



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

FIRST SECTION

CASE OF ACHOUR v. FRANCE

(Application no. 67335/01)

JUDGMENT

STRASBOURG

10 November 2004

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
29 March 2006**

*This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention. It may be subject to editorial revision.*

In the case of Achour v. France,

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

Mr C.L. ROZAKIS, *President*,

Mr J.-P. COSTA,

Mr G. BONELLO,

Mrs F. TULKENS,

Mrs N. VAJIĆ,

Mr A. KOVLER,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 11 March and 21 October 2004,

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

PROCEDURE

1. The case originated in an application (no. 67335/01) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Algerian national, Mr Couider Achour (“the applicant”), on 26 April 2000.

2. The applicant was represented by Ms F. Thouin-Palat, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government (“the Government”) were represented by their Agent, Mr R. Abraham, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a violation of Article 7 of the Convention in that he had been deemed to be a recidivist when convicted of an offence.

4. The application was allocated to the First 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.

5. By a decision of 11 March 2004, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1963 and lives in Lyons.

8. On 16 October 1984 the Lyons Criminal Court found the applicant guilty of drug trafficking involving ten kilograms of hashish and sentenced him to three years' imprisonment.

9. In a judgment of 14 April 1997 the Lyons Criminal Court found the applicant guilty of a drug offence, following the discovery in his garage of two bags containing some fifty-seven kilograms of cannabis, and sentenced him to eight years' imprisonment, in addition ordering his exclusion from French territory for ten years. It gave the following reasons for its decision:

“We have a young man returning from Guadeloupe in late 1993, with no job or verifiable income, who, having tried his hand in turn at property, trading in linen, crockery, air-conditioners, foie gras and, incidentally, counterfeit 200-franc notes (??), found himself, somehow or other – he repeatedly tried to explain this with a story about profitable 'air-conditioners' – in possession of a considerable pile of money, more than 61 million old francs, at his home (see D351), scattered about and hidden in the unlikeliest places (such as the maintenance hatch under the bath!!).

Even better, the arrest on 7 December 1995 in the morning resulted in the seizure, without a warrant, of two bundles of drugs, consisting of more than 50 kilograms of prohibited substances, laid out, packed and wrapped in a manner bearing little resemblance to a craft industry.

Nobody claimed them – which one of H. or Achour turned the other one in??

What is more, H. was in possession of 3 kilograms of the same kind of resin (see the expert report, D339) and 33,000 francs in cash, stored in the glovebox of his car.

The circumstances outlined above amount to two pieces of evidence against Achour, which elicited nothing more than vague and inconsistent explanations in which he accused H. of being the delivery man, claimed ignorance as to the nature of the two bundles (!!!), and referred again and again, as a kind of 'judicial trump card', to the money-spinning air-conditioners (repeatedly) and the savings of his late brother (A.).

A third piece of evidence results from shadowing, tracking and telephone-tapping.

Treading stealthily like a Sioux Indian and behaving like a secret agent, before and after 30 October 1995, Achour moved about a good deal, showing a preference for mornings, twisting and turning constantly, keeping a sharp lookout where necessary, and receiving his 'contacts' vehicles in his garage (albeit for very short amounts of time)... What was going on??

What was going on, his counsel argued, as, subsequently, did counsel for D. and R., was indeed 'trading', but in linen, foie gras (in 'blocks'), counterfeit banknotes, trousers, but never hashish.

This cunning strategy was supported by the statements of G. (D322), and indeed those of V. or C.

Furthermore, and above all, no air-conditioners, foie gras or trousers were seized on 7 December 1995; what was physically observed in this case was hashish, and a sizeable quantity of it.

Accordingly, Couider Achour, who already has several convictions, having, in particular, been sentenced to three years' imprisonment in October 1984 for a drug offence, cannot lay claim to any indulgence, even in view of the particularly well-organised nature of his activities (the court has left aside the pagers, mobile phones, etc. used for 'contacts'). The public prosecutor, for his part, sought an eight-year term of imprisonment and the court endorses and imposes that sentence, which is still mild when it is borne in mind that the defendant is classified in law as a recidivist. A proportionate fine and continued detention, in addition, in order to ensure that the sentence is executed and that the offence is not repeated. Lastly, as an additional penalty, exclusion from national territory for ten years."

10. The Criminal Court also sentenced the applicant's mother and his partner, S., to two years' imprisonment, suspended, for handling the proceeds of drug offences.

11. In a judgment of 25 November 1997 the Lyons Court of Appeal increased the applicant's sentence to twelve years' imprisonment and upheld the exclusion order. It observed, among other things:

"By Article 132-9 of the Criminal Code, a person is deemed to be a recidivist where, having already been convicted with final effect of an offence punishable by ten years' imprisonment, he commits a further offence carrying a similar sentence within ten years of the expiry of the limitation period for enforcing the previous sentence.

That was so in the case of Couider Achour-Aoul, who, having been sentenced by the Lyons Criminal Court on 16 October 1984, after adversarial proceedings, to three years' imprisonment for offences under the regulations on buying, possessing, using, trading in and transporting drugs, punishable under Article L. 627, paragraph 1, of the Public Health Code, as applicable at the time, by a term of between two and ten years' imprisonment, and having completed that sentence on 12 July 1986, committed the offences with which he was charged, which likewise carry a sentence of ten years' imprisonment pursuant to Article 222-37 of the Criminal Code, in the course of 1995 and up to 7 December of that year.

In convicting him on the charges set out in the order committing him for trial, the court below made a correct analysis of the facts of the case and drew the necessary legal inferences. Its judgment must therefore be upheld as to the finding of guilt.

Despite having been convicted on 16 October 1984 of drug offences relating to the possession of 10 kilograms of cannabis resin, Couider Achour-Aoul, with no declared income since 1993, had no hesitation in committing further drug offences, making a substantial profit which he shared with his family and amassing a sizeable fortune which he invested shrewdly.

A total of 57 kilograms of cannabis resin – a substance extremely harmful to the health of young people, in particular those living in poverty, who are exposed to the

illegal and dangerous activities of unscrupulous individuals – was found at his home. He had asked Mr H.M., who had sought his help in finding a decent job, to sell hashish for him.

Accordingly, both the nature and the seriousness of the accused's conduct, reflecting a deep-seated inclination to crime for financial gain regardless of the risk to other people's lives and occurring at a time when he was liable to be classified as a recidivist, dictate that he should be sentenced to twelve years' imprisonment..."

12. The applicant appealed on points of law, arguing, among other things, that his classification in law as a recidivist contravened the rule governing the application of successive criminal laws, the Court of Appeal having retrospectively applied the harsher provisions of the new legislation.

13. In a judgment of 29 February 2000 the Court of Cassation dismissed his appeal. It held that the Court of Appeal had been justified in deeming him to be a recidivist, on the following grounds:

"... where a law introduces new rules on recidivism, for them to apply immediately it is sufficient for the offence constituting the second component of recidivism – which the offender may choose to commit or not to commit – to have been committed after the law's entry into force."

14. The applicant is due for release on 21 June 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Code

15. The relevant provisions of the Criminal Code, as in force before 1 March 1994, were as follows:

Article 57

"Anyone who, having been sentenced for a serious crime [*crime*] to a term of imprisonment exceeding one year, commits, within five years of the expiry of that sentence or of the time allowed for its enforcement, a further serious crime or other major offence [*délit*] punishable by imprisonment shall be sentenced to at least the statutory maximum penalty for that offence and, at most, twice that penalty."

Article 58

"The same shall apply to persons who have been sentenced for a major offence [*délit*] to a term of imprisonment exceeding one year and, within the same period, are found guilty of the same offence or of a serious crime punishable by imprisonment.

Anyone who, having previously been sentenced to a shorter term of imprisonment, commits the same offence within the same period shall be sentenced to a term of imprisonment of at least twice the previous sentence and, at most, twice the statutory maximum sentence.

...”

16. Article 132-9 of the new Criminal Code, which came into force on 1 March 1994, provides:

Article 132-9

“Where a natural person who has already been convicted with final effect of a serious crime or other major offence punishable under the law by ten years' imprisonment commits, within ten years of the expiry of the previous sentence or of the time allowed for its enforcement, a further offence carrying a similar sentence, the maximum sentence and fine that may be imposed shall be doubled.

Where a natural person who has already been convicted with final effect of a serious crime or other major offence punishable under the law by ten years' imprisonment commits, within five years of the expiry of the previous sentence or of the time allowed for its enforcement, a further offence carrying a prison sentence of more than one year but less than ten years, the maximum sentence and fine that may be imposed shall be doubled.”

B. Case-law of the Court of Cassation

17. As early as 1893 the Criminal Division of the Court of Cassation held:

“... the increase in the sentence in the event of recidivism amounts to an additional penalty not for the first offence but for the second, which the offender may choose to commit or not to commit. Accordingly, new legislation may, without having retrospective effect, lay down the penalties that may be imposed in future for offences committed while it is in force; the offender cannot request the application of the penalties under the previous legislation for an offence committed since the new legislation has been in force, his status as a recidivist being determined by the new legislation.” (Cass. crim., 31 August 1893, D. 1896.1.137)

18. That position has been reiterated in subsequent judgments of the Criminal Division of the Court of Cassation (Cass. crim. 14 June 1945, *Bull. crim.* no. 68; 29 January 1948, *Bull. crim.* no. 38; 23 March 1981, *Bull. crim.* no. 103; 29 February 2000, *Bull. crim.* no. 95).

C. Parliamentary proceedings

19. During the passage through Parliament of a bill amending the general provisions of the Criminal Code, the rapporteur for the Senate stated, among other things (Senate Report no. 271, appended to the record of the sitting of 27 April 1989):

“Article 132-9

Recidivism entailing a serious crime or other major offence punishable by seven years' imprisonment and a further offence carrying a sentence of seven years or between one and seven years

...

The increased severity of the rules on recidivism applicable where the second offence is punishable by seven years' imprisonment lies in the extension of the 'probationary period' (ten years) within which a convicted person may be deemed to be a recidivist. If the second offence is punishable by a prison sentence of between one and seven years, the rules on recidivism apply only if the 'relapse' occurs within a period of five years. In both cases, the maximum sentence and fine that may be imposed are to be doubled in the event of recidivism.

The existing rules on the subject derive from a law of 26 March 1891 and are set out in Article 57 of the Criminal Code. They provide for a conception of recidivism that is general in scope but limited in time (the probationary period being five years) where a person who, having been sentenced for a serious crime to a penalty exceeding one year's imprisonment (i.e. between one year and life), is prosecuted for a further serious crime or other major offence punishable by imprisonment. In such cases the sentence is increased to at least the statutory maximum penalty for the second offence and, at most, twice that penalty ...”

D. Criminal records

20. Article 769 of the Code of Criminal Procedure, on criminal records, provides, *inter alia*:

“... The following shall be removed from a person's criminal record: entries concerning convictions that have been expunged as a result of an amnesty or of automatic or judicial rehabilitation, or amended in accordance with a decision to rectify the criminal record. The same shall apply, save in the case of convictions for crimes not subject to limitation, to entries concerning convictions dating back more than forty years which have not been followed by a further conviction for a serious crime or other major offence.

Entries concerning the following shall also be removed from the criminal record:

(1) personal bankruptcy orders or disqualifications provided for in section 192 of the aforementioned Law no. 85-98 of 25 January 1985 where such measures are expunged by means of a judgment terminating the proceedings on account of the payment of outstanding debts, by means of rehabilitation, or upon the expiry of five years from the date on which the orders in question became final; and also orders for the liquidation of a natural person's assets, upon the expiry of five years from the date on which the orders in question became final, or after the delivery of a judgment rehabilitating the person concerned.

However, if the personal bankruptcy order or disqualification is valid for more than five years, an entry concerning these measures shall remain in the criminal record for the same period;

(2) disciplinary decisions expunged as a result of rehabilitation;

(3) sentences which are wholly or partly suspended, with or without probation, upon the expiry of the periods laid down in Articles 728-4 and 728-7 of the Criminal Code, calculated from the date on which the sentences are to be deemed void;

(4) discharges, upon the expiry of a three-year period starting on the date on which the conviction became final;

(5) convictions for petty offences [*contraventions*], upon the expiry of a three-year period starting on the date on which the convictions became final; this period shall be increased to four years where repetition of the offence in question constitutes a more serious offence [*délit*];

(6) measures carried out under the agreed penalty scheme, upon the expiry of three years from the date on which it is certified that the measure has been carried out, if during that period the person has not been convicted of a serious crime or other major offence or carried out a further measure under the agreed penalty scheme; and

(7) measures ordered in accordance with Articles 8, 15, 15-1, 16, 16 *bis* and 28 of the aforementioned Ordinance no. 45-174 of 2 February 1945, upon the expiry of three years from the date on which the measure was ordered, if during that period the person has not received a sentence for a serious crime or other major offence, or carried out a measure under the agreed penalty scheme, or been the subject of a further measure ordered in accordance with the aforementioned provisions of the Ordinance.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

21. The applicant complained that the domestic courts had deemed him to be a recidivist in convicting him after the entry into force of the new Criminal Code on 1 March 1994. He relied on Article 7 of the Convention, which provides:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

A. Arguments before the Court

1. The Government

22. The Government noted, among other things, that recidivism was an aggravating circumstance affecting the sentence that could be imposed for the second offence and not the first. Its purpose was to counter the danger posed by those who persisted in offending despite warnings from the courts. Although it was indeed intended to have a deterrent effect, it did not contain any probationary element. In that respect, it differed from other provisions of French law that were designed either to alleviate the risk of social exclusion or to encourage the social reintegration of offenders, such as those on suspended sentences with or without probation. That fundamental difference explained why, contrary to what the applicant maintained, the expiry of the period within which recidivism was possible under the law as worded in 1984 was not irrevocable; the new rules were to apply where the second offence had been committed after the legislation had been amended.

23. Recidivism was made up of two components. The first was a final, and still valid, criminal conviction by a French court. The second was the commission of a further offence. Recidivism could be general or specific in nature, and unlimited or limited in time. In the instant case it had been general and time-limited. The applicant had first been convicted on 16 October 1984 of an offence punishable by ten years' imprisonment; that conviction constituted the first component of recidivism. He had completed his sentence on 12 July 1986, which was the starting point of the ten-year period for "time-limited" recidivism, as provided in the first paragraph of Article 132-9 of the new Criminal Code. The second offence, committed in 1995 – before the expiry of that ten-year period – had indeed constituted the second component of recidivism as defined in the law, as the Lyons Court of Appeal had found in the applicant's case.

