

**APPLICATION/REQUÊTE N° 11423/85**

Paolo SENIS v/France

Paolo SENIS c/France

**DECISION** of 13 March 1989 on the admissibility of the application

**DÉCISION** du 13 mars 1989 sur la recevabilité de la requête

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**Article 6, paragraph 1 of the Convention:** *French customs offences constitute criminal charges within the meaning of this provision.*

**Article 6, paragraph 2 of the Convention:** *States may establish presumptions of fact or law on condition that they remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (Reference to the Salabiaku judgment).*

*In this case, application of French customs law providing for an almost irrebuttable presumption in favour of the charge, based on mere possession of goods, was not contrary to the principle of presumption of innocence, because the unlawful importation was established by the applicant's own statements.*

**Article 6, paragraphe 1, de la Convention:** *Les infractions au droit douanier français relèvent de la matière pénale au sens de cette disposition.*

**Article 6, paragraphe 2, de la Convention:** *Les Etats peuvent instaurer des présomptions de fait ou de droit à condition de ne pas dépasser des limites raisonnables prenant en compte la gravité de l'enjeu et préservant les droits de la défense (référence à l'arrêt Salabiaku).*

*En l'espèce, l'application du droit douanier français édictant, en faveur de l'accusation, une présomption irréfragable basée sur la seule détention d'une marchandise, n'était pas contraire au principe de la présomption d'innocence, puisque l'importation illégale reposait sur les déclarations du requérant lui-même.*

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*(TRANSLATION)*

## **THE FACTS**

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

The applicant, an Italian national, was born in 1946 in San Antico and is in detention in Regensdorf prison (Switzerland) following his extradition by France.

In the proceedings before the Commission he is represented by Mr. A. Lestourneaud and Mr. Ch. Dieterle, lawyers practising in Nice.

1. Following a police check in Nice on 22 November 1982, three people were arrested after the discovery in the vehicle which they were using of weapons, ammunition and the sum of 10,310 French francs. Among the people arrested by the police was D.

During the police investigation, one of the people apprehended, A.P., said that he had escaped about one and a half months earlier from Thorberg prison in Switzerland along with two other prisoners, including a certain "Paolo". Quite independently of this first circumstance, a certain A.M. was arrested in the context of the investigation. He confirmed that he had escaped from a prison along with Pietro Paolo Senis. According to his statement, this event had occurred on 15 October 1982. He also stressed the fact that they had remained hidden in the mountains for a fortnight before crossing the French border.

Still in the context of the investigation, a search was made in a house in Saint-Laurent-du-Var on 22 November 1982. Several weapons, ammunition, personal effects and sums of money in foreign currency were seized, according to the seizure record, and placed under seals on 23 November 1982.

The applicant was arrested on 28 November 1982 in Chamonix then brought before the Bonneville public prosecutor under an arrest warrant issued by the Nice investigating judge.

The investigation also revealed that the applicant had been "suspected of burglary" in Switzerland.

2. Under an order by the investigating judge dated 7 December 1982 the applicant was charged with infringements of the legislation on weapons: unlawful possession and transport of arms and ammunition.

On 1 February 1983 the customs authorities lodged a complaint in respect of infringements of the legislation and regulations governing financial relations with other countries. The customs authorities indicated in their complaint that they were acting pursuant to a legal presumption of smuggling of goods (arms and ammunition) in the frontier zone.

The customs authorities, in their first instance submissions filed at a hearing on 22 April 1983, added that "under Article 197 of the Customs Code and under the Decree of 17 November 1969, goods circulating in the frontier zone must be accompanied by an excise pass or documents stipulated in Article 198 paragraph 2 of the Customs Code. In the absence of such documents, the goods shall be deemed to have been smuggled (Article 418 paragraph 1 of the Customs Code). This presumption shall be irrebuttable and in the absence of force majeure the accused may not benefit from any excuse".

At the hearing on 22 April 1983 the applicant filed written submissions with a view to having the presumption of guilt established by Article 418 of the Customs Code declared incompatible with Article 6 para. 2 of the Convention. The customs authorities filed further submissions for a hearing on 4 May 1983 and the applicant replied with further submissions.

