

In the Rubinat case *,

* The case is numbered 7B/1983/63/98. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

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. G. Wiarda, President,
Mr. J. Cremona,
Mr. Thór Vilhjálmsson,
Mr. E. García de Enterría,
Mr. L.-E. Pettiti,
Mr. C. Russo,
Mr. J. Gersing,

and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 22 January 1985,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 July 1983, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9317/81) against the Italian Republic lodged with the Commission on 21 July 1978 under Article 25 (art. 25) by Mr. Pedro Rubinat, a Spanish national. The Commission had ordered the joinder of this application with another (no. 9024/80), lodged against the same State on 5 May 1980 by Mr. Giacinto Colozza, an Italian national.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 21 September 1983, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Cremona, Mr. Thór Vilhjálmsson, Mr. L. Liesch, Mr. L.-E. Pettiti and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr. E. García de Enterría, substitute judge, replaced Mr. Liesch, who was prevented from taking part in the consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. The Registrar endeavoured to put to Mr. Rubinat - notably

through the lawyer who had acted for him before the Commission - the inquiry provided for under Rule 33 para. 3 (d), but despite several attempts he was unsuccessful, being unable to discover the applicant's whereabouts. The President accordingly decided in October 1983 to treat Mr. Rubinat as not wishing to take part in the proceedings; he reserved the possibility of reopening the question should the applicant contact the Court in the near future, but that did not happen.

5. By telegram received at the registry on 21 May 1984, the Agent of the Italian Government ("the Government") requested the Court to strike Mr. Rubinat's case out of the list pursuant to Rule 48 para. 2.

On being consulted in this connection by the President, the Delegate of the Commission replied, on 15 June 1984, that he left the matter to the wisdom of the Court, but that in his view any striking out, if there was to be one, should not be effected before the oral proceedings in respect of Mr. Colozza's complaints.

6. On 26 September 1984, the Court severed the two cases in the interests of the proper administration of justice. On 22 January 1985, the Court decided not to hold a hearing in the present case, having first satisfied itself that the requisite conditions for such a derogation from normal procedure had been fulfilled (Rule 26).

AS TO THE FACTS

7. Mr. Pedro Rubinat is a Spanish sailor born in 1933. On 27 April 1972, in the course of a dispute, he fatally wounded a Nicaraguan sailor in a boarding-house in Genoa, after which he went abroad.

The next day, the Italian authorities issued a warrant for his arrest, but he could not be found. On 23 May 1972, the police drew up a report stating that searches had been unsuccessful (*vane ricerche*) and Mr. Rubinat was thenceforth treated as "*latitante*", that is as a person wilfully evading the execution of a warrant issued by a court (Article 268 of the Code of Criminal Procedure).

8. On 25 November 1974, the Genoa Assize Court, after holding a trial by default (*contumacia*; Articles 497 to 501 of the Code of Criminal Procedure), sentenced the applicant to twenty-one years' imprisonment for murder. In accordance with the provisions concerning accused persons who fail to appear (Article 173 of the Code of Criminal Procedure), the summons to appear had been lodged in the court registry and had thus been brought to the attention of the officially-appointed defence counsel.

9. The officially-appointed defence counsel entered an appeal, but on 28 May 1976 the Genoa Appeal Court of Assize upheld the impugned judgment. Counsel then applied to the Court of Cassation, but as he had no right of audience before that Court he sought and was granted leave to be replaced by a colleague.

10. On 29 October 1976, Mr. Rubinat was arrested in France in connection with criminal proceedings being brought against him in that country. The Italian authorities requested his extradition; this took place on 27 May 1977, without any formal procedure as Mr. Rubinat had consented. It is not known whether, at that time, he was aware that the merits of his case had already been judged at first instance and on appeal. He subsequently asserted that he expected to be able to explain his version of the events before a court and that, when he left Genoa, he did not realise that the injuries he had inflicted were fatal.

11. On his arrival in Italy, Mr. Rubinat successively appointed

two defence lawyers and was able to consult the court file on his case. The Court of Cassation dismissed his appeal on points of law on 4 July 1978, whereupon he entered a "procedural objection" and applied for a retrial. These applications were dismissed by the Genoa Court of Appeal and the Court of Cassation on 20 November 1979 and 29 January 1981, respectively.

12. On 12 May 1983, the President of the Italian Republic granted a pardon to Mr. Rubinat, who after his release went abroad. He is probably living in France, but he has not indicated, even to his lawyer, his current address and the Registrar, despite his efforts, has been unable to discover it (see paragraph 4 above).

PROCEEDINGS BEFORE THE COMMISSION

13. Mr. Rubinat lodged his application with the Commission on 21 July 1978. Relying on Article 6 (art. 6) of the Convention, he complained that he had not received the benefit of a fair trial.

The Commission declared the application (no. 9317/81) admissible on 9 July 1982, having ordered its joinder with the application of Mr. Colozza (no. 9024/80) (see paragraphs 1 and 6 above). In its report of 5 May 1983 (Article 31) (art. 31), the Commission expressed the unanimous opinion that Article 6 para. 1 (art. 6-1) had been violated. The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to the present judgment.

AS TO THE LAW

14. The Government grounded their request for striking out on a pardon granted on 12 May 1983 by the President of the Republic to the applicant as a result of which he was released from prison. The Government invoked Rule 48 para. 2 of the Rules of Court, which provides:

"When the Chamber is informed of a friendly settlement, arrangement or other fact of a kind to provide a solution of the matter, it may, after consulting, if necessary ... the Delegates of the Commission and the applicant, strike the case out of the list."

The Court has been able to consult the Delegate, but not Mr. Rubinat in view of the fact that his current whereabouts is not known (see paragraphs 4, 5 and 12 above).

15. As was pointed out by the Delegate of the Commission, there has been no friendly settlement or arrangement in the present case, the pardon granted to the applicant being in the nature of a unilateral measure even though some negotiation may have preceded it (see, *inter alia*, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 30, para. 85).

On the other hand, there is good cause for considering that the circumstances disclose a "fact of a kind to provide a solution of the matter". Mr. Rubinat was released well before expiry of the sentence of twenty-one years' imprisonment which had been imposed on him by the Genoa Assize Court on 25 November 1974 and then upheld by the Genoa Appeal Court of Assize on 28 May 1976 (see paragraphs 8-10 above). The lasting silence observed by him since then seems, if not to amount to an implied discontinuance - he being a person who, as a strict matter of law, does not have the standing of a party to the proceedings before the Court (see, *inter alia*, the Tyrer judgment of 25 April 1978, Series A no. 26, p. 13, para. 25) -, at least to reflect the wish no longer to be associated in the proceedings, the aim he was pursuing having been attained.

16. Taken on its own the case does admittedly raise issues of

principle transcending the person and the interests of Mr. Rubinat (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 20, para. 38). That being so, the Court could, having regard to its responsibilities under Article 19 (art. 19) of the Convention, proceed with the consideration of the case notwithstanding the "fact" referred to above (Rule 48 para. 4). The Court, nevertheless, sees no compelling reason to opt for this course and not to accede to the Government's request: it has already given a ruling, by a judgment of today's date, on analogous legal issues arising in respect of Mr. Colozza and thereby clarified the scope of the engagements undertaken by the Contracting States in this area.

17. Consequently, it is appropriate to strike the Rubinat case out of the list. The Court, however, reserves the power to restore the case to the list in the event of fresh circumstances capable of justifying such a course.

FOR THESE REASONS AND WITH THIS RESERVATION, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 12 February 1985.

Signed: Gérard WIARDA
President

Signed: Marc-André EISSEN
Registrar