



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

CASE OF CIVET v. FRANCE

(Application no. 29340/95)

JUDGMENT

STRASBOURG

28 September 1999

In the case of Civet v. France,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), as amended by Protocol No. 11¹, and the relevant provisions of the Rules of Court², as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Sir Nicolas BRATZA,
Mr L. FERRARI BRAVO,
Mr L. CAFLISCH,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANȚÎRU,
Mr A.B. BAKA,
Mr E. LEVITS,
Mr K. TRAJA,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 21 April and 8 September 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention³, by the French Government (“the Government”) on 19 June 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 29340/95) against the French Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 by a French national, Mr Daniel Civet, on 17 March 1995.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

The Government's application referred to former Article 48. The object 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 5 § 3 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A¹, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, 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 written procedure. Pursuant to the order made in consequence, the Registrar received the Government's memorial on 5 January 1999. The applicant did not produce a memorial.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr J.-P. Costa, the judge elected in respect of France (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Sir Nicolas Bratza, President of Section (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr M. Fischbach, Mr M. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panțiru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

Subsequently Mr A.B. Baka, substitute judge, replaced Mrs Vajić, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

5. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr J.-C. Geus, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 21 April 1999.

1. *Note by the Registry.* Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

There appeared before the Court:

(a) *for the Government*

Mr B. NEDELEC, *magistrat*, on secondment to the
Human Rights Section,
Legal Affairs Department,
Ministry of Foreign Affairs, *Agent*,
Mr A. BUCHET, Head of the Human Rights Office,
European and International Affairs Department,
Ministry of Justice, *Counsel*;

(b) *for the applicant*

Mr L. VIVIER, of the Agen Bar, *Counsel*;

(c) *for the Commission*

Mr J.-C. GEUS, *Delegate*.

The Court heard addresses by Mr Geus, Mr Vivier and Mr Nedelec.

THE FACTS

7. Mr Civet, a French national, was born in 1947 and is currently in custody at Aiton Prison.

I. THE CIRCUMSTANCES OF THE CASE

A. The investigation

8. On 6 October 1993 one of the applicant's daughters, Mrs Isabelle Di Malta (née Civet), who was born in 1970, went to the police station with her mother, Mrs Liliane Civet, to complain that her father had raped her on several occasions. She stated that Mr Civet had sexually abused her a number of times at the family home, while her mother was out, between 1984 and 1987.

9. On 7 October 1993 another daughter of the applicant, Miss Aline Civet, born in 1972, also reported her father to the police for raping her a number of times at the family home, while her mother was out, when she was 16 years old.

10. On the same day Mr Civet was placed under judicial investigation on charges of rape of a minor by a legitimate ascendant (*ascendant légitime*).

The applicant was immediately charged and remanded in custody by an investigating judge of the Saint-Etienne *tribunal de grande instance*.

11. The applicant went on hunger strike for the first time, for twelve days until 6 April 1994.

12. On 13 July 1994 the investigating judge informed the parties that the investigation appeared to be complete and that the case file would be sent to the public prosecutor for his views on whether a prosecution should be brought. However, the investigation continued after that date as the judge had granted an application by Mr Civet for supplementary investigative measures.

13. On 8 February 1995 the investigating judge informed the parties again that the investigation appeared to be complete, but granted a further application by the applicant for supplementary investigative measures.

14. On 10 May 1995 the investigating judge informed the parties for the third time that the investigation appeared to be complete. The case file was sent to the public prosecutor on 31 May 1995 for his views on whether a prosecution should be brought.

15. On 2 October 1995 the investigating judge made an order for the documents to be forwarded to the public prosecutor at the Lyons Court of Appeal, in order to conclude the investigation.

16. In a judgment of 24 November 1995 the Indictment Division of the Lyons Court of Appeal committed the applicant for trial at the Assize Court on several counts of rape of a minor by a legitimate ascendant. An appeal on points of law by the applicant was dismissed on 21 March 1996.

B. The applicant's applications for release

17. On 3 June 1994 the investigating judge dismissed an application for release submitted on 31 May 1994. In a judgment of 24 June 1994 the Indictment Division of the Lyons Court of Appeal upheld the order dismissing his application.

18. The applicant appealed to the Court of Cassation on points of law, but his appeal was dismissed on 4 October 1994 on the ground that he had failed to lodge his grounds of appeal within the statutory time.

19. On 5 August 1994 the investigating judge dismissed a further application for release, submitted on 2 August 1994, on the following grounds:

“[The applicant's] two daughters have made grave allegations against him of sex offences classified as ‘serious crimes’ (*de nature criminelle*). Offences of this kind, committed against girls under the age of 15 by a legitimate ascendant, seriously prejudice public order. There is a risk that the victims and their mother will be intimidated. The applicant has numerous previous convictions.”

