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

CASE OF SOUMARE v. FRANCE

(48/1997/832/1038)

JUDGMENT

STRASBOURG

24 August 1998

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SUMMARY[1]

Judgment delivered by a Chamber

France – application to court for ruling on lawfulness of detention pursuant to order of criminal court for imprisonment in default under Article 388 of Customs Code (Articles 749 et seq. of Code of Criminal Procedure)

I. ARTICLE 5 § 4 OF THE CONVENTION

A. Government's preliminary objection (failure to exhaust domestic remedies)

Closely linked to complaint on merits.

Conclusion: objection joined to merits (unanimously).

B. Merits of complaint

Respondent State relied on possibility of appeal to Court of Cassation – yet, in case before Court, Paris Court of Appeal, ruling on applicant's application to have order for imprisonment in default discharged on ground that he was insolvent (Article 752 of Code of Criminal Procedure), had expressly relied on decision of Civil Division of Court of Cassation in which it had been held that ordinary courts had no jurisdiction in cases of imprisonment in default.

Unresolved issue of French law – not for Court to determine it or to express view on appropriateness of domestic courts' choice of policy as regards case-law – its task was confined to determining whether consequences of that choice were in conformity with Convention.

Recapitulation of Court's case-law: existence of a remedy had to be sufficiently certain, failing which it would lack accessibility and effectiveness required for purposes of Article 5 § 4 – case-law of Court of Cassation uncertain at material time – since, according to Government, Court of Appeal judges had not followed changes in case-law on that subject, it would have been inappropriate to require applicant and his officially assigned lawyer to regard an appeal to Court of Cassation as effective remedy.

Effective enjoyment of right guaranteed by Article 5 § 4 had not been secured with sufficient degree of certainty at material time.

Conclusion: preliminary objection dismissed after consideration of merits; violation (eight votes to one).

1. This summary by the registry does not bind the Court.

II. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Finding of a violation constituted sufficient satisfaction (unanimously).

B. Costs and expenses

Claim dismissed (unanimously).

COURT'S CASE-LAW REFERRED TO

5.11.1981, X v. the United Kingdom; 24.6.1982, Van Droogenbroeck v. Belgium; 2.3.1987, Weeks v. the United Kingdom; 25.10.1990, Thynne, Wilson and Gunnell v. the United Kingdom; 8.6.1995, Jamil v. France; 26.11.1997, Sakık and Others v. Turkey; 19.12.1997, Brualla Gómez de la Torre v. Spain; 22.5.1998, Vasilescu v. Romania

In the case of Soumare v. France[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr L.-E. PETTITI,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr U. LÕHMUS,
Mr E. LEVITS,
Mr T. PANTIRU,
Mr M. VOICU,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 23 May and 27 July 1998,

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

PROCEDURE

1. The case was referred to the Court by the French Government ("the Government") on 12 May 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 23824/94) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under Article 25 by a Malian citizen, Mr Abdourahim Soumare, on 2 February 1993.

The Government's application referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46). The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 4 of the Convention.

Notes by the Registrar

1. The case is numbered 48/1997/832/1038. 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.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer, Mr M. Daffé of the Bamako (Mali) Bar, who would represent him (Rule 30). Mr Daffé was given leave by the President to represent the applicant but did not attend the hearing.

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 3 July 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Pekkanen, Mr A.N. Loizou, Mr U. Lōhmus, Mr E. Levits, Mr T. Pantiru, Mr M. Voicu and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently, Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who had died on 18 February 1998 (Rule 21 § 6, second sub-paragraph).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 3 and 30 March 1998 respectively.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 May 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mrs M. DUBROCARD, *magistrat*, on secondment
to the Department of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr A. BUCHET, Head of the Human Rights Office,
Department of European and International
Affairs, Ministry of Justice,
Mrs R. CODEVELLE, Inspector of Customs,
Department of Customs and Indirect Taxes,
Ministry of the Budget, *Advisers*;

(b) *for the Commission*
Mr J.-C. SOYER, *Delegate*.

The Court heard addresses by Mr Soyer and Mrs Dubrocard.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The orders made against the applicant

6. Mr Abdourahim Soumare, a Malian national, had no fixed abode in France when he was convicted. He now lives in Mali.

7. He was arrested in Paris and remanded in custody on 22 January 1988 in connection with a heroin-trafficking operation involving five other people. He was charged with illegally importing controlled substances (852 grams of heroin) and of conspiring with a co-accused to import drugs and of being his accomplice.

8. On 10 November 1989 Bobigny Criminal Court sentenced Mr Soumare to ten years' imprisonment and made an order permanently excluding him from French territory. It also ordered confiscation of the drugs that had been seized and imposed a fine of 2,726,000 French francs (FRF) jointly on the applicant and the other convicted defendants in lieu of confiscation and ordered them, pursuant to Article 414 of the Customs Code ("CC"), to pay a like amount, equal to the value of the unlawfully imported substances, to the customs authorities. The applicant's joint liability was limited to FRF 1,504,000. Lastly, the court ordered Mr Soumare's continued detention pursuant to Article 388 CC (see paragraph 22 below), for a period not exceeding the maximum period for imprisonment in default – which, under Article L. 627-6 of the Public Health Code ("PHC" – see paragraph 21 below) was two years –, until the customs' penalties had been paid.

9. On 18 May 1990, on an appeal by Mr Soumare and a cross-appeal by the prosecution, the Paris Court of Appeal upheld both the applicant's conviction and sentence and the orders made in favour of the customs authorities. The applicant's appeal to the Court of Cassation was dismissed on 10 June 1991.

10. On 13 December 1991 the applicant applied to the Ministry of Justice to be transferred to Mali under the Franco-Malian Treaty on the Transfer of Sentenced Persons. On 30 June 1992 the Ministry rejected the application on the ground that the customs fine had not been paid. It added

that the application could be reconsidered if all or part of the sum was paid, and that to that end the applicant could, if he so wished, contact the customs authorities with a view to a settlement.

B. Applications for discharge of the order for imprisonment in default

1. Applications to the customs authorities for the order to be discharged

11. On several occasions Mr Soumare, who was held in Toul detention centre, sought a "settlement with the customs authorities". On 30 June 1992 he applied for the order for imprisonment in default to be discharged offering to pay FRF 6,500. Further applications, in which he offered to pay FRF 7,000 and then FRF 9,000, were unsuccessful as the Director of the Customs Information and Inquiries National Division had fixed the sum required for discharge of the order at FRF 300,000.

12. In a letter of 13 June 1994, Mr Soumare renewed his offer of FRF 9,000 while at the same time asking the customs authorities to advise him urgently what they would consider a "reasonable offer" as his prison sentence for the criminal offences was due to end on 21 June 1994.

13. On 10 August 1994 the customs authorities replied that his offers were too low compared with the penalties imposed, that his tax return showing a nil liability to income tax could not be taken into account as profits derived from drug trafficking were necessarily undeclared and, lastly, that the order for his imprisonment in default would not be discharged until the sum of FRF 300,000, which had previously been indicated, had been paid. That decision would be reviewed once he had served six months' imprisonment in default. Having regard to the position taken by the customs authorities, the Ministry of Justice also rejected further requests by the applicant to be transferred to Mali.

2. Applications to the Nancy tribunal de grande instance *for the order to be discharged*

14. In the meantime the applicant had, on 8 July 1992, lodged an application with the President of the Nancy *tribunal de grande instance* to have the order for his imprisonment in default discharged as he was insolvent, insolvency being a ground for not enforcing such orders (Article 752 of the Code of Criminal Procedure – "CCP" – see paragraph 20 below). The President rejected that application on 23 July 1992 on the ground that it was devoid of purpose, since the applicant was still detained by virtue of the criminal conviction and sentence, "a sentence unconnected with imprisonment in default".

15. On 11 August 1994 Mr Soumare renewed his application to the President of the Nancy *tribunal de grande instance* and enclosed the letter

from the customs authorities (see paragraph 13 above) and a certificate attesting that he had no income-tax liability. The President was asked to hear the application in his capacity as urgent applications judge, under Article 756 CCP (see paragraph 20 below).

16. In an order made in that capacity on 23 August 1994 the President asked the public prosecutor's office, pursuant to the first paragraph of Article 710 and to Article 711 CCP (see paragraph 20 below), to refer the difficulty to the Paris Court of Appeal, which had sentenced the applicant. The order read as follows:

> "...
>
> Mr Soumare asserted that he was insolvent and produced a certificate attesting that he has no liability for ITI (income tax on individuals) for 1993.
>
> The urgent applications judge has jurisdiction to order a stay of execution of an order for imprisonment in default if the committal warrant is not prima facie valid.
>
> The prima facie validity of a warrant is not in issue if it was issued by a court in a decision that is final...
>
> Mr Soumare produced a certificate attesting that he has no liability for ITI for 1993. That document does not by itself suffice to show that he is insolvent or justify discharging the order for imprisonment in default.
>
> In these circumstances it is appropriate to ask the public prosecutor's office to refer the difficulty to the Paris Court of Appeal, which passed the sentence."

3. Application to the Paris Court of Appeal for the order to be discharged

17. At a hearing on 25 November 1994 the Paris Court of Appeal heard the applicant, the lawyer officially assigned to represent him and the customs authorities; the latter submitted that Articles 752 and 756 CCP were not applicable in the case. On 9 December 1994 the Paris Court of Appeal dismissed the application for discharge, holding that:

> "The Court of Appeal considers that the Criminal Court's decision to prolong the applicant's detention under Article 388 of the Customs Code is not covered by the ordinary criminal-law procedure laid down in Articles 749 et seq. of the Code of Criminal Procedure giving jurisdiction to the urgent applications judge (Court of Cassation, 2nd Civil Division, 30 June 1993).
>
> Consequently, the Court of Appeal holds that Soumare's application for the order for his imprisonment in default to be discharged is admissible, as it concerns an interlocutory issue over the execution of a sentence, but is unfounded in law."

18. The applicant was released on 16 January 1995 after paying the sum of FRF 10,000 to the customs authorities.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General principles

19. Imprisonment in default is an invention of Roman law originally designed to guarantee execution of a court order to pay a sum of money either to the State or to a private individual. It consists in detaining the recalcitrant debtor in a short-stay prison, where he is not obliged to work. It is not an alternative to payment, as the person against whom the order is made remains liable to pay the sum due (Article 762 CCP – see paragraph 20 below), but it may not be imposed a second time for the same debt. Its scope has gradually been whittled away since the nineteenth century, when it was seen as a real means of punishment available to creditors, who could apply to have insolvent civil debtors committed to prison. It was permanently abolished in civil and commercial proceedings by the Law of 22 July 1867, surviving in respect of debts to the Treasury only (Article 749 CCP – see paragraph 20 below), and the rules governing its enforcement have become more lenient (exempting insolvent individuals from imprisonment in default was the most important feature of a reform introduced on 30 December 1985 by Law no. 85-1407, Article 752 CCP – see paragraph 20 below).

Imprisonment in default now serves to guarantee recovery of debts to the State, such as pecuniary penalties – with the exception of those imposed for political or press offences – or any other payment to the Treasury not in the nature of civil damages.

It is governed in many respects by the same principles as those governing execution of sentence: it cannot be executed once the time-limit for enforcing sentence has expired. In extradition cases (Law of 10 March 1927) and for the purposes of rehabilitation (Articles 784 and 788 CCP) its execution is deemed the equivalent of payment. The criminal-law principles that sentences must be adapted to the individual and that consecutive sentences must not be imposed apply.

In spite of these aspects, imprisonment in default is regarded not as a form of imprisonment in lieu of payment but as a guarantee of enforcement directed at the debtor's person. On 4 January 1995, on an appeal on points of law by an offender sentenced to pay three fines of FRF 300 each for contravening a *département* health regulation on manure tipping, the Court of Cassation pointed out: “Imprisonment in default is not a penalty. It is a means of enforcement automatically attached to any pecuniary order made by a criminal court and satisfies the requirements of both Article 5 [§ 1] (b) of the Convention ... and Article 2 of Protocol No. 4.” After the judgment in the case of Jamil v. France of 8 June 1995 (Series A no. 317-B, p. 28, § 32), in which the Court held that imprisonment in default was a “penalty” within the meaning of Article 7 § 1 of the Convention, the Criminal Division of the Court of Cassation held that in tax cases imprisonment in default is a

"punitive" measure and may be ordered only if there has been a conviction for a criminal offence (29 February 1996, *Bulletin criminel* (*Bull. crim.*) no. 100).

When a criminal court orders imprisonment in default, it does not have power to vary its duration, which is laid down by law (Articles 749 and 750 CCP – see paragraph 20 below). In certain circumstances, as an exception to the ordinary law, the customs authorities can obtain enforcement of a warrant of committal for default before it becomes final (Article 388 CC).

B. Relevant provisions

1. The Code of Criminal Procedure

20. The Code of Criminal Procedure provides as follows:

Article 710, first paragraph

"Any interlocutory issue relating to the execution of a sentence shall be referred to the court which passed sentence, which may also rectify any purely clerical errors in its decisions."

Article 711, first paragraph

"Where such an issue is referred by the public prosecutor or the convicted person, the court shall rule in chambers after hearing submissions from the public prosecutor's office, counsel for the convicted person (if counsel so requests) and, where appropriate, the convicted person himself, subject to the provisions of Article 712."

Article 749

"Where an order to pay a fine or court costs or to pay the Treasury any other sum not in the nature of civil damages is made in respect of an offence which is not political and does not attract a sentence of life imprisonment, the length of imprisonment in default applicable in the event of failure to comply shall be as laid down in Article 750.

Where appropriate, the length shall be determined according to the total amount of debt outstanding."

Article 750

"The length of imprisonment in default shall be:

(1) five days, where the fine and the sums whose payment has been ordered amount to at least 1,000 francs, but do not exceed 3,000 francs;

(2) ten days, where they amount to more than 3,000 francs, but not more than 10,000 francs;

(3) twenty days, where they amount to more than 10,000 francs, but not more than 20,000 francs;

(4) one month, where they amount to more than 20,000 francs, but not more than 40,000 francs;

(5) two months, where they amount to more than 40,000 francs, but not more than 80,000 francs;

(6) four months, where they exceed 80,000 francs."

Article 752

"Imprisonment in default may not be enforced in respect of convicted persons who prove that they are insolvent by producing:

(1) a certificate from their local tax-collector, stating that they are not liable to income tax; or

(2) a certificate from their local mayor or police superintendent. The fact that the convicted person is in fact solvent may be proved by evidence in any form."

Article 756, first paragraph

"If, when in prison, the debtor wishes to lodge an urgent application concerning his imprisonment in default, he shall immediately be brought before the President of the *tribunal de grande instance* for the place where he was arrested, who shall rule on the application as a matter of urgency, or, if appropriate, refer the case back to the court which shall rule on the application in accordance with the procedure and subject to the conditions laid down in Articles 710 and 711."

Article 762

"A convicted person who has been imprisoned in default of payment shall not thereby be released from the payment obligation."

2. The Public Health Code

21. Article L. 627-6, second paragraph, of the Public Health Code provides:

"As an exception to the provisions of Article 750 of the Code of Criminal Procedure, the length of imprisonment in default shall be two years where the fine and any other pecuniary penalties imposed for an offence mentioned in the above paragraph [breaches of provisions of statutory instruments concerning poisonous substances or plants classified as dangerous drugs] or for related customs offences exceed F 500,000."

Article L. 627-6 was repealed by Law no. 92-1336 of 16 December 1992, known as "the transitional law", on the entry into force of the new Criminal

Code and the amendment of certain provisions of criminal law and criminal procedure made necessary by its commencement. It was replaced by Article 706-31 CCP, which came into force on 1 March 1994 and was amended by Law no. 95-125 of 8 February 1995. Article 706-31 provides:

> "Prosecution for the serious crimes (*crimes*) defined in Article 706-26 shall be subject to limitation after thirty years. Sentences passed on conviction for one of these offences shall lapse by limitation after thirty years from the date on which the conviction became final.
>
> Prosecution for the other major offences (*délits*) defined in Article 706-26 shall be subject to limitation after twenty years. Sentences passed on conviction for any of these offences shall lapse by limitation after twenty years from the date on which the conviction became final.
>
> As an exception to the provisions of Article 750, the length of imprisonment in default shall be two years where fines and any other pecuniary penalties imposed for any of the offences mentioned in the preceding paragraph or for the related customs offences exceed F 500,000."

3. The Customs Code

22. The following provisions of the Customs Code are relevant in the present case:

Article 382

> "1. Judgments and decisions in customs cases may be executed by any means provided for by law.
>
> 2. Judgments and decisions by which persons are convicted of offences against customs legislation shall also be enforceable by imprisonment in default..."

Article 388

> "A person convicted of a customs offence or an offence relating to indirect taxation may, where the court makes an express order to that effect, be kept in detention, even if an ordinary appeal or an appeal on points of law has been lodged, until he has paid the fiscal penalties imposed on him; save in the case of drug offences, any period of detention served on that account following conviction shall be deducted from the period of imprisonment in default ordered by the court and may not exceed the minimum period laid down in the Code of Criminal Procedure for failure to comply with an order to pay a sum equal to the fiscal penalties imposed."

C. Remedies available for challenging the lawfulness of imprisonment in default; the case-law

23. The remedy available to a person who seeks, *inter alia* on the ground of his insolvency, to challenge an order for his imprisonment in default, is

an application to the urgent applications judge under Article 756 CCP. If there is an arguable issue over execution of the order, the urgent applications judge refers the case to the trial or appellate court which made the order (see Article 710, first paragraph, CCP).

24. The issue of the applicability of Article 756 and, therefore, of the ordinary procedure to cases of imprisonment in default of payment to the customs authorities has given rise to conflicting case-law (see paragraph 25 below). In its decision of 9 December 1994 in the instant case, the Court of Appeal held that the ordinary courts have no jurisdiction to review orders for imprisonment in default in customs cases (see, to the same effect, the judgment of the Fort-de-France Court of Appeal of 6 December 1993 – which was however set aside by the Criminal Division of the Court of Cassation on 26 October 1995; and the order of the urgent applications judge of the Bayonne *tribunal de grande instance* of 27 January 1993). In so doing, it referred to a judgment of the Second Civil Division of the Court of Cassation (Gilborson, 30 June 1993), in which it was held:

> "... The trial court's decision to prolong the applicant's detention, made under Article 388 of the Customs Code, is not covered by the ordinary criminal-law procedure provided for in Articles 749 et seq. of the Code of Criminal Procedure, which gives jurisdiction to the urgent applications judge."

The Criminal Division of the Court of Cassation also came to the same conclusion in a judgment of 28 October 1987 (*Bull. crim.* no. 377, p. 999):

> "No appeal on points of law lies from a decision of the Court of Appeal ruling on an appeal against an order of the urgent applications judge made pursuant to Article 756 of the Code of Criminal Procedure..."

In an earlier decision of 19 January 1983 the Second Civil Division of the Court of Cassation had held that the Paris Court of Appeal had jurisdiction to order a stay of execution of an order for imprisonment in default after it had found that the order for detention was not prima facie valid as the sentence imposed on the person concerned had been time-barred thus precluding the execution of the order made against him.

The Commercial Division of the Court of Cassation initiated a change in the case-law by its judgments of 18 January and 1 February 1994, in which it held:

> "... The Court of Appeal did not misdirect itself in law in holding that, by introducing a particular form of imprisonment in default, Article 388 of the Customs Code did not preclude the application of Articles 752 and 756 of the Code of Criminal Procedure." (Commercial Division, 18 January 1994, *Bull.* IV no. 26)

and

> "The urgent applications judge has the power to suspend the enforcement of an order for imprisonment in default in cases in which he considers that the order has become prima facie invalid in the light of new developments since it was made, in

particular, where the debtor claims that he is insolvent. However, in such circumstances, the judge must refer the case to the trial or appellate court which made the order." (Commercial Division, 1 February 1994, D. 1994, IR 48)

That line has also been followed by the Criminal Division of the Court of Cassation in a decision of 26 October 1995, in which it said:

"By introducing a particular form of imprisonment in default, Article 388 of the Customs Code did not preclude the application of Articles 710, 752 and 756 of the Code of Criminal Procedure. A judgment declaring inadmissible an application for relief from execution, on the ground of insolvency, of an order for imprisonment in default must be quashed." (*Bull. crim.* no. 325)

25. The issue of the extent of the powers of the urgent applications judge on applications for discharge of an order for imprisonment in default has also given rise to inconsistencies in the case-law. The question has been whether the urgent applications judge has jurisdiction only to determine the prima facie validity of the order or whether he also has jurisdiction to decide whether the debtor is insolvent.

Some urgent applications judges have held that their jurisdiction is limited to reviewing the prima facie validity of the order for imprisonment in default (see Saintes *tribunal de grande instance*, 31 October 1994, *Gazette du Palais*, 10–11 March 1995, p. 26, and Mulhouse *tribunal de grande instance*, 7 July 1995). Others have referred the insolvency issue to the court that made the order (see Draguignan *tribunal de grande instance*, 26 May 1993, and Toulouse *tribunal de grande instance*, 1 July 1994), while still others have held that they were empowered to decide the insolvency issue and to discharge the order for imprisonment in default (see La Rochelle *tribunal de grande instance*, 12 December 1994, and Mulhouse *tribunal de grande instance*, 17 February 1995).

The Court of Cassation reversed and quashed a judgment of a court of appeal that had held that an urgent applications judge had jurisdiction to decide whether the debtor was insolvent (see the Commercial Division's decision of 1 February 1994 cited above). The full court of the Court of Cassation held on 5 February 1996 that urgent applications judges do have such power. However, that decision concerned a debtor who was not in prison.

PROCEEDINGS BEFORE THE COMMISSION

26. Mr Soumare applied to the Commission on 2 February 1993. He complained of a breach of Article 5 § 4 of the Convention in that he had not been able to have a court rule on the lawfulness of his detention under the order for his imprisonment in default. He also complained of a breach of

Articles 4, 6 § 2, 11 and 14 of the Convention and of Article 1 of Protocol No. 4 to the Convention.

27. The Commission declared the application (no. 23824/94) admissible on 9 April 1996 solely as regards the complaint that the applicant, in breach of Article 5 § 4, had no remedy before a court and inadmissible as to the remainder. In its report of 14 January 1997 (Article 31), it expressed the opinion that there had been a violation of Article 5 § 4 of the Convention (twenty-five votes to four). 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[1].

FINAL SUBMISSIONS TO THE COURT

28. In their memorial, the Government, "as their main submission, request[ed] the Court to hold that domestic remedies ha[d] not been exhausted in the present case and, in the alternative, that there ha[d] been no violation of Article 5 § 4 of the Convention".

29. The applicant invited the Court to hold that there had been a breach of Article 5 § 4 in that he had not had an effective remedy to obtain a ruling on the lawfulness of his imprisonment in default.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

30. Mr Soumare complained that he had not had an effective remedy to obtain a ruling on the lawfulness of his detention pursuant to the order for his imprisonment in default. He relied on Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government contested that argument. The Commission accepted it.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

A. The Government's preliminary objection

31. The Government raised a preliminary objection of failure to exhaust domestic remedies in that the applicant had not appealed to the Court of Cassation against the Court of Appeal's judgment of 9 December 1994 (see paragraph 17 above), even though such an appeal would have been effective if it had been brought in reliance on the Court of Cassation's recent case-law (see paragraph 24 above).

32. In its decision on the admissibility of the application, the Commission considered that the issue of exhaustion of domestic remedies was inseparable from the issue on the merits in that what had to be established was whether the applicant had had an effective remedy "before a court" within the meaning of Article 5 § 4.

33. The Court notes that the Court of Appeal, in its judgment of 9 December 1994 – against which the Government said the applicant should have appealed to the Court of Cassation – expressly cited a decision of 30 June 1993 of the Court of Cassation (see paragraphs 17 and 24 above) as authority for holding that it had no jurisdiction to rule on imprisonment in default in customs cases. That clearly shows that the preliminary objection is closely linked to the question of whether an appeal to the Court of Cassation would have been effective and, therefore, to the merits of the complaint that there has been a breach of Article 5 § 4. Consequently, the Court will consider the preliminary objection with the merits.

B. Merits of the complaint

34. The applicant said that he had been detained under an order for imprisonment in default from 22 June 1994 to 16 January 1995. Neither his application to the urgent applications judge or to the Paris Court of Appeal could be considered an effective remedy in the light, in particular, of the reasons given by the Court of Appeal for refusing to discharge the order for his imprisonment in default. It was apparent from that reasoning that an appeal to the Court of Cassation would have been unsuccessful.

35. The Government submitted that by failing to appeal to the Court of Cassation the applicant had not satisfied the condition requiring exhaustion of domestic remedies. By expressly relying on a decision of the Civil Division of the Court of Cassation that the ordinary courts had no jurisdiction in imprisonment in default cases, the Paris Court of Appeal had erred in law. As regrettable as it was that the Court of Appeal judges were unaware of the developments in the case-law on the subject, in particular, the decisions of the Commercial Division of the Court of Cassation of 18 January and 1 February 1994 (see paragraph 24 above), Mr Soumare's counsel, if not Mr Soumare himself, should have been aware of that case-law and appealed to the Court of Cassation precisely for the purpose of

having the difficulties in construction of the relevant provisions of the Code of Criminal Procedure resolved. As the two judgments cited above had been published in the reports of the Court of Cassation's decisions approximately six months after they had been handed down, that is to say, before the Court of Appeal's decision of 9 December 1994, the applicant's counsel must have known their tenor. Thus, the Court of Appeal's decision, in which Articles 749 et seq. of the Code of Criminal Procedure were construed very restrictively, ran counter to all the developments in the case-law on the subject. In any event, the Court of Cassation had in 1983 already accepted that the ordinary courts had jurisdiction in cases of imprisonment in default (see paragraph 24 above). In those circumstances, an appeal to the Court of Cassation could not clearly be said to have had no prospect of success.

36. As regards the merits, which the Government addressed in the alternative, their argumentation before the Court differed from their argumentation before the Commission in that they no longer maintained that the judicial supervision required by Article 5 § 4 had been incorporated in the initial decision as to sentence. They said that Mr Soumare had nonetheless had an effective remedy available to obtain a review of the lawfulness of his imprisonment in default, as the President of the Nancy *tribunal de grande instance* (see paragraph 16 above) had held that he had jurisdiction to consider Mr Soumare's application for a discharge, but had not granted it because there had been insufficient proof of his insolvency. Consequently, the President had referred the application to the court which had ordered the measure.

37. The Commission considered that an appeal to the Court of Cassation could not be considered, at the material time, an effective remedy, as such an appeal was neither sufficiently certain nor sufficiently speedy to comply with the requirements of Article 5 § 4. The uncertainty in the case-law, more particularly the conflicting decisions of the various divisions of the Court of Cassation – which were resolved with the judgment of the Criminal Division of that court on 26 October 1995 (see paragraph 24 above) –, could justifiably have raised a doubt in the applicant's mind as to the real prospects of success of such an appeal. The fact that the Paris Court of Appeal had expressly referred to the decision in which the Court of Cassation had held that the ordinary courts had no jurisdiction in cases of imprisonment in default had further reinforced that doubt.

38. The Court notes that in a judgment of 10 June 1991 the Paris Court of Appeal sentenced Mr Soumare to ten years' imprisonment and imposed a customs fine coupled with an order for his imprisonment in default, intended to secure payment. After he had served his prison sentence, the applicant was held in detention for almost six months, from 22 June 1994 to 16 January 1995 (see paragraphs 12 and 18 above), under the order for imprisonment in default, because he had not paid the customs fine.

As regards the first period of detention, which began on 22 January 1988 and ended on 21 June 1994, the supervision required by Article 5 § 4 of the Convention was incorporated in the Paris Court of Appeal's decision passing sentence. It was therefore only subsequently that the applicant's right to "take proceedings [before] … a court" to obtain a ruling on the lawfulness of his imprisonment in default arose. The lawfulness of the deprivation of liberty depended on the applicant's solvency, a factor which could evolve with time (see among other authorities, *mutatis mutandis*, the following judgments: X v. the United Kingdom of 5 November 1981, Series A no. 46; Van Droogenbroeck v. Belgium of 24 June 1982, Series A no. 50; Weeks v. the United Kingdom of 2 March 1987, Series A no. 114; and Thynne, Wilson and Gunnell v. the United Kingdom of 25 October 1990, Series A no. 190-A).

The need for such supervision was made even greater by the fact that Mr Soumare's release was largely dependent upon financial agreements or arrangements with the customs authorities. It has to be said that, irrespective of the issue of judicial supervision, which, depending on trends in the case-law, is to a greater or lesser degree "theoretical", the customs authorities have wide powers to settle. It is accordingly essential that when an issue of freedom of the individual is referred to them, the judges of the judicial order should have the widest possible powers to consider it.

Lastly, the Court points out that for the purposes of Article 7 of the Convention it has held that imprisonment in default constitutes a penalty (see the Jamil judgment referred to above) and that such imprisonment subsequent to the serving of the main sentence may consequently be considered to be separate detention for the purposes of Article 5 § 4 of the Convention.

39. In the instant case the applicant applied on 11 August 1994 to the President of the Nancy *tribunal de grande instance* under Article 752 of the Code of Criminal Procedure (see paragraph 20 above) to have the order for his imprisonment in default discharged on the basis that he was insolvent. He relied on a certificate attesting that he had no income-tax liability. The President considered that that document did not provide sufficient proof that he was insolvent and referred the case to the court – the Paris Court of Appeal – that had sentenced him, which dismissed the application on the ground that it had no jurisdiction.

40. The Government maintained that the Paris Court of Appeal had erred in its construction of the provisions of the Code of Criminal Procedure as it had not followed an earlier decision in which it had been held that, *inter alia*, the Court of Cassation had jurisdiction to rule on cases of imprisonment in default. The Court does not, however, consider that it must determine that question of French law (see, among other authorities and *mutatis mutandis*, the Vasilescu v. Romania judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1075, § 39), or express a view on the appropriateness of the domestic courts' choice of policy as

regards case-law. Its task is confined to determining whether the consequences of that choice are in conformity with the Convention (see, *mutatis mutandis*, the Brualla Gómez de la Torre v. Spain judgment of 19 December 1997, *Reports* 1997-VIII, p. 2955, § 32). Consequently, the Court will consider the case on the basis of the provisions of French law as applied in the applicant's case, in this instance by the Paris Court of Appeal.

41. The change in the Court of Cassation's case-law began in 1994 and has subsequently been confirmed. In these circumstances, that issue of domestic law may be considered to have been uncertain at the material time and the case-law on the subject recent and in the formative stage. The 1983 judgment to which the Government allude (see paragraphs 24 and 35 above) cannot constitute a valid precedent as it did not concern the issue of insolvency, the provisions regarding which were brought in by the legislative reform in 1985. It was that issue which gave rise to the problem of determining the jurisdiction, or at least the powers, of the ordinary courts and the customs authorities.

42. In addition, the fact that the Paris Court of Appeal expressly relied on a decision of the Court of Cassation in dismissing as unfounded in law the application to have the order discharged was a decisive factor in instilling in the applicant the belief that it would be pointless to seek satisfaction through an appeal to the Court of Cassation. Since, in the Government's submission, the specialised judges of the Paris Court of Appeal had not correctly applied the law and had not followed the decisions of the Commercial Division of the Court of Cassation, it would be inappropriate to require the applicant and his officially assigned lawyer to regard an appeal to the Court of Cassation as an effective remedy.

In that respect, the Court reiterates that the existence of a remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 5 § 4 (see among other authorities and *mutatis mutandis*, the Van Droogenbroeck judgment cited above, p. 30, § 54, and the Sakık and Others v. Turkey judgment of 26 November 1997, *Reports* 1997-VII, p. 2625, § 53).

Further, the Court observes that if the applicant had appealed to the Court of Cassation, his appeal, being a criminal appeal, would have been considered by the Criminal Division, which, at the material time, had not yet aligned its case-law with that of the Commercial Division.

43. As regards the exercise and effectiveness of the application to the urgent applications judge to determine whether Mr Soumare was solvent, the Court observes that in the instant case the judge considered only the prima facie validity of the detention. It is true that the judge's decision to refer the case to the court that had passed sentence (see paragraph 16 above) complied with Article 710, first paragraph, of the Code of Criminal Procedure (see paragraph 20 above). The decision must, however, be analysed in the light of the case-law at that time, the characteristic feature of which was great uncertainty over whether the urgent applications judge had

power to consider whether the debtor was insolvent (see paragraph 25 above). In those circumstances, the judge's decision could in any event have been effective for the purposes of Article 5 § 4 only if the Paris Court of Appeal had accepted that it had jurisdiction.

The Court does not exclude the possibility that the successive exercise of the remedies provided for by law enabling a detained person to apply, on the grounds of his insolvency, for the discharge of an order for his imprisonment in default may now, as a result of the changes in the case-law described above, lead to a result that complies with the requirements of Article 5 § 4. It must nonetheless find that no such result was obtained in the instant case, as the effective enjoyment of the right guaranteed by Article 5 § 4 was not secured with a sufficient degree of certainty at the material time.

44. Consequently, the Court dismisses the Government's preliminary objection and holds that there has been a violation of Article 5 § 4.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

45. Article 50 of the Convention provides:

> "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

46. Mr Soumare claimed a total sum of 500,000,000 French francs, but did not describe the nature of the damage.

47. The Government maintained that his claim was unfounded. In any event, a finding of a violation would in itself provide sufficient reparation for any damage sustained.

48. The Delegate of the Commission expressed no view.

49. In the instant case the Court considers that a finding of a violation of Article 5 § 4 in itself constitutes sufficient just satisfaction.

B. Costs and expenses

50. The applicant sought the reimbursement of the costs and expenses incurred in the proceedings before the Strasbourg institutions, but did not quantify them and provided no details about them.

51. In consequence, the Court dismisses his claim.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the Government's preliminary objection, but *dismisses* it after considering the merits;

2. *Holds* by eight votes to one that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds* unanimously that this judgment constitutes in itself sufficient just satisfaction for the alleged damage;

4. *Dismisses* unanimously the claim for reimbursement of the costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 August 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinion of Mr Pettiti is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PETTITI

(*Translation*)

I voted with the majority in favour of finding that domestic remedies had been exhausted, but voted in favour of holding that there had been no violation of Article 6.

The Court firstly had to analyse the procedural questions relating to the Government's objection that domestic remedies had not been exhausted. Most of the judgment is devoted to that question. However, the procedural analysis on this point is not decisive when it comes to consideration of the merits.

The Court did not have before it the issue of principle as to whether imprisonment in default in customs cases is a lawful method of enforcement under Article 6 of the European Convention on Human Rights.

The applicant could have raised that problem in his appeal to the Court of Cassation against the sentence that was imposed on him on 18 May 1990. He did not do so.

The application to the Commission related only to Mr Soumare's complaint that he had not been able to take proceedings under domestic law to have the lawfulness of his detention pursuant to the order for his imprisonment in default decided speedily.

The first application for discharge made on 8 July 1992 had been dismissed because, at that time, Mr Soumare was still serving his main sentence.

After he had completed his sentence, Mr Soumare applied on 11 August 1994 for the order to be discharged on the grounds that he was insolvent.

On 23 August 1994 the President of the Nancy *tribunal de grande instance* held that there was insufficient proof of his insolvency on the file, but asked the public prosecutor's office to refer the difficulty to the Paris Court of Appeal (see Articles 710 and 711 of the Code of Criminal Procedure).

The Paris Court of Appeal held as follows:

> "The Court of Appeal considers that the Criminal Court's decision to prolong the applicant's detention under Article 388 of the Customs Code is not covered by the ordinary criminal-law procedure provided for in Articles 749 et seq. of the Code of Criminal Procedure giving jurisdiction to the urgent applications judge (Court of Cassation, 2nd Civil Division, 30 June 1993).
>
> Consequently, the Court of Appeal holds that Soumare's application for discharge of the order for his imprisonment in default is admissible as it concerns an interlocutory issue over the execution of a sentence, but is unfounded in law."

In its opinion of 14 January 1997, the Commission found that there had been a violation of Article 5 § 4, holding as follows:

> “69. The Commission notes that the Court of Cassation (Commercial Division) has resolved the conflicting case-law by its judgments of 18 January and 1 February 1994, in which it held that applications could be made to the urgent applications judge and then, if applicable, to the initial trial court, notwithstanding the provisions of the Customs Code. The Criminal Division has followed this line of reasoning in a judgment of 26 October 1995, in which it held that the court which had decided the merits of the case had jurisdiction to decide the issue of solvency in the context of the enforcement of an order for imprisonment in default of payment of customs debts.
>
> 70. Having regard to the foregoing, the Commission considers that at the material time the available remedy was not certain enough, nor indeed speedy enough, to be deemed to satisfy the requirements of Article 5 § 4 of the Convention, since the conflicting case-law was not settled once and for all until the judgment delivered by the Court of Cassation (Criminal Division) on 26 October 1995 (see in particular, *mutatis mutandis*, application no. 11613/85, decision of 16 May 1990, Decisions and Reports 65, p. 75).”

The Commission therefore based its opinion essentially on the fact that the remedy was “insufficiently” effective owing to the conflict between the decisions of the Court of Cassation. Consideration of the preliminary objection was mainly concerned with the controversy over those contradictions.

The European Court held that there had been a violation both because of the existence of that contradiction, which it analysed in relation to the preliminary objection, and because it considered in paragraph 43 that an application to the urgent applications judge was not a sufficiently certain and effective remedy.

To my mind, that analysis does not take into account the machinery of the remedies provided by domestic law, particularly with regard to the substantive conditions, as Article 752 of the Code of Criminal Procedure provides that enforcement of an order for imprisonment in default is contingent on the defendant being solvent.

Article 756 of the Code of Criminal Procedure provides that initially it is the civil courts which have jurisdiction. Mr Soumare consistently argued his case on the basis of his insolvency; he did not call into question before the Commission the validity of the order made in the criminal proceedings for his imprisonment in default (which is a different issue from the one before the Commission and the Court).

Yet Mr Soumare had sought – on 1 July 1991, and 24 February and 22 October 1993 – to negotiate a settlement with the customs authorities offering on 22 October 1993 to pay 9,000 francs and on 13 June 1994 repeating that offer while inviting the authorities to indicate to him what other sum would be “reasonable” (see the Commission’s report, paragraphs 20, 22 and 23). Finally, he agreed to pay 10,000 francs in 1993.

Where arguable grounds for contesting imprisonment in default exist, the criminal court may hear an application for its discharge (see Articles 710 and 711 of the Code of Criminal Procedure).

The urgent applications judge has jurisdiction to determine whether a defendant is insolvent and may order a stay of execution, or refer the application to a criminal court if there is an arguable case.

In addition, as an ordinary judge, the urgent applications judge has jurisdiction in all proceedings of general application in that he may hear cases of all types.

Two remedies were therefore available – on the issue of insolvency the judge therefore has jurisdiction to hear urgent applications. Mr Soumare's offers obviously contradicted his claim that he was insolvent; that justified the domestic court's finding that he had not proved that he was insolvent.

Urgent applications judges have on many occasions in domestic law heard applications for discharge on grounds of insolvency of orders for imprisonment by default[1].

As that remedy was available, Mr Soumare could not consider that it would necessarily have been unsuccessful. He was unable to obtain a discharge because he failed to prove that he was insolvent. Further, he could have made other applications for discharge.

A recent study by Mr J. Brandeau concerning disputes over imprisonment in default of payment of tax, L. 271 *LPF* (*Petites affiches*, 1 June 1998, no. 65), shows that remedies in imprisonment in default cases are effective. In certain respects, the analysis of the situation in cases of imprisonment in default of payment of tax may be transposed to customs cases.

> "In conjunction with the decisions of the criminal courts ordering imprisonment in default of payment of taxes that have been fraudulently evaded, the civil courts may give leave for enforcement by that method on application by the authority responsible for collection.
>
> On service of the order laid down by Article 754 of the Code of Criminal Procedure, the person concerned may challenge it before the Paymaster General or the Head of the Revenue in accordance with the provisions of Article L. 281 of the *LPF*.
>
> The fact that proceedings have been brought under Article 756 of the Code of Criminal Procedure does not prevent an urgent application being made under Article 809 of the New Code of Civil Procedure and the Court of Cassation has confirmed that the urgent applications judge has jurisdiction to order a stay of execution of the order for imprisonment in default.
>
> The full court extended that role in its judgment of 9 April 1996 holding that the urgent applications judge had power to review all the conditions relating to the lawfulness of the arrest and imprisonment."

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[1] See judgments of La Rochelle *tribunal de grande instance* of 12 December 1994 and of Mulhouse *tribunal de grande instance* of 17 February 1995.

The role and jurisdiction of urgent applications judges in such cases is reinforced by the general French case-law.

In any event, the procedural machinery for imprisonment in default in customs and tax cases is neither discretionary nor arbitrary. In the instant case, Mr Soumare had procedural possibilities available that could be considered effective remedies within the meaning of the Convention.