

APPLICATION/REQUÊTE N° 12541/86

Vito CIANCIMINO v/ITALY

Vito CIANCIMINO c/ITALIE

DECISION of 27 May 1991 on the admissibility of the application

DECISION du 27 mai 1991 sur la recevabilité de la requête

Article 5 of the Convention

- a) The 'right to liberty' concerns the physical liberty of a person*
- b) This Article is not concerned with mere restrictions on freedom of movement which is governed by Article 2 of Protocol No. 4*
- c) The difference between deprivation of and restriction upon liberty is merely one of degree or intensity and not one of nature or substance (reference to the Guzzardi judgment)*

In order to determine whether an individual is "deprived of his liberty", it is necessary to examine his actual situation and take into account the type, duration, effects and manner of implementation of the measures in question. In this case, special surveillance with compulsory residence in a specific commune, imposed under the Italian law of 1956, does not constitute a deprivation of liberty.

Article 2, paragraph 3 of the fourth Protocol *Special surveillance with compulsory residence imposed under the Italian law of 1956 is a measure in accordance with the law and in this case is considered necessary in a democratic society for the maintenance of 'ordre public' and the prevention of crime. Examination of the proportionality of the interference to the aim*

(TRANSLATION)

THE FACTS (Extracts)

The facts, as submitted by the applicant, are as follows

The applicant, Vito Ciancimino, is an Italian national born on 2 April 1924 in Corleone (Palermo)

For the proceedings before the Commission he is represented by Mr Giorgio Ghiron, a lawyer practising in Rome

The applicant is a politician whose career has been spent mainly in Sicily, where he became, firstly, a member of Palermo City Council, then deputy mayor in charge of Palermo's direct works departments (between 1956 and 1959) and public works (between 1959 and 1964), and finally mayor of Palermo in 1970

At the end of the 1960s the applicant was implicated by the parliamentary commission of inquiry into the 'mafia' (set up in accordance with Article 81 of the Italian Constitution) as a member of that criminal organisation

The applicant faces criminal charges in a number of separate sets of proceedings and has been subjected to preventive measures concerning his personal liberty and his financial affairs

The preventive measures

Concurrently with the criminal proceedings, the applicant has been the subject of two separate sets of proceedings intended to determine whether he represented such a danger to society that he should be subjected to preventive measures concerning his personal liberty and his financial affairs

a Domestic legislation

Preventive measures were introduced by Act No. 1423 of 27 December 1956 (the 1956 Act) and concern persons presenting a danger for security and public morality. Under section 3 of the Act such persons may be placed under special police supervision (*sorveglianza speciale della pubblica sicurezza*) if necessary, this may be combined either with a prohibition on residence in one or more given districts or provinces or, in the case of a particularly dangerous person (*particolare pericolosità*), with an order for compulsory residence in a specified district (*obbligo del soggiorno in un determinato comune*)

Only the District Court of the chieftown of the province has the power to order these measures. The District Court must give a reasoned decision (*provvedimento*) in chambers within thirty days. It will first hear the public prosecutor's department and the person concerned, the latter being entitled to submit written pleadings and to be assisted by a lawyer (section 4, second paragraph)

The prosecuting authorities and the person concerned may, within ten days, lodge an appeal which does not have suspensive effect, the Court of Appeal has

to give a reasoned decision (decreto) in chambers within thirty days (section 4, fifth and sixth paragraphs) That decision may in turn and on the same conditions be the subject of a further appeal to the Court of Cassation, which must give its ruling in chambers within thirty days (section 4, seventh paragraph)

When adopting one of the measures listed in section 3, the District Court must specify for how long it is to remain in force – not less than one and not more than five years (section 4, fourth paragraph) – and give directives with which the person in question must comply (section 5, first paragraph)

Act No 575 of 31 May 1965 (the 1965 Act), amended in 1982, added to the provisions of the 1956 Act specific new provisions directed against persons whom there are strong reasons to suspect of belonging to “mafia type” associations

Act No 327 of 3 August 1988 (the 1988 Act) abolished the possibility of imprisoning the person concerned pending examination of the application for a compulsory residence order. In addition, a compulsory residence order must henceforth be enforced in the district where the person concerned has his domicile or residence

Lastly, Act No 55 of 19 March 1990 (the 1990 Act) gives judges powers to suspend proceedings on an application for preventive measures when criminal proceedings are pending and until the outcome of the latter

From the financial point of view the 1982 Act strengthens this legislative armoury with provisions incorporated into the 1965 Act intended to strike at the funds of mafia-type organisations

For example, under section 2 (3) of the 1965 Act, during the proceedings for the application of the preventive measures provided for in the 1956 Act in respect of a person suspected of belonging to such organisations, the District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person concerned, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his life style and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or has been acquired with those proceeds

Under the same section, “together with application of the preventive measure the District Court shall order the confiscation of any goods seized whose lawful origin has not been proved”

b. The preventive measures applied to the applicant

aa The compulsory residence order

The applicant was first required to comply with a preventive measure restricting his personal freedom. It is with this preventive measure that his complaints are concerned. The procedure followed in this case was as follows:

On 4 October 1984 the Palermo public prosecutor filed with the division of the Palermo District Court having competence for preventive measures an application for an order placing the applicant under special police supervision and a compulsory residence order. He also asked for an arrest warrant to be issued against the applicant to secure enforcement of the above measure.

On 8 October 1984 the President of the District Court refused to issue an arrest warrant, merely issuing a provisional order requiring the applicant to reside in the district of Patti. He fixed the first hearing for examination of the public prosecutor's application for 30 October 1984.

During these proceedings the applicant asked for various evidence to be taken. He also requested that the proceedings be conducted in public. He raised objections concerning the use in these proceedings of the file prepared by the parliamentary commission of inquiry into the mafia. Lastly, he pleaded the unconstitutionality of the provisions of section 1 of the 1965 Act, concerning the application of preventive measures to persons suspected of belonging to the mafia, having regard to Articles 24 (rights of the defence) and 25 (principle of the lawfulness of penalties and security measures) of the Italian Constitution. In a decision dated 9 April 1985 the Palermo District Court rejected the above requests and objections.

With regard to the applicant's objections concerning the constitutionality of section 1 of the 1965 Act, having regard to Article 25 of the Constitution, in so far as it was aimed at persons suspected of belonging to mafia-type organisations, the court held that the legal provisions defining "mafia-type" organisations were sufficiently precise, particularly in the light of the case-law which had been built up around that question and the definition given in Article 416 bis of the Criminal Code.

The court also rejected the applicant's objection that in the proceedings on the application for preventive measures the judgment about his dangerousness to society had been based on evidence identical to that adduced against him in the context of criminal proceedings against him on the charge of belonging to a

criminal organisation of the mafia type (Articles 416 and 416 bis of the Criminal Code), so that the proceedings on the application for the preventive measures should be suspended pending a judgment on the merits of the charges against him. The court ruled that the purpose of proceedings on an application for preventive measures was to determine whether an individual presented a danger to society, whereas the purpose of criminal proceedings was to determine a defendant's criminal responsibility. It was not necessary, merely because the facts established during criminal proceedings could be assessed autonomously in the context of preventive measure proceedings, to adjourn the latter, whose autonomy in relation to the criminal proceedings was derived partly from the fact that the conditions of application (*presupposti*) were different, partly from their purpose and partly from the assessment criteria applied. The court added that this autonomous assessment could not constitute a violation of the rights of the defence when the accused and his counsel had been informed of the events and "symptomatic behaviour" on which the judgment as to "dangerousness" to society had been based.

The court refused the hearings of witnesses requested by the defence, ruling that the points on which the applicant wanted the witnesses' evidence to be taken constituted "an inadmissible expression of personal opinions which could not possibly inform the court's decision in any way".

As the District Court had refused to summon the witnesses whose appearance he had requested, and had rejected under the 1956 Act his request that the proceedings be conducted in public, the applicant waived his right to appear in these proceedings and dismissed his lawyers.

In a decision (*decreto*) dated 5 July 1985, deposited with the registry on 22 July and served on the applicant on 25 July 1985, the Palermo District Court decided to impose on the applicant the special supervision measure provided for in section 3 of the 1956 Act, as amended by the 1965 Act and later legislation, together with a compulsory residence order requiring him to reside in the district of Rotello (Campobasso province) for a period of four years. The court order stated: "It seems advisable, within the district assigned for his compulsory residence, to forbid the applicant to leave his chosen home without previously informing the supervisory authority, to return home after 8 p.m. or to leave home before 7 a.m. without certified need."

The applicant arrived in Rotello on 24 November 1985. The police report drawn up on 26 November 1985, on communication to the applicant of rules concerning enforcement of the preventive measure, shows that he was enjoined

- not to leave the district of Rotello without first obtaining authorisation in each case from the competent judicial authority, and only on grounds relating to professional questions, studies, family or health ,

- to report to the Rotello police every day at 11 a m ,

- not to return home after 8 p m or leave home before 7 a m without certified need, and in any case without duly informing the authority responsible for his supervision "

On 3 August 1985 the applicant appealed against the decision of the Palermo District Court in accordance with section 4 of the 1956 Act. In his statement of the grounds of appeal the applicant claimed that the decision against him had been based on allegations whose truthfulness the court had omitted to check, since it had refused to entertain the evidence he had asked to submit.

It appears from the documents relating to these proceedings that, between 20 January 1986, the date fixed for the first hearing in the Court of Appeal, and 22 May 1990, the Palermo Court of Appeal held 25 hearings on this case.

Apart from a few delays resulting from adjournments requested by the defence (from 20 January 1986 to 3 June 1986 and from 5 October 1987 to 9 November 1987, i.e. about five and a half months), or from events which prevented the defence appearing or the court sitting (from 30 May 1988 to 15 November 1988 and from 13 March 1989 to 3 April 1989, i.e. about six months), the proceedings progressed without interruption. On 27 December 1988 the Court of Appeal joined the appeals concerning the personal and financial (see below) preventive measures imposed on the applicant, this was not opposed by the applicant's counsel. Subsequently, on 4 July 1989, having regard to the complexity of the issues raised by application of the financial measures, it decided to separate the two appeals again.

The Court of Appeal ordered a large number of papers to be added to the file, particularly certain documents from the files concerning other criminal proceedings involving persons accused, as was the applicant, of belonging to a mafia-type organisation.

The proceedings relating to the applicant's appeal against the preventive measures were conducted in chambers by the 5th criminal division of the Palermo Court of Appeal, which was competent to hear such appeals. The procedure makes provision for the person concerned to be present and to be assisted by defence counsel. The applicant was present in Palermo for most of the hearings.

However, on several occasions the court proceeded in his absence, holding that such absence was not justified. The applicant's counsel were always present at these hearings.

Lastly, it should be noted that in an order made on 12 September 1988, pursuant to the 1988 Act, the President of the Palermo District Court substituted for the compulsory residence order a ban on residence in the districts of Palermo, Trapani, Agrigento, Caltanissetta and Catania.

The applicant's period of compulsory residence, for which the above exclusion order had been substituted, ended on 25 October 1989.

THE LAW (Extracts)

1. The applicant complains of the special supervision order and compulsory residence order imposed on him by the Palermo District Court in a decision (decreto) dated 5 July 1985.

b. The Commission must [next] state its opinion as to whether the compulsory residence order imposed on the applicant constituted an infringement of his right to liberty and security of person, as recognised by Article 5 of the Convention, under which "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law".