20. The Indictment Division of the Lyons Court of Appeal upheld that order in a judgment of 23 August 1994.

21. On 9 September 1994 the investigating judge refused a further application for release, submitted on 6 September 1994, stating:

“The charges are serious. These offences classified as ‘serious crimes’ are, by definition, seriously prejudicial to public order in that they inflict lasting damage on the physical, mental and psychological well-being of children. The applicant is known for his intemperance and violence and has numerous previous convictions.”

22. The applicant appealed. In a judgment of 4 October 1994 the Indictment Division of the Lyons Court of Appeal upheld the order of 9 September 1994.

23. In an order of 4 October 1994 the investigating judge extended the pre-trial detention for one year on the same grounds as those set out in the order of 9 September 1994.

24. On 17 August 1995 the investigating judge dismissed an application for release submitted by the applicant on 14 August 1995. The applicant appealed.

25. In a judgment of 1 September 1995 the Indictment Division of the Lyons Court of Appeal upheld the order on the grounds that, despite the applicant's denials,

“there is serious and strong evidence that he committed the rapes with which he has been charged. Given his attitude to the charges, there is a risk that, if released, he would be tempted to pressurise the victims, and indeed his wife, into retracting their statements. These violent crimes, even if not widely publicised, have caused serious prejudice to public order as far as the protection of children’s physical and psychological well-being is concerned. This prejudice, temporarily contained by remanding the applicant in custody, would recur if he were to be released, particularly as the investigation is almost complete. [The applicant], who is unemployed and has several previous convictions (for theft, handling stolen goods, misappropriation, driving while under the influence of alcohol and a hit-and-run offence), is described as a violent individual who presents a danger both to himself and others, particularly when under the influence of alcohol, and thus cannot provide sufficient guarantees that he will appear for trial. It therefore appears necessary to keep the accused in detention on remand in order to prevent him from reoffending, to protect public order from the consequences of these offences and to ensure that he remains at the disposal of the judicial authorities ...”

26. In an order of 29 September 1995 the investigating judge dismissed a further application for release, submitted on 25 September 1995. Mr Civet appealed.

27. In a judgment of 20 October 1995 the Indictment Division of the Lyons Court of Appeal upheld the order for the same reasons as those contained in its judgment of 1 September 1995.

C. The applicant's trial

28. On 27 June 1996 the Assize Court for the *département* of the Loire convicted the applicant of the offences charged and sentenced him to ten years' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

29. The relevant provisions of the Code of Criminal Procedure on pre-trial detention applicable at the material time are the following:

Article 144

"In cases involving serious crimes (*matière criminelle*) and other major offences (*matière correctionnelle*), where the possible sentence is equal to or exceeds one year's imprisonment in the case of an offence discovered during or immediately after its commission (*délit flagrant*), or two years' imprisonment in other cases, and if the constraints of judicial supervision are inadequate in regard to the functions set out in Article 137, detention pending trial may be ordered or continued

(1) where detention of the accused pending trial is the sole means of preserving evidence or material clues or of preventing either pressure being brought to bear on witnesses or victims, or collusion between accused and accomplices;

(2) where such detention is necessary to protect the accused, to put an end to the offence or to prevent its repetition, to ensure that the accused remains at the disposal of the judicial authorities or to preserve public order from the disturbance caused by the offence.

Detention pending trial may also be ordered, in the circumstances set out in Article 141-2, where the accused deliberately fails to comply with the obligations imposed by judicial supervision."

Article 145

"Whatever the classification of the offence, an order for detention pending trial must set out the legal and factual reasons for the decision with reference to the provisions of Article 144 alone; the accused shall be informed orally of the order and be given a full copy of it, receipt being acknowledged by signature in the case file ..."

Article 145-1

"In cases involving lesser criminal offences (*matière correctionnelle*) pre-trial detention may not exceed four months. However, at the end of this period, the investigating judge may extend the detention by an order giving reasons as indicated

in the first paragraph of Article 145. No extension may be ordered for a period exceeding four months.

Where the accused has not previously been sentenced for a serious crime (*crime*) or other major offence (*délit*) to a non-suspended term of imprisonment exceeding one year and where the sentence that may be passed on him does not exceed five years, the extension of detention provided for in the preceding paragraph may be ordered only once and for a period not exceeding two months.

In other cases the accused may not be kept in detention for longer than one year. However, in exceptional circumstances the investigating judge may decide at the end of that period to extend the detention, for a period not exceeding four months, by a reasoned order made in accordance with the provisions of the first and fourth paragraphs of Article 145, his lawyer having been summoned in accordance with the provisions of the second paragraph of Article 114. That order is renewable by means of the same procedure. Nevertheless the accused may not be kept in detention for more than two years where the sentence to which he is liable does not exceed five years.

The orders referred to in the first and second paragraphs of this Article shall be made after the public prosecutor and, if applicable, the accused or his lawyer have submitted their observations.”

