AS TO THE ADMISSIBILITY OF

Application No. 21156/93
by G.J.
against Luxembourg

The European Commission of Human Rights (First Chamber) sitting in private on 22 October 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 September 1992 by G.J. against Luxembourg and registered on 14 January 1993 under file No. 21156/93;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 19 April 1995 and the observations in reply submitted by the applicant on 24 November 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Danish citizen, born in 1933. He resides at Dannemare, Denmark. In the proceedings before the Commission the applicant is represented by Mr. Tyge Trier, a lawyer practising in Copenhagen.

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

In 1967 the applicant moved to Luxembourg. In 1975 he founded a limited liability company for the purpose of trading in fur and leather products. The applicant held 90% of the company's shares and his wife the remaining 10%.

The firm went through a period of considerable expansion but soon experienced certain problems in respect of the tax assessments made by the Internal Revenue Service, in particular concerning the period from 1978 to 1980. Eventually the applicant decided, in 1986, to liquidate the company and it furthermore appears that it was intended to establish a new limited liability company as of 15 May 1987 which would be managed by the applicant's two sons.

The applicant left Luxembourg in April 1987 and eventually returned to Denmark. The intended voluntary liquidation of his company, however, ended on 14 May 1987 when the Commercial Court of first instance (le tribunal d'arrondissement de et à Luxembourg siégeant en matière commerciale) declared the company bankrupt and appointed an official receiver to sort out the estate and settle the accounts. It does not appear that the applicant appealed against this decision but by letters of 18 and 22 May 1987 he submitted certain complaints to the official receiver and the Danish Embassy in Luxembourg, respectively. It furthermore appears that the applicant engaged a lawyer in Luxembourg to take care of his interests in connection with the realisation of the company's assets. Finally, it appears that certain movable property was sold by auction as well as certain immovable property which was sold by auction on 15 March 1990. Otherwise the applicant contends that he heard nothing from the official receiver.

The applicant divorced in April 1991.

In November 1991 one of the applicant's two sons, who were still living in Luxembourg, fell ill. As the applicant wanted to see him he contacted the Commercial Court on 10 November 1991 and enquired whether the proceedings concerning the liquidation of his company had come to an end and whether anything would impede his free entry into and departure from Luxembourg.

The applicant's son died on 12 November 1991.

On 21 November 1991 the Commercial Court informed the applicant that the proceedings were still pending. In a letter to the Commercial Court dated 29 November 1991, the applicant then complained of the conduct of the insolvency proceedings and particularly the time taken to conclude the proceedings. Upon request the Danish Embassy in Luxembourg informed the applicant, on 11 December 1991, that the official receiver was of the opinion that the proceedings would be concluded by January 1992. However, on 6 March 1992 the Embassy informed the applicant that the proceedings were still pending, inter alia due to the fact that the competent court was overburdened with work. The official receiver, however, expected the proceedings to come to an end before Easter 1992. Finally, on 18 May 1992 the Embassy confirmed that the case was still pending.

On 18 January 1993 the official receiver informed the applicant that the company's accounts would be finalised during a court meeting to be held on 22 January 1993 and it appears that the accounts showed a deficit of approximately 30 million Luxembourg francs. The applicant did not appear at the court meeting but was subsequently informed through the Luxembourg Embassy in Copenhagen that the proceedings concerning the liquidation of his limited liability company ended on 14 May 1993.

COMPLAINTS

The applicant complains that the proceedings concerning the liquidation of the limited liability company, in which he owned 90% of the shares, were not terminated within a reasonable time within the meaning of Article 6 para. 1 of the Convention.

He furthermore complains, under Article 8 of the Convention, that these proceedings interfered with his right to respect for his family life as it allegedly resulted, inter alia, in the dissolution of his marriage.

Finally, the applicant complains that he has been treated in a discriminatory manner in the proceedings concerning the liquidation of his company only due to the fact that he is a foreigner. He invokes in this respect Article 14 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 September 1992 and registered on 14 January 1993.

On 22 February 1995 the Commission (First Chamber) decided that notice of the application should be given to the respondent Government and invited them to submit written observations on the admissibility and merits.

On 24 May 1995 the Commission decided to grant legal aid to the applicant.

The Government submitted their observations on 19 April 1995. The applicant's observations in reply were submitted on 24 November 1995.

THE LAW

1. The applicant complains of the length of the insolvency proceedings, that these proceedings interfered with his right to respect for his family life and that he has been treated in a discriminatory manner.

The Government have raised a preliminary objection, pleading an abuse of the right of petition, as the applicant has, so the Government contend, submitted inaccurate and misleading information in his application to the Commission showing that he was allegedly debarred from being a director, shareholder or employee of a Luxembourg company for a period of two years, and that his freedom of movement was restricted.

The applicant maintains that he has a legitimate interest in an opinion from the Commission, in particular as to why the insolvency proceedings lasted six years. The Government have not given any answer so far and the information submitted has been based on what has been made available to the applicant.

The Commission observes that whether or not an application is abusive under the Convention depends on the particular circumstances of the case. A finding of abuse might be made if it appears that the application is clearly unsupported or outside the scope of the Convention (cf. for example No. 11208/84, Dec. 4.3.86, D.R. 46 p. 182 with further references) or if the application is based on untrue facts in a deliberate attempt to mislead the Commission (cf. No. 24760/94, Dec. 27.6.96 to be published in D.R.). The Commission does not find this to be the case here and has not found any other elements which could lead to the conclusion that the application is abusive under the Convention.

Accordingly, the Commission does not consider the application to be an abuse of the right of petition.

2. The applicant complains that the insolvency proceedings concerning the liquidation of the limited liability company, in which he owned 90% of the shares, were not terminated within a reasonable time. He invokes in this respect Article 6 (Art. 6) of the Convention which in so far as relevant reads as follows:

> "In the determination of his civil rights ... everyone is entitled to a ... hearing within a reasonable time ...".

The Government point out that the insolvency proceedings were directed against the limited liability company and, therefore, had no effect on the applicant's civil rights and obligations.

To the extent the Government suggest that the applicant cannot

claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention the Commission recalls that the term "victim" in Article 25 (Art. 25) of the Convention denotes the person directly affected by the act or omission which is at issue. The Commission furthermore recalls that disregarding a company's legal personality as regards the question of being a "victim" will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Commission through the organs set up under its articles of incorporation or - in the event of liquidation - through its liquidators (cf. Eur. Court HR, Agrotexim and Others v. Greece judgment of 24 October 1995, Series A no. 330, para. 66).

In the present case the company was under liquidation and the complaint brought before the Commission relates to the activities of the liquidators - the official receiver and the Commercial Court. In these circumstances the Commission finds it established that it was in all practicality impossible for the company, as a legal personality, to bring the case before the Commission. On the other hand the Commission considers that the applicant is entitled to claim to be a "victim" within the meaning of Article 25 (Art. 25) of the Convention of the measures directed against the company as he held a substantial majority shareholding of 90% in the company, was in effect carrying out his business through the medium of the company and has a direct personal interest in the subject-matter of the complaint (cf. No. 11189/84, Dec. 11.12.86, D.R. 50 p. 121 with further references).

In these circumstances the Commission rejects the Government's objections in this respect.

The Government furthermore maintain that the conduct of insolvency proceedings and the time taken to conclude them depended on the number of duties incumbent on the official receiver and the zeal with which he attended to them. In respect of the length of the insolvency proceedings the applicant could therefore have invoked section 462 of the Commercial Code which provides that the Commercial Court may at any time replace "the juge-commissaire", or discharge the official receiver, and thereby obtain redress. Furthermore, the Government point out that the applicant remained silent for more than four years before complaining about the allegedly excessive length of the proceedings. The Government contend that these circumstances render the application inadmissible under Article 26 (Art. 26) of the Convention.

The applicant maintains that the formal competence of the Commercial Court to discharge the official receiver is an extraordinary remedy which he is not required to exhaust in respect of a complaint concerning the length of the proceedings, in particular since section 462 of the Commercial Code does not appear to contain any specification as to what could lead the Commercial Court to discharge the receiver. Furthermore, the applicant considers that his conduct should be assessed under Article 6 (Art. 6) of the Convention when considering the reasonableness of the length of the proceedings and not under Article 26 (Art. 26) of the Convention.

As regards the applicant's alleged prolonged silence the Commission agrees that this is not a matter which in the present case falls to be examined under Article 26 (Art. 26) of the Convention. As regards the exhaustion of domestic remedies the Commission recalls that only remedies which are likely to provide redress for an applicant's complaints need to be taken into account. In particular the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. Furthermore, it falls to the respondent State to establish that these conditions are satisfied (cf. for example No. 12742/87, Dec. 3.5.89, D.R. 61 p. 206).

In the present case the Government have referred to a possibility under the Commercial Code to have the "juge-commissaire" or the official receiver replaced. They have not, however, in any other way indicated that this remedy would have been likely to provide redress for the applicant's complaint about the length of the proceedings. In these circumstances the Commission is not convinced that such an act would have, from the applicant's point of view, any positive effect on the length of the proceedings; the more so since it has not been shown that the Commercial Court thereby could have ordered the "juge-commissaire" or the official receiver to proceed in any particular way.

Consequently, the Commission finds that the applicant has not failed to comply with the requirements of Article 26 (Art. 26) of the Convention.

In view of the above the Commission considers, in the light of the parties' submissions, that the complaint concerning the length of the insolvency proceedings raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

3. The applicant also complains that his right to respect for his family life has been interfered with and that he has been treated in a discriminatory manner. He invokes in this respect Articles 8 and 14 (Art. 8, 14) of the Convention.

The Commission has examined these complaints as they have been submitted. However, it finds that the applicant has not substantiated his allegations and accordingly this part of the application does not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint concerning the length of the insolvency proceedings, and

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber