APPLICATION N° 23201/94

Alain MILHAUD v/FRANCE

DECISION of 3 March 1997 on the admissibility of the application

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Article 6, paragraph 1 of the Convention

a) In concluding that in the instant case disciplinary proceedings on appeal against a doctor do not concern the determination of civil rights and obligations, the Commission notes that the disciplinary offences for which the applicant incurred a rebuke were not the subject of a civil action for damages and that the applicant did not risk incurring harsher penalties such as to disqualify him from practising medicine

b) Relevant criteria for assessing whether proceedings concern a "criminal charge" classification of the act in domestic law, nature of the offence and severity of the penalty

In concluding that, in the instant case, disciplinary proceedings on appeal against a doctor were not criminal the Commission finds that the rules on which the national courts based the conviction are exclusively disciplinary law provisions, that the offence fell exclusively into the sphere of disciplinary proceedings and that the sanction imposed (a rebuke), the possible indirect consequences of which are insufficient for it to be construed as a penalty was not sufficiently severe to fall into the criminal sphere

Article 7, paragraph 1 of the Convention *Not applicable to the proceedings against the applicant before the institutions of the* Ordre des Medecins *(Medical Association) on grounds of his failure to carry out his professional duties as a doctor as the offence and the sanctions incurred apply only to doctors and cannot therefore be classified as a criminal offence and penalties within the meaning of this provision*

THE FACTS

The applicant, a French citizen, born in 1931, is Professor of Anaesthesiology at Amiens Regional Teaching Hospital and lives in Amiens.

Before the Commission, he was represented by the law firm Piwnica-Molinie, a member of the *Conseil d'Etat* and Court of Cassation Bar.

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

A *Particular circumstances of the case*

On 11, 12 and 16 February 1988 the applicant performed experiments on a brain-dead patient without having informed the patient's family and obtained their authorisation. He had sought neither the opinion of the teaching hospital's Ethics Committee nor that of the National Ethics Committee.

On 29 February 1988 the Ministers of Health and of Higher Education respectively suspended the applicant and referred the case to the teaching hospital's disciplinary tribunal. In a decision of 27 May 1988, the disciplinary tribunal imposed the lightest penalty - namely, a warning - on the applicant and lifted the order suspending him.

On 29 February 1988 the Director of Health and Social Affairs for the *département* of the Somme reported the matter to the Regional Council of the Picardy *Ordre des médecins*.

In a decision of 14 June 1988, the Regional Council of the *Ordre de médecins* found that "technical exercises" had been carried out on a brain-dead subject and that Sections 2, 7 and 9 of the Code of Professional Conduct did not apply as they referred to a human being or a patient. It imposed a rebuke on the applicant for breaching Section 11 of the Code of Medical Professional Conduct regarding professional confidentiality and Section 33-1 regarding acts of a kind to discredit the profession.

On 9 August 1988 the applicant appealed against that decision to the disciplinary section of the National Council of the *Ordre des médecins*. He claimed, *inter alia*, that the decision of the Regional Council of the *Ordre* was procedurally flawed, as the hearing had not been held in public, contrary to Article 6 para. 1 of the Convention.

In a decision of 23 January 1991, following a hearing in private, the National Council of the *Ordre* held that there had been no procedural flaw since Article 6 of the Convention applies "to courts determining a criminal charge or *contestations* (disputes) over civil rights and obligations", it found that the applicant had not violated medical

confidentiality but upheld the penalty, basing its decision on Sections 2, 7 and 19 of the Code of Professional Conduct, considering that the rebuke imposed on the applicant by the Regional Council was not excessive when set against the liability he had incurred

The applicant appealed to the *Conseil d'Etat* He again alleged that, as his case had not been heard in public, there had been a violation of Article 6 of the Convention Ten days before the hearing, the President of the *Conseil d'Etat* informed the applicant of his intention to raise a pure point of law of his own motion, namely, that the principles of professional conduct governing the medical profession, including those set forth in Sections 2 and 7 of the Code of Medical Professional Conduct, apply to a brain-dead subject' and invited the applicant to submit his pleadings in defence The applicant submitted, in his observations, that the ground raised by the *Conseil d Etat* was a mixture of fact and law

The Government Commissioner pointed out, in his submissions, that the complaint filed by the patient's family had been discontinued by the investigating judge on 14 November 1989 on the ground that

> as the subject became brain dead before Professor Milhaud carried out the experiments, the accused cannot be charged with assault, as that offence presupposes that the victim is alive In the absence of any alternative charge, I conclude that under the current law the experiments performed by the accused do not fall within the criminal law and the charge must be dropped

In a decision of 2 July 1993 the *Conseil d Etat* found that the applicant's patient had died and concluded that the provisions relied on by the National Council of the *Ordre* were inapplicable to the case, since they could apply only to living persons The *Conseil d Etat* considered that the National Council of the *Ordre* had misdirected itself in law

However the *Conseil d Etat* upheld the penalty on the ground that

> the fundamental principles regarding respect for human dignity by which doctors are bound in their dealings with their patients do not cease to apply when the patient dies in particular, apart from the removal of organs pursuant to the Law of 22 December 1976 and governed by that Law, these principles prohibit experiments on a subject after his death where, firstly, death has not been recorded in conditions of the kind defined in sections 20 to 22 of the Decree of 21 March 1978 secondly, such experiments do not correspond to a recognised scientific need and lastly, the individual concerned has not given his consent while alive or the agreement of his relatives, if any, has not been obtained

B *Relevant domestic law and practice*

a) Code of Medical Professional Conduct

Section 2

"Doctors serving the interests of the individual and of public health shall perform their duties with due respect for life and human dignity'

Section 7

'The patient's wishes must be respected at all times as far as possible Where a patient is unable to express his wishes, his relatives must be contacted and informed, save in an emergency or where this is impossible

Section 19

No new treatment shall be performed on a patient unless adequate biological studies have been carried out under strict supervision and only if such therapy is of direct benefit to the person concerned "

b) Public Health Code

Section L 423

"The Regional Council has power to impose the following disciplinary penalties

A warning
A rebuke

A temporary disqualification from practising medicine (for a maximum of three years)
Striking off the register of the *Ordre*

The first two penalties in this list also entail a three year disqualification from membership of a *departement* council, a regional council or the National Council of the *Ordre* the other penalties entail permanent disqualification from membership

c) Case law

In a judgment of 19 February 1964 in the Sieur Plainemaison case, the *Conseil d'Etat* held that where a case comes before the National Council of the *Ordre* exclusively by way of an appeal from a pharmacist on whom a penalty

has been imposed at first instance, the Council cannot legally impose a harsher penalty on that pharmacist than the one imposed by the regional council "

In a judgment of 6 February 1981 in the Lebard case, the *Conseil d'Etat* specified that " having regard to the nature of the powers exercised by the councils of the professional *Ordres* when ruling on disciplinary matters, the cross-appeal was inadmissible as there is no legislative or regulatory provision for such an appeal, the appeal to the disciplinary section of the National Council of the *Ordre des chirurgiens-dentistes* (Medical Association of Dental Surgeons) therefore emanated from Mr Lebard alone and, consequently, the Council could not legally impose a harsher penalty on that practitioner than the one imposed by the regional council "

COMPLAINTS (Extract)

1 The applicant, relying on Article 6 para 1 of the Convention, complains that the hearing before the National Council of the *Ordre des médecins* was not held in public, and of an infringement of the rights of the defence before the *Conseil d'Etat* in that, although he had been informed that the *Conseil d'Etat* intended to raise a pure point of law of its own motion, he was unable to defend himself adequately against a charge of which he knew neither the scope nor the terms, and that the hearing was therefore unfair

2 The applicant also complains of a violation of Article 7 of the Convention in that the criminal law was applied retrospectively in this case, since the *Conseil d'Etat* based its decision to uphold the penalty on a general principle of law which had not been formulated in this way until the judgment of 2 July 1993

THE LAW (Extract)

1 The applicant complains that the hearing before the National Council of the *Ordre des médecins* was not held in public, and of an infringement of the rights of the defence before the *Conseil d'Etat* in that, although he had been informed that the *Conseil d'Etat* intended to raise a pure point of law of its own motion, he was unable to defend himself adequately against a charge of which he knew neither the scope nor the terms, and that the hearing was therefore unfair He invokes Article 6 para 1 of the Convention which provides that

' In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing by an independent and impartial tribunal Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of

morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The respondent Government submit that Article 6 para. 1 of the Convention is inapplicable to this case, whether examined under its civil or its criminal head.

A. Applicability of Article 6 para. 1 under its civil head

The Government submit on this point that disciplinary proceedings do not fall within the scope of Article 6 para. 1 unless the *contestation* (dispute) was over "civil rights and obligations", that is, the penalty imposed has pecuniary consequences for the individual concerned, e.g. where a doctor loses the right to continue practising. In this case, as the applicant was merely given a rebuke, a penalty which has no direct pecuniary consequences, the dispute does not concern "civil rights and obligations" within the meaning of Article 6.

The applicant has not submitted any observations on this point.

The Commission recalls that, in order to determine whether Article 6 of the Convention is or is not applicable to this case, regard must be had to whether the proceedings about which the applicant complains concern either the determination of a criminal charge or a *contestation* (dispute) over civil rights. The Commission notes also that, according to the case-law of the Convention organs, disciplinary proceedings do not ordinarily lead to a *contestation* (dispute) over civil rights or to the determination of a criminal charge (see Eur. Court HR judgments in Albert and Le Compte v. Belgium, Series A no. 58, p. 14, para. 25, and Engel and Others v. the Netherlands of 8 June 1976, Series A no. 22, pp. 33-37, paras. 80-88; see also No. 10059/82, Dec. 5.7.85, D.R. 43, p. 5).

The Commission observes that from the time of the appeal proceedings before the National Council of the *Ordre* onwards, the applicant did not, as will be shown in the following pages, risk incurring a harsher penalty such as to disqualify him from practising and neither was there a civil action for damages based on the disciplinary offences for which the applicant incurred a rebuke (see, *a contrario*, No. 21257/93, Dec. 27.11.95, unpublished). Thus, in accordance with the aforementioned case-law, the Commission considers that the proceedings in question did not concern the applicant's "civil rights and obligations".

The Commission therefore considers that the objection raised by the Government is well-founded.

B Applicability of Article 6 para 1 under its criminal head

The Government, referring to the criteria laid down in the above mentioned Engel judgment, consider that disciplinary proceedings do not concern a criminal charge The Government stress that the sanction imposed on the applicant was not a criminal penalty firstly because the criminal complaint against him ended with the charges being dropped, as no offence had been made out and secondly, because the *Conseil d'Etat* has consistently held that Article 6 of the Convention does not apply to disciplinary proceedings before the *Ordre's* institutions It is a criminal offence which is at stake, but a breach of the rules of professional conduct which concern doctors alone

As regards the aim and severity of the penalty, the Government specify that although disciplinary law does not lay down a definition of the conduct which may lead to a particular penalty there is a scale of penalties prescribed in Section L 423 of the Public Health Code ranging from a warning to striking off the register of the *Ordre* The Appeal Court unlike the Court of Cassation, reviews the proportionality of the breach to the penalty as was done in this case Conduct which may amount to a breach and the penalties imposed for a particular type of breach according to the seriousness thereof are laid down in the case law Moreover, the Government stress that, according to the established case-law of the French administrative courts, a penalty cannot be increased on an appeal by the person on whom it has been imposed (see *Conseil d Etat*, Plainemaison judgment of 19 February 1964), that this rule constitutes a general principle of law and that a cross appeal is inadmissible (see *Conseil d Etat*, Division, Lebard judgment of 6 February 1981)

The Government go on to point out that the applicant incurred a rebuke imposed in the proceedings before the Picardy Regional Council and that only the applicant appealed The Government observe in the alternative, that even the harshest penalty i e striking off, would not amount to a criminal penalty as it is neither a measure occasioning deprivation of liberty nor a fine

The applicant contests the Government's submission that a rebuke was the harshest penalty he risked incurring and considers that the *Ordre des medecins* could have lodged a cross appeal The applicant asserts that as far as he was concerned, the rebuke ruined his teaching hospital career since his contract as head of department was not renewed The repercussions of a rebuke, although indirect were exceptionally harsh and according to the applicant fell well within the definition of a criminal charge

The Commission recalls the three criteria laid down by the European Court of Human Rights in the above mentioned Engel and Others judgment firstly whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently secondly the very nature of the offence and lastly, the degree of severity of the penalty which the person concerned risks incurring Mainly penalties occasioning deprivation of liberty may indicate that a criminal charge is at issue

The Commission notes first of all that the rules under which the national courts convicted the applicant are not rules of French criminal law, but exclusively of disciplinary law

As regards the nature of the offence in question, it is limited and linked to the exercise of the medical profession, to professional ethics and to the observance of professional standards It therefore belongs exclusively to the disciplinary sphere (see, *mutatis mutandis*, No 10059/82, Dec 5 7 85, D R 43, p 5)

As regards the degree of severity of the penalty, the Commission notes that the applicant confined himself to contesting the Government's claims without supporting his submissions with case law Having regard to the case law of the French administrative courts on this point, as in the Engel judgment, the appellate court had no jurisdiction to impose a harsher penalty, so it was indeed the judgment of the Picardy Regional Council which settled once and for all what was at stake (see the above mentioned judgment, p 35 para 83)

In the Commission's report on the Albert and Le Compte case (Comm Report 14 12 81, Eur Court HR Series B no 50, pp 35 36, paras 63 to 68), the Commission concluded that having regard to the nature of the applicable texts, which indisputably formed a part of disciplinary law, to the nature of the conduct complained of, constituting disciplinary offences and to the sanction imposed, which in its nature and purpose was a typical disciplinary sanction and could not be treated as being equivalent to a penal sanction there was in that case, no criminal charge within the meaning of Article 6 para 1

The Commission notes that the penalty imposed in this case is much lighter than the one in the Albert and Le Compte case The indirect consequences of such a penalty are insufficient for it to be construed as a criminal penalty The Commission therefore sees no reason to depart from its case law that such cases do not involve a criminal charge within the meaning of Article 6 para 1 of the Convention (see No 10059/82 op cit)

The Commission therefore considers, in accordance with its established case law on this point, that Article 6 of the Convention, under its criminal head does not apply in this case

It follows that the Government's objection is well founded in this respect as well This part of the application must therefore be rejected as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 27 para 2 of the Convention

2 The applicant complains further about an infringement of Article 7 of the Convention in that the criminal law was applied retrospectively in this case, since the *Conseil d'Etat* based its decision to uphold the penalty on a general principle of law which had not been formulated in this way until the judgment of 2 July 1993

Article 7 of the Convention is worded as follows

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed

The Government consider that Article 7 is inapplicable to this case The applicant contests their submission

The Commission notes that the proceedings against the applicant before the *Ordre*'s institutions concerned the manner in which the applicant had carried out his professional duties as a doctor The penalties incurred were those listed in Section L 423 of the Public Health Code, that is, a warning, a rebuke, a temporary disqualification from practising medicine and striking off the register of the *Ordre* The proceedings thus concerned an offence and sanctions applicable to one particular category of persons i e doctors, and were therefore disciplinary in nature, and not a criminal offence and penalties within the meaning of Article 7 of the Convention It follows that this Article is inapplicable to this case

This part of the application is therefore also incompatible *ratione materiae* with the provisions of the Convention and must be rejected, pursuant to Article 27 para 2 of the Convention