[TRANSLATION - EXTRACT]

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THE FACTS

The applicant [Mr Antoni Ubach Mortes] is an Andorran national, born in 1942. When he lodged his application, he was in Andorra la Vella Prison. He was represented before the Court by Mr M. Tubiana, of the Paris Bar.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was the director of the Andorran Social Security Fund (CASS) from its inception in April 1968 until 10 June 1993, apart from the period between January 1982 and 1984. The CASS is a quasi-public organisation responsible for the administrative, financial and technical management of the Andorran social security system. At the end of 1986 the CASS had accumulated old-age pension fund reserves of seventeen thousand million pesetas (ESP). The governing body decided, at its meeting on 10 June 1986, to diversify the use of those reserves by earmarking a maximum of 20% for variable-rate investments.

In his capacity as director of the CASS, the applicant followed a policy of investing part of the retirement pension fund by buying company stock or variable-rate securities. In the course of those operations, the applicant became acquainted with a Spanish national, J.M.R., representative and shareholder of a Spanish company called Collins S.A., whose head office was in Madrid. In 1988 the applicant and J.M.R. decided that the CASS's investments in Spain would be effected through Collins. In order to take up the shareholding in Collins, the applicant used as intermediary the Andorran company, IBERINSA, of which he was a shareholder. On 6 December 1989 the Board of Directors of IBERINSA decided to subscribe to shares in Collins and appointed the applicant to represent it in its dealings with the company.

From then on, according to the judgments delivered by the Andorran courts, the applicant, aided and abetted by J.M.R., began channelling substantial pension funds into investment operations in Spain – on many occasions without the consent or approval of the CASS's governing body. The CASS incurred losses totalling more than ESP 4,000,000,000 as a result of, *inter alia*, the depletion by the applicant and J.M.R. of the assets of various companies for the benefit of Collins.

On 16 June 1993 the episcopal *batlle* (judge) received a complaint from the chairman of the governing body of the CASS informing him that the applicant had received threats from J.M.R. and setting out the situation

regarding the administration of the CASS's pension fund reserves. A preliminary investigation was opened following the complaint, but was discontinued a few days later.

On 15 July 1993 the General Council, the legislative body of the Principality of Andorra to which the applicant regularly had to report on the management of the CASS in his capacity as director thereof, lodged a criminal complaint against the applicant with the French *batlle*, followed several months later by a further criminal complaint and application to join the proceedings as a civil party. That complaint gave rise to a criminal investigation, which is the subject of this application. The applicant lodged an application with the investigating judge in which he contested the General Council's *locus standi* to join the criminal proceedings. His application was dismissed. The applicant appealed to the *Tribunal de Corts*, which set aside the decision on 7 March 1996 and dismissed the General Council's complaint and application to join the proceedings as a civil party. There thus remained the public prosecutor as instigator of the criminal proceedings and the CASS as private prosecutor.

The applicant was kept in pre-trial detention from 24 July 1993 until 4 August 1993, then from 15 August 1993 until 3 December 1993, and, lastly, from 29 July 1996 until his conviction on 25 November 1996. In the meantime, the investigating judge issued an arrest warrant against J.M.R. on 23 November 1993.

At the end of the investigation, the public prosecutor lodged his provisional indictment submissions in which he categorised the offence as misappropriating public assets or funds, damaging the economy and forging private and official documents.

At the beginning of his trial in the *Tribunal de Corts* the applicant complained that the trial was being held in the absence of J.M.R. and requested a stay of proceedings. The court replied that J.M.R. was well aware of the commencement date of the trial since his lawyer had stated at the beginning of the hearing that he had spoken to his client on the telephone and, furthermore, had produced a medical certificate issued on a date very close to that of the trial certifying that he was ill and therefore could not attend court. The court added that as J.M.R. was a Spanish national in Spain, the warrant for his arrest could not be enforced and that any move by the Andorran courts to secure his extradition would be doomed to failure. Accordingly, the court decided to continue with the trial in order, *inter alia*, to guarantee the applicant his right to have his case heard within a reasonable time in accordance with Article 6 § 1 of the Convention. It also noted that the applicant had not at any time during the investigation requested to cross-examine J.M.R. or to be confronted with him.

In a judgment of 25 November 1996, delivered after public proceedings deemed to be *inter partes*, the *Tribunal de Corts* found the applicant guilty

of misappropriating public funds and forging official documents. It sentenced him to nine years' imprisonment and payment to the CASS of ESP 4,414,784,041 in damages. It acquitted him, however, of damaging the economy. The court based its decision on a whole range of evidence freely discussed at a public trial, particularly the applicant's written statements, the testimony of numerous witnesses, auditors' reports and documentary evidence.

The applicant appealed to the High Court, contending that his fundamental rights had been breached. In a judgment delivered after adversarial proceedings, the High Court dismissed his appeal on 7 May 1997.

The applicant requested the public prosecutor to lodge an *empara* appeal against that judgment with the Constitutional Court, which is a remedy for violations of the right to a fair trial guaranteed by Article 10 of the Constitution. On 26 May 1997 the public prosecutor decided to lodge the *empara* appeal, while disagreeing with the applicant's allegations.

In a decision of 10 July 1997, the Constitutional Court declared the *empara* appeal inadmissible. The public prosecutor lodged a *súplica* appeal with the Constitutional Court, which dismissed it on 17 September 1997 on the ground that it did not satisfy the conditions set out in Article 102 (c) of the Constitution.

Following the entry into force of the 22 April 1999 Act amending the Constitutional Court Act, and pursuant to its third transitional provision, the applicant appealed directly to the Constitutional Court (remedy of *empara*) on 3 June 1999 against the High Court's judgment of 7 May 1997 complaining of a violation of his fundamental rights guaranteed by Article 10 of the Convention. In his appeal the applicant alleged the following violations:-

1. Violation of the right to a predetermined impartial tribunal because the investigation of the case had been entrusted to the French *batlle* and not the episcopal *batlle* who had examined the first complaint lodged by the chairman of the CASS's governing body about the threats received by the applicant.

2. Violation of the right to a fair trial on account of the court's decision to continue with the trial against the defendants present and in the absence of a co-defendant, J.M.R., whom he had been unable to cross-examine or confront.

3. Refusal by the trial and appeal courts to set aside all the investigative measures undertaken during the period in which the General Council was a party to the proceedings as private prosecutor.

4. Violation of the principle of the presumption of innocence on account of the assessment of the evidence made by the trial and appeal courts.

5. Violation of the rule that offences and punishments shall be strictly defined by law on the ground that the offence with which the applicant had been charged did not constitute the offence of misappropriation of public funds defined by Article 106 of the Criminal Code.

In a judgment of 5 November 1999, the Constitutional Court dismissed the *empara* appeal. With regard to the complaint of an infringement of the right to an impartial and predetermined tribunal, the Constitutional Court concluded, after observing that the applicant had never claimed that the investigating judge had breached his duty of subjective or objective impartiality and examining the provisions of the Code of Criminal Procedure governing conflicts of court jurisdiction, that there had been no violation of the right relied on because the French *batlle* had begun his investigation after the preliminary investigation opened by the episcopal *batlle* had been closed. In respect of the complaint that the *Tribunal de Corts* had decided to continue with the trial notwithstanding the absence of a co-defendant, J.M.R., the Constitutional Court found that the trial court had duly justified its decision on the ground that J.M.R. could not attend trial for health reasons and its conviction that he had no intention of cooperating with the courts. The court held that, while J.M.R.'s absence might have affected some of the evidence the applicant wished to adduce, that had neither prevented him from exercising his defence rights nor, consequently, infringed the constitutional rights on which he had relied. With regard to the General Council's participation in the proceedings up until the *Tribunal de Corts*'s decision of 7 March 1996 which excluded it, the Constitutional Court observed that, as the High Court had pointed out, there was nothing to indicate that the General Council's presence had prevented any investigative measure requested by the applicant from being carried out. As regards the applicant's complaint that he was systematically excluded during the entire investigation, the Constitutional Court found, *inter alia*, that the decision to convict had taken account of a whole range of evidence, that the applicant had had the opportunity of informing himself of the investigative measures and that all the evidence he had requested to adduce had been admitted.

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COMPLAINTS

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Besides that, he complained, relying on Article 6 § 3 (b) and (d) of the Convention, that he was unable to cross-examine or have cross-examined the main witness in the case, J.M.R., who was also his co-defendant.

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THE LAW

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In so far as the applicant complains that he was unable to cross-examine or have cross-examined J.M.R., his co-defendant, who was also the main witness in the case, the Court reiterates that Article 6 § 3 (d) does not guarantee the accused an unlimited right to secure the appearance of witnesses in court. It is for the domestic courts to decide whether it is appropriate to call a witness (see the John Ekbatani v. Sweden case, application no. 10563/83, Commission decision of 5 July 1985, DR 44, p. 113, and the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, § 89). In the instant case, the Court finds that the Andorran courts cannot be held responsible for J.M.R.'s failure to appear, since they concluded that this was not possible because J.M.R. was in Spain and, moreover, could not attend on health grounds. It also notes that, according to the *Tribunal de Corts*'s judgment, at no time during the investigation did the applicant request to cross-examine J.M.R. or be confronted with him. Furthermore, the applicant did not show how J.M.R.'s evidence would have been decisive in proving him innocent of the offence with which he was charged. As the Constitutional Court pointed out, while J.M.R.'s absence might have affected some of the evidence the applicant wished to adduce, that had not prevented him from exercising his defence rights. What is more, *impossibilium nulla est obligatio*; it is clear that the applicant, in insisting on calling J.M.R., was making a demand which it was materially impossible to satisfy. The Court therefore holds that the fact that it was impossible to cross-examine J.M.R. did not, in the circumstances of the case, violate the rights of the defence or deprive the applicant of a fair trial (see the Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 11, §§ 30-31). It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

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For these reasons, the Court unanimously

Declares the application inadmissible.