



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

COURT (CHAMBER)

CASE OF FUNKE v. FRANCE

(Application no. 10828/84)

JUDGMENT

STRASBOURG

25 February 1993

In the case of Funke v. France*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")*** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr Thór VILHJÁLMSSON,

Mr F. MATSCHER,

Mr L.-E. PETTITI,

Mr C. RUSSO,

Mr N. VALTICOS,

Mr J.M. MORENILLA,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 September 1992 and 27 January 1993,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10828/84) against the French Republic lodged with the Commission under Article 25 (art. 25) by a German national, Mr Jean-Gustave Funke, on 13 February 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 2 and Article 8 (art. 6-1, art. 6-2, art. 8).

* The case is numbered 82/1991/334/407. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

*** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mrs Ruth Funke, née Monney, who, as Mr Funke's widow, had continued the proceedings before the Commission, stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). For reasons of convenience Mr Funke will continue to be referred to as "the applicant" although it is now Mrs Funke who is to be regarded as having this status (see, among other authorities, *mutatis mutandis*, the Giancarlo Lombardo v. Italy judgment of 26 November 1992, Series A no. 249-C, p. 39, para. 2).

3. On 24 January 1992 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of *Crémieux and Mialhe v. France**.

* Cases nos. 83/1991/335/408 and 86/1991/338/411.

The Chamber to be constituted for this purpose included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On the same day, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsón, Mr F. Matscher, Mr C. Russo, Mr N. Valticos, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 11 June 1992 and the Government's memorial on 19 June. On 17 July the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 24 July the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 September 1992. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 para. 5, second subparagraph).

There appeared before the Court:

- for the Government

Mr B. GAIN, Head of the Human Rights Section,

Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Miss M. PICARD, magistrat,

on secondment to the Department of Legal Affairs, Ministry of

Foreign Affairs,
 Mr J. CARRÈRE, magistrat,
 on secondment to the Department of Criminal Affairs and
 Pardons, Ministry of Justice,
 Mrs C. SIGNERINICRE, Head
 of the Legal Affairs Office, Department of Customs, Ministry of
 the Budget,
 Mrs R. CODEVELLE, Inspector of Customs,
 Department of Customs, Ministry of the Budget,
 Mr G. ROTUREAU, Chief Inspector of Customs,
 Strasbourg Regional Head Office of Customs, *Counsel*;
 - for the Commission
 Mr S. TRECHSEL, *Delegate*;
 - for the applicant
 Mr R. GARNON, avocat, *Counsel*.
 The Court heard addresses by Mr Gain for the Government, Mr Trechsel
 for the Commission and Mr Garnon for the applicant.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Jean-Gustave Funke, a German national, was born in 1925 and died on 22 July 1987. He worked as a sales representative and lived in France, at Lingolsheim (Bas-Rhin). His widow, Mrs Ruth Funke, née Monney, is French and lives in Strasbourg.

A. The house search and the seizures

7. On 14 January 1980 three Strasbourg customs officers, accompanied by a senior police officer (officier de police judiciaire), went to the house of the applicant and his wife to obtain "particulars of their assets abroad"; they were acting on information received from the tax authorities in Metz.

Mr Funke admitted having, or having had, several bank accounts abroad for professional and family reasons and said that he did not have any bank statements at his home.

The customs officers searched the premises from 10.30 a.m. to 3.00 p.m., and discovered statements and cheque-books from foreign banks, together with a German car-repair bill and two cameras. They seized all these items and on the same day drew up a report.

B. The court proceedings

8. The customs officers' search and the seizures did not lead to any criminal proceedings for offences against the regulations governing financial dealings with foreign countries. They did, however, give rise to parallel proceedings for disclosure of documents and for interim orders.

1. The proceedings for disclosure of documents (14 January 1980 - 18 December 1990)

(a) The main proceedings

9. During their search on 14 January 1980 the customs officers asked the applicant to produce the statements for the previous three years - that is to say 1977, 1978 and 1979 - of his accounts at the Postsparkasse in Munich, the PKO in Warsaw, the Société de Banque suisse in Basle and the Deutsche Bank in Kehl and of his house-purchase savings plan at the Württembergische Bausparkasse in Leonberg and, lastly, his share portfolio at the Deutsche Bank in Kehl.

10. Mr Funke undertook to do so but later changed his mind.

(i) In the Strasbourg police court

11. On 3 May 1982 the customs authorities summoned him before the Strasbourg police court seeking to have him sentenced to a fine (amende) and a further penalty (astreinte) of 50 French francs (FRF) a day until such time as he produced the bank statements; they also made an application to have him committed to prison.

12. On 27 September 1982 the court imposed a fine of FRF 1,200 on the applicant and ordered him to produce to the customs authorities the bank statements of his accounts at the Société de Banque suisse in Basle, the PKO in Warsaw and the Deutsche Bank in Kehl and of his savings account at the Württembergische Bausparkasse in Leonberg and all documents concerning the financing of the flat he had bought at Schonach (Federal Republic of Germany), on penalty of FRF 20 per day's delay.

The reasons given for its judgment were the following:

"...

On 12.2.1980 Mr Funke told the Customs Service that he was unable to make available the documents that he had undertaken to produce.

He has provided no reason for this and has submitted no correspondence that would show he took the necessary steps to obtain the required documents or would prove that the foreign banks refused to supply him with any such document.

Mr Funke acknowledged that, together with his brother, he bought a bedsitter at Schonach (Federal Republic of Germany) and produced photocopies of the contract of

sale and of the entry in the land register; but he refused to produce documents concerning the financing of the purchase.

Article 65 of the Customs Code provides: 'Customs officers with the rank of at least inspector ... may require production of papers and documents of any kind relating to operations of interest to their department'.

It appears from the present proceedings taken by the customs authorities that the prosecuting officer has the rank of inspector.

The documents sought, namely the bank statements and the documents relating to the financing of the purchase of the flat, can be brought within the category of documents covered by Article 65 of the Customs Code.

The same Article 65 provides in paragraph 1(i) that such requests for production may be made 'on the premises of (chez) any natural or legal person directly or indirectly concerned in lawful or unlawful operations falling within the jurisdiction of the Customs Service'.

In this context the term 'chez' must not be restricted to 'at the home of' (au domicile de) but must be construed as meaning 'wherever ... may be' (auprès de).

Any other construction would enable the person concerned to evade the Customs Service's investigations by keeping any compromising papers elsewhere than at his home.

The house search and Mr Funke's own statements provided sufficient evidence that there were bank accounts and financing operations concerning the defendant to enable the Customs Service to exercise their right of inspection in relation to the relevant documents notwithstanding that these were not at Mr Funke's home.

As the holder of an account used abroad, Mr Funke, like any account-holder, must receive statements following any transaction on the account. A statement is an extension, a reflection of the situation, of an account at a given time. The holder of the account is the owner of his statements and may at any time ask for them from his bank, which cannot refuse them."

(ii) In the Colmar Court of Appeal

13. Appeals were brought by Mr Funke, the public prosecutor and the customs authorities. On 14 March 1983 the Colmar Court of Appeal upheld the judgment of the court below other than as regards the inspection of documents relating to the flat at Schonach, and increased the pecuniary penalty to FRF 50 per day's delay.

It dealt with Mr Funke's argument based on the Convention as follows:

"Article 413 bis of the Customs Code, which applies to financial dealings with foreign countries by virtue of Article 451 of the same code, makes any refusal to produce documents and any concealment of documents in the cases provided for, *inter alia*, in Article 65 of the aforementioned code punishable by imprisonment for a period ranging from ten days to one month and a fine of FRF 400 to 2,000.

Under Article 65, customs officers may require production of documents of any kind relating to operations of interest to their department, in general, on the premises of any natural or legal person directly or indirectly concerned in lawful or unlawful operations falling within the jurisdiction of the Customs Service.

In the instant case Funke is liable only to a fiscal penalty: to a fine, therefore.

It does not appear that the power conferred by the aforementioned provisions on a revenue authority conflicts with the protection of human rights and fundamental freedoms which it is the purpose of the instrument of international law relied on to guarantee.

The defendant had a fair hearing.

Obviously, no offences which performance of the duty to produce documents may disclose are yet before the courts; that being so, Funke's objections of principle are premature.

Moreover, while everyone charged with a criminal offence is to be presumed innocent until proved guilty according to law, Article 6 para. 2 (art. 6-2) of the Convention does not otherwise restrict the type of evidence which the *lex fori* places at the disposal of the prosecuting party in order to satisfy the court.

Lastly, the obligation on a defendant to produce in proceedings evidence likely to be used against him by the opposing side is not a special feature of customs or tax proceedings since it is enacted in Article 11 of the New Code of Civil Procedure likewise.

On the other hand, while Article 8 (art. 8) of the Convention provides that everyone has the right to respect for his private life and his correspondence, there may be interference by a public authority with the exercise of this right so long as it is in accordance with the law and amounts to a measure which is necessary in a democratic society, *inter alia* in the interests of the economic well-being of the country or for the prevention of disorder or crime.

In most of the countries signatories to the Convention, moreover, the customs and revenue authorities have a right of direct investigation in banks."

(iii) In the Court of Cassation

14. On 21 November 1983 the Court of Cassation (Criminal Division) dismissed an appeal on points of law by Mr Funke. The third and final ground, in which Articles 6 and 8 (art. 6, art. 8) of the Convention were prayed in aid, was rejected in the following terms:

"The Court of Appeal held that, while everyone charged with a criminal offence was to be presumed innocent until proved guilty according to law, Article 6 (art. 6) of the Convention ... did not otherwise restrict the types of evidence that the *lex fori* placed at the disposal of the prosecuting party in order to satisfy the court; and that while it was true that Article 8 (art. 8) of the Convention provided that everyone has the right to respect for his private life and his correspondence, there might ... be interference by a public authority with the exercise of this right so long as the interference was in

accordance with the law and amounted to a measure which was necessary in a democratic society, inter alia in the interests of the economic well-being of the country or for the prevention of disorder or crime.

In so stating, and irrespective of any superfluous reasoning, the Court of Appeal justified its decision and the ground therefore cannot be upheld."

(b) The proceedings to enforce the customs penalty

15. In a report on 30 May 1984 the customs authorities noted Mr Funke's refusal to comply with the Colmar Court of Appeal's judgment of 14 March 1983 (see paragraph 13 above).

On 2 January 1985 they served a garnishee notice on the applicant's bank requiring it to pay a sum of FRF 10,750, representing the amount of the penalties owed by its customer for the period from 31 May to 31 December 1984.

(i) In the Strasbourg District Court

16. On an application by Mr Funke, the Strasbourg District Court upheld the notice in question on 27 March 1985, holding that the customs authorities were entitled to recover the sum owed in respect of a pecuniary penalty resulting from an enforceable court decision in the same way as a customs fine and notwithstanding that an application (which did not have any suspensive effect) had been made to the European Commission of Human Rights.

(ii) In the Colmar Court of Appeal

17. On an appeal by Mr Funke, the Colmar Court of Appeal delivered a judgment on 20 February 1989 reversing the lower court's judgment of 27 March 1985 and quashing the garnishee notice.

(iii) In the Court of Cassation

18. An appeal on points of law by the customs authorities was dismissed by the Court of Cassation on 18 December 1990. Like the Court of Appeal, the Court of Cassation held that the amount of the customs penalty could not be recovered by means of a garnishee notice.

19. Following this judgment, the customs authorities made no further attempt to collect payment of the penalty in question.

2. *The proceedings relating to interim orders (16 April 1982 - July 1990)*

(a) Making of the orders

(i) In the Strasbourg District Court

20. On 16 April 1982 the customs authorities applied for an order from the presiding judge of the Strasbourg District Court for attachment of Mr Funke's movable and immovable property to the value of FRF 100,220. Half of this sum was to be in lieu of confiscation of the undeclared funds, while the other half corresponded to the fine payable. Relying on Article 341 bis-1 (see paragraph 32 below) and Article 459 of the Customs Code, the customs authorities stated that they already had a definite right to payment from the applicant. The documents seized at Lingolsheim showed that he had contravened Article 1 of the decree of 24 November 1968, which provided that any payment made abroad by persons resident in France had to be effected through an approved intermediary (bank or post office) established in France.

21. The District Court made an order granting the application on 21 April 1982.

On 26 May 1982 it delivered a judgment dismissing an objection lodged by Mr Funke (Article 924 of the local Code of Civil Procedure).

