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

COURT (CHAMBER)

CASE OF CARDOT v. FRANCE

(Application no. 11069/84)

JUDGMENT

STRASBOURG

19 March 1991

In the Cardot case[*],

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 Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr S.K. MARTENS,
Mr J.M. MORENILLA,

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

Having deliberated in private on 26 October 1990 and 19 February 1991,

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") on 21 May 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11069/84) against the French Republic lodged with the Commission under Article 25 (art. 25) by a national of that State, Mr Jean-Claude Cardot, on 12 December 1983.

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 object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

[*] The case is numbered 24/1990/215/277. 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.

[***] The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

the respondent State of its obligations under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

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 24 May 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr B. Walsh, Mr R. Macdonald, Mr C. Russo, Mr S.K. Martens and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence on 29 June 1990, the Registrar received the Government's memorial on 10 September and the applicant's memorial on 24 September. On 18 October the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 9 July the Secretary to the Commission produced documents relating to the proceedings before it; the Registrar had asked for these on the President's instructions.

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 12 September that the oral proceedings should open on 24 October 1990 (Rule 38).

7. On 12, 16 and 24 October the Commission and the Government filed several documents.

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J.-P. PUISSOCHET, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,

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

Mr P. TITIUN, magistrat,
on secondment to the Department of Legal Affairs,
Ministry of Foreign Affairs,

Mr M. ROUCHAYROLE, magistrat,
on secondment to the Department of Criminal Affairs and Pardons, Ministry of Justice, *Counsel*;
- for the Commission
Mr J.-C. SOYER, *Delegate*;
- for the applicant
Mr C. ETELIN, avocat, *Counsel*.

The Court heard addresses by Mr Puissochet for the Government, Mr Soyer for the Commission and Mr Etelin for the applicant, as well as their replies to a question put by one of the judges.

9. On 14 and 20 November the Registrar received from the applicant's lawyer a supplementary memorial on the application of Article 50 (art. 50) of the Convention and a number of documents.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. Mr Jean-Claude Cardot is a French national and works as a road haulier.

On 2 August 1979 the public prosecutor at Valence (Drôme) applied to a local investigating judge for an investigation to be opened into, inter alia, the importing, exporting and transporting of drugs by a person or persons unknown. The police had just discovered an international organisation specialising in drug trafficking between the Middle East and Europe. The organisation had been active since 1978 and was made up of Iranian suppliers and French carriers, masterminded by Dutch nationals.

A. The judicial investigation

11. In August 1979 the investigating judge charged Mr Cardot and fourteen others with drug offences.

1. The applicant's conviction in Italy and his extradition to France

12. On 27 November 1979 the Italian police arrested Mr Cardot in Verona while he was carrying 455 kg of hashish in his lorry; the investigating judge at Valence was informed of the arrest on 30 November.

On 21 June 1980 the Verona District Court sentenced the applicant to five years and one month's imprisonment, but on appeal the Venice Court of Appeal reduced the sentence to three years and seven months.

13. On 21 December 1981 Mr Cardot was pardoned. He was not released, however, as an international warrant for his arrest had been issued by the investigating judge at Valence on 26 June 1980, and on 3 July the French Government had applied to the Italian authorities for his extradition. On 14 August 1980 Mr Cardot had been served with a further warrant for his arrest, issued by the same judge, on suspicion of inciting an attempt to import 1,080 kg of hashish and attempting to import 650 kg; the commission of the first offence had been frustrated only by a circumstance beyond his control (the arrest of the principal offender in Tehran), while commission of the second had been prevented by the applicant's arrest in Verona.

On 24 March 1981 the Venice Court of Appeal ruled in favour of extradition for the purposes of proceedings relating to participation in transporting drugs on three occasions in 1978. On 23 February 1982 the Ministry of Justice decided to extradite Mr Cardot, who was handed over to the French authorities on 23 March.

2. *Committal for trial of the applicant and his co-defendants and the trial of the latter*

(a) Committal for trial of the applicant and his co-defendants

14. In an order of 5 February 1981 the investigating judge committed Mr Cardot, who was still in Italy, and his co-defendants for trial at the Valence Criminal Court.

The applicant was charged, firstly, with having, in concert with his co-defendants, organised an association or a conspiracy to import and export drugs and of having imported and transported drugs and, secondly, of having aided and abetted the offences with which the other defendants were charged and of having attempted to import, export and transport hashish on two specific occasions.

(b) Trial of the applicant's co-defendants

15. The court gave judgment on 7 May 1981.

It decided to sever the proceedings against Mr Cardot on account of his being in custody in Italy (see paragraphs 12-13 above).

One of the defendants (Mrs Cuvillier) was acquitted on the ground that there was insufficient evidence, and six others were given either immediate custodial sentences (Mr Millo sixteen years, Mr Jacques Montaner sixteen years, and Mr Humbert eight years) or suspended sentences (Mr Kabayan three years, Mr Jean Montaner five years, and Mrs Sabatier five years).

As to the seven co-defendants who had not appeared, the court sentenced them in absentia to periods of imprisonment ranging from five to twenty years.

The judgment contained the following passages concerning Mr Cardot:

"It appears from the preliminary investigation and the hearing that in late March or early April 1978, on Cardot's instructions, a convoy of eight lorries driven by, among others, Cardot, Millo, Humbert and a driver from Jacques Montaner's firm carried chemicals and pharmaceuticals to Afghanistan, returning via Iran.

Two days after the arrival of Cardot's lorry at the Jacques Montaner depot at Charmes (Ardèche), Cardot and Millo dismantled the petrol tank and took out a number of metal boxes ... containing 300-400 kg of hashish ...

At all events, before the petrol tank was dismantled, Cardot had indicated to Millo that it contained hashish, whereas Montaner was confronted with a fait accompli.

...

Cardot subsequently asked Jacques Montaner and Millo, who agreed, to bring back a quantity of hashish when carrying car-wheel rims from Yugoslavia ...

When Cardot had arranged the rendez-vous, Millo and Jacques Montaner set off together during June 1978 ...

...

Cardot gave Jacques Montaner FRF 6,000, which did not even cover his expenses, while Millo received FRF 50,000 only after another journey to Iran.

...

For the petrol tanks fitted by the Dutchmen, Cardot went to two different boilermakers so as not to arouse suspicion ...

According to Millo and Montaner, the tanks measured 2.3m-2.5m x 0.8m x 0.8m and their components were charged to the Société Transpyrénées [Transpyrenean Company], in other words paid by Cardot (record of the hearing).

...

On returning from a trip to Afghanistan, Cardot suggested to Jean-Paul Humbert that he should engage in smuggling ...

At the end of July 1978 ... Humbert saw Cardot again, who told him that a petrol tank was ready.

...

Cardot, who went to Iran before Humbert, had arranged to meet him in the car park of Tehran Customs.

After his vehicle had been immobilised ..., Humbert, acting on Cardot's instructions, got in touch again with an Iranian, who escorted him to a warehouse in the centre of the working-class district of Tehran, where, at night, he watched two other Iranians load forty rectangular metal boxes into the tank ...

...

On Cardot’s instructions and accompanied by him, he took an empty lorry to Holland, where Cardot made a telephone call from the Novotel car park on the outskirts of Amsterdam.

Guided by André Bronkhorst in the car which Cardot had got into ..., Humbert left his trailer at the Dutchman’s disposal outside a warehouse ...

...

On his return to Charmes, still accompanied by Cardot, he was given FRF 120,000 by Cardot for transporting 700 kg of hashish.

...

At about the same time, likewise on Cardot’s instructions, Jacques Montaner went to Iran in his lorry in order to bring back a quantity of hashish ...

According to Montaner’s disclosures at the hearing, Cardot, Millo and Humbert also went to Iran, each with specially adapted petrol tanks, whereas his own was not adapted until he reached Iran.

...

Montaner travelled via France to Amsterdam, where he rang a telephone number he had been given by Cardot in order to contact Antonius Vriens, known as ‘Tony’, who took delivery from him.

After the petrol tank had been cut out with a chain-saw in a warehouse, Montaner unloaded the tins containing the hashish, came back to France and subsequently received from Cardot payments of FRF 20,000, FRF 50,000 and FRF 10,000 on account, i.e. FRF 80,000 in all for the two journeys, this one and the one that had been made to Yugoslavia in June.

...

At Cardot’s instigation, Millo returned to Tehran by air on 30 September 1978 in order to collect his lorry, which he had left in Iran on 26 August and which Cardot had said was now ‘ready’ ...

...

From the statements of the various defendants and persons charged and inquiries made in Holland it appears that Van Dam Gybertus financed the operation and was the person for whom the consignments of drugs carried by the hauliers were ultimately intended.

...

André Bronkhorst, an important member of the organisation, took delivery in Amsterdam in August 1978 of the drugs brought from Iran by Humbert and Cardot.

...

Esser got Cardot involved in smuggling hashish ...

...

Gérardus Waterloo went to Valence several times in June 1978 to make specially adapted petrol tanks together with Van Vemde and Cardot.

...

In sum, as regards the transport of drugs, it has been established that:

1. In March 1978 Cardot and Millo took part in importing 400 kg of hashish from Afghanistan and exporting it.

2. In June 1978 Cardot, Jacques Montaner and Millo took part in importing 1,500 kg of hashish from Yugoslavia and exporting it to Holland.

3. In July 1978 Cardot and Humbert took part in importing 700 kg of hashish from Iran and exporting it to Holland.

4. In August 1978 Cardot and Jacques Montaner took part in importing 600 kg of hashish from Iran and exporting it to Holland.

5. In late September or early October 1978 Cardot incited an attempt to import 1,080 kg of hashish from Iran.

...

8. In November 1979 Cardot attempted to import and export 650 kg of hashish.

...

The offence of importing prohibited goods - in this instance 10 kg of morphine, 7 kg of heroin and more than 3,500 kg of hashish, with a total value of 47 million francs -, which is punishable under Articles 38, 215, 373, 414, 417, 419 and 435 of the Customs Code, has been made out.

The foregoing offence is imputable to Jacques Montaner, Millo, Humbert, Jean Montaner, Kabayan, Sabatier, Cardot, Sarrafinehad, Van Dam, Bronkhorst, Van Vemde, Vriens, Esser and Waterloo severally, the proceedings against Cardot having, however, been severed.

..."

(c) The appeals by some of the applicant's co-defendants

16. Five of those convicted appealed and on 18 February 1982 the Grenoble Court of Appeal gave judgment. It acquitted two of them (Mr Jean Montaner and Mrs Sabatier) on the grounds that there was insufficient

evidence, and reduced the prison sentences of the three others (Mr Humbert, Mr Millo and Mr Jacques Montaner) by a quarter.

In its judgment the court indicated that they had all claimed to have received their instructions from Mr Cardot, who was repeatedly named in the text. The judgment included the following references:

"...

It is apparent from the case file and the oral proceedings that in March 1978 Gérard Roucaries put Jean-Claude Cardot in touch with the Dutchman Esser Stanley, known as Carlos, who proposed to Jean-Claude Cardot - who was then in the business of road haulage to the Middle East - that he should carry hashish against payment of 100,000 French francs per tonne. Jean-Claude Cardot accepted this proposal, and in late March or early April 1978, on Cardot's instructions, a convoy of eight lorries driven by, among others, Cardot, Millo, Humbert and a driver from Jacques Montaner's firm carried chemicals and pharmaceuticals to Afghanistan, returning via Iran.

Two days after the arrival of Cardot's lorry at the Jacques Montaner depot at Charmes (Ardèche), Cardot and Millo dismantled the petrol tank ...

...

Cardot subsequently asked Jacques Montaner and Millo, who agreed, to bring back a quantity of hashish when carrying car-wheel rims from Yugoslavia.

When Cardot had arranged the rendez-vous, Millo and Jacques Montaner set off together ...

...

On returning from a trip to Afghanistan, Cardot suggested to Jean-Paul Humbert that he should engage in smuggling.

...

After his vehicle had been immobilised ..., Humbert, acting on Cardot's instructions, got in touch again with an Iranian ...

...

On Cardot's instructions and accompanied by him, he took an empty lorry to Holland ...

...

At about the same time, likewise on Cardot's instructions, Jacques Montaner went to Iran in his lorry in order to bring back a quantity of hashish.

...

Francis Millo admitted at the hearing that ... he had driven a consignment of hashish from Valence to Holland that had just been brought from Iran by Jean-Claude Cardot.

...

At Cardot's instigation, he returned to Tehran by air on 30 September 1978 in order to collect his lorry, which Cardot had said was now 'ready'.

..."

3. The investigation in respect of the applicant

17. Mr Cardot was summoned to appear before the Valence Criminal Court on 2 April 1982.

On the same day, on an application by the prosecution, the court ordered that further inquiries should be made into the facts and that the defendant should remain in custody. On an appeal against the latter decision, the Grenoble Court of Appeal upheld the lower court's decision on 19 May 1982.

18. On 17 June the Valence Criminal Court appointed an investigating judge to carry out the further inquiries.

19. The judge questioned Mr Cardot on 28 June and 30 July 1982.

20. He also confronted Mr Cardot with the four main witnesses: Mr Humbert, Mr Millo, Mr Jean Montaner and Mr Jacques Montaner on 12, 13, 16 and 26 July respectively (see paragraphs 15 and 16 above).

On each occasion, in the presence of Mr Cardot and his lawyer, the investigating judge read out the statements that the witnesses had made to the police on 21 and 23 October 1979 and 19 February 1980. Mr Humbert, Mr Millo and Mr Jacques Montaner confirmed them.

The applicant disputed certain points in Mr Millo's and Mr Jean Montaner's statements; Mr Montaner had retracted certain things he had said to the police and to the courts. Mr Cardot also questioned the witnesses through his lawyer. He applied successfully for the record of his confrontation with Mr Jean Montaner to be amended and had further questions put to him.

B. The court proceedings

1. At the Valence Criminal Court

21. The trial at the Valence Criminal Court opened on 1 September 1982. The prosecution did not deem it necessary to call as witnesses the four people with whom Mr Cardot had been confronted, and the accused himself did not make any written application for evidence to be heard from them.

The court adjourned the case to 17 September so that the national head office of the Customs investigations branch could be represented as a civil party.

22. During the hearing on 17 September Mr Cardot gave an account of himself in relation to the charges against him. He again challenged the statements that his former co-defendants had made to the police, pointing out that they had varied, but he did not apply for the persons concerned to be called.

23. On the same day the court sentenced him to six years' imprisonment. He was found guilty as charged; the court did not take into account the offences of which he had been convicted by the Venice Court of Appeal (see paragraph 12 above).

The judgment referred to the statements of the former co-defendants:

"...

... Millo stated that Cardot had used the time to have his trailer equipped with a specially adapted petrol tank made in Iran.

It appeared from Humbert's statements that Cardot had had contacts concerning the transport of smuggled goods - Cardot did not deny this but claimed that the goods in question were carpets -, that when he (Humbert) drove his lorry with its specially adapted petrol tanks to Tehran, Cardot had told him that he could be paid FRF 120,000 per journey, that he had indeed heard conversations between Cardot and a Dutchman on the subject of drugs ...

For his part, Millo said that during his stay in Tehran, at that time, Cardot suggested to him that he should have his lorry loaded with hashish to take back to France, and Montaner stated that on returning from Afghanistan Cardot brought round 400-500 kilos of drugs, which had been collected by another lorry.

...

Millo said that the four petrol tanks had been made for Cardot by Van Vemde ...

...

While returning to France on or about 8 or 10 August 1978 Cardot met Millo in Turkey; the latter said during the further inquiries into the facts that Cardot had told him on that occasion that his lorry was carrying hashish; he even told Montaner that he had brought back hashish on this journey.

Millo stated categorically that on his return to France 400 kilos of hashish remained from Cardot's consignment; ...

...

Montaner and Millo stated categorically that Cardot was behind the transporting of hashish from Yugoslavia; Montaner and Millo said that Cardot had organised the journey and given all the necessary instructions; ...

...

But in his original statements Humbert had said that ten or twelve days after this journey to Holland Cardot had paid him FRF 120,000 in cash in France ...

...

Cardot denied any involvement in the journey allegedly made to Lille by Montaner and himself together with Millo ...; Montaner and Millo, however, had said that all three of them had stopped at the Novotel in Lille before Millo continued his journey to Holland; the Dutchman Tony Vriens had joined them; Montaner had said that this Dutchman had given Cardot a bag containing money; Cardot had given him two bundles each containing FRF 50,000 in 500-franc notes and he had given one of these bundles of notes to Millo.

..."

2. In the Grenoble Court of Appeal

24. Mr Cardot, the civil party and the prosecution appealed, and the Grenoble Court of Appeal gave judgment on 17 March 1983. It upheld the lower court's judgment as regards Mr Cardot's guilt and increased the sentence to seven years' imprisonment.

The part of its judgment headed "The facts" contained the following:

"It appears from the police inquiries, from the judicial investigation and from the partly confirming judgment of this Court on 18 February 1982 [(see paragraph 16 above)] that the facts are established as follows:

...

... The judicial investigation established that [the traffickers] were divided into three groups: ... and, lastly, the carriers, consisting of Francis Millo, Jacques Montaner and Jean-Paul Humbert, who subsequently formally implicated Jean-Claude Cardot, whom they described as the intermediary between the Dutch and themselves.

...

For his part, Jean-Paul Humbert stated that on this occasion Cardot introduced him to two Dutchmen, 'Tony' and 'Carlos' ...

...

Jacques Montaner and Francis Millo ... stated that they made this journey at Cardot's request in order to bring back a consignment of hashish. ... Millo stated that Cardot helped to load the lorry ...

...

According to [Cardot's mistress], who confirmed Humbert's and Jacques Montaner's statements, Cardot helped Van Vemde and Waterloo to make specially adapted petrol tanks, but Cardot denied this. ...

...

> Furthermore, during the trial in this Court on 18 February 1982 Millo stated ... that on that journey he had driven a consignment of hashish from Valence to Holland that had just been brought from Iran by Jean-Claude Cardot. He also stated that after meeting Cardot in Ankara he took his vehicle to Tehran and came back to France, subsequently returning to Tehran by air at Cardot's instigation on 30 September 1978 in order to collect his lorry, which Cardot had told him was 'ready'. ...
>
> ...
>
> The various French lorry drivers involved in this trafficking, in particular Jacques Montaner, Francis Millo and Jean-Paul Humbert, who were convicted by this Court on 18 February 1982, all stated that they had received their instructions from Jean-Claude Cardot. ..."

25. At the hearing of the appeal the prosecution had considered "the facts ... completely established by the evidence in the file and in the concordant statements made by Jacques Montaner, Jean-Paul Humbert and Francis Millo during the judicial investigation and at the hearing in the Court of Appeal which led to their conviction".

Mr Cardot had challenged all the prosecution evidence. In particular, he had asserted that "Montaner's and Millo's statements [were] untrue and malicious and ha[d] no other purpose than to minimise their own responsibility" and that "the Grenoble Court of Appeal's judgment of 18 February 1982 [could not] be used in evidence against him". He had not, however, made any application for witnesses to be called.

3. In the Court of Cassation

26. Mr Cardot appealed on points of law. One of his three grounds of appeal was based on failure to comply with Articles 485 and 593 of the Code of Criminal Procedure, lack of reasons, absence of any legal basis and a breach of the rights of the defence.

He criticised the Grenoble Court of Appeal for having

> "found [him] guilty of the charges against him by reference to the terms of a judgment delivered on 18 February 1982 by the Grenoble Court of Appeal in a case brought by the public prosecutor's office against other defendants, and to the hearing which [had] preceded that judgment.
>
> The court, however, has to reach its verdict in the light of the particular circumstances of the case and not by reference to cases already tried; by referring to an earlier decision given in respect of other defendants and concerning facts which were necessarily distinct from those then before it, the Court of Appeal [had] not give[n] its decision any legal basis."

He ended this ground of appeal as follows:

> "It follows in reality that the appellant was tried on the basis not of the evidence uncovered by the investigation or by the hearing which preceded his conviction but of evidence from an earlier decision, to which he was not a party, and of a hearing during which he had not been able to put forward his defence.

The reference thus made in the judgment of the Court of Appeal to the contents of an earlier decision and, above all, to the hearing which preceded that decision to which the appellant was not a party manifestly amounts to a violation of the rights of the defence.

..."

27. The Criminal Division of the Court of Cassation dismissed the appeal on 13 February 1984. As regards the ground of appeal in question, it said:

"It appears from the impugned judgment of the Court of Appeal and from the lower court's judgment, whose reasoning the Court of Appeal adopted to the extent that it was not inconsistent, and from the case file that Cardot, a road haulier, took part in substantial smuggling of hashish between Iran and the Netherlands, in particular by organising, preparing and carrying out the transport of the drug as well as the manufacture and fitting in France of hidden compartments on lorries.

In order to found its belief as to the importance of Cardot's role in organising the smuggling, the Grenoble Court of Appeal referred to the findings of another judgment it had given on 18 February 1982, in relation to proceedings against all the other members of the criminal organisation and from which Cardot's case had been severed, on the direction of the court of first instance, because he was in custody in Italy for separate offences.

As copies of that judgment of the Court of Appeal and of the judgment it upheld have been added to the case file, the Court of Cassation is able to satisfy itself that, in holding as it did, the Court of Appeal in no way infringed the rights of the defence.

The courts have unfettered discretion to assess the weight of the various pieces of evidence, provided that, as in the instant case, this evidence was adduced in adversarial proceedings; it is accordingly wholly permissible to file documents from other proceedings.

It follows that this ground of appeal must be rejected."

II. THE RELEVANT DOMESTIC LEGISLATION

28. Before the Convention institutions the Government and the applicant mentioned or relied on several provisions of the Code of Criminal Procedure. The main ones were the following:

Article 427

"Unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge, and the court shall reach its decision on the basis of being satisfied beyond reasonable doubt (intime conviction).

The court may only base its decision on evidence which has been adduced during the trial and discussed before it inter partes."

Article 437

"Anyone called to be heard as a witness shall be required to appear, to take the oath and to give evidence."

Article 438

"A witness who fails to appear or who refuses either to take the oath or to give evidence may, on an application by the public prosecutor, be punished by the court as provided for in Article 109."

Article 439, first paragraph

"If a witness fails to appear and has not put forward any excuse recognised as being valid and legitimate, the court may, on an application by the public prosecutor or of its own motion, order the witness to be brought before it immediately by the police in order to be examined or adjourn the case."

Article 444, third paragraph

"With the court's leave, evidence may also be given by persons suggested by the parties and who are present at the beginning of the trial but have not been formally summoned."

Article 513, second paragraph

"Witnesses shall be heard only if the court [of appeal] so orders."

Article 590, first paragraph

"Pleadings shall contain the grounds of appeal to the Court of Cassation and shall refer to the statutory provisions which it is claimed have been disregarded."

PROCEEDINGS BEFORE THE COMMISSION

29. In his application of 12 December 1983 to the Commission (no. 11069/84) Mr Cardot complained that he had been convicted on the strength of evidence gathered in connection with proceedings to which he had not been a party and that he had not had an opportunity, either at his trial or on appeal, to challenge or have challenged those who had testified against him.

He also impugned his conviction for aiding and abetting an offence for which the principal offender, who had been amnestied in Iran, could no longer be prosecuted in France. He alleged, lastly, that the Court of Cassation, because of the insufficient reasoning in the judgment of the

Grenoble Court of Appeal, had not been able to satisfy itself that the principle of non bis in idem had been complied with.

30. On 7 September 1989 the Commission declared the last two complaints inadmissible, but declared the application admissible as regards the conduct of the judicial investigation and the court proceedings.

In its report of 3 April 1990 (made under Article 31) (art. 31), the Commission expressed the opinion that there had been a breach of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d). The full text of the Commission's opinion, which was unanimous, is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

31. At the hearing the Government maintained the submissions in their memorial. In this they had asked the Court to hold that there had been no violation of Article 6 (art. 6) of the Convention for a number of reasons, arguing in the first place that domestic remedies had not been exhausted and, in the alternative, that the application was unfounded.

Counsel for the applicant asked the Court to hold that there had been a violation of paragraphs 1 and 3 (d) taken together.

AS TO THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTION

32. The Government's main submission, which was the same as that made before the Commission, was that Mr Cardot had not exhausted domestic remedies as he had failed to raise in the French courts, even in substance, the complaint based on a violation of Article 6 para. 3 (d) (art. 6-3-d) of the Convention.

The applicant had not called any witnesses in the Criminal Court proceedings or asked the Court of Appeal to summon any, as he was entitled to do under Article 437 and Article 513, second paragraph, of the Code of Criminal Procedure (see paragraph 28 above). Furthermore, in his appeal on points of law to the Court of Cassation he had impugned the

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 200 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

appeal court's judgment of 17 March 1983 only by reference to the judgment of 18 February 1982 concerning the appeals of his former co-defendants (see paragraph 26 above); he had not raised any issue concerning the hearing of witnesses either expressly or by implication.

33. The Delegate of the Commission submitted, on the contrary, that Mr Cardot had satisfied the requirements of Article 26 (art. 26) of the Convention by appealing on points of law. In claiming that the use of evidence gathered in other proceedings was contrary to the rights of the defence, he had in substance complained of not having had a fair trial; by challenging the reasoning in the Grenoble Court of Appeal's judgment, he had implicitly criticised the taking of evidence during his appeal, including the failure to examine witnesses at the hearing.

34. The Court does not accept this argument. Admittedly, Article 26 (art. 26) must be applied with some degree of flexibility and without excessive formalism (see, among other authorities, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 26, para. 72), but it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be made subsequently at Strasbourg should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (ibid., pp. 25-27, paras. 71-72; see also the decision of the Commission of 11 January 1961 on the admissibility of application no. 788/60, Austria v. Italy, Yearbook of the Convention, Vol. 4, pp. 170-172); and, further, that any procedural means which might prevent a breach of the Convention should have been used (see the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, pp. 28-29, paras. 58-59, and also the Commission decision previously cited, pp. 166-170).

Practice in international arbitration would appear to reflect a similar approach. An example is to be found in the award of 6 March 1956 in the Ambatielos case. The British Government argued that legal remedies had not been exhausted, on the ground that the claimant, a Greek shipowner, had not called a witness during proceedings in an English court. The Commission of Arbitration allowed the objection in the following terms:

> "The rule [of exhaustion] requires that 'local remedies' shall have been exhausted before an international action can be brought. These 'local remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. ...
>
> ...
>
> It would be wrong to hold that a party who, by failing to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to

rely on this fact in order to rid himself of the rule of exhaustion of local remedies." (Reports of International Arbitral Awards, United Nations, vol. XII, pp. 120 and 122)

35. In the court of first instance Mr Cardot did not express any wish that evidence should be heard from his former co-defendants, although they said that he had played a major part in organising the smuggling of hashish from Iran to France and although three of them, when confronted with him before the investigating judge, had confirmed their earlier statements (see paragraph 20 above). Nor did he make any application to the Court of Appeal for such evidence to be heard. The case file discloses no special reason which could have excused him from calling those witnesses or applying to have them called.

As to his appeal on points of law, only one of the three grounds put forward related to the proceedings in respect of the former co-defendants who had been heard in that capacity at the time (see paragraph 26 above). Above all, it did not rely on paragraph 3 (d) of Article 6 (art. 6-3-d) or even on the general principle in paragraph 1 (art. 6-1) and did not refer to the statements that Mr Humbert, Mr Millo, Mr Jacques Montaner and Mr Jean Montaner had made to the investigating judge; so that it was too vague to draw the Court of Cassation's attention to the issue subsequently submitted to the Convention institutions, namely the failure to hear prosecution witnesses at any stage of the court proceedings against Mr Cardot. It may also be asked whether it would have been admissible for Mr Cardot, who had not raised this point before the trial courts, to raise it for the first time in the Court of Cassation. At all events, nothing would have prevented him from appealing against the Valence Criminal Court's judgment if he had been unsuccessful in calling witnesses at the trial, or from challenging in the Court of Cassation a judgment of the Grenoble Court of Appeal in which it refused to grant an application for witnesses to be heard (see, mutatis mutandis, the Delta judgment of 19 December 1990, Series A no. 191, pp. 9-10, paras. 18-21).

36. In sum, Mr Cardot did not provide the French courts with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26), namely the opportunity of preventing or putting right the violations alleged against them (see, among other authorities, the Guzzardi judgment previously cited, Series A no. 39, p. 27, para. 72). The objection that domestic remedies have not been exhausted is therefore well founded.

FOR THESE REASONS, THE COURT

Holds by six votes to three that by reason of the failure to exhaust domestic remedies, it is unable to take cognisance of the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 March 1991.

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 separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Macdonald; (b) dissenting opinion Mr Martens; (c) dissenting opinion of Mr Morenilla.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE MACDONALD

Unfortunately I am unable to share the opinion of the majority of the Court on the question relating to Article 26 (art. 26) of the Convention.

This provision must be applied with some degree of flexibility and without excessive formalism (see, among other authorities, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 26, para. 72). In the instant case the ground of appeal based on a breach of the rights of the defence, although perhaps drawn in terms lacking in clarity and precision, expressly referred to the "hearing which [had] preceded" the judgment of the Grenoble Court of Appeal (see paragraph 26 of the present judgment). The circumstances of the hearing in that court on 17 March 1983 were precisely what, according to the defence, had been influenced to Mr Cardot's detriment by those of the hearing in the same court on 17 February 1982, at which Mr Cardot had not been present. The ground of appeal was therefore indeed tantamount to complaining in substance of a disregard of the rights enshrined in paragraph 1 of Article 6 (art. 6-1) of the Convention, of which paragraph 3 (d) (art. 6-3-d) is a specific aspect. In so doing, Mr Cardot provided the Court of Cassation with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26), namely the opportunity of putting right the violations alleged against them (see, inter alia, the Guzzardi judgment previously cited, Series A no. 39, p. 27, para. 72).

It follows that, in my opinion, the objection that domestic remedies have not been exhausted is unfounded.

DISSENTING OPINION OF JUDGE MARTENS

1. I have voted in favour of rejecting the French Government's preliminary objection because it was examined and rejected by the Commission: for the reasons given in my separate opinion in the Brozicek case (judgment of 19 December 1989, Series A no. 167, pp. 23 et seq.), I think that the Court should leave it to the Commission to determine whether such pleas are founded or not.

2. I have so voted with all the more conviction because in my opinion the objection was indeed unfounded.

I agree with those of my colleagues who think that in his appeal to the Court of Cassation on points of law the applicant did not raise, even in substance, the grievance which in the course of the Strasbourg proceedings gradually became his principal complaint, namely that although he had had the opportunity to question his former co-accused when confronted with them by the investigating judge, the Grenoble Court of Appeal nevertheless violated his rights under Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention by using their statements as decisive evidence, because those statements had not been made at a public hearing in court.

Assuming, however, that this complaint is well-founded - as in this context one should (see the Van Oosterwijck judgment of 6 November 1980, Series A no. 40, p. 14, para. 27) - and taking into account the facts that French courts seem to be bound to apply (self-executing provisions of) the Convention ex officio[1] and that if the lower courts have failed to do this, the Court of Cassation may quash ex officio[2], I think that the applicant did provide the French courts to a sufficient degree with the opportunity which the rule of exhaustion of domestic remedies is designed in principle to afford, namely "the opportunity of preventing or putting right the violations alleged ..." (see paragraph 36 of the present judgment): if the applicant's interpretation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) is assumed to be correct, the Court of Cassation should have quashed ex officio because it was evident from the Court of Appeal's judgment that his conviction was based on "unlawful" evidence. I realise, of course, that this conflicts with what the European Court held in paragraph 39 of its Van Oosterwijck judgment but, in my opinion, the view taken there is, as regards human rights cases, too strict: it unnecessarily disregards the protection which a national law that requires its judiciary to apply the Convention ex officio

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[1] See: Andrew Z. Drzemczewski, European Human Rights Convention in Domestic Law (1983), p. 78; Marc-André Eissen, 'le statut juridique interne de la Convention devant les juridictions pénales françaises' in Gérard Cohen-Jonathan et al., Droits de l'Homme en France (1985), p. 28; Gérard Cohen-Jonathan, la Convention Européenne des Droits de l'Homme (1989), pp. 245 and 257.

[2] See: Jacques Boré, La cassation en matière pénale (1985), nos. 3086 et seq.

intends to afford to those who for present purposes should be assumed to be victims of a violation of that instrument.

DISSENTING OPINION OF JUDGE MORENILLA

(Translation)

To my regret, I dissent from the majority's conclusion that, by reason of failure to exhaust domestic remedies, the Court is unable to take cognisance of the merits of the case, and I do so for two reasons.

1. In the first place, I voted with Judge Martens in favour of rejecting the French Government's preliminary objection because the Commission, after examining Mr Cardot's application, declared it admissible, in accordance with Article 27 para. 3 (art. 27-3) of the Convention.

I agree with Judge Martens's analysis and arguments in his separate opinion in the Brozicek case (judgment of 19 December 1989, Series A no. 167, pp. 23-28). In it he indicates that he is in favour of departing from the precedent set by the Court in the De Wilde, Ooms and Versyp judgment of 18 June 1971 (Series A no. 12, pp. 29-31, paras. 47-55), in which the Court held that it had jurisdiction to entertain preliminary objections as to admissibility, such as pleas that domestic remedies had not been exhausted, provided that they had previously been raised before the Commission.

To reiterate his practical arguments, from the point of view of the functioning of the Convention system and of more efficient protection of human rights, I likewise think that the Court is not to act as a court of appeal from the Commission and that it does not fit in with this system that (as is possible under the Court's doctrine) in one and the same case the Commission should reject the preliminary objection, accept the petition and express the opinion that there has been a violation, while the Court should find that objection well-founded and therefore hold that it is unable to take cognisance of the merits of the case. It is also undesirable that an applicant, after winning his case before the Commission, should find himself denied a judgment on the merits after lengthy proceedings.

2. Furthermore, in the instant case I consider that the applicant did in substance make before the French Court of Cassation the complaints relating to paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) of the Convention. In the Van Oosterwijck judgment of 6 November 1980 (Series A no. 40, p. 14, para. 27) the Court held that in order to determine whether a remedy satisfies the conditions laid down in Article 26 (art. 26) "and is on that account to be regarded as likely to provide redress for the complaints of the person concerned, the Court does not have to assess whether those complaints are well-founded; it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis".

Article 26 (art. 26), which refers to the "generally recognised rules of international law", must be applied with some degree of flexibility and without excessive formalism (see the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 26, para. 72). The special character of the

Convention and its purpose of protecting rights which benefit from "collective enforcement" (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, para. 239, and the Soering judgment of 7 July 1989, Series A no. 161, p. 34, para. 87) "require that its provisions be interpreted and applied so as to make its safeguards practical and effective" (see the Soering judgment, loc. cit.). The object and purpose of the Convention call in this case for a flexible "pro victima" interpretation of this Article (art. 26), favouring admissibility of applications, so that the complaints made can be considered by the Convention institutions.

In the instant case the ground of appeal to the Court of Cassation based on a breach of the rights of the defence expressly referred to the "hearing which [had] preceded the judgment of the Grenoble Court of Appeal" (see paragraph 26 of the judgment). The circumstances of the hearing in that court on 17 March 1983 were precisely what, according to the defence, had been influenced to Mr Cardot's detriment by those of the hearing in the same court on 17 February 1982, at which Mr Cardot had not been present. Furthermore, he alleged that "the court ... ha[d] to reach its verdict in the light of the particular circumstances of the case and not by reference to cases already tried" (ibid.). Like the Commission I consider that by challenging the Grenoble Court of Appeal's reasoning, the applicant had by implication criticised the procedure whereby evidence was taken.

The ground of appeal was therefore indeed tantamount to reasoning based on a disregard of the rights enshrined in paragraph 1, of which paragraph 3 (d) is a specific aspect (see, among other authorities, the Deweer judgment of 27 February 1980, Series A no. 35, p. 30, para. 56; the Pakelli judgment of 25 April 1983, Series A no. 64, p. 19, para. 42; and the Goddi judgment of 9 April 1984, Series A no. 76, p. 11, para. 28), because "when compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots" (see the Artico judgment of 13 May 1980, Series A no. 37, p. 15, para. 32).

The ground of appeal could probably have been drawn in terms that were clearer and more precise and might, similarly, have alleged a breach of paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) of the Convention. But while it is normally for the domestic courts to assess the evidence they have gathered (see the Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 15, para. 33), the reasons set out by the applicant clearly provided the Court of Cassation with "the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26), namely the opportunity of putting right the violations alleged against them" (see the Guzzardi judgment previously cited, p. 27, para. 72).