Article 145-2

“In cases involving serious crimes (*matière criminelle*) an accused cannot be held in detention for more than one year. However, the investigating judge may, at the end of that period, decide to prolong detention for a period not exceeding one year in a decision made in accordance with the provisions of the first and fourth paragraphs of Article 145, his lawyer having been summoned in accordance with the provisions of the second paragraph of Article 114. That decision is renewable by means of the same procedure.

The provisions of this Article shall apply until the disposal order is made.”

Article 147

“Whatever the classification of the offence, the accused may be released, subject or not to judicial supervision, by means of an order made by the investigating judge of his own motion after the public prosecutor has submitted his observations, provided that the accused undertakes to attend for procedural purposes whenever required to do so during the investigation and to keep the investigating judge informed of all his movements.

The public prosecutor may also apply at any time for the accused to be released. The investigating judge shall rule within five days of such an application.”

Article 148

“Whatever the classification of the offence, the accused or his lawyer may at any time lodge with the investigating judge an application for release, subject to his giving the undertakings referred to in the preceding Article.

The investigating judge shall communicate the file immediately to the public prosecutor for his submissions.

The investigating judge shall take a decision, in an order setting out the legal and factual reasons for the decision with reference to the provisions of Article 144, not later than five days following communication of the file to the public prosecutor. However, where a decision has still to be taken on a previous application for release or on an appeal against an earlier order refusing release, the five-day period shall not start to run until the date of the decision of the investigating judge or indictment division.

Where release is granted, it may be made subject to judicial supervision.

If the investigating judge fails to give a decision within the period laid down in the third paragraph, the person concerned may apply directly to the indictment division, which after receiving the Principal Public Prosecutor’s reasoned submissions in writing, shall give a decision within twenty days of the application to it, failing which the accused shall automatically be released unless an order has been made for particulars of his application to be verified. The public prosecutor is likewise entitled to apply to the indictment division in the same eventuality.”

Article 148-1

“An application for release may also be made by any accused for any reason and at any stage in the proceedings ...”

Article 148-2

“Any judicial authority which has to rule, pursuant to Articles 141-1 and 148-1, on an application for a judicial supervision order to be discharged in whole or in part or for release shall give its decision after hearing the prosecution and the accused or his lawyer; an accused who is not in detention and his lawyer shall be given notice by registered letter at least forty-eight hours before the date of the hearing.

The judicial authority to which the application has been made, depending on whether it is an authority of first or second instance, shall give its decision within ten or twenty days of receipt of the application. However, where on the date of receipt of the application a decision has still to be taken on a previous application for release or on an appeal against an earlier decision to refuse release, the ten- or twenty-day period shall not start to run until the date of the decision of the relevant judicial authority; if no decision has been given by the end of that period, the judicial supervision or detention pending trial shall be terminated and the accused, unless detained for another reason, shall automatically be released.

The judicial authority's decision shall be enforceable immediately notwithstanding any appeal; where the accused remains in detention, the indictment division shall give its decision within twenty days of the appeal, failing which the accused, unless detained for another reason, shall automatically be released."

Article 148-4

"When four months have elapsed since his last appearance before the investigating judge or a judge delegated by the investigating judge, an accused or his lawyer may, provided no disposal order has been made, apply for release directly to the indictment division, which shall decide as laid down in the last paragraph of Article 148."

Article 567

"In the event of a breach of the law, judgments of indictment divisions and judgments of the criminal courts against which no ordinary appeal lies can be set aside on an appeal on points of law to the Court of Cassation lodged by the public prosecutor or by the party adversely affected, according to the distinctions made hereafter.

Such an appeal shall be lodged with the Criminal Division of the Court of Cassation."

Article 567-2

"The Criminal Division, when hearing an appeal on a point of law against a judgment of the indictment division concerning pre-trial detention, shall rule within three months of the file's being received at the Court of Cassation, failing which the accused shall automatically be released.

The appellant or his lawyer shall, on pain of having his application dismissed, file his pleading setting out the grounds of appeal within one month of the file's being received, save where exceptionally the President of the Criminal Division has decided to grant an extension of eight days. After the expiry of this time-limit, no new grounds may be raised by him and no further pleadings may be filed.

As soon as the pleading has been filed, the President of the Criminal Division shall set the case down for hearing."

Article 591

"Judgments of indictment divisions and judgments of trial and appeal courts against which no ordinary appeal lies and which comply with the formal requirements laid down by statute can be quashed only on grounds of a breach of the law."

Article 592

"Such judgments shall be declared null and void if they are not delivered by the prescribed number of judges or have been delivered by judges who have not attended all the hearings in the case. Where several hearings have been held in one and the

same case, the judges who have taken part in the decision shall be presumed to have attended all of them.

Such judgments shall also be declared null and void if they have been delivered without submissions having been heard from the public prosecutor.

Subject to the exceptions laid down by law, judgments which have not been delivered, or in respect of which the proceedings have not been conducted in open court, shall also be declared null and void.”

Article 593

“Judgments of indictment divisions and judgments against which no ordinary appeal lies shall be declared null and void if they contain no reasons or if the reasons are insufficient and do not enable the Court of Cassation to exercise its power of review and to ascertain that the law has been complied with in the operative provisions.

The same rule shall apply in the event of a failure or refusal to rule either on one or more applications by the parties or on one or more applications by the public prosecutor.”

B. The Judicial Code

30. The relevant provisions of the Judicial Code are the following:

Article L. 131-5

“The Court of Cassation shall be able to quash a judgment without remitting it to the Court of Appeal if quashing it does not entail a rehearing of the merits.

It may also, when quashing a judgment without remitting it to the Court of Appeal, dispose of the case where the facts, as found and assessed by the tribunals of fact in the exercise of their exclusive jurisdiction, allow it to apply the appropriate rule of law.

...”

C. Case-law

31. The Court of Cassation has acknowledged that the assessment of the facts of a case by indictment divisions is a matter falling within their exclusive jurisdiction, but verifies that they have addressed “essential” (*péremptoires*) grounds, including those based on Article 5 § 3 of the Convention (Court of Cassation, Criminal Division (“Cass. Crim.”), 20 October 1987, *Bull. Crim.* no. 356; 12 April 1995, appeal no. 95-80,328;

see also Cass. Crim., 2 September 1997, appeal no. 97-83,234). The Criminal Division of the Court of Cassation reviews the reasoning of indictment divisions in order to satisfy itself that it complies with statutory requirements, and ascertains that the reasons given by the tribunals of fact for their decisions regarding the length of pre-trial detention are adequate and consistent (see Cass. Crim., 20 June and 16 July 1996, appeals nos. 96-81,557 and 96-82,086 respectively; see also Cass. Crim., 2 September 1998, appeal no. 98-83,322). Where an indictment division omits to address in its judgment a pleading by an appellant to the effect that there has been a violation of Article 5 § 3 of the Convention, the Court of Cassation will find that the judgment has no legal basis and quash it (see Cass. Crim., 12 December 1995, appeal no. 95-84,949; and 14 May 1996, appeal no. 96-81,045; see also Cass. Crim., 18 May 1998, appeal no. 98-81,085). In exercising its power of review, the Court of Cassation has delivered judgments in the following terms, in particular:

“The courts must address ‘essential’ grounds raised in pleadings submitted to them; all judgments must contain reasons justifying the decision reached, and giving inadequate reasons is tantamount to giving no reasons.

It appears from the judgment appealed against and the documents exhibited in the proceedings that [C.W.], a Belgian national extradited from Spain, was charged by the investigating judge on 18 May 1991 with several counts of fraud and with infringing the Act of 24 January 1984 on money-lending and on the same day was ordered to be detained pending trial. An order was made on 16 September 1991 extending pre-trial detention for four months from 18 September 1991. On 19 November 1991 the investigating judge ordered him to be released subject to judicial supervision and on payment, before release, of security in the amount of 4,500,000 francs. 100,000 francs of that amount was intended to ensure that he appeared for subsequent proceedings and up to a ceiling of 4,400,000 francs to guarantee payment of ‘compensation for the damage caused by the offence, the expenses incurred by the State and fines’; that order was not complied with, since the defendant paid only 2,563,000 francs of the required security; on 15 May 1992 the investigating judge dismissed an application by [W.] for the judicial supervision order to be discharged in part and extended the pre-trial detention for four months from 18 May 1992, ‘subject to activation of the order for his release that was made on condition that a security in the amount of 4,500,000 francs was paid in advance’; in an order of 16 September 1992, against which the defendant appealed, the pre-trial detention was extended for a further period of four months with effect from 18 September 1992.

In upholding that order [extending the pre-trial detention, following non-payment of the sum set by way of security], the Indictment Division, after referring to the offences with which [C.W.] had been charged and to the fact that the order of 19 November 1991 releasing him subject to judicial supervision had become final, stated: ‘The discussion initiated by [W.]’s lawyer of the criteria for pre-trial detention has no place here; it is of no relevance now that the defendant’s release has been ordered subject to judicial supervision and that his detention is being extended as a result of his own acts and therefore does not violate the rules laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms.’ The Indictment Division added: ‘As a

subsidiary consideration, his failure to comply with the conditions accepted by him suggests that were he to be released today, he would not appear for trial.’

However, in reaching that decision and not addressing the pleading submitted to it, in which reliance was placed on a violation of Article 5 § 3 of the above-mentioned Convention, according to which everyone arrested or detained is entitled to trial within a reasonable time or to release pending trial, and in failing to set out the considerations of law and of fact which, under Article 144 of the Code of Criminal Procedure, justified extending pre-trial detention, the rules on which (as laid down by Article 145-1 of that Code) do not provide for any exception, the Indictment Division infringed the aforementioned provisions and principle and deprived its decision of a legal basis.

The decision must therefore be quashed. For these reasons, the Court quashes and sets aside ...” (Cass. Crim., 20 January 1993, *Bull. crim.* no. 32)

“... [D.Z.] submitted before the Indictment Division that he had been continuously detained, since being charged, for four years and six months, during which the only measures taken by the investigating judge had been: at the end of 1994, to arrange a confrontation with the witnesses who had implicated him; between November 1994 and January 1996, to instruct experts to identify the victims who had died in 1992; and, during 1996, to take further witness statements. The length of his detention had thus been justified neither by the complexity of the case nor by his own conduct.

In upholding the order appealed against, the Indictment Division stated that despite [D.Z.]’s denials, there was strong evidence that he had committed the offences with which he was charged; that detaining him was the sole means of ensuring until the trial that no pressure was brought to bear on witnesses and that the accused, who had no regular employment and no fixed address, appeared for trial; and that the investigating judge’s refusal of the application for release therefore had to be upheld, notwithstanding the length of time already spent in detention, which had been justified by the difficulties encountered by the judge in carrying out his task and especially in identifying the deceased.

But by confining itself to referring, in order to justify the length of detention, to an investigative measure carried out by an expert and omitting to address the main arguments in the pleading submitted to it, the Indictment Division infringed the principles alluded to above.

The decision must therefore be quashed. For these reasons, the Court quashes and sets aside ...” (Cass. Crim., 22 July 1997)

“ ... Regard being had to Article 593 of the Code of Criminal Procedure, read together with Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

The courts are required to address the main arguments in the pleadings submitted to them.

In dismissing [J.E.]’s application for release, the Court of Appeal in its judgment went no further than stating that the charges of aggravated rape of which he stood accused had caused exceptional and continuing prejudice to public order and that keeping him in detention was the only means of preventing him from bringing

pressure to bear on the victim or evading justice by taking refuge outside French territory, since judicial supervision was inadequate for that purpose.

However, in reaching that decision without addressing the defendant's pleading in which reliance was placed on a violation of Article 5 § 3 of the European Convention on Human Rights, which provides that everyone arrested or detained is entitled to trial within a reasonable time or to release pending trial, the Indictment Division deprived its decision of a legal basis.

The judgment must therefore be quashed. For these reasons, and without its being necessary to examine the other grounds of appeal, the Court quashes and sets aside ...” (Cass. Crim., 18 May 1998, appeal no. 98-81,085)

32. The Criminal Division of the Court of Cassation also quashes judgments for non-compliance with statutory formalities laid down on pain of nullity (Cass. Crim., 25 April, 21 August and 15 November 1995, appeals nos. 95-80,682, 95-83,124 and 95-84,543 respectively) and errors of law in the interpretation and application of the Code of Criminal Procedure (Cass. Crim., 11 January, 15 February, 27 February and 10 May 1995, appeals nos. 94-85,155, 94-85,570, 94-85,957 and 95-80,975 respectively).

33. Lastly, having regard to the provisions inserted into the Code of Criminal Procedure by Law no. 96-1235 of 31 December 1996, which came into force on 31 March 1997, the Court of Cassation now quashes judgments of indictment divisions which do not make clear why judicial supervision would be inadequate in a particular case or do not give any special reasons why the investigation should be continued (Cass. Crim., 6 and 19 August 1997, appeals nos. 97-82,955 and 97-38,014 respectively) or any indications of when the investigation is likely to be completed (Cass. Crim., 19 August 1997, cited above).

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Civet applied to the Commission on 17 March 1995. He alleged a violation of Article 5 § 3 of the Convention.

35. The Commission declared the application (no. 29340/95) admissible on 7 April 1997. In its report of 16 April 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 5 § 3 (twelve votes to three). The full text of the Commission's opinion is reproduced as an annex to this judgment¹.

1. *Note by the Registry.* For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

36. In their memorial the Government asked the Court to state that an appeal on points of law to the Court of Cassation was a remedy which should have been used and, in the alternative, to state that the length of the pre-trial detention had not breached Article 5 § 3 of the Convention.

37. For his part, the applicant asked the Court to find that there had been a violation of Article 5 § 3 of the Convention and to grant him just satisfaction under Article 41.

THE LAW

THE GOVERNMENT'S PRELIMINARY OBJECTION

38. The Government's main submission, as it had been before the Commission, was that Mr Civet had not exhausted domestic remedies as he had failed to submit the ground of appeal based on Article 5 § 3 of the Convention for examination by the Court of Cassation. The Government contended that an appeal on points of law to the Court of Cassation was a remedy which should be used in relation to pre-trial detention. They stressed that the Court of Cassation reviews the reasoning of indictment divisions, satisfies itself that their reasoning complies with statutory requirements, and ascertains that the reasons given by the trial and appeal courts for their decisions regarding the length of pre-trial detention are adequate and consistent.

39. The applicant replied that an appeal on points of law was not an effective remedy in relation to the length of pre-trial detention as the Court of Cassation refused to examine grounds of appeal based on Article 5 § 3 of the Convention, characterising such grounds as "factual".

40. The Commission took the view that Mr Civet had satisfied the requirements of former Article 26 (now Article 35) of the Convention. It considered that the Court of Cassation examined only questions of law and that a ground of appeal based on the excessive length of the proceedings in relation to Article 5 § 3 of the Convention was therefore inadmissible in the Court of Cassation as being a ground of "pure fact" or of "mixed fact and law".

41. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, for example, the *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33, and the *Remli v. France* judgment of

23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 571, § 33). Thus the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. Nevertheless, the only remedies that must be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, in particular, the Vernillo v. France judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27, and the Dalia v. France judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38).

The Court also reiterates that an appeal to the Court of Cassation is one of the remedies that should in principle be exhausted in order to comply with Article 35 (see the Remli judgment cited above, p. 572, § 42).

In that connection, the Court has already had the opportunity to emphasise the crucial role of proceedings in cassation, which form a special stage of criminal proceedings whose consequences may prove decisive for the accused (see the Omar and Guérin v. France judgments of 29 July 1998, *Reports* 1998-V, p. 1841, § 41, and p. 1869, § 44, respectively).

42. In the instant case the Court notes that the applicant did not appeal against the judgments of the Indictment Division of the Lyons Court of Appeal, with two exceptions: firstly, he appealed against its judgment of 24 June 1994, an appeal that was declared inadmissible on the ground that he had failed to lodge his grounds of appeal within the statutory time (see paragraph 18 above); and, secondly, he appealed against the judgment whereby he was indicted and committed for trial at the Assize Court (see paragraph 16 above). The applicant therefore never raised the ground of appeal based on Article 5 § 3 of the Convention in an appeal to the Court of Cassation.

43. The Court further notes that the Court of Cassation is indeed bound by the Indictment Division's unappealable findings of fact (see paragraph 31 above). That position is justified by the nature of an appeal on points of law to the Court of Cassation, a remedy whose purpose is different from that of an ordinary appeal. As the possibilities of appealing to the Court of Cassation are limited by Article 591 of the Code of Criminal Procedure to breaches of the law (see paragraph 29 above), the Court of Cassation, unlike a court of appeal, does not have jurisdiction to reassess matters of pure fact.

However, in the Court's opinion, this does not mean that the "facts" and the "law" can be conceived of as two radically separate fields and that reasoning which effectively denies that the two are interwoven and are complementary is acceptable. Notwithstanding that its jurisdiction is limited

to examining grounds of “law”, the Court of Cassation nonetheless has the task of checking that the facts found by the tribunals of fact support the conclusions reached by them on the basis of those findings. Thus, over and above examining whether a judgment referred to it complies with the formal requirements, the Court of Cassation ascertains that, regard being had to the facts of the case, the Indictment Division has given adequate reasons for its decision to prolong pre-trial detention (see paragraphs 31 to 33 above). If it has not, its decision will be quashed. The Court therefore considers that the Court of Cassation is in a position to assess, on the basis of its examination of the proceedings, whether the judicial authorities have complied with the “reasonable time” requirement of Article 5 § 3 of the Convention (see paragraph 31 above).

44. In sum, Mr Civet, in failing to appeal to the Court of Cassation, did not provide the French courts with the opportunity which is in principle intended to be afforded to Contracting States by Article 35, namely the opportunity of preventing or putting right the violations alleged against them (see, among other authorities, the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, p. 27, § 72, and the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 19, § 36). The objection that domestic remedies have not been exhausted is therefore well-founded.

FOR THESE REASONS, THE COURT

Holds by twelve votes to five that, by reason of the failure to exhaust domestic remedies, it is unable to take cognisance of the merits of the case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 September 1999.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mrs Palm, Sir Nicolas Bratza, Mr Fischbach, Mr Zupančič and Mr Hedigan is annexed to this judgment.

L.W.
M.d.S.

JOINT DISSENTING OPINION OF JUDGES PALM,
Sir Nicolas BRATZA, FISCHBACH, ZUPANČIČ
AND HEDIGAN

(*Translation*)

The Court has held that the application is inadmissible by reason of Mr Civet's failure to exhaust domestic remedies in that he did not lodge an appeal on points of law during his pre-trial detention. We wish to indicate our disagreement with the reasoning adopted and the result reached by the majority of the judges.

The Court held that the Government's argument should prevail, in view of the scope of the Court of Cassation's review. For the avoidance of any misunderstanding, we consider it useful, as a preliminary, to state the points on which we are in agreement with the majority of the judges.

In the first place, it is not our intention to dispute that "an appeal to the Court of Cassation is one of the remedies that should in principle be exhausted in order to comply with Article [35]" (see the *Remli v. France* judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 572, § 42). The fact remains that the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation and that "it falls to the respondent State to establish that these various conditions are satisfied" (see, in particular, the *Vernillo v. France* judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27). Where the Government do not succeed in supporting their argument concerning the sufficiency and effectiveness of the remedy, the European Court is entitled to consider that the appeal on points of law does not meet the requirement of effectiveness (see the *Dalia v. France* judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). The Court has already had occasion to attach only limited significance to an appeal on points of law in another context. In the cases of *Letellier* and *Navarra v. France* it held that there had been no violation of Article 5 § 4 – despite overall lengths of time, including proceedings in appeals on points of law, which gave the Court "certain doubts" – on the ground that the review requirement of Article 5 § 4 was satisfied by the right to make fresh applications for release to the investigating judge at any time (see the judgments of 26 June 1991, Series A no. 207, p. 22, § 56, and 23 November 1993, Series A no. 273-B, pp. 28-29, § 29, respectively). There are thus exceptions to the principle that an appeal on points of law must be lodged, and some of them have already been pointed out by our Court.

In the second place, we do not wish to call in question or minimise the importance of the Court of Cassation's case-law. As the Code of Criminal Procedure makes it compulsory to give reasons for decisions to order or extend pre-trial detention, the Court of Cassation reviews whether that

statutory requirement has been satisfied. There is no doubt that in the context of that review it would be artificial to distinguish between “fact” and “law”, the more so as the Court of Cassation verifies that the reasoning, in accordance with the law, is based on the particular facts of the case and does not, for example, consist of stereotyped reasons (the Commission’s decision does not mention this detail, but does not put it in doubt). In its judgments the Court of Cassation also refers to the concept of “unappealable assessment by the tribunals of fact”. What is the import of this expression? It refers to the Court of Cassation’s role as a tribunal of law and not of fact. As it is not a final court of appeal on the facts, the Court of Cassation does not have the task of re-examining factual matters. It may nonetheless review the way in which the tribunals of fact have applied rules of law to their unappealable findings and assessments of “fact”. The cases cited by our Court in its judgment say precisely that.

We therefore return to the essential point: what, exactly, was the issue that the Court had to decide? The question was whether an appeal on points of law is capable of remedying the alleged prejudice where an applicant complains only of the length of his or her pre-trial detention (which is a “key” issue in relation to Article 5 § 3).

In its judgment the Court answers the question by linking that complaint to the reasoning of indictment-division judgments. The question of length is thus said never to arise *per se*, in isolation, but always in relation to the reasoning adopted by the indictment division under the control of the Court of Cassation. “Length” and “reasoning” are said to be inseparable; hence the effectiveness of an appeal on points of law.

Accordingly, we think it necessary to look at the problem in a different way, by means of hypotheses reflecting real situations.

1. An applicant disputes one or more findings of “fact” referred to by the tribunals of fact as justifying placing or keeping him or her in detention: Will the applicant be able to challenge them in an appeal on points of law? The answer is *no*. That is confirmed by the foregoing reference to the case-law; the Court of Cassation has no jurisdiction where what is at issue is the unappealable assessment of the circumstances of the case. This, then, is one instance in which it is unnecessary to bring an appeal on points of law.

2. An applicant considers that notwithstanding the reasons put forward (or likely to be put forward) by the indictment division, the length of his or her pre-trial detention is unjustified *per se*: Will that applicant be able to challenge it effectively in an appeal on points of law? The answer will depend on a number of variables:

(a) *yes, if* the applicant complains that the reasons cannot justify keeping him or her in detention (because they are stereotyped, or are not sufficiently supported by the facts of the case or are inconsistent with each other or do not address essential grounds);

(b) *no*, if the applicant disputes the assessments of fact underlying the reasons (which he or she may consider false, tendentious, etc.);

(c) *no*, if the applicant does no more than say that, regardless of the facts noted by the indictment division and the inferences it has drawn from them, he or she denies having committed offences and seeks to benefit from the presumption of innocence;

(d) *no*, if the length of the detention is itself in issue, that is to say if, irrespective of the merits of the reasons put forward by the tribunals of fact, the length of pre-trial detention is excessive *per se*.

In all the instances in which the answer is “no”, the applicant can only make fresh applications to the investigating judge and then, if need be, apply to the indictment division, in the hope of changing their minds; an appeal on points of law is therefore not an effective remedy.

We should like to lay particular emphasis on the assessment of whether the length of detention is reasonable or not, a recurring and crucial problem for our Court.

The French Government did not produce any judgment

(a) in which the Court of Cassation *of its own motion* condemned pre-trial detention on the ground that it had lasted too long notwithstanding the contrary opinion and detailed reasons of the indictment division; or

(b) *a fortiori*, in which it was established that the Court of Cassation, having noted of its own motion an excessive length of detention, could release the detainee on that sole ground (and not by reason of a breach of a statutory provision whose infringement automatically entails the release of the person concerned).

It will also be noted that in the cases in which the Convention institutions considered that there had been a breach of Article 5 § 3 of the Convention on account of excessive length of pre-trial detention an appeal on points of law had previously been lodged with the Court of Cassation, which had not criticised the length of detention or even attempted to do so (see, in particular, the following judgments: Letellier and Navarra, both cited above; Kemmache v. France (nos. 1 and 2), 27 November 1991, Series A no. 218; Muller v. France, 17 March 1997, *Reports* 1997-II).

More significantly still, our Court’s judgment is at odds with the case-law of the Criminal Division of the Court of Cassation itself, in particular its judgments of 18 February and 6 March 1986 (*Bull. crim.*, nos. 66 and 94 respectively) and 12 December 1988 (*Bull. crim.*, nos. 418 and 419), which were cited by the Commission. Those judgments characterise the ground based on Article 5 § 3 of the Convention either as a “ground of pure fact” or as “a ground of mixed fact and law”, so that in every instance it was declared inadmissible. In particular, in its judgment of 6 March 1986 the Court of Cassation dealt with the ground based on a violation of Article 5 § 3 in the following terms, which are quite unequivocal:

“Lastly, the *Indictment Division* addressed the issue of the complexity and length of the proceedings. While it only referred expressly to Article 6 of the European Convention for the Protection of Human Rights, it is to be inferred from its decision to refuse the application for release that it *considered that the length of the detention itself did not exceed a reasonable time. The Court of Cassation has no jurisdiction to review that assessment of fact.*” (emphasis added)

Other judgments have followed, confirming that the issue of whether the length of pre-trial detention is reasonable or not is an issue of fact which lies outside the Court of Cassation’s jurisdiction (in particular, judgments of 28 November 1991, periodical *Droit pénal* 1991, commentary 274; and 3 May 1993, *Bull. crim.*, no. 160). The European Court had an earlier opportunity to be persuaded of the reality of that case-law when considering the Muller case (cited above). In that case the Court of Cassation had held, more than four years after pre-trial detention had begun:

“In order to answer the submission that there had been a violation of Article 5 § 3 of the Convention on the ground that pre-trial detention had exceeded a reasonable time, the court below stated: ‘In the instant case, in view of its complexity and the number of offences with which the accused is charged, this “reasonable time” has not been exceeded’.

The Court of Cassation has no jurisdiction to review that assessment of fact.” (emphasis added) (judgment of 23 March 1993, quoted in the Muller judgment cited above, p. 384, § 28)

Lastly, confirmation that a ground based on excessive length itself (which can in reality be assessed separately from the question of the reasoning adopted) is inadmissible may be found in another case decided by the Criminal Division of the Court of Cassation in which periods of time were concerned. A number of new provisions were added to the Code of Criminal Procedure by Law no. 96-1235 of 31 December 1996; these included Article 144-1, which expressly refers to the concept of “reasonable time”, and Article 145-3, which provides that orders whereby investigating judges either direct that pre-trial detention should be extended or refuse an application for release must also contain, among other things, “the information in the particular case which justifies ... the forecast of how long it will take to complete the proceedings”. Here, then, as with the issue which concerns us now, there is a question of “time” which has to be assessed, giving rise to a decision for which the law requires that special reasons must be given. Does that make it a question of law that can be reviewed by the Court of Cassation? The answer is *no*; the assessment of that time is “a question of pure fact which the Court of Cassation has no jurisdiction to review” (Cass. Crim., 28 April 1998, appeal no. 98-80,754, *Recueil Dalloz-Sirey* 1998, Information in brief, p. 172).

We are thus persuaded that the assessment of a period of time, whether one laid down in the Convention or in domestic law, lies outside the jurisdiction of the Court of Cassation. This was noted by the Commission,

which took care to examine the issue of admissibility in plenary session, and it was only after its decision on admissibility had been taken – unanimously – that it referred the case to a Chamber for consideration of the merits.

It therefore seems to us that the position taken by the majority of the judges cannot be reconciled with these numerous instances in which an appeal on points of law does not allow the alleged prejudice to be remedied. In particular, the extracts from three decisions of the Court of Cassation in the judgment (see “Relevant domestic law and practice”) represent settled case-law only on the obligation on indictment divisions to address “essential” grounds, notably those based on Article 5 § 3; but that does not entail any review by the Court of Cassation of either the period of time itself or the unappealable assessment by the tribunals of fact.

The present case is undoubtedly one of those instances in which an appeal on points of law is ineffective: the applicant protested his innocence, challenged the findings of “fact” referred to by the tribunals of fact to justify placing and then keeping him in detention, sought to benefit from the presumption of innocence and complained of the length of the detention *per se*; in short, no grounds on which an appeal on points of law could be effective.