The Government refer in this connection to the case-law of the European Court of Human Rights, and maintain that the right to liberty protected by Article 5 is the right to liberty in the classic sense, i.e. the right to physical liberty, so that Article 5 is not concerned with mere restrictions on liberty of movement. In the *Guzzardi* judgment the Court accepted that a compulsory residence order, as provided for in Italian legislation, did not as such constitute deprivation of liberty within the meaning of Article 5 of the Convention, but should be classified as a restriction on liberty of movement, covered by Article 2 of Protocol No. 4 to the Convention.

The Italian Government admit that in the *Engel*, *Guzzardi*, *Van Droogenbroeck* and *Ashingdane* judgments the Court held that even a measure limiting freedom of movement might, depending on the manner of its implementation,

prove in reality to be a deprivation of liberty, so that in order to determine whether someone has been deprived of his liberty an examination of the actual situation is indispensable

They maintain, however, that in this case such an examination does not disclose any of the significant factors which, cumulatively and in combination, led the Court to conclude in the *Guzzardi* case that there had been a true deprivation of liberty

The Government emphasise from the outset that the place where the compulsory residence order was enforced is a commune with a population of 1 500 people 65 kilometres away from the chieftown of the province. It is provided with all essential public services and places of worship and has perfectly satisfactory communications with the rest of Italian territory. Lastly, the applicant was able to lead a normal life there together with his close family.

With regard to the applicant's obligations under the compulsory residence order, the Government assert that he was forbidden to leave his home between 8 p.m. and 7 a.m. without certified need, or to leave the territory of the commune without first informing the supervisory authorities (cf. Court of Cassation, 20 November 1972, *Argento - Mass-Cass*, para. 196). He was expected to inform the supervisory authorities of brief visits to the immediate surroundings of the municipal territory without the need for prior authorisation (Cass. 16 XI 1962 - *Maisto*, in *Cass. pen. mass.* 1963, p. 582 no. 991, *Cass.* 15 I 1965 - *Piscopia*, in *Giustizia pen.* 1966, c. 696, *Cass.* 27 V 1980 - *Scardanilli*, in *Riv. pen.* 1981, p. 360).

The Government argue that the main reason for all these restrictions is the fact that the person subject to the compulsory residence order has been placed under 'special police supervision'.

The applicant maintains that it is well-established in the case-law of the Convention institutions that preventive measures consisting in compulsory residence orders are measures involving deprivation of liberty within the meaning of Article 5 of the Convention. Having regard to the criteria used by the European Court of Human Rights for the purpose of determining in concrete cases the appropriate classification of a compulsory residence order, namely the size of the area in which the person concerned can move freely, the nature of the supervision to which he is subject, and the extent to which his social contacts and political activity are limited, the applicant considers that he was the victim of an actual deprivation of liberty.

He also asserts that he was subject to permanent surveillance. His presence at home was checked every day and sometimes even at odd hours of the night. The applicant also alleges that he was refused authorisation to leave the district of residence for medical consultations with specialists.

The applicant disputes the Government's assertion that he could absent himself from his home during the day without prior authorisation, in this connection he cites the case law of the Court of Cassation (Cass. pen. 11 I 1989, in Riv. pen. 1989, 1233, Cass. pen. 23 XI 1984). He considers that the compulsory residence order in his case amounted to house arrest.

Moreover, in view of his social, political and cultural standing, his confinement to the commune of Rotello caused a particularly serious impairment of his social contacts and his work.

The Commission recalls that Article 5 of the Convention contemplates the physical liberty of the person rather than mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 (Fur. Court H.R., Guzzardi judgment of 6 November 1980, Series A no. 39, p. 33, para. 92). As provided for under the 1956 Act, special supervision accompanied by an order for compulsory residence in a specified district does not of itself come within the scope of Article 5 para. 1 of the Convention. However, the Court has pointed out that 'The difference between deprivation of and restriction upon liberty is merely one of degree or intensity and not one of nature or substance' (previously cited Guzzardi judgment, p. 33, para. 93) and that it is therefore necessary to verify that a deprivation of liberty does not result from the manner of implementation of such a measure (previously cited Guzzardi judgment, pp. 33-34, para. 94).

In this connection, the Commission notes, first of all, that the compulsory residence order was enforced in a commune where the applicant's living conditions were the same as those of the rest of the population (see, *a contrario*, Guzzardi judgment, pp. 33-34, para. 94 *in fine*). Moreover, it appears from the decision of 5 July 1985, together with the police report of 26 November 1985, that the applicant could move freely inside the limits of the commune during the day.

With regard to supervision of the applicant by the authorities, the applicant has not proved that it exceeded the limits of what was reasonable, bearing in mind the nature and purpose of the preventive measure, which was to subject the applicant to special police supervision. Consequently, the Commission considers that the length of the period during which the preventive measure was applied, which in this case was two years and nearly ten months, since the order requiring

the applicant's compulsory residence in the commune of Rotello, initially for a period of four years, was changed on 12 September 1988 to a ban on residence in certain provinces of Sicily, does not in itself make that measure a deprivation of liberty within the meaning of Article 5 of the Convention (cf No 7960/77, *Guzzardi v Italy*, Dec 5 10 77, and *Guzzardi* judgment, p 34, para 94 *in fine*)

The Commission considers that in this case the special supervision measure applied to the applicant did not constitute a deprivation of liberty within the meaning of Article 5 of the Convention. That provision is thus not applicable to this case and the applicant's complaint is in this respect manifestly ill-founded within the meaning of Article 27 para 2 of the Convention.

2 However, with regard to a measure restricting liberty of movement, guaranteed by Article 2 of Protocol No 4 to the Convention, the question arises whether the measure complained of infringed the applicant's recognised right to liberty of movement. Article 2 of Protocol No 4 to the Convention provides as follows:

"1 Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence

3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of "ordre public", for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

In this connection, the Government argue that the restrictions on the applicant's liberty of movement imposed by the Palermo District Court's decision of 5 July 1985 were in accordance with the law and necessary in the interests of public safety and for the prevention of crime. They further assert that the measure complained of was ordered in a decision of the Palermo District Court at the end of proceedings which satisfied the fundamental requirement of criminal trials, namely respect for the principle that the case of both parties must be heard and guaranteed rights for the defence. In the course of these proceedings it was established that the applicant represented a danger to society because of his suspected links with a mafia type organisation.

The applicant did not submit any observations on this question

The Commission notes that the impugned measure imposed major restrictions on the applicant's liberty of movement and constituted an interference with the exercise of that right as defined in paragraph 1 of Article 2 of Protocol No 4. It notes that these restrictions are provided for by the 1956 Act, as amended by subsequent legislation, and were ordered by a court pursuant to the Act.

The very title of the legal provisions shows that the restrictions contemplated are aimed at the prevention of crime and the maintenance of "ordre public", which are legitimate aims for the purpose of this provision of the Convention.

The Commission considers that, having regard to the particularly serious nature of the threat to "ordre public" posed by criminal organisations and the importance of crime prevention in connection with persons suspected of belonging to the mafia, compulsory residence measures can in principle be regarded as necessary in a democratic society in pursuit of the aims mentioned above.

In the present case the Commission notes that the applicant's "dangerousness" has been assessed during judicial proceedings which are still pending conducted in the Palermo District Court, and that in those proceedings the rights of the defence have been fully respected. It further notes that in the case under consideration the application of such measures, which are the subject of separate proceedings, is nevertheless also connected with criminal proceedings against the applicant, who faces various charges in three separate criminal trials.

That being so, the Commission considers that there was no disproportion between the aim pursued and the measure adopted in the applicant's case. It follows that, when examined from the standpoint of Article 2 of Protocol No 4 to the Convention, the applicant's complaint is manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention.