Commission accordingly accepts that a dispute ("contestation") over a "right" which the applicant claimed, namely that of continuing to practise his profession as a business agent, arose in the present case and was determined by the administrative courts.

On the question whether the right to continue practising this profession was a "civil" right and whether, as the applicant claims, this right was affected the Commission recalls that, under the Convention, the concept of 'civil rights and obligations' is autonomous and cannot be interpreted solely by reference to domestic law (Eur Court H R , Konig judgment of 28 June 1978, Series A no 27, pp 29-30, paras 88-89) In deciding whether it is a "right" for the purposes of Article 6 para 1 account should be taken of its "substantive content and effects, the object and purpose of the Convention and the national legal systems of the other Contracting States" (Konig judgment, *loc cit* , and Kaplan v United Kingdom, Comm Report 17 7 80, paras 133-134, D R 21 p 24)

It is not sufficient for there to have been, as in the present case, a dispute ("contestation") As the Court held in the Le Compte, Van Leuven and De Meyere case, it must in addition be shown that "the 'contestation' (dispute) related to 'civil rights and obligations', in other words that the 'result of the proceedings' was 'decisive' for such a right" (Eur Court H R , Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no 43, p 21, para 46)

The Commission cannot accept the Government's argument that in the present case, there was no direct relationship between the proceedings in question and the right claimed by the applicant to continue practising the profession of business agent It is clear that the prohibition in the Prefect's order of 23 August 1978 effectively deprived him of the right to continue his professional activities

The Commission considers that the right in this case is similar in character to the rights at issue in the Konig case in that it is a right to carry on a commercial activity in the private sector, albeit subject to administrative authorisation and supervision in the public interest (Konig judgment, *loc cit* , paras 92-93, and Kaplan, Comm Report , *loc cit* , para 138)

The Commission concludes therefore that the right in question here was of a private nature It was therefore a "civil" right for the purposes of Article 6 para 1 of the Convention and the dispute ("contestation") brought before the administrative courts was "decisive" for the right claimed by the applicant to continue practising as a business agent Article 6 of the Convention therefore applies

The respondent Government then raise an objection to admissibility on the ground that domestic remedies have not been exhausted in the present case

The Commission recalls that it has many times held that the exhaustion of domestic remedies requires remedies to be used only in so far as they are effective or sufficient, that is to say capable of remedying the situation at issue

The Government have maintained, as they did in the proceedings before the European Court of Human Rights in the Bozano case (see, Eur Court H R , Bozano judgment of 18 December 1986, Series A no 111 p 21, para 49) that a distinction has to be made according to whether the alleged breach is continuing or as in the

present case, "has ceased". The purposes for which a person who claims to be the victim of a violation which has ceased institutes proceedings before the Convention organs are, on the one hand, to secure a finding that his rights guaranteed by the Convention have been violated and, on the other, to obtain compensation for the prejudice suffered, which in the present case, since the alleged violation has ceased, could consist only in the granting of damages. In the present case, the only means of redress lay in an action for damages ("action indemnitaire").

The Government consequently maintain that before he petitioned the Commission, the applicant ought to have raised the question of the State's liability before the domestic courts by instituting an action for damages. In support of their argument, the Government quote an Assembly decision ("arrêt d'Assemblée") of 29 October 1978, the Darmont decision, in which the Conseil d'Etat held that "in pursuance of the general principles governing the liability of the public authorities, gross negligence by an administrative jurisdiction in the exercise of its judicial functions may create entitlement to compensation". In his submissions, the Government Commissioner cited, as one of the circumstances in which the State might incur liability, the case in which the damage resulted from the excessive time a court took to reach a decision. The Government conclude that this remedy enabled the applicant to obtain compensation for the alleged prejudice, that it was indeed an effective remedy within the meaning of Article 26 of the Convention, and that it is a remedy still open to the applicant today.

The applicant, for his part, maintains that an action for damages against the State had, in the circumstances of the case, no chance of succeeding and was therefore not an effective remedy enabling compensation for the alleged prejudice to be obtained at the national level

It is true that the Court has held that "an action for damages in the administrative courts in respect of liability of public authorities is undoubtedly a remedy which, in some cases, would probably be effective and sufficient for the purposes of Article 26 of the Convention" (Bozano judgment, *loc. cit.*, para. 49).

The Commission considers, however, that this is not so in the present case. It observes in this connection that the Government have cited no authority other than the already old and isolated one of the Darmont decision of 1978. More particularly, they have been unable to cite an instance in which the Conseil d'Etat decided that a French court had been guilty of gross negligence because of the excessive length of proceedings before it.

The Commission therefore considers that an action for damages against the State could not, in the circumstances of the present case, constitute an effective remedy within the meaning of Article 26 of the Convention.

It follows that the French Government's objection that domestic remedies have not been exhausted cannot be accepted

Finally, the Commission has examined the applicant's complaint under Article 6 para. 1 of the Convention which, *inter alia*, affords everyone the right to have his civil rights and obligations determined within a reasonable time by a tribunal.

It recalls in this connection that the question whether proceedings have exceeded the reasonable time provided for in Article 6 para. 1 of the Convention must be assessed in each case according to its circumstances (Eur. Court H.R., König judgment of 28 June 1978, Series A no. 27, p. 34 para. 99) and that the criteria to be taken into account for this purpose, as they have been established in the case-law, are essentially the complexity of the case, the manner in which the matter was dealt with by the judicial authorities and the conduct of the parties. In civil matters, furthermore, the benefit of the right to have one's case heard in a reasonable time is conditional on due diligence being shown by the party concerned (Eur. Court H.R., Capuano judgment of 27 June 1987, Series A no. 119, p. 11, para. 23 *et seq.*).

In the present case, the starting date for the period to be taken into consideration by the Commission in determining the length of the proceedings is 29 November 1978, on which date the applicant petitioned the administrative courts. The proceedings were terminated with a decision of the Conseil d'Etat dated 27 July 1984. They therefore lasted almost six years.

The Commission considers that the application raises serious issues of fact and law which cannot be resolved at this stage in the examination of the application but require an examination of the merits. It follows that the application cannot be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. The Commission further notes that there are no other grounds for declaring the application inadmissible.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits.