



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

CASE OF GUÉRIN v. FRANCE

(51/1997/835/1041)

JUDGMENT

STRASBOURG

29 July 1998

In the case of Guérin 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:

Notes by the Registrar

1. The case is numbered 51/1997/835/1041. 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.

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 27 May and 10 July 1997 respectively, within the three-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. 25201/94) against the French Republic lodged with the Commission under Article 25 by a French national, Mr Yves Guérin, on 11 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 applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

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

4. That Chamber included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)), 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).

5. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant’s lawyer 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 applicant’s memorials on 15 and 19 December 1997 and the Government’s memorial on 15 December 1997.

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 R. 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,

1. Case no. 43/1997/827/1033.

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 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 12 February 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 Omar 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 applicant*

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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(d) *for Mr C. Omar, Mr K. Omar and Mr H. Omar*

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

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 Yves Guérin, a French national who was born in 1942, lives in Brest. At the material time, he was a deputy police sergeant.

A. The investigation proceedings

9. On 28 November 1990 an airport and border police squad based in Menton stopped a vehicle on the motorway between Ventimiglia and Menton. There were six people inside, of whom five did not have valid papers for entry into French territory.

10. The driver, Mr Sérigné Fall, admitted that he had assisted these five to cross the border illegally.

11. He implicated the applicant, who was at that time serving at the Ventimiglia frontier post, alleging that he had allowed him to enter France in exchange for a payment of five hundred French francs (FRF) and the promise of an imitation Rolex watch.

12. On 29 November 1990 the applicant was charged with accepting a bribe and remanded in custody.

B. The trial proceedings

1. *In the Nice Criminal Court*

13. In a judgment of 6 June 1991 the Nice Criminal Court acquitted Mr Guérin, rescinded the order for his detention and ordered his immediate release.

14. On 11 June 1991 the prosecution appealed.

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

15. In a judgment of 14 October 1991 the Aix-en-Provence Court of Appeal, giving judgment in the applicant's absence, set aside the judgment at first instance and sentenced the applicant to two years' imprisonment.

16. On 28 June 1992 the applicant requested a retrial.

17. The case was heard on 12 October 1992 at a public hearing attended by Mr Guérin.

18. In a judgment of 23 November 1992 the Aix-en-Provence Court of Appeal found the applicant guilty of accepting a bribe, sentenced him to two years' imprisonment, six months of which were suspended, and issued a warrant for his arrest. Although the applicant had been duly informed of the date of delivery of the judgment, he was not present.

19. On 24 November 1992 Mr Guérin was admitted to a psychiatric institution, where he stayed until 16 December 1992, when the police enforced the warrant for his arrest.

3. In the Court of Cassation

20. On 26 November 1992, acting through a lawyer with the right of audience in the Aix-en-Provence Court of Appeal, the applicant 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 24 below).

In his statement of the grounds of appeal the applicant's lawyer put forward two arguments, one procedural and one substantive, concerning the elements of the offence. He also explained that "as soon as he knew [the Court of Appeal's decision], the appellant tried to commit suicide".

In a supplementary pleading on the question of admissibility, he asked the Court of Cassation to declare the appeal admissible, either by departing from its case-law to the effect 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, or by making the rule more flexible and not applying it in the particular circumstances of the case.

On the first point, he referred to the report adopted by the Commission on 3 September 1992 in the case of *Poitrimol v. France* and pointed out that the Commission had referred to the Court the question whether the relevant case-law of the Criminal Division was contrary to Article 6 § 1 of the Convention.

On the second point, the lawyer stated that as the applicant lived in Brest he had not attended the hearing at which the judgment convicting him was delivered on account of the distance he would have had to travel and because he was very perturbed by the proceedings against him.

It would also have been materially impossible for him to comply with the warrant for his arrest in the three days between the reading of the judgment and the lodging of the notice of intention to appeal. Moreover, on learning that he had just been convicted, and immediately after instructing his lawyer to lodge an appeal on points of law, he had tried to commit suicide, and for that reason had been treated in a psychiatric institution from 24 November 1992 to 16 December 1992. Having stayed in that institution throughout the period allowed for an appeal on points of law, it had been absolutely

impossible for him to comply with the warrant voluntarily before lodging the appeal. Lastly, the arrest warrant had been executed on 16 December 1992 at the clinic where the applicant remained at the disposal of the courts. The lawyer concluded in the following terms:

“There is no doubt that in such conditions applying the case-law established in 1846 in order to declare the appeal inadmissible would mean unjustly depriving Mr Guérin of the right to determination of his appeal.”

21. In a judgment of 19 January 1994 the Court of Cassation declared the appeal inadmissible on the following grounds:

“It is apparent from the notice of intention to appeal that the applicant lodged his appeal through an attorney at a time when he was liable to arrest under a warrant issued at the hearing on 23 November 1992, which was not executed until 16 December 1992. It follows from the general principles of criminal procedure that a convicted person who has not complied with a court order 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. In the present case the appellant has not supplied evidence of any such circumstances.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. In general

22. 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.

23. 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...

...”

24. 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

25. 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.”

26. 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

27. 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

28. 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.

29. 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

30. Mr Guérin applied to the Commission on 11 July 1994. He alleged that the decision to rule his appeal on points of law inadmissible had infringed his right to a court, one of the elements of the right to a fair trial guaranteed by Article 6 § 1 of the Convention.

31. On 24 June 1996 the Commission declared the application (no. 25201/94) admissible. In its report of 11 April 1997 (Article 31), it expressed the opinion that there had been a violation of Article 6 § 1 (twenty-nine votes to one). The full text of the Commission’s opinion and of the two separate opinions contained in the report, one concurring and one dissenting, is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

32. In their memorial the Government asked the Court to “dismiss the application introduced by Mr Guérin as manifestly ill-founded in so far as he complains that there has been a violation of Article 6 § 1 of the Convention”.

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.

33. The applicant asked the Court to hold that there had been a breach of that Article.

AS TO THE LAW

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

34. Mr Guérin submitted that the decision to declare his appeal on points of law inadmissible on the ground that he had not complied with the warrant for his arrest had infringed his right of access to a court, one of the elements of the right to a fair trial. He 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...”

The applicant pointed out that in its *Poitrimol v. France* judgment of 23 November 1993 the Court had held that the inadmissibility of an appeal on points of law was 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” (Series A no. 277-A, p. 15, §§ 38–39). Such inadmissibility 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, the applicant had never tried to withhold information about where he was living, which appeared in the Court of Appeal’s judgment convicting him and was perfectly well known to the police. In addition, there was no law which obliged him to attend the Court of Appeal in person on the day appointed for the reading of the judgment, five weeks after the hearing. As soon as he had learned of his conviction he had instructed his lawyer to lodge an appeal on points of law, and had then attempted to commit suicide. His family had thereupon had him admitted to a psychiatric clinic, where the arrest warrant was enforced three weeks later. In the present case, therefore, the sanction was disproportionate to the public-policy requirements relied on.

35. The Government submitted that the Court of Cassation’s ruling that the applicant’s 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 applicant had deliberately failed to comply with the warrant for his arrest, since he had not attended the hearing for the delivery of the Court of Appeal's judgment, the date of which had been duly notified to him, and had had himself admitted to a psychiatric clinic without informing the Court of Appeal and without giving the address. 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 Mr Guérin, regard being had in addition to the level of the court which had ruled it inadmissible. Moreover, unlike Mr Poitrimol, the applicant had had the benefit of adversarial procedure at first instance and on appeal, so that the Court's conclusion in its judgment in that case (see paragraph 34 above) could not be transposed to the present case. Lastly, scrutiny of the criminal proceedings against the applicant as a whole showed that his right to a fair trial had been respected.

36. The Commission considered that the finding the Court had reached in its Poitrimol judgment should be even more applicable in the case of a defendant who was not seeking to evade justice, but was in hospital, and who had complied with the arrest warrant as soon as he came out of hospital, the Court of Cassation's attention having been duly drawn to his particular situation. On this point it expressed the view that for the Government to demand that this situation be explained in the notice of appeal itself would be too formalistic, regard being had to the repercussions and consequences of that requirement for respect of the right of access to a court, which was an essential element of a fair trial as guaranteed by the Convention.

37. 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).

38. In the present case the Court of Cassation declared the 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 court order 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. In the present case the appellant has not supplied evidence of any such circumstances” (see paragraph 21 above).

39. The Court must therefore determine whether, in the circumstances of the present case, the fact that the applicant’s appeal on points of law was automatically declared inadmissible because he had not complied with the warrant for his arrest infringed his right of access to a court.

40. 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 24 above), is derived from the very long-established and consistent case-law of the Criminal Division of the Court of Cassation (see paragraph 28 above).

41. 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 29 above).

42. 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 convicted person 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.

43. 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.

44. In that connection, the Court emphasises the crucial role of proceedings in cassation, which form a special stage of 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).

45. 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).

46. 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, the applicant did not attempt to evade enforcement of the arrest warrant. Living in Brest, he was acquitted at first instance and travelled to Aix-en-Provence to attend the hearings in the Court of Appeal. He was not in court for the delivery of the judgment, but no statutory provision obliged him to attend, since in French law such attendance is a right not an obligation.

The day after the judgment of the Court of Appeal he was admitted to a psychiatric institution. The police could have apprehended him at any time, and indeed did so on 16 December 1992 at the hospital he was in (see paragraph 19 above).

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

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

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

48. 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. Non-pecuniary damage

49. Mr Guérin claimed FRF 150,000 for non-pecuniary damage on account of the fact that he had been deprived of any opportunity to submit his arguments to the Court of Cassation and to have that court quash the conviction he sought to challenge.

50. The Government submitted that a finding that there had been a violation would constitute sufficient just satisfaction.

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

52. The Court considers that Mr Guérin undeniably sustained non-pecuniary damage on account of the breach of the Convention found in the present judgment. Taking the various factors into account and making its assessment on an equitable basis, as required by Article 50, it awards him FRF 20,000.

B. Costs and expenses

53. The applicant also claimed FRF 50,000 for the costs and expenses he had incurred before the Court of Cassation and the Convention institutions, in addition to any sums he might be awarded in legal aid.

54. The Government left this question to the Court's discretion, while pointing out that the applicant had received legal aid before the Convention institutions.

55. The Delegate of the Commission did not express an opinion.

56. Making an assessment on an equitable basis and in the light of the criteria it applies on this issue, the Court awards the applicant FRF 60,000, minus the FRF 11,278 paid by the Council of Europe in the form of legal aid before the Court.

C. Default interest

57. 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 twenty votes to one that there has been a breach of Article 6 § 1 of the Convention;
2. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months, 20,000 (twenty thousand) French francs for non-pecuniary damage and 48,722 (forty-eight thousand seven hundred and twenty-two) French francs for costs and expenses;
 - (b) that simple interest at an annual rate of 3.36% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* unanimously 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 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 dissenting opinion of Mr Pettiti is annexed to this judgment.

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

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority against finding violations of Article 6 of the Convention in the Guérin and Omar cases. In the Guérin case, I voted with the majority on points 2 to 4 of the operative provisions. I would also have voted for finding a violation of Article 6 if the reasoning adopted had been based on the shortcomings of case-law and practice concerning verification of good faith, the possibility of securing a ruling, even retrospectively, that there had been a case of *force majeure*, and the possibility of obtaining restitution of a forfeited right of appeal.

The question of the conditions for access to the Court of Cassation must be replaced in the general context of the Convention and the Court's case-law. The Court has already held that an appeal on points of law may be made subject to special conditions, and that the Convention permits systems of prior authorisation for appeals on points of fact or of law (see the Golder v. the United Kingdom judgment of 21 February 1975 and the Editions Périscope v. France judgment of 26 March 1992).

It is therefore only a question of assessing the proportionality of the conditions laid down by national legislation, where under that legislation appeals on points of law may be lodged without prior authorisation.

The, to my mind, ambiguous wording of the judgment could give the impression that the Court of Cassation does not have to take into account arrest warrants issued by courts of appeal, although it may be regrettable that the relevant decisions are not enforced by the police or gendarmerie.

Moreover, there is a certain contradiction between paragraphs 43 and 46 as regards Mr Guérin's particular situation.

In any case, the most prudent interpretation of the judgment from paragraph 43 onwards would be to consider that the Court paid special attention to the evidence of *force majeure* and good faith in the Guérin case, and that it did not give an express ruling on the question whether arrest warrants may be a bar to lodging or examining appeals on points of law.

The Poitrimol judgment was mainly based on the fact that there had been no adversarial defence before the Court of Appeal, so that the difficulty of access to the Court of Cassation made it impossible to secure a ruling on the lack of an adversarial procedure and thus to obtain redress for it by having the case remitted to a different Court of Appeal. In the Guérin case the Court has not adopted the reasoning it followed in the Poitrimol judgment.

The Convention obliges States not to overstep the reasonable limits of pre-trial detention (see the Letellier v. France and Kemmache v. France judgments). As a result, persons accused of serious offences may be at liberty when they appear at their trial or before the Court of Appeal. An arrest warrant may become a necessity, and the Convention does not prohibit this.

If convicted persons are given the right to appeal on points of law in all cases, some of them could evade execution of a sentence accompanied by an arrest warrant for months. The effect of the Omar and Guérin judgments would be to oblige the State to do away with arrest warrants completely, or make them ineffective *de facto*, which is not what Mr Guérin sought in his application and his memorials (see paragraph 20 of the judgment). But in paragraph 46 the majority were mainly influenced by the fact that Mr Guérin was ill, and had been prevented by *force majeure* from complying with the arrest warrant fortuitously issued against him, and accordingly considered that he should have been deemed to be a convicted person not subject to an arrest warrant.

The admissibility of an appeal on points of law cannot be made to depend on how quickly the police enforce a warrant. There may be all kinds of reasons for their speed, or lack of it.

The reasoning in paragraph 43 might make the procedure subject to police action to enforce the arrest warrant. This would be tantamount to saying that, if they act quickly, detention is justified, but if they do not act quickly, and enforce the warrant too late, this warrant would no longer stand in the way of consideration of the appeal and could therefore not be maintained! The result would be inequality of treatment without any legal justification, and this would remove any obligation to surrender to custody even where the arrest warrant is justified by the risk that the defendant might abscond or by a threat to public order.

The applicant did not go so far in his memorial to the Court of Cassation. In that memorial, Mr Lyon-Caen submitted:

“Having regard to the extremely short period of time allowed for an appeal on points of law, it can be seen that the legitimate concern to ensure execution of the court’s decision is not in itself compromised by the right to lodge an appeal on points of law before the decision has been executed. It no doubt seems difficult to go so far as to extend application of Article 583 of the Code of Criminal Procedure, which allows an appellant to wait until the day before the hearing in the Court of Cassation before surrendering to custody, to cases where an arrest warrant has been issued at the hearing, because the time which would then elapse between delivery of the decision and its execution would be likely to be too long. But it would be perfectly conceivable, despite the fact that there is no provision which governs this situation, for the Court of Cassation to make the admissibility of an appeal, or its consideration of the merits of the appeal, subject to enforcement of the warrant within a reasonable time to be assessed in the light of the circumstances of the case. It will be seen that the circumstances of the present case fully justify changing the emphasis of the case-law in such a way.

That means that the only real justification of the impugned case-law is the fact that the defendant should normally be present at the hearing when judgment is pronounced, so that it should then be possible to execute the arrest warrant on the spot. But, apart from the fact that the issue of an arrest warrant is usually justified precisely because the defendant is not in court when the judgment is read out, punishing such absence by ruling the appeal on points of law inadmissible seems rather excessive in

relation to the fundamental right of access to a court. The defendant is not required by any statutory provision – except in the case of the adjournment of an appeal on points of law (Article 469-3) – to be present when the decision is read out, although his presence is desirable for many reasons that it is unnecessary to rehearse here. It may be justified in certain cases to issue an arrest warrant when the court finds that the person concerned obviously has different views about the desirability of his presence. But to rule an appeal on points of law inadmissible where the warrant has not been complied with within the five days following delivery of the judgment is excessive in relation to the fundamental right to lodge such an appeal.”

At the hearing before the European Court, Mr Lyon-Caen made the following submission:

“[The presumption of fault] also results from case-law to the effect that voluntarily surrendering to custody just over a month after expiry of the time-limit for lodging an appeal cannot make the appeal admissible retrospectively.

But, even if you were to take the view that, as some have suggested, you were too categorical in your Poitrimol judgment, you should then only accept that, with a view to striking the right balance between the right of access to a Court of Cassation and the need to comply with judicial decisions, regulations may be adopted limiting such access only where it has not been possible for the police to enforce the arrest warrant because the person concerned is actually seeking to evade justice. You should, therefore, in any case, condemn as disproportionate to the aim of preventing disorder, the sanction of inadmissibility on account of a presumed intention to abscond established by the case-law of the Court of Cassation, based exclusively on an arbitrary analysis of the appellant’s attitude during the five days allowed for the lodging of an appeal after delivery of the judgment.”

This shows that the applicant alleged a violation on account of disproportionality but only in so far as, being able to prove that he had been ill or prevented from complying by *force majeure*, he was not permitted to do so when his appeal came before the Court of Cassation for consideration or to secure reinstatement in the forfeited right. That is the reasoning which, in my opinion, the Court should have adopted.

The aspect of the current practice which is most open to criticism is the fact that the procedural mechanism does not allow an appellant to prove that he is in good faith, that he has a fixed abode or that he was prevented from complying with the arrest warrant by *force majeure*, and therefore does not allow the Court of Cassation to rule at the outset on the proportionality of the measure and to exempt the appellant from it, if need be, where the Court of Appeal has not been asked to rule on an application for exemption.

The argument in paragraph 43 of the judgment concerning the proportionality of the burden of proof suggests that the Court could have restricted itself to requiring the immediate examination, on a case-by-case basis, of the question whether the arrest warrant is necessary or not, permitting acceptance of the appeal at that examination with the possibility of reinstatement in the forfeited right, even retrospectively, and the possibility of proving retrospectively that one is in good faith, has a fixed abode and is not likely to abscond.

In that way the Court of Cassation would examine the question of proportionality before requiring the defendant to surrender to custody, which could be one alternative.

In the Guérin case the appeal was registered, i.e. accepted, to begin with, and the obligation to surrender to custody arose several months later, with no possibility for Guérin of securing reinstatement in the forfeited right on account of his real situation.

In the course of the domestic proceedings the right to apply to the Court of Appeal for exemption from the obligation to surrender to custody is always open.

But where the grounds for exemption can only be raised later, the current practice does not allow for reinstatement in the forfeited right during examination of the appeal.

In my opinion it would have been sufficient for the Court's judgment to note this failing while remaining within the parameters of the case put to the Court of Cassation. A general review of criminal policy and arrest warrants must certainly be undertaken, for example by the Council of Europe's Committee of Experts on Human Rights, in order to improve all the European systems.

The judgments of the Court of Cassation open up the way to changes in case-law:

(1) Judgment of 7 November 1989

“Although a convicted person who has not complied with a court order is not entitled to lodge an appeal on points of law through a representative, there is no legal provision or principle of law which would bar him from giving notice of intention to appeal himself.

...

... no legal provision or principle of law bars him from giving notice of intention to appeal himself; the appeal lodged by Hugues Dureisseix in person is therefore admissible.”

(2) Judgment of 13 May 1985

“A remedy exercised within the time-limit and in accordance with the procedure prescribed by law may not be declared inadmissible unless the defendant, by not complying with a warrant for his arrest, seeks to avoid execution of the court's decision.

...

... Therefore, when it criticised him for not complying with the warrant before lodging his application for a retrial, in which he had given his exact address, which was in any event already known, a circumstance which showed that Weingaertner had not absconded, the Court of Appeal, which, moreover, noted that the warrant had been executed a few days later, did not specify in what respect Weingaertner had evaded

execution of the court's order, and had thus wrongfully sought a retrial in breach of the rights of the prosecution." [judgment accordingly quashed]

(3) Judgment of 21 May 1981

"It follows from the general principles of the Code of Criminal Procedure that a convicted person who has not complied with a court order against him is not entitled to act through a representative in order to lodge an appeal on points of law. It cannot be otherwise unless he supplies evidence of circumstances making it absolutely impossible for him to surrender to custody at the appropriate time.

...

In the present case the appellants have not supplied evidence of any such circumstances. Their appeals must therefore be declared inadmissible." [*a contrario*, possibility of admissibility]

It is therefore apparent that there are a number of possible ways in which an appeal on points of law can be declared admissible and exemption from the obligation to surrender to custody granted.

As a matter of comparative law, I would refer to Belgian case-law, which in some respects is similar to the case-law of the French Court of Cassation.

In a judgment of 9 January 1990 the Court of Cassation held:

"An appeal on points of law lodged by a defendant against the judgment convicting him, where that judgment orders his immediate arrest, is inadmissible as regards its criminal-law provisions if it does not appear that the defendant was in fact in custody at the time when he lodged the appeal; that condition is not laid down with regard to the admissibility of an appeal against the decision on the civil action."

In a judgment of 6 December 1992 the Court of Cassation held:

"The rule that an appeal on points of law lodged by a defendant against a judgment sentencing him to imprisonment and ordering his immediate arrest is only admissible if the appellant is in fact in custody does not breach Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or Article 14 of the International Covenant on Civil and Political Rights..."

The reasoning of the Guérin judgment seems to depart, in my opinion, from the usual line of the case-law established by the Golder v. the United Kingdom judgment (1975) and the Levages Prestations Services v. France judgment (1996, see paragraph 46 of the judgment). Where a State establishes a third level of jurisdiction, it can limit the conditions for access to that third level provided that those conditions are not contrary to the European Convention. The right of access of a convicted person in respect of whom a Court of Appeal has issued an arrest warrant cannot be assimilated in every respect to the right of access to a court which must be open to all.

The solutions adopted in other systems, such as leave for appeal or prolongation of pre-trial detention, may be more disadvantageous, in terms of discouraging appeals on points of law.

The future case-law of the Court of Cassation will be able to draw from all the elements of the reasoning set out in the Guérin judgment the arguments most calculated to satisfy both the requirements of criminal policy in the general interest and those of Article 6 of the Convention in the light of the successive judgments given by the European Court.