

APPLICATION N° 18978/91

William MIALHE v/FRANCE

DECISION of 6 April 1994 on the admissibility of the application

Article 6, paragraph 1 of the Convention

- a) When a criminal charge has been successively examined by different organs, Article 6 para 1 does not demand that the first of these satisfy the requirements of that provision*
- b) In this case, criminal proceedings for breaches of tax legislation, preceded by the mandatory authorisation of the Tax Offences Commission. In view of the powers of this administrative body, Article 6 applies to proceedings before it*
- c) Failure of the tax authorities, in the context of an administrative inquiry preceding the institution of criminal proceedings for breaches of tax legislation, to hand over all the documents seized (Complaint declared admissible)*
- d) Failure of the tax authorities to hand over to the courts all the documents which it had obtained from the tax authorities of a third State (Complaint declared admissible)*

Article 25 of the Convention *An applicant whose defence rights the courts have found to have been infringed because the authorities refused to hand over all the documents on which the proceedings against him were based although he himself had been able to obtain certain of those documents, may claim to be the victim of a violation of Article 6*

Article 26 of the Convention

- a) *Criminal proceedings for breaches of tax legislation, preceded by the mandatory authorisation of the Tax Offences Commission (France)*

To argue before the Court of Cassation that the proceedings in the Tax Offences Commission should be set aside, whereas an application had been made in the trial court for all the proceedings, including those in the Tax Offences Commission to be set aside, does not constitute a fresh ground from which it should be concluded that the domestic remedies have not been exhausted

- b) *Failure of the authorities to hand over all the documents seized in the context of an administrative inquiry preceding criminal proceedings (France)*

It cannot be objected that the applicant who did not request the authorities to produce these documents in court failed to exhaust domestic remedies when a similar request from the investigating judge was in part refused by the authorities and moreover the applicant asked for the proceedings to be set aside because he was not given access to these documents

In the case of the authorities' failure to produce private documents, an application to the Access to Administrative Documents Commission is not a remedy which has to be exhausted

THE FACTS

- 1 *The specific circumstances of the case*

The applicant, who was born on 5 December 1931, is a French national who also has Philippine nationality. He is a company director and was honorary consul for the Philippines in Bordeaux from 1979 to 1982. He is resident in France and in the Philippines.

Before the Commission he is represented by Mr Lesourd and Mr Baudin, lawyers at the "Conseil d'Etat" and the Court of Cassation.

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

- 1 On 5 and 6 January 1983, officers from the Bordeaux customs service, accompanied by a senior police officer, conducted a search of the applicant's residence, which also houses the Consulate of the Republic of Philippines in Bordeaux. They seized nearly 15,000 documents. The operation was carried out under Articles 64 and 454 of

the Customs Code, as part of an investigation to establish whether the applicant was to be regarded as resident in France or abroad, for the purpose of ascertaining whether there had been any contravention of the legislation on financial dealings with foreign countries. An investigation was subsequently opened in connection with the unlawful constitution and possession of assets abroad.

The applicant instituted proceedings in the domestic courts to have the seizures declared null and void, but was unsuccessful. He then submitted an application (No 12661/87) to the European Commission of Human Rights, claiming on a violation of Articles 8 and 13 of the Convention. The Commission declared the application admissible but on 8 October 1991 adopted a report which found that there had been no violation of the Articles invoked. On 25 February 1993, the European Court of Human Rights delivered a judgment stating that there had been a violation of Article 8 of the Convention (see Eur Court H.R., *Mialhe v France* judgment, Series A no 256 C). On 29 November 1993, the Court ordered France to pay the applicant the sum of 50,000 francs by way of non pecuniary damages and 60,000 francs in respect of costs and expenses (see Eur Court H.R., *Mialhe (Article 50) v France* judgment, Series A no 277-C).

2. The customs service subsequently passed on the seized documents to the direct taxation authorities in accordance with the right of inspection provided for in Articles 81 ff of the Taxation Procedures Book and 64 A of the Customs Code.

