

APPLICATION

SUBMITTED TO

EUROPEAN COURT OF HUMAN RIGHTS

Council of Europe
Strasbourg, France

Under Article 37 § 2 of the Convention for the Protection of
Human Rights and fundamental Freedoms
and Rule 43 of the Rules of Court

I. THE APPLICANT

Surname..... LESECQ

First name..... Christian

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Representative : None. The applicant is a JurisDoctor, thesis Paris 1961 (" Docteur d'Etat en Droit ", thèse Paris 1961). He was a tax and legal consultant (" conseil juridique et fiscal ") for many years in international practice and thereafter a member of the Paris Bar.

II. PURPOSE OF THE APPLICATION

The present application is grounded on Article 37 § 2 of the Convention for the Protection of Human Rights and fundamental Freedoms (the "Convention") and Article 43 of the Rules of the Court (the "Rules") providing as follows:

Article 37 of the Convention - Radiation

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 43 of the Rules:

(5) The Court may restore an application to its list if it considers that exceptional circumstances justify such a course.

Therefore the Court has issued directions that files be preserved for one year before they are destroyed.

The purpose of the present application is to have the Court restore to its list of cases the two former applications hereunder:

- Individual application under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which was lodged with the Court on May 2, 2003 against the French Republic and entered into list of cases under No. 17488/03,
- Individual application under Article 34 of the Convention which was lodged with the Court on October 12, 2004 and completed on November 30, 2004 against the French Republic and entered into list of cases under N° 37322/04.

III. STATEMENT OF FACTS

A tax collector ("receveur") had claimed wrongfully 130.328 € for payment of inheritance taxes.

An auctioneer ("commissaire-priseur") appointed by the tax collector had taken over and away the furniture and office equipment of the taxpayer for payment of the taxes.

In the end, the tax claim was cancelled and no tax had to be paid but the furniture and office equipment were never returned to the taxpayer who lost his property.

These facts are documented and evidenced by a judgment of the Court of Appeal of Versailles dated April 26, 2000 as follows:

" He (the applicant) recalls and justifies by producing the minute of the seizure that all his furniture was seized, whereas the claim was not even challenged but did not exist; that the sale of his furniture took place on 10/22/1996 ; that he does not intend to put the functioning of the administration in cause but attempts to demonstrate the penal liability of one or several persons".

"Il (le requérant) rappelle et justifie par la production du procès-verbal de saisie, que tous ses meubles ont été saisis, alors que la créance était non pas contestée mais inexistante ; que la vente de ses meubles a été réalisée le 22/10/1996 ; qu'il n'entend pas mettre en cause le fonctionnaire (lire : fonctionnement) de l'administration mais tente de démontrer une responsabilité pénale d'une ou plusieurs personnes ".

Two complaints for criminal offences with civil party application ("plaintes avec constitution de partie civile") were lodged by the applicant on September 19, 1998 before courts of great instance ("tribunaux de grande instance"), on one hand against the tax collector ("receveur") and on the other hand against the auctioneer ("commissaire-priseur") .

The complaints were lodged pursuant to Article 2 of the Code of criminal procedure which provides as follows:

Article 2:

"All those who have personally suffered from the damage directly caused by a serious offence ("crime"), less serious offence ("délit") or petty offence ("contravention") may bring civil party proceedings ("action civile") to seek compensation for such damage".

The applicant wanted to obtain damages from the auctioneer ("commissaire-priseur") but also from the French Republic as it is liable under civil law for the torts caused by its employed tax collector.

Pursuant to courts' rules of territory jurisdiction, and for lack of evidence of collusion for peculation ("concussion"), the complaints were lodged with two courts. Violations alleged against the tax collector were deemed to have taken place in Saint-Germain-en-Laye where is located the tax collector's office, which is within the jurisdiction of the court of Versailles, whereas the violations alleged against the auctioneer had taken place in Paris, where the applicant's furniture and office equipment were located at his residence of boulevard of Courcelles, No 94, when they were taken over and away.

So, courts of first instance of Paris and Versailles judged initially the two criminal complaints aiming at different persons. Eventually the cases reached the Court of

cassation after separate proceedings of different durations before investigation Chambers ("Chambres de l'instruction") of Courts of Appeal of Paris and Versailles. In the end, the Court of cassation made two decisions, one on November 14, 2002 notified on December 16, 2002, and the other one on February 24, 2004 notified on June 21, 2004.

Within the six months periods after notice of each of the decisions was given to the applicant, he lodged with the European Court the two applications mentioned herein-above under Article 34 and in compliance with Article 35 § 1 of the Convention.

Both applications were declared non-admissible by a committee under Article 28 of the Convention composed of three judges (K. Jungwiert, president, M. Ugrekheldidze and A. Mularoni):

- Application No. 17488/03 on October 25, 2005,
- Application No 37322/04 on November 22, 2005.

IV. STATEMENT RELATIVE TO DECISION OF OCTOBER 25, 2005

The decision dealt with application N° 17488/03.

The applicant sustained in the application that his case had not been heard equitably because he had no knowledge of the report from the counsellor-reporter ("conseiller rapporteur") before the hearing of the criminal Chamber ("Chambre criminelle") of the Court of cassation.

The application read:

"The undersigned points out that he has deposited by himself his memorial for cassation ("mémoire en cassation"), and that, as he was not represented by a lawyer to the Councils ("avocat aux Conseils"), he could not have knowledge of the report from Counsellor DULLIN before the audience of the criminal Chamber and that he could not therefore reply in writing. Now, the right to contradictory proceedings within the meaning of article 6 § 1 such as interpreted by a constant case-law (Richen and Gaucher case of January 23, 2003) entails as a principle the right for the parties to a lawsuit to receive communication of, and discuss, any document or observation presented to the judge, even by an independent magistrate, in order to influence his decision. "

" Le soussigné fait valoir qu'il a lui-même déposé son mémoire en cassation, et que s'étant abstenu de se faire représenter par un avocat aux Conseils, il n'a pu connaître le rapport du conseiller DULLIN avant l'audience de la chambre criminelle et que partant il n'a pu y répliquer par écrit. Or le droit à une procédure contradictoire au sens de l'article 6 § 1 tel qu'interprété par une jurisprudence constante (arrêt Richen et Gaucher du 23 janvier 2003) implique en principe le droit pour les parties à un procès de se voir

communiquer et de discuter toute pièce ou observation présentée au juge, fût-ce par un magistrat indépendant, en vue d'influencer sa décision."

Since the *Rheinhardt and Slimane Kaïd vs. France* case of March 31, 1998 (Recueil des arrêts et décisions 1998.II.pp.665-666), the Court has continuously held that the failure to communicate the report from the counsellor-reporter ("conseiller-rapporteur"), because of its importance, creates an inequality which does not fit with the necessities of a fair lawsuit and is detrimental to the applicant.

A list of decisions made by the Court against the French Republic, judging that the failure to communicate the report from the counsellor-reporter ("conseiller rapporteur") is in violation of Article 6 § 1 of the Convention is as follows, subject to error or omission :

- *Rheinhardt and Slimane-Kaïd vs. France* of March 11, 1998 (mentioned above), § 105;
- *Slimane-Kaïd vs. France*, No. 29507/95 of January 25, 2000, § 23;
- *Berger vs. France*, No. 48221/99 of December 3, 2002, § 42;
- *Mc Gee vs. France*, No. 46802/99 of January 7, 2003, § 15;
- *Pascolini vs. France*, No. 45019/98 of June 26, 2003, § 23;
- *Fontaine et Bertin vs. France*, No. 38410/97, § 15, and No 40373/98 of July 8, 2003, § 62;
- *Slimane-Kaïd vs. France*, No. 48943/99 of November 27, 2003, § 17;
- *Crochard and six others vs. France*, No. 68255/01, No. 68256/01, No. 68257/01, No. 68258/01, No. 68259/01, No. 68260/01, No. 68261/01 of February 3, 2004, § 13;
- *Weil vs. France*, No. 49843/99 of February 5, 2004, § 26;
- *Quesne vs. France*, No. 65110/01 of April 1st, 2004, § 12;
- *Coorbanally vs. France*, No. 67114/01 of April 1, 2004, § 12;
- *Chesnay vs. France*, No. 56588/00 of October 12, 2004 § 23;
- *Casalta vs. France*, No. 58906/00 of October 12, 2004, § 16;
- *Lafaysse vs. France*, No. 63059/00 of October 12, 2004, § 21;
- *Coulaud vs. France*, No. 69680/01 of November 2, 2004, § 17;
- *Fenech vs. France*, No. 71445/01 of November 30, 2004, § 23;
- *Lebégue vs. France*, No. 57742/00 of December 22, 2004, § 23;
- *Sibaud vs. France*, No. 51069/99 of January 18, 2005, § 25;
- *SCP Huglo, Lepage & Associés, Conseil vs. France*, No. 59477/00 of February 1, 2005, § 26;
- *Lacas vs. France*, No. 74587/01 of February 8, 2005, § 28;
- *F.W. vs. France*, No. 61517/00 of March 31, 2005, § 24;
- *Fourchon vs. France*, No. 60145/00 of June 28, 2005, §20;
- *Bach vs. France*, No. 64460/01 of June 28, 2005, § 13;
- *M.B. vs. France*, No. 65935/01 of September 13, 2005, § 19;
- *Fernandez-Rodriguez vs. France*, No. 69507/01 of October 25, 2005, § 16;
- *Authouart vs. France*, No. 45338/99 of November 8, 2005, § 49;
- *De Sousa vs. France*, No. 61328/00 of November 8, 2005, § 16;
- *Bozon V*, No. 71244/01 of November 8, 2005, § 19;
- *Relais du min Sarl vs. France*, No. 77655/01 of December 20, 2005, § 18;

- André vs. France, No 63313/00 of February 28, 2006, § 26;
- Luca vs. France, No 8112/02 of May 2, 2006, § 28;
- Hostein vs. France, No 76450/01 of July 18, 2006, § 35.

As of February 1, 2003, in order to end the above violations and put its proceedings in conformity with the case law of the European Court, the Court of cassation implemented new measures in cases where to be represented by a lawyer to the Councils ("avocat aux Conseils") is not mandatory. This was obviously an acknowledgement by the French Republic that former proceedings were in violation of rules for a fair lawsuit.

More precisely, in the André vs. France case above-mentioned, taking into account the case law of the European Court about the subject-matter and the date when the applicant's appeal for cassation was examined (a date which was before the changes made in the practice of the Court of cassation pursuant to the case law) the government did not argue and merely stated that it relied upon Court's wisdom to appreciate whether the complaint about the failure to communicate the report from the counsellor-reporter ("conseiller rapporteur") is grounded.

In the present case, Court of cassation rendered the decision on November 14, 2002, that is when the Court was erring, before new measures were taken to correct the erring. The date of the decision should be enough evidence that it was in violation of the European Court case law.

It is true that two cases may narrow the present case law by withdrawing from its domain particular cases dealt with under prior admission proceedings for an appeal to Court of cassation ("procédure préalable d'admission des pourvois en cassation") provided for by article L.136-1 of the Code of judiciary organization ("Code de l'organisation judiciaire"). The cases are Stepinska vs. France, No 1814/02 of June 15, 2004 and Salé vs. France, No 39765/04 of March 21, 2006.

But in the two cases, it has been judged that the complaint about the failure to communicate the report from to the counsellor-reporter to the applicant and his counsel before the hearing was not ill-founded with regard to Article 35 § 3 of the Convention. Consequently, in both cases, the Court found the requests to be admissible.

In the present case, the Court of cassation made its decision of November 14, 2002:

BASED ON THE REPORT FROM COUNSELLOR DULLIN
(Sur le rapport de M. le Conseiller Dullin)

VISA COMMUNICATION MADE TO GENERAL PROSECUTOR
(Vu la communication faite au procureur général)

Whereas obviously no communication was made to the applicant.

As far as need be, it is to be reminded that the civil party ("partie civile") has the same rights as the defendant in a criminal lawsuit and must receive communication of

documents submitted to court. The word "défense" is a generic term which covers both the defendant and the civil party (Cassation, crim. February 15, 2000).

In the Holstein vs. France case, No 76450/01 of July 18, 2006 (§ 35), there has been stated again the principle : "The Court reminds that the lack of communication of the report from the counsellor-reporter ("conseiller rapporteur") to the parties, whereas this document has been passed on to the prosecuting attorney ("avocat général") did not agree with the requirements of the equitable lawsuit.

In its decision of November 14, 2002, the Court of cassation, meeting as provided for in article L.136-1 of the Code of judiciary organization ("Code de l'organisation judiciaire"), has not declared the appeal not admitted as being non-receivable or not grounded, and the decision was taken after hearing the report from the counsellor-reporter Dullin that the invoked arguments did not allow to receive the appeal.

But the applicant refrains here and now from arguing the case in substance because the present application is limited to request that the case is re-entered in the Court's list of cases in order to be submitted to a chamber.

It shall be up to a chamber to appreciate in the present case whether the lack of communication of the report of the counsellor-reporter to the applicant constitutes a violation of Article 6 § 1 of the Convention, or does not.

According to Article 53 of the Rules, the field of a committee's decisions is about matters which require no further examination. A decisions inconsistent with the Court's case law, which does require a substance examination, is consequently outside the committee's powers to declare not admissible an application or strike it out of the Court's list of cases. Only a chamber can reach such a decision after further examination.

V. STATEMENT RELATIVE TO DECISION OF NOVEMBER 22, 2005

The decision dealt with Application N° 37322/04.

The decision was made on the following ground:

"The Court considered that the final domestic decision, within the meaning of Article 35 § 1 of the Convention, was the decision made on September 10, 2003, that is more than six months before the date when the application was made. It results there from that the application was made lately".

"La Cour a considéré que la décision interne définitive, au sens de l'article 35 § 1 de la Convention, était la décision rendue le 10 septembre 2003, soit plus de six mois avant la date de l'introduction de la requête. Il s'ensuit que la requête a été introduite tardivement."
"

Surprisingly, that consideration does not specify what is the nature of the final decision it says has been taken on September 10, 2003. This will be argued and shown later on in the present application.

The applicant had lodged on September 19, 1998 with the Court of great instance ("tribunal de grande instance") of Versailles a complaint pursuant to Article 2 of the Code of criminal procedure (above-mentioned).

In lodging the complaint, the applicant wanted to obtain damages a from the French Republic as it is liable under civil law for the torts caused by its tax-collector. A complaint with civil party application ("plainte avec constitution de partie civile") is within the domain of the Convention (Chesnay vs. France, No 56588/00 of October 12, 2004, § 12).

The complaint was followed by:

- the investigation judge's decision ("ordonnance du juge d'instruction") made on August 31, 1999 dismissing the complaint,
- the decision of the indictment Chamber ("Chambre d'accusation") of the Court of Appeal of Versailles of April 26, 2000 nullifying the judge's decision above,
- the new investigation judge's decision ("ordonnance du juge d'instruction") made on March 13, 2003 dismissing the complaint,
- the decision of the investigation Chamber ("Chambre de l'instruction" - new name of the indictment Chamber) of the Court of Appeal of Versailles of September 10, 2003 ratifying the judge's decision above of March 13, 2003,
- the decision of the criminal Chamber ("Chambre criminelle") of the Court of cassation of February 24, 2004, which was notified on June 21, 2004.

September 10, 2003 is the date when was made the decision of the investigation Chamber ("Chambre de l'instruction") of the Court of Appeal of Versailles.

That decision was appealed against to the Court of cassation, which made the final decision on February 24, 2004 .

The decision of September 10, 2003 of the investigation Chamber ("Chambre de l'instruction") of the Court of Appeal of Versailles is not the final decision provided for in the Convention's Article 35 and the starting date of the six-months period is June 21, 2004 when was notified the decision made finally by the criminal Chamber of the Court of cassation on February 24, 2004. Then the six months period was to expire on December 20, 2004 and the application which was lodged on October 12, 2004 and duly completed on November 30, 2004 was not out of time.

The applicant wrote his first letter to the Court on October 12, 2004 (copy attached hereto). The Court answered by letter of October 20, 2004 stating that the October 12, 2004 letter shall be considered as the date when the application is made. Later, the applicant sent to the Court on November 30, 2004 the standard official application form duly filled up with all required documents.

Article 35 § 1 of the Convention says:

"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."

In effect, it is a principle of international law that protection of human rights is carried out by national governments, and access to international enforcement mechanisms is seen as a last resort, after the State has failed to correct the violation or to carry justice.

The individual citizen must first attempt to remedy the violation using national law. This is provided for in the Rules of the European Convention as well as in the Rules of the Inter-American Court of Human Rights (Article 46) and the Human Rights Committee of the United Nations.

It is obvious that the exhaustion of national remedies within the French judiciary system requires in principle that appeal is made to Court of cassation.

The Committee of Human Rights of the United Nations maintains the principle even though there were doubts about effectiveness of the recourse.

In Communication N° 550/1993 of 16/12/1996 (paragraphs 4.3 and 4.4), the French government itself invoked that case law and submitted that the communication was inadmissible on the basis of non-exhaustion of domestic remedies, in so far as Mr. F... not appeal his case to the Court of cassation to remedy the alleged violation. And the French government reminded the Human Rights Committee of its jurisprudence that mere doubts about the effectiveness of available remedies do not prejudice the exhaustion of domestic remedies.

The following statement made in this case by the French government about the Court of cassation shows that it is and must be the last remedy :

"4.4 In this context, the State party notes that while the Court of cassation indeed does not examine facts and evidence in a case, it does ascertain whether the law was applied correctly to the facts, and can determine that there was a violation of the law, of which the Covenant is an integral part (art, 55 of the French Constitution of 4 June 1958). Article 55 stipulates that international treaties take precedence over domestic laws, and according to a judgment of the Court of Cassation of 24 May 1975, domestic laws contrary to an international treaty shall not be applied, even if the internal law was adopted after the conclusion of the treaty. Thus, the author remained free to invoke the

Covenant before the Court of cassation, as the Covenant takes precedence over the law of 13 July 1990."

The European Court adheres to the principle and it is its well established case law that the exhaustion of domestic remedies prescribed by the Convention entails the obligation to go to the Court of cassation:

- A. vs. France of November 23, 1993, série A no 277-B, pp. 47-48, § 30,
- Hentrich vs. France of September 22, 1994, série A, no 96-A, p.18, § 33,
- Remli vs. France of April 23, 1996, jugements et décisions 1996-II, p. 571, § 42,
- Fressoz et Roire, N0 29.183/95 of January 21, 1999 (Great Chamber), § 37,
- vs. France of September 28, 1999 (Great Chamber), §§ 38 - 44,
- Frangy vs. France, No 42270/98 of February 1, 2005, § 28.

In the case Remli vs. France above-mentioned, the Court stated again that an appeal to Court of cassation must be made in principle event if it is likely to be unsuccessful.

In the Civet vs. France case, the Court reiterated that the finality of Article 35 of the Convention is to give the Contracting States the opportunity of preventing from, or putting right, the violations alleged against them before those allegations are submitted to the European Court. Thus the complaint that it is intended to submit to the Court must first have been raised, at least in substance, within the forms and time prescribed by the national law, in front of the suitable national jurisdictions.

An appeal to the Court of cassation should not be deemed useless in advance, or deprived of any chance of success, because a change in case law is always possible (Frangy vs. France mentioned above).

Because of the authorities which support the principle that the recourse to Court of cassation is a necessity for the exhaustion of domestic remedies, it cannot be discarded by a committee under Convention's article 28 without further examination.

Besides, the restrictive effect of Article 575 of the Code of Criminal Procedure on a civil party's right to appeal to the Court of cassation is relaxed under the liberal interpretation by the criminal Chamber of the Court of cassation of the sixth circumstance set out in the second paragraph of Article 575. By extending the notion of "conditions essential" for the legal validity of the judgment to the reasoning, the Court of cassation has held that an appeal by the civil party alone was possible if the judgment was not properly reasoned, omitted to address to the main argument of the civil party's memorial, contained no statement of the facts or did not give adequate reasons in respect of the charges laid in the complaint and civil

party application. Because of that more liberal case law, article 575 of the Code of Criminal Procedure does not prevent any more the civil party to appeal to Court of cassation (see Berger vs. France above mentioned, § 27). And the decision of the Court of cassation of February 24, 2004 did not even look for application of article 575.

Attached to the applicant's first letter of October 12, 2004 to the Court were copies of the decision of the Court of cassation of February 24, 2004 and the notification thereof made to the applicant on June 21, 2004. And in the answer from the Court of October 20, 2004, the applicant was warned that the Court shall verify that all national remedies were exhausted as it is required under Article 35 of the Convention. Of course the applicant complied as it is evidenced by page 5 of the application attached hereto.

In any case, the decision of non-admissibility is not one which could be taken without further examination (Article 53 of the Rules of the Court) for applying Article 35 § 1 of the Convention to a judgment of the investigation Chamber ("Chambre de l'instruction") without consideration to the appeal made later to Court of cassation which did render a decision on February 24, 2004 notified on June 21, 2004 starting the six months period from that date.

At last, it must be pointed out that if the decision made by the committee on November 22, 2005 was validated as a matter of case law and that the six-month period were to run from the date when a judgment is made by the investigation Chamber ("Chambre de l'instruction"), then an applicant would run the likely risk that his application is dismissed later for failing to exhaust domestic remedies for lack of an appeal to Court of cassation.

VI. LIST OF DOCUMENTS

- a) Decision of the investigation Chamber of the Court of Appeal of Versailles in date of September 10, 2003, which was wrongly considered to be the starting date of the six months period of Convention's Article 35,
- b) Decision of the criminal Chamber of Court of cassation in date of February 24, 2004, which is the last decision for exhaustion of domestic remedies,
- c) Notification made on June 21, 2004 to the applicant of the Court of cassation's decision of February 24, 2004. Said notification is the starting date for the computation of the six months period of Convention's Article 35,
- d) Applicant's letter of October 12, 2004,
- e) Letter of October 20, 2004 from the Court,
- f) Page 5 of the application dated November 30, 2004.

VII. CONCLUSION

The decision of October 25, 2005 taken by a committee under Article 28 of the Convention is in full contradiction with Court's well-established case law about fair trial.

The decision of November 22, 2005 taken by a committee under Article 28 of the Convention is also in full contradiction with Court's well-established case law when it abstains from considering the final recourse to Court of cassation made by the applicant. The Court of cassation did make a decision on February 24, 2004 and the six months period prescribed by Article 35 of the Convention started upon the date when the decision has been notified to the applicant, i.e. on June 21, 2004. Furthermore, the committee's decision is in formal contradiction with the case law of the Human Rights Committee of the United Nations, which is the authority about what are the "generally recognized rules of international law" referred to in Article 35 of the Convention.

The applications were made in good faith and in earnest by the applicant who is a specialized lawyer, obviously they are not unfounded nor abusive and they do contain grounds for alleged violations to the Convention *ratione materiae*.

There are no grounds whatever to find the applications non-admissible for any reasons whatsoever under Article 35 § 3 of the Convention.

Europe's protection must be insured under the Convention and be dispensed by the Court in order to protect the victim from abuses and/or improper functioning of governmental bodies, what-ever may be the stain resulting there from for the State concerned. The Court should have no care to preserve a stainless picture that a government would strive to maintain about its tax administration or auxiliaries of its judiciary system when the Convention has been breached.

There results from the above that the Court has to deal with a very exceptional set of circumstances such as justifying the use of Article 37 § 2 of the Convention.

Made at Sainte Marguerite de Carrouges

On September 22, 2006

Signature of the applicant: