

AS TO THE ADMISSIBILITY OF

Application No. 33995/96  
by Francesca MAMBRO  
and Valerio FIORAVANTI  
against Italy

The European Commission of Human Rights (First Chamber) sitting in private on 9 September 1998, the following members being present:

MM M.P. PELLONPÄÄ, President  
N. BRATZA  
E. BUSUTTIL  
A. WEITZEL  
C.L. ROZAKIS  
Mrs J. LIDDY  
MM L. LOUCAIDES  
B. MARXER  
B. CONFORTI  
I. BÉKÉS  
G. RESS  
A. PERENIC  
C. BÎRSAN  
K. HERNDL  
M. VILA AMIGÓ  
Mrs M. HION  
Mr R. NICOLINI  
  
Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 21 August 1996 by Francesca MAMBRO and Valerio FIORAVANTI against Italy and registered on 27 November 1996 under file No. 33995/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

## THE FACTS

The applicants are two Italian nationals, a woman (hereinafter referred to as "M") and a man (hereinafter referred to as "F"), born in 1959 and in 1958 respectively. They are married. The applicants are currently detained in the prison of Rebibbia, in Rome, where they are serving several life imprisonment sentences. They are represented before the Commission by Mrs Ambra Giovene, a lawyer practising in Rome.

The applicants are among the founders of the "revolutionary armed nuclei" ("nuclei armati rivoluzionari" or "NAR"), one of the most famous Italian extreme-right terrorist organizations, mainly active in the seventies and responsible for a number of crimes, including murders and robberies.

The facts of the present case may be summarized as follows.

On 2 August 1980, at 10.25 a.m., a bomb exploded in Bologna train station causing 85 deaths and injuring about 200 persons.

### The investigation

The extremely complex investigation covered three distinct aspects: the main event, i.e. the explosion of the bomb in Bologna, the so-called "sidetracking operation" (il depistaggio) involving corrupt elements of the Italian secret services (servizi segreti deviati), and the alleged existence of a widespread subversive organization (organizzazione sovversiva) planning to control political life in the country (the planting of the bomb was thought to be part of such a plan to spread terror throughout the country and destabilize the political system).

On 19 September 1980 the Bologna Public Prosecutor's Office issued a warrant of arrest against F and six others on the charge of "aggravated conspiracy to cause subversion" (associazione sovversiva aggravata) and of belonging to an armed association; the grounds for ordering the arrest were some documents seized in Rome and some testimony which were kept secret for reasons of security.

On 11 April 1981 M. S. (hereinafter referred to as "X") a petty criminal who had been arrested for robbery and possession of firearms and explosives, while being questioned before the Rome District Court during investigation, stated that he had met the applicants in Rome two days after the explosion of the bomb (i.e. on 4 August), that F had introduced him to M and asked him for forged identity documents: a driving licence and an identity card. X further stated that he gave such documents to F the morning after (5 August). X added that F said to him "did you see the explosion!!!" ("hai visto che botto!!!") and that he also told him that he had passed through Bologna disguised as a German tourist whereas M, who had not been disguised, was afraid that she would be identified and so had later dyed her hair.

X was further examined, as a witness, on 13 May 1981 and on 27 July 1981 respectively, and basically confirmed his earlier statements. On 5 May 1982 X was questioned as an accused, whereupon gave a different version of the events: he stated that he was no longer sure that he had met the applicants on 4 August and that, in fact, he might have met them in September.

On 25 November 1981 the Public Prosecutor requested the investigating judge (giudice istruttore) of the Bologna District Court to issue a warrant of arrest for murder (strage) against the applicants, the ground for the request being mainly the statements made by X.

On 12 January 1982 the investigating judge rejected the request for a warrant of arrest to be issued against the applicants for the crime of murder, the evidence gathered so far not constituting a sufficient basis for such a measure.

On 25 January 1982 the Public Prosecutor appealed the above decision to the Bologna Court of Appeal.

On 22 April 1982 the Bologna Court of Appeal granted the appeal. This decision was further appealed by the applicants (both of whom had been arrested in the meantime - see below -) before the Court of Cassation which, on 13 December 1982, rejected the appeal and remitted the case to the Court of Appeal.

On 24 March 1983 the Preliminary Investigations Office attached to the Bologna Court of Appeal issued an arrest warrant against the applicants for murder and belonging to an armed association.

However, F had already been arrested in February 1981 (several arrest warrants having previously been issued against him on various charges). M was arrested in March 1982 (she also being already wanted by the police also in relation to other offenses).

On 14 May 1986 the Public Prosecutor requested that the applicants, together with 16 co-accused, be committed for trial.

On 14 June 1986 the investigating judge declared that the investigation was closed and ordered the applicants to be committed for trial and kept in detention on remand pending trial for the relevant crimes (murder, membership of an armed association and some minor related crimes).

#### The proceedings

On 19 January 1987 the proceedings against the applicant on charges of murder and belonging to an armed association started before the Bologna Assize Court.

On 30 September 1987 the Bologna Assize Court questioned X who confirmed his first version of events, i.e. that he had met the applicants on 4 August 1980. As

regards the fact that he had given a different account on 5 May 1982, he alleged that this was due to the threats to which he had been subject.

On 11 July 1988 the Bologna Assize Court sentenced the applicants to life imprisonment with one year's day-time solitary confinement for the multiple murder. The court further sentenced M and F to 15 and 16 years' imprisonment respectively for belonging to an armed association. The court based its decision on the following factors:

- i) the statements made by X both during the investigation and at the hearing held on 30 September 1987, namely that he had met the applicants on 4 August 1984 as stated in his first three depositions;
- ii) the lack of a convincing alibi. For the days preceding 5 August 1980, when the applicants committed a robbery in Rome, there was no objective evidence of their whereabouts and activities. The applicants had always stated that they had spent those first days of August in Treviso, where they were housed in a girlfriend's apartment. This woman, F.S., confirmed their alibi. F.S.'s mother stated that the applicants had been there but that she could not be sure about the dates. The applicants maintained that they had spent the morning of 2 August 1980 in Padua with two friends (who were also involved in the "NAR"). There were minor inconsistencies between these persons' (the applicants and their two friends) versions of what exactly they had done that day, the colour of the car which they had used to go to Padua etc.
- iii) a telephone call made by L.C., a member of the "NAR", on 1 August 1980. L.C. telephoned a friend of his girlfriend and postponed a journey to Venice planned for the day after, 2 August, because there would be "problems". The court found that L.C. knew about the bomb that would explode the day after and that he decided to postpone his trip to Venice precisely for this reason;
- iv) the involvement of the applicants in the killing of another terrorist (hereinafter referred to as "Y"). This person had been referred to in a leaflet spread by the extreme-right group "terza posizione" as the 86th victim of the Bologna massacre.
- v) the presence at Bologna train station on the morning of 2 August 1980 of S.P., a minor criminal who was held to be linked, although in an unspecified manner, with the extreme-right groups.

The applicants filed an appeal with the Bologna Assize Court of Appeal, the main ground for the appeal being that the only evidence against them was the statements made by X, all the other elements on which the court had based its conviction being merely argumentative and speculative, with no factual basis. As for the statements made by X, the applicants stressed that their accuser was contradicted by at least two persons, his wife and the housekeeper, who had stated that he could not have been in Rome on the day when he had allegedly met F since he was with them on holiday at the seaside and had not left. The applicants asked for a retrial.

The appeal proceedings started on 25 October 1989. The Bologna Assize Court of Appeal granted the applicants' request for a retrial: eighty hearings were held.

On 18 July 1990 the Bologna Assize Court of Appeal quashed the previous judgment as regards the applicants' role in planting the bomb, but nevertheless sentenced M and F respectively to 12 and 13 years' imprisonment for belonging to an armed association. The applicants were acquitted on the main charge on the ground that they had not committed the crime (*per non aver commesso il fatto*). The Bologna Assize Court of Appeal held that the circumstantial evidence on which the lower court had based its judgment was ambiguous and ambivalent: all the elements were capable of several different interpretations. The results not being conclusive as to the applicants' guilt or innocence, the court considered that the applicants should be acquitted on the ground of reasonable doubt.

The Public Prosecutor filed an appeal with the Court of Cassation against the above judgment. On 4 February 1992 the Court of Cassation quashed the decision under appeal for deficiencies and flaws in the reasoning applied to assess the circumstantial evidence. The Court of Cassation remitted the case to the Bologna Assize Court of Appeal.

The proceedings before the Bologna Assize Court of Appeal started on 10 October 1993. The court ordered a partial retrial: fifty-seven hearings were held.

By an ordinance issued on 23 December 1993 the Bologna Assize Court of Appeal rejected the applicants' requests to call as witnesses X's wife, her housekeeper and F.S. (the woman who had allegedly housed the applicants in Treviso during the first days of August 1980) on the ground that those persons had already testified on a number of occasions and that the applicants had not submitted any new grounds for re-calling them. The court also rejected the applicants' request to call as a witness the former President of the Republic, Francesco Cossiga, on the ground that the statements of a general character which he had made during certain interviews, on which he was to be questioned at the trial would not be relevant in establishing the applicants' liability for the crime of which they were accused. The court finally rejected the applicants' request to have X's criminal and medical records examined on the ground that these documents could not add any relevant evidence.

By a judgment delivered on 16 May 1994 the Bologna Assize Court of Appeal held again the applicants guilty of the massacre. The judgment stated that the circumstantial evidence as a whole, and in particular its four main elements - the statements of X, the lack of a convincing alibi, the telephone call made by L.C. and the motive for the murder of Y -, was unambiguous and proved beyond reasonable doubt that the applicants were guilty of the massacre of 2 August 1980.

On an unspecified date the applicants filed a further appeal with the Court of Cassation. On 23 November 1995 the court dismissed the appeal, finding that the Assize Court of Appeal's assessment of the evidence was not open to criticism in terms of the

statements of grounds. The decision was filed with the court registry on 23 February 1996.

## COMPLAINTS

1. The applicants complain that they did not have a fair trial before the Italian courts. They allege violations of paragraphs 1, 2, 3 (b) and 3 (d) of Article 6 of the Convention.

a) They assert in the first place that the judges accepted the testimony of a witness who was not credible and that they incorrectly assessed the circumstantial evidence before them. In particular, they submit:

i) that their requests for further investigation of the statements made by X were refused; the confrontation they requested between X and his wife and the housekeeper, who had refuted his testimony, was never arranged;

ii) that a confrontation between two other defence witnesses, F.S. (the woman who housed the applicants in Treviso and who confirmed their presence there on 2 August) and her mother (who stated that she could not clearly recall when the applicants had been in her daughter's apartment) was never arranged;

iii) that the Bologna Assize Court of Appeal refused to examine X's criminal records, which would have helped to clarify his personality and would have cast doubt on his reliability as a witness. The same court also refused to examine X's medical records which contained an entry for 1982 stating that X had an incurable cancer and should therefore be released on health grounds. X being still perfectly healthy about 16 years later, the applicants intended to demonstrate that he had been given a forged health certificate allowing him to leave prison in exchange for his testimony;

iv) that the Bologna Assize Court of Appeal did not grant the applicants' request for the former President of the Republic, Francesco Cossiga, who had stated in several interviews that he had been deceived by the Secret Services about the fascists' responsibility in the massacre, to be called as a witness.

b) The applicants also complain of the extreme disparity of financial and material resources between the prosecution and the defence. They allege that they could not afford to have copies of all the documents - amounting to approximately 300,000 pages - examined in the course of the proceedings.

c) The applicants further complain about the extreme "politicization" of the proceedings which had been considered, and depicted by politicians and the media as "the trial of the fascists". They allege that judges and politicians frequently released interviews prior to the trial, asserting that the applicants were responsible for the massacre.

2. The applicants complain, finally, that X has never been tried for the forgery of the documents he said he had given the applicants and that the privileges he is granted as a pentito (criminal turned prosecution witness) were not revoked even when he was later arrested twice for further crimes. The applicants allege that none of the pentiti who had accused right-wing extremists in the context of the events in Bologna were ever prosecuted for defamation even when it was later proved that the accusations were false, which created a climate of "impunity" encouraging anyone who wished to obtain the benefits granted by Italian law to pentiti to testify against them.

## THE LAW

1. The applicants complain that they did not have a fair trial before the Italian courts. They allege violations of paragraphs 1, 2, 3 (b) and 3 (d) of Article 6 of the Convention.

They complain in particular of the weight given to the statements of their main accuser X, of the failure of the courts to arrange confrontations between some of the defence witnesses and to call a witness for the defence, of the courts' failure to admit certain evidence, of the disparity of resources between the prosecution and the defence and of the politicization of the trial and the prejudicial influence of the media.

Paragraphs 1, 2, 3 (b) and 3 (d) of Article 6, insofar as relevant, read as follows:

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(b) to have adequate time and facilities for the preparation of his defence; ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

The Commission first recalls that the requirements of para. 3 of Article 6 are specific aspects of the general concept of a fair hearing guaranteed in para. 1 of the same article (cf., e.g., Eur. Court HR, *F.C.B. v. Italy* judgment of 28 August 1991, Series A no. 208-B, p. 20, para. 29).

The Commission also recalls that the question of the admissibility of evidence and of its probative value is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them, as well as the evidence which the accused seeks to adduce (see Eur. Court HR, *Edwards v. the United*

Kingdom judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, para. 34; Windisch v. Austria judgment of 27 September 1990, Series A no. 186, p. 120, para. 25).

It is true that the Commission has already observed that the use of statements made by pentiti can raise a certain number of delicate issues as, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages which Italian criminal law grants to pentiti or for personal revenge (see *mutatis mutandis* No. 27143/95, Dec. 14.1.97, D.R. 88, pp. 94-112).

However, the Commission's task in the present case is not to express a view as to whether all the relevant defence evidence was admitted and the prosecution evidence correctly assessed by the judges, but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see Eur. Court HR, Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 56, para. 43).

The Commission notes that in the present case the applicants provided the judges with all the information capable of casting doubt on their accuser's credibility. The Bologna courts examined the evidence before them thoroughly, and came to the conclusion that the statements made by X were convincing.

It is true that Bologna Assize Court of Appeal reached the opposite conclusion on 18 July 1990 and quashed the first-instance judgment holding the applicants not guilty of the killings on the ground that the evidence was ambiguous and ambivalent.

Nevertheless, two further judgments (the Bologna Assize Court of Appeal judgment of 16 May 1994 and the Court of Cassation judgment of 23 November 1995) held that the evidence gathered was convincing as to the applicant's guilt in planting the bomb. In particular the Bologna Assize Court of Appeal, in the judgment delivered on 16 May 1994, stated that the circumstantial evidence as a whole, and in particular its four main elements (the statements made by X, the telephone call made by L.C., the lack of a convincing alibi and the motive for the killing of Y), were unambiguous and proved beyond any reasonable doubt that the applicants were guilty of the massacre of 2 August 1980.

The Commission notes that the Court of Cassation analyzed thoroughly and in detail all of the applicants' complaints, addressing the issues of the credibility of the main prosecution witness and of the assessment of evidence by the lower courts, and concluded that the latter had not overstepped the bounds of their discretion as to the assessment of evidence or made arbitrary finding of fact.

The Commission does not find these conclusions arbitrary or otherwise unfair.

The applicants further complain of the failure of the courts to arrange confrontations between some of the defence witnesses and to call a witness for the defence.

The Commission recalls that, as a general rule, it is for the national courts to assess the evidence before them and the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 para. 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses; it does not require the attendance and examination of every witness on the accused's behalf (see, among other, Eur. Court HR, Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43; No. 17265/90, Dec. 21.10.93, D.R. 75, p. 76).

The Commission notes that in the present case, the Bologna Assize Court of Appeal rejected the requests for confrontations to be arranged between certain defence witnesses on the ground that these persons had already testified on a number of occasions and that the applicants had not submitted any new grounds to justify re-calling them or confronting them with one another. The Commission also notes that this court did not grant the request to call a former President of the Republic as a defence witness, on the ground that the statements of a general character he had made during certain interviews and on which he was to be questioned in court would not have been relevant in establishing the applicants' guilt or innocence of the crime of which they were accused. The Commission finally notes that the same court rejected the applicants' requests that documents such as X's criminal and medical records be examined, on the ground that they could not add any new relevant evidence.

The Commission takes the view that, having regard to the reasons set out therein, the Bologna Assize Court of Appeal decisions were not arbitrary insofar as the applicants had failed to demonstrate the relevance of additional evidence which they were seeking.

In conclusion, the Commission considers that an examination of the proceedings as a whole does not disclose that the applicants were deprived of a fair hearing within the meaning of Article 6 of the Convention in respect of the gathering and taking of evidence.

The applicants further complain about the disparity of financial and material resources between the prosecution and the defence. The Commission first notes that the particular circumstances of this case imply that there were a high number of persons claiming damages as a civil parties to the criminal proceedings since the bomb which the applicants were accused of planting had killed 85 persons and injured 200 others. The mere fact that the parties claiming damages, considered together, disposed of greater financial means than the applicants does not in itself raise an issue under the Convention provided that the rights of the defence were respected.

Insofar as this complaint could raise an issue under Article 6 subparagraphs 3 (b) and (c), the Commission notes that in the present case the applicants were assisted by several lawyers during the whole course of the proceedings and that they appear to have had unlimited access to the case files. The Commission further notes that the applicants do not seem ever to have complained, in the various appeals they filed before the national

courts, about difficulties of access to files and documents due to their inability to pay the related costs.

The applicants further complain about the "politicization" of the trial which they say was influenced by a virulent press campaign and by statements made by the authorities. The applicants claim that even judges often released interviews pending the trial, asserting the applicants' guilt.

The Commission first recalls that it has already held in some cases that a virulent press campaign can adversely affect the fairness of a trial (see, for example, No. 13251/87, Dec. 6.3.91, D.R. 68, p. 137; No. 10486/83, Dec. 9.10.86, D.R. 49, pp. 86, 101.).

The Commission notes that the applicants' trial was discussed on a large scale by the Italian media. The Commission however observes that, considering the importance of the crime of which the applicant were accused, it was unavoidable that the media would repeatedly and thoroughly discuss the subject.

The Commission also observes that, considering the undoubted dangerousness of the applicants, who had already been convicted for murder and other serious crimes, the press and even the authorities responsible for crime policy, while they could be expected to refrain from statements about the guilt of the applicants, could not be so expected in relation to their dangerous character, where uncontested information was available to them (cf. *mutatis mutandis* Nos. 7572/76, 7586/76 and 7587/76 joined, Dec. 8.7.78, D.R. 14, pp. 64-112).

In this respect the Commission further observes that, on the basis of the materials submitted by the applicants, it appears that the press was not unanimous in considering the applicants guilty: both the press and public opinion appeared to have been divided between those who believed the applicants guilty and those who considered them innocent.

As regards the applicants' allegations that the judges trying the case made accusatory statements against them in public before the end of the proceedings, the Commission, in the light of the material submitted by the applicants, considers that they are unsubstantiated.

The Commission, in these circumstances, finds it impossible to perceive any impairment of the fairness of the trial or any breach of the principle of presumption of innocence.

In the light of all the above considerations, the Commission finds that the applicants were not deprived of their right to a fair trial. It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicants complain, finally, that X has never been tried for the forgery of the documents he said he had given the applicants and that the privileges he is granted as a pentito were not revoked even when he was later arrested twice for further crimes.

The Commission recalls its established case-law according to which the right of access to a Court afforded by Article 6 para. 1 does not include a right to have criminal proceedings instituted against a third person (No. 7116/75, Dec. 4.10.76, D.R. 7, p. 91; No. 9777/82, Dec. 14.7.83, D.R. 34, p. 158).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 27 para. 2.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO  
Secretary  
to the First Chamber

M.P. PELLONPÄÄ  
President  
of the First Chamber