24. The Government further pointed out that the first component of recidivism had not simply ceased to exist, since the applicant's 1984 conviction remained in his criminal record, the purpose of which was to provide information about a person's previous convictions so that any appropriate inferences could be drawn.

25. The Government observed that the applicant had been sentenced to twelve years' imprisonment for an offence committed in 1995. His sentence had certainly been provided for in the legislation applicable on that date, namely Article 222-37 of the Criminal Code, concerning drug offences, and Article 132-9 of the same code concerning recidivism, which had been applicable to the 1995 offence. The penalty imposed on him, having been applicable at the time the offence had been committed, had therefore satisfied the requirements of Article 7.

26. The issue of the application of successive criminal laws remained to be addressed. The Government considered that the Court of Cassation, in its judgment of 29 February 2000, had provided a clear response by holding that for new rules on recidivism to be applicable immediately, it was

sufficient for the offence constituting the second component to have been committed after their entry into force. That judicial interpretation, the Government stressed, was justified by the fact that the factor of recidivism followed from the second offence and the consequent increase in the sentence related to the commission of that offence alone. Accordingly, the applicant had been fully aware of the consequences when he had committed the 1995 offence; he had known what penalty he faced, in accordance with the law applicable at that precise time. The approach taken by the Court in the case of *Coëme and Others v. Belgium* (nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR 2000-VII) could therefore not be applied to the instant case. Unlike suspended sentences with probation, which were governed by rules laid down by the court at the time of the conviction, recidivism was solely governed and defined by the law, which specified the conditions in which it was applicable. In other words, there was no comparison between recidivism and suspended sentences with or without probation. The requirements for taking recidivism into account had been satisfied in the instant case; furthermore, they did not allow for the possibility of recidivism being unlimited in time.

27. Under the indisputable rule governing successive conflicting laws, the existence of recidivism had to be assessed with reference to 1995; accordingly, any notion of retrospective application could be ruled out. The Government pointed out that the relevant case-law of the Criminal Division of the Court of Cassation had been particularly clear and settled since a judgment of 31 August 1893 and had, moreover, not called into question the idea that recidivism was subject to a time-limit and ceased to apply once the ten-year period had expired.

28. The Government submitted, lastly, that the applicant's initial conviction had not ceased to be valid after 12 July 1991, since it had remained in his criminal record and had therefore not been expunged.

2. The applicant

29. The applicant submitted, in particular, that while increasing the sentences applicable to recidivists was justified by the greater danger they posed on account of their persistence despite warnings from the courts, the concept of recidivism was considered above all to be a means of ensuring exemplary conduct on the part of those who had committed an offence of some seriousness, through a form of probation resulting from the risk of receiving an increased penalty in the event of their reoffending. The rules on recidivism were therefore intended to contribute to reforming convicted persons; that aim, which formed one of the main trends in modern crime policies, accordingly had some bearing on the determination of issues concerning the application of successive laws. In a democratic society the requirements of protecting the social order had to be reconciled with the aim

of reforming offenders. He observed that Article 7 of the Convention related to the requirement of legal certainty.

30. The applicant noted that Article 132-9 of the new Criminal Code had doubled the period between the two components of recidivism and that in order to apply these new, harsher provisions to him, the Court of Cassation had laid down a rule which, to put it simply, was extremely questionable in the light of Article 7, not least because it placed sole emphasis on the second component. The applicant considered that the first component of recidivism, which had been totally ignored by the Court of Cassation, was nevertheless an essential aspect of the process. He complained, firstly, that the Court of Cassation had applied harsher legal provisions of which he could not have been aware on the date of his initial conviction and, secondly, that the retrospective application of the new Criminal Code had called into question the fact that the first component of recidivism had quite simply ceased to exist. A person with a previous conviction was entitled to have it disregarded after the expiry of the period laid down in the legislation on recidivism, whether this was a probationary period or a limitation period for enforcing the sentence. A law that had come into force after that time could not revive the first component by extending the period in question.

31. The applicant pointed out that he had first been convicted in 1984, that he had finished serving his prison sentence on 12 July 1986 and that, consequently, he had ceased to be a potential recidivist five years later. He further observed that that had been his position under the criminal law for a number of years. He considered that the period within which recidivism was possible had expired in respect of the 1995 offence, by analogy with the rules on time-limits for bringing a prosecution or enforcing a sentence.

B. The Court's assessment

1. General principles

32. The Court reiterates that Article 7 of the Convention embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the

assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

33. When speaking of “law” Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1627, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002).

34. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145). Since the term “penalty” is autonomous in scope, to render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision (see *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27). Having regard to the aim of the Convention, which is to protect rights that are practical and effective, it may also take into consideration the need to preserve a balance between the general interest and the fundamental rights of individuals and the notions currently prevailing in democratic States (see, among other authorities, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26; *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, pp. 34-35, § 95; and *Coëme and Others*, cited above).

2. Application of the above principles

35. The Court notes that recidivism is part of the more general issue of sentencing. The fact that a warning issued to an offender by means of an initial criminal conviction has not been sufficient to prevent him from committing a further offence elicits greater severity on the part of the legislature, recidivism being a ground for increasing the penalty.

36. According to the law, recidivism is made up of two components forming an indivisible whole. The first component must be a criminal conviction by a French court. The conviction must have final effect and, consequently, must not have been expunged as a result of an amnesty or rehabilitation or have been deemed void. The second component is a further offence. Since the statutory rules on recidivism are intended to provide a clearly defined framework, the legislation lays down the period within which the commission of a fresh offence may constitute recidivism or, conversely, the point after which no second component is possible. The legislation in France initially provided, in the former Criminal Code, for a

period of five years, which was subsequently extended to ten years in the new Criminal Code which came into force on 1 March 1994.

37. The Court considers that the issue before it relates to the general principles of law, in particular those of criminal law and criminal procedure. As a corollary of the principle that only the law can define a crime and prescribe a penalty, the provisions of the criminal law are to be strictly construed and are subject to the rule that new, more severe legislation cannot be applied to an ongoing situation that arose before it came into force.

38. In the instant case the Court notes that the approach adopted by the Court of Cassation was to apply the new rules on recidivism that had come into force on 1 March 1994 and had therefore been applicable at the time of the fresh offence committed in 1995. While the application of the new legislation to the offence constituting the “second component” of recidivism has not been disputed in itself, the fact remains that for the courts to classify the offender as a recidivist there must also have been a “first component” within the meaning of domestic law.

39. It would be pointless to set up an opposition between the two components of recidivism, especially in the context of a debate on the purpose of this system, and to take only one into account or minimise the significance of one in relation to the other. The relevant provisions of French criminal law are unambiguous on this point: recidivism consists of two inseparable components which must be considered in conjunction with each other. Accordingly, the provisions on recidivism in the Criminal Code as in force from 1 March 1994 require the application of one of the solutions prescribed by law, regard being had, for both components, to the nature of the offence (serious crime, other major offence or petty offence) and the sentence that may be imposed.

40. In the instant case the two components were governed by different statutes. The first offence was committed at a time when the law provided that recidivism could occur within a period of five years, whereas the second fell within the scope of the new Criminal Code, which provides for a ten-year period. Besides this initial difficulty, it must be noted that there was no overlap between these two periods. In the eyes of the law, the first period ended on 12 July 1991, in accordance with the legal rules in force at the time. The new ten-year period, however, did not become law in France until three years after that date, on 1 March 1994.

41. The Court considers that the application of the new legislation necessarily restored a legal situation that had ceased to have effect in 1991. The applicant's previous conviction, which could no longer have formed a basis for recidivism from 12 July 1991 onwards, accordingly had legal consequences, not in relation to the statutory rules which had governed it at the time but under the new rules that had come into force years later. In other words, in so far as the entry into force of the new Criminal Code on

1 March 1994 resulted in the application of Article 132-9 to the offence of which the applicant had been convicted on 16 October 1984, the courts were required to restore the applicant's status as a potential recidivist, although under the provisions of French law itself that status had officially lapsed on 12 July 1991.

42. Accordingly, notwithstanding the distinction that may legitimately be made between “immediate” and “retrospective” application of new legislation, the Court considers that the circumstances of the present case in fact concern the “retrospective” application of the criminal law. It is not called upon to determine whether the new legislation should have applied while the period in which recidivism was possible under the previous legislation had yet to expire (see, *mutatis mutandis*, *Coëme and Others*, cited above, §§ 149 and 150), since the applicant's complaint was that the new legislation conflicted with the effects of the previous legislation, under which the period was no longer in progress but had already expired.

43. The application of the new legislation in the circumstances of the present case leads the Court to make an observation that is, to say the least, disconcerting: if the applicant had committed a second offence the day after 12 July 1991 (the expiry of the statutory period in which recidivism was possible) or on any date between 13 July 1991 and 28 February 1994 (the day before the new Criminal Code came into force) – that is, during a period of almost three years – French law would have prohibited the courts from deeming him to be a recidivist.

44. It cannot therefore be validly maintained that the applicant's initial conviction did not cease to have effect after 12 July 1991. On this point, moreover, the Court fails to see any connection between the present application and the issue of suspended sentences raised by the Government; the applicant merely described the limitation period for recidivism as a “probationary” measure and Parliament itself referred to a “probationary period” (see paragraph 19 above). There is clearly no comparison between recidivism and suspended sentences, whether with or without probation, as the Government expressly agreed in their observations.

45. The Government took the view that the applicant's initial conviction nonetheless continued to have legal consequences in that it remained in his criminal record. The Court notes, however, that the rules governing entries in criminal records are not designed to take the place of the provisions of the Criminal Code on recidivism. Nor can they account for the fact that the applicant could not have been classified in law as a recidivist between 13 July 1991 and 28 February 1994. Furthermore, while it is true that, through reference to entries in a person's criminal record, the courts may take into account the circumstance of recidivism where appropriate, they inevitably do so only after checking whether the relevant period has expired or not. The date of the expiry of the sentence (the starting point for

calculating the period in which recidivism may occur) is explicitly mentioned in the corresponding entry.

46. In any event, the entry of a conviction in a person's criminal record does not in itself entail the possibility of recidivism, in so far as there is no connection between such an entry and the expiry of the relevant period for the purposes of recidivism. Although entries may be removed from the criminal records in the event, for example, of an amnesty or rehabilitation, as the Government noted, this may also occur in other circumstances provided for by law, for example where a person's conviction dates back more than forty years, on condition, firstly, that he has not subsequently been convicted of a serious crime or other major offence and, secondly, that the initial conviction did not concern an offence not subject to limitation.

47. It may therefore be concluded from the circumstances of the case that the relevant provisions of the new Criminal Code were applied retrospectively; those provisions are distinct from procedural rules, which in principle apply immediately to proceedings that are under way (see *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997-VIII, p. 2956, § 35).

48. It remains to be determined whether the new legislation was harsher or more lenient. The Court notes, firstly, that the length of the period in which recidivism may be taken into account as an aggravating circumstance was increased from five to ten years and, secondly, that the application of this new period also had the effect of subjecting the applicant to the other provisions of the new Criminal Code, notably with regard to penalties. In the instant case this effectively caused the trial and appeal courts to impose a heavier penalty, as the statutory maximum penalty may be doubled in the event of recidivism; the applicant was sentenced to twelve years' imprisonment because the circumstance of recidivism was taken into account, whereas the statutory maximum sentence in the absence of recidivism was ten years (see, *mutatis mutandis*, *Jamil v. France*, judgment of 8 June 1995, Series A no. 317-B).

49. It is therefore legitimate to consider that Article 132-9 of the new Criminal Code should not have applied retrospectively and that in the second set of proceedings the applicant should have been tried as a first offender and not as a recidivist.

50. Lastly, the Court considers that where a person is, as in the instant case, convicted as a recidivist pursuant to new legislation, the principle of legal certainty dictates that the statutory period for the purposes of recidivism, determined in accordance with the principles of law, in particular the principle that criminal statutes are to be strictly construed, should not already have expired under the previous legislation. Moreover, the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of

protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency.

51. There has therefore been a violation of Article 7 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

53. The applicant claimed 284,825 euros (EUR) in respect of alleged pecuniary damage and EUR 30,490 for non-pecuniary damage.

54. The Government did not express a view.

55. The Court considers that no causal link has been established between the violation of Article 7 of the Convention and the pecuniary damage alleged by the applicant. His claims under this head should therefore be dismissed. On the other hand, the Court considers that the applicant sustained non-pecuniary damage, which is sufficiently compensated by its finding of a violation (see paragraph 51 above).

B. Costs and expenses

56. The applicant sought an aggregate sum of EUR 24,072 to cover the costs incurred before the domestic courts and the Court.

57. The Government did not express a view.

58. Where the Court finds that there has been a violation of the Convention, it will award applicants their costs and expenses before the national courts only in so far as they were incurred for the prevention or redress of the violation (see, among many other authorities, *Lilly France v. France*, no. 53892/00, 14 October 2003). As that was partly the case in this instance, the Court, making its assessment on an equitable basis as required by Article 41 of the Convention, awards the applicant EUR 3,000 under this head.

With regard to costs and expenses before the Court, applicants may recover their costs and expenses only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Kress v. France* [GC], no. 39594/98, § 102, ECHR 2001-VI). In the instant case the Court finds that the sums claimed by the applicant are manifestly excessive. In particular, it notes that a bill was submitted for

more than EUR 14,000 for “procedural assistance before the European Commission of Human Rights”, despite the fact that, firstly, the present application was not lodged with that body and, secondly, the lawyer on behalf of whom the claim was made was not the applicant's representative before the Court. However, the applicant produced a bill drawn up by his representative, Ms F. Thouin-Palat, for 19,136 French francs (FRF) (EUR 2,917) in connection with his application to the Court. The Court therefore decides to award that amount to the applicant.

