



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

SECOND SECTION

**CASE OF GÖKTAN v. FRANCE**

*(Application no. 33402/96)*

JUDGMENT

STRASBOURG

2 July 2002

**FINAL**

*02/10/2002*



**In the case of Göktan v. France,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr A.B. BAKA, *President*,

Mr J.-P. COSTA,

Mr GAUKUR JÖRUNDSSON,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 23 November and 5 December 2001 and 11 June 2002,

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

**PROCEDURE**

1. The case originated in an application (no. 33402/96) against the French Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Ali Riza Göktan (“the applicant”), on 11 March 1996.

2. The applicant was represented before the Court by Ms M.-C. Reminiac, of the Bourg-en-Bresse Bar, and Mr T. Beygo, of the Istanbul Bar. The French Government (“the Government”) were represented by their Agent, Mrs M. Dubrocard, Head of the Human Rights Office, Department of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged a violation of Article 6 § 1 of the Convention and of Article 4 of Protocol No. 7.

4. On 1 November 1998 the application was transferred to the Court after the entry into force of Protocol No. 11 (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 27 November 2001, the Chamber declared the application partly admissible.

7. The Government, but not the applicant, filed written observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1953 and currently lives in Turkey.

10. He entered France in 1974. At the material time, he worked for a business in Strasbourg.

11. On 15 March 1991 he and another person, M. B., were arrested by officers from the Strasbourg Regional Police Department (“the SRPJ”) and customs officers on the verge of concluding a drugs deal with a couple, who managed to make their getaway.

12. The applicant consistently protested his innocence, saying that he had been the victim of a put-up job by customs officers. He explained that he had agreed to act as an “informer”, and in that capacity had cooperated with J.-F. R. of the SRPJ and J.-P. C., a customs inspector and the person allegedly behind his arrest. As for the couple who had “escaped” arrest by the police, they were in fact both customs officers, known as “Maud” and “Serge”.

13. On 18 March 1991 the applicant was charged with drug trafficking and detained. On 3 June 1991 he was brought before the Strasbourg Criminal Court, which on 25 June 1991 sentenced him and M.B. to the following penalties: (a) five years' imprisonment for the criminal offences of importing, purchasing, possessing and transporting drugs, attempting to supply drugs, and importing, possessing and dealing in drugs without a licence; (b) an order permanently excluding them from French territory; and (c) an order requiring them to pay 1,070,000 French francs (FRF) in lieu of confiscation and a customs fine of FRF 400,000 that was imposed jointly and severally for the customs offence of illegally importing goods.

14. The Strasbourg Criminal Court also made an order under Article 382 of the Customs Code in the same judgment for the defendants' imprisonment if the sums were not paid.

15. On 27 June 1991 the public prosecutor sought an order for two years' imprisonment in default, as the customs fine had not been paid.

16. On 5 November 1991 the Criminal Appeals Division of the Colmar Court of Appeal upheld the Criminal Court's judgment in its entirety, as regards the issues of both criminal law and customs law.

17. On 6 November 1991 the applicant decided to appeal to the Court of Cassation; however, he later withdrew his appeal and the case was struck out of the Court of Cassation's list on 3 February 1992.

18. On 4 September 1994 the applicant completed his prison sentence. However, he remained in custody pursuant to the order requiring him to serve two years' imprisonment in default of payment of the customs fine of FRF 1,470,000. He made an urgent application to the President of the Mulhouse *tribunal de grande instance*, arguing that the order for his imprisonment in default was defective, as the Customs Office had failed to serve him with a demand for payment. The urgent-applications judge dismissed that application in an order of 27 September 1994. In a judgment of 28 November 1994 the Colmar Court of Appeal upheld that order for the following reasons:

“Under Article 388 of the Customs Code the court may make an express order for a person who has been convicted of a [customs] offence or offence relating to indirect taxation to remain in custody, even if an ordinary appeal or appeal on points of law has been lodged, until he or she has paid the fiscal penalties imposed on him or her.

The courts have consistently held that customs law is a special branch of law and an exception to the general law.

In the present case, the express reference in the Customs Code to the Code of Criminal Procedure relates only to the length of the imprisonment in default.

Consequently, since the Criminal Court made an express order – upheld by the Court of Appeal – under Article 388 of the Customs Code for enforcement of the order for imprisonment on the ground of anticipatory default, the provisions of Articles 749 et seq. of the Code of Criminal Procedure giving the President of the *tribunal de grande instance* jurisdiction to hear urgent applications are inapplicable.”

19. On 26 October 1994 the Court of Cassation ruled that the applicant's appeal on points of law against that decision had lapsed, as he had not lodged written pleadings in support of his appeal within the statutory time-limit.

20. On 14 March 1996 the applicant made an application for an order for the prison sentence and the term of imprisonment in default to run concurrently, arguing that he was serving two prison sentences for the same offence.

21. He alleged a violation of Article 4 of Protocol No. 7 to the Convention, which sets out the *non bis in idem* rule, and of Article 6 of the Convention. He relied in particular on the Court's judgment in *Jamil v. France* (judgment of 8 June 1995, Series A no. 317-B), in which imprisonment in default was found to constitute a “penalty” for the purposes of the Convention.

22. In a judgment of 21 May 1996 the Colmar Court of Appeal dismissed the applicant's application on the grounds that, firstly, “the European Court of Human Rights' judgments are declaratory and therefore

not binding on the trial court, which is only required to apply the European Convention on Human Rights”; and, secondly, “imprisonment in default possesses the legal characteristics not of a penalty, but of a means of enforcement attached to the financial penalties whose recovery they are intended to secure”. The Court of Appeal concluded from that that Article 5 of the former Criminal Code, which required sentences to run concurrently, had not been infringed by the trial court and could not enable a prison sentence and term of imprisonment in default to be served concurrently.

23. On 22 May 1996 the applicant appealed to the Court of Cassation against that judgment. In a judgment of 16 September 1997 the Court of Cassation dismissed the appeal for the following reasons:

“The appellant cannot validly argue that, by sitting in private in accordance with Article 711 of the Code of Criminal Procedure, the Court of Appeal infringed Article 6 of the European Convention on Human Rights ...

The requirement for a public hearing laid down by that provision applies only to proceedings for 'the determination of a criminal charge' and cannot therefore be relied on with respect to proceedings relating, as in the instance case, to an application for a ruling that sentences be served concurrently ...

The impugned judgment and procedural documents show that the appellant, Ali Göktan, was found guilty of an offence under the drug-trafficking and customs-offences legislation and, *inter alia*, sentenced to five years' imprisonment and a customs fine. After being ordered to serve two years' imprisonment in default of payment, he made an application for a ruling that that term should run concurrently with the prison sentence.

In dismissing that application, the Court of Appeal found, in particular, that imprisonment in default possesses the legal characteristics not of a penalty, but of a means of enforcement attached to the financial penalties whose recovery they are intended to secure.

In these circumstances, the Court of Appeal has justified its decision and the alleged grievance is without foundation ...”

24. The applicant, who has now completed all the sentences he was required to serve, was deported to Turkey, where he came from, pursuant to the permanent exclusion order.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Imprisonment in default

25. Imprisonment in default is a surviving relic of the debtors' prison, and entails jail for the recalcitrant debtor. It is now only available as a remedy to the Treasury and guarantees the recovery of money owed to the

State, such as financial penalties or any other sums due to the Treasury apart from civil reparation.

26. When the applicant was convicted, Article L.627-6 of the Public Health Code was still in force and provided:

As an exception to the provisions of Article 750 of the Code of Criminal Procedure, the length of imprisonment in default shall be two years where fines and any other pecuniary penalties imposed for any of the offences mentioned in the preceding paragraph or for the related customs offences exceed FRF 500,000.”

27. Article 706-31 of the New Code of Criminal Procedure, which came into force on 1 March 1994, contains identical provisions.

28. Article 382 of the Customs Code provides:

“Judgments concerning customs offences may be executed by any means provided for by law.

Judgments by which persons are convicted of offences against customs legislation shall also be enforceable by imprisonment in default ...”

29. Article 388 of the Customs Code provides:

“A person convicted of a customs offence or an offence relating to indirect taxation may, where the court makes an express order to that effect, be kept in detention, even if an ordinary appeal or an appeal on points of law has been lodged, until he has paid the fiscal penalties imposed on him; save in the case of drug offences, any period of detention served on that account following conviction shall be deducted from the period of imprisonment in default ordered by the court and may not exceed the minimum period laid down in the Code of Criminal Procedure for failure to comply with an order to pay a sum equal to the fiscal penalties imposed.”

30. As an exception to the general law, the customs authorities may, therefore, seek a court order under Article 388 of the Customs Code for the enforcement of an order for imprisonment on the ground of anticipatory default of payment of a customs fine. In practice, this means that, instead of being released, a debtor who has completed his or her prison sentence for a criminal offence will immediately begin to serve the term of imprisonment in default.

31. Traditionally, the courts regarded imprisonment in default as a means of enforcement intended to compel debtors to perform the obligations imposed on them. Following the Court's judgment in *Jamil*, cited above, the Criminal Division of the Court of Cassation has ruled that imprisonment in default constitutes “a measure of a penal nature, prescribed by law to guarantee compliance with pecuniary orders, fiscal penalties and fraudulently evaded duties, as permitted by Article 5 § 1 (b) of the European Convention on Human Rights” and not “a subsidiary prison sentence that may run concurrently with a custodial sentence pursuant to Articles 132-3 and 132-4 of the former Criminal Code” (*Caytarla*, Court of Cassation, Criminal Division (“*Cass. crim.*”), 29 May 1997). The Commercial Division added, in a judgment of 16 May 2000, that “an order for

imprisonment in default constitutes a penalty within the meaning of Article 7 of the Convention and, if ordered to ensure the payment of debts due to the customs authorities, is unenforceable unless a demand for payment has been served on the debtor under Article 754 of the Code of Criminal Procedure no less than five days and no more than one year before enforcement commences, as, in providing a special procedure for implementing imprisonment in default, Article 388 of the Customs Code did not exclude the application of Articles 752 to 756 of the Code of Criminal Procedure” (Court of Cassation, Commercial Division (“*Cass. com.*”), 16 May 2000).

### **B. The rule that sentences shall run concurrently**

32. This rule is laid down by Article 5 of the Code of Criminal Procedure, which was in force when the applicant was sentenced:

“If a defendant is convicted of more than one serious crime [*crimes*] or other major offence [*délits*], he shall only receive the longest of the sentences. The same rule shall apply to custodial sentences imposed on a defendant convicted of more than one class-five minor offence.”

33. The rule that sentences shall run concurrently is now contained in Articles 132-2 to 132-7 of the New Criminal Code.

34. The Criminal Division of the Court of Cassation has consistently held that orders for imprisonment in default are not penal in nature, but constitute a means of enforcement. It has ruled in particular that “although statute attaches imprisonment in default to the financial penalties it is intended to secure recovery of, it nonetheless remains a means of enforcement” (*Cass. crim.*, 26 June 1989, 25 July 1991 and 4 January 1995).

35. Consequently, owing to that interpretation of the nature of imprisonment in default, the rule that sentences must run concurrently cannot apply under French law to a prison sentence and a term of imprisonment in default.

36. However, the different Divisions of the Court of Cassation are divided on whether imprisonment in default constitutes a penalty or a means of execution. The Commercial Division considers that it constitutes a penalty within the meaning of Article 7 of the Convention (*Cass. com.*, 16 May 2000, cited at paragraph 31 above).



## THE LAW

### I. GOVERNMENT'S REQUEST FOR THE COURT TO REVIEW ITS DECISION REGARDING THE EXHAUSTION OF DOMESTIC REMEDIES

37. In their additional observations, the Government invited the Court to reconsider its position regarding the merits of the preliminary objection of failure to exhaust domestic remedies. That objection had been raised by the Government previously and was dismissed by the Court in its admissibility decision of 27 November 2001. In support of their request, the Government said that in the instant case the application for the terms to run concurrently could not constitute an effective domestic remedy as defined by the Court's case-law as it had no prospect of success. It was inconceivable that the decision would be favourable to the applicant, as he did not satisfy the statutory conditions to qualify for concurrent sentences. Conversely, he could have sought to "remove the source of his complaint" by paying or depositing all or part of the customs debt or arranging for a surety to pay the sum on his behalf (Article 759 of the Code of Criminal Procedure); alternatively, he could have applied to be released from payment of the fine by showing that he was insolvent (Article 752 of the Code of Criminal Procedure); finally, he could have brought an action challenging the lawfulness of the procedure.

38. The Court finds no new factors that would warrant its reconsidering its decision of 27 November 2001 on the exhaustion of domestic remedies. It follows that the Government's request must be refused.

### II. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

39. The applicant alleged that ordering imprisonment in default for failure to pay customs fines in addition to prison sentences for drug trafficking amounted in practice to the convicted person being sentenced to two consecutive terms of imprisonment for the same offence. Consequently, the Court of Appeal's refusal, upheld by the Court of Cassation, to order the two terms to run concurrently had infringed Article 4 of Protocol No. 7 to the Convention, which provides:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

...”

40. The Government said that the applicant had been sentenced to both a custodial sentence and a customs fine, the latter being a hybrid penalty. Imprisonment in default only took effect if the convicted person failed to pay all or part of the fine. Its role was thus purely subsidiary. Moreover, in *Jamil*, cited above (see “Relevant domestic law and practice”), the Court expressly stated that its decision in that case applied only in the context of Article 7 of the Convention to the specific problem of the retrospective application of the criminal statute; indeed that had been the only complaint before it. Consequently, the judgment in *Jamil* could not be construed as implying that imprisonment in default constituted a “penalty” within the meaning of Article 4 of Protocol No. 7, subject to all the rules in the Criminal Code applicable to prison sentences.

41. Even supposing that imprisonment in default did constitute a “penalty”, the Government said that the applicant was not entitled to an order for the prison terms to run concurrently, as that issue was at the discretion of the relevant court and there was no evidence to show that it would have granted such an application in view of the nature and seriousness of the offences. Accordingly, the Court of Appeal's refusal to grant the applicant's application for an order for the terms to run concurrently could not constitute a violation of Article 4 of Protocol No. 7.

42. The Government added that the applicant had been tried by a criminal court and no further proceedings had been brought against him in respect of the offences of which he had been convicted. As he had been sentenced in a single judicial decision for two separate offences for which two separate penalties had been imposed, there were no grounds for applying Article 4 of Protocol No. 7 in the instant case.

43. The applicant maintained that ordering imprisonment in default of payment of a customs fine in addition to prison sentences for drug trafficking amounted in practice to the convicted person being sentenced to two consecutive terms of imprisonment for the same offence. The Court of Cassation had consistently held that imprisonment in default was purely a means of execution of an obligation of a pecuniary and punitive nature, for which neither the court imposing it nor the authority requesting it had to give reasons (*Cass. crim.*, 26 June 1989, 25 July 1991 and 4 January 1995). It was no longer the courts which determined the length of the imprisonment in default, as the law left them no discretion on that account. The sentence inflicted on the applicant – and handed down by a criminal court as a deterrent – had resulted in a punitive deprivation of liberty and

constituted an automatic additional penalty for the purposes of Article 4 of Protocol No. 7.

44. The Court notes, firstly, that its case-law concerning the *non bis in idem* rule is relatively sparse. It further notes that in *Jamil*, cited above, it held that imprisonment in default constituted a penalty, within the meaning of Article 7 of the Convention. In *Gradinger v. Austria* (judgment of 23 October 1995, Series A no. 328-C), the Court found that the fact that a person had been punished twice, by two different courts, for causing death by negligence while under the influence of drink violated Article 4 of Protocol No 7. Conversely, in *Oliveira v. Switzerland* (judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V), it found that there had been a single act constituting multiple offences (*concours idéal d'infractions* – namely, failure to control a vehicle and negligently causing physical injury) and, distinguishing that case from that in *Gradinger*, held that there had been no violation of Article 4 of Protocol No. 7.

45. In *Ponsetti and Chesnel v. France* ((dec.), nos. 36855/97 and 41731/98, ECHR 1999-VI), the Court held that the imposition of the fiscal fine by the tax authority and a criminal penalty by a criminal court had not violated the *non bis in idem* rule set out in Article 4 of Protocol No. 7.

46. The Court also notes that, apart from revealing that the *non bis in idem* rule was construed relatively narrowly, the *travaux préparatoires* on Protocol No. 7 shed little light on the matter.

47. Article 4 of Protocol No. 7 prohibits a defendant from being tried or punished in criminal proceedings (under the jurisdiction of the same State) for an offence of which he has already been finally convicted.

48. The Court finds that imprisonment in default of payment of the customs fine was not a means of enforcing the fine, but a penalty, both within the meaning of Article 7 of the Convention (see *Jamil*, cited above) and of Article 4 of Protocol No. 7. The notion of what constitutes a “penalty” cannot vary from one Convention provision to another. It therefore finds that the applicant's imprisonment in default amounted to criminal punishment and that the applicant had previously been subjected to criminal punishment for both the drug-trafficking offence (by the prison sentence – and the order excluding him from French territory) and the customs offence of illegally importing goods (by the customs fine). The customs fine is indeed a hybrid measure (it constitutes both civil reparation and criminal punishment – see *Jamil*, cited above, pp. 21-22, § 14).

49. The applicant maintained essentially that he had been punished twice for the same offence, as he had served two terms of imprisonment, one for drug trafficking and the other for failing to pay the customs fine. He complained in particular that his application for an order for the prison terms to run concurrently had been dismissed (he said in French law the court only had a discretion to order sentences to run concurrently, and not all States had such a system).

50. In fact, the Court considers that in the instant case a single criminal court tried the same person for the same criminal conduct, namely dealing in illegally imported drugs. In other words, as in *Oliveira*, cited above, a single criminal act constituted two separate offences: an offence under the general criminal law and a customs offence. As in *Oliveira*, this might also be seen as an example of the same act being caught by various statutory definitions (*concours idéal de qualifications*), and there is all the more reason to transpose that precedent to the present case (since in *Oliveira* the defendant was convicted by two courts; although the Court found that to be regrettable since it was inconsistent with the proper administration of justice, it nevertheless went on to hold that there had been no violation).

51. The Court has to express reservations about the imprisonment in default system as such: it constitutes an archaic custodial measure available only to the Treasury (Article 1 of Protocol No. 4, however, is not applicable, as it prohibits imprisonment for debt solely when the debt arises under a contractual obligation). However, having regard to both *Gradinger* and *Oliveira*, the Court finds that there has been no violation of Article 4 of Protocol No. 7 in the instant case. It further notes – although the point was not taken by the Government – that France issued a reservation on ratifying Protocol No. 7 declaring that it agreed to Article 4 solely in cases that fell within the jurisdiction of the French criminal courts. As the Court accepted in *Jamil*, cited above, customs fines are hybrid in nature and may, therefore, come within the scope of that reservation. The Court cannot, however, rely on the reservation, since it has not been pleaded and because the fine was imposed by a criminal court.

52. In conclusion, the Court considers that there has been no breach of Article 4 of Protocol No. 7 to the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

53. The applicant also alleged procedural unfairness, arguing that the courts' lack of discretion as to the length of the imprisonment in default (the term being set by Article 706-31 of the Code of Criminal Procedure), the defendant's inability to contest the term (since the sentence was automatic) and the failure to state reasons for the sentence in the judgment (as imprisonment in default was regarded by the case-law as a means of enforcement) constituted a violation of Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

54. The Government contended that, contrary to what the applicant had alleged, imprisonment in default under French law was neither automatic

nor inevitable. The criminal court did retain some powers when imposing customs penalties. Under Article 369 § 1 of the Customs Code it had power to reduce the amount of any sum confiscated and of any customs fine if there were mitigating circumstances. In the instant case, the Criminal Court had reduced the amount of the fine, having imposed a fine of FRF 400,000 instead of the sum of FRF 1,070,000 to FRF 2,140,000 sought by the customs authorities. Furthermore, Article 388 of the Customs Code left it to the criminal court to decide whether or not the defendant should remain in custody in default of payment. The court therefore had a discretion and not, as the applicant had wrongly asserted, an obligation.

55. Moreover, a person liable to imprisonment in default could apply to the President of the *tribunal de grande instance* under the urgent-applications procedure set out in Article 756 of the Code of Criminal Procedure for discharge of the order for imprisonment in default. The urgent-applications judge could either decide the application alone by examining whether the warrant of committal was in the proper form and whether there were grounds for immediate release owing to a change of circumstances since the judgment was delivered or, if there was an arguable issue, refer the case to the full court. Indeed, the Court had recognised the effectiveness of that remedy by stating in a partial inadmissibility decision of 6 April 2000 that as regards “the future enforcement of an order for imprisonment in default [an] applicant could [seek to avoid it being automatic] by applying to the urgent-applications judge under Article 756 of the Code of Criminal Procedure for discharge of the order on grounds of insolvency pursuant to Article 752 of the Code” (see *Heinrich v. France* (dec.), no. 44006/98, 30 January 2001).

56. Lastly, Article 756 of the Code of Criminal Procedure provided that the urgent-applications judge could refer any interlocutory issues to the trial court. In the event of an issue regarding the defendant's solvability, it was the trial court which was the better placed to decide the relevance of evidence of insolvency. It therefore appeared that an order for imprisonment in default could always be stayed, or even discharged, when the time came for it to be enforced, following adversarial argument between the representative of the public prosecutor's office and the party making the application for discharge.

57. The applicant alleged that the judicial authority with jurisdiction to impose the customs fine and to order imprisonment in default had no power to adjust the length of such imprisonment, the term being fixed by statute. Consequently, the court had no discretion to weigh up the arguments for or against imprisonment. The applicant also said that he had been deprived of the right to make observations on the customs authorities' accusations and applications. Since the sentence was automatic, the court had been unable to exercise any supervisory role or the applicant to put forward a defence. Lastly, since imprisonment in default amounted to a penalty within the

meaning of the Convention, the failure to give reasons also contravened the requirement for procedural fairness.

58. The Court notes that the applicant has alleged that the rules governing a fair trial were infringed in that the sentence was automatic, the rights of the defence were violated and no reasons were given. However, it finds that there is practically no evidence to support the complaint that the rights of the defence were violated. At all events, they were complied with before the criminal court which imposed the order for imprisonment in default. The applicant has not suggested the contrary and that is true also of the issue of the reasoning in the judgment. The applicant has in fact confused that judgment and the decision of the court to keep him in custody at the end of his main custodial sentence in order to serve the term of imprisonment in default (Article 388 of the Customs Code). The length of the imprisonment in default is, it is true, set by statute, by reference to the amount of the customs fine (see Article 706-31 of the Code of Criminal Procedure). However, the case-law of the Convention institutions on Articles 6 or 7 contains no authority in which a legislature has been censured for laying down a fixed sentence or the courts required to “adapt” such a sentence to the circumstances of the case, independently of the amount of the customs fine imposed. That is particularly true where the measure concerns both civil reparation and a criminal penalty.

59. The Court consequently finds that there has been no violation of Article 6 § 1 of the Convention.

## FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's request for the Court to review its decision concerning the preliminary objection of failure to exhaust domestic remedies;
2. *Holds* unanimously that there has been no violation of Article 4 of Protocol No. 7;
3. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 2 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ  
Registrar

A.B. BAKA  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Loucaides is annexed to this judgment.

A.B.B.  
S.D.

## PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

While I agree with the majority, for the reasons given in the judgment, that there has been no violation of Article 4 of Protocol No 7, I do not share the conclusion that there has been no violation of Article 6 of the Convention in this case.

I believe that inasmuch as the relevant legal provisions applied in this case provided for a fixed period of imprisonment depriving in this way the competent court from exercising any discretion so as to adjust the sentence to the particular facts and circumstances of the case, including the personal circumstances of the accused, there is a breach of Article 6 of the Convention. A penal provision, like the one in issue in this case, providing for two years' imprisonment to be imposed in all cases of a certain category, irrespective of the circumstances or merits of each particular case when in such category there are bound to arise cases where the imposition of such punishment would (because of the circumstances of the case) be disproportionate to the gravity of the offence is, in my opinion, a provision incompatible with the right to a fair trial.

In view of the provision for a fixed period of two years' imprisonment the court in imposing such sentence could not and therefore did not enter into an examination of any facts which would be relevant to the question of adapting the sentence to the specific circumstances of the case. Therefore, we cannot say whether in this case the sentence in question was in actual fact disproportionate to the gravity of the offence or not. What matters, however, is the principle involved and the possibility that the judge might have imposed a lesser sentence if he had had the power to adjust the sentence to the circumstances of the case.

I do not agree with the majority when they say that "there is no precedent in the case-law of the Convention institutions on Articles 6 or 7 in which a legislature has been censured for laying down a fixed sentence or the courts required to 'adapt' such a penalty to the circumstances of the case" (see paragraph 58 of the judgment). In fact, it appears that the Court in its case-law "has not excluded that an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention" (*Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI). And a penal provision for a fixed sentence may very well result in a "disproportionately lengthy sentence" so long as such provision does not allow the adjustment of the sentence to the circumstances of a particular case.

I believe that the right to a fair hearing/trial is not confined to procedural safeguards but extends also to the judicial determination itself of the case. Indeed, it would have been absurd for the Convention to secure proper procedures for the determination of a right or a criminal charge and at the same time leave the litigant or the accused unprotected as far as the result of



such a determination is concerned. Such approach would allow a fair procedure to end up in an arbitrary or evidently unjustified result. The possibility of a judicial adjustment of the sentence to the particular circumstances and merits of the case in order to avoid the imposition of a disproportionately lengthy or unjust sentence is in my view implicit in the concept of a fair determination of a criminal charge.

Furthermore, the view can also be propounded that the fixing of mandatory sentences by the legislature with the result that no discretion is left to the courts to adjust the sentence to the circumstances of every particular case is difficult to reconcile with the notion of separation of powers between the legislature and the judiciary (see, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV).

Certainly the legislature may lay down the type of sentence for any offence. But the courts must at the same time be allowed to take account of the particular facts of the cases which come before them in order to determine the exact punishment they consider just and appropriate within the framework of the relevant legislation. If the courts are not given the necessary discretionary power to adapt the sentence to the individual case then, inevitably, they will be hindered in their judicial role requiring them to apply sentencing principles and to ensure independence, fairness and impartiality – a corollary of which is the avoidance of punishment that is disproportionate to the gravity of the offence. The practical result of depriving the courts of their discretionary powers is that the sentence is imposed directly and *in abstracto* in all cases, irrespective of their factual differences, by the legislature, contrary to the obligation to conduct a fair trial and to the principle of separation of powers.