In a letter of 13 September 1984, the French tax authorities requested administrative assistance from the Philippine authorities, in accordance with the mutual assistance procedure provided for in the Franco-Philippine Tax Convention of 9 January 1976, a letter of reply, accompanied by documents, was sent on 8 November 1984. The applicant obtained some of these documents in the Philippines.

After securing the necessary authorisation of the Tax Offences Commission, the Directorate General of Taxes lodged a civil claim on 16 April 1986 and this preliminary claim enabled the public prosecutor's office to institute proceedings against the applicant for tax evasion in the years 1981 and 1982, in accordance with Article 1741 of the General Tax Code.

The investigating judge at the Bordeaux Regional Court requested the tax authorities to produce all the documents sent by the Philippine authorities, but the relevant departments supplied only some of them.

On 6 May 1988, the investigating judge committed the applicant for trial before the Bordeaux Criminal Court on charges, firstly, of unlawfully evading, in 1982 and 1983, the assessment and payment of part of his income tax for the years 1981 and 1982 and, secondly, of failing to make certain income category declarations within the prescribed time limits and of omitting a portion of his agricultural and property income from his 1981 and 1982 declarations, in contravention of Article 1741 of the General Tax Code.

Before the criminal court, the applicant argued for the proceedings to be declared void on three grounds

He maintained that the seizures carried out by customs officials in 1983 violated Article 8 of the Convention, that the tax authorities' requests for proof and notifications of reassessment had been based on documents whose originals had been seized in 1983, of which he did not have copies and to which he could not therefore give a proper reply, so that the adversarial principle was violated, and finally, that the tax authorities' concealment of some of the documents supplied by the Philippine authorities violated the rights of the defence provided for in Article 6 of the Convention, since only the documents which supported the tax authorities' case had been produced. In particular, the applicant stated that the documents concealed established that he was resident in the Philippines for tax purposes.

In a judgment of 11 January 1989, the Bordeaux Criminal Court rejected these objections and stated that the seizures carried out by customs officials in 1983 did not contravene Article 8 of the Convention, that the principle of the independence of fiscal and criminal proceedings prevented the criminal courts from assessing whether the fiscal proceedings were void, and, finally, that the tax authorities' failure to produce during the proceedings certain documents which were important for the accused's defence did constitute a violation of his rights, referring in this context to exchanges of letters and documents between the Philippine authorities and the tax legislation department of the Ministry of Economic Affairs and the Budget which were not included in the file. The court stated that 'the tax authorities must enable the judge to evaluate on the charges against the accused. Failure to produce during the proceedings certain documents which are important for the accused's defence and which the investigating judge has requested in their entirety constitutes a violation of his rights'. However, the court decided that since the documents produced at the hearing, particularly by the applicant, who had been able to secure certain items in the Philippines, had been examined in the presence of both parties, this violation of the rights of the defence was not such as to render the earlier proceedings void.

The criminal court found the applicant guilty of tax evasion and sentenced him to three years' imprisonment, two years and six months of which were suspended, and a fine of 150 000 francs. It also ordered publication of parts of the judgment in the French 'Journal Officiel' and in the newspapers 'le Monde', 'le Figaro' and 'le Sud-Ouest'.

The applicant appealed and applied for the judgment to be set aside on the grounds raised before the criminal court.

In a judgment of 7 June 1989, the Bordeaux Court of Appeal dismissed these objections.

Referring specifically to the third ground, based on the alleged concealment of certain of the documents which the tax authorities had obtained from the Philippines, the court stated:

the documents which were not produced were of no relevance to the case and had in any case been produced at the court hearing and discussed on that occasion the same argument apart from the discussion of the documents, applies to the Tax Offences Commission. In addition, no application was made at first instance for the proceedings before the Commission to be set aside finally, the (applicant's) allegation that a great many other documents were supplied but not placed on file has not been established and cannot be taken into account

The Court of Appeal reduced the suspended part of the three year sentence to twenty six months and increased the fine from 150,000 to 250,000 francs. The applicant appealed against this judgment to the Court of Cassation

