



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

COURT (CHAMBER)

CASE OF SAIDI v. FRANCE

(Application no. 14647/89)

JUDGMENT

STRASBOURG

20 September 1993

In the case of Saïdi 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 F. MATSCHER,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr R. PEKKANEN,

Mr J.M. MORENILLA,

Mr F. BIGI,

Sir John FREELAND,

Mr M.A. LOPES ROCHA,

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

Having deliberated in private on 25 March and 23 August 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 11 September 1992, 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. 14647/89) against the French Republic lodged with the Commission under Article 25 (art. 25) by a Tunisian national, Mr Fährat Saïdi, on 17 January 1989.

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 and 3 (d) (art. 6-1, art. 6-3-d).

* The case is numbered 33/1992/378/452. 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 26 September 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr C. Russo, Mr R. Pekkanen, Mr J.M. Morenilla, Mr F. Bigi, Sir John Freeland and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 14 January 1993 and the applicant's claims for just satisfaction (Article 50 of the Convention) (art. 50) on 15 and 18 January; on 17 March he received the observations of the Delegate of the Commission.

On 3 March the Commission had 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 22 March 1993. 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
of the Legal Affairs Department, Ministry of Foreign Affairs,
Agent,

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

Mrs F. TRAVAILLOT, magistrat,
on secondment to the Criminal Affairs and Pardons Department,
Ministry of Justice, *Counsel;*

- for the Commission

Mr L. LOUCAIDES, *Delegate;*

- for the applicant

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

The Court heard addresses by Mr Gain for the Government, Mr Loucaides for the Commission and Mrs Waquet for the applicant, as well as replies to its questions and to those of its President.

On the same day the Government replied in writing to the questions put by the Court.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Fährat Saïdi, a Tunisian national born in 1951, is a bricklayer and lives in Nice.

A. The police inquiry

7. On 29 May 1986 the Nice police arrested him in connection with an inquiry concerning two deaths - of Mrs Jovet (24 May) and Mr Molinie (26 May) - caused by the injection of heroin; the police were acting on information received from drug users and small-time dealers.

8. The following day a detective questioned the applicant concerning, *inter alia*, a number of persons:

"Q [question]: Do you know Allala le boiteux [Lame Allala]?"

R [reply]: I don't know him. I'd have to see him.

Q: Do you ever go to the Claridge?

R: Yes, I go there regularly.

Q: A person who was present during a conversation between you and Allala le boiteux says that it was you who took the order for ten grammes at the Claridge on 26 May last. What do you have to say?

R: I don't know whether I met this lame bloke. I'd have to be able to see him to say yes ...

...

Q: Do you know a Tunisian, quite an old man, whose first name is Sadok?

R: I don't know him. I'd have to be able to see him ...

Q: A young man who only got his supplies directly from you also died in the last few days following an overdose. His friend, who is also a drug addict and who gets his drugs only from you, accuses you directly of being the person who sold them the drugs which led to his friend's death. What do you have to say for yourself?

R: I've never touched drugs and I've never supplied anyone with them. I would like to be confronted with this person.

SI [sur interpellation - on examination]: The person who you've just shown to me and whom you say is called Allala le boiteux does go to the Claridge. I only know him by sight. I haven't had any special dealings with him.

..."

9. On the same day the police showed Mr Saïdi and two other persons who had been arrested (Mr Bousselmi and Mr Hamza), through a two-way mirror, to three drug addicts - Mrs Bentaieb and Mr Hamdi Pacha, who were facing charges of possession, supply and use of heroin, and Mr Trihan; the three addicts identified him categorically.

B. The judicial investigation

10. Still on 30 May 1986 an investigating judge at the Nice tribunal de grande instance charged Mr Saïdi with possession and supply of heroin and involuntary homicide. He remanded him in custody by an order which gave the following reasons:

"The alleged offences are very serious; inquiries still have to be made; confrontations are to be organised;"

11. On the instructions of the investigating judge, the police obtained statements from several witnesses, drug addicts or former drug addicts: Mr Happe and Mrs Evrard on 2 June 1986, Mr Mazoyer on 5 June and Mrs Pothier on 10 June. The officers showed them photographs and they all identified Mr Saïdi and the two other persons charged as drug dealers.

12. On 6 June 1986 the applicant's lawyer sent to the investigating judge the following letter:

"May I request you, on behalf of Mr Fahrât Saïdi, whom I saw at Nice remand prison, to consider organising as soon as possible a confrontation between him and the persons who have denounced him.

Fahrât Saïdi denies the charge of drug trafficking and would like to be able to prove his innocence."

13. On 5 November 1986 the judge in question interviewed Mr Nenouchi, a friend of one of the victims - Mr Molinie -, who had come forward spontaneously to testify against Mr Saïdi, whom he described as his former supplier of drugs.

14. When questioned on 14 November 1986 by the investigating judge, Mr Saïdi stated, inter alia, as follows:

"SI: You tell me that I've been accused by Trihan ..., Mazoyer ..., Nenouchi ..., who are all drug addicts and who claim that I sold them drugs. It's untrue, I want to be confronted with them."

15. On 24 November 1986 Mr Saïdi's lawyer again wrote to the investigating judge, in the following terms:

"Following the interview which you conducted on 14 November, I would ask you, as my client has already himself done directly, to organise a confrontation between him and the persons who accuse him."

16. By an order of 4 December 1986, the investigating judge decided that the applicant should remain in custody.

17. On the same day the judge committed Mr Saïdi and four other persons for trial on the following charges:

"Bentaieb and [Hamdi] Pacha:

that they did in Nice in the course of 1985 and 1986, contravene the legislation on dangerous drugs by possessing, supplying and making unlawful use of heroin, a class B drug;

Bousselmi, Sadok Hamza, Fährat Saïdi:

that they did in the same place and over the same period as the aforementioned

(a) contravene the legislation on dangerous drugs by possessing and supplying heroin, a class B drug;

(b) by inadvertence, imprudence, lack of care, negligence or failure to respect the legislation involuntarily cause the death of Corinne Jovet and Patrick Molinie."

C. The trial and the appeal proceedings

1. In the Nice Criminal Court

18. On 3 February 1987 the Nice Criminal Court sentenced Mr Saïdi and Mr Bousselmi to ten years' imprisonment for infringement of the dangerous drugs legislation and involuntary homicide, Mr Hamza to three years for possession and supply of heroin, and Mrs Bentaieb and Mr Hamdi Pacha, who had not appeared at the trial, to three years for supply and use of drugs.

The court based its decision on the following grounds:

"...

On the evening of 29 May 1986 Fährat Saïdi and Allala Bousselmi were arrested. Allala Bousselmi made possible the arrest in his turn of his intermediary, Sadok Hamza, by giving the latter's address and his first name.

The three men were formally identified by the couple Abdel Hamdi Pacha and Saïda Bentaieb; Fährat Saïdi was also identified by Jean-Pierre Trihan.

In the course of their interrogations, the aforementioned Allala Bousselmi, Fahrât Saïdi and Sadok Hamza denied all the accusations levelled against them, although they were concurring and had been made by persons who did not know each other.

The first witnesses to be heard subsequently explained the role played by each of the accused.

Thus Alain Happe and Michèle Evrard formally identified from a plate of photographs Allala Bousselmi, Sadok Hamza and Saïdi and specified that Bousselmi sold the drugs through the intermediary of Sadok Hamza, Fahrât Saïdi being the "wholesale" supplier. Later other witnesses implicated the same three individuals.

Christian Mazoyer, well known to the police as a drug addict, claimed to have bought between February and April 1986 from one and a half to two grammes of heroin from Fahrât Saïdi. He stated that Saïdi was the regular supplier of drugs to the prostitute and transvestite community.

Valérie Pothier, also a drug addict, affirmed that in the course of 1985 she had bought drugs from the Boiteux. She stated that at the time Allala Bousselmi supplied the addicts directly. She also knew Fahrât Saïdi by his first name, as a drugs dealer.

Nevertheless, the three men, Fahrât Saïdi, Allala Bousselmi and Sadok Hamza continued to deny all the accusations levelled against them, both before the investigating judge and at the trial.

...

Allala Bousselmi and Fahrât Saïdi were formally implicated by some of their regular customers (Alain Happe ..., Michèle Evrard ..., Christian Mazoyer ..., Valérie Pothier ..., Patricia Rogowicz ...) and by the very people who carried out some of their deliveries (Bentaieb ..., Abdel Hamdi Pacha ...); their different roles were precisely described by several witnesses, Bousselmi, the central figure in the traffic, who took the orders, received payment and gave instructions for the delivery, Saïdi, Bousselmi's supplier and identified as a dealer in large quantities of heroin;

It has been formally established by the statements of the immediate circle of the drug addicts who died of an overdose that the fatal dose had been sold by Bousselmi, who had been supplied by Saïdi; the findings of the pathologists from examining the victims' bodies leave no room for doubt as to the direct causal connection between the taking of the drug in question and the death which occurred within a very short time of the injections."

The court also made in respect of the applicant and Mr Bousselmi and Mr Hamza, who were likewise Tunisian nationals, an order permanently excluding them from French territory.

2. In the Aix-en-Provence Court of Appeal

19. On appeals by Mr Saïdi and Mr Bousselmi, and by the public prosecutor, the Aix-en-Provence Court of Appeal gave judgment on 1 October 1987. It found the accused guilty on only one count of involuntary homicide - in relation to Mr Molinie - and reduced Mr Saïdi's sentence to

eight years' imprisonment and that of Mr Bousselmi to six years. However, it confirmed the permanent exclusion from French territory.

Its judgment included the following reasoning:

"...

The accused, as they had done throughout the police inquiry, the judicial investigation and the first-instance trial, formally denied that they had committed the alleged offences;

They argued for their acquittal and stressed the inadequacy of the investigation and in particular the fact that there had been no confrontation between them and their accusers.

...

After Fahrat Saïdi was arrested, he was shown to Trihan behind a two-way mirror and the latter stated word for word as follows: 'That's the person to whom I go to buy powder when I'm in Nice. He's the one who supplied us, Patrick Molinie and myself, on the evening of 24 May 1986.'

In the course of the investigation and on the instructions of the investigating judge the police officers showed photographs of various individuals to Alain Happe ... and Michèle Evrard ...

The latter formally identified from these photographs Allala Bousselmi, Sadok Hamza and Fahrat Saïdi.

According to Happe, Allala Bousselmi supplies drugs to him and to Corinne Jovet. He had them delivered by Sadok Hamza. Fahrat Saïdi was indeed the 'wholesaler' who supplied Bousselmi and Hamza.

Michèle Evrard affirmed that Bousselmi had supplied her with drugs through the intermediary of Saïda Bentaieb.

Sadok Hamza acted as 'drug-keeper' for Allala Bousselmi and Fahrat Saïdi was a heroin 'wholesaler'.

Other drug addicts, Christian Mazoyer, known as 'Barbara' ..., Valérie Pothier ... and Marcel Nenouchi, known as 'Sabrina'..., also implicated Fahrat Saïdi and Allala Bousselmi.

The autopsy of the bodies of the two victims, Patrick Molinie ... and Corinne Jovet ..., revealed their drug addiction and there were recent marks, consistent with the time of death, of intravenous injections.

In both cases the cause of death was, according to the experts, acute oedema of the lung, of toxic origin, probably the result of a massive injection of heroin.

...

As regards the offence of infringement of the dangerous drugs legislation, the court agrees with the relevant reasons on which the first-instance court based its decision and finds Allala Bousselmi and Fahrat Saïdi guilty;

The concurring and repeated statements of the people who sold the drugs supplied by them, Saïda Bentaieb and Abdel Hamdi Pacha, and those who bought the drugs, Alain Happe, Michèle Evrard, Patricia Rogowicz, Jean-Pierre Trihan, Christian Mazoyer, Valérie Pothier and Marcel Nenouchi, are sufficiently convincing to establish the offence of which they are accused and also the role which they played in the heroin traffic in Nice;

Although the police officers and the investigating judge did not organise a confrontation with their accusers, the methods of identification which were used (identification through a two-way mirror or examination of photographic plates bearing their photograph) show sufficiently that, for their own personal reasons, the dealers and the drug addicts who gave evidence did not wish to be physically confronted with the accused;

Even if confrontations had led to statements being retracted, that would not have deprived of their weight the repeated affirmations of the dealers and users;

It has been sufficiently established by the police inquiry and the judicial investigation that Fahrat Saïdi did indeed sell to Jean-Pierre Trihan and Patrick Molinie the heroin, the injection of which led to Trihan being taken ill and Molinie's death.

..."

3. In the Court of Cassation

20. Mr Saïdi appealed on points of law. His sole ground of appeal was worded as follows:

"Violation of the general principles of criminal procedure and of Article 6 para. 3 (d) (art. 6-3-d) of the Convention ...;

in that the Court of Appeal convicted the accused of drug dealing and involuntary homicide;

whereas, firstly, in order to determine the accused's guilt the lower courts relied solely on his being identified indirectly by the witnesses who viewed him from behind a two- way mirror; this method offends against the fairness of the investigation and cannot furnish admissible evidence under criminal procedure;

whereas, secondly, by refusing to organise a confrontation between the accused and the persons who accused him and whom he had never seen and never been able to examine, the contested judgment infringed the accused's right to examine the witnesses against him."

21. On 19 August 1988 the Criminal Division of the Court of Cassation dismissed the appeal on the following grounds:

"It appears from the impugned judgment that in finding Fährat Saïdi guilty of heroin trafficking and the involuntary homicide of Patrick Molinie, who died as a result of a massive injection of that drug, the Court of Appeal noted that two methods of identification had been used by the investigating police officers, identification through a two-way mirror and by means of photographs; these had enabled various witnesses, named in the judgment, to identify Saïdi as the person who had supplied the heroin; the Court of Appeal held that the concurring and repeated statements of the dealers and users of the drugs supplied by Saïdi and the evidence from the police inquiry and the judicial investigation were sufficiently convincing to establish the role of the accused and his guilt as charged;

In the light of these findings and conclusions arrived at by the lower courts in the exercise of their unfettered discretion to assess the weight of the evidence adduced in court at an adversarial hearing and given that neither the contested judgment nor any properly made submissions show that the accused requested the courts to organise a confrontation, the Court of Appeal, without disregarding the general principles of criminal procedure and the provisions of Article 6 para. 3 (d) (art. 6-3-d) of the ... Convention ..., set out grounds for its decision and gave a legal basis to the contested judgment;"

D. Subsequent developments

22. On 5 January 1990 the Aix-en-Provence Court of Appeal declared inadmissible an application by Mr Saïdi for the lifting of the order imposed by the first and second-instance courts permanently excluding him from French territory. The applicant filed an appeal on points of law against that decision.

He was released on 17 August 1991, after serving five years, two months and seventeen days. The same day he refused to comply with an order for his expulsion (*reconduite à la frontière*), which led to his being convicted in the Créteil Criminal Court. On appeal the Paris Court of Appeal sentenced him to six months' imprisonment, together with a ten-year prohibition on residing on French territory. Mr Saïdi applied to the same court to have the prohibition lifted. His application was heard on 22 January 1993 and the proceedings were adjourned to 7 May.

23. The Court has no information as to the outcome of the appeal on points of law and of the application to have the prohibition lifted.

II. THE EXAMINATION OF WITNESSES IN CRIMINAL PROCEEDINGS (CORRECTIONELLE)

A. The investigating authorities

1. The investigating judge

24. As far as the investigating judge is concerned, three provisions of the Code of Criminal Procedure are relevant in the present case:

Article 101

"The investigating judge shall summon to appear before him, through a bailiff or a police officer, any persons whose testimony he considers would be useful ...

The witnesses may also be summoned by ordinary letter, by registered letter or through administrative channels; they may also appear of their own accord."

Article 102

"They shall be heard separately, not in the presence of the accused, by the investigating judge assisted by his clerk; a formal record shall be drawn up of their statements.

..."

Article 118

"The accused and the civil complainant may be heard or confronted only in the presence of their lawyers or after the latter have been duly summoned, unless they expressly waive this right.

..."

2. The indictment division

25. On appeal the investigation is governed by equivalent rules laid down in the Code of Criminal Procedure:

Article 201

"The indictment division may, in all cases, at the request of the principal public prosecutor, of one of the parties or even of its own motion, order any additional investigative measure which it considers useful.

..."

Article 205

"Additional investigative measures shall be effected in accordance with the provisions relating to the preliminary investigation either by one of the members of the indictment division or by an investigating judge which it delegates to this effect.

..."

B. The trial and appellate courts

26. The rules governing the examination of witnesses differ according to whether the court is hearing the case at first instance or on appeal.

1. The Criminal Court

27. The principal provision of the Code of Criminal Procedure which was applicable in the instant case is to be found in Article 427, which is worded as follows:

"Unless otherwise provided by statute, any type of evidence shall be admissible to substantiate a criminal charge, and the court shall reach its decision on the basis of being satisfied beyond reasonable doubt (intime conviction).

The court may only base its decision on evidence which has been adduced during the trial and discussed before it inter partes."

2. The Court of Appeal

28. The rules of procedure laid down for the Criminal Court also apply in principle to the court of appeal, but subject to an important proviso in the second paragraph of Article 513 of the Code of Criminal Procedure, which reads:

"Witnesses shall be heard only if the court of appeal so orders."

29. This provision gave rise to a line of decisions by the Criminal Division of the Court of Cassation, which appears to have departed from those precedents in 1989, that is to say after the events in the present case.

(a) The case-law until 1989

30. The Criminal Division decided very early on that appeal courts were not required to hear afresh witnesses who had already given evidence at the original trial, even where an application had been made for them to be re-examined; it did, however, consider that they were under an obligation to hear and determine any such applications made and to give reasons for any refusal (30 October and 13 December 1890, Bulletin criminel (Bull.) nos. 212 and 253; 20 October 1892, Recueil périodique Dalloz (D.P.) 1894, I, p.

140; 13 January 1916, D.P. 1921, I, p. 63; 20 December 1955, Dalloz 1956, *sommaires*, p. 29).

Where they deemed it useful or necessary, appeal courts could summon witnesses who had not testified in the Criminal Court; but if they refused to call such witnesses, it was sufficient by way of reasons if they stated in their judgment that there was no need for further inquiries into the facts (20 October 1892, Bull. no. 212; 9 February 1924, Bull. no. 70; 5 November 1975, Bull. no. 237, p. 629).

(b) The case-law since 1989

31. The Criminal Division's approach seems to have changed markedly in its *Randhawa* judgment of 12 January 1989:

"By Article 6 para. 3 (d) (art. 6-3-d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 'everyone charged with a criminal offence has the [right] ... to examine or have examined witnesses against him'. It follows that, unless it is impossible for reasons which they must specify, courts of appeal are bound, on a properly made application, to order the examination in the presence of the parties of prosecution witnesses who have not been confronted with the defendant at any stage of the proceedings.

Sarb Randhawa, who was charged with drug trafficking and a customs offence, made an application to the Court of Appeal for an examination *inter partes* of the witnesses Joris Suray and Catherine Guillaume, whom he had called and whose statements provided, he claimed, the sole basis for the finding of guilt. He said that he had not been able to have them examined at any stage of the proceedings.

In support of its refusal of this application, and although it based its finding of the defendant's guilt solely on the statements of the aforementioned witnesses, the court below noted merely that the witnesses whose examination had been sought had been interviewed during the police inquiry and the judicial investigation and that the defendant had been informed of the prosecution evidence deriving from their statements.

But while a refusal to hear evidence from a prosecution witness does not, as such, infringe the aforementioned provisions of the Convention, since the court may take into account any special difficulties entailed by an examination of a given witness in the presence of the parties, for example the risk of intimidation, pressure or reprisals, such a refusal must nevertheless respect the rights of the defence and the court must explain why a confrontation is impossible.

This was not so in the present case, and the judgment must accordingly be set aside; ..." (Bull. 1989, no. 13, pp. 37-38)

This approach was confirmed in a judgment of 22 March 1989 (case of X, Bull. 1989, no. 144, pp. 369-371; see also the judgments of 23 January, 6 March and 9 October 1991, Bull. 1991, no. 40, p. 102, no. 115, p. 293, and no. 336, p. 840).

PROCEEDINGS BEFORE THE COMMISSION

32. In his application of 17 January 1989 to the Commission, Mr Saïdi complained of the refusal of the judicial authorities to organise a confrontation with the prosecution witnesses who had identified him; he considered this to be incompatible with Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention.

33. The Commission declared the application (no. 14647/89) admissible on 5 September 1991. In its report of 14 May 1992 (made under Article 31) (art. 31) the Commission expressed the opinion, by thirteen votes to one, that there had been a violation Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d). 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

34. In their memorial the Government "maintain[ed] their preliminary objection that domestic remedies [had] not [been] exhausted and, in the alternative, that the application [was] manifestly ill-founded".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (d) (art. 6-1, art. 6-3-d)

35. Mr Saïdi complained that he had not had a fair trial. He relied on paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d), according to which:

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

...

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

...

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 261-C of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

A. The Government's preliminary objection

36. The Government contended primarily, as they had done before the Commission, that Mr Saïdi had failed to exhaust his domestic remedies inasmuch as he had not raised in the trial courts the complaint based on a violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

They maintained that the applicant had not called witnesses in the Nice Criminal Court or asked for witnesses to be summoned in the Aix-en-Provence Court of Appeal, although it had been open to him to do so under the Code of Criminal Procedure. There was nothing in the file to suggest that there had been a special circumstance or reason of such a nature as to justify this failure.

The Government conceded that during the trial the applicant had raised the question of the lack of a confrontation, but he had neglected to file written submissions requesting further inquiries and to call, or ask the public prosecutor to summon, witnesses, despite the fact that their names and addresses had been in the file.

37. According to the Delegate of the Commission, on the other hand, Mr Saïdi had satisfied the requirements of Article 26 (art. 26) of the Convention. On appeal he had stressed the fact that he had not been confronted with the persons who had implicated him and the Court of Appeal had devoted two paragraphs of its judgment to justifying this omission. In addition, the applicant had expressly invoked Article 6 para. 3 (d) (art. 6-3-d) in his appeal on points of law.

38. In its judgment in the case of *Cardot v. France* of 19 March 1991, the Court reiterated that, although Article 26 (art. 26) had to be applied "with some degree of flexibility and without excessive formalism", it did not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given; it normally required also that the complaints intended to be formulated subsequently at Strasbourg should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means which might prevent a breach of the Convention should have been used (Series A no. 200, p. 18, para. 34).

39. The Court must consider whether these conditions are satisfied in the present case.

At first instance Mr Saïdi manifested the desire that the Criminal Court should hear the persons who had denounced or identified him; that is apparent - according to the Government - from the record of the hearing. Even though he did not use the proper procedure and did not name the witnesses, there were several considerations on the basis of which the court could have acceded to his request. The investigation file contained documents, including the order of 30 May 1986 remanding him in custody and the record of the accused's interrogation of 14 November 1986 (see paragraphs 10 and 14 above), which referred to the necessity of or the request for confrontations. Secondly, the accused could have hoped to refute at the trial the statements of two of his co-accused, Mrs Bentaieb and Mr Hamdi Pacha, who had been committed for trial with him and duly summoned; they did not, however, appear at the hearing and were convicted in absentia (see paragraph 18 above). Thirdly, throughout the trial Mr Saïdi continued to deny the accusations made against him (see the same paragraph), thereby seeking to cast doubt on the credibility of the persons who had made them. Finally, in France it is traditionally the public prosecutor, as the authority with responsibility for bringing the charges and proving them, who calls the prosecution witnesses in the criminal court.

On appeal Mr Saïdi's lawyer did not lodge written submissions requesting a confrontation and did not refer to the Convention. However, according to the very wording of the judgment of 1 October 1987, he "stressed the inadequacy of the investigation and in particular the fact that there had been no confrontation between [his client] and [the latter's] accusers" (see paragraph 19 above). Moreover, the Aix-en-Provence Court of Appeal did not take refuge in procedural considerations; it went into the substance of the matter and gave detailed reasons for its refusal to hear the prosecution witnesses.

As regards the appeal to the Court of Cassation, the applicant's sole submission was based on Article 6 para. 3 (d) (art. 6-3-d) of the Convention and on that provision alone (see paragraph 20 above).

40. In sum, Mr Saïdi - in contrast to Mr Cardot (see the above-mentioned judgment, pp. 18-19, paras. 35-36) - provided the French courts with the opportunity which is in principle intended to be afforded to the Contracting States by Article 26 (art. 26), namely the opportunity to prevent or to put right the violations alleged against them (see, *inter alia*, the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, p. 27, para. 72). The objection based on a failure to exhaust the domestic remedies is therefore unfounded.

B. Merits of the complaint

41. In the applicant's submission, his conviction was based solely on the statements of the persons who had identified and implicated him. There was

no additional prosecution evidence to corroborate their testimony, such as physical evidence or the results of inquiries or expert reports. In those circumstances, the refusal of the judicial authorities to organise a confrontation between him and the persons in question had deprived him of a fair trial.

42. The Government emphasised the reasons which had led the criminal courts not to hear the witnesses.

They argued that the file had been complete, which meant that confrontations would have served little purpose; the accurate, consistent and concurring character of the testimony obtained first during the police inquiry and then during the judicial investigation gave grounds for considering that the facts were sufficiently established.

Secondly, the nature of the offence and the difficulty of obtaining testimony from drug addicts had made the organisation of confrontations a sensitive matter. In that field the protection of the witnesses took priority and called for exceptional precautions. It was necessary to take account of the psychological fragility of the drug users and their legitimate desire to remain anonymous. The persons concerned were often themselves petty dealers who were dependent on larger suppliers and who feared that they would face reprisals if they co-operated with the judicial authorities.

43. The Court reiterates that the taking of evidence is governed primarily by the rules of domestic law and that it is in principle for the national courts to assess the evidence before them. The Court's task under the Convention is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, as the most recent authority, the *Edwards v. the United Kingdom* judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34).

All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1), provided that the rights of the defence have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (see, among other authorities, the *Isgrò v. Italy* judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 34).

44. Like the Commission, the Court notes that in convicting the applicant the two courts which tried him referred to no evidence other than the statements obtained prior to the trial.

The Nice Criminal Court drew attention to the statements or depositions of several drug users or dealers; it concluded that Mr Saïdi had been "formally implicated by some of [his] regular customers ... and by the very people who carried out some of [his] deliveries" (see paragraph 18 above).

The Aix-en-Provence Court of Appeal stated that it endorsed the grounds relied on at first instance, which were, in its view, relevant. It considered that "the concurring and repeated statements of the people who sold the drugs supplied by [him] ... and those who bought the drugs ... [were] sufficiently convincing to establish the offence of which [he was] accused and also the role which [he had] played in the heroin traffic in Nice" (see paragraph 19 above).

The testimony therefore constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial. The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking - in particular with regard to obtaining and producing evidence - and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of "everyone charged with a criminal offence".

In short, there has been a violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d).

II. APPLICATION OF ARTICLE 50 (art. 50)

45. According to 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."

A. New trial or adoption of administrative measures

46. Mr Saïdi sought in the first place and above all a retrial. He requested that, in the event of the Court's considering it inappropriate to order a new trial, his criminal conviction should be removed from his police record or certain extracts (bulletins) therefrom and that his situation on French territory should be regularised, in particular by according him a right of residence.

Neither the Government nor the Commission submitted observations on this question.

47. The Court notes that the Convention does not give it jurisdiction to direct the French State to open a new trial (see, *mutatis mutandis*, the *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, p. 32, para. 76) or to adopt one of the other measures sought by the applicant.

B. Damage

48. Mr Saïdi also claimed compensation of 1,000,000 French francs for the imprisonment which he had undergone as a result of his conviction by the French courts.

The Government did not express a view on this matter; the Delegate of the Commission, on the other hand, called for the applicant to be paid a substantial amount, having regard to compensation awarded in similar cases.

49. The Court cannot speculate as to what the outcome of the proceedings in question would have been had the violation of the Convention not occurred. It considers that in the circumstances of the case the present judgment constitutes sufficient just satisfaction for the applicant.

C. Costs and expenses

50. Finally, Mr Saïdi sought the reimbursement of the costs and expenses that he had incurred in the French courts (7,000 francs for his appeal on points of law against the judgment of the Aix-en-Provence Court of Appeal of 1 October 1987 and 10,000 francs for his appeal on points of law against the judgment of the same court of 5 January 1990) and subsequently before the Convention institutions (20,000 francs before the Commission and 15,000 francs before the Court).

The Government did not express an opinion. The Delegate of the Commission considered the sums in question to be "perfectly reasonable".

51. Having regard to the evidence at its disposal and to its case-law in this field, the Court allows the applicant's claims with the exception of that concerning the second appeal on points of law, which had no connection with the violation found. It therefore awards him 42,000 francs under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;
2. Holds that there has been a violation of Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d);
3. Holds that, as regards the damage alleged by the applicant, the present judgment constitutes sufficient just satisfaction for the purposes of Article 50 (art. 50);

4. Holds that the respondent State is to pay to the applicant, within three months, 42,000 (forty-two thousand) French francs in respect of costs and expenses;
5. Dismisses the remainder of the applicant's claims.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 September 1993.

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 concurring opinion of Mr Pettiti is annexed to this judgment.

R. R.
M.-A. E.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I came to agree with the finding of a violation principally because the present case was very different from those which have previously been dealt with by the European Court in its decisions in French cases concerning the hearing of witnesses, namely the Delta and Cardot cases*.

* Judgments of 19 December 1990 and 19 March 1991, Series A nos. 191-A and 200.

In the Saïdi case the Court was confronted with a judgment of the Aix-en-Provence Court of Appeal which was based solely, as had been the decision of the Nice Criminal Court, on testimony obtained by the police and during the judicial investigation, with no reference to other precise and concurring evidence on which it could have founded its finding of the applicant's guilt beyond reasonable doubt. This does not mean that in other circumstances - for example inter partes hearing of witnesses by the investigating judge not repeated before the Criminal Court or the Court of Appeal, or conviction without confrontation of the witnesses at the hearing, but based on additional evidence - there would not be a finding of no violation from the point of view of Article 6 (art. 6) of the European Convention.

It is possible to understand the position of the Court of Appeal in view of the seriousness of the alleged offences in a case in which there had been two young victims of drug dealers, but the extreme and traditional vigilance of the courts in the necessary punishment of such offences, when they are proved, must of course also extend to the grounds for the decision from the point of view of Article 6 (art. 6) of the Convention. This is particularly so where the defence's failure to call witnesses in the Criminal Court and the decision not to have recourse to Article 513 of the Code of Criminal Procedure would appear to have been a tactic adopted by the accused, who reserved the possibility of invoking Article 6 (art. 6) of the Convention for the proceedings in the Court of Cassation. Even though some of the depositions of the witnesses did not have a decisive influence on the Court of Appeal's assessment of the applicant's guilt, it would have been prudent in proceedings involving serious offences and heavy sentences to organise a confrontation with the prosecution witnesses, even if this was not expressly requested by the defence in that it did not call witnesses in the Criminal Court or seek to invoke Article 513 of the Code of Criminal Procedure in the Court of Appeal.

The decision of the European Court on Article 50 (art. 50) and the dismissal of the claim for just satisfaction shed further light on the scope of this judgment which should be considered with reference to the Delta and Cardot judgments.