



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

CASE OF OMAR v. FRANCE

(43/1997/827/1033)

JUDGMENT

STRASBOURG

29 July 1998

In the case of Omar v. France¹,

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A², as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr L.-E. PETTITI,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr J. MAKARCZYK,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr P. KÜRIS,
Mr E. LEVITS,
Mr J. CASADEVALL,
Mr P. VAN DIJK,
Mr M. VOICU,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 March and 24 June 1998,

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”) and by the French Government (“the Government”) on 16 April and 7 July 1997 respectively, within the three-

Notes by the Registrar

1. The case is numbered 43/1997/827/1033. 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.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). It originated in an application (no. 24767/94) against the French Republic lodged with the Commission under Article 25 by three Algerian nationals, Mr Cheniti Omar, Mr Kamal Omar and Mr Hassane Omar, on 27 July 1994.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46); the Government’s application referred to Article 48. The object of the request and of the application 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 § 1 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants each stated that they wished to take part in the proceedings and designated the lawyers who would represent them (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), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 28 April 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr A.B. Baka, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr K. Jungwiert, Mr P. Kūris, Mr E. Levits and Mr P. van Dijk (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. On 2 June 1997 the President of the Court decided that, in the interests of the proper administration of justice, the case of Guérin v. France¹ should be considered by the Chamber already constituted to hear the instant case (Rule 21 § 7).

5. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicants’ lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence, the Registrar received the memorials of the applicants and the Government on 19 November and 14 December 1997 respectively.

6. On 22 October 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, the President of the Court, and Mr Bernhardt, the Vice-President, together with the members and the four substitutes of the original Chamber, the latter being Sir John Freeland, Mr M. Voicu, Mr J. De Meyer and Mr J. Makarczyk (Rule 51 § 2 (a) and (b)). On 25 October 1997 the President, in the presence of the Registrar, drew by lot the names of the seven additional judges needed to complete the

1. Case no. 51/1997/835/1041.

Grand Chamber, namely Mr A. Spielmann, Mr N. Valticos, Mrs E. Palm, Mr I. Foighel, Mr A.N. Loizou, Mr L. Wildhaber and Mr V. Butkevych (Rule 51 § 2 (c)). Mr Ryssdal, who died on 18 February 1998, was replaced as President of the Grand Chamber by Mr Bernhardt, and Mr P. Jambrek joined the Chamber as a full member. Subsequently Mr J. Casadevall replaced Mr Valticos, who was unable to take part in the further consideration of the case.

On 22 January 1998 the Commission produced certain documents from the proceedings before it, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing in the present case and the case of *Guérin v. France* took place in public in the Human Rights Building, Strasbourg, on 23 March 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr J.-F. DOBELLE, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,	<i>Agent,</i>
Mrs M. DUBROCARD,	
Mr B. NÉDÉLEC, <i>magistrats</i> , on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	<i>Advisers;</i>

(b) *for the Commission*

Mr L. LOUCAIDES,	<i>Delegate;</i>
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(c) *for the applicants*

Mr J.-L. CACHEUX,	
Mr L. BORÉ, lawyers practising in the Lyons Court of Appeal,	<i>Counsel;</i>

(d) *for Mr Guérin*

Mr A. LYON-CAEN, lawyer practising in the <i>Conseil d'Etat</i> and the Court of Cassation,	<i>Counsel.</i>
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The Court heard addresses by Mr Loucaides, Mr Lyon-Caen, Mr Cacheux, Mr Boré and Mr Dobelle, and the latter's reply to a question from one judge.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Mr Cheniti Omar, an Algerian national who was born in 1931, is retired and lives in Lyons.

His two sons, Hassane and Kamal Omar, who are also Algerian nationals, and were born in 1959 and 1962 respectively, were building workers at the material time.

A. The investigation proceedings

9. The three applicants were charged in October 1989 with aiding and abetting the investment, concealment or conversion of funds derived from drug trafficking. Cheniti Omar was detained on remand from 13 October to 3 November 1989 and Kamal and Hassane Omar from 13 October to 8 December 1989. On release they were placed under judicial supervision.

10. On 14 June 1990 the investigating judge appointed an expert to inspect the accounts of a number of firms and those of the Omar family. The expert filed his main report on 8 March 1991 and a supplementary report on 29 April 1991.

B. The trial proceedings

1. *In the Lyons Criminal Court*

11. By an order of 23 May 1991 the applicants were committed for trial in the Lyons Criminal Court, which, in a judgment of 19 November 1991, sentenced Cheniti Omar to four years' imprisonment, forty-two months of which were suspended, and Kamal and Hassane Omar to five years' imprisonment each. It also issued warrants for their arrest.

The court held, *inter alia*, that the offence of laundering the proceeds of drug trafficking had been made out by the fact that the accused were unable to give convincing explanations regarding the source of the family's considerable income. The expert had noted the existence of sixty-seven bank accounts containing a total of more than three million francs, whose origin could not be explained solely by the activity of the trading or property companies owned by the accused, notwithstanding their assertion during the investigation that they had accumulated the money by not declaring their earnings to the inland revenue.

2. *In the Lyons Court of Appeal*

12. The three applicants appealed against the above judgment and requested a second expert opinion on their accounts.

13. On 1 October 1992 the case was heard at an adversarial hearing attended by the accused.

14. In a judgment of 16 February 1993 the Lyons Court of Appeal fully upheld the impugned judgment with regard to the five-year prison sentences imposed on Kamal and Hassane Omar and raised Cheniti Omar's sentence to five years. It also issued warrants for the arrest of each of the three applicants, with a view to ensuring that they would serve the sentences imposed on them. They, although duly informed of the date on which the judgment would be delivered, were not in court.

3. *In the Court of Cassation*

15. Acting through a lawyer at the Court of Cassation, the three applicants lodged an appeal on points of law within the time-limit of five clear days laid down by Article 568 of the Code of Criminal Procedure (see paragraph 21 below). None of the applicants complied with the arrest warrants issued, but Cheniti Omar was arrested by the police at his place of work on 27 May 1993 and committed to prison pursuant to the warrant for his arrest.

16. On 7 February 1994 the Court of Cassation declared the appeal inadmissible on the ground that:

“It follows from the general principles of criminal procedure that a convicted person who has not complied with a warrant for his arrest is not entitled to act through a representative in order to lodge an appeal on points of law. It cannot be otherwise unless evidence has been supplied of circumstances making it absolutely impossible for him to surrender to custody at the appropriate time. As no such evidence has been supplied by the three appellants, against whom arrest warrants were issued after they had appeared in court for the hearing, their appeal, which has been lodged by an attorney practising in the Court of Appeal, must be declared inadmissible.”

17. In April and September 1994 Kamal and Hassane Omar were arrested and committed to prison pursuant to the warrants for their arrest.

18. On 15 and 17 May 1995 the prefect of the Rhône *département* issued deportation orders against them.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. *In general*

19. In French law an appeal on points of law, which is an exceptional remedy, may be lodged by any person who has an interest in doing so and

gives notice within the time-limit, against any judicial decision given at last instance.

20. Article 576 of the Code of Criminal Procedure, which lays down the formalities to be observed in connection with appeals on points of law, provides:

“Notice of an appeal on points of law must be given to the registrar of the court which has delivered the decision being challenged.

It must be signed by the registrar and by the appellant himself or by an attorney (*avoué*) of the court which has given judgment or by a specially authorised agent. In the last-mentioned case, the authority to act shall be annexed to the document drawn up by the registrar...

...”

21. Article 568 of the Code of Criminal Procedure provides:

“The prosecution and all parties shall have five clear days after the date on which the impugned decision was given in which to lodge an appeal on points of law.”

B. Suspensive effect of an appeal on points of law

22. Article 569 of the Code of Criminal Procedure provides:

“During the time allowed for an appeal on points of law and, where such an appeal has been lodged, until the Court of Cassation delivers judgment, execution of the judgment of the Court of Appeal shall be stayed, except in respect of orders concerning civil matters, and unless the Court of Appeal upholds the warrant issued by the trial court pursuant to Article 464-1 or Article 465, first sub-paragraph, or unless it issues a warrant itself under the same conditions and according to the same rules.”

23. The suspensive effect of an appeal on points of law is derived from statute and may therefore likewise be restricted by statute, particularly in the interests of speedier and more effective punishment. That is the case where an arrest warrant has been issued by the trial court (see, to that effect, B. Bouloc, *Précis de procédure pénale*, Dalloz, 16th edition, 1996, § 739).

C. Forfeiture of the right to appeal on points of law

24. Article 583 of the Code of Criminal Procedure provides:

“If a person sentenced to a term of imprisonment of more than six months has not surrendered to custody and has not obtained from the court which convicted him exemption, on or without payment of a surety, from the obligation to surrender to custody, his right to appeal on points of law shall be forfeit.

The memorandum of imprisonment or the judgment granting exemption shall be produced before the Court of Cassation not later than the time when the case is called for hearing.

For his appeal to be admissible, it is sufficient for the appellant to establish that he has surrendered to custody at a prison, either in the place where the Court of Cassation sits or in the place where sentence was passed. The governor of that prison shall admit him there on the order of the Principal Public Prosecutor at the Court of Cassation or of the head of the public prosecutor's office at the court of trial or appeal."

D. Conditions of admissibility of an appeal on points of law

25. The Court of Cassation has ruled on a number of occasions that an appeal lodged by the representative of a convicted person who has not complied with a warrant for his arrest is inadmissible (Cass. crim. 10 December 1986, *Dalloz* 1987, p. 165). But the convicted person may give notice himself of his intention to appeal (Cass. crim. 7 November 1989, *Bull. Crim.* no. 397), subject to the provisions of Article 583, reproduced above.

26. The Criminal Division of the Court of Cassation considers that an appeal is admissible in the following two situations:

(a) where, instead of acting through a representative, the appellant signs the notice of intention to appeal in person (Cass. crim. 28 June 1978, *Bull. crim.* no. 57) by reporting to the registry before the warrant has been executed (Cass. crim. 7 November 1989, *Bull. crim.* no. 397) and accepting the risk of being arrested by mentioning his exact address in the notice (Cass. crim. 13 May 1985, *Bull. crim.* no. 180; Cass. Crim. 7 September 1993, *Bull. crim.*, p. 263, confirmed by a decision of 15 February 1994 published in the *Recueil Dalloz* 1994, *Somm.*, p. 187);

(b) where, when acting through a representative, in accordance with Article 576 of the Code of Criminal Procedure, he can prove that there were "circumstances that made it absolutely impossible for him to surrender to custody at the appropriate time" (Cass. crim. 21 May 1981, *Bull. crim.* no. 168; Cass. crim. 19 January 1984, *Bull. crim.* no. 27; Cass. crim. 8 March 1985; Cass. crim. 8 March 1996, *Bull. crim.* no. 94).

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Cheniti Omar, Mr Kamal Omar and Mr Hassane Omar applied to the Commission on 27 July 1994. They alleged that the decision to rule their appeal on points of law inadmissible had infringed their right to a court, one of the elements of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.

28. On 24 June 1996 the Commission declared the application (no. 24767/94) admissible. In its report of 6 March 1997 (Article 31), it expressed the opinion that there had been a violation of Article 6 § 1 (twenty-three votes to eight). The full text of the Commission's opinion and

of the two dissenting opinions contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

29. In their memorial the Government asked the Court to dismiss the application lodged by the applicants.

30. The applicants asked the Court to “declare their application admissible and well-founded”.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

31. The applicants submitted that the decision to declare their appeal on points of law inadmissible on the ground that they had not complied with the warrants for their arrest had infringed their right of access to a court, one of the elements of the right to a fair trial. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

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

Such inadmissibility, they submitted, was not prescribed by law but had been introduced by case-law and was contrary to the “presumption of innocence”, since it was based on the idea that the accused had deliberately sought to evade justice. In the present case, however, they had never failed to appear in court and had complied whenever summoned by judges or experts. Before the Court of Cassation they had instructed a lawyer (Mr Monod) to represent them and they had not left the address given as their place of residence in the case file. There was accordingly no proportionality between their failure to comply with the arrest warrants and the sanction that had been imposed for that reason. The Code of Criminal Procedure did not lay down any positive obligation to surrender to custody and it had not been asserted that they had resisted any attempts to enforce the warrants.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission’s report is obtainable from the registry.

32. The Government submitted that the Court of Cassation's ruling that the applicants' appeal was inadmissible satisfied the criteria laid down by the Court's case-law, in so far as the limitation concerned did not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right [was] impaired". Access to the Court of Cassation was not denied to an absconding defendant but only made subject to certain conditions intended to ensure a fair balance between the protection of public interests and respect for the rights of the defence. In the present case the applicants had deliberately failed to comply with the warrants for their arrest, since they had not attended the hearing for the delivery of the Court of Appeal's judgment, the date of which had been duly notified to them. They had lodged their appeal on points of law three days later, and could therefore not maintain that, not having been served in person with a copy of the arrest warrant, they were not obliged to comply with it. The ruling that the appeal was inadmissible had thus been proportionate to the aim pursued, which was to make it possible to enforce the court's order against the applicants, regard being had in addition to the level of the court which had ruled it inadmissible. Moreover, unlike Mr Poitrimol, the applicants had had the benefit of adversarial procedure at first instance and on appeal, so that the Court's conclusion in the Poitrimol v. France judgment (23 November 1993, Series A no. 277-A) could not be transposed to the present case. Lastly, scrutiny of the criminal proceedings against the applicants as a whole showed that their right to a fair trial had been respected.

33. The Commission considered that there was no direct or relevant connection between the obligation for a convicted person to surrender to custody at a prison before his appeal on points of law is considered and his right of access to a court or his exercise of his rights of defence. It also expressed the opinion that the Court's decision in the Poitrimol case was valid not only in respect of cases where a defendant had unsuccessfully sought on appeal to justify his refusal to appear before the court and to be represented by counsel; it had to do with the disproportionate nature of the sanction as such. In the present case the sanction was all the more disproportionate because, unlike Mr Poitrimol, who had left French territory, the applicants had not absconded and had never at any time attempted to evade justice.

34. The Court reiterates that the right to a court, of which the right of access is one aspect (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36), is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They

must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (see the *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 49–50, § 65; the *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, pp. 78–79, § 59; the *Bellet v. France* judgment of 4 December 1995, Series A no. 333-B, p. 41, § 31; and the *Levages Prestations Services v. France* judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1543, § 40).

35. In the present case the Court of Cassation declared the applicants' appeal on points of law inadmissible on the grounds that "[i]t follows from the general principles of criminal procedure that a convicted person who has not complied with a warrant for his arrest is not entitled to act through a representative in order to lodge an appeal on points of law. It could not be otherwise unless he supplied evidence of circumstances making it absolutely impossible for him to surrender to custody at the appropriate time. As no such evidence has been supplied by the three appellants, against whom arrest warrants were issued after they had appeared in court for the hearing, their appeal, which has been lodged by an attorney practising in the Court of Appeal, must be declared inadmissible" (see paragraph 16 above).

36. The Court must therefore determine whether, in the circumstances of the present case, the fact that the applicants' appeal on points of law was automatically declared inadmissible because they had not complied with the warrants for their arrest infringed their right of access to a court.

37. The Court notes in the first place that the obligation for a defendant sentenced to a non-suspended term of imprisonment accompanied by a warrant for his arrest to surrender to custody at the time when he gives notice of his intention to appeal on points of law, that is within five days of delivery of the Court of Appeal's judgment (see paragraph 21 above), is derived from the very long-established and consistent case-law of the Criminal Division of the Court of Cassation (see paragraph 25 above).

38. At the hearing the Agent of the Government emphasised that this rule had an essentially moral basis and was underpinned by the idea "that it would be shocking to allow a person who has deliberately failed to comply with a court order to appeal on points of law". It was not absolute and was no longer applied where the appellant's good faith could be presumed, as, for example, when he came in person to sign his notice of appeal (see paragraph 26 above).

39. However, some French legal writers have criticised the rule, arguing that the decision, when considering an appeal on points of law, to declare it inadmissible *ipso jure* when the defendant has not surrendered to custody within the five-day time-limit is based on a presumption that he is at fault, whereas his fault is not necessarily intentional.

40. The Court can only note that, where an appeal on points of law is declared inadmissible solely because, as in the present case, the appellant

has not surrendered to custody pursuant to the judicial decision challenged in the appeal, this ruling compels the appellant to subject himself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time-limit for lodging an appeal has expired.

This impairs the very essence of the right of appeal, by imposing a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and exercise of the rights of the defence on the other.

41. In that connection, the Court emphasises the crucial role of proceedings in cassation, which form a special stage of the criminal proceedings whose consequences may prove decisive for the accused. “Article 6 § 1 of the Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6” (see the *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, p. 14, § 25).

42. In its *Poitrimol* judgment the Court held that “the inadmissibility of the appeal on points of law, on grounds connected with the applicant’s having absconded, ... amounted to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society” (judgment cited above, p. 15, § 38).

43. That finding is even more valid in the present case. Whereas Mr Poitrimol had left French territory and was on the run abroad with his two children, none of the applicants attempted to evade enforcement of the arrest warrants. They did not leave their work or the address given as their place of residence in the case file. They attended the hearings in the Court of Appeal. They were not in court for the delivery of the judgment, but no statutory provision obliged them to attend, since in French law such attendance is a right not an obligation.

The police could have apprehended them at any time, and indeed did apprehend Mr Cheniti Omar, who was arrested at his place of work on 27 May 1993 (see paragraph 15 above).

44. Having regard to all the circumstances of the case, the Court considers that the applicants suffered an excessive restriction of their right of access to a court, and therefore of their right to a fair trial.

There has accordingly been a breach of Article 6 § 1.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

45. Under Article 50 of the Convention,

“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. Damage

46. The applicants claimed restitution of the sums seized by the customs, a total of 2,726,031.23 French francs (FRF), and FRF 15,000 per month of detention per person, that is FRF 450,000 for Mr Cheniti Omar, FRF 532,500 for Mr Kamal Omar and FRF 655,000 for Mr Hassane Omar, for pecuniary damage. Mr Hassane Omar further claimed FRF 50,000 in compensation for non-pecuniary damage arising from the fact that his wife had commenced divorce proceedings as a result of his imprisonment.

47. The Government submitted that only a finding upholding the complaint raised before the Court, which in the present case concerned the right of access to the Court of Cassation, could give rise, if such were the Court's decision, to the award of just satisfaction.

48. The Delegate of the Commission did not express an opinion on the question.

49. The Court considers that there is no causal connection between the violation found and the alleged pecuniary damage, and that it is not required to speculate as to what the outcome of the proceedings in issue would have been if the breach of the Convention had not taken place. With regard to the non-pecuniary damage alleged by Mr Hassane Omar, the circumstance he invoked has nothing to do with the inadmissibility of his appeal on points of law.

B. Costs and expenses

50. The applicants also claimed FRF 100,000 for costs and expenses. The Government left this question to the Court's discretion. The Delegate of the Commission did not express an opinion.

51. Making an assessment on an equitable basis and in the light of the criteria it applies on this issue, the Court awards the applicants FRF 60,000.

C. Default interest

52. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by eighteen votes to three that there has been a breach of Article 6 § 1 of the Convention;
2. *Holds* by nineteen votes to two
 - (a) that the respondent State is to pay the applicants, within three months, 60,000 (sixty thousand) French francs for costs and expenses;
 - (b) that simple interest at an annual rate of 3.36% shall be payable on this sum from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* unanimously the remainder of the applicants' claims.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 July 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Pettiti;
- (b) dissenting opinion of Mr Baka joined by Mr Jambrek.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted against finding a violation of Article 6 of the Convention and against the decisions in points 2 and 3 of the operative provisions, mainly for the reasons of principle set out in my dissenting opinion annexed to the Guérin judgment. In addition, I consider in any case that there was no violation in the Omar case on account of fundamental differences between the cases, even though a violation could have been found in Guérin, but on the basis of more restrictive reasoning than the Court adopted.

The fundamental differences lie in the first place in the applicants' situation.

For them there was no case of *force majeure*, as there was for Mr Guérin, who was not in court when the judgment was delivered and the warrant issued for his arrest, after being acquitted by the Criminal Court.

The Omars had been detained and convicted and warrants had been issued for their arrest. The first arrest warrants were set aside on 12 February 1993. New warrants were issued against them on 16 February 1993.

More significantly, in the course of the proceedings the Omars did not, as Mr Guérin did, apply for restitution of the forfeited right of appeal or for leave to supply proof of *force majeure*. A comparison between paragraph 46 of the Guérin judgment and paragraph 43 of the Omar judgment illustrates the differences. In my opinion, therefore, the Omar decision could not be based on the delay in enforcing the warrants for the applicants' arrest.

That would mean wiping the slate clean in respect of arrest warrants issued by courts of appeal, although that criminal-policy measure is not prohibited by Article 6 of the Convention.

However, the wording of paragraph 43 of the judgment could be understood to tie the decision in Omar to the particular circumstances of the case by assimilating the case to one of "good faith" on the part of a convicted person who was not likely to abscond, since the arrest warrants had remained unenforced for some time although the address of the convicted applicants was known and fixed. That fact could not have been noted by the Court of Cassation, for lack of any positive case-law on this point.

In any event, for the reasons set out in my dissenting opinion in the Guérin case, the Court of Cassation will in future be able to find a fair balance which respects both criminal policy and the requirements of Article 6 of the Convention.

DISSENTING OPINION OF JUDGE BAKA
JOINED BY JUDGE JAMBREK

I voted for finding a violation of Article 6 § 1 of the Convention in the Guérin case. However, I have difficulty in following the majority in this respect in the Omar case.

In my view there is a decisive difference between the two cases. In the Guérin case the Court rightly used the same principle which was applied in the Poitrimol case, namely that “the inadmissibility of the appeal on points of law, on grounds connected with the applicant’s having absconded, ... amounted to a disproportionate sanction, having regard to the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society” (Poitrimol v. France judgment of 23 November 1993, Series A no. 277-A, p. 15, § 38). This principle was applicable in the Guérin case because a day after delivery of the Court of Appeal’s judgment the applicant was admitted to a psychiatric institution. Consequently the applicant was objectively not at all in a position to comply with the court order. Declaring his appeal inadmissible on the ground that the applicant had not surrendered to custody – which under the circumstances was objectively impossible for him – genuinely restricted the applicant’s right of access to a court.

On the other hand, the circumstances were different in the Omar case. In this case it was entirely foreseeable that the applicants’ appeal on points of law against the Court of Appeal’s judgment would be declared inadmissible simply because they deliberately avoided complying with the warrants for their arrest. On this point I fully share the view of Judges Ryssdal, Sir John Freeland and Lopes Rocha in the Poitrimol judgment according to which “had [the applicant] surrendered to the warrant for his arrest, the grounds on which his appeal to the Court of Cassation was dismissed would not have existed. The remedy was, in other words, at all material times in his own hands and we do not see how it was “disproportionate” for the French system of justice to leave it there.”

Consequently, I find no violation of Article 6 § 1 in the Omar case.