COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF POITRIMOL v. FRANCE

(Application no. 14032/88)

JUDGMENT

STRASBOURG

23 November 1993

In the case of Poitrimol v. France*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr M.A. LOPES ROCHA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 May and 26 October 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the French Republic ("the Government") on 26 October and 11 December 1992, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 14032/88) against France lodged with the Commission under Article 25 (art. 25) by a French national, Mr Bernard Poitrimol, on 21 April 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case

* The case is numbered 39/1992/384/462. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 October 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr C. Russo, Mr S.K. Martens, Mr I. Foighel, Mr R. Pekkanen, Mr A.N. Loizou, Sir John Freeland and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 5 April 1993 and the Government's memorial on 6 April. On 7 May 1993 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 20 April 1993 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 May 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr B. GAIN, Head of the Human Rights Section,
Legal Affairs Department, Ministry of Foreign Affairs,
Agent,

Miss M. PICARD, magistrat
on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,

Mr A. MARON, Judge
of the Versailles Court of Appeal,

Mrs M. INGALL-MONTAGNIER, magistrat
on secondment to the Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;

- for the Commission

Mr A. WEITZEL, *Delegate*;

- for the applicant
Mr A. MARTI, avocat, *Counsel*.
The Court heard addresses by Mr Gain, Mr Weitzel and Mr Marti.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Bernard Poitrimol married Miss Catherine Bisserier in February 1973. There were two children of this marriage, born on 23 January 1974 and 18 February 1975.

A. The divorce proceedings

8. On a petition by the applicant's wife, the Paris tribunal de grande instance granted a divorce on 5 January 1982 on the grounds of fault by her husband, awarded her custody of the children and allowed Mr Poitrimol the right to have them visit him or stay with him.

9. On 20 February 1984 the Paris Court of Appeal varied that decision. It pronounced divorce on the grounds of fault by both spouses and upheld the other provisions after studying a social inquiry report on the children's living conditions with their mother.

10. The applicant did not appeal on points of law against the Court of Appeal's judgment but lodged a complaint against his former wife alleging that she had committed forgery and uttering during the divorce proceedings. On 7 July 1988 the Paris Court of Appeal sentenced Mrs Poitrimol to a fine of 10,000 French francs (FRF) for having produced four false certificates supposedly from her employers.

11. In September 1984, when exercising his right of access to the children, the applicant had left French territory and taken his two children to Turkey.

12. Mr Poitrimol applied to the matrimonial causes judge at the tribunal de grande instance in Marseilles, where the applicant's former wife now lived, for custody of the children. On 24 October 1985 the judge awarded custody to both parents jointly and made an order that the father should return at least temporarily to France, within three months at most, in order that the children should be interviewed. If, for reasons other than circumstances beyond his control, the applicant did not comply with the time-limit, the mother would continue to have sole custody.

B. The proceedings for failure to return the children

13. On 8 October 1984 Mrs Poitrimol lodged a complaint alleging failure to return children.

1. At the Marseilles Criminal Court

14. On 19 December 1985 the investigating judge committed the applicant for trial at the Marseilles Criminal Court.

15. Mr Poitrimol did not return to France but sought leave to avail himself of Article 411 of the Code of Criminal Procedure (see paragraph 23 below). The court gave leave and he was represented at the trial on 3 March 1986 by two counsel, who filed pleadings in which they asked for their client and his children to be examined on commission and, in the alternative, for him to be acquitted. They submitted that the defendant had acted under irresistible mental duress owing to the risk of harm to the physical health and psychological balance of his children, having regard to the behaviour of their mother and her lovers.

16. In a judgment delivered after proceedings deemed to be inter partes the court sentenced him on the same day to a year's imprisonment and issued a warrant for his arrest.

2. In the Aix-en-Provence Court of Appeal

17. On 5 March 1986 counsel for Mr Poitrimol lodged an appeal and the prosecution immediately did likewise.

18. Although he had been summoned to the hearing on 10 September 1986, the applicant did not appear in person. His lawyer, Mr Schmerber, said that his client wished to be tried in absentia and defended in court by his counsel; he proceeded to make submissions similar to those he had filed at the trial. In an interlocutory judgment the Aix-en-Provence Court of Appeal adjourned the case to 4 February 1987 and, under the third paragraph of Article 411 of the Code of Criminal Procedure, ordered that Mr Poitrimol should be summoned again as it considered his presence in court to be necessary.

19. The applicant did not attend the new hearing, but Mr Schmerber did and made supplementary submissions asking the court to uphold his pleadings of 10 September and authorise him to represent his client.

20. On 25 February 1987, pursuant to Article 410 of the Code of Criminal Procedure (see paragraph 23 below), the Court of Appeal, taking its decision after proceedings deemed to be inter partes, delivered a judgment in which it refused the latter request on the following grounds:

> "While a defendant summoned for an offence punishable, as in the instant case, by a term of imprisonment of less than two years may, by letter to the presiding judge, apply to be tried inter partes in his absence but represented by counsel, pursuant to the first and second paragraphs of Article 411 of the Code of Criminal Procedure, it is a

principle, and is apparent from the general scheme of the Code of Criminal Procedure, that this is a right which does not apply where, as in Mr Poitrimol's case, a warrant has been issued for the defendant's arrest and the defendant has absconded and is accordingly not entitled to instruct counsel to represent and defend him ...;

That being so, the Court will try the case on the merits without the defendant, Bernard Poitrimol, being able to be represented by Mr Schmerber."

It also ruled that the pleadings of 10 September 1986 were inadmissible and upheld the impugned judgment in its entirety.

3 In the Court of Cassation

21. Through a member of the Conseil d'Etat and Court of Cassation Bar the applicant appealed on points of law against the Court of Appeal's judgment. In substance he argued that Article 411 previously cited was incompatible with the Convention.

On 21 December 1987 the Court of Cassation declared the appeal inadmissible on the grounds that a convicted person who had not surrendered to a warrant issued for his arrest was not entitled to instruct counsel to represent him and lodge an appeal on points of law on his behalf against his conviction.

22. Mr Poitrimol submitted a petition for pardon, which was rejected by the French President on 21 November 1989.

II. RELEVANT DOMESTIC LAW

23. The main provisions of the Code of Criminal Procedure mentioned in the case are the following:

Article 410

"An accused on whom a summons has been served personally in the proper manner must appear unless he provides an excuse that is accepted as valid by the court before which he has been summoned. An accused shall be under the same obligation where it is established that, even though the summons was not served on him personally, he was made aware by the means provided for in Articles 557, 558 and 560 that he had been properly summoned.

If these conditions are satisfied, an accused who fails to appear and has not been excused from doing so shall be tried as if he were present."

The Court of Cassation has held this provision to be compatible with the Convention (Beltikhine, 16 December 1985) but sometimes quashes judgments in which no ruling has been made on whether there was a valid excuse as argued by the defendant (Grenier, 9 June 1993) or no finding made as to whether the defendant had been made personally aware of the date of the hearing (Tourtchaninoff, 10 June 1992).

Article 411

"An accused summoned in connection with an offence punishable by a fine or a term of imprisonment of less than two years may, by letter to the presiding judge which shall be placed in the file on the proceedings, apply to be tried in absentia.

In that case his counsel shall be heard.

However, if the court considers it necessary for the accused to appear in person, he shall be summoned again, at the instance of the prosecution, to a hearing on a date which shall be fixed by the court.

An accused who fails to comply with this summons shall be tried as if he were present.

He shall likewise be tried as if he were present in the eventuality provided for in the first paragraph of this Article."

According to the case-law of the Court of Cassation, where an accused who fails to appear and has not been excused from doing so is tried as if he were present, his counsel can neither be heard nor file pleadings (Criminal Division, 29 October 1970, Bulletin criminel (Bull.) no. 284; 5 May 1970, Bull. no. 153).

It is not possible to apply to a court to set aside a judgment it has given in the accused's absence and rehear the case (opposition) (see Articles 489 and 512 below) where the judgment was given after proceedings deemed to have been inter partes.

Article 417

"An accused who appears may instruct counsel to assist him.

If he has not done so before the hearing and nevertheless asks to be assisted, the presiding judge shall assign counsel officially.

Counsel may be chosen or appointed only from among the members of a Bar ...

The assistance of counsel is compulsory where an accused suffers from an infirmity of a kind likely to jeopardise his defence."

