

APPLICATION N° 20714/92

Georges HENRY v/FRANCE

DECISION of 6 April 1995 on the admissibility of the application

Article 6, paragraph 1 of the Convention: *Inapplicable when the person concerned cannot maintain on arguable grounds that domestic law recognises the right claimed, that the right is the subject of a dispute (contestation), that it is "civil" and that the outcome of the proceedings is decisive for such a right*

Subordinate accountant (comptable secondaire - France) seeking a certificate of discharge for the refund of a security and awaiting the result of an audit by the Audit Court of accounts kept by public-sector accountants. The Commission concludes, on the basis that the outcome of the proceedings was not directly decisive for the issuing of the certificate, as the Audit Court audits only the accounts drawn up by principal accountants (comptables principaux), that the issue before that court did not concern the determination of civil rights and obligations

THE FACTS

1. *Particular circumstances of the case*

The applicant is a French citizen. He was born in 1923 and lives in Strasbourg

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

The applicant was the Treasurer in charge of tax collection for the Third Division of Strasbourg until he retired on 31 December 1983 Pursuant to the Decree

of 2 July 1964 regarding the deposit and release of the security required of public sector accountants the applicant had been obliged, throughout his working life, to deposit sums of money with the State by way of security. He had deposited the total sum of 509,000 French francs (FRF)

As a rule this security is pledged in cash. State annuities or other Treasury bills, but it may be given in the form of a guarantee whereby the accountant takes out a policy with the French Mutual Surety Association (Association française de cautionnement mutuel). The applicant joined this Association and paid contributions until December 1983. The reserve fund deposited by the applicant with the Association came to 0.2% of the total security which he was obliged to pay, i.e. FRF 1,018. In addition to this reserve fund, to which the applicant conserved title, he had to pay the equivalent of one thousandth of the total security to the Association in annual contributions.

Under the Articles of Association governing this Association, which has been approved by the Minister for Economic Affairs and Finance, the reserve funds deposited by policyholders are refunded to them plus 8% per full year's subscription on proof that the accounts for which they were responsible have been finally approved. The applicant's reserve fund including interest totalled FRF 2,220. Interest ceases to accrue on the sums deposited however as soon as the policyholder ceases to pay contributions. The applicant paid no further contributions as of 31 December 1983.

In a letter of 21 February 1985 the French Mutual Surety Association informed the applicant that he was now classified as a non-contributing member and that in order to obtain a refund of his reserve fund, he had five years in which to provide, *inter alia*, a certificate of discharge to be issued by the authority for whose accounts he was responsible in his capacity as City Treasurer for the Third Division of Strasbourg.

The administration accounts drawn up at the end of each calendar year by public sector accountants are audited by the Audit Court or the regional audit board which either issues the accountant with a certificate of discharge or imposes a sanction.

As regards certain operations such as the collection of direct taxes a chief accountant, the Treasurer of the département submits to the Audit Court a set of accounts which include the operations done by the City treasurers for his area. The Audit Court then audits these accounts in their entirety while examining separately, in the course of its audit the operations for which the subordinate accountants are responsible.

In provisional judgments of 6 and 25 October 1989 the Audit Court ordered the Treasurer of the Bas Rhin département to clarify certain questions arising out of the accounts. The Audit Court gave a final judgment on 25 November 1991 approving the Treasurer of the Bas Rhin département's accounting for the period from 1 March 1980 to 30 September 1985.

The applicant sent a letter dated 19 December 1991 to the Treasurer of the Bas Rhin 'departement' asking for his certificate of full and final discharge. He received a reply on 28 February 1992 informing him that as the most recent discharge issued by the Audit Court was for the accounting year 1982, it was not possible to provide him with the document he had requested.

Following a request by the applicant dated 23 March 1992, the Principal Legal Adviser attached to the Audit Court informed him in a letter of 23 April 1992 that, as the applicant was a subordinate accountant, the court did not audit his accounts, which were included in the accounts submitted by the Treasurer of the 'departement'. The applicant was also informed, for whatever purpose it may serve, that the Audit Court had not made any orders in respect of tax collection in the division of Strasbourg for which he had been responsible and that a judgment, which was currently being served, had been given on 25 November 1991 signifying that the Treasurer of the 'departement''s accounts for the period from 1 March 1980 to 30 September 1985 were in order.

On 16 November 1992 the applicant received a certificate of full and final discharge from the Treasurer of the Bas Rhin 'departement' authorising the release of all the securities deposited by him in his capacity as an accountant working for the Treasury in public sector bodies (*comptable du Tresor*).

The notice enclosing this certificate said:

Following the judgment delivered by the Audit Court stating that all the accounts kept by you for the IIIrd Division of the Treasury of Strasbourg are in order, please find enclosed, in accordance with the Directive of 30 July 1987, the certificate of full and final discharge which you should submit to the Mutual Surety Association in order to obtain a refund of your contributions to the reserve fund.'

2 *Relevant domestic law*

Decree No. 62 1587 of 29 December 1962 on the general regulations governing public sector accounting.

The main task of public sector accountants, who are, in the State's eyes, civil servants administering public funds, is to ensure that financial operations comply with budgetary and accounting rules (Decree of 29 December 1962, Articles 11, 12 and 13). Public sector accountants are personally and financially liable for the operations they effect and must therefore, on taking up their post, deposit securities, which take the form of a contract of guarantee and a statutory charge.

Accountants are required to render their accounts annually. These accounts are then audited as a matter of course by the Audit Court, even where no dispute has arisen between the public sector body concerned and the accountant. If the accounts are found to be in order, judgment is given to that effect; if the court finds an irregularity, however, it gives a provisional judgment and orders the accountant to provide an explanation in rebuttal of the presumption of liability against him. The court then either discharges the accountant or delivers a final judgment, giving reasons, stating that the accountant is liable for the deficit found in the accounts.

Article 14 "Public-sector accountants are either principal accountants or subordinate accountants. Principal accountants are those who submit their accounts directly to the Audit Court. The accounts drawn up by subordinate accountants are centralised by a principal accountant."

Article 15 "Public-sector accountants are in charge of items of account."

Article 17 "Before taking up their duties, public sector accountants must deposit securities and swear an oath."

Article 19 "On the terms laid down in the Finance Laws, accountants are personally and financially liable for the operations entrusted to them pursuant to Article 11."

Decree No 64-685 of 2 July 1964 on the deposit and release of the security required of public-sector accountants

Article 11 "The principal accountant shall be issued with a certificate of full and final discharge for all his accounting if the Audit Court has given judgment discharging the principal accountant in respect of all the accounts which he has to submit in his capacity as principal accountant."

Article 12 "The subordinate accountant shall be issued with a certificate of full and final discharge by the authority referred to in Article 15 below. This authority may refuse to issue the certificate of full and final discharge for two months from the date of expiry of the period during which the accountant's successor may state any reservations. Thereafter, the accountant may request the certificate from the Minister for Economic Affairs and Finance, who must give a decision within six months from the date of such request."

Article 15 "The certificate of full and final discharge shall be issued to subordinate accountants on their request by

- The Treasurer of the "département", to accountants working directly in the Treasury (comptables directs du Trésor) who are not accountants for district councils or for national or local public sector bodies
- The director-general or director at "département" level, with the agreement of the principal accountant to whom the accounts are submitted, to accountants working for the Inland Revenue or Customs and Excise
- The principal accountant to whom the accounts are submitted, to other subordinate accountants

Directive No 87-93 VI of 30 July 1987

"Accountants working for the Treasury's local departments in the provinces shall be issued with certificates of discharge, on the request of the persons concerned, by the Treasurer of the departement

Law No 67-483 of 22 June 1967 on the Audit Court

The conditions in which public sector accountants may incur liability are very unusual in French law. The first distinctive feature is due to the fact that a presumption of liability arises merely if, as a matter of fact, receipts are found to have been omitted, payments made improperly or if the accounts show a deficit, that is, fault on the part of the accountant need not be proved for him or her to incur liability. The second distinctive feature stems from the fact that two bodies decide whether or not to take action against the accountant: jurisdiction is shared between the Audit Court and the Minister of Finance - Conseil d'Etat. Article 1 of the Law of 22 June 1967 provides that "the Audit Court shall audit the accounts kept by public-sector accountants and the decision whether or not to take proceedings against the accountant is a matter exclusively for the Minister of Finance and is supervised by the administrative courts

Case-law

The Audit Court's case law is qualified. In the "Association Nice communication" judgment of 26 May 1992, the court held that in deciding whether persons who are not public-sector accountants have accidentally or fraudulently acted as such, the Audit Court shall have regard to the fundamental principles of the European Convention of Human Rights. However, in the "Commune de la Ciotat" judgment of 4 May 1993, concerning analogous proceedings, the court instructed the Provence Côte d'Azur regional audit board that Article 6 was inapplicable.

