

**APPLICATION N° 22924/93**

**Areski AIT-MOUHOUB v/FRANCE**

**DECISION** of 21 October 1996 on the admissibility of the application

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**Article 6, paragraph 1 of the Convention** *An impecunious applicant's criminal complaints coupled with requests to join the proceedings as a civil party declared inadmissible for failure to lodge a substantial security. Question whether there was a dispute as to civil rights and obligations and if so, whether the applicant's access to a court was impeded (Complaint declared admissible)*

**Article 26 of the Convention** *Where an impecunious applicant is allegedly refused access to the courts in that his criminal complaints and requests to join the proceedings as a civil party are declared inadmissible for failure to lodge a substantial security, it is not necessary for the applicant in order to exhaust domestic remedies, to contest the impugned malpractice during the criminal proceedings against him or file a fresh application (at the end of the main proceedings) to join the proceedings as a civil party or make a further request for legal aid*

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**THE FACTS**

The applicant, a French national, born in 1951, is currently detained in Montpellier Prison. In the proceedings before the Commission he was represented by Mr. Claude Sokolovitch, who lives in Thonon les Bains.

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

## 1 Particular circumstances of the case

On 1 July 1992 the Indictments Chamber of Nîmes Court of Appeal ordered the applicant's indictment and committed him, together with his son and daughter, who were both minors at the material time, for trial at the Youth Assize Court of the Gard *département* on one count of aiding and abetting armed robbery, several counts of robbery and one of handling stolen goods

On 11 December 1992 the Assize Court sentenced the applicant to 12 years' imprisonment, with no remission for at least seven years, for aiding and abetting armed robbery and aggravated handling of stolen goods

On 14 December 1992 the applicant appealed to the Court of Cassation

On 28 December 1992 the applicant filed a criminal complaint against M, a senior police officer, and S, a *gendarme*, both of whom had been involved in investigating the case against him, for procuring persons to give false evidence, fabricating evidence and tendering forged public documents, malfeasance in public office, abuse of official authority, extortion and aiding and abetting theft, all of which are, or may be, classified as 'crimes'. The applicant also requested leave to join the proceedings as a civil party

On 2 January 1993 the applicant filed a second criminal complaint, this time against G D and J E, both prosecution witnesses, for theft, threats, blackmail, procurement of a minor, failure to report offenders and selling military weapons. He considers that he incurred serious financial consequences as a result of these offences and that the theft of his professional and personal property by J E, with the complicity of one of the *gendarmes* against whom the first complaint was filed, caused his financial ruin. The applicant again requested leave to join the proceedings as a civil party

The applicant applied for legal aid in respect of both these complaints

On 28 June 1993 the Legal Aid Office of Nîmes *tribunal de grande instance* rejected the applicant's request for legal aid for the first complaint on the ground that, despite the fact that the applicant's means had been assessed at nil, his application was inadmissible, as his appeal against the Assize Court's judgment of 11 December 1992 was still pending

On 24 July 1993 the applicant appealed to the Legal Aid Office against this decision. He wrote a letter on 1 October 1993 confirming that he had appealed

The Legal Aid Office did not give a decision on the request for legal aid for the second complaint

In an order of 24 August 1993, the senior investigating judge attached to the *tribunal de grande instance*, having noted that the applicant had been refused legal aid, fixed at 80,000 French francs (FRF) the security payable in respect of the complaint against the senior police officer, M, and the constable, S

In an order of the same date, the senior investigating judge also fixed at FRF 80,000 the security payable in respect of the complaint against G D and J E, on the ground that "the evidence and the existence of another complaint justify applying sections 88 1 and 91 of the Code of Criminal Procedure

The senior investigating judge ordered this security to be lodged by 28 September 1993, on pain of both complaints being declared inadmissible

On 9 September 1993 the applicant wrote to the senior investigating judge informing him that he had appealed against the decision refusing him legal aid in respect of the first complaint and that no decision had yet been made regarding his second application

On 21 September 1993 the Court of Cassation dismissed the applicant's appeal against the *Gard Assize Court's* judgment of 11 December 1992

As the applicant had heard nothing from the Legal Aid Office regarding either his appeal against the refusal to grant him legal aid for his first complaint or his enquiry regarding the second, he wrote again, on 18 October 1993, repeating his requests for legal aid for both complaints. He specified, in respect of the first complaint, that the reason stated in the decision of 28 June 1993 for refusing him legal aid was no longer valid, since the Court of Cassation had in the meantime given its decision

On 29 December 1993 the senior investigating judge declared the applicant's complaints inadmissible on the ground that, as he had been refused legal aid, the security (FRF 160 000) had not been lodged in time

On 15 March 1994 the Legal Aid Office dismissed the applicant's appeal against its decision of 28 June 1993 refusing him legal aid

## 2 *Relevant domestic law*

### Code of Criminal Procedure

#### Section 88 (Law no 93 2 of 4 January 1993)

The investigating judge shall make an order noting that a complaint has been filed. He shall fix on the basis of the civil party's means, the amount of the security which, in the event that he has been refused legal aid, the civil party must lodge at the court registry and the date by which that sum must be lodged, on pain of inadmissibility of the complaint. He may declare the civil party exempt from the obligation to lodge a security

Section 88 1 (Law no 93 2 of 4 January 1993)

The security fixed under section 88 guarantees payment of any civil fine payable pursuant to sub paragraph 1 of section 91

The sum lodged shall be refunded where the proceedings brought under this provision are time-barred or have resulted in a final decision that the application to join the proceedings as a civil party was neither vexatious nor dilatory "

General circular C 88-1 (Circular 1 March 1993)

"Section 88 1, sub paragraph 1, provides that the security fixed under section 88 guarantees payment of the civil fine

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Section 91 paragraph 1 (Law no 93-2 of 4 January 1993)

' Where a request to join the proceedings as a civil party has been lodged and those proceedings are discontinued following an investigation, the public prosecutor may summon the civil party to appear before the criminal court which dealt with the case. Where the request to join the proceedings as a civil party is held to be vexatious or dilatory, the court may order the party in question to pay a civil fine of not more than FRF 100,000

## COMPLAINT

The applicant complains that he did not have an effective remedy before a national court, as his requests to join the proceedings as a civil party were declared inadmissible on grounds of his inability to pay the security (FRF 160,000). He invokes Articles 5, 6, 13 and 17 of the Convention.

## THE LAW

The applicant considers that, in view of his personal financial means, the amount of the security which the senior investigating judge ordered him to pay, on pain of his complaints and requests to join the proceedings as a civil party being declared inadmissible, effectively denied him access to a court. He invokes Articles 5, 6, 13 and 17 of the Convention. However, the Commission considers, in view of the circumstances of the case, that the complaint should be examined in the light of the principle of access to the courts within the meaning of Article 6 para 1 of the Convention, the relevant part of which provides that

' In the determination of his civil rights and obligations , everyone is entitled to a fair hearing by [a] tribunal

The applicability of Article 6 para 1 of the Convention

The respondent Government argue, primarily, that Article 6 para 1 of the Convention is inapplicable here

They consider, first, that the applicant cannot claim to be facing a criminal charge within the meaning of that provision and, secondly, that neither of the complaints he filed concerned the determination of civil rights and obligations. The Government refer in this regard to a decision of the Commission in which it declared an application inadmissible on the ground that the Convention does not recognise the right to instigate criminal proceedings against a third party (No 21919/93, Dec 2 12 93, unpublished)

The Government consider that the applicant filed both complaints out of vindictiveness and without any intention of seeking damages. They allege that the applicant was also, to an extent, seeking to have his conviction declared unsafe. The Government recall the Court's case-law that in order for Article 6 to apply to a request to join proceedings as a civil party, there must be a claim for compensation (*Moreira de Azevedo v Portugal* judgment of 23 October 1990, Series A no 189, *Tomasi v France* judgment of 27 August 1992, Series A no 241-1). The Government recall, however, the European Court's ruling in the *Helmers* case that a civil right does not necessarily depend on whether or not monetary damages are claimed, what is important is whether the outcome of the proceedings is decisive for the civil right at issue, and specify that what was at stake in that case was the applicant's right to enjoy a good reputation (*Helmers v Sweden* judgment of 29 October 1991, Series A no 212 A, p 14, para 29)

In this case, the Government assert that the applicant's sole aim in filing both his complaints and requests to join the proceedings as a civil party was to secure the conviction of the four individuals referred to in his complaints and, if possible, to have his own conviction declared unsafe. The proceedings could not therefore be regarded as relating to the determination of civil rights. The Government conclude from this that the proceedings in question are excluded *ratione materiae* from the scope of application of Article 6 of the Convention.

The applicant, on the other hand, considers that Article 6 of the Convention does apply to cases such as this, concerning criminal complaints coupled with requests to join the proceedings as a civil party.

The Commission considers that the objection raised by the respondent Government raises issues of law and of fact which can be dealt with only on an examination of the merits of the case.

Exhaustion of domestic remedies within the meaning of Article 26 of the Convention

The Government rely, in the alternative, on failure to exhaust domestic remedies arguing that the applicant failed to challenge during the criminal proceedings against

him the conduct of the persons about whom he complains. The Government note that the persons referred to in the complaints had all, to various degrees, contributed to securing the applicant's conviction and go on to note that the applicant waited for the Assize Court to deliver its verdict before attempting to instigate criminal proceedings. Thus, as he did not complain during the Assize Court hearing of any malpractice by the police, the first time he made any such complaint was before the Court of Cassation, to which the case was referred from the Assize Court. Furthermore, the Court of Cassation held "that the judgment of the Indictments Chamber, which has become final, covers any previous procedural flaws there may have been"

The Government then note that it is still open to the applicant to file a criminal complaint against the person referred to in his first complaints and to request leave to join the proceedings as a civil party, on the ground that the investigating judge's decision that the complaints were inadmissible owing to the applicant's failure to lodge a security does not affect the merits of his complaints. Besides this, the Government submit that the applicant could still apply for legal aid for his second complaint as the Legal Aid Office has still not replied to his request.

The applicant maintains that he has exhausted domestic remedies and that the amount of the security fixed by the senior investigating judge precludes him from filing a fresh application to join the proceedings as a civil party.

The Commission notes that the applicant applied to the senior investigating judge for leave to join the proceedings as a civil party after the Assize Court had given its judgment, in order to instigate criminal proceedings and obtain damages for his loss. Even supposing that, during the criminal proceedings, the applicant had complained of the malpractice of the senior police officer and *gendarme* and contested the validity of the witness evidence, this would, if successful, merely have resulted in certain procedural measures being set aside. The Commission notes that the filing of a criminal complaint coupled with a request to join the proceedings as a civil party, once the criminal proceedings against the applicant have been completed, has a different aim. The Commission therefore considers that the Government's objection cannot be accepted.

As regards the Government's submission that the applicant could have filed a fresh application to join the proceedings as a civil party, the Commission, noting that this contradicts the Government's submissions in their first objections, considers that, in view of the senior investigating judge's decision to fix the total security at FRF 160,000 regardless of the circumstances of the case, it cannot accept this objection. As regards the possibility of making a further application for legal aid in respect of the second complaint, the Commission is forced to conclude that the applicant's complaint was based precisely on the failure to reply to such a request. This objection cannot therefore be accepted.

The Commission considers, having examined the arguments put forward by the parties, that this question raises issues of law and fact requiring an examination of the merits of the application. This complaint cannot therefore be declared manifestly ill founded, within the meaning of Article 27 para 2 of the Convention, and no other ground for finding it inadmissible has been established.

For these reasons, the Commission, by a majority,

**DECLARES THE APPLICATION ADMISSIBLE**, without prejudging the merits of the case.