(ii) In the Colmar Court of Appeal

22. On 28 July 1982 the Colmar Court of Appeal dismissed Mr Funke's appeal against that judgment, holding that unless attachment orders were granted, it was to be feared that enforcement of the decision to be expected in the criminal trial would become impossible or much more difficult; furthermore, the creditor had made his claim credible by producing reports (Articles 917 and 920 of the local Code of Civil Procedure).

23. The applicant did not appeal on points of law.

(b) Discharge of the orders

24. On 22 November 1989 Mrs Funke made an application for discharge of the attachment order (Article 926 of the local Code of Civil Procedure); by this means she wanted to compel the customs authorities to bring to trial the issue of the existence of the right to payment which had provided the justification for the attachment order. She also sought leave to sell a property.

25. In an order made on 31 May 1990 the Strasbourg District Court gave the Director-General of Customs one month in which to bring proceedings on the merits.

The customs authorities decided not to do so and in July 1990 agreed to the discharge of the attachment orders and of the associated mortgage.

II. RELEVANT CUSTOMS LAW

26. The criminal provisions of customs law in France are treated as a special body of criminal law.

A. Establishment of offences

1. Officials authorised to establish offences

27. Two provisions of the Customs Code are relevant as regards these officials:

Article 453

"The officials designated below shall be empowered to establish offences against the legislation and regulations governing financial dealings with foreign countries:

1. customs officers;
2. other officials of the Ministry of Finance with the rank of at least inspector;
3. senior police officers (officiers de police judiciaire).

The reports made by senior police officers shall be forwarded to the Minister for Economic Affairs and Finance, who shall refer cases to the prosecuting authorities if he thinks fit."

Article 454

"The officials referred to in the preceding Article shall be empowered to carry out house searches in any place as provided in Article 64 of this code."

2. House searches

(a) The rules applicable at the material time

28. When the house search was made (14 January 1980), Article 64 of the Customs Code was worded as follows:

"1. When searching for goods held unlawfully within the customs territory, except for built-up areas with a population of at least 2,000, and when searching in any place for goods subject to the provisions of Article 215 hereinafter, customs officers may make house searches if accompanied by a local municipal officer or a senior police officer (officier de police judiciaire).

2. In no case may such searches be made during the night.

3. Customs officers may act without the assistance of a local municipal officer or a senior police officer

(a) in order to make searches, livestock counts, and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officials may force an entry in the presence of a local municipal officer or a senior police officer."

(b) The rules applicable later

29. The Budget Acts of 30 December 1986 (section 80-I and II) and 29 December 1989 (section 108-III, 1 to 3) amended Article 64, which now provides:

"1. In order to investigate and establish the customs offences referred to in Articles 414-429 and 459 of this code, customs officers authorised for the purpose by the Director- General of Customs and Excise may make searches of all premises, even private ones, where goods and documents relating to such offences are likely to be held and may seize them. They shall be accompanied by a senior police officer (officier de police judiciaire).

2. (a) Other than in the case of a flagrant offence (flagrant délit), every search must be authorised by an order of the President of the tribunal de grande instance of the locality in which the customs headquarters responsible for the department in charge of the proceedings is situated, or a judge delegated by him.

Against such an order there shall lie only an appeal on points of law as provided in the Code of Criminal Procedure; such an appeal shall not have a suspensive effect. The time within which an appeal on points of law must be brought shall run from the date of notification or service of the order.

The order shall contain:

(i) where applicable, a mention of the delegation by the President of the tribunal de grande instance;

(ii) the address of the premises to be searched;

(iii) the name and position of the authorised official who has sought and obtained leave to make the searches.

The judge shall give reasons for his decision by setting out the matters of fact and law that he has accepted and which create a presumption in the case that there have been unlawful activities of which proof is sought.

If, during the search, the authorised officials discover the existence of a bank strongbox which belongs to the person occupying the premises searched and in which documents, goods or other items relating to the activities referred to in paragraph 1 above are likely to be found, they may, with leave given by any means by the judge who made the original order, immediately search the strongbox. Such leave shall be mentioned in the report provided for in paragraph 2(b) below.

The judge shall take practical steps to check that each application for leave made to him is well-founded; each application shall contain all information in the possession of the customs authorities that may justify the search.

He shall designate the senior police officer responsible for being present at the operations and keeping him informed of their progress.

The search shall be carried out under the supervision of the judge who has authorised it. Where it takes place outside the territorial jurisdiction of his tribunal de grande instance, he shall issue a rogatory letter, for the purposes of such supervision, to the President of the tribunal de grande instance in the jurisdiction of which the search is being made.

The judge may go to the scene during the operation.

He may decide at any time to suspend or halt the search.

The judicial order shall be notified orally to the occupier of the premises or his representative on the spot at the time of the search, who shall receive a complete copy against acknowledgement of receipt or signature in the report provided for in paragraph 2(b) below. If the occupier of the premises or his representative is absent, the judicial order shall be notified after the search by means of a registered letter with recorded delivery. Notification shall be deemed to have been made on the date of receipt entered in the record of delivery.

Failing receipt, the order shall be served as provided in Articles 550 et seq. of the Code of Criminal Procedure.

The time-limits and procedures for appeal shall be indicated on notification and service documents.

(b) Searches may not be commenced before 6 a.m. or after 9 p.m. They shall be made in the presence of the occupier of the premises or his representative; if this is impossible, the senior police officer shall requisition two witnesses chosen from persons not under his authority or that of the customs.

Only the customs officers mentioned in paragraph 1 above, the occupier of the premises or his representative and the senior police officer may inspect documents before they are seized.

The senior police officer shall ensure that professional confidentiality and the rights of the defence are respected in accordance with the provisions of the third paragraph of Article 56 of the Code of Criminal Procedure; Article 58 of that code shall apply.

The report, to which shall be appended an inventory of the goods and documents seized, shall be signed by the customs officers, the senior police officer and the persons mentioned in the first sub-paragraph of this section (b); in the event of a refusal to sign, mention of that fact shall be made in the report.

Where an on-the-spot inventory presents difficulties, the documents seized shall be placed under seal. The occupier of the premises or his representative shall be informed that he may be present at the removal of the seals, which shall take place in the presence of the senior police officer; the inventory shall then be made.

A copy of the report and of the inventory shall be given to the occupier of the premises or his representative.

A copy of the report and the inventory shall be sent to the judge who made the order within three days of its being drawn up.

3. Customs officers may act without the assistance of a senior police officer

(a) in order to make searches, livestock counts and inspections at the homes of holders of livestock accounts or owners of rights of pasture; and

(b) in order to look for goods which, having been followed and kept under uninterrupted surveillance as provided in Article 332 hereinafter, have been taken into a house or other building, even if situated outside the customs zone.

4. If entry is refused, customs officers may force an entry in the presence of a senior police officer."

3. Production of documents

(a) The duty

30. Article 65-1 of the Customs Code gives the customs authorities a special right of inspection:

"Customs officers with the rank of at least inspector (inspecteur or officier) and those performing the duties of collector may require production of papers and documents of any kind relating to operations of interest to their department;

...

(i) ... in general, on the premises of any natural or legal person directly or indirectly concerned in lawful or unlawful operations falling within the jurisdiction of the Customs Service."

(b) The sanction

31. Anyone refusing to produce documents is liable to imprisonment for a period ranging from ten days to one month and to a fine of FRF 600 to 3,000 (Article 413 bis-1 of the Customs Code).

Furthermore, a pecuniary penalty of not less than FRF 10 per day's delay may be imposed on him (Article 431) and he may be committed to prison for non-payment (Article 382).

4. Interim measures

32. Article 341 bis-1 of the Customs Code provides:

"Customs reports, where they are conclusive unless challenged as forgeries, shall be a warrant for obtaining, in accordance with the ordinary law, leave to take any necessary interim measures against persons liable in criminal or in civil law, for the purpose of securing customs debts of any kind appearing from the said reports."

B. Prosecution of offences

33. Article 458 of the Customs Code provides:

"Offences against the legislation and regulations governing financial dealings with foreign countries may be prosecuted only on a complaint by the Minister for Economic Affairs and Finance or one of his representatives authorised for the purpose."

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Funke applied to the Commission on 13 February 1984, raising several complaints. He claimed that his criminal conviction for refusal to produce the documents requested by the customs had violated his right to a fair trial (Article 6 para. 1 of the Convention) (art. 6-1) and disregarded the principle of presumption of innocence (Article 6 para. 2) (art. 6-2); that his case had not been heard within a reasonable time (Article 6 para. 1) (art. 6-1); and that the search and seizures effected at his home by customs officers had infringed his right to respect for his private and family life, his home and his correspondence (Article 8) (art. 8).

35. The Commission declared the application (no. 10828/84) admissible on 6 October 1988. In its report of 8 October 1991 (made under Article 31) (art. 31), the Commission expressed the opinion

(a) that there had been no breach of Article 6 para. 1 (art. 6-1) either as regards the principle of a fair trial (by seven votes to five) or on account of the length of the proceedings (by eight votes to four);

(b) that there had been no breach of Article 6 para. 2 (art. 6-2) (by nine votes to three); and

(c) that there had been no breach of Article 8 (art. 8) (by six votes to six, with the President's casting vote).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

36. In its memorial the Government asked the Court to "dismiss all the complaints brought by Mr Funke and taken up by Mrs Funke".

37. As to counsel for the applicant, he requested the Court to "find that there has been a breach of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2), Article 8 paras. 1 and 2 (art. 8-1, art. 8-2) and Article 13 (art. 13) of the Convention;

note that the applicant requests just satisfaction of FRF 300,000;

order the respondent State to pay the applicant the sum of FRF 125,000 by way of costs and expenses, plus VAT; and

order that all the sums shall produce interest at the statutory rate one month after delivery of the judgment".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 2 (art. 6-1, art. 6-2)

38. Mr Funke claimed to be the victim of breaches of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2), which provide:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

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

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 256-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

A. Fairness of the proceedings and presumption of innocence

1. The Government's preliminary objection

39. As they had done before the Commission, the Government raised an objection of inadmissibility for lack of victim status. No criminal proceedings, they said, had been taken against Mr Funke for contravening the regulations governing financial dealings with foreign countries, and his death on 22 July 1987 finally precluded any prosecution.

40. The Court notes that the applicant's complaints under Article 6 (art. 6) relate to quite different proceedings, those concerning the production of documents. The objection must therefore be dismissed.

2. Merits of the complaint

(a) Article 6 para. 1 (art. 6-1)

41. In the applicant's submission, his conviction for refusing to disclose the documents asked for by the customs (see paragraphs 9-14 above) had infringed his right to a fair trial as secured in Article 6 para. 1 (art. 6-1). He claimed that the authorities had violated the right not to give evidence against oneself, a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights, as although they had not lodged a complaint alleging an offence against the regulations governing financial dealings with foreign countries, they had brought criminal proceedings calculated to compel Mr Funke to co-operate in a prosecution mounted against him. Such a method of proceeding was, he said, all the more unacceptable as nothing prevented the French authorities from seeking international assistance and themselves obtaining the necessary evidence from the foreign States.

42. The Government emphasised the declaratory nature of the French customs and exchange-control regime, which saved taxpayers having their affairs systematically investigated but imposed duties in return, such as the duty to keep papers concerning their income and property for a certain length of time and to make them available to the authorities on request. This right of the State to inspect certain documents, which was strictly supervised by the Court of Cassation, did not mean that those concerned were obliged to incriminate themselves, a requirement that was prohibited by the United Nations Covenant (Article 14) and had been condemned by the Court of Justice of the European Communities (Orkem judgment of 18 October 1989, European Court Reports, 1989-9, pp. 3343-3354); it was not contrary to the guidelines laid down in the Convention institutions' case-law on what constituted a fair trial.

In the instant case the customs had not required Mr Funke to confess to an offence or to provide evidence of one himself; they had merely asked him to give particulars of evidence found by their officers and which he had admitted, namely the bank statements and cheque-books discovered during the house search. As to the courts, they had assessed, after adversarial proceedings, whether the customs' application was justified in law and in fact.

43. The Commission reached the same conclusion, mainly on the basis of the special features of investigation procedures in business and financial matters. It considered that neither the obligation to produce bank statements nor the imposition of pecuniary penalties offended the principle of a fair trial; the former was a reflection of the State's confidence in all its citizens in that no use was made of stricter supervisory measures, while responsibility for the detriment caused by the latter lay entirely with the person affected where he refused to co-operate with the authorities.

44. The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (see paragraphs 30-31 above) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.

There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

(b) Article 6 para. 2 (art. 6-2)

45. The foregoing conclusion makes it unnecessary for the Court to ascertain whether Mr Funke's conviction also contravened the principle of presumption of innocence.

B. Length of the proceedings

46. In view of the finding in paragraph 44 above, the Court considers it likewise unnecessary to examine the complaint that the proceedings relating to the making and discharge of the interim orders (see paragraphs 20-25 above) lasted for more than a "reasonable time" as required by Article 6 para. 1 (art. 6-1).

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

47. In the applicant's submission, the house search and seizures made in the instant case were in breach of Article 8 (art. 8), which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

48. The Government conceded that there had been an interference with Mr Funke's right to respect for his private life, and the Commission additionally found that there had been an interference with his right to respect for his home.

The Court considers that all the rights secured in Article 8 para. 1 (art. 8-1) are in issue, except for the right to respect for family life. It must accordingly be determined whether the interferences in question satisfied the conditions in paragraph 2 (art. 8-2).

A. "In accordance with the law"

49. The applicant contended that the interferences had no legal basis. As worded at the time, Article 64 of the Customs Code was, he claimed, contrary to the 1958 Constitution because it did not make house searches and seizures subject to judicial authorisation. Admittedly, its constitutionality could not be reviewed, since it had come into force before the Constitution had. Nevertheless, in the related field of taxation the Constitutional Council had rejected section 89 of the Budget Act for 1984, concerning the investigation of income-tax and turnover-tax offences, holding, *inter alia*:

"While the needs of the Revenue's work may dictate that tax officials should be authorised to make investigations in private places, such investigations can only be conducted in accordance with Article 66 of the Constitution, which makes the judiciary responsible for protecting the liberty of the individual in all its aspects, in particular the inviolability of the home. Provision must be made for judicial participation in order that the judiciary's responsibility and supervisory power may be maintained in their entirety." (Decision no. 83-164 DC of 29 December 1983, Official Gazette (Journal officiel), 30 December 1983, p. 3874)

50. The Government, whose arguments the Commission accepted in substance, maintained that in Article 64 of the Customs Code, as supplemented by a fairly substantial body of case-law, the power to search houses was defined very closely and represented a transposition to customs legislation and the regulations governing financial dealings with foreign countries of the power of search provided for in ordinary criminal procedure. Provision was first made for it in an Act of 6 August 1791 and subsequently in a legislative decree of 12 July 1934, and it had been widened in 1945 to cover investigations into exchange-control offences and

confirmed on several occasions. In the Government's submission, its constitutionality could not be put in doubt, any more than that of Article 454 of the same code, since review of the constitutionality of statutes took place between their enactment by Parliament and promulgation and was within the sole competence of the Constitutional Council, to the exclusion of all other courts.

As to the "quality" of the national legal rules vis-à-vis the Convention, it was ensured by the precision with which the legislation and case-law laid down the scope and manner of exercise of the relevant power, and this eliminated any risk of arbitrariness. Thus even before the reform of 1986-89 (see paragraph 29 above), the courts had supervised customs investigations ex post facto but very efficiently. And in any case, Article 8 (art. 8) of the Convention contained no requirement that house searches and seizures should be judicially authorised in advance.

51. The Court does not consider it necessary to determine the issue in this instance, as at all events the interferences complained of are incompatible with Article 8 (art. 8) in other respects (see paragraphs 57-59 below).

B. Legitimate aim

52. The Government and the Commission considered that the interferences in question were in the interests of "the economic well-being of the country" and "the prevention of crime".

Notwithstanding the applicant's arguments to the contrary, the Court is of the view that the interferences were in pursuit of at any rate the first of these legitimate aims.

C. "Necessary in a democratic society"

53. In Mr Funke's submission, the interferences could not be regarded as "necessary in a democratic society". Their scope was unlimited and they went well beyond what was required in the public interest, since they were not subject to judicial supervision; furthermore, they had not only taken place in the absence of any flagrant offence (flagrant délit), circumstantial evidence or presumption but had also been carried out in an improper manner.