In support of his appeal, the applicant relied in particular on the violation of his right to a fair trial and the infringement of the adversarial principle and the principle of equality of arms within the meaning of Article 6 of the Convention

The applicant relied firstly on a judgment of the Jurisdiction Court in another case, dated 19 December 1988 as a result of which the criminal courts henceforth had jurisdiction to decide on the validity of administrative proceedings prior to the opinion of the Tax Offences Commission

According to the applicant, in failing to take account of this decision, thereby confirming the first court's position that the independence of fiscal and criminal proceedings prevented the criminal courts from assessing whether the fiscal proceedings were void the Court of Appeal made it impossible for him to establish a violation of the adversarial principle at the stage prior to the opinion of the Tax Offences Commission

The applicant also maintained that the tax authorities' concealment of documents supplied by the Philippine authorities, both from the investigating judge and from the trial court, constituted a violation of the rights of the defence pursuant to Article 6 of the Convention

In a decision of 18 March 1991, the Court of Cassation dismissed the appeal

Regarding the first ground of appeal the court observed that before the lower courts the applicant had applied for the reassessment proceedings to be set aside in their entirety whereas before the Court of Cassation he was calling more specifically for the administrative stage, prior to the opinion of the Tax Offences Commission, to be set aside. However, Article 385 of the Code of Criminal Procedure stipulates that a fresh ground of appeal cannot be presented for the first time before the Court of Cassation

Regarding the second ground of appeal the Court of Cassation accepted the reasoning of the appeal court judges and stated that in determining the case as it did

the Court of Appeal, which based its conclusions solely on the documents produced in court, provided a legal basis for its decision".

2 *Extracts from domestic law*

Article L-228 of the Taxation Procedures Book

"In order to be admissible, complaints calling for the imposition of criminal sanctions in cases concerning direct taxes, value added tax and other turnover taxes, registration fees, land registration taxes and stamp duties shall be lodged by the authorities following the approval of the Tax Offences Commission

The commission shall examine cases referred to it by the Minister for Finance. The taxpayer concerned shall be notified of the referral to the Commission, which shall invite him to supply within thirty days any information which it considers necessary

The Minister is bound by the Commission's opinion "

Jurisdiction Court, 19 December 1988, No 2548

" considering that the appeals lodged by M R . . , a taxpayer, against the decision to refer his case to the Tax Offences Commission and the latter's authorisation, prior to the lodging of a complaint by the Minister, are directed against measures which are preconditions for the institution of criminal proceedings and that such measures cannot be isolated from those proceedings, it follows that the courts before which the case is brought must hear those appeals, without prejudice to any preliminary points of law."

Crim. 28 January 1991, Lavigne, Carles

" the court finds that the opinion of the Tax Offences Commission contains information which makes it possible to identify the authority which referred the case to it, the date on which it was referred and the identity of the person implicated by the authorities; it notes that the adversarial principle, secured by the European Convention for the Protection of Human Rights, cannot apply in this case, since the Commission does not constitute a court of first instance and the only purpose of the advice it tenders to the Minister is to limit his discretion to initiate proceedings

. the court finds that Article L-228 of the Taxation Procedures Book did not institute *inter partes* proceedings in the above-mentioned Commission, which is a consultative and not a judicial body, and provides for a purely administrative procedure only .

the provisions of the Act of 17 July 1977 to improve relations between the administrative authorities and the public, particularly those granting access to administrative documents, are not relevant to the validity of the procedure followed in accordance with Article L. 228 of the Taxation Procedures Book "

Article 26 of the Franco-Philippine Convention

"The competent authorities of the Contracting States shall exchange the information necessary for the application of the provisions of this Convention and of the Contracting States' domestic laws relating to the taxes covered by this Convention, particularly to prevent fraud or evasion in connection with these taxes. The information exchanged shall remain confidential and shall only be communicated to the persons and authorities (including the administrative courts or bodies) responsible for the assessment, collection or recovery of taxes covered by this Convention or proceedings, claims and appeals concerning those taxes "

COMPLAINTS

The applicant complains of violations of the principles of equality of arms and of the rights of the defence within the meaning of Article 6 of the Convention

He relies firstly on a violation of the principle of equality of arms during the "administrative" stage of the proceedings, that is prior to the opinion of the Tax Offences Commission, in that it was impossible for him to have access to all the documents of which the originals were seized by the customs service and communicated to the tax authorities, to enable him to organise his defence

He relies secondly on a violation of the rights of the defence during the judicial stage of the proceedings, since the tax authorities did not, as fairness required, produce at the hearings all the documents which had been passed on to them by the Philippine tax authorities, but only those which were likely to support the authorities' case

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 September 1991 and registered on 23 October 1991

On 8 December 1992, the Commission (Second Chamber) decided to give notice to the respondent Government of the complaints concerning the absence of equality of arms and the rights of the defence within the meaning of Article 6 of the Convention

The Government presented their observations on 13 May 1993, after an extension of the time-limit, and the applicant presented his observations in reply on 16 August 1993

THE LAW

1 The applicant complains of a violation of the principle of equality of arms during the administrative stage of the proceedings

Article 6 para 1 of the Convention provides that

"In the determination of any criminal charge against him, everyone is entitled to a fair hearing by a tribunal

As a preliminary point, the respondent Government note that the applicant's complaint relates only to the administrative stage of the proceedings between the referral to the Tax Offences Commission and that Commission's issuing of an opinion. Regarding the purely administrative stage concerning the establishment of the applicant's tax situation, the Government state that proceedings are currently pending before the Bordeaux Administrative Court of Appeal. Should the Commission nevertheless decide to examine a complaint relating to the purely administrative stage of the proceedings, the Government would wish to present additional observations.

a) *Exhaustion of domestic remedies*

The applicant complains that he did not receive the documents supplied by the customs service to the tax authorities, which would have enabled him to prepare his defence before the Tax Offences Commission.

The respondent Government argue firstly that the applicant did not properly raise this objection before the domestic courts and has therefore failed to exhaust the domestic remedies in accordance with Article 26 of the Convention. The Government consider that the applicant did not raise the question of the lawful nature of the proceedings before the Tax Offences Commission, the criminal court or the Court of Appeal since, according to the Government, he only challenged before these bodies the procedure prior to the referral to the Tax Offences Commission, that is to say the purely administrative tax audit procedure. This is why the objection regarding equality of arms before the Tax Offences Commission was declared inadmissible by the Court of Cassation, pursuant to Article 385 of the Code of Criminal Procedure. The applicant's argument that prior to the Jurisdiction Court's decision he was unable to challenge the Tax Offences Commission's proceedings in the criminal court of first instance or in the Court of Appeal does not stand up to analysis. The applicant cannot explain his refusal to rely on this ground by the fact that he knew it to be ineffective in the criminal courts, given the Court of Cassation's case law at that time, since each of the courts had opted for jurisdiction by the other. Thus, before the Jurisdiction Court's decision of 19 December 1988, there was certainly one court, if not two, which could have heard the applicant's application for the proceedings to be set aside.

In reply to the Government's objection that the case is inadmissible because domestic remedies have not been exhausted, the applicant states that he could not indulge in feats of legal dexterity and anticipate future case law, given that the Jurisdiction Court took its decision on 19 December 1988 and the criminal court gave judgment on 11 January 1989

The Commission has doubts about the Government's reasoning since the applicant applied for the entire tax reassessment proceedings to be set aside at both first instance and on appeal, and while he chose, in his submission to the Court of Cassation, to contest more specifically the proceedings before the Tax Offences Commission, this cannot constitute a new ground of appeal. In other words, it cannot reasonably be concluded from the fact that a complaint relates to the Tax Offences Commission stage, whereas previously the complaint related to the entire administrative stage (including the proceedings before the Tax Offences Commission), that this constitutes a fresh ground

The Commission therefore considers that the Government's first objection based on failure to exhaust the domestic remedies must be rejected

The respondent Government also argue that the applicant has never attempted to obtain the documents seized during the administrative stage before the Tax Offences Commission. The Government consider that the applicant had two possible avenues for obtaining the documents seized by the customs service. He could have asked the customs or tax authorities at the very outset of the administrative proceedings to produce all the seized documents. In this context, a distinction must be drawn between an application for restitution of the seized documents (*demande de restitution*) and an application for production of the files for inspection (*demande de communication*) which would enable the applicant to inspect the file in the offices of the relevant authorities or to make copies. He could also have applied for all the documents to be lodged in the investigation file at the start of the criminal proceedings. More generally, under the provisions of Act No 78 753 of 17 July 1978 setting out various measures to improve relations between the administrative authorities and the public and various administrative, social and tax provisions he could have secured access to the file by applying to the Access to Administrative Documents Commission (CADA)

The applicant observes that it is pointless for the Government to claim that he could have secured access to the documents seized by the customs under the provisions of the Act of 17 July 1978, since Section 1 of the Act defines administrative documents in such a way as to exclude documents which are not administrative but rather private documents seized by the public authorities

The Commission recalls that the investigating judge of the Bordeaux Regional Court had asked the tax authorities for the entire file but that they had only supplied part of it. The Government cannot therefore object that the applicant did not ask for all the documents to be filed, since it is clear that the authorities would not have supplied him with them any more than it did the court

The Commission also notes that the applicant tried to have the proceedings at first instance and before the Court of Appeal set aside on the grounds that he had not had access to the documents

The Commission considers untenable the Government's objection that the case is inadmissible because the applicant never attempted to have the documents produced, since an application to the Access to Administrative Documents Commission is not an effective remedy given the nature of the documents concerned which, as the applicant points out, are private documents seized by the public authorities and not personal documents of an administrative character

The Commission therefore considers that the Government's second objection based on failure to exhaust the domestic remedies must also be rejected

b) *Applicability of Article 6 of the Convention*

The respondent Government maintain that the Tax Offences Commission is a purely administrative body with no judicial character and that the proceedings before it therefore fall outside the scope of Article 6 of the Convention. It relies in this regard on the case-law of the European Court of Human Rights, according to which an organ whose role is confined to giving an opinion does not provide the 'determination by a tribunal of the matters in dispute which is required by Article 6' (Eur. Court H.R., *Bentham* judgment of 23 October 1985, Series A no 97). According to the Government, this is even more the case in that the Tax Offences Commission's opinion does not relate to the applicant's guilt but simply to the advisability of the authorities' lodging a complaint, the court not being bound by this opinion. The complaint is therefore incompatible *ratione materiae* with the provisions of the Convention. In addition, Article 6 does not apply to this stage of the proceedings since in any event the Tax Offences Commission does not decide on criminal charges and it is the criminal court alone which decides what action in criminal law should be taken on a complaint lodged by the authorities, with regard to both the category of offence and the person to be charged.

The applicant considers that the Tax Offences Commission's role is not confined to giving opinions, since the Commission's authorisation is an essential precondition for the institution of criminal proceedings for tax evasion. Notwithstanding, the applicant states that the complaint is not directed specifically against the Tax Offences Commission's authorisation but rather against the entire proceedings which led to a criminal conviction.

The Commission recalls that, for Article 6 to apply, the authority before which the proceedings take place must have the power to determine the dispute, this condition excludes bodies which are merely empowered to tender advice (Eur. Court H.R., *Bentham* judgment of 23 October 1985, Series A no 97, p. 17, para. 40). However, the Court recognises that "demands of flexibility and efficiency" may justify the prior intervention of administrative bodies and, *a fortiori*, of judicial bodies which do

not satisfy the requirements [of Article 6 of the Convention] in every respect" and that tribunals need not meet all the requirements of Article 6 at all stages of their proceedings (Eur Court HR , Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no 43, pp 22-23, para 51)

The Commission notes in this context that consulting the Tax Offences Commission is an essential formality prior to the institution of any criminal proceedings for tax evasion. Moreover, the Commission's opinion, if it is favourable, is binding on the Minister for Finance, who must then institute criminal proceedings. Finally, it also recalls that the criminal courts are now responsible for assessing the validity of objections concerning the lawfulness of proceedings before the Tax Offences Commission, following the abandonment in 1988 of the principle of the independence of the criminal and administrative courts in these matters.