3. During the proceedings concerning the weapons and on the basis of supplementary prosecution submissions dated 24 January 1983, further charges were served on the applicant on 4 March 1983, and further investigation measures were ordered, for receiving stolen goods, harbouring criminals and infringing the legislation and regulations governing financial relations with others countries, on the basis of Article 5 of Decree No. 68-1021 of 24 November 1968.

Among the customs offences, the customs authorities claimed, relying on Article 459 of the Customs Code and in application of a circular dated 9 August 1973, that the accused had not changed imported foreign currency into francs through an approved agent within the maximum time-limit of one month after importation.

In the submissions filed for his defence, the applicant denied that he had committed the alleged customs offence on the ground that the time-limit of one month laid down in the circular of 9 August 1973 had not actually expired between the date of crossing the French border and the seizure of the foreign currency by the authorities. As to the law, the applicant maintained moreover that Article 373 of the Customs Code reversed the burden of proof, in breach of the presumption of innocence referred to in Article 6 para. 2 of the Convention.

The whole case was brought for hearing before the Nice Regional Court on 4 May 1983.

In a judgment dated 11 May 1983, the court set aside the proceedings relating to the exchange regulations, in application of Article 458 of the Customs Code, acquitted the accused of the charge of receiving stolen goods (concerning the cash that was seized or the objects acquired with this cash), declared the applicant guilty of the possession, carrying and introducing of weapons and ammunition on to French territory without proof of origin, and sentenced him to one year's imprisonment, with a 20,000 francs fine, five years' prohibition of residence and, jointly, a 5,000 francs fine for the customs offence concerning the weapons.

4. On the day the judgment was delivered, 11 May 1983, the customs authorities, whose first proceedings had just been set aside, filed a further complaint once again concerning the importation of foreign currency into France.

The investigation of this new complaint was assigned to the same judge who had dealt with the previous complaint, the proceedings for which had been set aside by the above-mentioned judgment of 11 May 1983.

On 26 May 1983, the applicant was questioned during the investigation into this fresh complaint and maintained that the facts of which he was accused did not constitute a customs offence. He refused to sign the record of the questioning and challenged the investigating judge's refusal to send his lawyer the seizure record which served as the basis for the prosecution, so that he might prove the absence of any substantive elements.

The investigating judge once again referred the matter to the criminal chamber of the Nice Regional Court by order dated 8 June 1983. The case was heard before this court on 6 July 1983.

The customs authorities filed submissions requesting that the following be convicted :

- Pietro Paolo Senis, as the perpetrator of an infringement of the exchange legislation, namely the undeclared importing of means of payment ;
- D., as a person involved in the fraud, under Article 399 para. 2 (b) of the Customs Code.

The applicant Senis filed submissions claiming that the facts of which he was accused did not constitute an offence and with the aim of rebutting the presumptions of guilt established by Articles 418 para. 1, 392 para. 1, 373 and 399 para. 2 of the Customs Code.

5. The Nice Regional Court, in its judgment of 16 September 1983, pronounced both of the accused guilty under Article 5 of Decree No. 68-1021 of 24 November 1968 and Article 459 of the Customs Code as well as under various provisions of the Criminal Code and the Code of Criminal Procedure.

The applicant Senis was sentenced to one month's imprisonment ; D. was discharged. Both were ordered jointly and severally to pay the sum of 148,006 francs (the value of the currency not seized) and the sum of 292,756 francs as a fine. The court also declared that the foreign currency and objects seized be confiscated.

Senis and D. appealed against this judgment on 20 and 22 September 1983. The Aix-en-Provence Court of Appeal confirmed the contested judgment in a decision dated 14 December 1983, relying on Articles 399 and 435 of the Customs Code.

The Court of Cassation, in a judgment of 19 November 1984, dismissed the appeal against the Court of Appeal's decision. It considered, with regard to the points

raised by the applicant from the point of view of the Convention, that "since the evidence of the clandestine introduction of the foreign currency found in the house in which the accused were living came from their own statements and not from any presumption of guilt, there is no reason to set aside the proceedings due to an alleged violation of the Convention for the Protection of Human Rights and Fundamental Freedoms; ... given these reasons, which are free from deficiency or contradiction, the Court of Appeal, far from being guilty of the complaints contained in the grounds of appeal, gave a legal justification for its decision ...".

## COMPLAINTS

1. The applicant alleges the violation of Article 6 paras. 1 and 2 of the Convention insofar as he considers that Articles 418 para. 1, 392 para. 1 and 373 of the Customs Code (1), as they were applied in the present case, do not comply with the requirements of Article 6 of the Convention.

The provisions on the basis of which he was convicted introduce veritable legal presumptions of guilt in criminal matters and reverse the burden of proof which, for the applicant, amounts to an infringement of Article 6 of the Convention on two counts:

- firstly, these presumptions constitute violations of the principle of the presumption of innocence guaranteed by Article 6 para. 2 of the Convention;
- secondly, in the applicant's relations with the customs authority, they constitute a breach of the principle of "equality of arms" encompassed in Article 6 para. 1.

2. The applicant also complains of a violation of Article 6 para. 1 of the Convention on account of the fact that he was not given a fair hearing by an "impartial tribunal" during the criminal investigation.

In this case the investigation of the first complaint lodged by the customs authorities, on 1 February 1983, was assigned to the most senior of the Nice investigating judges. The Nice Regional Court, to which the case had been referred, set aside the proceedings concerning the customs offences for violation of Article 458 of the Customs Code. On the same day as this judgment was delivered, the customs authorities filed a further complaint for the same offences, and the investigation was assigned to the same investigating judge. Despite the claim by the applicant that the facts of which he was accused did not constitute an offence, the investigating judge once again transferred the file to the Nice Regional Court.

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(1) *Article 373 of the Customs Code*: In any action concerning seizure, the burden of proof that an offence has not been committed lies with the person whose goods have been seized.

*Article 392 para. 1 of the same Code*: The person in possession of the contraband goods is deemed liable for the offence.

Without questioning the subjective impartiality of the investigating judge, the applicant considers that his objective impartiality was called into question on account of appearances which in this case take on a certain importance.

## **THE PROCEEDINGS**

The application was introduced on 5 February 1985 and registered on 20 February 1985.

On 12 December 1985, the Commission decided to give notice of the application to the French Government, in accordance with Rule 42 para. 2 (b) of its Rules of Procedure, and to invite them to submit their written observations on the admissibility and merits of the complaints made in respect of Article 6 of the Convention.

Following two extensions of the time-limit set for the submission of their observations on the admissibility and merits of the application, the French Government submitted their observations on 30 September 1986.

The applicant submitted his observations in reply to the Commission on 20 November 1986.

On 7 October 1987, the Commission decided to postpone examination of the application pending the outcome of the proceedings in the Salabiaku case, at the time pending before the European Court of Human Rights.

## **THE LAW**

The applicant alleges a violation of paragraphs 1 and 2 of Article 6 of the Convention insofar as he considers that the provisions of the Customs Code, as applied in the present case, do not comply with certain requirements of Article 6 of the Convention. This provision states:

“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 maintained in the present case that the principle of equality of arms arising from the notion of a fair trial, laid down in Article 6 para. 1 of the Convention, was respected when an almost irrebuttable presumption of guilt is placed upon an accused operating in favour of the customs authorities, on the basis of mere possession of goods.

The applicant also considers that it cannot be maintained that the principle of presumption of innocence, enshrined in Article 6 para. 2 of the Convention, was respected insofar as the reversal of the burden of proof resulted in the fact that, despite being accused, the accused must prove that he is not guilty.

The Government challenge this approach. They assert that the above-cited provisions of the Customs Code, as they were applied, do not contravene any of the principles laid down in Article 6 of the Convention.

For the Government these provisions establish not a presumption of guilt but a presumption of liability according to which it is necessary to establish only the objective responsibility for the offence. This is therefore a specific rule of evidence peculiar to customs law. Furthermore, lightening the burden of proof lying with the prosecution can be regarded as an aspect of a fair trial, in compliance with Article 6 para. 1. Besides, the Convention does not require that the burden of proof lie entirely with the prosecution.

In the present case, the applicant's responsibility did not have to be proven since it had been established that the accused had unlawfully introduced foreign currency into France; it was still necessary to prove that this unlawful introduction of currency had taken place. It was also up to the prosecution (the customs authorities and the public prosecutor) to provide such proof.

Lastly, as far as the Government are concerned, the presumptions in the above-cited articles of the Customs Code are not contrary to the presumption of innocence established in Article 6 para. 2 of the Convention and under no circumstances replace it.