54. The Government, whose contentions the Commission accepted in substance, argued that house searches and seizures were the only means available to the authorities for investigating offences against the legislation governing financial dealings with foreign countries and thus preventing the flight of capital and tax evasion. In such fields there was a corpus delicti only very rarely if at all; the "physical manifestation" of the offence therefore lay mainly in documents which a guilty party could easily conceal

or destroy. Such persons, however, had the benefit of substantial safeguards, strengthened by very rigorous judicial supervision: decision-making by the head of the customs district concerned, the rank of the officers authorised to establish offences, the presence of a senior police officer (*officier de police judiciaire*), the timing of searches, the preservation of lawyers' and doctors' professional secrecy, the possibility of invoking the liability of the public authorities, etc. In short, even before the reform of 1986-89, the French system had ensured that there was a proper balance between the requirements of law enforcement and the protection of the rights of the individual.

55. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 (art. 8-2) are to be interpreted narrowly (see the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 21, para. 42), and the need for them in a given case must be convincingly established.

56. Undoubtedly, in the field under consideration - the prevention of capital outflows and tax evasion - States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment, made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange-control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse (see, among other authorities and *mutatis mutandis*, the *Klass and Others* judgment previously cited, Series A no. 28, p. 23, para. 50).

57. This was not so in the instant case. At the material time - and the Court does not have to express an opinion on the legislative reforms of 1986 and 1989, which were designed to afford better protection for individuals (see paragraph 29 above) - the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government (see paragraph 54 above), appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued.

58. To these general considerations may be added a particular observation, namely that the customs authorities never lodged a complaint against Mr Funke alleging an offence against the regulations governing financial dealings with foreign countries (see paragraph 8 above).

59. In sum, there has been a breach of Article 8 (art. 8).

III. APPLICATION OF ARTICLE 50 (art. 50)

60. Under Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

61. Mr Funke sought, firstly, compensation in the amount of 300,000 French francs (FRF), on the ground that the breaches of the Convention had had a serious impact on his person and on that of his wife as well as on their private life.

The Government and the Delegate of the Commission expressed no opinion.

62. The Court considers that the applicant must have suffered non-pecuniary damage, for which the findings of violations in this judgment do not afford sufficient satisfaction. Making its assessment on an equitable basis as required by Article 50 (art. 50), it awards him FRF 50,000 under this head.

B. Costs and expenses

63. Mr Funke also sought reimbursement of the costs and expenses he had incurred in the French courts (FRF 90,000) and in the proceedings before the Convention institutions (FRF 35,000, plus VAT).

The Government and the Delegate of the Commission did not put forward any view on the issue.

64. Applying its usual criteria, the Court awards the applicant FRF 70,000.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;
2. Holds by eight votes to one that, for want of a fair trial, there has been a violation of Article 6 para. 1 (art. 6-1);

3. Holds by eight votes to one that it is unnecessary to consider the other complaints raised under Article 6 (art. 6);
4. Holds by eight votes to one that there has been a breach of Article 8 (art. 8);
5. Holds unanimously that the respondent State is to pay the applicant, within three months, 50,000 (fifty thousand) French francs for non-pecuniary damage and 70,000 (seventy thousand) francs for costs and expenses;
6. Dismisses unanimously the remainder of the applicant's claims.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 February 1993.

Rudolf BERNHARDT
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Thór Vilhjálmsson;
- (b) concurring opinion of Mr Matscher.

R.B.
M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

I have voted against the finding of a violation of Articles 6 and 8 (art. 6, art. 8) of the Convention in this case. My reasons are much the same as those set out by the majority of the Commission in its report.

CONCURRING OPINION OF JUDGE MATSCHER
CONCERNING PARAGRAPHS 41-44 OF THE JUDGMENT

(Translation)

Although I voted in favour of finding that there had been a violation of Article 6 para. 1 (art. 6-1), I should none the less like to point out the following. Under the fiscal legislation (on taxes, customs and exchange control), a person who does not submit the required returns or does not produce documents relating to them within the time-limits laid down in law (or by the authorities) has pecuniary penalties (astreintes) in the form of "reasonable" fines imposed on him or else his tax liability is estimated - also in a "reasonable" manner - by the appropriate authorities. This is not in itself inconsistent either with the requirements of a fair trial or with the presumption of innocence (in the sense that one cannot be obliged to give evidence against oneself).

Rules of this kind are indeed common in the countries of Europe.

In the present case, however, the French authorities brought criminal proceedings against the applicant in order to have a pecuniary penalty imposed on him, and this went beyond what I consider to be compatible with the principles I have just set out.