C. Default interest

59. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 7 of the Convention;
2. *Holds* by four votes to three that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,917 (five thousand nine hundred and seventeen euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 10 November 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Costa joined by Mr Rozakis and Mr Bonello is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE COSTA JOINED BY JUDGES ROZAKIS AND BONELLO

(Translation)

I should like to explain why I was not persuaded by the reasoning adopted in this delicate and, in my view, unprecedented case, and have therefore reached a different conclusion from the majority of my colleagues.

1. I shall briefly recapitulate the facts of the case, which are set out in paragraphs 8 to 14 of the judgment and are fairly straightforward.

2. On 16 October 1984 Mr Achour was sentenced to three years' imprisonment for offences under the regulations on buying, using, trading in and transporting drugs. At the time those offences were punishable under the relevant legislation by a sentence of between two and ten years' imprisonment. Mr Achour's conviction was final and he was not subsequently rehabilitated or granted an amnesty in respect of it. It remained in his criminal record. He finished serving his sentence on 12 July 1986.

3. Mr Achour was later tried for similar offences, committed in the course of 1995 and up to 7 December of that year and punishable at the time when they were committed by (a maximum of) ten years' imprisonment. On 14 April 1997 the Criminal Court sentenced him to eight years' imprisonment, and on 25 November 1997 the Court of Appeal increased that sentence to twelve years. It applied Article 132-9 of the new Criminal Code, which provides:

“Where a natural person who has already been convicted with final effect of a serious crime or other major offence punishable under the law by ten years' imprisonment commits, within ten years of the expiry of the previous sentence or of the time allowed for its enforcement, a further offence carrying a similar sentence, the maximum sentence and fine that may be imposed shall be doubled.”

4. In other words, the Court of Appeal considered that Mr Achour satisfied the requirements of these provisions and was therefore liable to a maximum of twenty years' imprisonment; it sentenced him to twelve.

5. The applicant appealed on points of law against that judgment, and the Court of Cassation dismissed his appeal on the following ground, in accordance with its settled case-law:

“... where a law introduces new rules on recidivism, for them to apply immediately it is sufficient for the offence constituting the second component of recidivism – which the offender may choose to commit or not to commit – to have been committed after the law's entry into force.”

6. On the face of it, such reasoning is unassailable: the new Criminal Code came into force on 1 March 1994, and the offences which made Mr Achour a recidivist were committed after that date.

7. However, Mr Achour submitted and pleaded that Article 7 of the Convention had been infringed in that, when he had committed the initial

offence, the prescribed period had been only five years instead of ten, that this period had expired before the entry into force of Article 132-9, and that harsher legislation had therefore been applied retrospectively in his case. The majority endorsed that line of reasoning in substance and also drew on the concept of legal certainty.

8. Mr Achour's submissions and the judgment rely more particularly on the second sentence of Article 7, paragraph 1, of the Convention, which provides:

“Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

9. On closer inspection, it might appear that this is the decisive argument; ultimately, however, I do not find it persuasive as it seems out of step with the reality of recidivism.

10. In practically all legal systems, recidivism is an aggravating factor in relation to the second offence, warranting a harsher sentence, where appropriate, for the recidivist (who, rightly or wrongly, is regarded as hardened or more dangerous). This increased severity is open to question on a general level; some criminologists believe, on the contrary, that mitigating circumstances should be taken into account in the case of recidivists, who have been corrupted by the crowded conditions and bad influences to which they have been exposed in prison. But this view is rejected by most countries, which consider that recidivists should be given increased sentences. There is, however, less common ground between States regarding multiple offences: some impose cumulative penalties, whereas in others, such as France, only the heaviest penalty is imposed.

11. Recidivism is provided for by law; it is an aggravating factor *in personam* and not *in rem*, since it relates to the conduct of the offender.

12. The legal rules governing recidivism in France – and in other States – require two components, the first being a *final* criminal conviction and the second the commission of a further offence, which may be the same as or equivalent to the first offence (specific recidivism) or a separate offence (general recidivism). It may be limited in time (as in Mr Achour's case) or unlimited (as in the case of serious crimes: an offender who commits a second serious crime, irrespective of the time that has elapsed, is classified as a recidivist, but that was not the case here). According to that legal approach, it is the second offence which makes a person a recidivist, just as a persistent recidivist is a person who breaks the criminal law three, four or any number of times. I must admit that, to my mind, there is nothing intrinsically shocking in this logic, which I consider to be central to the present case.

13. The difficulty with this approach, however, lies in ascertaining whether a new law extending the time that may elapse between the two components of recidivism may apply to a second offence committed after its

entry into force or whether the law should have been in force before the first conviction or even the first offence. The courts (and also, it would seem, most legal writers) have consistently taken the view since the late 19th century that the new law, in so far as it predates the commission of the second offence, is not retrospective (and hence does not infringe Article 7 of the Convention). The offender, who is or should be aware of the new law, knows the penalties he faces if, after its entry into force, he commits a second offence entailing his classification as a recidivist and, consequently, aggravating circumstances *in personam*. The penalty imposed on him, to be increased where appropriate on account of the factor of recidivism, will not be heavier than the one applicable at the time when the second offence was committed, since by definition that time will be after the date on which the new law came into force, in this case 1 March 1994.

14. There is, admittedly, some force in the argument set out in paragraph 43 of the judgment that if Mr Achour had “reoffended” between 12 July 1991 – five years after completing his initial sentence – and the date before the new Criminal Code came into force, he could not have received as severe a sentence as he did in 1997 under this new legislation.

15. But on reflection, I do not consider that argument decisive. Any new law entailing harsher criminal sanctions will affect the penalties which may be imposed for offences committed after the law comes into force, irrespective of whether the offenders are recidivists. Obviously, the Convention does not prevent States from taking tougher measures against certain criminal offences in the context of their policy on crime, having regard to criminal developments and the need for an appropriate reaction in society. It is always regrettable that the criminal-law system should become more punitive, but that does not in itself necessarily entail a breach of the Convention (see, in this connection, the Commission's decision of 9 April 1996 in the case of *H.M.A. v. Spain*, application no. 25399/94, Decisions and Reports 85-B, p. 117, in particular the following passage:

“The Commission recalls ... that the Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects.”)

If a State can introduce new criminal offences, it is *a fortiori* entitled to increase the penalties to which offenders are liable.

16. A further objection may be raised. Should not the legal rules on recidivism be treated as akin to the – more favourable – rules on the activation of suspended sentences, in which the principle of not applying the law retrospectively is construed more broadly, at least in France?

17. However, in spite of the apparent similarities, these two concepts are quite different. A court may, at its discretion, decide that a sentence it imposes should be suspended (with or without probation). Such a measure accordingly exempts the convicted person from having to serve the sentence, such exemption being subject to the condition that, within a period

specified by law, he does not commit a further offence resulting in a second conviction. The president of the court must, when imposing a suspended sentence, warn the convicted person of the consequences of his reoffending (Articles 132-29 and 132-40 of the new Criminal Code). A suspended sentence is therefore *probationary*, unlike a conviction constituting the first component of recidivism, and this is a significant difference.

18. The effects of a suspended sentence are also different. If no further conviction occurs during the statutory period, the conviction is automatically treated as non-existent; the exemption from having to serve the sentence becomes permanent; the conviction can no longer constitute the first component of recidivism; and, lastly, it is deleted from “Bulletin no. 2” of the criminal record. Nothing of the kind occurs in relation to a recidivist's initial conviction (except in the event of rehabilitation or an amnesty, neither of which occurred in the present case). The expiry of the statutory period does not expunge the initial conviction either retrospectively or for the future and has no effect on the person's criminal record.

19. It is therefore unsurprising that if a law extended the period in which no further offences were to be committed following the imposition of a suspended sentence, it could not be applied to a person who had already received such a sentence as it would come into force after the judgment in question and would interfere with *res judicata* (see Article 112-2, point (3), of the new Criminal Code, and the relevant case-law, such as the Criminal Division's judgment of 20 November 1996, *Bull. crim.* no. 418). However, legislation of that kind is applicable to a recidivist, whose factual and legal position is in no way the same.

20. It may be thought desirable for the existing rules on recidivism in France to be relaxed, for example by introducing the right to have the first conviction disregarded or expunged. That, however, is a matter relating to criminal policy and not to the retrospective application or the legality of penalties. But is the law as it stands incompatible with Article 7 in general terms or in the present case? I do not think so. Not only was Mr Achour not sentenced to a heavier penalty than the one applicable at the time the criminal offence was committed, but the relevant legislation (Article 132-9) satisfied the requirements of accessibility and foreseeability set forth in the Court's case-law since it was based on a settled and, in my view, reasonable interpretation that had been applied consistently for a century (see, for example, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 19, § 40, or *Streletz, Kessler and Krentz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 82, ECHR 2001-II).

21. Lastly, I have been unable to find any grounds in the case-law of the Convention institutions (or of the Constitutional Council, even in the frequently cited decision no. 86-215 DC of 3 September 1986) for broadening to such an extent the notion of retrospective application (as that is what we are dealing with here). The case-law cited in the judgment is not

decisive. In other recent judgments (see *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, ECHR 2001-II, or *Gabbari Moreno v. Spain*, no. 68066/01, 22 July 2003) a violation of Article 7 has indeed been found where a heavier penalty has been imposed retrospectively. But none of these cases seem to me to be directly, or even indirectly, applicable to the circumstance of recidivism and the applicant's situation, the facts being completely different.

22. In short, while acknowledging the great importance of Article 7 of the Convention (from which, moreover, no derogation is permissible under Article 15) and of Article 8 of the Declaration of the Rights of Man and of the Citizen, I am unable to find that there has been a violation of the Convention in the present case, even from the point of view of legal certainty (on this point, I would refer to paragraph 15 above).