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HUMAN RIGHTS COMMITTEE
Ninety-first session
15 October-2 November 2007

DECISION

Communication No. 1505/2006

Submitted by:	Jean-Pierre Vincent (represented by counsel, Alain Garay)
Alleged victim:	The author
State party:	France
Date of communication:	20 July 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 31 October 2006 (not issued in document form)
Date of decision:	31 October 2007
Subject matter:	Revocation of an appeal in cassation on the grounds that the decision under appeal has not been executed
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to a fair trial
Articles of the Covenant:	14
Articles of the Optional Protocol:	5, paragraph 2 (a) and (b)

[ANNEX]

* Made public by decision of the Human Rights Committee.

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninety-first session

concerning

Communication No. 1505/2006*

Submitted by: Jean-Pierre Vincent (represented by counsel, Alain Garay)

Alleged victim: The author

State party: France

Date of communication: 20 July 2006 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 20 July 2006, is Jean-Pierre Vincent, a French national. He claims to be the victim of a violation by France of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Alain Garay. The Covenant and the Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984 respectively.

1.2 On 5 January 2007, the Special Rapporteur on new communications, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The facts as submitted by the author

2.1 On 26 January 1994 the author registered the trademark "Global Inquisitive System" (GIS) with the National Intellectual Property Institute in Paris. On 27 January 1994, his company, Féronia, ceded this trademark to the company Radio Video Security, in exchange for a lump-sum royalty payment of 2 million francs: 500,000 francs were deposited on the day that the contract was signed, and the balance was to be paid within the following fortnight. The contract was drawn up by an attorney (Maître Aymes) and was registered on 18 April 1994 at the National Trademark Registry in Paris.

2.2 The first cheque for 500,000 francs drawn by Maître Aymes on his professional account with CARPA (the fund for lawyers' pecuniary payments), which he held at the Crédit Lyonnais, was cashed by the company Féronia. In order to pay the balance, three further cheques for 500,000 francs each were drawn on the same account by Maître Aymes on 28 February 1994, and handed to Féronia the same day. The first of these cheques was cashed without any difficulty. The other two, however, which were presented for payment on 6 June 1994, were rejected by Crédit Lyonnais. In the meantime, the President of the Rodez Bar, to which Maître Aymes belonged, had blocked payment on the grounds of fraudulent use of cheques.

2.3 Féronia and the author, having been defrauded by Maître Aymes, tried to reclaim the outstanding payment. They instituted civil proceedings before the Tribunal de Grande Instance Regional Court in Toulouse, which, on 7 May 2002, ordered them to pay back 1,000,000 francs to CARPA in Toulouse for the two cheques which had already been cashed. This decision was upheld by the Toulouse Court of Appeal on 24 July 2003. At no point did the courts take cognizance of the accounting records, including Maître Aymes' bank statements, in the case file. The author did not have access to the records of the disciplinary proceedings of the Rodez Bar Council, or those of the proceedings brought against Maître Aymes for abuse of trust by an attorney and for fraud. These documents would have assisted the author in the preparation of his defence. In a similar case, the courts found for Xavier Barbeau, who had also been defrauded by Maître Aymes, in 1995.

2.4 On 11 February 1997, the author wrote to the investigating magistrate in Rodez who was responsible for the case against Maître Aymes, applying for civil indemnification in the case in accordance with the Code of Criminal Procedure. Following a written reminder dated 18 March 1999, the magistrate replied that he had informed the author by registered post on 4 December 1998 that he was intending to conclude his investigation of the case in which the author had applied for civil indemnification. The author claims to have never received this notification. The author was thus missing crucial information when the civil indemnification proceedings began before the Civil Court in Toulouse. He tried on several occasions to obtain information on the criminal proceedings against Maître Aymes. On 28 March 2000, the Rodez Government Procurator informed him that there appeared to be "no evidence of fraudulent use of the cheques by Féronia for its own benefit". The Toulouse judicial authorities did, however, find against Féronia in civil proceedings for an error committed when cashing the cheques concerned.

2.5 On 13 September 2003, the author submitted an appeal to the Court of Cassation against the ruling of the Toulouse Court of Appeal of 24 July 2003. The legal adviser for Crédit Lyonnais informed him that unless he paid what he owed, Crédit Lyonnais would seek to have

his appeal before the Court of Cassation revoked. The author did not respond to this request. By order of 17 November 2003 the Court of Cassation recorded the abandonment of appeal by the claimant party.

2.6 On 13 February 2004 the author took his case to the European Court of Human Rights (application No. 8060/04). On 14 September 2004 this Court declared the application to be inadmissible on the grounds of non-exhaustion of domestic remedies owing to abandonment of the appeal in cassation.

The complaint

3.1 The author considers himself to be a victim of a violation of article 14 of the Covenant, on the grounds of infringement of his right of access to a court. He contends that while the right of access to a court is not absolute, restrictions on that right should never encroach upon its substance. Any limitation should have a legitimate purpose and be reasonably proportionate to that purpose.

3.2 The author also considers himself a victim of a breach of article 14 of the Covenant, owing to the manner in which French proceedings are conducted and the methods of administration of justice from which he has suffered. He contends that he has fallen victim to a serious dysfunction in the administration of justice owing to the obstacles he faced, i.e. the failure to communicate evidence during the civil indemnification proceedings in Toulouse, the failure of the investigating magistrate to pass on the file of the investigation in good time to the author, who had written to apply for civil indemnification in the criminal proceedings, and the failure of the civil courts to pronounce on the position of the Rodez Government Procurator, which had been clearly stated in writing. He therefore considers that his right to a fair trial has been violated.

3.3 On the effects of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol, the author recalls that there is nothing to prevent the Human Rights Committee from ruling on the merits if the European Court of Human Rights has not already done so. He decries the briskness of the decision that he received from the Court and contends that the Court has not examined his petition on the merits.

3.4 Regarding the exhaustion of domestic remedies, the author contends that the lack of a procedure for suspending execution of an appeal court decision is contrary to the right to a fair trial, since it was impossible for him to assert his interests and ensure that he was fairly defended before a court. The forced execution of the decision by the Toulouse Court of Appeal was a genuine financial setback for him. He considers that he has never been fully able to assert his rights or seek redress through the courts as a result of the system of forced execution and the bank's demand.

3.5 The author requests reasonable satisfaction in the form of damages for the material and moral injury he has suffered.

The State party's observations on admissibility

4.1 On 29 December 2006, the State party contested the admissibility of the communication. It invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol, arguing that the

issue has already been examined by the European Court of Human Rights. Should the Committee reason that the Court has not examined the case on its merits, but only on procedural issues, the reservation should nevertheless apply. The consideration of admissibility is a decisive part of the overall examination of a case, and should not be sidestepped. The Committee cannot consider that a case which has been examined and found inadmissible by an international body on procedural grounds has not been examined within the meaning of the reservation to article 5, paragraph 2 (a), without misconstruing that reservation. The point of the reservation is that cases which have been examined in the broad sense, including examination on procedural issues, should not be entertained by the Committee - not just cases that have been examined on the merits.

4.2 With regard to the issue of the exhaustion of domestic remedies, the State party recalls that it was decided to revoke the author's appeal to the Court of Cassation. This decision was taken pursuant to article 1009-1 of the new Code of Civil Procedure, which provides that the first president of the Court of Cassation can, at the request of the respondent, decide to "strike a case off the list if the petitioner cannot demonstrate that he has executed the decision against which he is appealing, unless he has reason to believe that execution would clearly have excessive consequences". The author has refrained from executing the decision of the Court of Appeal, but does not claim to have tried to demonstrate that execution would clearly have had excessive consequences for him. Furthermore, article 1009-3 of the new Code of Civil Procedure allows for a case to be reinstated on the Court of Cassation list if it can be shown that the decision under appeal has been executed. In addition, the Court of Cassation can accept partial execution taking account of the petitioner's circumstances. It can therefore be deduced that the author did not wish to take advantage of a reinstatement and has deliberately chosen not to put his case to the Court of Cassation. The author has therefore not exhausted domestic remedies.

The author's comments on the State party's observations

5.1 In his comments of 26 February 2007, the author repeats his previous arguments on the effects of the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol. In response to the State party's argument that he has not tried to demonstrate that execution of the Court of Appeal's decision would clearly have excessive consequences for him, he contends that the decision itself clearly had excessive consequences: it found that a perfectly licit contract had become illicit, and that the written determination of the Government Procurator to proceed to examination was null and void. It disregarded a decision of the Court of Cassation fully recognizing an error of management on the part of CARPA and ignored that Court's request for indisputable proof. The author was ordered to repay the considerable sum of nearly 200,000 euros, though his annual income was less than 9,000 euros a year in 2003 and 2004.

5.2 The author stresses that in the context of an attempt at mediation, the mediator stated that "a very long procedure has led Mr. Jean-Pierre Vincent - FERONIA astray because the Rodez Bar Association did not inform him of the remedies available and the lawyers in the region one by one declined to provide any pointers to potential remedies".

5.3 In response to the State party's argument that he could have had his case reinstated on the Court of Cassation's list pursuant to article 1009-3 of the new Code of Civil Procedure, the author contends that this alleged oversight can be taken into consideration only on the formal

condition that there is a sufficient degree of certainty, not only in theory but also in practice, and that is not the case here. The State party must demonstrate that the requirements have been satisfied, not simply allege that they have. The successive lawyers to whom the author has turned have not provided regular assistance. From June 1999 onwards the author has been contacting lawyers from the Toulouse area who have never followed up his request to take on his case. On 19 June 2000, he alerted the first President of the Toulouse Regional Court to the fact that he could not get the chairman of the Toulouse bar to designate a lawyer to represent him. It was not until 4 August 2000 that a lawyer was finally appointed. The author subsequently consulted nine lawyers from the Conseil d'Etat and the Court of Cassation who refused to register an appeal for him, telling him first to comply with the financial order handed down by the Toulouse Court of Appeal. Only Maître Boullez finally agreed to assist him, while clearly stating that pursuant to article 611-1 of the new Code of Civil Procedure, he could not lodge an appeal until the ruling by the Toulouse Court of Appeal had been officially announced. The author therefore went back to his solicitor at the Toulouse Court of Appeal for an original copy of the Court's decision. The solicitor refused to produce any documents because the author had not paid the fees owed to him. Thus, article 1009-3 of the new Code of Civil Procedure cannot apply without a real denial of justice if there are oversights in the judicial administration of an appeal or circumstances make it unreasonable to insist on exhausting all remedies.

5.4 The author points out that he did nevertheless lodge an appeal before the Court of Cassation on 13 September 2003 against the decision of the Toulouse Court of Appeal but that the Court of Cassation struck the case off its list on 17 November 2003.

6. On 5 September 2007, the author stated that it was his counsel, the Nicolas Boullez civil-law professional partnership, which had requested abandonment of the proceedings. This was further proof of the inadequate legal advice he had been given. He had reasonably followed the advice of his lawyers not to continue with his appeal, which they had been led to believe - and themselves implied - was sure to fail. Although articles 1024 ff. of the new Code of Civil Procedure restrictively lay down the strict conditions relating to "abandonment", the author had received impartial advice. He maintains he will find himself in a legal impasse if the Committee finds that he has not exhausted domestic remedies without looking into the reasons why.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

7.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author (complaint No. 8060/04) was found inadmissible by the European Court of Human Rights on 14 September 2004 because domestic remedies had not been exhausted. The Committee also recalls that on acceding to the Optional Protocol, the State party entered a reservation to article 5, paragraph 2 (a), of that Protocol specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". The Committee notes, however, that the European Court has not "examined" the case in the sense of article 5, paragraph 2 (a), of the

Optional Protocol, inasmuch as its decision pertained only to an issue of procedure.[1] There is therefore no impediment arising out of article 5, paragraph 2 (a), of the Optional Protocol as modified by the State party's reservation.

7.3 Regarding the exhaustion of domestic remedies, the Committee notes that the author's appeal to the Court of Cassation led to a decision by the first president of the Court of Cassation to strike it off the list on 17 November 2003. It takes note of the State party's argument that the author refrained from executing the decision of the Toulouse Court of Appeal dated 24 July 2003, but does not claim to have tried to demonstrate that its execution would clearly result in excessive consequences for him. It also notes that article 1009-3 of the new Code of Civil Procedure allows a case to be reinstated on the Court of Cassation's list upon demonstration of execution, albeit partial, of the decision under appeal. Although the author pleads before the Committee a lack of the financial wherewithal to execute the Toulouse Court of Appeal's decision (see 5.1 above), the case file shows that the author did not state or provide evidence of his financial situation to the Court of Cassation when he lodged his appeal, even though he carried the burden of proof that the decision to be executed was such that it would clearly have excessive consequences. The Committee also notes that after the appeal had been struck off the list, the author did not ask the first president of the Court of Cassation for the case to be reinstated and that, on the contrary, the author maintains that it was his own lawyer who requested abandonment of the proceedings. In these circumstances, the Committee considers that the author has not exhausted domestic remedies.

8. As a result, the Committee decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That the present decision will be communicated to the State party and to the author.

[Adopted in English, Spanish and French (original). The text will also be translated into Arabic, Chinese and Russian, for inclusion in the annual report.]

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[1] See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, inadmissibility decision adopted on 25 July 2005, para. 4.3; and communication No. 1446/2006, *Wdowiak v. Poland*, inadmissibility decision adopted on 31 October 2006, para. 6.2.