APPLICATION N° 20373/92

M M v/FRANCE

DECISION of 9 January 1995 on the admissibility of the application

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Article 6, paragraph 1 of the Convention

a) This provision does not require States to set up courts of appeal or cassation. If however, such courts are instituted the requirements of Article 6 must be respected

b) This provision does not prevent Contracting States from regulating access to appeal jurisdictions in order to secure the proper administration of justice

The general principle under French law that in civil proceedings, the appellant must first have executed the judgment delivered by the lower court before an appeal will be listed for hearing before the Court of Cassation is aimed at securing the proper administration of justice

No indication in the instant case, that this precondition was disproportionate to the aim pursued and therefore unreasonably hindered access to the Court of Cassation

c) Reasonable time (civil) Assessment of the length on the basis of the following criteria complexity of the case conduct of the applicant (special diligence of the person concerned in civil matters) and conduct of the judicial authorities

The duty of vigilance incumbent on judicial authorities is confined to those aspects of the proceedings subject to their control In the instant case the applicant alone is responsible for the delays resulting from the decision to suspend examination of his appeal to the Court of Cassation pending execution by him of the decision being challenged

Article 6, paragraph 1 and Article 25, paragraph 1 of the Convention *Does an applicant whose appeal is struck out of the Court of Cassation list on the ground that he should first have executed the judgment being challenged qualify as a victim? Does he qualify as a victim after re-listing of his appeal following execution of the contested decision? (Questions unresolved)*

THE FACTS

The applicant is a Portuguese citizen He was born in 1952 and lives in Le Perreux (France)

He is represented in the proceedings before the Commission by Mr Paul-François Ryziger, a lawyer practising at the "Conseil d'Etat" and the Court of Cassation

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

The dispute involves three brothers, M A , M M and the applicant, who was at the material time the manager of a firm of building contractors and who, having been forced to give up his business, is currently an employee in the building industry The issue in dispute here is whether the three brothers were in a *de facto* partnership and the financial consequences for each of them of M A 's retirement from the partnership

M A considered that the failure of the plan to set up a limited liability company with his two brothers and himself as members did not alter the fact that they had carried on business together as building contractors in a *de facto* partnership He claimed that this entitled him to certain sums of money for his share in this partnership from November 1982 to March 1984 M A issued proceedings against his two brothers before Creteil tribunal de grande instance on 20 and 26 June 1985, seeking payment of the said amounts and, in the alternative, the appointment of an expert

The applicant and M M defended the action on the principal ground that no partnership, even *de facto*, had existed and that M A had merely been the applicant's employee and had left his employer, taking the equipment away with him, which justified a counterclaim by the employer for damages, and that, furthermore, the "tribunal de grande instance" did not have jurisdiction to deal with a claim for payment of arrears of wages, which was a matter for the Industrial Tribunal (conseil de prud'hommes) alone

In an interlocutory order dated 10 February 1987, the court appointed an expert to examine all the principal claims and counterclaims

The expert filed his report on 10 February 1989 In the light of this report, M A filed two sets of pleadings dated 25 April 1989 and 7 June 1989 The applicant and M M filed their pleadings in reply on 20 June 1989 On 4 July 1989, the applicant filed further pleadings, having instructed another lawyer

In a judgment of 19 September 1989, Créteil "tribunal de grande instance" held that, having regard to the documents exhibited and the expert report filed by the accountant, a *de facto* partnership had indeed existed, and found in favour of M A His brothers were ordered jointly and severally to pay him 76,585 French francs (FRF) plus interest, corresponding to his share in the net assets of the *de facto* partnership

The applicant and M M appealed against this judgment, instructing the same Appeal Court lawyer (avoue) M A filed his pleadings in reply on 16 October 1990

In a judgment dated 23 January 1991, Paris Court of Appeal upheld this judgment in its entirety It also dismissed the claim made by the third brother, M M , for his share in the net assets of the *de facto* partnership, on the ground that this claim, made against the applicant, was inadmissible under Article 564 of the New Code of Civil Procedure

On 7 June 1991, the applicant appealed to the Court of Cassation However on 26 November 1991 M A applied to the President of the Court of Cassation for the appeal be struck out of the court list, pursuant to Article 1009-1 of the New Code of Civil Procedure (1), on the ground that the applicant had failed to execute the Court of Appeal judgment

In his submissions in defence, the applicant argued that execution of the judgment would result in extreme consequences in view of his limited means In support of this argument he exhibited copies of his pay-slips and certificate of tax exemption

In an order of 17 January 1992, the judge delegated by the President of the Court of Cassation to deal with the case granted the application and struck the appeal out of the list

This order stated that the decision to strike a case out of the list constitutes neither a penalty for lack of diligence nor a decision that the case is inadmissible for any reason, ( ) In accordance with the fundamental rules of judicial organisation, it is an administrative and regulatory measure intended to underscore the principle that appeals to the Court of Cassation may be made only in specific circumstances laid down by law and to ensure that litigants who have succeeded in obtaining an enforceable judgment may fully exercise the rights acknowledged to be theirs by the lower courts It went on 'the effects of this measure, (are) merely provisional and do not prejudice any rights, remedies or claims ( )

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(1) Article 1009 1 New Code of Civil Procedure Other than in cases where the filing of an appeal prevents execution of the decision being challenged the President may at the defendant s request and after obtaining the opinion of State Counsel and the parties order the case to be struck out of the list where the appellant fails to show that he has executed the decision being appealed unless it appears to him that execution of the decision would result in manifestly extreme consequences
On submission of proof that the decision being challenged has been executed the President shall order the case to be re listed

The judge delegated to deal with the case held finally that the applicant "does not submit any evidence of diligence on his part from which I can conclude that he is willing to execute the decision made by the lower courts Neither does he refer to any personal circumstances which would suggest that execution of the judgment would result in manifestly extreme consequences

The applicant filed an application on 31 December 1993 for his appeal to be re-listed for hearing before the Court of Cassation

In an order dated 4 May 1994, the judge delegated by the President of the Court of Cassation ordered the appeal to be re-listed for hearing before the Court of Cassation

He noted firstly that the applicant had submitted documents to prove that he had executed the Court of Appeal judgment in its entirety and secondly that M A did not oppose his application

He ruled as follows "The appellant's appeal to the Court of Cassation does not have the effect of staying the proceedings and he is therefore obliged first to execute the inherently enforceable decision delivered by the lower courts I am satisfied that he has fully complied with this obligation"

COMPLAINTS

1 The applicant complains that he was denied a fair hearing as a result of his appeal to the Court of Cassation being struck out of the list pursuant to Article 1009-1 New Code of Civil Procedure

He argues that this provision discriminates between litigants, as only those with sufficient resources to execute the Court of Appeal judgment are at liberty to appeal

The applicant considers finally that the decision to strike the case out of the list infringes the principle of proportionality, because it hits litigants of slender means harder.

Without referring explicitly to Article 6 of the Convention, the applicant complains of a violation of the principles laid down in that Article, since his inability to execute the judgments made against him results in his being denied an effective remedy before the Court of Cassation

2 In his observations of 16 March 1994 and his letter of 11 August 1994, the applicant raises a further complaint based on "delay in examining his case"

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 July 1992 and registered on 24 July 1992

On 28 June 1993, the Commission decided to give notice of the application to the respondent Government, inviting them to submit observations on the admissibility and the merits

The Government submitted their observations on 2 December 1993 On 9 December 1993, these were sent to the applicant's lawyer who failed to reply within the specified time In a letter of 24 February 1994, the Commission's Secretariat warned the applicant's lawyer that the application might be struck out of the list The applicant's observations in reply were received on 16 March 1994

On 8 August 1994, the Commission's Secretariat sent a letter to the applicant's lawyer asking for further details of progress made in the proceedings

In a letter of 11 August 1994, the applicant's lawyer indicated that by an order dated 4 May 1994, the applicant's appeal had been re listed for hearing before the Court of Cassation He added that the applicant intended, nevertheless, to pursue his application before the Commission on the ground that the application concerns a matter of principle and there is continuing prejudice owing to the delay in examining his case"

In a letter of 22 August 1994 the Commission's Secretariat sent the Government copies of the order of 4 May 1994 and the letter from the applicant s lawyer stating that the applicant intended to pursue his application

THE LAW

1 The applicant complains, invoking in substance Article 6 para 1 of the Convention, that he was denied a fair hearing and, in particular, the right of access to a tribunal, owing to his appeal being struck out of the Court of Cassation list

The relevant provisions of Article 6 para 1 of the Convention are worded as follows

> In the determination of his civil rights and obligations ( ) everyone is entitled to a fair hearing ( ) by a tribunal ( ) '

The Government's first contention is that the applicant does not qualify as a victim, which the applicant denies The Government refer to the Commission's case law according to which "someone who complains about a situation which he himself helped to bring about cannot claim to be the victim of a violation" (No 1271/87, Dec 8 9 88, D R 57 p 196) and consider that the applicant helped to bring about the situation of which he complains by refusing to comply with the legislative provisions in force

The applicant contests this argument on the ground that it may lead to extreme consequences The result, he argues, is to deprive a person, who, believing certain legislative provisions to be contrary to the Convention refuses to comply with them,

of the opportunity of referring a case to the Commission for a ruling that such provisions are contrary to the Convention, on the sole ground that by failing to comply with the legislative provisions in question, the individual himself has helped to bring about the situation complained of

The Government also observe that the applicant does not have a real and subsisting cause of action, since it is still open to him to apply for his appeal to be re-listed for hearing before the Court of Cassation and thereby avoid the alleged violation The applicant contests this on the ground that his case arises as a result of his appeal being struck out of the list and not as a result of a refusal to re list it

The Government submit further that the applicant failed to exhaust domestic remedies They argue that the applicant never applied for the appeal to be re-listed (the Government lodged their observations on 2 December 1993, i e before the applicant filed his application for his appeal to be re listed dated 31 December 1993), which is an appropriate remedy in so far as it may set aside the decision being challenged They also argue that the applicant has not previously raised, either expressly or in substance, the complaint which he now submits to the Commission

The applicant contests this submission, arguing that the application to have his appeal re-listed for hearing before the Court of Cassation is merely an application for it to be stated on record that the grounds for striking out no longer subsist The applicant further submits that the only time he could have raised the complaint relating to the violation of the Convention, even in substance, was before the President of the Court of Cassation, who on account of his status and powers, could not have given a judicial decision on this point The applicant doubts moreover, whether the President would have been willing to give precedence to the Convention over domestic law to which he owes his powers The applicant submits that he did, in any case, make implicit reference to a violation of the Convention by claiming that the decision to strike the appeal out of the list would entail manifestly extreme consequences

On the merits, the Government consider that the complaint relating to a violation of Article 6 para 1 of the Convention is manifestly ill founded They contest first of all the applicant's allegation that his right of access to the Court of Cassation was restricted not only has the applicant had access to courts, both of first instance and appeal, but he would also have access to the Court of Cassation, to which, moreover, appeals may be made only in specific cases prescribed by law, were he not depriving himself of this opportunity by his own conduct in failing to execute the Court of Appeal judgment The order striking the appeal out of the list is merely an administra tive measure employed by the courts

Even if the order striking out the appeal does constitute a restriction on the right of access to a tribunal, the Government consider such a measure necessary for the proper administration of justice and proportionate to the aim pursued The aim is to ensure that court decisions are executed and to prevent appeals from being entered merely to gain time Furthermore, as the effects of such an order are provisional and do not prejudice the appellant's rights, this measure strikes a balance between the rights of judgment creditors and judgment debtors

The applicant contends that as appeals to the Court of Cassation do not have the effect of staying the proceedings, the judgment creditor can take measures to enforce judgment without it being necessary for the case to be struck out of the list. Derogations from the striking out rule are interpreted narrowly, and may result in there being no possibility of appeal for those who are unable to execute the judgment and are, for example, forced to file a bankruptcy petition.

The Commission does not consider it necessary to examine whether the applicant could and may still, having regard to the re-listing on 4 May 1994 of his appeal for hearing before the Court of Cassation, claim to be the victim of a violation of Article 6 para. 1 and, if so, whether he exhausted domestic remedies, because the application fails in any event on another ground of inadmissibility

The Commission recalls the Court's case-law according to which Article 6 para. 1 of the Convention does not oblige the Contracting Parties to set up courts of appeal or cassation Nevertheless, a State which does institute such courts is required to ensure that individuals shall enjoy before these courts the fundamental guarantees contained in Article 6 (Eur Court H.R., Delcourt judgment of 17 January 1970, Series A no 11, p 14, para 25; case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), judgment of 23 July 1968, Series A no. 6, p. 33, para. 9).

In this case, the Commission notes that the applicant did have the opportunity of appealing to the Court of Cassation against the Court of Appeal judgment of 23 January 1991 which ordered him and one of his two brothers jointly and severally to pay the third brother FRF 76,585 plus interest, corresponding to his share in the net assets of the partnership The applicant took this opportunity but, as he failed to pay the amount in question, his appeal was struck out of the Court of Cassation list at the respondent's request pursuant to Article 1009-1 of the New Code of Civil Procedure.

It is true that this rule, which may make access to a higher court conditional on payment of a particular sum due under the terms of a lower appeal court judgment, does raise potential problems under Article 6 para 1 of the Convention which guarantees everyone right of access to a tribunal The Commission recalls, however, the principle laid down in its case-law that this provision does not prevent Contracting States from regulating access to appellate courts, provided that such regulations are aimed at ensuring the proper administration of justice (see, *mutatis mutandis*, No 10857/84, Dec. 15.7 86, D.R. 48 p. 106).

In the instant case, the Commission notes that the rule in Article 1009 1 of the New Code of Civil Procedure is designed to ensure compliance with the principle that an appeal to the Court of Cassation, which is confined to an appeal on points of law, is an extraordinary procedure in civil proceedings, which, as a matter of principle, has no suspensive effect. Moreover, the rule is not applied automatically: on an application for striking out, the President of the Court of Cassation makes a ruling after hearing argument for both sides, and will order the appeal to be struck out only if the

consequences of such a measure do not appear to him or her to be manifestly extreme The Commission notes finally that the sole effect of an order striking out an appeal is to stay the proceedings until judgment is executed

For the various reasons given above, the Commission considers that the procedure provided for in Article 1009-1 of the New Code of Civil Procedure is aimed at securing the proper administration of justice

The Commission's task is therefore to examine whether or not the restrictions resulting from application of this rule restricted the individual's access to a tribunal "in such a way or to such an extent that the very essence of the right is impaired', whether they "pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see Eur Court H R , Ashingdane judgment of 28 May 1985, Series A no 93, pp 24 and 25, para 57)

The Commission notes, in this case, that the damages awarded against the applicant, jointly and severally with his brother, were not disproportionate Furthermore, the applicant has not proved that paying these damages, in execution of the judgment, would entail "manifestly extreme consequences The Commission is particularly inclined to this opinion on noting that the applicant did eventually execute the judgment, which shows that the precondition was not disproportionate to the aim pursued

In the circumstances, the Commission does not find anything to support the allegation of a violation of the applicant's right not to be unreasonably hindered in his access to the courts, and in particular to the Court of Cassation

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 27 para 2 of the Convention

2 In his observations in reply to the French Government, the applicant, whose appeal had not yet been re listed for hearing before the Court of Cassation submitted that the case had in any event been considerably delayed as a result of the order dated 17 January 1992 striking the appeal out of the list In his letter of 11 August 1994, the applicant raised again the issue of "delay in examining his case

The Commission considers that this is a further complaint which needs to be examined under Article 6 para 1 of the Convention which provides that

> "In the determination of his civil rights and obligations ( ) everyone is entitled to a fair hearing ( ) within a reasonable time by a tribunal ( )

The proceedings before the civil courts began on 26 June 1985 when a writ was issued against the applicant in Creteil "tribunal de grande instance", and are still pending before the Court of Cassation

The Commission recalls that the reasonableness of the length of proceedings must be evaluated according to the circumstances of the case and with the assistance of the following criteria the complexity of the case, the conduct of the parties and the conduct of the authorities dealing with the case (see Eur Court H R , Vernillo judgment of 20 February 1991, Series A no 198, p 12, para 30, Monnet v France judgment of 27 October 1993, Series A no 273-A, p 11, para 27)

The Commission identifies three major periods in the course of the proceedings a period of one year and seven and a half months between the issue of the initial writ against the applicant and the interlocutory order appointing an expert, a period of two years between the date of the expert's appointment and the filing of his report, and finally a period of two years, three months and seventeen days between the applicant's appeal being struck out and subsequently re-listed

The Commission observes that the subject of the dispute submitted to the courts of first instance was whether or not the three brothers had been in *de facto* partnership and the financial consequences thereof for each of them In reaching a decision, the court dealing with the case had to identify whether the three factors which constitute a partnership under French law were present in this case, that is, whether contributions had been made by the three parties, whether they intended to form a partnership and whether they planned to share the profits and losses The Commission notes that such a dispute could not be settled on the basis of the documents alone and required full and detailed investigations by the expert, which were made particularly difficult by the parties' contradictory submissions and the fact that the events had occurred a long time ago

In the circumstances, the Commission considers that there was a degree of complexity to the case and that this explains the first two periods referred to above

The Commission notes that the applicant's complaint concerning the delay in examining his case relates essentially to the period of two years, three months and seventeen days in which the examination of his appeal was suspended owing to non-execution of the judgment in question

The Commission notes that this period sub divides into two periods the first of these, from 17 January 1992 to 31 December 1993, i e one year and eleven and a half months, can be explained by the fact that the applicant had not paid the sum due under the judgment, the second period, from the date on which the applicant did execute the judgment to 4 May 1994, the date on which his appeal was re-listed, i e four months and four days, is attributable to the court dealing with the case

The Commission recalls that according to the case-law of the Convention organs, the exercise of the right to a hearing within a reasonable time is subject, in civil cases, to diligence being shown by the party concerned (see Eur Court H R , Pretto and Others judgment of 8 December 1983, Series A no 71, p 14, para 33) In addition, only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement (see, for example, Eur Court H R , H v United Kingdom judgment of 8 July 1987, Series A no 120 B, p 59, para 71)

The Commission notes, in the instant case, that the delay in the proceedings of which the applicant complains is mainly due to his lack of diligence in executing the judgment As regards the period of over four months attributable to the judicial authorities, the Commission does not consider this period, taken in isolation, to be unreasonable

Notwithstanding the applicant's submission that he was financially incapable of paying the damages awarded against him in the judgment, the Commission considers that the period of time in question cannot be attributed to the judicial authorities Although they are obliged to ensure that the proceedings progress reasonably swiftly (see Eur Court H R , Martins Moreira v Portugal judgment of 26 October 1988, Series A no 143, p 17, para 46), their duty of vigilance is confined to those aspects of the proceedings subject to their control

It is clear from the facts of the instant case that, during the period in question, the judicial authorities had no means at their disposal to accelerate the proceedings, the progress of which depended solely on the applicant s diligence in executing the judgment

In the circumstances, the Commission considers, on the basis of an overall assessment of the proceedings, that the State cannot be deemed responsible for any delay such as to render the length of the proceedings unreasonable within the meaning of Article 6 para 1 of the Convention

Having regard to the complexity of the case and the conduct of the applicant, the Commission finds that the length of the proceedings is not excessive and meets the reasonable time requirement laid down in Article 6 para 1

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority

DECLARES THE APPLICATION INADMISSIBLE