APPLICATION N° 16462/90

Francisco IRIBARNE PEREZ v/FRANCE

DECISION of 19 January 1994 on the admissibility of the application

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Article 1 of the Convention

a) The responsibility of a High Contracting Party may be engaged by acts of its authorities producing effects outside its own territory

b) The Convention cannot be regarded as automatically applicable to Andorran territory merely by virtue of its ratification by France

The responsibility of France is not engaged by the actions of an Andorran court

Article 5, paragraph 1 (a) of the Convention *Enforcement by a Contracting State of a custodial sentence passed by the courts of another State is not contrary to this provision The enforcing State must nevertheless refrain from lending assistance if it appears that the conviction is the result of a flagrant denial of justice*

The "Tribunal des Corts" in Andorra is a "competent court" and Franco-Andorran custom is a sufficient legal basis for the enforcement in France of custodial sentences passed by that court In this case, the proceedings in the "Tribunal des Corts" do not appear to have involved a flagrant denial of justice capable of making the detention unlawful for the purposes of Article 5 of the Convention

Article 26 of the Convention *With regard to the lawfulness of detention in France consequent upon conviction by an Andorran court, an appeal provided for in Andorran law is not an appeal available in French law and therefore does not have to be brought by an applicant imprisoned in France*

THE FACTS

The applicant, born in 1931, is a Spanish national He is at present a prisoner in Muret prison, France Before the Commission he is represented by Mr José J Rico Iribarne, a lawyer practising in Lerida/Lleida

The facts, as submitted by the parties, may be summarised as follows

The applicant took refuge in the Principality of Andorra in 1981, ostensibly for political reasons, and began to work as an informer for the Spanish "Guardia civil" It is alleged that in 1985, on their behalf, he infiltrated a gang of traffickers bringing drugs into Spain from Andorran territory

On 7 July 1985 the applicant was arrested by the Andorran police in possession of a small quantity of drugs and a firearm He was held in police custody for four days and alleges that during that time the police threatened and struck him to make him confess It is also alleged that after an attempt to escape from the Andorra prison the applicant was taken to the police station and beaten again He lodged a complaint, accompanied by a medical certificate, but claims no action was taken

The applicant asserts that during the trial he stated that his confession had been obtained under duress and that his participation in the offences had been designed to make possible the arrest of drug traffickers wanted by the Spanish "Guardia civil"

In a judgment delivered on 26 November 1985 the "Tribunal des Corts", ruling at first and final instance, sentenced the applicant to twelve years' imprisonment for drug trafficking and carrying a firearm He was also sentenced on the same day to eighteen months' imprisonment for procuring the commission of an offence and attempting to escape from lawful custody The court also sentenced two other defendants charged with the same offences to eight years' imprisonment and ordered the expulsion of all three from Andorran territory

The applicant asserts that this judgment was not served on him until three years later, through the Spanish Consulate General in Toulouse According to the Government, it was served on the applicant on 2 December 1985 in the presence of his lawyer After two further trials the "Tribunal des Corts" sentenced the applicant, on a date which has not been specified, to one year's imprisonment for bribing a public servant, and on 17 June 1987 to ten months' imprisonment for attempting to escape from lawful custody According to the applicant, these judgments were never served on him

The applicant chose to serve his sentence in France On 17 December 1985 he was incarcerated in Toulouse prison On 16 March 1986 he attempted to escape from that prison and was sentenced by the Toulouse Criminal Court, on 17 June 1987, to ten months' imprisonment for this offence After serving part of his sentence at Fresnes prison between 11 April 1986 and 12 January 1987, the applicant was taken to Muret

prison, where he is now detained He is due to be released on 21 August 1996, unless he qualifies for remission prior to that date

COMPLAINTS

In his application, directed exclusively against France, the applicant complains that

a he suffered treatment contrary to Article 3 of the Convention while in police custody and detention on remand,

b he is deprived of his liberty in a French prison in execution of a judgment delivered by a court which is not competent within the meaning of Article 5 para 1 (a) of the Convention, in that the judges of the "Tribunal des Corts" are not legal practitioners, while the language used during the proceedings was Catalan, a language he did not understand at the time, in breach of Article 5 para 2 of the Convention,

c the safeguards afforded by Article 6 of the Convention were not respected during the proceedings complained of in the "Tribunal des Corts", in that

- the "Tribunal des Corts" was not impartial, as the "viguier" who had conducted the preliminary inquiry also sat as a judge,

- the judgment was influenced by a press campaign directed against him and tendentiously fostered by the police, and

- his Spanish lawyer, appointed the week before the trial, after his Andorran lawyer had withdrawn from the case, did not have enough time to prepare his defence, as the "Tribunal des Corts' refused the adjournment requested,

d the sentence of twelve years' imprisonment imposed on him is not provided for in the Code of Customary Law in force in Andorra (such a sentence never before having been imposed for a drug trafficking offence) and is contrary to Article 7 of the Convention,

e his home was searched by the Andorran police and numerous items disappeared, which the applicant considers a violation of Article 8 of the Convention,

f he had no remedy, as Article 13 of the Convention requires, whereby he could request the French authorities to review both the lawfulness of his detention and observance by the "Tribunal des Corts" of the rights set forth in the Convention,

g lastly, the sentence passed on him was more severe than the sentence usually passed on Andorran citizens He therefore considers himself to be a victim of discrimination on the ground of his nationality, contrary to Article 14 of the Convention

In further observations submitted on 31 August 1993 the applicant complains that he did not have the benefit of the procedures provided for in Articles 713-1 *et seq* (1) of the Code of Criminal Procedure, whereas these provisions were applied by

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(1) **Article 713-1** (Law no 84-1150 of 21 December 1984) Where, in application of an international convention or agreement, a person detained in execution of a sentence passed by a foreign court is transferred to French territory in order to serve the remaining portion of his sentence there, the sentence shall be enforced in accordance with the provisions of this Code and in particular Articles 713-2 to 713 6

Article 713-2 (Law no 84 1150 of 21 December 1984) Immediately after his arrival in French territory the convicted prisoner shall be brought before the public prosecutor of the place of arrival, who shall question him as to his identity and make out a report on his findings Where, however it is not possible to question him immediately, the convicted person shall be taken to the district prison, where he may not be detained for more than twenty four hours On expiry of that limit the "prison governor" (Law no 87-432 of 22 June 1987) shall ensure that he is brought without further formality before the public prosecutor
Having inspected the documents recording the agreement of the States to the transfer and the prisoner's consent, together with an original or execution copy of the foreign judgment containing his conviction, accompanied, where necessary by an official translation, the public prosecutor shall apply for the convicted person's immediate imprisonment

Article 713-3 (Law no 84-1150 of 21 December 1984) The portion of the sentence passed abroad which remained to be served in the foreign State shall, by virtue of the international convention or agreement, be directly enforceable in French territory with immediate effect
However, where the sentence passed is, by its nature or length more severe than the penalty provided for in French law for the same offence, the criminal court of the place of detention, on an application by either the public prosecutor or the convicted prisoner, shall substitute for it the sentence which is most similar in French law, or reduce it to the maximum the law allows Consequently, the court shall determine, according to the circumstances the nature of the sentence to be enforced, and its length, which may not exceed the portion which remained to be served in the foreign State

Article 713-4 (Law no 84-1150 of 21 December 1984) The court shall give its decision in public, after hearing the public prosecutor, the convicted prisoner and, where appropriate the lawyer chosen by him or appointed to assist him at his request under the legal aid scheme This decision shall be enforceable with immediate effect, any appeal notwithstanding

Article 713-5 (Law no 84-1150 of 21 December 1984) The time taken for the transfer shall be set off in full against the length of the sentence enforced in France

Article 713-6 (Law no 84 1150 of 21 December 1984) All disputes relating to enforcement of the custodial sentence remaining to be served in France shall be submitted to the criminal court of the place of detention

Article 713-7 (Law no 84-1150 of 21 December 1984) Execution of sentence shall be governed by the provisions of this Code

Article 713-8 (Law no 84-1150 of 21 December 1984) No criminal proceedings may be brought or continued and no sentence may be enforced in respect of the same offence against a convicted prisoner serving in France, under the terms of an international convention or agreement, a custodial sentence passed by a foreign court

France in the case of Drozd and Janousek, who, it is alleged, had the benefit of them as soon as they arrived in French territory He complains of the violation of Articles 5, 6, 7, 13 and 14 of the Convention

THE LAW (Extract)

1 Relying on Articles 6, 5 para 2, 7 and 14 of the Convention, the applicant complains, firstly, that he did not have a fair trial by an impartial tribunal, secondly that the proceedings in the "Tribunal des Corts" were conducted in a language he did not understand, and lastly that the sentence imposed on him was not provided for by the law in force and that it was more severe than those usually imposed on Andorran citizens for the same offences

The applicant further complains that the Andorran authorities subjected him to treatment contrary to Article 3 of the Convention and searched his home in breach of Article 8 of the Convention

However, the Commission notes that the events complained of by the applicant occurred in the territory of the Principality of Andorra In the case of Drozd and Janousek (Eur Court H R , judgment of 26 June 1992, Series A no 240, pp 28 29, paras 85-90) the Court held that the Principality of Andorra, whose status in international law was both complex and unusual, was not bound by the provisions of the Convention It does not form part of either France or Spain, nor is its territory an area common to the French Republic and the Kingdom of Spain, States which have no jurisdiction either to make a territorial declaration relating to Andorra under Article 63 of the Convention or to act on its behalf Moreover, as the Principality of Andorra is not one of the member States of the Council of Europe, it is not a Party to the Convention in its own right

It follows that, in so far as the events complained of by the applicant occurred in Andorra, the Commission is not competent *ratione loci* to examine them

There remains the question whether the responsibility of France is engaged on account of acts by its authorities producing effects in Andorran territory In that connection the Court has expressly held that the actions of the Andorran authorities, in particular the "Tribunal des Corts", are not subject to supervision by the French authorities and are outside their jurisdiction (see the previously cited Drozd and Janousek judgment, para 96) Consequently, the acts complained of by the applicant cannot be imputed to France and fall outside the Commission's competence *ratione personae*

It follows that these complaints must be rejected as being incompatible with the provisions of the Convention within the meaning of Article 27 para 2

2 The applicant further asserts that his detention in France fails to satisfy the requirements of Article 5 para 1 (a) of the Convention and that he had no remedy whereby he could have the lawfulness of this detention reviewed

The Government maintain that the applicant has not exhausted domestic remedies, in accordance with Article 26 and Article 27 para 3 of the Convention, since under an Andorran decree of 13 July 1990, which followed a decree of 12 July 1990 setting up a Higher "Tribunal des Corts , persons convicted by the "Tribunal des Corts" could appeal against conviction The Government recognise, however, that this is not a remedy afforded by French law, and that it was not introduced until after the applicant's conviction

The applicant maintains that this is not an accessible remedy, in that he was a prisoner in France at the time when it was introduced

The Commission notes that this is not a remedy afforded by French law and that, in any case, it did not even exist at the time when the application was lodged with the Commission Consequently, the Commission considers that the objection of non-exhaustion cannot be upheld

3 With regard to the applicant's complaint to the effect that his detention in France after conviction by an Andorran court was in breach of Article 5 para 1 (a) of the Convention because it had no legal basis, the Commission first cites the relevant part of Article 5 para 1, which reads as follows

> "1 Everyone has the right to liberty and security of person No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law
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> a the lawful detention of a person after conviction by a competent court,

The Government point out that, in its judgment of 26 June 1992 in the Drozd and Janousek case (para 110), the Court held as follows

> "The Contracting States are, however, obliged to refuse their co operation if it emerges that the conviction is the result of a flagrant denial of justice (see, *mutatis mutandis*, the Soering v United Kingdom judgment of 7 July 1989, Series A no 161, p 45, para 113) "
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> In the Soering case, the Court held as follows
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> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society (see, *inter alia*, the Colozza judgment of 12 February 1985, Series A no 89, p 16, para 32) The Court does not

exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial "

Consequently, the Government note that the Court has introduced a legal parallelism in the extraterritorial application of Article 6 of the Convention, whether this concerns past or future events However, as the Court itself declared, there has to be a flagrant violation of Article 6, since in the extraterritorial application of this Article its requirements are diluted.

The Government emphasise that when France is called upon to implement a foreign decision it must not refuse its co-operation unless the decision is manifestly at variance with its public policy, i e in this context the fundamental values of its criminal justice system, of which the Convention forms a part Accordingly, refusal to enforce a sentence can only be the result of a comparison between the two criminal justice systems concerned If that of the convicting State is manifestly at variance with the inviolable values of the French legal system, enforcement will be refused In particular, it is necessary to verify in a given case whether the essential rights of the defence have been infringed

In that connection the Government observe that:

- the applicant had the assistance of a lawyer (which has in any case been compulsory before the "Tribunal des Corts" since a decree of the Co-Princes dated 10 April 1976),

- it can be seen from the judgment itself that the trial was public,

- contrary to the applicant's assertions, it was not the "viguier" R. who prepared the case for trial, but a French "bayle" who had no vote in the court's deliber ations, and lastly

- the judgment was served on him in the presence of his lawyer as early as 2 December 1985

Consequently, the Government consider that the essential rights of the defence were preserved, so that the applicant was not the victim of a flagrant denial of justice Therefore, as the decision given was not at variance, from the procedural point of view, with the inviolable values of the French criminal justice system, France had a duty to enforce it in accordance with the custom which had grown up between France and Andorra, whose binding legal force was recognised by the Court (Drozd and Janousek judgment, previously cited, para. 107) In addition, the applicant was tried a few months before the applicants Drozd and Janousek, under a similar procedure and enjoying at least equivalent safeguards. In that case, however, the Court expressed the opinion that it had not been shown that in the circumstances of the case France was required to refuse its co-operation in enforcing the sentences (*ibid*, para 110 *in fine*)

The same conclusion is valid for the present applicant The Government conclude that there has been no violation of Article 5 para 1 of the Convention

The applicant, for his part, considers that the "Tribunal des Corts", which tried him, does not appear to satisfy the requirements concerning a court's independence laid down in Article 6 of the Convention The fact that the "viguier" representing the Bishop of Urgel continues to sit in person as a member of that court, thus exercising both judicial and administrative functions concurrently, is contrary to the provisions of Article 6 of the Convention. If the term "competent court" can apply only to "an independent and impartial tribunal", Articles 5 and 6 of the Convention were violated in spite of the formal observance of the laws in force in Andorra Referring to the dissenting opinion expressed by Judges Pettiti, Valticos and Lopes Rocha in the Drozd and Janousek judgment, the applicant considers that in this case his detention in France infringed the provisions of Article 5 of the Convention.

The Commission recalls that Article 5 para. 1 (a) does not prohibit enforcement by a particular Contracting State of a sentence of imprisonment pronounced outside its territory (see the Drozd and Janousek case, previously cited, Comm Report 11.12 90, para. 120). The "Tribunal des Corts", which convicted the applicant, must be regarded as the "competent court" referred to in Article 5 para. 1 (a) of the Convention (previously cited Drozd and Janousek judgment, para. 110) The Commission also recalls that the Court held that the Franco-Andorran custom under which France could enforce in its territory criminal sentences passed in Andorra constituted a legal basis for detention in France (*ibid.*, para. 107).

It is true that in order to satisfy the requirements of Article 5 para 1 (a), a State must refrain from lending assistance if it appears that the conviction is the result of a flagrant denial of justice (*ibid*, para. 110)

In the light of the foregoing considerations, the Commission will examine the question whether the applicant's conviction in Andorra was the result of a flagrant denial of justice. In that connection, the Commission notes that the complaints made by the applicant about his trial before the "Tribunal des Corts" are similar to those submitted in the Drozd and Janousek case Moreover, the Commission cannot find any circumstance which might persuade it to reach a conclusion different from that adopted by the Court in that case.

Accordingly, although it is possible that the proceedings complained of were not entirely in conformity with Article 6 of the Convention, the Commission takes the view that in this case no flagrant denial of justice can be discerned. It follows that this part of the application must be rejected as being manifestly ill founded, pursuant to Article 27 para. 2 of the Convention.

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