In any case, the Commission recalls that, while the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a tribunal competent to determine the charge, it does not follow that the Article has no application to pre-trial proceedings' (Eur Court HR , Imbrioscia v Switzerland judgment of 24 November 1993, Series A no 275, p 13, para 36). The requirements of Article 6 may therefore become operative before the case is brought before the trial court if and in so far as the initial failure to observe them poses a serious threat to the fairness of the proceedings.

The Commission therefore considers that Article 6 can apply to the procedural stage before the Tax Offences Commission.

It follows that this complaint is not incompatible *ratione materiae* with Article 27 para 2 of the Convention.

c) *The merits*

According to the Government, the applicant already knew at the administrative stage of the proceedings that the documents which the tax authorities were relying on were taken from the file of documents seized by the customs service, and that although that file was classified in such a way as to make it appear a single whole it was clear that a selection had been made, so that the applicant was in a position to supplement the file himself or have other documents added in order to defend his interests. The applicant has in fact never specified which documents he would have wished to be handed over to the court in order to show that he was not guilty of tax evasion.

According to the applicant, his claim that his right to a fair trial was violated is reinforced by the European Court's finding in its judgment of 25 February 1993 that the seizure of his documents was illegal (Eur Court HR , Mialhe judgment, Series A no 256-C, paras 30-40). Article 6 of the Convention necessarily implies that if the tax authorities decide to institute proceedings for tax offences they can only do so on the basis of information obtained fairly and not on the basis of documents which they

hold in violation of the right to respect for private life, within the meaning of Article 8 of the Convention

The Commission considers, in the light of all the parties' submissions, that the application raises serious questions of fact and of law which cannot be resolved at this stage of the examination of the application but require examination of the merits. It follows that this part of the application cannot be declared manifestly ill-founded under Article 27 para 2 of the Convention.

2. The applicant complains that he was not given access to all the documents supplied by the Philippine tax authorities within the framework of the mutual assistance provisions of the Convention concluded between France and the Philippines on 9 January 1976, and complains of a violation of the rights of the defence at the judicial stage of the proceedings.

a) *The applicant's status as victim*

According to the respondent Government, the applicant cannot claim to be a victim of this violation under Article 25 of the Convention since he himself obtained certain of the said documents. The competent courts have found that the documents supplied by the Philippine authorities which were not produced in the proceedings were not relevant to his situation or did not relate to the period to which the charges pertain.

The Commission recalls that the Bordeaux Criminal Court found that not all the documents supplied by the Philippine authorities had been produced in the proceedings and that the applicant's defence rights had thus been infringed. The Government cannot therefore maintain that the applicant is not a victim.

b) *The merits*

The Government consider that the speciality rule applied to international conventions does not permit information exchanged between States which can only be passed on to persons and authorities responsible for the assessment, collection or recovery of taxes to be included in a criminal case-file, even if the case relates to tax evasion, when the criminal proceedings are independent of the administrative proceedings. That being so, it was decided to hand over only those documents which linked the applicant to the facts mentioned in the charges. The Government stress that the existence of the documents supplied to France was not concealed, since the fact of their being supplied was explicitly referred to in the inspector's summary report. The Government maintain that it is perfectly legitimate not to hand over documents which do not relate to the charges and that consequently the fact that they were not produced could in no event have infringed the applicant's defence rights.

The applicant recalls that the courts of first instance and appeal had acknowledged that documents had been concealed. The authorities could in no event rely on the confidentiality rule laid down in Article 6-1 of the Franco-Philippine Convention, since that text explicitly excludes judicial authorities hearing charges from the scope of this rule.

The Commission considers in the light of all the parties' submissions that this part of the application also raises serious questions of fact and of law which cannot be resolved at this stage of the examination of the application but require examination of the merits. It follows that this part of the application cannot be declared manifestly ill-founded under Article 27 para. 2 of the Convention, no other grounds for inadmissibility having been noted.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits.