



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

COURT (CHAMBER)

CASE OF KEMMACHE v. FRANCE (No. 3)

(Application no. 17621/91)

JUDGMENT

STRASBOURG

24 November 1994

In the case of Kemmache v. France (no. 3)*,

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 Rules of Court A**, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr L.-E. PETTITI,

Mr B. WALSH,

Mr A. SPIELMANN,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

Mr J. MAKARCZYK,

Mr D. GOTCHEV,

Mr B. REPIK,

and also of Mr H. PETZOLD, *Acting Registrar*,

Having deliberated in private on 24 June and 27 October 1994,

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 9 December 1993, 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. 17621/91) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr Michel Kemmache, on 28 December 1990.

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 5 para. 1 (art. 5-1) of the Convention.

* The case is numbered 45/1993/440/519. 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.

** Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, 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 25 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr B. Walsh, Mr J. De Meyer, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr J. Makarczyk, Mr D. Gotchev and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr A. Spielmann, substitute judge, replaced Mr De Meyer, who was unable to take part in the further consideration of the case (Rule 22 paras. 1 and 2 and Rule 24 para. 1).

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 registry received the Government's memorial and the applicant's memorial on 12 and 15 April 1994 respectively. On 28 April the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 2 May 1994 the Commission produced various documents 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 June 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

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

Mrs N. COMBOT, magistrat, on secondment to
the Criminal Affairs and Pardons Department, Ministry of
Justice,

Mr F. PION, magistrat, on secondment to
the European and International Affairs Section, Ministry of
Justice, *Counsel;*

- for the Commission

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

- for the applicant

Mrs C. MÉRAL, avocate, *Counsel.*

The Court heard addresses by Mr Titium, Mr Soyer and Mrs Méral.

AS TO THE FACTS

6. Mr Michel Kemmache, a French national, is currently serving a nine-year prison sentence at Draguignan (Var). Previously he resided at Pantin where he was employed as a hotel receptionist. At one time he had been the manager of the hotel and before that the director of several companies in which he owned shares. These consisted of gaming clubs, hotels and restaurants.

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Kemmache's detention from 11 June to 10 August 1990 was ordered in connection with criminal proceedings conducted in the French courts from 16 February 1983 (when he was arrested and charged) to 6 February 1993 (when his appeal on points of law against conviction was dismissed). During this time the applicant underwent four periods of detention before being tried (from 16 February to 29 March 1983, from 22 March 1984 to 19 December 1986, from 11 June to 10 August 1990 and from 14 March to 25 April 1991).

In a judgment of 27 November 1991, the Court found that there had been a breach of Article 5 para. 3 and Article 6 para. 1 (art. 5-3, art. 6-1) of the Convention (Series A no. 218).

A. The proceedings in the Alpes-Maritimes Assize Court

1. The indictment and the custody order

8. On 13 August 1985 the Indictment Division of the Lyons Court of Appeal indicted the applicant on charges of knowingly aiding and abetting "the importation and use on French territory of counterfeit foreign bank notes" and knowingly aiding and abetting the commission of the related offence of "unlawful circulation of such counterfeit bank notes within the customs area". It committed the applicant for trial in the Alpes-Maritimes Assize Court and issued a delivery into custody order (*ordonnance de prise de corps*) directing that the accused "[was to] be taken to or held at the prison" within the jurisdiction of that court.

9. Mr Kemmache had been at liberty since 19 December 1986 and no longer subject to court supervision since 4 October 1988, when, on 11 June 1990, he reported to Nice prison to be taken into custody. In so doing he was complying with the delivery into custody order of 13 August 1985 and Article 215-1 of the Code of Criminal Procedure, as the trial in the Assize Court had been set down for 12, 13 and 14 June 1990.

2. The adjournment of the proceedings

10. One of his two co-accused, Mr Klaushofer, sought the adjournment of the proceedings on the ground that his lawyer, who had been designated by the authorities to act for him on 8 June 1990, had not been able to familiarise himself with the case-file. Mr Kemmache joined this application, whereas the third co-accused, Mr Ceccio, opted to be tried immediately.

The Assize Court allowed these applications by a decision of 12 June and ordered the separation of the cases. Mr Ceccio was, accordingly, the only one of the accused to be tried on 12 and 13 June 1990.

3. The dismissal of the application for release

11. On 12 June 1990 Mr Kemmache applied to the Assize Court for his release. On 13 June his application was rejected on the following grounds:

"...

The application to have the proceedings adjourned was made not only by Stephan Klaushofer, but also by Michel Kemmache.

The delivery into custody order executed on 11 June 1990 remains in force throughout the trial proceedings.

In view of the sentence which he risks, the accused is not able to provide sufficient guarantees that he will appear for trial.

Mere court supervision, even subject to the payment of a security, appears at this stage of the proceedings inadequate to ensure that the accused Kemmache will appear for trial.

In addition, the risk of pressure being brought to bear on witnesses cannot be ruled out.

..."

B. The proceedings in the Indictment Division of the Aix-en-Provence Court of Appeal

1. Release subject to court supervision

12. On 18 June 1990 the applicant filed a further application for release with the Indictment Division of the Aix-en-Provence Court of Appeal; he relied in particular on Article 5 paras. 1, 2, 3 and 4 (art. 5-1, art. 5-2, art. 5-3, art. 5-4) and also on Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

By a decision of 4 July 1990 the Indictment Division ordered his release subject to court supervision and to the payment of a security set at 800,000

French francs (FRF). FRF 400,000 of this amount was intended to ensure that he appeared for trial and the remainder to guarantee payment of such costs and fines as he might be required to pay. It considered, *inter alia*:

"...

Michel Kemmache was committed for trial in the Alpes-Maritimes Assize Court by a decision of the Indictment Division of the Lyons Court of Appeal of 13 August 1985.

He is detained pursuant to the delivery into custody order issued with that decision.

...

Michel Kemmache had been released on 8 December 1986 and it would not therefore appear that his detention is necessary unless there are new considerations justifying such a step.

However, it seems that the case is ready for trial at a forthcoming session of the Assize Court.

Given the numerous disruptions to these proceedings as a result of the use by the accused persons of all the available means to delay the trial, it is necessary to take steps to ensure that Kemmache appears for trial.

To this end his release must be subject to court supervision and to the obligation to pay a security.

Kemmache had previously paid two securities amounting to a total of FRF 800,000 in accordance with a court supervision order.

By a decision of 4 October 1988 the Alpes-Maritimes Assize Court ordered the lifting of the court supervision order and the repayment of the securities on the ground that, purely as a matter of law, since the time-limit for giving judgment had expired, the court supervision order had automatically to be rescinded.

In his memorial Michel Kemmache indicated that there had been no significant change in the guarantees that he could provide to ensure his appearance for trial.

He is still an employee of the company 'Société Nouvelle Hôtelière de Pantin', in which he has shares and the only alteration had been in his family circumstances.

The security should therefore be set at FRF 800,000, an amount which he had earlier been in a position to pay and which corresponds to his financial circumstances in view of his salary, and above all his position as partner.

..."

2. The variation of the court supervision order

13. On 26 July 1990 the Indictment Division varied the conditions for the payment of the security to allow it to be paid in monthly instalments of FRF 100,000.

3. The applications to have the court supervision order lifted and Mr Kemmache's release

14. On 30 July 1990 Mr Kemmache filed an application for release with the Indictment Division. It was dismissed on 8 August 1990 on the following grounds:

"...

Kemmache, who was at liberty and not subject to court supervision surrendered to be taken into custody the day before he was due to appear in the Assize Court, in accordance with the provisions of Article 215-1 of the Code of Criminal Procedure. By virtue of those provisions the delivery into custody order continues to produce its effects until the final determination of the charges set out in the indictment.

Kemmache's release was ordered by a decision of 4 July 1990. It follows that he is no longer detained pursuant to the delivery into custody order, but because he has failed to satisfy the conditions of court supervision requiring him to pay the first instalment of the security prior to his release.

The case is ready for trial at a forthcoming session of the Assize Court. Given the numerous disruptions to these proceedings and in particular the use by the accused persons of all the available means to delay the trial, it is necessary to take steps to ensure that Kemmache appears for trial. To this end his release must remain subject to court supervision and to the obligation to pay a security.

As was noted in the decision of 4 July 1990 the amount of the security corresponds to Kemmache's financial circumstances and in particular to his position as a partner in the 'Sté Nouvelle Hôtelière de Pantin'; he has not shown that his businesses have failed, as he maintained in his pleadings, or that he has insufficient funds to pay the sum fixed as security.

..."

15. On 10 August 1990, after paying the first instalment of the security, FRF 100,000, Mr Kemmache was released.

16. On 5 September 1990 the Indictment Division again refused to lift the court supervision order.

17. The applicant paid a second instalment of the security on 10 September 1990. He subsequently reported to the principal public prosecutor at the Aix-en-Provence Court of Appeal stating that he was not in a position to pay the remaining instalments and that he was ready to surrender to custody.

C. The proceedings in the Criminal Division of the Court of Cassation

18. By three decisions of 22 November 1990 the Criminal Division of the Court of Cassation dismissed Mr Kemmache's appeals against the decision of the Assize Court of 13 June 1990 and those of the Indictment Division of 4 July and 8 August 1990.

In the first it held, *inter alia*, as follows:

"...

... the delivery into custody order, properly executed, constitutes authority for detention which remains valid until the final determination of the charges set out in the indictment, without its being necessary to order its continuation where the accused's case is separated from other proceedings and adjourned to a subsequent session.

..."

In the second and third decision, it found that:

"...

... as Michel Kemmache was lawfully detained, his release ordered by the impugned decision could be made subject to a court supervision order pursuant to the combined provisions of Articles 138 and 148 of the Code of Criminal Procedure ... [and] ... according to the terms of Article 5 para. 3 (art. 5-3) of the ... Convention ..., release may be conditioned by guarantees to ensure that the accused will appear for trial.

..."

D. The subsequent developments

19. On 25 April 1991 the Alpes-Maritimes Assize Court sentenced the applicant to a fine of FRF 2,600,000 and eleven years' imprisonment, the latter term being reduced to nine years on 21 May 1992 by the Var Assize Court, to which the case had been remitted.

The appeal on points of law lodged against that last decision was dismissed by the Court of Cassation on 3 February 1993.

II. RELEVANT DOMESTIC LAW

A. The delivery into custody order

20. In proceedings concerning serious offences (*matière criminelle*), "[the decision indicting the accused] shall include an order for the accused's delivery into custody ..." (Article 215 of the Code of Criminal Procedure - "CCP").

21. Under Article 215-1 CCP:

"An accused who is not in remand custody must surrender to be taken into custody not later than the day before the trial hearing in the Assize Court ...

The delivery into custody order shall be enforced against him if, having been duly summoned through administrative channels to report to the registry of the Assize Court and without a legitimate excuse, he fails to appear on the appointed day to be examined by the President of the Assize Court. The same applies in the situation provided for in Article 141-2 [, that is if he deliberately fails to comply with the conditions of court supervision]."

According to the case-law of the Court of Cassation (see paragraph 18 above), the delivery into custody order, lawfully executed, constitutes authority for detention which remains valid until the final determination of the charges set out in the indictment.

B. Applications for release

22. Any remand prisoner may apply for his release "in whatever circumstances" and "at any stage in the proceedings", including therefore the trial proceedings. Where the case has been referred to the trial court it is for that court to rule on the application for release. Before committal for trial in the Assize Court and in between Assize Court sessions, such applications are heard by the Indictment Division (Article 148-1 CCP).

23. In such circumstances the decision dismissing an application for release must give specific reasons in accordance with the conditions laid down in Article 145 CCP (crim. 16 December 1971, *Recueil Dalloz* (D.) 1972, p. 318; 15 September 1979, *Bulletin criminel* no. 258; 7 August 1990, *ibid.* no. 296, D. 1991, *sommaires*, p. 210), in other words "set out the considerations of fact and of law on which it is based ... with reference to Article 144".

Under Article 144 CCP, in proceedings concerning serious offences, detention on remand may be ordered or continued:

1. where it "is the sole means of preserving evidence or material clues or of preventing either pressure being brought to bear on the witnesses or the victims, or collusion between the accused and accomplices";

2. where it "is necessary to preserve public order from the prejudice caused by the offence or to protect the accused, to cause the offence to cease or to prevent its repetition or to ensure that the accused remains available to the judicial authorities".

It may also be ordered, in the circumstances provided for in Article 141-2, "where the accused deliberately fails to comply with the conditions of court supervision".

C. Court supervision

24. The powers conferred on the investigating judge by Articles 139 and 140 are, whatever the circumstances, vested in the court with jurisdiction as defined by Article 148-1 (Article 141-1 CCP).

The relevant court may therefore place the accused under court supervision and, at any moment, impose on him one or more new conditions, revoke conditions entirely or in part, vary one or more conditions or accord an occasional or temporary derogation from the obligation to comply with certain conditions (Article 139 CCP). It may also, at any moment, direct that the court supervision order be lifted (Article 140 CCP).

25. A court supervision order may require the accused to lodge a security, the amount of which and the time-limits for the payment of which, as a single payment or in instalments, are fixed, *inter alia*, having regard to his financial circumstances (Article 138 CCP). The object of this security is to guarantee (Article 142 CCP):

1. the accused's presence for all the steps of the proceedings and for the execution of the judgment, and, where appropriate, the enforcement of other obligations imposed on him;

2. the payment in the following order of: (a) the costs incurred by the party seeking damages, reparation for the damage caused by the offence and sums owed in restitution, and maintenance payments, where the accused is facing proceedings for their non-payment; (b) costs incurred by the prosecuting authority; (c) fines.

26. If the accused deliberately violates the conditions of the court supervision order, the competent court may, whatever the length of the prison sentence risked, order his detention on remand. The delivery into custody order is then executed by order of the President of the Assize Court or, in between sessions, the President of the Indictment Division (Article 141-2 CCP).

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Kemmache applied to the Commission on 28 December 1990. He maintained that his continued detention after the Assize Court's decision to adjourn the proceedings on 12 June 1990 violated Article 5 para. 1 (art. 5-1) and Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

28. On 8 February 1993 the Commission declared the application (no. 17621/91) admissible as regards the complaint based on Article 5 para. 1 (art. 5-1) and inadmissible for the remainder. In its report of 21 October 1993 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 5 para. 1 (art. 5-1). The full text of the

Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

29. In their memorial, the Government asked the Court "to hold that there has been no violation of the Convention".

30. The applicant requested the Court to find "that the provisions of Article 5 para. 1 (art. 5-1) of the Convention ... have been violated by France".

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1) OF THE CONVENTION

31. Mr Kemmache complained of the fact that he had been kept in detention after his case had been adjourned to a subsequent session by the Alpes-Maritimes Assize Court. He relied on Article 5 para. 1 (art. 5-1) of the Convention, the relevant provisions of which read as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

32. The Court notes that the applicant surrendered to be taken into custody at Nice prison on 11 June 1990 in accordance with Article 215-1 CCP (see paragraph 21 above) and that from 12 June 1990 he was detained

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 296-C of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

pursuant to the delivery into custody order issued on 13 August 1985 by the Indictment Division of the Lyons Court of Appeal (see paragraph 8 above). As Article 215-1 CCP and orders for delivery into custody are intended to ensure that the accused appears for trial, the detention in issue falls to be dealt with under Article 5 para. 1 (c) (art. 5-1-c) of the Convention.

Accordingly, the Court's first task is to determine the period of detention to be taken into consideration. It must then assess whether the detention was ordered in accordance with a procedure prescribed by law and whether it was lawful.

A. Period of detention to be taken into consideration

33. The starting-point of the relevant period is not in dispute. It began on 12 June 1990, the date on which the Assize Court ordered the separation of the cases of Mr Kemmache and Mr Klaushofer from that of Mr Ceccio and adjourned the cases of the former to a subsequent session (see paragraph 10 above).

34. The position is different with regard to the end of the relevant period.

According to the Government, the judicial authorities effectively opposed Mr Kemmache's release only until 4 July 1990, the date on which the Aix-en-Provence Court of Appeal ordered his release subject to the payment of a security; the accused had been kept in detention after 4 July because he had failed to comply with the conditions of the court supervision order.

Like the applicant and the Commission, the Court takes the view that, in the present case and for the purposes of its review, the relevant date is that of the applicant's actual release, namely 10 August 1990, when the first instalment of the above-mentioned security was paid (see paragraph 12 above).

B. Whether the detention was ordered in accordance with a procedure prescribed by law

35. Mr Kemmache argued that he ought to have been released on 12 June 1990. In his submission, a delivery into custody order could not constitute the legal basis for detention where a case was adjourned to a subsequent session. The sole purpose of such an order was to ensure that the accused appeared for trial and it could only be executed the day before the trial or, exceptionally, before that date, but only in the situations provided for in Article 215-1 CCP (see paragraph 21 above). When proceedings were adjourned, the effects of the order were therefore suspended until the day before the next trial hearing. In short, the deprivation of liberty in issue had no legal basis.

36. The Government and the Commission both referred to the case-law of the Court of Cassation (see paragraph 18 above). They were in no doubt that a delivery into custody order, properly executed as in this instance, constituted "authority for detention which [remained] valid until the final determination of the charges".

37. The Court reiterates that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary (see the *Winterwerp v. the Netherlands* judgment of 24 October 1979, Series A no. 33, pp. 19-20, para. 45).

Although it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review. However, the logic of the system of safeguard established by the Convention sets limits on the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see the *Winterwerp* judgment, cited above, p. 20, para. 46, the *Bozano v. France* judgment of 18 December 1986, Series A no. 111, p. 25, para. 58, and the *Bouamar v. Belgium* judgment of 29 February 1988, Series A no. 129, p. 21, para. 49).

38. In the instant case the Court finds that Mr Kemmache was kept in detention in accordance with Articles 215 and 215-1 CCP as interpreted by the Court of Cassation. It does not discern, either in the wording of those provisions or in their application, any contradiction with the Convention. The Court therefore concludes that the deprivation of liberty in question had a legal basis in French law.

C. Whether the detention was lawful

39. Mr Kemmache argued that his detention had not been lawful. He maintained that there had been no risk that he would abscond. He had reported to the prison of his own accord after three years at liberty, despite the fact that he had no longer been subject to court supervision. It had no longer been necessary to keep him away from the witnesses after the end of

the trial hearing of his co-accused Ceccio, on the evening of 13 June, particularly as he had had every opportunity to make contact with them during the three years of liberty prior to his reincarceration. The reason given by the Alpes-Maritimes Assize Court on 13 June 1990, namely that "mere court supervision, even subject to the payment of a security, appears at this stage of the proceedings inadequate to ensure that the accused Kemmache will appear for trial" (see paragraph 11 above), had likewise lacked relevance. Indeed, on 4 July, the Aix-en-Provence Indictment Division had in fact ordered the applicant's release subject to court supervision. Finally, the sums sought as security had exceeded what the accused was capable of paying.

40. The Commission essentially accepted the applicant's view.

41. According to the Government, the decision refusing to release the applicant given on 13 June by the Assize Court had been intended to prevent him from absconding as he could not provide sufficient guarantees that he would appear for trial, and to make it impossible for him to bring pressure to bear on the witnesses during the trial. These fears had not been groundless. The applicant had twice, without a legitimate reason, failed to comply with a summons issued by the investigating judge and had displayed a dilatory attitude by joining the application for adjournment filed by one of his co-accused (see paragraph 10 above).

As regards the fact that he had been kept in detention after the decision to release him taken by the Indictment Division on 4 July 1990, this had been the result of his failure to satisfy the conditions of the court supervision order, in other words his failure to pay the security intended to ensure his appearance for trial, a sum which was fixed and then varied in the light of Mr Kemmache's financial circumstances.

42. The Convention requires that every deprivation should be "lawful". This is also the case where the provision invoked is Article 5 para. 1 (c) (art. 5-1-c), the French version of which, unlike the English text, makes no express reference to "régularité" (lawfulness). The notion is a general one which applies to the whole of Article 5 para. 1 (art. 5-1) (see, among other authorities, the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, p. 38, para. 102).

Lawfulness implies conformity with the substantive and the procedural rules of domestic law and also with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness (see, as the most recent authority, the *Wassink v. the Netherlands* judgment of 27 September 1990, Series A no. 185-A, p. 11, para. 24). In a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as lawful (see, *inter alia*, the *Winterwerp* judgment, cited above, p. 18, para. 39).

43. Detention pursuant to a delivery into custody order during an Assize Court trial is based on grounds which may be either complementary to those relied on in respect of remand detention or formulated differently.

44. In principle, and without prejudice to its power to examine the compatibility of national decisions with the Convention, it is not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action.

45. In deciding to keep Mr Kemmache in detention, the Alpes-Maritimes Assize Court (13 June 1990) considered, *inter alia*, that "in view of the sentence which he [risked], [he was] not able to provide sufficient guarantees that he [would] appear for trial" (see paragraph 11 above). The Aix-en-Provence Indictment Division (4 and 30 July 1990) took the view that "given the numerous disruptions to these proceedings on account of the use by the accused persons of all the available means to delay the trial, it is necessary to take steps to ensure that Kemmache appears for trial" (see paragraphs 12 and 14 above). The Assize Court took into account, in addition, the risk of pressure being brought to bear on the witnesses (see paragraph 11 above). The Indictment Division had fixed and varied the security to be paid by the accused and had given detailed reasons (see paragraphs 12-14 above). In the Court's opinion, such decisions disclose neither abuse of authority nor bad faith nor arbitrariness. They cannot therefore be held to be unlawful, especially in view of the fact that once an Assize Court has adjourned the trial, applications for release may be made to the Indictment Division at any time.

D. Conclusion

46. In sum, no violation of Article 5 para. 1 (art. 5-1) has been established.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that there has been no breach of Article 5 para. 1 (art. 5-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 November 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

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

R. R.
H. P.

DISSENTING OPINION OF JUDGE WALSH

1. Under the Convention no person is obliged to provide a justification for his right not to be deprived of his liberty. It is for those who deprive him of that right to justify their actions. Any "justification" put forward by the detainer must be treated as a nullity unless it is one which does not contravene the provisions of the Convention even if it is in accord with the national law.

2. The reasons put forward to justify the detention complained of in the present case are all conclusions of fact devoid of any factual evidence put forward to support them. As no factual evidence was offered in the national courts to justify the conclusions the applicant was thereby deprived of the opportunity of challenging "such facts" (if any such existed).

3. It appears to me that conclusions expressed were entirely based on a speculative and intuitive approach on the part of the national judicial authorities. Such an approach cannot be a substitute for evidence. Neither does it offer any meaningful respect for the presumption of innocence guaranteed by the Convention. That presumption does not permit of any a priori assumption that every person reasonably suspected of or charged with a criminal offence will seek to evade justice either by flight or by interference with the witnesses or the evidence.

4. The Convention contemplates provisional liberty being available to such persons and contemplates that in appropriate circumstances certain conditions may be attached to such liberty including financial conditions by way of security against evading justice. It follows that any such condition must not be so unreasonable in all the circumstances, including the means of the detained person, as to be effectively a refusal.

5. In the present case the conditions initially imposed on the applicant could not be met by him and so he remained in detention. He had been ordered to pay FRF 400,000 as security against the possibility of non-appearance at the trial and, more dubiously, payment of another FRF 400,000 to guarantee payment of any costs or fines which he might be ordered to pay in respect of a conviction on the charges for which he had not yet been tried. This was not compatible with the presumption of innocence. That eventually he was released upon payment of a first instalment of 100,000 francs highlights the unreasonableness and the prohibitory character of the initial demand. The fact that he had not paid the initial demand had been offered as one of the justifications for refusing an earlier release.

6. As no evidence had been offered in the national courts on the intentions of the applicant or of his probable attitude to the question of evading justice, or evidence which could reasonably support an inference that he would probably seek to evade justice, I am of the opinion that the surrounding circumstances fully justified the opinion of the Commission on

this point as set out in paragraphs 51, 52 and 53 of the Commission's report. The Commission was not seeking to re-interpret any evidence offered to the national courts but were simply drawing legitimate inferences from uncontested material.

7. In my opinion the applicant has been the victim of a breach of Article 5 para. 1 (art. 5-1) of the Convention.