COMPLAINTS

The applicant complains of the length of time taken by the Audit Court to audit his accounts and invokes Article 6 para 1 of the Convention.

He submits that as a result of the delay in the audit proceedings, he had to wait for more than eight years for a refund of his contributions to the reserve fund of the Mutual Surety Association. The sums frozen in this way ceased to carry interest from the date of his retirement in December 1983. Furthermore, his property remained encumbered, at least to the extent of the security which he was obliged to pay to the State: i.e. FRF 509,000, unless and until the Audit Court gave judgment signifying that his accounts were in order, as there was always a risk that judgment would be given stating that he was liable for a deficit found in the accounts. This, in turn, affected his estate planning, his ability to stand as guarantor and his ability to change his choice of matrimonial property regime.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 March 1992 and registered on 29 September 1992

On 1 December 1993 the Commission decided to give notice of the application to the respondent Government and invited them to submit their written observations on the admissibility and merits of the application

The Government submitted their observations on 22 April 1994, after two extensions of the time limit, and the applicant replied on 12 June 1994

On 12 October 1994 the Commission decided to invite the parties to submit their observations on the admissibility and merits of the application orally at an *inter partes* hearing. The Government, in particular, were invited to make submissions as to whether the applicant's complaint came within the provisions of Article 1 of Protocol No. 1.

The hearing was held on 6 April 1995

The parties appeared as follows

For the respondent Government

Mrs Marie Merlin Desmarts, a judge at the Administrative Court on secondment to the Legal Affairs Department of the Ministry of Foreign Affairs, as Agent

Mr Christian Descheemaeker, Principal Advocate General of the Audit Court, as Counsel

Mr Alain Turc, Deputy Director of the Public Finance Department of the Ministry for the Budget, as Counsel

For the applicant

Mr Georges Henry in person

THE LAW

1 The applicant complains of the length of time taken by the Audit Court to audit his accounts. He submits that as a result of the delay in those proceedings he had to wait more than eight years for a refund of his contributions to the reserve fund of the Mutual Surety Association, which had the effect of preventing him from disposing of his property as he wished. He invokes Article 6 para. 1 of the Convention.

Article 6 para 1 of the Convention provides, in so far as relevant

“In the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

The Government object at the outset that the application is inadmissible in that as far as the applicant is concerned, Article 6 of the Convention is inapplicable on the facts, to the proceedings in which the Audit Court discharges the accountant in respect of his accounts

The Government recall that the term “victim” in Article 25 means a person directly concerned by the act or omission in question. They submit that the applicant does not qualify as a victim because the proceedings before the Audit Court concerned only the Treasurer of the Bas Rhin “département” who, in his capacity as principal accountant, was the sole party concerned by the proceedings, whereas the accounts kept by the applicant in his capacity as subordinate accountant were not audited by the Audit Court. The Government consider that the applicant is challenging the workings of a court to whose jurisdiction he is neither directly nor indirectly subject.

The Government argue that the applicant need not have waited for the judgment of the Audit Court signifying that his accounts were in order, since under Article 15 of the Decree of 2 July 1964, clarified by the Directive of 30 July 1987, he could, from the date of his retirement, have expressly requested his certificate of full and final discharge from the Treasurer of the “département”. The applicant was entitled to claim his retirement rights on 31 December 1983, but waited until 19 December 1991, i.e. eight years later, before requesting the certificate of discharge from the Treasurer of the Bas Rhin “département”. Had the Treasurer refused to issue him with this certificate the applicant could have applied for it directly from the Minister for Finance (Article 12 of the Decree of 2 July 1964 and HA of the Directive of 30 July 1987). Should the Minister have refused, or failed to respond, the applicant could then have filed an application with the administrative court seeking both judicial review of that decision and damages.

The Government object further that the application is inadmissible on the ground that it is incompatible *totone materiae* with the Convention as proceedings before the French Audit Court for a certificate of discharge concern neither civil rights and obligations nor a criminal charge.

When the Audit Court audits a set of accounts, it merely examines whether they comply with budgetary and accounting rules and its audit is conducted as a matter of course without there necessarily being a dispute between the accountant and the relevant public sector body. In other words, the Audit Court judges accounts, not accountants.

The Commission did find in its report in the *Muyldermans v Belgium* case (see Comm Report 2 10 90 and Eur Court HR , Series A no 214-A) that a dispute had arisen within the meaning of Article 6 para 1 of the Convention, but that was because the applicant's accounts showed a deficit and the question arose as to whether she was liable for the disappearance of certain sums of money. The Government submit that a dispute arises only where the Audit Court gives a provisional judgment ordering the parties to submit all relevant evidence, only then do judicial adversarial proceedings begin, which was not the case here.

The Government further recall the case-law of the Convention institutions which states that where the applicable national law comprises simultaneously features of public law and private law, the Court identifies both aspects in order to assess their respective importance and decide which law predominates (see Eur Court HR , *Francesco Lombardo* judgment of 26 November 1992, Series A no 249 B, pp 26 27, paras 15-17).

Proceedings before the Audit Court in relation to principal accountants concern both obligations to comply with budgetary and accounting rules on the keeping of accounts and the accountant's right to obtain the release of charges secured against his property. The Government do not contest that the personal financial liability of public-sector accountants is similar to contractual liability in civil law but contend that in this case features of public law overwhelmingly predominate as regards the rights and obligations in question. The management of public funds belongs par excellence to the domain of activity assigned to the public authorities and is governed by rules which are by their very nature rules of public law. Furthermore, accountants' rights and obligations vis-à-vis the Treasury arise as a result of their status as civil servants and their professional position.

The Government argue that Article 6 is therefore inapplicable to proceedings in which the Audit Court audits accounts kept by public sector accountants.

In the alternative, should the Commission consider that the audit of accounts kept by public-sector accountants does concern a dispute as to a civil right, the Government consider that the applicant's complaint is manifestly ill founded because the length of the proceedings was not unreasonable.

The Government argue that the period to be taken into question runs from the date of the provisional judgments given by the Audit Court on 6 and 25 October 1989. The court's final judgment of 25 November 1991, which removed the presumption of liability against the Treasurer of the Bas Rhin 'departement' and signified that his accounts were in order, constitutes the end of the proceedings. The time taken by the Audit Court to examine the presumption of liability against the principal accountant does not therefore appear unreasonable. Admittedly, the judgment of 25 November 1991 was not served on the applicant until one year later, but it took the applicant until 23 March 1992 to ask the Audit Court when the Treasurer of the Bas-Rhin 'departement' would be fully and finally discharged in respect of the accounts.

As to whether Article 6 para 1 of the Convention applies to the proceedings here, the applicant recalls the European Court's decision in an earlier case in which it held that certain proprietary rights pertaining to the status of civil servant, such as the right to a pension on retirement, are civil rights

The applicant does not dispute that as a subordinate accountant, he was not directly subject to the jurisdiction of the Audit Court, but argues that he was indirectly so since the accounting operations for which he was responsible could be and indeed were, referred to during the proceedings. As the accounts kept by a subordinate accountant are audited separately in proceedings to which he is not directly a party, he is far from uninvolved

The applicant recalls that he retired in 1983 and could not therefore have known of his right to make an express request for a certificate of full and final discharge from the Treasurer of the Bas Rhin département as provided for in the 30 July 1987 Directive

Only after it had been clarified by the 30 July 1987 Directive did the Decree of 2 July 1964 become fully applicable. The 2 July 1964 Decree was not actually applied and, in practice, it was customary, even for subordinate accountants, to wait for a discharge from the Audit Court. The applicant refers to his correspondence both with the Treasurer of the département and the Principal Legal Adviser attached to the Audit Court. Furthermore, it is common knowledge that the Audit Court takes years to give a full and final discharge of accounts so that the applicant, relying on his previous experience, did not become concerned until the normal period had gone by

Referring to the spirit of the Geouffre de la Pradelle judgment (Eur Court HR judgment of 16 December 1992, Series A no 253) in which the applicant claimed that he did not have access to a decree, the applicant notes that this Directive was circulated in 1987 within the divisions responsible to the Public Sector Accounting Department but that those primarily concerned, i.e. retired accountants, could not have known of it. The applicant considers that the authorities had a duty to inform persons likely to be concerned by the Directive of its existence

The applicant submits that it should not be up to accountants to request a certificate of release of their security, this should be issued automatically by the authorities since they request that the security be deposited in the first place

The Commission agrees with the Government that the main question arising in this matter is whether Article 6 para 1 of the Convention is applicable

For this to be so, the outcome of the proceedings must be decisive for a right which can, at least arguably, be claimed to be recognised in domestic law (see Eur Court HR, Pudas judgment of 27 October 1987, Series A no 125 A, p 15, para 35 and Eur Court HR, Zander v Sweden judgment of 25 November 1993, Series A no 279 B, p 38, para 22)

Although it is true that French law recognises the applicant's right to obtain a certificate of full and final discharge, the outcome of the proceedings before the Audit Court was not decisive, in this case, for the issuing of that certificate

Although the applicant's duties were important, he was only a subordinate accountant throughout the period in question. His accounts were not therefore subject to the Audit Court's supervision. In this respect, Article 15 of Decree No 64 685 of 2 July 1964 provides clearly that the only authority competent to issue the applicant with a certificate of full and final discharge was the Treasurer of the "département"

Under Article 12 of that Decree, the Treasurer could not refuse to issue this certificate unless the subordinate accountant succeeding the applicant had expressed reservations as to the applicant's accounting operations

Finally, if the Treasurer of the "département" had refused, despite his legal obligation, to issue the certificate of full and final discharge, the applicant could (also under Article 12 of the above mentioned Decree) have requested this certificate from the Minister, who would have had to give a decision on the matter within six months of the request

The applicant retired on 31 December 1983 and did not request his certificate of full and final discharge for more than eight years. That certificate would have provided him with a full and final discharge in respect of his accounts for the years in question and would therefore have enabled him to recover his reserve fund

The Commission notes that the applicant explains his failure to act by citing an age-old practice whereby accountants have always waited for the Audit Court's judgment discharging the principal accountant (the Treasurer of the "département") in respect of his accounts before discharging, in turn, the subordinate accountant in respect of his accounts. However, the applicant has not shown that this practice - presuming it was proved to exist - prevailed over the positive, specific and well established law, i.e. the above-mentioned Decree of 2 July 1964, which had been published more than nineteen years before the applicant retired

The Commission therefore considers that the issue before the Audit Court was not a dispute relating to the applicant's civil rights and obligations, as the applicant, in his capacity as a subordinate accountant, was not, on the facts, a party to the proceedings before the Audit Court discharging accountants in respect of their accounts

In the light of the foregoing, the applicant's complaint must be rejected under Article 27 para 2 of the Convention on the ground that it is incompatible *ratione materiae* with the provisions of the Convention

2 The Commission had also expressed the wish that the parties would make submissions at the hearing in respect of Article 1 of Protocol No 1 to the Convention

In this respect and as regards the effects of the length of the proceedings on the applicant's proprietary rights, the Government stress that the only issue at stake for the applicant in the relevant proceedings was the refund of the reserve fund he had deposited with the Mutual Surety Association which totalled, including interest, the modest sum of FRF 2,220 The Government submit further that the State did not take any statutory charge on the applicant's property at any time during his career

The applicant accepts that it is not the recovery of his reserve fund which is important to him He argues, however, that although the State did not take a statutory charge over his possessions, it is nonetheless unpleasant to be dogged by the risk ten years after retiring, of judgment being given stating that he was liable for a deficit found in the accounts Unless and until the Audit Court issued him with a certificate of discharge, the applicant was morally and physically prevented from disposing of his property as he saw fit at least to the extent of his security, i.e FRF 509,000 The applicant recalls that, under the strict liability rules governing public sector accountants, this was a very real risk

Having examined the parties' arguments regarding the effects of the length of the proceedings before the Audit Court on the applicant's ability to dispose of his property, the Commission considers, in view of the conclusion it came to regarding the complaint under Article 6, that no separate issue arises under Article 1 of Protocol No 1 to the Convention

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE