APPLICATION N° 16839/90

Saïd André REMLI v/FRANCE

DECISION of 12 April 1994 on the admissibility of the application

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Article 26 of the Convention :

a) The exhaustion of domestic remedies rule demonstrates that it is primarily the Contracting States' responsibility to redress any violation of the Convention

b) In order to have exhausted the domestic remedies the person concerned must have raised, at least in substance, before the national authorities the complaint he puts to the Commission

c) Racist remarks reportedly made prior to the hearing by a member of an Assize Court jury required to try the applicant, such as to cast doubt on the court's impartiality (France)

The accused had recourse to an effective remedy in requesting the Assize Court to take formal note of these remarks, an essential precondition for an appeal to the Court of Cassation which also gave the Assize Court the opportunity to order an investigation into the facts

The following are not effective remedies a request for a transfer on grounds of bias, which is only applicable against a full court, the procedure for challenging the juror, since the jury had already been sworn in at the time of the facts, a request for the juror's replacement, a procedure whose effectiveness the Government did not demonstrate in this case

d) The six months time-limit begins to run from the Court of Cassation's judgment on the Assize Court's interlocutory decision - in this case its refusal to take formal note of the racist remarks reportedly made by one of the court's jurors

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THE FACTS

A *The specific circumstances of the case*

The applicant is a French national of Algerian origin He was born in 1957 and has no occupation He is currently in custody in Fresnes prison

Before the Commission he is represented by Ms Claire Waquet, a lawyer practising before the Conseil d'Etat and the Court of Cassation

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

The applicant, who was then in custody in Lyon-Montluc prison, devised an escape plan with another prisoner of Algerian origin, Mr M

On 16 April 1985, while carrying out their plan, the applicant and M knocked out one of the warders, who died from the effects of the blows received

The escape attempt failed and the applicant and M were charged with intentional homicide for the purpose of facilitating, preparing or carrying out the offence of escaping and attempting to escape In a judgment of 12 August 1988, the Indictments Chamber of the Lyon Court of Appeal committed the applicant and M for trial before the Rhône Assize Court on the above charges

The applicant appealed on points of law against the committal decision, and in a decision of 5 December 1988 the Court of Cassation dismissed the appeal

The hearings before the Rhône Assize Court took place between 1 45 p m on 12 April and 14 April 1989 On 12 April, the jurors making up the trial jury plus two substitute jurors were chosen by lot After the accused and the public prosecutor had exercised their right of challenge, the jury was formally declared to be constituted and the hearing of witnesses began

When the hearing resumed at 1 50 p m on 13 April 1989, the applicant's lawyers filed pleadings in which they requested the court to take formal note of the remarks made by one of the jurors prior to the hearing of 12 April and overheard by a person not involved in the case, Mrs M , and to enter the pleadings and Mrs M 's statement in the record

The statement read

> To whom it may concern, I the undersigned ( ) solemnly declare that I have witnessed the following facts

At about 1 p m , I was standing at the door of the court next to a group of persons From their conversation, I discovered by chance that they were members of the jury chosen by lot for the Merdji Remli v Pahon case

One of them then spoke the following words

'In addition, I am a racist'

I do not know the name of this person but I can state that this person was on the left of the juror located immediately to the left of the judge sitting on the left of the president

I am unable to attend the hearing to confirm the facts owing to my daughter's recent admission to hospital but I am at the court's disposal if it is necessary for me to give evidence

After deliberating, the court, for this purpose composed only of judges, refused to take formal note of the remarks on the grounds that

'according to this statement and the pleadings, the remarks were made before the start of the first hearing in this case and not in the presence of the judges composing the court, the court is therefore unable to take formal note of events which reportedly took place outside its presence

It also ordered the statement and the pleadings to be entered in the record of the proceedings

In a judgment of 14 April 1989, the Rhône Assize Court sentenced the applicant to life imprisonment for intentional homicide and attempting to escape

The applicant appealed on points of law against this judgment, citing several grounds of appeal, including violation of Article 6 para 1 of the Convention because of the Assize Court's refusal to take formal note of the remarks reported in the statement

In a judgment of 22 November 1989, the Court of Cassation dismissed the applicant's appeal and replied to the ground of appeal as follows

the court was quite justified in refusing to take formal note of events which, assuming they were established, took place outside the hearing thus making it impossible for the court to observe them ( )

B *Relevant domestic law and practice*

Composition and functioning of Assize Courts

Proceedings before the Assize Courts are governed by Articles 231 to 380 of the Code of Criminal Procedure.

The Assize Court comprises the court proper, composed of three judges and the jury. The latter is made up of persons aged at least 23 years and exercising full rights, who appear on a list drawn up annually in each Assize Court's judicial district.

The Assize Court does not sit continuously but holds sessions every three months. At least thirty days before the opening of the assizes, the names of thirty-five jurors and ten substitutes are chosen by lot from the annual list. The session jury list as drawn up is notified to each accused at least two days before the hearing.

The trial jury is selected in public session at the start of the hearing. Nine jurors are chosen by lot from the session list, the accused being entitled to challenge up to five jurors and the public prosecutor up to four. The trial jury is constituted once the names of nine non-challenged jurors have been drawn by lot. The court may also order the drawing by lot of substitute jurors.

Once the trial jury has been constituted, the president of the court requires the jurors to swear on oath to reach a decision according to their conscience and personal conviction, not to communicate with anyone and to maintain the confidentiality of the deliberations. During the hearing jurors may put questions to the accused and witnesses, when so authorised by the president, and may not make known their opinions.

At the conclusion of the hearing, the court and the jury jointly retire to consider the verdict and the sentence. The vote as to guilt is taken by secret ballot, on the basis of a list of questions drawn up by the president. Any decision which goes against the accused must be adopted by a majority of eight votes and blank or spoiled votes are counted as favourable to the accused. There is then a secret ballot to decide the sentence.

The decisions are recorded on the question sheet, which is signed by the president and the first juror, and are then read out.

No reasons are given for Assize Court judgments and there is no appeal against them. They can only be appealed from on points of law to the Court of Cassation.

- Conduct of hearings:

Throughout the hearing, a record is kept which includes, *inter alia*, any requests in the form of submissions made by the prosecution or by the defendant or the party claiming damages, on which the court (without the jury) is required to give a ruling. Article 316 of the Code of Criminal Procedure states that interlocutory judgments delivered by the court may only be the subject of an appeal on points of law at the same time as the judgment on the merits.

The Court of Cassation may not give rulings on complaints of which the Assize Court has not been asked to take formal note and which have not been entered in the record of proceedings (Cass crim 23 December 1899, Bull no 380 24 July 1913 Bull no 365, 12 May 1921 Bull no 211, 31 January 1946, Bull no 40 30 May 1955, Bull no 28 21 November 1973 Bull no 427 22 April 1977 Dalloz 1978 p 28) In the absence of a decision on a procedural dispute it is for the president and not the court, to place the fact on record

The court may refuse to place on record events occurring outside the hearing The court has the power to order an investigation if it considers this relevant, and has sovereign discretion in this respect (Cass crim 16 January 1903, D P 1904 I 479 5 August 1909 Bull no 422 12 January 1911 Bull no 21)

Appeals in respect of procedural disputes

Article 316 of the Code of Criminal Procedure reads

All procedural disputes shall be settled by the court after hearing the public prosecutor and the parties or their counsel

These decisions may not prejudice the merits of the case

They may only be appealed against to the Court of Cassation at the same time as the judgment on the merits

Applications for cases to be transferred to another court on grounds of bias

According to Article 662 of the Code of Criminal Procedure

In criminal ( ) cases, the criminal chamber of the Court of Cassation may remove a case from any court and transfer it to another court of the same type on grounds of reasonable suspicion of bias

The request for transfer may be presented by the public prosecutor at the Court of Cassation the public prosecutor attached to the court hearing the case the accused or the party claiming damages
( )

According to the case law, transfer on grounds of bias can only apply to a full court and not to one of its members, against whom the challenge procedure must be us -

A request for a transfer on grounds of bias will only be accepted if there are specific and serious grounds for the request The Court of Cassation has ordered the removal of cases from Assize Courts when there were circumstances likely to interfere with the independence or impartiality of jurors or witnesses, the exact ascertainment of

the truth or the normal course of justice (Cass crim 26 November 1931, Bull no 272, 22 March 1933, Bull no 61), or when there were grounds for fearing that "the circumstances in which a criminal court is required to hear a case could be such as to compromise its freedom and authority to reach a decision' (Cass crim 30 June 1911, Bull no 333)

- Appeals on points of law

The Court of Cassation has jurisdiction to decide whether there has been a violation of the Convention, which is directly applicable in French law

COMPLAINTS

1 The applicant complains that his case was not heard by an impartial tribunal since the Assize Court refused to take formal note of the racist remarks made by one of the jurors before the hearing and reported in a statement made by a witness In this connection the applicant relies on the provisions of Article 6 para 1 of the Convention

2 He also alleges a violation of Article 14 of the Convention, under which the right to an impartial tribunal shall be secured without discrimination on any ground such as race or national origin

PROCEEDINGS BEFORE THE COMMISSION (Extract)

The application was introduced on 16 May 1990 and registered on 10 July 1990

On 1 April 1992, the Commission (Second Chamber) decided to give notice to the French Government of the complaints concerning the court's lack of impartiality and discrimination and to declare the remainder of the application inadmissible

The Government presented their observations on 8 July 1992, after an extension of the time limit, and the applicant presented his observations in reply on 3 August 1992

On 12 January 1994 the Commission decided to hold a hearing on the admissibility and merits of the application

The hearing took place on 12 April 1994

THE LAW (Extract)

The applicant complains that his case was not heard by an impartial tribunal in so far as the Assize Court refused to take formal note of the racist remarks made by one of the jurors before the hearing which were reported in a statement made by a

witness. In this connection the applicant relies on the provisions of Article 6 para. 1 of the Convention, and in particular the guarantee as to the tribunal's impartiality He also complains that he was the subject of discrimination based on racial origin, in contravention of Article 14 of the Convention

1. *The objections of non exhaustion of domestic remedies and the lateness of the application*

The Government raise the objection that the applicant has not exhausted the domestic remedies They rely secondly on the lateness of the application.

Under Article 26 of the Convention

> "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rule of international law, and within a period of six months from the date on which the final decision was taken."

a) Non-exhaustion of domestic remedies

Regarding the first objection concerning the complaint based on Article 6 para 1 of the Convention, the Government maintain that in requesting the Assize Court to take formal note of the juror's remarks the applicant was not exercising an effective remedy since the court had not observed the events, which occurred elsewhere than in the courtroom. According to the Government, the applicant should first have asked for an investigation to establish the facts and then to have them placed on record The Government also state that the applicant should have asked for the juror to be replaced.

They also point out that the applicant could have lodged an application for the case to be transferred to another court on grounds of bias, as provided for in Article 662 of the Code of Criminal Procedure

Concerning the complaint under Article 14 of the Convention, the Government argue that the applicant did not bring this complaint before the national courts

The applicant disputes these arguments. Regarding the first, he states that the remedy to which he had recourse before the Assize Court was the correct one if he subsequently intended to base his defence on the nullity of the proceedings, since the formal noting of a fact is an absolute precondition when the evidence for it does not emerge from the official record of the proceedings He considers that his failure to ask for an investigation is irrelevant, since he submitted evidence to the court and it was for the latter to order an investigation of its own motion if it considered this necessary He also argues that a request for the replacement of the juror would have been refused if the fact was not formally noted

On the third point, he states that he did not apply for the case to be transferred on grounds of bias precisely because his request for the fact to be formally noted had been refused and that such an application would not have been admissible in the absence of evidence

Finally, regarding the complaint based on Article 14 of the Convention, he states that the violation results from the decision of the Court of Cassation itself

The Commission has to establish whether the conditions laid down in Article 26 of the Convention have been met in this case

The basis of the rule concerning the exhaustion of domestic remedies is that before bringing a case before an international court, an applicant must have given the State responsible the opportunity to redress the alleged violations through domestic proceedings, using the judicial means afforded by national legislation, provided that they are effective and adequate (No 788/60, Austria v Italy, Dec 11 1 61, Yearbook 4 pp 117, 169, No 712/60, Retimag v Federal Republic of Germany, Dec 16 12 61, Yearbook 4 pp 385, 401, No 5964/72, Dec 29 9 75, D R 3, p 57, Eur Court H R , Guzzardi judgment of 6 November 1980, Series A no 39, p 27, para 72, Eur Court H R , Cardot judgment of 19 March 1991 Series A no 200, p 19, para 36)

For this purpose, the applicant must have made not merely applications to the relevant domestic courts but also the same complaints to those courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, as those he intends subsequently to make to the Convention organs (above cited Guzzardi judgment, pp 25-27, paras 71 72, above cited Cardot judgment, p 18, para 34)

In order to assess the relevance of the Government's objection on the first point, the Commission must establish whether the procedure whereby formal note is taken constitutes an effective remedy It notes in this connection that complaints cannot be referred to the Court of Cassation unless a request has been made in the Assize Court to take formal note of them and they have been entered in the record of the proceedings It also appears that, while the Assize Court may refuse to take formal note of an event which occurred outside the hearing, it has total discretion to order any relevant investigations

The Commission therefore considers that in asking the Assize Court to take formal note of the juror's alleged remarks, the applicant took a step which was an absolute precondition for any subsequent appeal on points of law Moreover, by drawing the court's attention to the statement by Mrs M , who reported the remarks she had overheard and offered to appear before the court, the applicant gave the court the opportunity to exercise its sovereign discretion to order an investigation

The Commission therefore considers that in asking for formal note to be taken the applicant was exercising an effective remedy according to the case law of the Convention organs

Concerning the argument that the applicant should have requested a transfer on grounds of bias, the Commission notes that this procedure may only be applied against a full court, particularly when there is reason to believe that jurors or witnesses might be subject to outside pressures When a single individual's impartiality is being questioned, the challenge procedure must be used

In this case, the Commission observes that the challenge procedure was no longer an option for the applicant, since the jury had already been finally constituted when his attention was drawn to the relevant remarks As to the Government's suggestion that the applicant could have requested the juror's replacement, the Commission finds that the Government have furnished no examples to show that this option was open to the applicant in the circumstances of this case In any event, it considers that following the court's refusal to take formal note of the occurrence, the court was no more likely to accede to such a request

Finally, the Commission considers that the applicant's allegation of a violation of Article 14 is linked to the complaint based on the violation of Article 6 para 1 of the Convention

It follows that the Government's objection that domestic remedies were not exhausted must be rejected

b) Failure to respect the six months time-limit

The Government maintain secondly that the application is out of time, since the applicant's complaint is based on the Assize Court's refusal to grant his request and the Court of Cassation considers that the trial court has sovereign discretion to decide whether the investigations requested should be carried out As a result, the appeal on points of law was bound to fail

The applicant replies that according to Article 316, final paragraph, of the Code of Criminal Procedure, the remedy against interlocutory judgments of the Assize Court is an appeal on points of law, which may only be lodged at the same time as an appeal against the judgment on the merits He states that in lodging this appeal, he was entitled to hope that the Court of Cassation would rectify the error committed by the Assize Court Finally, he argues that the Court of Cassation's decision must be assessed in terms not of domestic case law but of the requirements of the Convention

The Commission observes that Article 316 of the Code of Criminal Procedure states

> All procedural disputes shall be settled on by the court, after hearing the public prosecutor and the parties or their counsel

These decisions may not prejudice the merits of the case

They may only be appealed against to the Court of Cassation at the same time as the judgment on the merits "

The Government's objection is linked to the issue of whether, in this case, the appeal to the Court of Cassation constituted an effective remedy

The Commission notes that Article 316 provides for appeals to the Court of Cassation against interlocutory judgments of the Assize Court It also observes that the Court of Cassation has jurisdiction to decide whether there have been violations of the Convention, which is directly applicable in French law The Government have not provided any evidence in this regard to show that the applicant's grounds for appeal to the Court of Cassation would have fallen foul of any established case law

The Commission therefore considers that the decision to be taken into account for the purposes of applying Article 26 of the Convention was the Court of Cassation's decision of 22 November 1989 and finds that the application, lodged on 16 May 1990, was introduced within the six months time-limit provided for in this Article It follows that this objection must also be rejected