In the light of the case-law of the Convention organs, Article 6 para. 1 of the Convention concerns only the charge brought against an individual and not the evidence used before a court.

Since he was presumed innocent, the applicant retained his rights until the judges of the Nice criminal court, then those of the Aix-en-Provence Court of Appeal, declared him guilty of smuggling foreign currency, after establishing the existence of elements constituting the offence in view of the evidence provided in the file and adduced at the hearing.

With regard to the findings related in the customs report, the exactitude and sincerity of the confessions and statements mentioned in this report could have been disproved by the applicant in accordance with the provisions of Article 373 of the Customs Code.

The Government add that the accused could have refuted his responsibility by providing proof of "force majeure" that could only result from an event for which responsibility is not attributable to the perpetrator of the offence and which it was

absolutely impossible for him to avoid" or of an "unavoidable error", in accordance with the case-law of the Court of Cassation concerning Articles 418 and 392 of the Customs Code.

In the light of these considerations, the Government conclude that the application should be rejected as being manifestly ill-founded.

The Commission notes first of all that no controversy arises in this case as to the applicability of Article 6 of the Convention. In any event, the punitive provisions of French customs law may give rise to "criminal charges" for the purposes of Article 6 (see Eur. Cour. H.R., Salabiaku judgment of 7 October 1988, Series A no. 141-A, para. 24).

In this case, the question is whether, as is claimed by the applicant, the manner in which the above-cited provisions of the Custom Code were applied gave rise to an inequality of arms between the parties in the case and infringed the principle of the presumption of innocence, in breach of Article 6 paras. 1 and 2 of the Convention.

As the Court noted in the above-mentioned judgment (para. 28):

"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law

.....

Article 6 para. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

The Commission will attempt to ascertain whether these limits were exceeded to the applicant's detriment.

The applicant was prosecuted for the unlawful importation into France of foreign currency, on the basis of Article 5 of Decree No. 68-1021 of 24 November 1968 and Article 459 of the Customs Code relating to criminal responsibility.

He was presumed innocent until the judges of the Nice Regional Court, then those of the Aix-en-Provence Court of Appeal, declared him guilty of smuggling foreign currency, after noting the existence of the essential elements of the offence in the light of evidence provided in the file and adduced at the hearing.

The Nice Regional Court noted that the applicant, who had escaped from a Swiss prison, had according to his own statements spent some time in Switzerland before clandestinely crossing the Franco-Swiss border, that he claimed to be the owner of the foreign currency and that he acknowledged having brought into



France 50,000 Swiss francs and two million lire without declaring them to the customs authorities. The court concluded that the evidence of the smuggling of foreign currency found in the possession of the accused resulted from their own statements and not from any presumption of guilt.

This was confirmed by the Aix-en-Provence Court of Appeal.

In its judgment of 19 November 1984, the Court of Cassation noted that the trial judges had exercised their power of evaluation having regard to the evidence provided in the file and discussed by both parties in their presence, and that in any event the proof of the smuggling of foreign currency resulted from the statements made by the accused, which included the applicant, and not from any presumption of guilt, and that there was therefore no reason to set aside the proceedings for an alleged violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Therefore, the French courts did not, in this case, apply the provisions of the Customs Code at issue in a manner which infringed the presumption of innocence laid down in Article 6 para. 2 of the Convention.

In respect of Article 6 para. 1 of the Convention, the applicant has made complaints which overlap to a large extent with those submitted under paragraph 2; essentially they consist of denouncing the presumption that the above-mentioned provisions of the Customs Code "operate in favour" of the prosecution. The Commission therefore sees no reason, in this case, under the general principle of a fair trial, to depart from the conclusion which it reaches from the specific point of view of the presumption of innocence.

In respect of the remainder, in particular the complaint relating to the alleged objective partiality of the investigating judge, an examination of the file does not, in the view of the Commission, disclose any breach of the various provisions of Article 6 para. 1, even supposing it is applicable in this case to the investigating judge. At first instance, on appeal and in the Court of Cassation, the proceedings fully respect the adversarial and judicial principles, which the applicant does not deny. In particular, the applicant had the possibility of refuting in the presence of the trial judge the conclusions reached by the investigating judge.

In the light of the foregoing the complaints raised by the applicant are manifestly ill-founded and the application must therefore be rejected pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission

**DECLARES THE APPLICATION INADMISSIBLE.**