

**APPLICATION N° 32258/96**

**Bernard Roger TAPIE v/FRANCE**

**DECISION** of 13 January 1997 on the admissibility of the application

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**Article 6, paragraph 1 of the Convention**

- a) The right to hold office as a Member of Parliament is not a civil right*
- b) An automatic five year disqualification for elected office imposed on the applicant a French and Euro MP after the court had ordered liquidation of his assets is not decisive for his civil rights and obligations*
- c) Does an automatic five year disqualification for elected public office imposed on the applicant after the court had ordered liquidation of his assets amount to a criminal charge? Importance of the classification of the act in domestic law, the nature of the offence and the nature of the penalty*

*On the facts an automatic five-year disqualification for elected office imposed on the applicant after the court had ordered liquidation of his assets did not suffice to bring the offence into the criminal domain as such disqualification is not a measure which in nature or degree of severity falls within the scope of Article 6 para 1*

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**THE FACTS**

The applicant, a French national, was born in 1943 and lives in Paris. He has been a French and Euro-MP

He was represented before the Commission by the law firm Lyon Caen, Fabiani, Thiriez, a member of the *Conseil d'Etat* and the Court of Cassation Bar

#### A *Particular circumstances of the case*

The applicant is a politician who has run many business activities. He formed a number of commercial partnerships (A C T, B T Gestion, G B T and F I B T), which comprised the shares of other companies. The applicant's wife was a partner in G B T and F I B T.

Following financial difficulties, the applicant sought leave from the Commercial Court to initiate a scheme of arrangement with his creditors regarding the two commercial partnerships F I B T and B T Gestion.

In judgments of 30 November 1994, Paris Commercial Court ordered a number of the applicant's companies into receivership.

On 7 December 1994 that court assumed jurisdiction of its own motion.

In three judgments of 14 December 1994 the court ordered liquidation of the applicant's assets and of F I B T liquidation of the applicant's and his wife's assets in their capacity as traders and, lastly liquidation of B T Gestion. The court considered that the liabilities of the applicant, his wife and the partnerships far exceeded their liquid assets.

On 19 December 1994 the Commercial Court again assumed jurisdiction of its own motion. It gave judgment on 23 January 1995, holding that judicial liquidation of F I B T automatically resulted in judicial liquidation of the assets belonging to the applicant and his wife, in their capacity as partners.

The applicant, his wife and a number of creditors appealed against those four judgments. In his pleadings, the applicant submitted, *inter alia*, that sections 194 and 195 of the Law of 25 January 1985 were incompatible with Article 6 para. 1 of the Convention on the ground that those sections provide that judicial liquidation of an individual's assets automatically results in a five-year disqualification for elected public office. The applicant submitted that the automatic nature of the penalty, particularly in view of the consequences for his position as a French and Euro MP, was contrary to the concept of a fair trial.

The applicant also pointed out that section 132.21 of the new Criminal Code provides that a criminal conviction shall not automatically result in the deprivation of civic rights. He considered that this provision therefore implicitly repealed the provisions of the 25 January 1985 Law.

On 31 March 1995 Paris Court of Appeal set aside the liquidation order of 14 December 1994 against the applicant and his wife on the ground that the summons to appear was not in the proper form but upheld the other three judgments.

The court made the following observations regarding the applicant's specific submissions on section 194 of the 1985 Law:

'Whereas with respect to section 194 of the 25 January 1985 Law the court could confine itself, in dismissing Mr Tapie's claims, to pointing out that no provision of the judgment under consideration here, or of any other one for that matter imposes on him the disqualification provided for in that Law as he is disqualified automatically without any need for a court ruling.

Whereas the court will, nevertheless, point out that section 194 of the 1985 Law cannot be deemed to have been implicitly repealed by section 132-21 of the new Code of Criminal Procedure as that provision refers to the criminal penalty defined in section 131-26 of that same Code and, above all, presupposes in excluding it that the loss of civic rights is an automatic consequence of a criminal conviction whereas judicial liquidation is clearly not a criminal penalty.

The applicant appealed to the Court of Cassation, submitting as his sole ground of appeal, that sections 194 and 195 of the 1985 Law conflicted with various national and international provisions and in particular with Article 6 para 1 of the Convention.

The applicant maintained that given the nature and severity of a disqualification for elected office it amounted to a criminal penalty according to the case law of the European Court of Human Rights. He therefore considered that the automatic imposition of such a penalty, without a court ruling was contrary to the provisions of Article 6 para 1 of the Convention.

The advocate general stressed in his submissions that the disqualification is based on a finding of financial fact regarding the state of the partnership, even discounting any consideration as to mismanagement.

On 9 July 1996 the Court of Cassation (Commercial Division) dismissed the applicant's appeal. Regarding his submission that there had been a violation of Article 6 para 1 of the Convention the court held as follows:

Whereas furthermore, disqualification, which is an automatic consequence at law of judicial liquidation of an individual's assets and which takes effect automatically from service thereof on the person concerned does not infringe the provisions of Article 6 para 1 of the Convention as that individual has the benefit of the guarantee under that Article by virtue of the proceedings leading up to judicial liquidation: it is not alleged that those proceedings failed to satisfy the requirements of a fair trial.

## **B** *Relevant domestic law*

Sections 194 and 195 of the Law of 25 January 1985 on court ordered receivership and liquidation

S 194 A person if bankruptcy order shall result in disqualification for elected office Anyone with regard to whom judicial liquidation has been pronounced shall also be so disqualified Disqualification shall take effect automatically from service thereof on the person concerned by the competent authority

S 195 - Disqualification for elected public office following judicial liquidation shall last for five years

The individual concerned may, in all cases, apply to the court for full or partial discharge of a disability incapacity or disqualification for elected public office if he has provided a sufficient contribution to discharging the liabilities "

Section 132 21 of the new Criminal Code

Notwithstanding any contrary provision, a criminal conviction shall not automatically result in partial or full deprivation of civic rights Anyone subject to a disqualification, disability or deprivation of rights of any kind may, either in the judgment pronouncing his conviction or in a subsequent judgment, be relieved in full or in part, including as to duration of that disqualification, disability or incapacity on the conditions set out in the new Code of Criminal Procedure

## **COMPLAINT**

The applicant considers that as he was automatically disqualified and had no right of appeal before the court he was prevented from making submissions in his defence He therefore considers that this measure infringes the right to a fair trial, within the meaning of Article 6 para 1 of the Convention

## **THE LAW**

The applicant complains that his disqualification following the liquidation order was automatic

He considers that he has not had a fair hearing, within the meaning of Article 6 para 1 of the Convention which reads as follows

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing by [an] tribunal.

The Commission notes first of all that the applicant does not allege any unfairness in the proceedings before the Commercial Court which led to the liquidation order against him.

The Commission observes that the applicant himself initiated proceedings to secure a scheme of arrangement with his creditors. He has not raised either before the national courts or before the Commission any complaint that the proceedings before the Commercial Court were unfair.

The Commission notes that the applicant complains solely about the penalty which was an automatic consequence of the liquidation order.

The issue before the Commission is therefore whether Article 6 para 1 of the Convention is applicable to this case in so far as either the applicant's civil rights or obligations or a criminal charge against him are concerned.

a) The Commission considers that this case concerns the right to hold office as an MP which, as such, does not fall within the scope of Article 6 para 1 of the Convention (No 12897/87, *Desmeules v France*, Dec 13 4 89, D R 67, p 166, No 24359/94, *Estrosi v France* Dec 30 6 95, D R 82, p 56).

The Commission therefore concludes that the penalty of which the applicant complains is not decisive for his civil rights or obligations, within the meaning of the above mentioned Article 6 para 1.

b) The Commission has also considered whether, on the facts, the case concerns the determination of a 'criminal charge' within the meaning of Article 6 para 1 of the Convention.

The Commission recalls the autonomy of the concept of 'criminal' as used in Article 6 para 1 of the Convention (see *inter alia*, Eur Court HR, *Engel and Others v the Netherlands* judgment of 8 June 1976, Series A no 22 p 34, para 81, *Bendenoun v France* judgment of 24 February 1994, Series A no 284 p 20, para 47). The Commission must first examine whether or not the text defining "the offence" belongs to criminal law, secondly, it must consider whether, having regard to the ordinary meaning of Article 6 of the Convention, the offence should, by its nature, be considered to belong to the criminal sphere, lastly, the nature and degree of severity of the penalties which the applicant risks incurring must be examined.

On the facts, the text defining the offence is the 25 January 1985 Law on court ordered receivership and liquidation of commercial companies and partnerships. The Commission has no doubt that under French law these are commercial law provisions and not criminal law provisions.

As regards the second criterion, the Commission observes that the offence consisted of the inability to meet the due and payable liabilities of a legal entity or of an individual owing to the lack of sufficient liquid assets. Even supposing that this offence may have criminal consequences, it is not in itself criminal.

The Court of Appeal specified on this point that judicial liquidation is not a criminal penalty. The applicant did not contest this in his appeal to the Court of Cassation. Secondly, the advocate general attached to the Court of Cassation stressed in his submissions that the disqualification flowed from the judicial liquidation proceedings irrespective of any consideration as to mismanagement.

The Commission notes, for its part, that the offence results from a cessation of payments in the course of a commercial activity, and that the competent courts merely noted that neither the partnerships nor the applicant himself, in his capacity as partner, could discharge their liabilities. Thus the nature of the offence is not, as such, criminal.

Lastly the Commission needs to examine whether the penalty, by its nature and severity, may fall within the criminal sphere, within the meaning of Article 6 para 1 aforementioned (see the above mentioned *Estrosi* decision *Pierre Bloch v France*, Comm Report 1796).

The Commission notes that this point has been examined in the *Estrosi* and *Pierre Bloch* cases referred to above. Those cases concerned a French law which imposed a maximum limit on election expenditure. As the applicants had exceeded that statutory limit, the *Conseil constitutionnel* declared their election invalid and disqualified them from standing for election for one year.

The Commission considered in both those cases that disqualification was not a measure which fell within the scope of Article 6 para 1 aforementioned either by its nature or by its degree of severity (see the above mentioned *Estrosi* decision p 72).

The Commission considers that there is no reason to depart from that case-law in the instant case even if, on the facts, the disqualification for elected office was of five years duration. The mere fact that the Criminal Code provides, in certain cases, for disqualification as a secondary penalty to the primary penalty is not sufficient, in itself, to invalidate that conclusion (*ibid*).

The Commission therefore considers that the applicant was not charged with a criminal offence within the meaning of Article 6 para 1 of the Convention.

It follows that the application is incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 27 para 2 of the Convention

For these reasons, the Commission, unanimously,

**DECLARES THE APPLICATION INADMISSIBLE**