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

COURT (CHAMBER)

CASE OF SAINTE-MARIE v. FRANCE

(Application no. 12981/87)

JUDGMENT

STRASBOURG

16 December 1992

In the case of Sainte-Marie 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 L.-E. PETTITI,
Mr B. WALSH,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,

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

Having deliberated in private on 26 June and 24 November 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 13 September 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. 12981/87) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr Jean-Pierre Sainte-Marie, on 29 April 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 para. 1 (art. 6-1).

---

[*] The case is numbered 78/1991/330/403. 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 September 1991 Mr J. Cremona, the Vice-President of the Court, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr R. Bernhardt, Mr S.K. Martens, Mrs E. Palm, Mr R. Pekkanen and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Government and the Delegate of the Commission lodged their observations respectively on 15 January and 12 February 1992. On 20 January the applicant's lawyer informed the Registrar that she would make oral submissions.

On 9 April 1992 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

On 22 May, with the Court's leave, the Government provided various documents (Rule 37 para. 1 in fine).

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 June 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

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

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

Mr J. BOULARD, magistrat,
on secondment to the Criminal Affairs and Pardons Department, Ministry of Justice, *Counsel*;

- for the Commission

Mr J.-C. SOYER, *Delegate*;

- for the applicant

Mrs C. WAQUET,
of the Conseil d'État and the Court of Cassation Bar, *Counsel*.

The Court heard addresses by Mr Gain for the Government, by Mr Soyer for the Commission and by Mrs Waquet for the applicant.

6. The representatives of the Government and the applicant produced various documents on 10 and 31 July 1992.

AS TO THE FACTS

7. Mr Jean-Pierre Sainte-Marie, a French national born in 1963, resides at Lantabat, in the Pyrénées-Atlantiques department; he is a farmer.

8. On 30 January 1985 police officers (gendarmes) arrested him and seized at his home various articles and documents, in particular arms and ammunition. They were acting in connection with an inquiry into a bomb attack carried out in the night of 19-20 January against the Mauléon-Licharre police station (gendarmerie), responsibility for which was subsequently claimed by Iparretarrak, a clandestine Basque separatist movement.

9. The following day a Bayonne investigating judge remanded the applicant in custody after having charged him under the following two heads: first, unauthorised possession of a category I weapon and category I ammunition, transport without a lawful reason of such a weapon and ammunition and of a category VI weapon, possession without a lawful reason of incendiary devices and criminal conspiracy; second, using explosives to cause criminal damage to another person's immoveable property, in connection with an earlier attack against another police station - then under construction -, that of Lecumberry, in the night of 24 to 25 November 1984.

10. The two sets of proceedings were conducted in parallel both as regards review of the detention on remand and for the investigation and trial.

I. THE PROCEEDINGS CONCERNING POSSESSION OF WEAPONS AND CRIMINAL CONSPIRACY

A. Detention on remand

1. The order of the Bayonne investigating judge of 8 March 1985

11. On 8 March 1985 the Bayonne investigating judge dismissed an application for release which Mr Sainte-Marie had submitted to him.

2. The decision of the Indictment Division of the Pau Court of Appeal of 5 April 1985

12. On an appeal by the applicant, the Indictment Division (chambre d'accusation) of the Pau Court of Appeal upheld the investigating judge's order, on 5 April 1985, on the following grounds:

"...

... Jean-Pierre Sainte-Marie said that he was a member of Iparretarrak, admitted ownership of the arms, ammunition and unlawful or suspect articles found in the cars and at his home, stated that the electrical mechanisms were to be used by the organisation for the detonation of explosives at targets of which he was unaware and acknowledged having even participated as driver in the expedition of 24-25 November 1984, the objective of which had been the police barracks under construction at Lecumberry, which were partly destroyed that night by explosives.

Jean-Pierre Sainte-Marie was therefore properly charged and remanded in custody, when brought before the Bayonne public prosecutor's office on 31 January 1985, in respect of two investigations:

- the first concerns a charge of using explosives to cause criminal damage to another person's immoveable property (in connection with the destruction of the Lecumberry police station);

- the second, which is the subject of the prosecution report before us, concerns charges of unauthorised possession of a category I weapon and category I ammunition, transport without a lawful reason of such a weapon and ammunition and of a category VI weapon, possession without a lawful reason of incendiary devices and criminal conspiracy.

...

When he was interviewed as to the substance of the charges on 6 February 1985, Jean-Pierre Sainte-Marie, who had admitted the offences when he first appeared, refused to make any further statements.

Expert examinations were carried out on the firearm and the ammunition seized, which were of the same type as those normally used by the Basque revolutionary group, Iparretarrak.

The alleged offences are therefore manifestly serious ones and in the light of the available evidence the accused's continued detention on remand is fully justified in order to prevent him from absconding since he could go into hiding like other members of the organisation. Detention is also the only means of ensuring that he does not re-offend."

13. The Indictment Division was composed of Mr Svahn, President, Mrs Plantavit de la Pauze and Mr Benhamou, judges, appointed on 22 March 1983 by the general assembly of the Court of Appeal (Article 191, fourth sub-paragraph, of the Code of Criminal Procedure).

B. Investigation and trial

1. The decision of the Bayonne Criminal Court of 4 July 1985

14. On 4 July 1985 the Bayonne Criminal Court declared void the flagrante delicto investigation concerning Mr Sainte-Marie, as well as all the subsequent proceedings. It found as follows:

"...

The flagrante delicto procedure confers on police officers by way of exception some of the widest powers of the investigating judge, including those which seriously encroach on individual freedoms such as the inviolability of a person's home. That is why a strict interpretation is called for of the criteria authorising what are 'veritable investigative powers' (Stéfani and Levasseur, Droit pénal général et procédure pénale, 1966 edition, volume II, no. 259).

Admittedly Article 55 of the Code of Criminal Procedure, which defines the conditions for an investigation under the flagrante delicto procedure, does not indicate any time-limit for such an investigation, with the result that the surprisingly long duration - ten days - of that carried out following the criminal bomb attack at Mauléon is not sufficient to entail its nullity, but this extension beyond the usual period in such circumstances exposed the police officers to the risk of losing sight of the conditions laid down in the relevant provision. Thus the measures taken by them against Sainte-Marie are open to the following criticisms:

In the first place, for the period from 27 January 5 p.m. to 28 January 5.50 p.m. no measure is mentioned in the recapitulatory report and no official record appears in the file of the proceedings. This interruption of over twenty- four hours removed any justification for the very prolonged continuation of the inquiry under the flagrante delicto procedure.

Secondly, the attention of the police officers was finally drawn to Sainte-Marie not only because he was known to be sympathetic to the Basque separatist movements, but also by the information received on 30 January that this new suspect sometimes drove a Renault 14 of the same colour as a Simca 'Horizon' which had been noticed in a street of Mauléon on the night of the attack. Yet it is 'within a very short time after the offence' (Article 53 of the C.C.P. [Code of Criminal Procedure]) that the persons suspected must manifest 'marks or clues' and this temporal condition cannot be regarded as satisfied where the clue which led the investigators to Sainte-Marie's home was only discovered by them ten days after the offences had been committed.

Finally, there can be no doubt that the procedural irregularity justifiably complained of has caused prejudice to the accused. The defence is therefore well-founded in claiming that the search which led to the discovery of various articles for the possession of which Sainte-Marie is charged and which led to the confessions relied on by the prosecution was void."

2. *The decisions of the Criminal Appeals Division of the Pau Court of Appeal of 14 August and 29 October 1985*

(a) The decision of 14 August 1985

15. On 14 August 1985 the Criminal Appeals Division of the Pau Court of Appeal ruled on the prosecuting authority's appeal against the decision of the court below:

"...

Contrary to the claims of the defence, which were accepted without verification by the first-instance court, the inquiry was continued without interruption, day and night, until 30 January (see in particular the official record of 28 January whose existence has been ignored by the defence, who have no excuse for this because it is referred to in the recapitulatory report of the single inquiry covering the attack on the police station and the possession of weapons, the latter offence being the subject of the present proceedings) up to the discovery of the car which had been seen in the locality of the attack and the searches carried out at the home of the persons who use this vehicle, which led to the discovery of weapons and incendiary devices in the possession of Jean-Pierre Sainte-Marie, who, when questioned, denied having taken part in the attack on the Mauléon police station, but admitted to being a member of the 'Abertzale' movement and having participated in the attack carried out a few weeks previously on the Lecumberry police station;

It follows that the two grounds of nullity invoked by the defence, grounds which were accepted by the court below, do not stand up to examination and the complaints must be dismissed;

Under Article 520 of the Code of Criminal Procedure, where the decision of a court which has ruled solely on a procedural objection without examining the charges, thus relinquishing jurisdiction for the continuation of the proceedings, is declared void, the Court of Appeal must try the case on its merits;

Consequently the case must be set down for hearing at a future date for the examination of whether the charges against Jean-Pierre Sainte-Marie are well-founded;

FOR THESE REASONS:

[The Court of Appeal]

Sitting in open court and in adversarial proceedings;

Holds that the appeal is admissible and well-founded;

Holds that the examination of the investigation carried out under the flagrante delicto procedure by the Mauléon-Licharre police force concerning Jean-Pierre Sainte-Marie does not disclose a ground of nullity;

Setting aside the relevant decision,

Quashes the decision appealed and, pursuant to Article 520 of the Code of Criminal Procedure, decides to try the case itself;

Sets down the case for hearing on 22 October 1985 to examine the charges;

Reserves the costs."

16. The Criminal Appeals Division was composed of Mr Svahn, President, and Mr Bataille and Mr Biecher, judges, all three of whom were appointed on 20 May 1985 by the First President of the Court of Appeal (Article 510 of the Code of Criminal Procedure).

(b) The judgment of 29 October 1985

17. By a second decision, of 29 October 1985, the Criminal Appeals Division sentenced the applicant to a term of four years' imprisonment, on the following grounds:

"The case falls to be heard on its merits by the Court of Appeal in accordance with the decision of this court dated 14 August 1985.

The unlawful possession of an automatic pistol, a category I weapon and ammunition for that weapon, and two molotov cocktails, which are incendiary devices, and the transport in a vehicle of such material and of a flick-knife are facts established by the findings of the police investigators in the course of the searches carried out and are moreover admitted by the accused himself; they indeed constitute the offences of unauthorised possession of category I weapons and ammunition and transport without a lawful reason of category I and category VI weapons and category I ammunition and the offence of possession without a lawful reason of incendiary devices, provided for and punished by Articles 28 and 32 of the Act of 18 April 1939 and Article 3 of the Act of 19 June 1971.

The accused admitted and even asserted his membership of the Iparretarrak movement; this movement was formed with a view to attaining political objectives aimed at securing the independence and unification of the northern and southern Basque provinces; in pursuit of that aim it adopted various methods, in particular armed struggle, which make it an association or a conspiracy established with a view to the preparation and commission of offences against persons or property within the meaning of Article 265 of the Criminal Code.

...

The weapons, ammunition and electrical components for devices for the detonation of explosives found in Jean-Pierre Sainte-Marie's possession and his own statements concerning his membership of the Iparretarrak movement and on the use to which he intended to put the weapons and the materials discovered leave no doubt as to the accused's intention of supporting that movement, the criminal aims of which are well known to him.

..."

18. The Criminal Appeals Division was composed of Mr Lasalle-Laplace, judge, replacing the President, the latter being unable to sit, and

designated for this purpose by the First President on 10 December 1984, as well as Mr Bataille and Mr Biecher, judges.

3. The judgment of the Court of Cassation of 6 November 1986

19. Mr Sainte-Marie filed two appeals on points of law against the decisions of 14 August and 29 October 1985. They were dismissed by the Criminal Division of the Court of Cassation in a single judgment of 6 November 1986.

In his memorial the applicant had made four submissions.

Two of them related to the decision of 14 August 1985, which is not in issue here (see paragraph 24 below).

The first concerned the composition of the Criminal Appeals Division when it quashed the decision of 4 July 1985 (see paragraphs 14-15 above). The Criminal Division of the Court of Cassation dismissed this complaint in the following terms:

> "As regards the first ground of appeal, based on the violation of Articles 49 and 591 of the Code of Criminal Procedure and of Article 6 (art. 6) of the European Convention ...[, whereby the appellant alleges as follows]:
>
> 'In so far as it appears from the interlocutory decision of 14 August 1985 that the Pau Court of Appeal was composed of Mr Svahn, sitting as President, and Mr Bataille and Mr Biecher, judges;
>
> in the first place, these judges had sat in the same case as members of the indictment division which, in two decisions dated 5 April and 8 August 1985, had confirmed orders refusing the applicant's release; having thus been involved in the case at the stage of the investigation, they were precluded by virtue of the provisions of Article 49 of the Code of Criminal Procedure from subsequently participating in the trial and ruling on whether the offence had been committed and on the accused's guilt;
>
> secondly, Article 6 (art. 6) of the European Convention provides that 'everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law ...'. The European Court has already held that impartiality must be assessed according to an objective test making it possible to affirm that a court affords sufficient guarantees to rule out any legitimate doubts in this respect; that was not the case in this instance, since, having given on two occasions, as members of an indictment division, decisions confirming orders refusing the applicant's release, these judges had necessarily carried out a preliminary examination of the merits and adopted a position on the value of the evidence and clues against the accused, so that they were precluded from subsequently participating in the trial and ruling on whether the offence had been committed and the accused's guilt';
>
> The fact that judges of the Criminal Appeals Division which gave the contested decisions had, in the same case, as members of the Indictment Division, previously ruled on the accused's detention on remand is not a ground for quashing a judgment, since no statutory provision prohibits on pain of nullity the members of the indictment division which has given such a ruling from subsequently sitting in the Criminal Appeals Division before which the case comes and, furthermore, such participation is

not contrary to the requirement of impartiality laid down in Article 6 (art. 6) of the European Convention ...;

Accordingly, the Court of Cassation is satisfied that the court was lawfully composed;

The submission must therefore fail."

The second submission concerned the lack of a statement of reasons, the failure to reply to final submissions, the lack of a legal basis and the violation of the rights of the defence (Articles 53, 56, 57, 76 and 593 of the Code of Criminal Procedure and Article 6 (art. 6) of the Convention).

The remaining submissions were founded on the lack of a record of the oath of the three witnesses who testified at the appeal hearing on 22 October 1985 (Articles 437, 446 and 454 of the Code of Criminal Procedure) as well as the failure to state reasons and the lack of a legal basis for the judgment of 29 October 1985 (Articles 265 of the Criminal Code and 593 of the Code of Criminal Procedure), and not the lawfulness of the composition of the Pau Court of Appeal in these proceedings (see paragraph 17 above).

II. THE PROCEEDINGS RELATING TO THE CHARGE OF CRIMINAL DAMAGE

A. Detention on remand

1. The order of the Bayonne investigating judge of 8 July 1985

20. On the basis of the decision of 4 July 1985 (see paragraph 14 above) and contending that the proceedings in question were void, Mr Sainte-Marie applied for his release.

On 8 July the investigating judge dismissed his application.

2. The decision of the Indictment Division of the Pau Court of Appeal of 8 August 1985

21. On 8 August 1985 the Indictment Division of the Pau Court of Appeal dismissed Mr Sainte-Marie’s appeal from the investigating judge’s order. Its decision was based on the following reasons:

"The facts have already been examined in an earlier decision of this Indictment Division dated 5 April 1985 [see paragraph 12 above]; express reference is made thereto.

In support of his application and his appeal, Sainte-Marie argues essentially that these proceedings, in respect of which he is detained, are void because the Bayonne Criminal Court has declared void other proceedings, the initial investigation for which had provided the legal basis for the present case. According to his lawyer, Sainte-

Marie’s confessions were obtained following his arrest, held to be unlawful by the criminal court on account of the flagrante delicto procedure used. He could not therefore, it was contended, be kept in detention on that basis.

However, the decision of the Bayonne Criminal Court was immediately appealed by the public prosecutor and is shortly to be examined by the Court of Appeal.

As the decision of the lower court has been challenged by an appeal to the second-instance court for a new ruling on the facts and the law, the argument of the accused, who claims to be detained by virtue of proceedings which have been declared void, cannot be accepted, beyond the [question of] fact already adjudicated upon; it does not fall to the Indictment Division to give a ruling, at this stage, on this matter.

The proceedings in question must therefore be regarded as perfectly lawful until such time as a final decision to the contrary has been given;

Sainte-Marie should be kept in detention, at the disposal of the judicial authorities. The other arguments put forward by the accused in his memorial are not sufficient to outweigh the fact that he has already shown that he represents a danger to public order and to the institutions of the State and that it may be thought that he would not hesitate to rejoin his comrades or accomplices in hiding if he were to be released."

22. The Indictment Division was composed of Mr Svahn, President, and Mr Bataille and Mr Biecher, judges, appointed on 20 May 1985 by the general assembly of the Court of Appeal (Article 191, fourth sub-paragraph, of the Code of Criminal Procedure).

B. The judgment

23. On 10 April 1986 the Bayonne Criminal Court sentenced Mr Sainte-Marie to five years’ imprisonment. Its judgment was upheld on 8 July 1986 by the Pau Court of Appeal. The applicant filed an appeal on points of law, which the Court of Cassation dismissed on 26 May 1987.

These various decisions are not at issue in the present proceedings.

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Sainte-Marie lodged his application with the Commission on 29 April 1987. He alleged a violation of Article 6 para. 1 (art. 6-1) of the Convention in so far as the Criminal Appeals Division of the Pau Court of Appeal had not constituted an impartial tribunal when it convicted him on 29 October 1985, because two of its members had previously ruled on an application for release.

25. The Commission declared the application (no. 12981/87) admissible on 3 December 1990. In its report of 10 July 1991 (Article 31) (art. 31), it expressed the opinion by fourteen votes to five that there had been no

violation of Article 6 para. 1 (art. 6-1). The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

26. At the hearing the Government confirmed the submissions set out in their memorial requesting the Court to "find that [the] application is inadmissible and, in the alternative, ill-founded".

27. The applicant's lawyer urged the Court "to recognise the violation of Article 6 para. 1 (art. 6-1) committed in this case".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

28. The Government contended that the applicant had failed to exhaust his domestic remedies. He had never challenged in the French courts the participation of Judges Bataille and Biecher in the adoption, by the Pau Criminal Appeals Division, of the two decisions in the possession of arms and criminal conspiracy case, namely the decision of 14 August 1985 on the validity of the flagrante delicto procedure and that of 29 October 1985 on the merits (see paragraphs 15-18 above).

29. The Court observes, like the Delegate of the Commission, that the applicant's complaint before the Convention organs was directed at something completely different. It concerned the lack of impartiality of the Court of Appeal in so far as the two above-mentioned judges had ruled on 8 August 1985 on an application for release in the criminal damage proceedings before determining, on 29 October 1985, the accused's guilt in the proceedings relating to charges of possession of arms and criminal conspiracy (see paragraphs 17 and 21 above). The preliminary objection is therefore devoid of purpose.

---

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 253-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

30. Mr Sainte-Marie maintained that his case had not been heard by an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1), according to which:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ..."

In his submission, the Criminal Appeals Division of the Pau Court of Appeal, which sentenced him, on 29 October 1985, to four years' imprisonment, did not satisfy the requirements of that provision. Two of its three members, Mr Bataille and Mr Biecher, had sat on the previous 8 August in the Indictment Division of the same Court of Appeal. In confirming an order dismissing an application for release, they must necessarily have considered whether there were plausible grounds for suspecting the applicant of having committed the offence and must, accordingly, have carried out a preliminary examination of the merits. They had thus formed an opinion on the weight of the evidence and the clues contained in the prosecution case. Although he had never been convicted, they had relied inter alia on the assumption that "he represent[ed] a danger to public order and to the institutions of the State" (see paragraph 21 above).

He conceded that their decision of 8 August 1985 had been taken in the context of the criminal damage proceedings and not, like the judgment of 29 October 1985, in the proceedings relating to the charges of possession of arms and criminal conspiracy, but it had, in his view, been one and the same criminal case. The public prosecutor's office had divided it into two separate proceedings for purely technical reasons and the sake of convenience. Several circumstances were relevant in this respect: the same investigating judge had opened on the same day two investigations which he had subsequently conducted simultaneously; in its decision of 8 August 1985 the Indictment Division had referred to the facts established in that of 5 April 1985, which cited circumstances relating to both cases and had mentioned both heads under which he had been charged; finally, in its judgment of 6 November 1986, the Court of Cassation had taken the view that only one case was involved.

In short, the objective impartiality of the trial court could appear open to doubt.

31. The Government contested this argument, relying principally on the judgments in Piersack and De Cubber v. Belgium (1 October 1982 and 26 October 1984, Series A nos. 53 and 86) and the opinions of the Commission in the cases of Ben Yaacoub v. Belgium and Hauschildt v. Denmark (7 May 1985 and 16 July 1987, Series A no. 127, pp. 11-16, and no. 154, pp. 33-38).

In the first place, the applicant had produced no evidence capable of casting doubt on the personal impartiality of Mr Bataille and Mr Biecher

when they sat on 29 October 1985. In addition, neither of them had previously been involved in the case as a representative of the prosecuting authority or as investigating judge. Finally, the decision of 8 August 1985 had dealt solely with the question of Mr Sainte-Marie's remand custody; the Indictment Division had not made any assessment in it of the applicant's possible criminal liability arising out of the attack on the Mauléon-Licharre police station.

In conclusion, for the Government, the impartiality of a court could not be impugned merely because some of its members had, before ruling on the accused's guilt, been called upon to examine a - single - application for release, filed moreover in the context of different proceedings, concerning different offences, committed at different times and in different places.

32. The main thrust of the applicant's argument, namely that the fact of having ruled on the question of detention on remand necessarily entails a lack of objective impartiality, runs counter to the Court's case-law. According to the Hauschildt judgment of 24 May 1989 , which moreover is concerned, as appears from its express wording, solely with the decisions of a judge who is not responsible for preparing the case for trial, the mere fact that such a judge has already taken pre-trial decisions in the case, including decisions relating to detention on remand, cannot in itself justify fears as to his impartiality (Series A no. 154, p. 22, paras. 50-51). Only special circumstances may warrant a different conclusion, as they did in the Hauschildt case (ibid., pp. 22-23, para. 52).

33. The Court shares the Commission's view that there was nothing of that nature in the present case. On 8 August 1985 the Indictment Division made "express reference" to the facts which it had already examined in the decision of 5 April 1985. That decision, given by a division composed to a large extent differently (see paragraph 13 above), set out extremely precise findings: Mr Sainte-Marie "said that he was a member of Iparretarrak, admitted ownership of the arms, ammunition and unlawful or suspect articles found in the cars and at his home" and "acknowledged having even participated as driver in the expedition of 24-25 November 1984" against the Lecumberry police station; "the firearm and the ammunition seized ... were of the same type as those normally used by the Basque revolutionary group, Iparretarrak" (see paragraph 12 above).

The Indictment Division thus based its decision of 8 August 1985 on the applicant's own statements. He did not retract these statements and never claimed that they had been obtained under duress. They were moreover corroborated by uncontested physical evidence. The Indictment Division confined itself to making a brief assessment of the available facts in order to establish whether prima facie the police suspicions had some substance and gave grounds for fearing that there was a risk of the accused's absconding.

34. In conclusion, the participation of Judges Bataille and Biecher in the adoption of the judgment of 29 October 1985 did not undermine the

impartiality of the Criminal Appeals Division since the applicant's misgivings cannot be regarded as objectively justified. There has therefore been no violation of Article 6 para. 1 (art. 6-1).

In these circumstances, it appears superfluous to rule on the views of the Government and the applicant as to whether or not the two sets of criminal proceedings brought against the latter were separate.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by eight votes to one that there has been no violation of Article 6 para. 1 (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Walsh is annexed to the present judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE WALSH

1. The Court has many times held that Article 6 para. 1 (art. 6-1) of the Convention requires that a tribunal should be structurally impartial. That is the question raised in the present case. There has been no claim that a judge has failed to be subjectively impartial.

2. The claim of absence of structural impartiality of the trial court which convicted the applicant rests upon the participation, as trial judges, of two judges who had previously heard and refused a request for provisional liberty made by the applicant before his trial.

3. In principle a trial judge is not disqualified by reason only of his having dealt with interim or interlocutory applications by the accused before the trial. Such applications may include one concerned with pre-trial liberty or remands in custody. But whether that is always so must necessarily depend upon the issues which fall to be decided, and the manner of their proof, in the particular pre-trial application.

4. here under national law an application for pre-trial provisional liberty requires or permits the judge to assess the probability or otherwise of the guilt of the applicant or where he speculates on that issue in course of arriving at, or for the purpose of, his decision, he has already reached at least a provisional view on the question of the strength of the case or even of the guilt of the applicant. Ordinarily the function of a judge hearing a pre-trial application for provisional liberty is to decide, on appropriate evidence, whether he is satisfied that the accused, if at liberty, will abscond or seek to defeat justice by tampering with or destroying evidence or intimidating witnesses. If the judge is not so satisfied he should grant the application subject to such reasonable guarantees or restrictive conditions as he thinks necessary and prudent. That applies equally to the innocent and the guilty. If liberty is refused simply because of the strong suspicion of guilt it violates the concept of the presumption of innocence enshrined in Article 6 (art. 6). If however the national legal system requires, or permits, consideration of the probability of guilt as a factor in the decision on provisional liberty, the judge who so decides clearly disqualifies himself from participation as a judge at the trial of the substantive issue of guilt or innocence.