



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

COURT (CHAMBER)

**CASE OF PHAM HOANG v. FRANCE**

*(Application no. 13191/87)*

JUDGMENT

STRASBOURG

25 September 1992

**In the case of Pham Hoang v. France\*,**

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

Mr R. RYSSDAL, *President*,

Mr R. BERNHARDT,

Mr Thór VILHJÁLMSSON,

Mr F. GÖLCÜKLÜ,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr A. SPIELMANN,

Sir John FREELAND,

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

Having deliberated in private on 23 April and 29 August 1992,

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 7 June 1991, 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. 13191/87) against the French Republic lodged with the Commission under Article 25 (art. 25) by a national of that State, Mr Tuan Tran Pham Hoang, on 20 August 1987.

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 respondent State of its obligations under Article 6 paras. 1, 2 and 3 (c) (art. 6-1, art. 6-2, art. 6-3-c).

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\* The case is numbered 66/1991/318/390. 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.

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 28 June 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr J. Pinheiro Farinha, Mr C. Russo, Mr R. Bernhardt, Mr A. Spielmann and Sir John Freeland (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr F. Gölcüklü, substitute judge, replaced Mr Pinheiro Farinha, who had resigned and whose successor had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

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 applicant's lawyer on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, and after two extensions of time due to an unsuccessful attempt to achieve a friendly settlement, the Registrar received the memorials of the applicant, the Government and the Delegate of the Commission on 4 November 1991, 16 December 1991 and 2 February 1992 respectively.

5. On 21 November 1991 the President had given the Conseil d'État and Court of Cassation Bar leave under Rule 37 para. 2 to submit written comments on a specific issue. These were received by the Registrar on 20 January 1992 and were supplemented by the representative of the Chairman of the Bar in a memorandum of 10 March 1992.

6. On 22 November 1991 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 April 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs E. BELLIARD, Deputy Director

of Legal Affairs, Ministry of Foreign Affairs, *Agent,*

Mr B. GAIN, Head

of the Human Rights Section, Department of Legal  
Affairs, Ministry of Foreign Affairs,

Miss M. PICARD, magistrat,

on secondment to the Department of Legal Affairs,  
Ministry of Foreign Affairs,

Mr J. CAMUT, Deputy Director-General of

Customs, Ministry of the Budget,  
 Mrs C. COSSON, magistrat,  
 on secondment to the European and International Affairs  
 Department, Ministry of Justice, *Counsel*;  
 - for the Commission  
 Mr H.G. SCHERMERS, *Delegate*;  
 - for the applicant  
 Mr A. LESTOURNEAUD, avocat,  
 Mrs P. POTIEZ-LESTOURNEAUD, avocate, *Counsel*.

The Court heard addresses by Mrs Belliard for the Government, Mr Schermers for the Commission and Mr Lestourneaud and Mrs Potiez-Lestourneaud for the applicant, as well as replies to its question.

## AS TO THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. Mr Tuan Tran Pham Hoang, a French national who was born in Saigon in 1963, was unemployed and living at Aulnay-sous- Bois (France) at the material time.

9. On 3 January 1984 he was arrested in Paris with four other people from Hong Kong, Cambodia or Vietnam, Mr Cheng Man Ming, Mr Fu Wing Kin, Mr Ngo Pan and Mr Tran Gia Quong. He was at the wheel of a car towards which Mr Cheng and Mr Fu were walking; they had just emerged from a hotel and were carrying two bags containing 2,750 grams of heroin base and 85 grams of almost pure heroin, together with a pair of scales, one pan of which bore traces of heroin. Two other people, Mr Jip Quang Duong and Mr Hanh Phuoc, were arrested after weapons and 5kg of caffeine were discovered by police while searching a flat visited by the applicant.

Since the end of December 1983 officers of the Drugs and Vice Squad had been carrying out surveillance and shadowing operations; they had got wind of preparations for heroin trafficking in relation to individuals from Hong Kong.

10. On 7 January 1984 an investigating judge charged the applicant with an offence under the drugs legislation and remanded him in custody. The applicant was released under judicial supervision on 6 March 1984.

### **A. Proceedings in the Paris tribunal de grande instance**

11. In an order of 25 March 1984 the investigating judge committed the applicant and the six others mentioned above for trial on the charge that they had "conspired in Paris during 1983-84, in particular up to 3 January, to produce, possess and supply drugs, namely heroin".

12. At the trial on 2 May 1985 the Director-General of Customs asked the court to

"Find Cheng, Fu Wing, Ngo, Tran, Hanh, Jip and Pham guilty of having committed within the French customs territory from 1 December 1983 to 3 January 1984 as persons in possession or having an interest in customs evasion, the class 3 customs offence of smuggling prohibited goods by means of a self-propelled vehicle and in a group of more than six individuals;

Sentence them jointly and severally on this charge to pay the customs authorities:

(a) a sum of 2,835,000 (two million eight hundred and thirty-five thousand) francs in lieu of forfeiture of the goods, which will be destroyed (Art. 435 of the CC [Customs Code]);

(b) a fine of 2,835,000 (two million eight hundred and thirty-five thousand) francs, being the value of the smuggled goods (Art. 414 of the CC);

Pass the maximum sentence of imprisonment provided for in the event of non-payment;

Order that the defendants shall be held in custody, within the limit of the term of that imprisonment, until such time as the customs penalties have been paid (new Article 388 of the Customs Code);

The above measures being pursuant to Articles 38, 215, 343, 373, 382, 388, 392, 399, 409, 416, 417, 419, 435 and 438 of the Customs Code, Article 750 of the Code of Criminal Procedure and the Order of 11 December 1981 made by the Minister for the Budget;

Without prejudice to the sentence of imprisonment provided for in Article 416 of the Customs Code and which the public prosecutor is asked to apply for pursuant to Article 343-1 of that Code."

The Director-General's submissions included the following details:

"The defendants' statements and the police surveillance disclosed the following:

Cheng Man Ming and Fu Wing Kin left Bangkok together by air on 26 December 1983 carrying a suitcase with a false bottom containing the heroin subsequently seized. When they arrived in Athens, Cheng continued his journey by air to Paris and instructed Fu to bring the suitcase by rail in order to avoid the thorough checks made at airports in Paris.

In France Ngo Pan accompanied Cheng to make a number of purchases: the receptacle which would have served to mix the heroin and the caffeine [and] the secateurs for cutting open the hidden compartment in the suitcase.

The heroin subsequently seized was to be transported in Pham's motor vehicle, and Tran was to drive with it to the home of Jip Quang Duong and Hanh Phuoc, where the 5kg of caffeine were seized.

It has therefore been established that the seven defendants constituted a group of individuals (whether or not all of them were in possession of the smuggled goods) formed with a view to importing heroin base, converting it, possessing it, transporting it and mixing it with caffeine in order to produce a commodity whose street value would have been trebled by virtue of this blending.

...

#### AS TO THE LAW

The goods in question are mentioned by name in the Order of 11 December 1981 made by the Minister for the Budget, which lists the substances to which Article 215 of the Customs Code is to apply.

Those who possess or transport goods specially designated in orders made by the Minister for Economic Affairs and Finance must, when first asked to do so by customs officers, produce either receipts certifying that the goods have been lawfully imported or invoices, manufacture notes or any other proof of origin from individuals or companies lawfully established within the customs territory.

In the absence of any proof of origin as indicated above, the goods in question are deemed to have been imported unlawfully (Art. 419 of the CC).

This constitutes the offence of unlawfully importing prohibited goods, namely 2,835 grams of heroin base or almost pure heroin with a value of 2,835,000 F, punishable under Articles 38, 215, 373, 414, 417, 419 and 435 of the Customs Code; with the following aggravating circumstances:

1. Heroin is the most strictly prohibited commodity in customs terms and the most harmful under health legislation; 2. ... the offence was committed by a group of six or more individuals (Art. 416 of the CC);

3. ... the goods were to be transported by a self-propelled vehicle (Art. 416 of the CC).

#### SPECIAL FEATURES OF CUSTOMS LAW

Art. 373 of the CC: in any proceedings concerning a seizure of goods, it shall be for the person whose goods have been seized to prove that he has not committed an offence.

The defendants cannot avoid their criminal liability by relying on their good faith, since the latter is of absolutely no effect in customs law.

Art. 409 of the CC: any attempted offence is punishable in the same way as the offence itself. Delivery was going to be taken of the smuggled goods in Pham's vehicle by Pham, Ngo and Tran.

#### LIABILITY

The offence described above is imputable to the above-mentioned persons as being in possession - in possession in law - or having an interest in customs evasion.

A person in possession of smuggled goods is deemed responsible for customs evasion (Art. 392 para. 1 of the CC).

By Art. 399 of the CC,

1. Anyone who as a person having an interest has taken part in any way in a smuggling offence or an offence of undeclared importation or exportation is liable to the same penalties as anyone committing the offence and, furthermore, to the loss of rights provided for in Article 432 of the Customs Code.

2. The following are deemed to have an interest:

(a) owners and members of business undertakings, insurers, insurance policyholders, moneylenders, owners of goods and in general anyone who has a direct interest in customs evasion;

(b) anyone who has contributed in any way to a series of acts committed by a number of individuals acting in concert, in accordance with a customs-evasion plan drawn up in order to achieve the jointly pursued purpose;

(c) anyone who has knowingly concealed the activities of smugglers or attempted to help them evade punishment or has purchased or possessed, even outside the customs zone, goods obtained by means of a smuggling offence or an offence of undeclared importation.

3. An interest in customs evasion cannot be imputed to anyone who has acted from necessity or as a result of an unavoidable mistake.

Where more than one person is found guilty of a single customs-evasion offence, they are jointly and severally liable for the penalties, both as regards pecuniary penalties in lieu of forfeiture and as regards fines and costs (Art. 406 para. 1 of the CC).

The owners of smuggled goods, anyone who has undertaken to import or export them, anyone with an interest in the customs evasion, accomplices and adherents are all jointly and severally liable and are subject to imprisonment for non-payment of fines, sums in lieu of forfeiture and costs (Art. 407 of the CC).

..."

13. On 31 May 1985 the Paris tribunal de grande instance (16th Criminal Division) acquitted the applicant, Mr Jip and Mr Hanh on all the charges against them for lack of sufficient evidence.

As regards the proceedings in respect of the ordinary criminal offence (see paragraph 11 above), it held:

"... there is no evidence that Pham Hoang, who was involved only on an ad hoc basis, knowingly agreed to transport the goods and those in possession of them in his car.

..."

As regards the proceedings in respect of the customs offence (see paragraph 12 above), it said:

"...

As far as the customs offence is concerned, no physical act of aiding and abetting or of having an interest in the customs evasion can be proved against Jip, Hanh and Pham.

It should be noted that the police intervened before they had been able to do anything to take possession of the prohibited goods. Accordingly, the question of any good faith on their part does not even arise.

..."

The other defendants, however, were sentenced to imprisonment for terms ranging from six to twelve years.

## **B. Proceedings in the Paris Court of Appeal**

14. The Director-General of Customs appealed against the decision to acquit the applicant, Mr Jip and Mr Hanh of the customs offence. For the hearing on 23 September 1985 he made the following submissions:

"As regards Pham, it should be stated that he has always claimed that he 'knew nothing about the operation in which he took part'. He cannot be acquitted on this account, since intention does not have to be taken into consideration by the court for the customs offence to be made out (Art. 373 of the CC).

It was Pham who drove the motor vehicle in which Tran and then Ngo had travelled. On several occasions the police saw them going to shops to buy hydrochloric acid - which is used to turn heroin base into soluble heroin.

Again driven by Pham, the two men went to Cheng's hotel. Cheng and Fu were arrested as they were about to put the heroin base into Pham's vehicle.

It is thus established that Pham was going to be in possession of 2,835 grams of heroin base. For a reason beyond his control, the drug did not in the end come into his possession.

Furthermore, the fact that Pham drove in his own vehicle two traffickers who firstly went to buy an ingredient of the smuggled goods, the hydrochloric acid, and secondly

were about to take delivery of a strictly prohibited commodity, the heroin base, warrants the assertion that he had an interest in the customs evasion.

In short, it has clearly been established that Pham, Jip and Hanh had indeed formed a group of individuals together with the four others with a view to possessing, transporting or attempting to transport consumable heroin and to convert it by attempting to add hydrochloric acid to heroin base and thereafter adding caffeine to the heroin hydrochloride in order to increase both the weight of the goods to be supplied on the illicit market and, above all, the profit to be derived from the trafficking.

In respect of the three defendants, the court below thus disregarded Articles 373, 392, 399 and 409 of the Customs Code.

Extenuating circumstances:

Pursuant to Article 369 of the CC, the court below was, however, entitled to find that there were extenuating circumstances in respect of Pham, Hanh and Jip and accordingly to reduce the sum to be paid in lieu of forfeiture and the fine to one-third of the value of the smuggled goods ( $2,835,000 * 3 = 945,000$  F) and not make an order for the forfeiture of Pham's vehicle.

Special features of customs law

Offences under the drugs legislation are inseparable from smuggling offences.

Customs offences, however, are strict-liability offences provided for and punishable under a body of law separate from the ordinary law, and in particular under: 369 para. 2: good faith is of absolutely no effect 373: where goods have been seized, the burden of proving that no offence has been committed is on the person whose goods have been seized 392: possession 399: interest in customs evasion

..."

15. In their written submissions made for the hearing on 2 December 1985 the two counsel for the applicant - Mr Lestourneaud and Mr Pugliesi-Conti - argued in particular that Articles 369 para. 2, 373, 392 para. 1 and 399 para. 2 of the Customs Code were "incompatible with the concepts of a fair trial and of presumption of innocence contained in Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the European Convention on Human Rights".

16. On 10 March 1986 the Paris Court of Appeal found the applicant "guilty of having, in Paris and within the customs territory, from 1 December 1983 to 3 January 1984, committed as a person in possession or having an interest in customs evasion, the class 2 customs offence of unlawfully importing prohibited goods by means of a self-propelled vehicle and in a group of more than three individuals".

He was sentenced to "pay the customs authorities, jointly and severally with Cheng Man Ming, Fu Wing Kin, Ngo Pan and Tran Gia Quong:

(a) a sum of 2,835,000 francs in lieu of forfeiture of the goods, which [were to] be destroyed, and

(b) a fine of 2,835,000 francs, being the value of the smuggled goods, his personal liability being limited in both cases to the sum of 1,000,000 francs".

The judgment contained the following reasons:

"A. As to the defence submissions concerning Pham

In submissions filed with the Court, counsel for Pham Hoang Tuan Khanh sought to have upheld the defendant's acquittal and to have dismissed the case put forward by the customs authorities as sole appellant against the defendant, on the ground that Articles 392-1, 373, 399-2 and 3, and 369 of the Customs Code were incompatible with the provisions of Article 6 (art. 6) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights signed in New York on 16 December 1966, both of which have been ratified by France and embody the principles of a 'fair trial' and 'the presumption of innocence in criminal proceedings'.

This ground does not amount to a preliminary objection, seeing that the conventions prayed in aid do not provide for applications for preliminary rulings to the supervisory bodies set up to implement them.

As it relates to the lawfulness of the prosecution, it must be considered, although it was not raised before any defence on the merits.

The defence submissions do not allege any breach of the rules governing the procedure followed during the judicial investigation or at the trial, but it is argued in them that under the provisions of the Customs Code relied on by the prosecution a person in possession of the goods is deemed responsible for customs evasion, and all those who come within specified categories are deemed to have an interest in customs evasion, in both cases regardless of their good faith or their intention, such that these provisions provide for a presumption of guilt which makes them incompatible with the provisions of the European Convention for the Protection of Human Rights and of the International Covenant, which provide that 'everyone is entitled to a fair ... hearing' and that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

It was pointed out that the European Court of Human Rights in Strasbourg has held that the presumption of innocence is one of the ingredients of a fair trial and that applying provisions which remove the burden of proof from the prosecution puts the defendant at a disadvantage, negates the equality of arms to his detriment, and, ultimately, deprives him of a fair trial.

But while it is true that the customs authorities do not have to prove bad faith on the part of the person in possession of the smuggled goods or of the person having an interest in customs evasion, they must establish the physical fact of possession and show that the defendant in some way took part, as a person having an interest, in an offence of smuggling or of undeclared importation or that he belongs to one of the categories of those who are deemed to have a direct interest in customs evasion.

It is the special nature of customs offences, which are complete as soon as the smuggled goods cross the border, that compels the legislature to define them as

offences which are made out as soon as the physical acts which disclose their existence have been evidenced on French territory.

The special nature of these offences does not, however, deprive the offender of any possibility of raising a defence, seeing that the law provides that a person in possession can exonerate himself by proving force majeure and that an interest in customs evasion cannot be imputed to anyone who has acted from necessity or as a result of an unavoidable mistake.

It appears from the evidence in the file that Pham, who was remanded in custody on 7 January 1984 and released under judicial supervision on 6 March 1984 and was acquitted by the court below, was consistently presumed innocent and had every possibility of putting forward the grounds allowed him by the law in order to exonerate himself.

That being so, there is no incompatibility in this case between the impugned provisions and the principles laid down in the conventions relied on, seeing that the customs authorities are prosecuting Pham for an offence of unlawfully importing strictly prohibited goods, namely 2,835 grams of heroin base or almost pure heroin, a commodity whose importation is strictly prohibited on account of its harmfulness to public health and of the damage its consumption causes both to the users' physical health and to the social order.

In the face of a scourge affecting young people more particularly and which is spreading alarmingly, the impugned provisions of the Customs Code, which were applied in conformity with the rules laid down in the Code of Criminal Procedure, can be seen as the response made within the constitutional framework and the limits of a European State's sovereignty to offences that are particularly serious and call for appropriate special punishment.

There is accordingly no ground for holding that these provisions are inapplicable.

#### B. As to Pham's guilt

It is established that on the afternoon of 3 January 1984 Ngo, who played an important part in the importation of the heroin, was driven by Pham in his Peugeot 104 car to buy hydrochloric acid in various shops to blend the pure heroin brought into France by Cheng and Fu.

Pham was present in the flat at 110 boulevard de la Chapelle at 1 p.m. when the 5kg of caffeine were delivered there by an Asian who was said by the other defendants to be the head of the trafficking network.

He agreed to drive Tran and Ngo to their rendezvous with Cheng and Fu.

At the time he was arrested, he was waiting for Cheng to get into his car so that he could drive him to Tran's flat in the boulevard de la Chapelle.

He was therefore on the point of being in possession of the smuggled goods, which only the intervention of the police prevented from being placed in his vehicle.

The customs authorities therefore rightly argued that the attempt is regarded in the same way as the offence itself, that it was for reasons beyond his control that Pham did not physically come into possession of the heroin that was going to be placed in his car and that the fact of his having driven in his own vehicle two traffickers who were on the point of taking delivery of the prohibited goods warranted the assertion that he had an interest in customs evasion.

He did not claim to have acted from necessity, and the circumstances in which he was implicated in the operation and arrested do not allow him to maintain that he acted as a result of an unavoidable mistake."

### **C. Proceedings in the Court of Cassation**

17. On the very day that the Court of Appeal gave its judgment, Mr Pham Hoang appealed to the Court of Cassation. Mr Lestourneaud wrote to the Chairman of the Conseil d'État and Court of Cassation Bar on 10 March 1986 applying for counsel to be officially assigned as his client was not in a position to meet further costs. The principles which the applicant intended to assert before the Court of Cassation were, he said, complex and the advice of a member of the Court of Cassation Bar was essential for following the proceedings. He reiterated this request in a letter of 21 March 1986.

18. On 26 March the Chairman of the Bar replied as follows:

"Legal aid is not available to convicted persons, who are infinitely numerous, in criminal cases which come before the Court of Cassation.

In certain exceptional cases, where the heaviest sentences are at stake, I assign one of my colleagues free of charge for the purposes of studying the file.

But Mr Pham Hoang does not come into this category and I cannot grant his request."

19. On 7 August 1986 the applicant sent a registered letter to the registry of the Court of Cassation; he indicated that he was filing, as pleadings, a copy of the appeal submissions lodged on 2 December 1985 by his two counsel (see paragraph 15 above).

20. The Court of Cassation (Criminal Division) dismissed the appeal on 9 March 1987 for the following reasons:

"Having regard to the personal application, which was properly produced, and to the pleadings in support;

The personal application does not in itself raise any point of law for determination and does not allege a breach of any provision. Accordingly, since it does not comply with the requirements of Article 590 of the ... Code [of Criminal Procedure], it is not admissible.

The Court of Appeal's judgment, moreover, contains no formal defect."

## II. RELEVANT DOMESTIC LAW

### A. The legislation and case-law on customs offences

21. In France customs offences are criminal offences with various special features.

The Customs Code essentially prohibits smuggling (Articles 417 and 422) and undeclared importation or exportation (Articles 423-429). This case is concerned solely with smuggling. Smuggling is defined as "any importation or exportation effected outside official customs premises and any infringement of the statutory provisions or regulations concerning the possession and transport of goods within the customs territory" (Article 417 para. 1), for example - but not exclusively - if importation of the goods is prohibited (Article 418 para. 1, to be read in conjunction with Article 38).

22. The following are the main provisions of the Customs Code that are referred to in the instant case:

#### **Article 369 para. 2**

"The courts shall not acquit offenders for lack of intent."

This paragraph was repealed by Law no. 87-502 of 8 July 1987, which changed tax and customs procedure, but the Law did not apply to the instant case.

#### **Article 373**

"In any proceedings concerning a seizure of goods, the burden of proving that no offence has been committed shall be on the person whose goods have been seized."

#### **Article 392 para. 1**

"A person in possession of smuggled goods shall be deemed responsible for customs evasion."

Taken literally, this provision appears to create an irrebuttable presumption. The courts have, however, mitigated its strictness. Thus the Criminal Division of the Court of Cassation now upholds the unfettered power of courts of trial and of appeal to assess the "evidence adduced by the parties before them" (see, for example, the Abadie judgment of 11 October 1972, Bulletin (Bull. crim.) no. 280, p. 723) and recognises that an accused may exonerate himself by establishing "a case of force majeure" resulting "from an event responsibility for which is not attributable" to him and which "it was absolutely impossible [for him] to avoid", such as "the absolute impossibility ... of knowing the contents of [a] package" (see, for example, the Massamba Mikissi and Dzekissa judgment of 25 January 1982, Gazette

du Palais, 1982, jurisprudence, pp. 404-405, and the Salabiaku judgment of 21 February 1983, extracts from which are reproduced in the Series A volume no. 141-A, p. 10, para. 15).

#### **Article 399**

"1. Anyone who as a person having an interest has taken part in any way in a smuggling offence or an offence of undeclared importation or exportation shall be liable to the same penalties as anyone committing the offence and, furthermore, to the loss of rights provided for in Article 432 hereinafter.

2. The following shall be deemed to have an interest:

(a) owners and members of business undertakings, insurers, insurance policyholders, moneylenders, owners of goods and in general anyone who has a direct interest in customs evasion;

(b) anyone who has contributed in any way to a series of acts committed by a number of individuals acting in concert, in accordance with a customs-evasion plan drawn up in order to achieve the jointly pursued purpose;

(c) anyone who has knowingly concealed the activities of smugglers or attempted to help them evade punishment or has purchased or possessed, even outside the customs zone, goods obtained by means of a smuggling offence or an offence of undeclared importation.

3. An interest in customs evasion cannot be imputed to anyone who has acted from necessity or as a result of unavoidable mistake."

Under French case-law, having an interest is distinct from the criminal offence of aiding and abetting as defined by Articles 59 and 60 of the Criminal Code, to which Article 398 of the Customs Code refers (27 April 1967, Bull. crim. no. 137).

"Unavoidable mistake" is to be understood as a mistake as to some physical fact, made in circumstances precluding any fault or negligence on the part of the person making it, such that the mistake could not be avoided, even after checks had been made; it is not a simple matter of good faith (24 November 1980, Bull. crim. no. 313). In a judgment of 12 November 1985 the Criminal Division of the Court of Cassation held: "Article 399 para. 2 of the Customs Code requires, in order for a person to be found guilty of having an interest in customs evasion committed by third parties, that the court should find that the defendant knowingly contributed to an unlawful operation which might result in customs evasion, even if he was ignorant of the actual arrangements" (Bull. crim. no. 350).

#### **Article 409**

"Any attempted customs offence shall be regarded in the same way as the offence itself."

## **B. Criminal appeals on points of law and legal aid**

23. Legal representation is not compulsory for applications to the Court of Cassation in criminal cases. A convicted defendant can lodge an appeal on points of law himself and set out his grounds of appeal in writing (Articles 568, 584 and 585 of the Code of Criminal Procedure). Only members of the Conseil d'État and Court of Cassation Bar, however, have the right of audience.

24. For many years there were no provisions to deal with the problem of legal aid for persons whose means were insufficient to ensure the exercise of their rights in the criminal courts.

Section 4 of Law no. 72-11 of 3 January 1972 on legal aid and payment of officially assigned or appointed counsel provided merely:

"Legal aid shall be granted for both contentious and non-contentious proceedings.

It shall be available for:

Any proceedings brought either before an ordinary court other than a criminal court or before the Conseil d'État, the administrative courts of appeal, the administrative courts or the Jurisdiction Disputes Court;

Any action in courts of trial or of appeal concerning a person's civil liability;

Any action brought by a civil party to criminal proceedings before investigating judges or courts and trial or appeal courts;

Any protective measure;

Any procedure for enforcement of either a judicial decision or any other legal transaction."

According to the Conseil d'État and Court of Cassation Bar, the situation before the 1991 reform (see paragraph 25 below) was as follows:

"...

In the absence of any provisions, it has always been the tradition of the French bars ... to ensure that persons unable to meet the costs of their defence are defended by counsel assigned officially by the Chairman of the Bar. Lack of means is a matter of presumption for these purposes and there is no kind of means test.

If it becomes apparent that a person to whom counsel has been assigned officially for proceedings in courts of trial or of appeal, generally at his own request but sometimes, to ensure the proper conduct of the proceedings, at the request of an investigating judge or of the presiding judge of the court (at the Assizes, for example), has means of his own, the official assignment (free of charge) may, at his request, be converted into an official appointment, the lawyer initially assigned then having the right to charge fees, under the supervision of the chairman of the bar.

Counsel at the Conseil d'État and the Court of Cassation have similarly always contributed to the provision of free representation in criminal cases; but, given the small size of the Conseil d'État and Court of Cassation Bar and the 'extraordinary' nature of an appeal to the Court of Cassation, it was necessary to adapt the procedure.

This adaptation was twofold in nature.

Firstly, the Chairman of the Conseil d'État and Court of Cassation Bar never officially assigned a colleague directly. Where it was possible for an official assignment to be made, he would appoint a member of the Bar to study the file; the latter would report to the Chairman, and if he had identified a ground of appeal, the appointment to study the file would be informally converted into an official assignment.

This preliminary study corresponded to the preliminary study made by the Legal Aid Office, and the same resources were available.

Where a ground of appeal could be set out at length, the appointed member of the Bar would produce pleadings on a voluntary basis.

Secondly, counsel was not automatically appointed following an application.

A study of the file was ordered as of right where there had been a conviction by an assize court and in the event of a case being remitted to an assize court or of a prison sentence being passed by a criminal court where the applicant was in custody pending trial. Study of the file was also ordered in the cases of those convicted by a criminal court of first instance or appeal who were not in custody but whose sentence was above a certain level, the level apparently having varied over time.

In all cases, if the Chairman indicated that he was unable to appoint a colleague, he qualified this by saying that he would have the file studied by one of his colleagues if his attention was drawn to a point of law that could be submitted for review by the Court of Cassation. Study of the file was in fact ordered fairly generously once counsel before a court of trial or of appeal had drawn the attention of the Chairman of the Bar to a specific point.

It is to be noted that such precautions were necessary, not only because of the small size of the Conseil d'État and Court of Cassation Bar but also because appeals to the Court of Cassation in criminal cases (except in respect of judgments in associated civil-party proceedings) have a suspensive effect. It was important that the hearing of appeals that could not be sustained should not be systematically delayed on the ground that the file was being officially studied (or that counsel had been officially assigned to it).

It must not be overlooked that when a file is allocated to counsel, he is given a deadline. Moreover, when pleadings are produced, the Court of Cassation is obliged to give a reasoned judgment, after the case has been examined by a reporting judge; whereas when an appeal is not supported in that way, the case is automatically entered in a list known as the 'formal list' because the Court of Cassation essentially considers only whether the impugned judgment is free from any formal defect; in actual fact, it also satisfies itself that the statutory maximum sentence has not been exceeded.

In 1985 the Chairman of the Conseil d'État and Court of Cassation Bar who had then been elected became concerned about the increasing number of applications made to him for official assignment of counsel and the number of official appointments he had to make for study of files in accordance with the foregoing criteria; the number of such appointments had indeed increased from 110 in 1975 to 200 in 1985.

He felt it his duty, on his own initiative, to make a slight alteration if not to the actual criteria, at least to the letter previously sent to those applying for an official assignment of counsel or to lawyers applying for it on their behalf. In these replies he ceased to mention automatically that counsel would be officially instructed to study the file if a point of law was brought to his attention; and he also changed the criterion for an official appointment, in respect of applicants who were not in custody, to a two-year prison sentence (instead, apparently, of one year previously).

When a point of law was notified to him, he did in fact order an official study of the file, as in the past; the same applied when it was justified by the applicant's psychological state.

These measures reduced the number of appointments made for study of files from 200 in 1985 to 170 in 1986.

The Chairman who was elected in 1988 took a decision to order study of all files without any distinction when an application for official assignment of counsel was made to him; the number of files studied rose from 189 in 1987 to 220 in 1988, and reached 342 in 1990, falling back to 315 in 1991.

..."

25. It is now provided, in Law no. 91-647 of 10 July 1991 on legal aid:

"Legal aid shall be granted to plaintiffs or defendants in contentious or non-contentious proceedings before any court.

It may be granted for all or part of the proceedings.

It may also be granted in respect of the execution of a judicial decision or of any other authority to execute."

Following an agreement between the Court of Cassation and the Conseil d'État and Court of Cassation Bar, a system of legal aid in criminal cases has been set up.

## PROCEEDINGS BEFORE THE COMMISSION

26. Mr Pham Hoang applied to the Commission on 20 August 1987. He complained that he had been convicted on the basis of statutory presumptions of guilt which were contrary to Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention because they were incompatible with the rights of the defence and with the presumption of innocence. He also relied

on Article 6 para. 3 (c) (art. 6-3-c) in that he had not been assisted by a lawyer during the hearing of his appeal on points of law.

27. The Commission declared the application (no. 13191/87) admissible on 11 May 1990. In its report of 26 February 1991 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) (by seven votes to five) and that there had been a violation of Article 6 para. 3 (c) (art. 6-3-c) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment\*.

## FINAL SUBMISSIONS TO THE COURT

28. At the hearing the applicant asked the Court, firstly, to reject the Government's preliminary objection that domestic remedies had not been exhausted and, secondly, to find that there had been a breach of paragraphs 1, 2 and 3 of Article 6 (art. 6-1, art. 6-2, art. 6-3) of the Convention.

He also sought just satisfaction.

29. The Government confirmed in substance the final submissions in their memorial. They asked the Court to dismiss the first complaint, based on Article 6 paras. 1 and 2 (art. 6-1, art. 6-2), on the ground that the applicant had not exhausted domestic remedies or, in the alternative, because it was ill-founded, and to dismiss the second complaint, relating to Article 6 para. 3 (c) (art. 6-3-c), as being unfounded.

## AS TO THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 2 (art. 6-1, art. 6-2)

#### **A. The Government's preliminary objection**

30. In the Government's submission, the applicant had not exhausted domestic remedies in that he had not put the Court of Cassation in a position to try his appeal. He had not indicated to it either the parts of the Court of

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\* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 243 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

Appeal's judgment that he was challenging or in what way they were incompatible with domestic law or the Convention.

31. Although the Commission maintained the contrary, the Court has jurisdiction to entertain the objection (see, as the most recent authority, the *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, p. 33, para. 77). It cannot allow the objection, however, as in the circumstances of the case the refusal of an official assignment of counsel rendered the remedy in question ineffective (see paragraph 40 below).

### **B. The merits**

32. Mr Pham Hoang submitted that his conviction contravened the principles of a fair trial and of presumption of innocence. The Paris Court of Appeal had applied four presumptions against him - based on Articles 369 para. 2, 373, 392 para. 1 and 399 of the Customs Code (see paragraph 22 above) - and not just one as in the case of *Salabiaku v. France* (Court's judgment of 7 October 1988, Series A no. 141-A), whereas the considerable importance of what was at stake called for greater vigilance in respecting the rights of the defence.

He claimed that there had been a breach of paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2) of the Convention, which provide:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government disputed this argument and the Commission did not accept it.

33. As was pointed out in the *Salabiaku* judgment of 7 October 1988 (p. 16, para. 28 in fine), Article 6 (art. 6) requires Contracting States to confine presumptions of fact or of law provided for in their criminal law within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. However, the Court is not called upon to consider in the abstract whether Articles 369 para. 2, 373, 392 para. 1 and 399 of the Customs Code conform to the Convention. Its task is to determine whether they were applied in the instant case in a manner compatible with the presumption of innocence and, more generally, with the concept of a fair trial (*ibid.*, pp. 14 and 17, paras. 25 and 30).

34. In response to the submissions asking it to hold that the four provisions of the Code which were impugned by the applicant were inapplicable, the Court of Appeal said the following in particular:

"The special nature of [customs] offences does not ... deprive the offender of any possibility of raising a defence, seeing that the law provides that a person in possession can exonerate himself by proving force majeure and that an interest in

customs evasion cannot be imputed to anyone who has acted from necessity or as a result of an unavoidable mistake.

It appears from the evidence in the file that Pham, who was remanded in custody on 7 January 1984 and released under judicial supervision on 6 March 1984 and was acquitted by the court below, was consistently presumed innocent and had every possibility of putting forward the grounds allowed him by the law in order to exonerate himself." (See paragraph 16 above)

Mr Pham Hoang was not, in fact, deprived of all means of defending himself; under paragraph 3 of Article 399, he could try to demonstrate that he had "acted from necessity or as a result of unavoidable mistake" (see paragraph 22 above). The presumption of his responsibility was not an irrebuttable one. The Court of Appeal found that he had not claimed to have acted from necessity and that the circumstances did not allow him to raise a defence of unavoidable mistake either (see paragraph 16 above).

35. Furthermore, in its judgment of 10 March 1986 the Court of Appeal did not cite in the reasons for its decision any of the impugned provisions of the Customs Code when it ruled on the accused's guilt, even if it in substance took Articles 399 and 409 as its basis for holding that he had had "an interest in customs evasion" and that he was guilty of an attempted customs offence (see paragraphs 16 and 22 above). The court set out the circumstances of the applicant's arrest and took account of a cumulation of facts. It noted that during the afternoon of 3 January 1984 he had, in his own car, driven an important drug trafficker to several shops in order to buy hydrochloric acid; a little earlier, it added, he had been present in the flat where the head of the trafficking network had brought 5kg of caffeine and he had agreed to take Tran and Ngo to where the heroin was to be delivered. Lastly, it noted that although he had "not physically come into possession" of the heroin, this was due only to the intervention of the police and was thus for reasons beyond his control (see paragraph 16 above).

36. It therefore appears that the Court of Appeal duly weighed the evidence before it, assessed it carefully and based its finding of guilt on it. It refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code and did not apply them in a manner incompatible with Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention (see, *mutatis mutandis*, the Salabiaku judgment previously cited, Series A no. 141-A, pp. 17-18, para. 30).

## II. ALLEGED BREACH OF ARTICLE 6 PARA. 3 (c) (art. 6-3-c)

37. Mr Pham Hoang also complained that he had been unable to secure the official assignment of counsel in the Court of Cassation. In his submission, the importance and complexity of the legal principles in issue called for such assistance, in the interests of justice, seeing that he had proved his lack of resources. The Chairman of the Conseil d'État and Court

of Cassation Bar, however, had refused it without even ascertaining whether there was a serious ground of appeal. It followed that there had been a breach of paragraph 3 (c) of Article 6 (art. 6-3-c) of the Convention, which provides:

"Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

The Commission reached the same conclusion.

38. The Government pointed out that legal representation was not compulsory in criminal cases which came before the Court of Cassation. The applicant had, moreover, been helped to make his application to the Court of Cassation by one of the counsel who had defended him in the Court of Appeal. Only the problem of his representation during the hearing could have arisen, but such representation would have been of no avail since the Court of Cassation dismissed the appeal as raising no point of law for determination.

39. The Court observes that in the Convention system the right of a person charged with a criminal offence to free legal assistance is one element, amongst others, of the concept of a fair trial in criminal proceedings (see, as the most recent authority, the *Quaranta v. Switzerland* judgment of 24 May 1991, Series A no. 205, p. 16, para. 27). Sub-paragraph (c) of Article 6 para. 3 (art. 6-3-c) attaches two conditions to this right. The first, lack of "sufficient means to pay for legal assistance", is not in dispute in the present case. On the other hand, it is necessary to determine whether the "interests of justice" required that Mr Pham Hoang be granted such assistance.

40. The comments by the Conseil d'État and Court of Cassation Bar suggest that the applicant met with the refusal during a transitional period in which a policy was followed differing from earlier or subsequent practice (see paragraph 24 above); since then, the authority of the Legal Aid Office at the Court of Cassation has been extended by legislation to cover criminal proceedings (see paragraph 25 above).

This does not alter the fact that the proceedings were clearly fraught with consequences for the applicant, who had been acquitted at first instance but found guilty on appeal of unlawfully importing prohibited goods and sentenced to pay large sums to the customs authorities (see paragraph 16 above).

In addition, and above all, Mr Pham Hoang intended to challenge in the Court of Cassation the compatibility of Articles 369 para. 2, 373, 392 para.

1 and 399 para. 2 of the Customs Code with Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. At least, this appears to emerge from his letter of 7 August 1986 to the registry of the Court of Cassation. In that letter he said that he was filing, as pleadings, a copy of the appeal submissions which were lodged on his behalf with the Court of Appeal on 2 December 1985 and in which the problem was raised (see paragraphs 15 and 19 above). He did not, however, have the legal training essential to enable him to present and develop the appropriate arguments on such complex issues himself. Only an experienced counsel could have undertaken this, for example by trying to persuade the Court of Cassation to depart from its case-law in the field under consideration (see, *mutatis mutandis*, the *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, p. 17, para. 34).

41. The "interests of justice" accordingly required a lawyer to be officially assigned to the case. Since he was unable to secure this, the applicant was the victim of a breach of Article 6 para. 3 (c) (art. 6-3-c).

### III. APPLICATION OF ARTICLE 50 (art. 50)

42. Article 50 (art. 50) 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."

43. The Court has not found any breach of paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2). Mr Pham Hoang's claims in respect of the proceedings in the Paris Court of Appeal, namely an award of 20,000 French francs (FRF) for costs and expenses and the recognition that there had indeed been a breach of the Convention in order to compensate the "genuine sense of injustice" that he had experienced, therefore do not fall to be considered.

44. In respect of the breach of paragraph 3 (c) (art. 6-3-c), the applicant first claimed compensation in the amount of FRF 25,000 for the pecuniary damage sustained as a result of the loss of an opportunity of winning an appeal to the Court of Cassation with free legal assistance.

The Court cannot speculate as to the outcome of the appeal if legal assistance had been granted; the applicant, moreover, conceded this. Consequently, the claim must be rejected in the present case.

45. Mr Pham Hoang also alleged that the refusal to grant him the services of a lawyer had given him "a genuine impression that he had been abandoned", but the non-pecuniary damage thus caused could, he said, be reasonably compensated by a finding that there had been a breach of Article 6 para. 3 (c) (art. 6-3-c). The Court so decides.

46. Lastly, Mr Pham Hoang sought FRF 50,000 for lawyer's fees in the proceedings before the Commission and the Court and FRF 13,690.85 for travel and subsistence expenses, less the FRF 16,155 paid by the Council of Europe in legal aid.

The first of these amounts is too high in view of the dismissal of the complaint based on paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2). Having regard to the observations of those appearing before the Court, to the other information before it and its own case-law in the matter, the Court considers that the applicant is entitled to reimbursement of a total net sum of FRF 30,000.

### FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Rejects the Government's preliminary objection;
2. Holds that there has been no breach of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2);
3. Holds that there has been a breach of Article 6 para. 3 (c) (art. 6-3-c);
4. Holds that this finding of a breach constitutes sufficient just satisfaction for the non-pecuniary damage sustained;
5. Holds that the respondent State is to pay the applicant, within three months, 30,000 (thirty thousand) French francs in respect of costs and expenses;
6. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 September 1992.

Rolv RYSSDAL  
President

Marc-André EISSEN  
Registrar