(TRANSLATION)

THE FACTS

The facts of the case may be summarised as follows:

The applicant, who is a Zairese national, was born in 1951 at Kinshasa. He is a student and resides in Paris. In the proceedings before the Commission he is represented by Jean-Paul Combenègre, barrister at the Paris Court of Appeal.

In July 1979 the applicant, who was at the time planning to marry a young woman of Ivory Coast nationality in France, had asked one of his relatives employed by the Air Zaïre company to send him various samples of food from his country.

On 25 July 1979 the applicant received through the Paris Agency of the above-mentioned company a telex advising him to go to the airport on Saturday 28 July 1979 to collect a "package" for his marriage, arriving on flight QC 010. On Saturday 28 July he therefore went to the airport to collect this package. However, at the airport he found no package bearing his name.

The applicant then spoke to an Air Zaïre official at Roissy, who indicated a trunk which bore no name but which had not been collected. At the same time this official sought discreetly to make it clear to the applicant that this trunk was likely to contain prohibited goods and recommended him not to take it.

The applicant nevertheless took possession of the trunk and, since it was larger than the package he had expected, he telephoned his brother to ask him to wait at the Porte Maillot terminal which was close to where they lived, in order to help him carry the trunk.

It was in those circumstances that, after having passed through customs without any trouble, the applicant was challenged. He was in the company of three other Zairese nationals whom he had just met at the airport and whom he had engaged in conversation.

The applicant immediately admitted that the trunk was intended for him and ruled out any complicity on the part of his three fellow-country men. When the trunk was opened it was found to contain ten kilograms of cannabis.

The applicant's brother was himself arrested at Porte Maillot.

However, in the meantime, Air Zaïre flight No. QC 010 had left for its final destination, Brussels. It was there that a bag bearing the applicant's name and address was unloaded. It contained African foodstuffs in poor condition.

The applicant and his brother were charged with smuggling prohibited goods.

In the course of the investigation, two of the three Zairese nationals who were present at the scene in the airport stated that a Zairese woman had also been there and had declared that the contested trunk belonged to her.

These statements led to the charging of M.K., a relative of this woman.

By an order dated 25 August 1980, the investigating judge committed the two Salabiaku brothers and M.K. for trial before the criminal court at Bobigny.

By judgment of 27 March 1981, that court ordered the discharge of the applicant's brother and M.K. They found the applicant guilty of having (a) "contravened the public health provisions concerning poisonous substances classified as narcotics (Articles L 626, L 627, L 629 and L 630-1 and R 5165 *et seq.* of the Public Health Code); and (b) "committed the constructive offence of smuggling prohibited goods" (Articles 38-414, 417, 419, 215, 435 of the Customs Code and 42, 43-1 etc., 44 of the Criminal Code). It sentenced the applicant to two years' imprisonment. In addition, accepting the submissions of the customs authorities in this respect, the court ordered the applicant to pay a customs fine of 100,000 FF. The applicant appealed against this decision.

Before the Court of Appeal, he stressed that he had not been aware of the real contents of the trunk which he had taken possession of at Roissy and had mistakenly believed that he had collected the package which in fact arrived in Brussels and which was intended for him. The applicant therefore submitted that the court should order his acquittal in the criminal prosecution and thus find the civil action brought by the customs authorities inadmissible. In particular, the applicant emphasised that his action constituted an unavoidable error which defeated any presumption of fraud relating to possession of the goods.

By a judgment of 9 February 1982, the Paris Court of Appeal set aside the judgment and ordered the applicant's acquittal, according him the benefit of the doubt, in the criminal prosecution for breach of the narcotics laws (Public Health Code). However, the court upheld the decision regarding the customs offence of smuggling prohibited goods (Customs Code) and confirmed the decision ordering the applicant to pay a customs fine of 100,000 FF.

The applicant appealed against this decision to the Court of Cassation claiming that by making a presumption of the accused's guilt operating in favour of the customs authorities the Court of Appeal had infringed Article 6 para. 1 of the Convention and that by establishing a virtually irrebuttable presumption of the accused's guilt the Court of Appeal had further infringed Article 6 para. 2.

However, by a judgment delivered on 21 February 1983, the criminal chamber of the Court of Cassation dismissed the applicant's appeal.

COMPLAINTS

The complaints may be summarised as follows:

The applicant alleges a violation of Article 6 paras. 1 and 2 of the Convention.

Article 392 of the French Customs Code provides as follows:

"A person in possession of smuggled goods is deemed liable for the offence."

This provision does not satisfy certain requirements of Article 6 of the Convention. Article 392 of the Customs Code provides for a double presumption in respect of the person in possession, namely that of his responsibility for goods and of his guilt.

Using this approach the moral element of the offence is reduced to a minimum requirement by the effect of a presumption of responsibility: the law infers from material facts the prior existence of criminal intent; a mere factual finding points to the existence of the offence.

Under the French classification of offences, customs offences, including that provided for in Article 392 of the Customs Code, are offences of "absolute" or "strict" liability. The burden of proof falling on the prosecution (public prosecution or Customs and Excise) is considerably reduced inasmuch as, by showing the existence of facts constituting a breach of criminal law, the prosecution establishes both the factual and the moral element of the offence.

Moreover, the person in possession, and therefore presumed guilty, cannot overturn that presumption. The French courts have shown particular severity in requiring that the existence of unavoidable error be established. As certain academic writers have pointed out, the presumption is in reality "virtually irrebuttable".

The arguments advanced by the French legislature and the authorities to justify the existence of the provisions in question, namely specific policy requirements relating to customs offences, and the need to preserve public order and to safeguard national interests, cannot disguise the fact that they conflict with several of the principles laid down in the Convention.

1. Alleged violation of Article 6 para. 1 of the Convention

If one of the parties in a criminal trial is entitled to rely on a principle allowing him to presume directly the accused's criminal intent from a material fact such as the mere possession of an article and benefits from a considerable easing of the burden of proof falling on him, then clearly the theoretical equality of the parties to the proceedings which the general principles of criminal law procedure are supposed to guarantee no longer exists. It follows that Section 392 of the Customs Code overtly infringes the principle of a fair trial.

Indeed, in the present case the Court of Cassation drew attention to the breach of the "fair trial" principle by holding that Article 392 of the Customs Code had not been implicitly repealed by France's accession to the Convention and should therefore be applied if the Court of Appeal, which took its decision on the basis of evidence argued before it by both the parties found that the accused had taken possession of the package in question and inferred from this material fact of possession a presumption which was not defeated by any evidence of an event for which the perpetrator of the offence was not responsible or which it was impossible for him to avoid.

2. Alleged violation of Article 6 para. 2 of the Convention.

Similarly, the dual presumption of responsibility for facts and of guilt provided for in Article 392 of the Customs Code and the very restrictive principles laid down by the criminal chamber of the French Court of Cassation and lower courts, had the effect of challenging the presumption of innocence on which the accused is entitled to rely.

Once the material fact such as possession has been established, the accused is virtually precluded from relying on the presumption of innocence laid down in his favour. On the contrary, it is ultimately a presumption of guilt which will, to say the least, operate against the accused.

In this instance it is particularly significant that the Paris Court of Appeal was able to acquit the applicant, albeit by according him the benefit of the doubt, in the criminal proceedings for the unlawful importation of narcotics, whilst finding him guilty of the customs offence and ordering him to pay the sum of 100,000 FF to the customs authorities.

Only the dual presumption of responsibility and guilt laid down in the contested legislation can explain why on the same facts the same accused can be presumed innocent in one case and be prevented from relying on the presumption of innocence in the other.

In the applicant's view, this state of affairs does not satisfy the requirements either of paragraph 1 or of paragraph 2 of Article 6.

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THE LAW

The applicant alleges a breach of paragraphs 1 and 2 of Article 6 of the Convention, considering that, as applied in this instance, Article 392 of the Customs Code which provides that "the person in possession of the smuggled goods is deemed liable for the offence" does not satisfy certain of the requirements laid down in Article 6 of the Convention.

This provision provides as follows:

"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.

....."

The applicant considers that it cannot be argued in this case that the rule of equality of arms inherent in the notion of a fair trial laid down in Article 6 para. 1 of the Convention was complied with where the court accepted a virtually irrebuttable presumption of the accused's guilt in favour of the customs authorities, inferred from mere possession of an article.

Nor, in the applicant's view, is it possible to maintain that the principle of the presumption of innocence laid down in Article 6 para. 2 of the Convention was complied with insofar as the reversal of the burden of proof means that, although in the position of accused, the defendant has to provide proof of his innocence.

The Government dispute these assertions. They argue that the provisions of Section 392 of the Customs Code, as applied, do not contravene any of the principles laid down in Article 6 of the Convention.

In their view these provisions do not establish a presumption of guilt but rather a presumption of liability, which requires only determination of the material responsibility for the facts constituting the offence. Thus modified rules of evidence exist in customs law.

The Government also contend that the easing of the burden of proof falling on the prosecution is not incompatible with a fair trial under Article 6 para. 1. Moreover, the Convention does not require that the prosecution bear the entire onus of proof.

Finally, according to the Government, the presumption established in Article 392 of the Customs Code is not contrary to the presumption of innocence laid down in Article 6 para. 2 of the Convention and in no way replaces it. They note that, according to the decisions of the Convention organs, Article 6 para. 2 concerns only charges brought against individuals and not evidence produced in domestic courts.

It is not disputed between the parties that customs offences such as those covered by Article 392 of the Customs Code fall within the category of criminal offences. They are derived from the body of laws annexed to the Criminal Code and have their own distinct characteristics, particularly the customs offences. The fact remains that the proceedings at issue fall within the scope of Article 6 of the Convention which covers any proceedings concerning the determination of a criminal charge.

The question therefore arises whether, as the applicant claims, the application of Section 392 of the Customs Code in the present case gave rise to an inequality of arms between the parties to the trial in view of the virtually irrebuttable presumption operating in favour of one of them, on the basis of the possession of an article. Does this state of affairs mean that the trial was unfair, in breach of Article 6 para. 1 of the Convention, which requires a certain "balance" or "equal treatment" in the proceedings, as is clear from the decisions of the European Commission and Court of Human Rights (Eur. Court H.R., Bönisch judgment of 6 May 1985, Series A no. 92, para. 28 et seq.)?

The Commission notes in addition that where a criminal charge is laid any defendant or accused is presumed innocent until his guilt has been formally established by a definitive judicial decision, in other words a decision which has become final. This presumption means that the accused or the defendant is accorded the benefit of the doubt and that the burden of proof lies on the prosecution.

It is therefore necessary to consider whether the principle of the presumption of innocence laid down in Article 6 para. 2 of the Convention was complied with despite the double presumption of material responsibility for facts and liability laid down in Article 392 of the Customs Code, which might lead to an accused being compelled to provide proof of his innocence (see No. 5124/71, Dec. 19.7.72, Collection 42 p. 135).

The Commission takes the view on the basis of a preliminary examination of the parties' submissions, of its own previous decisions and those of the European Court of Human Rights, that the complaints put forward by the applicant in connection with Article 6 paras. 1 and 2 raise questions of interpretation which are sufficiently complex and important to require an examination of the merits of the application and, accordingly, that the said application cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE, without in any way prejudging the merits of the case.