Article 489

"A judgment in absentia shall be null and void in all its provisions if the accused applies to the court which gave it to set it aside and rehear the case.

..."

Article 512

"The rules laid down in respect of the Criminal Court shall apply in the Court of Appeal ..."

Article 576

"Notice of an appeal on points of law must be given to the registrar of the court which has delivered the decision being challenged.

It must be signed by the registrar and by the applicant himself or by an attorney (avoué) of the court that has given judgment or by a specially authorised agent: in the last-mentioned case, the authority to act shall be annexed to the document drawn up by the registrar ...

..."

Article 583

"If a person sentenced to a term of imprisonment of more than six months has not surrendered to custody and has not obtained from the court which convicted him exemption, on or without payment of a surety, from the obligation to surrender to custody, his right to appeal on points of law shall be forfeit.

The memorandum of imprisonment or the judgment granting exemption shall be produced before the Court of Cassation not later than the time when the case is called for hearing.

For his appeal to be admissible, it is sufficient for the applicant to establish that he has surrendered to custody at a prison, either in the place where the Court of Cassation sits or in the place where sentence was passed; the chief warder of that prison shall take him into custody there on the order of the Principal Public Prosecutor at the Court of Cassation or of the head of the public prosecutor's office at the court of trial or appeal."

The Court of Cassation has already decided on several occasions that it follows from the general principles underlying the Code of Criminal Procedure that a convicted person who has not surrendered to a judicial warrant for his arrest and has evaded execution of it is not entitled to appeal on points of law against the decision whereby he was convicted (Criminal Division, 30 November 1976 and 26 June 1978, Juris- Classeur périodique 1980, II, 19437; 24 April 1985, Bull. no. 157; 10 December 1986, Recueil Dalloz-Sirey 1987, p. 165). It has pointed out, however, that the situation may be different where a convicted person can show that circumstances made it impossible for him to surrender to custody in good time (Criminal Division, 21 May 1981, Bull. no. 168).

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Poitrimol applied to the Commission on 21 April 1988. Relying on Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention, he alleged that he had not had a fair trial in that his counsel had not been heard by the Court of Appeal and that he had not validly been able to appeal on points of law.

25. The Commission declared the application (no. 14032/88) admissible on 10 July 1991. In its report of 3 September 1992 (made under Article 31) (art. 31), it expressed the opinion by fourteen votes to one that there had been a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) taken together during the proceedings in the Court of Appeal and a violation of paragraph 1 of that Article (art. 6-1) at the stage of the proceedings in the Court of Cassation. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

26. In their memorial the Government asked the Court to dismiss the two complaints raised by Mr Poitrimol.

27. The applicant requested the Court to

> "Hold that, more especially in the Aix-en-Provence Court of Appeal, [he] ha[d] not had a fair trial and, in particular, had not had the right to defend himself, in accordance with the provisions of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention;
>
> Hold that the Court of Cassation ha[d] violated Article 6 para. 1 (art. 6-1), and in particular the right to ... a fair hearing, by holding the applicant's appeal to be inadmissible".

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 277-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (c) (art. 6-1, art. 6-3-c)

28. Mr Poitrimol complained that the Aix-en-Provence Court of Appeal had convicted him in absentia without his counsel being able to put the case for the defence. He also complained that he had been refused access to the Court of Cassation on the ground that he had not surrendered to the warrant for his arrest. He alleged a breach of paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c) of the Convention, which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing ...;
>
> ..."

The Government rejected this submission but the Commission accepted it.

29. As the requirements of paragraph 3 of Article 6 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1 (art. 6-1), the Court will examine the complaints under both provisions taken together (see, among many other authorities, the F.C.B. v. Italy judgment of 28 August 1991, Series A no. 208-B, p. 20, para. 29).

30. This case differs from the Goddi, Colozza, F.C.B. and T. v. Italy cases (judgments of 9 April 1984, Series A no. 76, p. 10, para. 26; 12 February 1985, Series A no. 89, p. 14, para. 28; 28 August 1991, previously cited, Series A no. 208-B, p. 21, paras. 30-33; and 12 October 1992, Series A no. 245-C, p. 41, para. 27) in that the applicant was notified of each of the hearing dates, including the one of the Court of Appeal hearing on 4 February 1987, and decided of his own accord not to appear.

31. Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact (see, mutatis mutandis, the Colozza judgment previously cited, Series A no. 89, p. 14, para. 27, and p. 15, para. 29). It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself, but

at all events such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see the Pfeiffer and Plankl v. Austria judgment of 25 February 1992, Series A no. 227, pp. 16-17, para. 37).

32. In the present instance the applicant had clearly expressed his wish not to attend the appeal hearings on 10 September 1986 and 4 February 1987 and thus not to defend himself in person. On the other hand, it is apparent from the evidence that he intended to be defended by a lawyer instructed for the purpose, who would attend the hearings.

The question accordingly arises whether an accused who deliberately avoids appearing in person remains entitled to "legal assistance of his own choosing" within the meaning of Article 6 para. 3 (c) (art. 6-3-c).

33. The Government pointed out that the provision in question referred to "assistance" and not "representation". In French law, they continued, the former term meant that the accused was present beside his counsel, whereas the latter term meant that he was legally replaced by the lawyer. In criminal matters, appearance in person was the rule, as set out in Article 410 of the Code of Criminal Procedure. Choosing not to appear meant declining to defend oneself. Mr Poitrimol, who was aware of the consequences of his attitude, had of his own volition put himself in the position of being tried by the Court of Appeal without his counsel, Mr Schmerber, being heard and he bore the responsibility for this. If judgments delivered in absentia could be set aside and rehearings granted on applications to the courts which gave them from individuals who had absconded, criminal proceedings would never end and the victims would suffer by that.

The applicant submitted that this argument ran counter to Resolution (75) 11 of the Council of Europe's Committee of Ministers "on the criteria governing proceedings held in the absence of the accused". Under the fifth of the nine "minimum rules" that member States were recommended to apply, "Where the accused is tried in his absence, evidence must be taken in the usual manner and the defence must have the right to intervene". For the Aix-en-Provence Court of Appeal and the Court of Cassation to have given judgment without affording the applicant any opportunity to be represented, to file submissions through his counsel and to have them taken into consideration was contrary to the letter and spirit of Article 6 para. 1 (art. 6-1) of the Convention. The system was a coercive one, because it was designed to compel the accused to appear and thus lay himself open to execution of the warrant for his arrest.

34. The Court cannot adopt the Government's narrow interpretation of the word "assistance". Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right

merely on account of not being present at the trial (see the Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, p. 45, para. 99, and, mutatis mutandis, the Goddi judgment previously cited, Series A no. 76, p. 12, para. 30, and the F.C.B. judgment previously cited, Series A no. 208-B, p. 21, para. 33). In the instant case it must be determined whether the Aix-en-Provence Court of Appeal was entitled under Article 411 of the Code of Criminal Procedure to deprive Mr Poitrimol of this right, given that he had been summoned personally and had provided no excuse acknowledged as valid for not attending the hearing.

35. It is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim - whose interests need to be protected - and of the witnesses.

The legislature must accordingly be able to discourage unjustified absences. In the instant case, however, it is unnecessary to decide whether it is permissible in principle to punish such absences by ignoring the right to legal assistance, since at all events the suppression of that right was disproportionate in the circumstances. It deprived Mr Poitrimol, who was not entitled to apply to the Court of Appeal to set aside its judgment and rehear the case, of his only chance of having arguments of law and fact presented at second instance in respect of the charge against him.

36. As to the Court of Cassation, the Government said that access to it was subject to rules designed to achieve a fair balance between the rights of society and of civil parties to criminal proceedings and the rights of the defence. In the light of the Ashingdane v. the United Kingdom judgment of 28 May 1985 (Series A no. 93, pp. 24-25, para. 57), the formal rules of which the applicant complained were compatible with Article 6 (art. 6).

37. Under the case-law of the Criminal Division of the Court of Cassation, which was followed in this case, a convicted person who has not surrendered to a judicial warrant for his arrest cannot be represented for the purposes of an appeal on points of law. The applicant could not validly lodge such an appeal without giving himself up at a prison (Article 583 of the Code of Criminal Procedure).

38. The Court considers that the inadmissibility of the appeal on points of law, on grounds connected with the applicant’s having absconded, also amounted to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society. Admittedly, the remedy in question was an extraordinary one relating to the application of the law and not to the merits of the case. Nevertheless, in the French system of criminal procedure, whether an accused who does not appear may have arguments of law and fact presented at second instance in respect of the charge against him depends largely on whether he has provided valid excuses for his absence. It

is accordingly essential that there should be an opportunity for review of the legal grounds on which a court of appeal has rejected such excuses.

39. In the light of all these considerations, the Court finds that there was a breach of Article 6 (art. 6) both in the Court of Appeal and in the Court of Cassation.

II. APPLICATION OF ARTICLE 50 (art. 50)

40. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

41. Mr Poitrimol sought, firstly, compensation in the amount of FRF 1,288,010.78 for pecuniary damage. He said he had suffered a loss of opportunities in the French courts and in his everyday life on account of the need to live abroad. To this was to be added non-pecuniary damage, quantified at FRF 50,000, which he had suffered as a result of his forced exile.

In the Government's submission, it ill became the applicant to blame the French authorities for the damages arising from his allegedly having had to leave France and his job, since the proceedings in issue arose precisely on account of his absconding.

The Delegate of the Commission considered the allegations of a loss of opportunities to be justified but not those of pecuniary damage stemming from the applicant's departure for Turkey. He expressed no view as to non-pecuniary damage.

42. The Court cannot speculate as to what the Court of Appeal's conclusion would have been had it given the applicant leave to be represented. Furthermore, no causal link has been established between the breach of the Convention found in this case and the items of alleged damage caused by his absconding. The claims under this head must therefore be dismissed.

B. Costs and expenses

43. In respect of costs and expenses, Mr Poitrimol sought:

(a) FRF 53,688 for counsel instructed by him in the Court of Appeal proceedings;

(b) FRF 9,000 for the appeal on points of law; and

(c) FRF 130,000 for his being represented in the proceedings before the Commission and the Court.

44. Like the Government, the Court finds that the applicant would have incurred legal costs in the Court of Appeal even if that court had given him leave to be represented by counsel. This item of the claim must accordingly be disallowed. On the other hand, the claim appears justified in respect of the proceedings in the Court of Cassation.

45. Under the head of the Strasbourg proceedings the Court, making its assessment on an equitable basis, awards the applicant FRF 100,000, having regard to the circumstances of the case.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been a breach of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c);

2 Holds by eight votes to one that the respondent State is to pay to the applicant, within three months, 109,000 (one hundred and nine thousand) French francs for costs and expenses;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 November 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Ryssdal, Sir John Freeland and Mr Lopes Rocha;

(b) dissenting opinion of Mr Pettiti.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, SIR JOHN FREELAND AND LOPES ROCHA

1. We formed part of the minority which voted against the finding of a violation of Article 6 (art. 6) of the Convention in this case.

2. At the proceedings before the Marseilles Criminal Court on 3 March 1986, the applicant was, with the leave of the court, represented by two counsel who filed pleadings and made submissions on his behalf. He had chosen to remain abroad with his two children despite an earlier order by a civil court that he should return at least temporarily, with those children, to France. No complaint of unfairness is made by the applicant about the criminal trial, which resulted in the imposition on him of a sentence of a year's imprisonment and the issue of a warrant for his arrest.

3. Notwithstanding this outcome, the applicant remained abroad with the children and, although twice summoned by the Aix-en-Provence Court of Appeal to appear, did not attend at the hearings before that court. In his absence his lawyer asked to be authorised to represent him, but this request was refused by the court as being ill-founded in French law where, as in his case, a warrant had been issued for the defendant's arrest and the defendant had absconded.

4. Similarly, when the applicant appealed to the Court of Cassation, on points of law, against the Court of Appeal's judgment his appeal was dismissed on the grounds that a convicted person who had not complied with a warrant issued for his arrest was not, according to the relevant case-law, entitled to be represented or to give instructions for an appeal on points of law to be lodged on his behalf against his conviction.

5. In the view of the majority of the Court, the refusal of the request for legal representation before the Court of Appeal and the dismissal by the Court of Cassation of the appeal to it, on the grounds stated in each case, were "disproportionate" and thus amounted to breaches of Article 6 (art. 6). It is, however, not contested that the applicant, who must be assumed to have acted throughout with the benefit of legal advice, chose of his own volition and in defiance of the French courts (which were, of course, concerned not only with his own personal situation but also with rights of his former wife and the children) not to return to France. Had he done so and had he attended, as summoned, before the Court of Appeal he would have been entitled to the assistance of counsel there; and had he surrendered to the warrant for his arrest, the grounds on which his appeal to the Court of Cassation was dismissed would not have existed. The remedy was, in other words, at all material times in his own hands, and we do not see how it was "disproportionate" for the French system of justice to leave it there. Given that he must be taken to have been advised of the legal position it should not avail him now to say that, although he remained outside the jurisdiction of his own accord, he asked for legal assistance before the Court of Appeal and

to be legally represented for an appeal to the Court of Cassation. In circumstances such as those of this case, where no taint of unfairness is alleged against the criminal trial at first instance, the conditions imposed in relation to the appeals to the Court of Appeal and the Court of Cassation were not in our view such as to justify a finding against the French Republic of violation of the Convention.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority in support of the view that there had been no violation of Article 6 (art. 6) of the Convention.

In my opinion, the majority's decision introduces requirements into criminal procedure which go beyond those in Article 6 (art. 6).

The right of everyone charged with a criminal offence to be defended by a lawyer, of his own choosing or assigned officially, does not mean that an accused who, without any legitimate excuse, deliberately avoids appearing at the trial when he has been properly and effectively summoned can instruct counsel to represent him in order to be tried as if inter partes.

The obligation to appear in person is a vital part of criminal procedure; the rights of the victims and civil parties to the proceedings, who would otherwise be deprived of any opportunity of having the accused cross-examined, must be respected. One can imagine having the option of representation for minor offences - each national legislature can lay down the level of sentence at which representation by counsel is or is not permitted.

One can also imagine that at the cassation stage the possibility of appeal on points of law should be available even to those who have not appeared in the Court of Appeal.

If an accused can avoid any appearance in person, he prevents the trial from being fair within the meaning of Article 6 (art. 6) vis-à-vis the complaints, victims and civil parties.

Secondly, the Court's judgment does not take sufficient account of the fact that as a result of the judgment at first instance there was a warrant out for Mr Poitrimol's arrest.

Article 6 (art. 6) does not prohibit States from providing that the courts may issue arrest warrants where defendants have unjustifiably failed to appear.

In such cases, criminal procedure in some European States requires that an accused whose arrest has been ordered in a judgment at first instance must surrender to the warrant for his arrest if he is to be able to exercise his rights of appeal.

In my view, the Court should have distinguished the case in which a judgment is given in absentia without any arrest warrant being issued from the case of a judgment in which arrest is ordered.

In absentia proceedings are a major problem in Europe in ensuring the proper administration of criminal justice and in preventing a growing number of defendants from eluding justice altogether (20-25% in France).

Article 6 (art. 6) must be looked at as a whole and as part of the attempt to strike a balance between the interests of the State (through the courts and the prosecution service), the public and the parties.

Equality of arms must be considered not only in the relationship between accused and prosecution but also in the relationship between victims, civil parties and accused. If a defendant is absent because he has refused to appear, it may put the victim or the civil party to the proceedings at a disadvantage.

A criminal trial reflects a particular conception of criminal procedural law, which is in essence punitive. The obligation to appear in person is a major feature of any criminal procedure, subject to force majeure or a legitimate excuse.

Admittedly, national legislation may provide that for certain categories of offence an accused may be represented in his absence by counsel, whether automatically or subject to leave of the court; but the lack of such provision does not in itself amount to a breach of Article 6 (art. 6). Resolution (75) 11 of the Council of Europe's Committee of Ministers only embodies wishes and recommendations and has no effect on the interpretation of Article 6 (art. 6).

A system of criminal procedure forms a coherent, homogeneous whole, particularly where it provides for proceedings in absentia, setting aside and rehearing (opposition), repeated absence, procedure deemed inter partes and appeal. It must be looked at in its entirety and not divided up into parts considered separately, which would upset its structural balance.

In the French system, proper provision is made in Article 489 for applications to have judgments in absentia set aside and rehearings granted on applications to the courts which gave the judgments. Article 489 applies likewise on appeal (cf. A. Vitu, 'La réglementation de l'appel et de l'opposition dans le code de procédure pénale', Juris- Classeur périodique 1959, I, 1486; Cass. Crim. 15 September 1986; Bulletin criminel (Bull.) no. 256).

The French Code of Criminal Procedure contains a whole series of rules which meet the requirements of Article 6 (art. 6).

In particular, the provisions of Articles 410 et seq., 417, 487 and 489 afford a person charged with a criminal offence the opportunity of being tried as if he were present depending on various circumstances and leave him a number of options; if he chooses not to attend, he does so at his own risk if he cannot give a legitimate excuse.

The European Court's judgment in the case of Colozza v. Italy* related to a case in which it was impossible for a defendant who wished to appear in person to have a rehearing after a trial in absentia; the circumstances were therefore different.

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* Note by the Registrar: judgment of 12 February 1985, Series A no. 89.

French case-law, under which, where a defendant chooses to lodge an ordinary appeal (appel) rather than to apply to the original court for its judgment to be set aside and the case reheard, he thereby forfeits the latter possibility (Cass. Crim. 7 February 1984, Bull. Crim. no. 44; D. Poncet, 'Le jugement par défaut devant les juridictions pénales; quelques considérations de droit comparé', Revue de Science criminelle et de droit pénal comparé, 1979, pp. 1 et seq.), does not contravene Article 6 (art. 6) of the Convention.

In my view, the various aspects of the problem are not properly assessed in the Court's judgment. In the first place, the Court's decision might, wrongly, be interpreted as seeking to give the word "assistance" the meaning of "representation" and even of representation mandatory on the court - which is contrary to the traditional interpretation (cf. J. Velu and R. Ergec, La Convention européenne des Droits de l'Homme, Brussels, 1990, p. 497, para. 603; H. Golsong, W. Karl, H. Miehsler, H. Petzold, K. Rogge, T. Vogler and L. Wildhaber, Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Cologne, 1986, p. 196, to be compared with the studies of trial in absentia by R. Merle and A. Vitu, Traité de droit criminel, third edition, pp. 821 et seq.; G. Stefani, G. Levasseur and B. Bouloc, Précis de procédure pénale, fourteenth edition, pp. 928 et seq.)

Thus "The European Convention on Human Rights does not confer on an accused the right to impose on his lawyer a system of defence which the lawyer considers unsustainable" (Velu and Ergec, op. cit. p. 497, para. 602; application no. 9127/80, decision of 6 October 1981, Decisions and Reports 26, p. 238). Assistance normally presupposes the accused's presence beside his counsel (Golsong et al., op. cit, p. 191). States are entitled to enact in their legal systems a requirement that defendants appear in person.

In the second place, an accused is not entitled to demand to be represented when he refuses to appear in person.

Criminal law is by its very nature a punitive system which has to reconcile the maintenance of order with the protection of human rights. It is not merely the law of protection of those charged with criminal offences.

Criminal procedure must ensure this balance and cannot isolate one element from the other. It cannot be solely a means of protecting defendants without taking any account of the protection of victims.

Criminal trials must comply with the requirements of criminal law, which, by its philosophical foundation, entails the right to punish. A criminal trial is the manifestation of the values in whose name a society prosecutes and punishes.

Like a rule of law, the rules governing trials confer on parties to a trial precise rights and powers which cannot be separated from each other.

These rules are reciprocal, multilateral, "assigning, mandatory" (Gurvich, Traité de sociologie).

The defendant cannot impose his absence from the trial as he pleases in order to prevent the victim from being confronted with him.

The European Court has based all its case-law hitherto on the principle that it is essential for parties and witnesses to appear in person so that they may be confronted before the court, which the Court has held to be a vital feature of a fair trial.

It cannot be objected that representation by a lawyer makes up for the accused's absence. What might at a stretch be conceivable in cases where minor penalties and no civil parties are involved is inconceivable where, in order to be able to present his case, the civil party, the victim, needs to be able to challenge, to unmask his opponent, in cross-examination or under Continental procedure. Or else the civil party who is a victim must be given the right to refuse representation by a lawyer in order that equality of arms may be respected.

Whence it would follow that if the accused never wished to appear and if the victim never wanted him to be represented, society would no longer be in a position to ensure the operation of criminal justice. By a perverse aberration, it would then be the accused who controlled the trial and took the place of the prosecution and the court in conducting it - which would have the result of disarming the State in its major function of dispensing justice.

If civil parties to criminal proceedings or victims are deprived of equality of arms, the field is open to applications from them for breaches of Article 6 (art. 6).

The applicant's reasoning would have the following consequence, for example: a Mafia boss, drug-trafficker, terrorist or arsonist, duly summoned, refuses to appear in person and demands to be represented by his lawyer.

On this account, the trial will be curtailed, all identification by the victim under adversarial procedure will be impossible. The lawyer has only to contest guilt or challenge identification in order to prevent a conviction, to the detriment of the victim or civil party and to the detriment of the prosecution of the case. Such an option might conceivably be restricted to offences to which small penalties attach, but would that not be to add to the existing Convention?

In that eventuality would there not be discrimination between States - those which make criminal appeal (appel) subject to leave (which may be conditional on appearing in person at the trial) and those which give defendants an unrestricted right of appeal as in the French Code of Criminal Procedure. This would be a two-speed Europe in terms of criminal justice.

When a court issues an arrest warrant, this is not intended as a means of coercion against a defendant who has failed to appear but a legitimate application of the Criminal Code in order to uphold public policy (ordre public).

To maintain that failure to appear could be sanctioned by imposing a fine without any other form of coercion is not to the point. Someone who wishes

to elude justice will not fear a fine, which will not induce him to appear in court.

The arrangement of making appeals on points of law conditional on the convicted person surrendering to custody, pursuant to the warrant for his arrest, is another problem.

It is not connected with the problem of trial in absentia because warrants are also issued in proceedings which are fully inter partes.

This condition is comparable to the leave to appeal on points of law required in certain States. Abolishing such a requirement is conceivable, but would that not be to add to the Convention as it currently stands?

Does the Convention require that a court's right to issue an arrest warrant must be abolished or that a defendant must have an absolute, unlimited right to appeal on points of law even without surrendering to a warrant for his arrest?

As regards the issue of appeal on points of law and the conditions attaching to it where an accused has not surrendered to a warrant for his arrest, the Court of Cassation's reasoning refers to the general principles of the Code of Criminal Procedure, whereby "a convicted person who has not surrendered to a judicial warrant for his arrest and has evaded execution of it is not entitled to appeal on points of law".

Such a rule may be regretted in respect of appeals based specifically on points of law; however, it does not appear from Article 6 (art. 6) that such a rule is in itself a breach of the Convention, even if some writers would like to see the Code of Criminal Procedure reformed in this regard.

The impact of the Court's judgment is, admittedly, attenuated by the fact that the Court has not expressly determined the issue of arrest ordered in a judgment and the consequences of such a system in relation to the conditions for representation by a lawyer - a situation which, obviously, differs from the case of a defendant summoned to appear before the Court of Appeal and whose arrest has not been ordered in the judgment of a lower court and who seeks leave to be represented by a lawyer in the Court of Appeal in his voluntary absence.

But at all events, in my view, the Court has not taken sufficient account of the principle of balance underlying Article 6 (art. 6) or of the needs of a criminal policy whose aim is to avoid conferring any impunity or privilege on persons seeking deliberately to evade justice.

Criminal law is by definition punitive law. Its purpose is to punish those guilty of causing social disorder. Mr Salas has written "a trial is the place where the social fact is expressed". The philosophical and social choice of favouring at any cost an absent defendant and of making an absolute solely of the defendant's choice (as to whether or not to appear at the trial) may be a proposition in a Foucault-type conception of criminal justice; but in that case we should have to give up the traditional conception of punitive criminal law and replace it by a new system for which no State offers a

model. But that would be to make procedural requirements not provided for in the European Convention. Even Committee of Ministers Resolution (75) 11, which has no binding effect on member States, does not go as far as that; indeed, it implies that the Convention allows States to restrict the rights of those seeking to elude justice.

In this sphere of criminal procedure the spirit of the European Convention seems to me to correspond to the prevailing opinion of criminal-law specialists that victims and accused should be afforded safeguards of identical scope.