



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

COURT (CHAMBER)

CASE OF MIAILHE v. FRANCE (No. 1)

(Application no. 12661/87)

JUDGMENT

STRASBOURG

25 February 1993

In the case of Mialhe 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. BERNHARDT, *President*,

Mr Thór VILHJÁLMSSON,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr N. VALTICOS,

Mr J.M. MORENILLA,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

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

Having deliberated in private on 24 September 1992 and 27 January 1993,

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 December 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. 12661/87) against the French Republic lodged with the Commission under Article 25 (art. 25) by three nationals of that State, Mr William Mialhe, who also has Philippine nationality, his mother Victoria, née Desbarats, and his wife Brigitte, née Damade, on 11 December 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

* The case is numbered 86/1991/338/411. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the respondent State of its obligations under Articles 8 and 13 (art. 8, art. 13).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 24 January 1992 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of *Funke and Crémieux v. France**.

The Chamber to be constituted for this purpose 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 (Rule 21 para. 3 (b)). On the same day, 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 C. Russo, Mr N. Valticos, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr L. Wildhaber (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 applicants' lawyers on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 12 June 1992 and the Government's memorial on 19 June. On 17 July the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 24 July the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 September 1992. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 para. 5, second subparagraph).

There appeared before the Court:

-for the Government

Mr B. GAIN, Head of the Human Rights Section,

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

Miss M. PICARD, magistrat,

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

Mr J. CARRÈRE, magistrat,

* Cases nos. 82/1991/334/407 and 83/1991/335/408.

on secondment to the Department of Criminal Affairs and
 Pardons, Ministry of Justice,
 Mrs C. SIGNERINICRE, Head of the Legal Affairs Office,
 Department of Customs, Ministry of the Budget,
 Mrs R. CODEVELLE, Inspector of Customs,
 Department of Customs, Ministry of the Budget,
 Mr G. ROTUREAU, Chief Inspector of Customs,
 Strasbourg Regional Head Office of Customs, *Counsel;*
 - for the Commission
 Mr S. TRECHSEL, *Delegate;*
 - for the applicants
 Mr D. BAUDIN,
 of the Conseil d'État and Court of Cassation Bar,
 Mr F. GOGUEL, avocat, *Counsel.*

The Court heard addresses by Mr Gain for the Government, Mr Trechsel for the Commission and Mr Baudin and Mr Goguel for the applicants.

On 3 November Mr Baudin confirmed his submissions concerning the possible application of Article 50 (art. 50) of the Convention.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr William Mialhe has dual French and Philippine nationality and has his home at Malate (Greater Manila) in the Philippines. He is a company director and in early 1983 was also honorary consul of the Philippines in Bordeaux, having just resigned as French foreign-trade counsellor in Manila.

Mrs Victoria Mialhe and Mrs Brigitte Mialhe, both of French nationality, are respectively the mother and the wife of the first applicant. They are housewives.

A. The house searches and seizures of documents

7. On 5 and 6 January 1983 officers from the Bordeaux customs, accompanied by a senior police officer (officier de police judiciaire), made two searches of premises in Bordeaux which housed the head offices of the companies managed by Mr Mialhe and which served as the Philippines consulate. The applicants - who in France lived at Château Siran (Labarde, Gironde) - used to receive there all private mail that was not sent direct to Manila. The searches took place from 9.15 a.m. to 3.50 p.m. on the first day

and from 9.15 a.m. to 12.50 p.m. on the second day, the applicant and his secretary being present on both occasions.

The officers seized nearly 15,000 documents. They placed them unsorted in eight cardboard boxes which they sealed and took away to the customs' regional head office.

Work on removing the seals and classifying the documents began on 21 January 1983, in the presence of a senior police officer and Mr Mialhe. The latter asked for and obtained a photocopy of documents that he said he needed urgently for his work.

After being suspended at the applicant's request, the work resumed on 28 January in the presence of two senior police officers; Mr Mialhe's lawyer had indicated by telephone that his client refused to attend.

In all, the customs registered 9,478 documents. They considered the remainder to be of no relevance to their inquiries and returned them in two sealed boxes.

8. The searches and seizures in issue were based on Articles 64 and 454 of the Customs Code (see paragraphs 17-18 below) and were part of an investigation to determine whether the applicants were to be regarded as being resident in France and whether they had contravened the legislation on financial dealings with foreign countries.

B. The court proceedings

1. The criminal proceedings against the applicants

9. On a complaint lodged by the director of customs investigations on 29 January 1985, the Bordeaux public prosecutor's office began a judicial investigation in respect of the three applicants on 19 February 1985.

A local investigating judge charged them on 20 June 1985 with offences against the legislation and regulations governing financial dealings with foreign countries.

In a final application of 18 June 1991 the Bordeaux public prosecutor requested the investigating judge to commit Mr and Mrs Mialhe for trial at the Bordeaux Criminal Court and to discharge Mrs Victoria Mialhe. On 3 July 1991 the judge made orders to this effect.

The trial was due to begin on 17 June 1992 but was postponed to 25 November 1992 at Mr and Mrs Mialhe's request. In a judgment of 2 December 1992 the Criminal Court ruled that the public prosecution and the proceedings for imposition of customs penalties in respect of Mr and Mrs Mialhe were barred as a result of changes in the criminal law. It also ordered the return of the seized documents.

2. The applicants' proceedings to have the reports and seizures declared null and void

(a) In the Paris District Court

10. On 11 August 1983 the three applicants had instituted proceedings against the Director-General of Customs and Excise in the Paris District Court (1st district), which they asked to

"Hold that under domestic law customs officers may make house searches as provided in Articles 454 and 64 of the Customs Code only in order to look for goods.

Hold that seizure of documents by customs officers cannot be regarded as being in accordance with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Hold that seizure of letters from lawyers to their clients amounts to an interference with the rights of the defence.

And consequently,

Declare the seizures of 5 and 6 January 1983 null and void."

11. On 20 December 1983 the court declined jurisdiction in favour of the Paris tribunal de grande instance.

(b) In the Paris tribunal de grande instance

12. The Mialhes applied to the Paris tribunal de grande instance, which likewise held that it had no jurisdiction. In its judgment of 16 May 1984 it gave the following reasons:

"That being so, as was held in the aforementioned judgment of 20 December 1983, the ordinary courts have no jurisdiction to assess the lawfulness of the actions in issue unless there has been a flagrantly unlawful act (*voie de fait*).

The customs officers made the seizures under Article 454 of the Customs Code.

That Article, which empowers authorised officers to establish offences against the regulations governing financial dealings with foreign countries as provided in Article 64 of the Customs Code, lays down a rule that applies not only to searches for goods held unlawfully but also to those for documents likely to constitute the subject-matter or evidence of these offences.

The seizures that are alleged to be null and void were therefore carried out by the authorities within the framework laid down by law for establishing offences against the regulations governing financial dealings with foreign countries, whose constitutionality is not for the Court to review.

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms provides in Article 8 (art. 8) that 'everyone has the right to respect for his private and family life, his home and his correspondence', interference

by a public authority with the exercise of this right is provided for in the same Article (art. 8) where such interference 'is in accordance with the law and is necessary ... in the interests of ... the economic well-being of the country, [and] for the prevention of ... crime ...'. The customs' action was taken in that context.

The provisions of Article 136 of the Code of Criminal Procedure on house searches relate to operations referred to in that code and do not apply to searches made under the Customs Code, which continue to be governed by the special legislation on the matter. The Act of 29 December 1977, which requires the intervention of the judicial authorities in respect of house searches during the investigation and establishment of offences against tax and business regulations, moreover provides in section 17 that 'house searches made pursuant to the Customs Code shall continue to be governed by existing legislation'.

The Constitutional Council's decision on which the plaintiffs relied is likewise irrelevant to that legislation.

The ordinary courts consequently have no jurisdiction to review the lawfulness of the seizures made at the home of Mr and Mrs Mialhe. The Court must decline jurisdiction."

(c) In the Paris Court of Appeal

13. The Mialhes appealed, seeking a declaration that the seizures on 5 and 6 January 1983 were null and void and an order for return of the documents held by the customs.

14. On 23 October 1984 the Paris Court of Appeal upheld the judgment of 16 May 1984 in the following terms:

"The seizures in issue were not challenged on the ground of any formal defect.

The courts below correctly held that the powers conferred on customs officers by Articles 64 and 454 of the Customs Code, special provisions which are not overridden by the more general ones of Article 136 of the Code of Criminal Procedure and the Act of 29 December 1977, cover the seizure of documents likely to constitute the subject-matter or evidence of offences against the regulations governing financial dealings with foreign countries.

To this extent the principles relating to the protection of private life, the home and correspondence cannot be an obstacle to applying these provisions.

However, although coming within the ambit of the aforementioned Articles 64 and 454, the unlawful seizure or retention of purely private documents that were manifestly irrelevant to the financial or business transactions which prompted the authorities' intervention could amount to a flagrantly unlawful act, since such an infringement of civil liberties would then be wholly severable from the authorities' powers.

In the instant case it appears from the search and seizure reports which have been put in evidence that on 5 and 6 January 1983 the authors of them placed a very large number of documents under seal in the offices of Mr Mialhe and in his presence, and that he, while protesting against the principle of the seizure, made no objection based

on the nature of any given document. On 21 January 1983 the seals were removed and all the documents were classified, and Mr Mialhe and his secretary availed themselves of the opportunity they were afforded to take a photocopy of those documents 'which they needed for their work in the coming days'. Once again, Mr Mialhe made no reference to the presence of purely private papers or letters among his business papers.

On 28 January 1983 the same customs officers proceeded to go through the documents in detail and seized them. Mr Mialhe had been summoned to attend but made it known that he refused to do so. Notwithstanding his absence, numerous documents were exempted from seizure 'as being of no relevance to their inquiries' and were placed in two sealed cardboard boxes and returned to Mr Mialhe some days later.

In these circumstances it appears that the officials took the most meticulous precautions in order not to exceed their powers under the law and that if it is subsequently shown that they have inadvertently kept purely private papers unconnected with their investigation - papers of which the three appellants have never given any particulars -, Mr Mialhe must be held largely responsible, and at all events it could only have occurred as a result of an involuntary mistake and not of a manifest, deliberate violation of a personal freedom."

(d) In the Court of Cassation

15. An appeal on points of law by the applicants was dismissed by the Commercial Division of the Court of Cassation on 17 June 1986. Its judgment read as follows:

"As to the first ground:

The Court of Appeal is criticised for having ruled as it did, in that, according to the applicants, in confining itself to noting that the seizure in dispute was made as part of an investigation into the status as a French resident of Mr Mialhe, the Philippines consul in Bordeaux, without even determining whether the purpose of the operation was to seize documents likely to constitute the subject-matter or evidence of an offence against the regulations governing financial dealings with foreign countries, the Court of Appeal infringed Articles 64 and 454 of the Customs Code.

It appears from the Court of Appeal's own reasons and those it adopted, however, that the disputed seizures were made during an investigation to ascertain whether Mr Mialhe had, as a French resident, committed offences against the legislation governing financial dealings with foreign countries. The ground has not been made out.

As to the second ground:

The Court of Appeal is further criticised for having ruled as it did, in that, according to the applicants, it could not, without infringing Article 455 of the New Code of Civil Procedure, omit to answer the submission in which Mr and Mrs Mialhe argued that, independently of the existence of any flagrantly unlawful act which might have been committed against them, Article 66 of the Constitution entrusted the judiciary with the

protection of every aspect of the liberty of the individual, and in particular the inviolability of the home.

In its judgment, however, the Court of Appeal held that, although coming within the ambit of the aforementioned Articles 64 and 454, the unlawful seizure or retention of purely private papers that were manifestly irrelevant to the transactions which had prompted the authorities' intervention could amount to a flagrantly unlawful act, since such an infringement of civil liberties would then be severable from the authorities' powers. The Court of Appeal also noted that the customs officials took the most meticulous precautions in order not to exceed their powers and that there was no manifest, deliberate violation of a personal freedom. In so holding, the Court of Appeal answered the submissions made, and it follows that the ground is not made out.

As to the third ground:

Lastly, the Court of Appeal is criticised for having ruled as it did, in that, according to the applicants, by raising of its own motion the points of pure fact that the customs officers classified the 15,000 documents seized and then went through them, which allegedly led to some of them being returned to Mr Mialhe on account of their irrelevance to the investigation, the Court of Appeal exceeded its powers and violated Articles 4, 7, 12 and 16 simultaneously of the New Code of Civil Procedure.

The Court of Appeal, however, held that the facts it noted appeared from the search and seizure reports put in evidence, which have been produced. Its judgment is therefore not susceptible to the criticism made in this ground."

II. RELEVANT CUSTOMS LAW

16. The criminal provisions of customs law in France are treated as a special body of criminal law.

A. Establishment of offences

1. Officials authorised to establish offences

17. Two provisions of the Customs Code are relevant as regards these officials:

Article 453

"The officials designated below shall be empowered to establish offences against the legislation and regulations governing financial dealings with foreign countries:

1. customs officers;
2. other officials of the Ministry of Finance with the rank of at least inspector;
3. senior police officers (officiers de police judiciaire).

The reports made by senior police officers shall be forwarded to the Minister for Economic Affairs and Finance, who shall refer cases to the prosecuting authorities if he thinks fit."

Article 454

"The officials referred to in the preceding Article shall be empowered to carry out house searches in any place as provided in Article 64 of this code."

2. House searches

(a) The rules applicable at the material time

18. When the house searches were made (5 and 6 January 1983), Article 64 of the Customs Code was worded as follows:

"1. When searching for goods held unlawfully within the customs territory, except for built-up areas with a population of at least 2,000, and when searching in any place for goods subject to the provisions of Article 215 hereinafter, customs officers may make house searches if accompanied by a local municipal officer or a senior police officer (officier de police judiciaire).

2. In no case may such searches be made during the night.

3. Customs officers may act without the assistance of a local municipal officer or a senior police officer

(a) in order to make searches, livestock counts, and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officials may force an entry in the presence of a local municipal officer or a senior police officer."

(b) The rules applicable later

19. The Budget Acts of 30 December 1986 (section 80-I and II) and 29 December 1989 (section 108-III, 1 to 3) amended Article 64, which now provides:

"1. In order to investigate and establish the customs offences referred to in Articles 414-429 and 459 of this code, customs officers authorised for the purpose by the Director- General of Customs and Excise may make searches of all premises, even private ones, where goods and documents relating to such offences are likely to be held and may seize them. They shall be accompanied by a senior police officer (officier de police judiciaire).

2. (a) Other than in the case of a flagrant offence (flagrant délit), every search must be authorised by an order of the President of the tribunal de grande instance of the locality in which the customs headquarters responsible for the department in charge of the proceedings is situated, or a judge delegated by him.

Against such an order there shall lie only an appeal on points of law as provided in the Code of Criminal Procedure; such an appeal shall not have a suspensive effect. The time within which an appeal on points of law must be brought shall run from the date of notification or service of the order.

The order shall contain:

- (i) where applicable, a mention of the delegation by the President of the tribunal de grande instance;
- (ii) the address of the premises to be searched;
- (iii) the name and position of the authorised official who has sought and obtained leave to make the searches.

The judge shall give reasons for his decision by setting out the matters of fact and law that he has accepted and which create a presumption in the case that there have been unlawful activities of which proof is sought.

If, during the search, the authorised officials discover the existence of a bank strongbox which belongs to the person occupying the premises searched and in which documents, goods or other items relating to the activities referred to in paragraph 1 above are likely to be found, they may, with leave given by any means by the judge who made the original order, immediately search the strongbox. Such leave shall be mentioned in the report provided for in paragraph 2(b) below.

The judge shall take practical steps to check that each application for leave made to him is well-founded; each application shall contain all information in the possession of the customs authorities that may justify the search.

He shall designate the senior police officer responsible for being present at the operations and keeping him informed of their progress.

The search shall be carried out under the supervision of the judge who has authorised it. Where it takes place outside the territorial jurisdiction of his tribunal de grande instance, he shall issue a rogatory letter, for the purposes of such supervision, to the President of the tribunal de grande instance in the jurisdiction of which the search is being made.

The judge may go to the scene during the operation.

He may decide at any time to suspend or halt the search.

The judicial order shall be notified orally to the occupier of the premises or his representative on the spot at the time of the search, who shall receive a complete copy against acknowledgement of receipt or signature in the report provided for in paragraph 2(b) below. If the occupier of the premises or his representative is absent,

the judicial order shall be notified after the search by means of a registered letter with recorded delivery. Notification shall be deemed to have been made on the date of receipt entered in the record of delivery.

Failing receipt, the order shall be served as provided in Articles 550 et seq. of the Code of Criminal Procedure.

The time-limits and procedures for appeal shall be indicated on notification and service documents.

(b) Searches may not be commenced before 6 a.m. or after 9 p.m. They shall be made in the presence of the occupier of the premises or his representative; if this is impossible, the senior police officer shall requisition two witnesses chosen from persons not under his authority or that of the customs.

Only the customs officers mentioned in paragraph 1 above, the occupier of the premises or his representative and the senior police officer may inspect documents before they are seized.

The senior police officer shall ensure that professional confidentiality and the rights of the defence are respected in accordance with the provisions of the third paragraph of Article 56 of the Code of Criminal Procedure; Article 58 of that code shall apply.

The report, to which shall be appended an inventory of the goods and documents seized, shall be signed by the customs officers, the senior police officer and the persons mentioned in the first sub-paragraph of this section (b); in the event of a refusal to sign, mention of that fact shall be made in the report.

Where an on-the-spot inventory presents difficulties, the documents seized shall be placed under seal. The occupier of the premises or his representative shall be informed that he may be present at the removal of the seals, which shall take place in the presence of the senior police officer; the inventory shall then be made.

A copy of the report and of the inventory shall be given to the occupier of the premises or his representative.

A copy of the report and the inventory shall be sent to the judge who made the order within three days of its being drawn up.

3. Customs officers may act without the assistance of a senior police officer

(a) in order to make searches, livestock counts and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officers may force an entry in the presence of a senior police officer."

B. Prosecution of offences

20. Article 458 of the Customs Code provides:

"Offences against the legislation and regulations governing financial dealings with foreign countries may be prosecuted only on a complaint by the Minister for Economic Affairs and Finance or one of his representatives authorised for the purpose."

PROCEEDINGS BEFORE THE COMMISSION

21. The three applicants applied to the Commission on 11 December 1986. They complained of the searches and seizures made on premises of theirs by customs officers. They relied on Article 8 (art. 8) of the Convention (infringement of their right to respect for their private life, their home and their correspondence) and Article 13 (art. 13) (lack of any effective remedy before a national authority).

22. The Commission declared the application (no. 12661/87) admissible on 3 October 1990. In its report of 8 October 1991 (made under Article 31) (art. 31), the Commission expressed the opinion that there had been no breach of Article 8 (art. 8) (by eleven votes to seven) or Article 13 (art. 13) (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

23. In their memorial the Government requested the Court to dismiss all the complaints raised by the applicants.

24. Counsel for the applicants asked the Court to

"hold [that their clients] ha[d] been victims of a breach of Article 8 (art. 8) of the Convention ... by the authorities of the French Republic;

reserve the application of Article 50 (art. 50) of the said Convention until the conclusion of the criminal proceedings in France against William and Brigitte Mialhe for offences against French exchange-control regulations; and

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 256-C of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

award William and Brigitte Mialhe, on an interim basis, and Mrs Victoria Mialhe, in final settlement, the sums indicated in the foregoing reasons in compensation for their non- pecuniary damage and the expenses incurred in upholding their rights".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

25. In the applicants' submission, the house searches and seizures made in the instant case were in breach of Article 8 (art. 8), which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The Government's preliminary objection

26. As they had done before the Commission, the Government raised an objection of inadmissibility on the ground that the application to Strasbourg had been lodged prematurely, as Mr and Mrs Mialhe could, at the outset of their trial at the Bordeaux Criminal Court on 25 November 1992 (see paragraph 9 above), complain that the customs' action forming the basis of the prosecution had been unlawful.

27. The Court notes that Mr and Mrs Mialhe brought proceedings to have customs reports on the facts and on the seizures declared null and void (see paragraphs 10-15 above) and pursued them to a conclusion, without omitting to plead Article 8 (art. 8). They cannot be criticised for not having - or not yet having - made use of a legal remedy which would have been - or would be - directed to essentially the same end. The objection must therefore be dismissed.

Besides, the Bordeaux Criminal Court ruled on 2 December 1992 that the criminal proceedings were barred (see paragraph 9 above).

B. Merits of the complaint

28. The Government conceded that there had been an interference with the applicants' right to respect for their private life, and the Commission

additionally found that there had been an interference with their right to respect for their home.

The Court considers it pointless in this instance to ascertain whether the premises occupied by the applicants could be considered as a home; it refers, *mutatis mutandis*, to the *Niemietz v. Germany* judgment of 16 December 1992 (Series A no. 251-B, p. 34, paras. 30-31). In the present case, it is sufficient to note that there was an interference with the applicants' private life and their correspondence.

29. It must accordingly be determined whether the interferences in question satisfied the conditions in paragraph 2 (art. 8-2).

1. "In accordance with the law"

30. The applicants contended that the interferences had no legal basis. As worded at the time, Article 64 of the Customs Code was, they claimed, contrary to the 1958 Constitution because it did not make house searches and seizures subject to judicial authorisation. Admittedly, its constitutionality could not be reviewed, since it had come into force before the Constitution had. Nevertheless, in the related field of taxation the Constitutional Council had rejected section 89 of the Budget Act for 1984, concerning the investigation of income-tax and turnover-tax offences holding, *inter alia*:

"While the needs of the Revenue's work may dictate that tax officials should be authorised to make investigations in private places, such investigations can only be conducted in accordance with Article 66 of the Constitution, which makes the judiciary responsible for protecting the liberty of the individual in all its aspects, in particular the inviolability of the home. Provision must be made for judicial participation in order that the judiciary's responsibility and supervisory power may be maintained in their entirety." (Decision no. 83-164 DC of 29 December 1983, Official Gazette (Journal officiel), 30 December 1983, p. 3874)

31. The Government, whose arguments the Commission accepted in substance, maintained that in Article 64 of the Customs Code, as supplemented by a fairly substantial body of case-law, the power to search houses was defined very closely and represented a transposition to customs legislation and the regulations governing financial dealings with foreign countries of the power of search provided for in ordinary criminal procedure. Provision was first made for it in an Act of 6 August 1791 and subsequently in a legislative decree of 12 July 1934, and it had been widened in 1945 to cover investigations into exchange-control offences and confirmed on several occasions. In the Government's submission, its constitutionality could not be put in doubt, any more than that of Article 454 of the same code, since review of the constitutionality of statutes took place between their enactment by Parliament and promulgation and was within the sole competence of the Constitutional Council, to the exclusion of all other courts.

As to the "quality" of the national legal rules vis-à-vis the Convention, it was ensured by the precision with which the legislation and case-law laid down the scope and manner of exercise of the relevant power, and this eliminated any risk of arbitrariness. Thus even before the reform of 1986-89 (see paragraph 19 above), the courts had supervised customs investigations *ex post facto* but very efficiently. And in any case, Article 8 (art. 8) of the Convention contained no requirement that house searches and seizures should be judicially authorised in advance.

32. The Court does not consider it necessary to determine the issue in this instance, as at all events the interferences complained of are incompatible with Article 8 (art. 8) in other respects (see paragraphs 38-40 below).

2. Legitimate aim

33. The Government and the Commission considered that the interferences in question were in the interests of "the economic well-being of the country" and "the prevention of crime".

Notwithstanding the applicants' arguments to the contrary, the Court is of the view that the interferences were in pursuit of at any rate the first of these legitimate aims.

3. "Necessary in a democratic society"

34. In the applicants' submission, the interferences could not be regarded as "necessary in a democratic society". The authorities, they said, had misused their powers under Article 64 of the Customs Code for the specific purpose of collecting evidence to establish that there had been an interruption in their permanent residence in Manila (see paragraph 6 above) at a time of strict exchange controls. In their view, the needs of the investigation in no way justified either the mass seizure of all Mr Mialhe's papers, including ones belonging to other members of the family, or the refusal to return a set of personal documents (doctor's prescriptions, correspondence with lawyers, etc.). More generally, the applicants complained that there were no curbs on customs powers or safeguards against abuse by customs officers, a situation which they claim had been typical of the French system before the reform of 1986-89.

35. The Government, whose contentions the Commission accepted in substance, argued that house searches and seizures were the only means available to the authorities for investigating offences against the legislation governing financial dealings with foreign countries and thus preventing the flight of capital and tax evasion. In such fields there was a *corpus delicti* only very rarely if at all; the "physical manifestation" of the offence therefore lay mainly in documents which a guilty party could easily conceal or destroy. Such persons, however, had the benefit of substantial safeguards,

strengthened by very rigorous judicial supervision: decision-making by the head of the customs district concerned, the rank of the officers authorised to establish offences, the presence of a senior police officer (*officier de police judiciaire*), the timing of searches, the preservation of lawyers' and doctors' professional secrecy, the possibility of invoking the liability of the public authorities, etc. In short, even before the reform of 1986-89, the French system had ensured that there was a proper balance between the requirements of law enforcement and the protection of the rights of the individual.

As regards the circumstances of the case, the Government made two observations. Firstly, the Bordeaux public prosecutor's final application (see paragraph 9 above) made clear the scale of the offences with which Mr and Mrs Mialhe were charged. Secondly, the latter had never indicated to the national courts what personal documents the customs had seized wrongly.

36. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 (art. 8-2) are to be interpreted narrowly (see the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 21, para. 42), and the need for them in a given case must be convincingly established.

37. Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse (see, among other authorities and *mutatis mutandis*, the *Klass and Others* judgment previously cited, Series A no. 28, p. 23, para. 50).

38. This was not so in the instant case. At the material time - and the Court does not have to express an opinion on the legislative reforms of 1986 and 1989, which were designed to afford better protection for individuals (see paragraph 19 above) - the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government (see paragraph 35 above), appear too lax and full of loopholes for the interferences with the applicants' rights to have been strictly proportionate to the legitimate aim pursued.

39. To these general considerations may be added a particular observation. The seizures made on the applicants' premises were wholesale and, above all, indiscriminate, to such an extent that the customs considered several thousand documents to be of no relevance to their inquiries and returned them to the applicants (see paragraph 7 above).

40. In sum, there has been a breach of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

41. In the proceedings before the Commission, the applicants also relied on Article 13 (art. 13), but they did not do so before the Court, which does not consider that it must examine the issue of its own motion.

III. APPLICATION OF ARTICLE 50 (art. 50)

42. Under Article 50 (art. 50),

"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 applicants invited the Court to defer its decision on the application of this provision until the criminal proceedings in France against Mr and Mrs Mialhe had been concluded. They asked it, however, to award each of them - in final settlement in the case of Mrs Victoria Mialhe, and on an interim basis in the cases of Mr Mialhe and his wife - 100,000 French francs (FRF) for non-pecuniary damage and FRF 100,000 for costs.

The Government and the Delegate of the Commission expressed no opinion.

44. In the Court's view, the question is not ready for decision although the criminal proceedings against Mr and Mrs Mialhe have ended with the Bordeaux Criminal Court's judgment of 2 December 1992 (see paragraph 9 above). Accordingly, it must be reserved and the further procedure must be fixed, due regard being had to the possibility of an agreement between the respondent State and the applicants (Rule 54 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by eight votes to one that there has been a breach of Article 8 (art. 8);
3. Holds unanimously that it is not necessary also to examine the case under Article 13 (art. 13);
4. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;
accordingly,
 - (a) reserves it in whole;
 - (b) invites the Government and the applicants to submit in writing, within three months, their observations on the matter and, in particular, to notify the Court of any agreement they may reach;
 - (c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 February 1993.

Rudolf BERNHARDT
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 Thór Vilhjálmsson is annexed to this judgment.

R.B.
M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

I have voted against the finding of a violation of Article 8 (art. 8) of the Convention in this case. My reasons are much the same as those set out by the majority of the Commission in its report.