

APPLICATION N° 29340/95

Daniel CIVET v/France

DECISION of 7 April 1997 on the admissibility of the application

Article 5, paragraph 3 of the Convention *Detention on remand lasting more than two and a half years (Complaint declared admissible)*

Article 26 of the Convention

- a) The obligation to exhaust domestic remedies requires only that the applicant make normal use of remedies which are effective, sufficient and accessible. To be effective, a remedy must be capable of remedying directly the impugned state of affairs.*
- b) The existence of remedies must be sufficiently certain, not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.*
- c) In the case of excessive length of detention on remand (France), neither an appeal on a point of law nor an application under section 175-1 of the Code of Criminal Procedure is a remedy which has to be exhausted.*

THE FACTS

The applicant, a French citizen, born in 1947, is currently in La Talaudière Prison.

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

On 6 October 1993 the applicant's elder daughter, I C , born in 1970, went to her local police station, with her mother, to report that her father had raped her on a number of occasions between 1984 and 1987

On 7 October 1993 the applicant's younger daughter, A C , born in 1972, also reported her father to the police for raping her when she was sixteen years old

On 7 October 1993 the applicant was charged and remanded in custody by an investigating judge attached to Saint Etienne *tribunal de grande instance*

The applicant went on hunger strike for the first time for twelve days, until 6 April 1994

On 3 June 1994 the investigating judge dismissed the applicant's application for bail. In a judgment of 24 June 1994, the Indictments Division upheld the order dismissing his application

The applicant's appeal on a point of law was struck out by the Court of Cassation on 4 October 1994 on the ground that he had failed to lodge his grounds of appeal within the statutory time-limit

On 13 July 1994 the investigating judge informed the parties that the investigation appeared to have been completed and that the case file would be sent to the public prosecutor for his views on whether a prosecution should be brought. However, the investigation continued after that date

On 5 August 1994 the investigating judge dismissed a further application for bail on the grounds that (the applicant's) two daughters have made grave allegations against him of serious sexual offences, that a crime of this kind committed on girls under the age of fifteen by an elder blood relative, seriously disrupts public order, that there is a risk that the victims and their mother will be intimidated, that the applicant has numerous previous convictions'. The Indictments Division upheld that order in a judgment of 23 August 1994

On 9 September 1994 the investigating judge refused a further application for bail on the grounds that the charges are serious, that serious crimes of this kind are, by definition, seriously disruptive of public order in that they inflict lasting damage on the physical, mental and psychological well being of children, that the applicant is known for his intemperance and violence and has numerous previous convictions. The applicant appealed

In a judgment of 4 October 1994, the Indictments Division of Lyons Court of Appeal upheld the order of 9 September 1994

In an order of 4 October 1994, the investigating judge extended the detention on remand on the same grounds as those set out in the order of 9 September 1994

On 8 February 1995 the investigating judge again informed the parties that the investigation appeared to have been completed and that the case-file would be sent to the public prosecutor for his views on whether a prosecution should be brought. However, the investigation continued after that date

The applicant went on hunger strike again, this time for seven days ending on 5 April 1995

On 10 May 1995 the investigating judge informed the parties for the third time that the investigation appeared to have been completed and that the case-file would be sent to the public prosecutor for his views on whether a prosecution should be brought

On 17 August 1995 the investigating judge dismissed a further application for bail. The applicant appealed

In a judgment of 1 September 1995, the Indictments Division of Lyons Court of Appeal upheld the order on the grounds that, despite the applicant's denials, "there is serious and strong evidence that he committed the rapes with which he has been charged, that, given his attitude to the charges, there is a risk that, if released, he would be tempted to pressurize the victims, and indeed his wife, into retracting their statements, that this violent crime, even if not widely publicised, has seriously disrupted public order as far as the protection of children's physical and psychological well being is concerned, that this disruption, temporarily contained by remanding the applicant in custody, would recur if he were to be released, particularly as the investigation is almost complete, that [the applicant], who is unemployed and has several previous convictions (for theft, handling stolen goods, misappropriation, driving while under the influence of alcohol and a hit and run offence), is described as a violent individual who presents a danger both to himself and others, particularly when under the influence of alcohol, and thus cannot provide sufficient guarantees that he will appear for trial, it therefore appears necessary to keep the accused on detention in remand in order to prevent him from re-offending, to protect public order from the consequences of these offences and to ensure that he remains at the disposal of the judicial authorities".

In an order of 29 September 1995, the investigating judge dismissed a further application for bail. The applicant appealed

On 2 October 1995 the investigating judge made an order for the documents to be forwarded to the prosecution in order to conclude the investigation

In a judgment of 20 October 1995, the Indictments Division of Lyons Court of Appeal upheld the order for the same reasons as those contained in its judgment of 1 September 1995

In a judgment of 24 November 1995, the Indictments Division committed the applicant for trial before the Assize Court on several counts of rape by an elder blood relative, including of a minor. The applicant's appeal on a point of law was dismissed on 21 March 1996.

On 27 June 1996 the Assize Court for the Loire *département* convicted the applicant of the offences and sentenced him to ten years' imprisonment.

Relevant domestic law

Case-law

- Crim 18 February 1986 (*Bull crim*, no 66, *Recueil Dalloz* 1986 *Informations Rapides* 305, Pradel's observations) and 12 Dec 1988 (*Bull crim*, no 418) a ground of appeal based on Article 5 para 3 of the Convention is a mixture of fact and law. It is accordingly not subject to review by the Court of Cassation.
- Crim 6 March 1986 (*Bull crim*, no 94, *Recueil Dalloz* 1986 p 315, note Mayer), 12 Dec 1988 (*Bull crim* no 419) a pure question of fact is involved, which is not subject to review by the Court of Cassation.

Legal opinion

Jurisclassueur Procédure pénale, chambre d'accusation, H Angevin, Vol 50, 1994, p 17. "Where a person in detention on remand invokes Article 5 para 3 in pleadings filed with the Indictments Division, the court must address that peremptory plea and assess whether, on the facts, the detention on remand has exceeded the reasonable time limit within the meaning of the above provisions.

However, once the Indictments Division has addressed that plea, its assessment of the reasonableness of the length of detention, having regard to the facts of the case, is not subject to appeal."

- *Droit pénal, droit européen, Mélanges offerts à Georges Levasseur, Le droit pénal du Conseil de l'Europe*, R Koering-Joulin, publ Litec, 1992, pp 222-223. "the Court of Cassation refuses to exercise its power to review the reasonableness of detention on remand, preferring to leave this issue, said to be a question of fact, to the unfettered discretion of the trial court. It can never be over-stated that a lower court's reasoning, however detailed, should not be used to legitimise intrinsically excessive delays. As eloquently stated by Wilfrid Jeandier 'the Court of Cassation thus lost a golden opportunity to elevate the reasonable time requirement to the rank of other principles laid down by the Convention and which it has readily placed at the forefront of the rules governing trials' (Prof W Jeandier, *Revue de Science Criminelle* 1986, p 720)".

- *Traité de droit criminel*, Vol. 2, R. Merle and A. Vitu, publ. CUIJAS, 1989, p. 455. "2. Instances of protracted periods of detention on remand or of failure to deal with a defendant's bail application within the statutory time-limits have led to appeals to the Court of Cassation and to complaints of a violation of Article 5 para. 3 of the Convention In such cases, the Criminal Division has refused to commit itself: it has dismissed claims that the reasonable time-limit has been exceeded, ruling that they involve a mixture of fact and law, and, furthermore, has taken refuge behind the assertion that the assessment of the length of detention on remand is a question of fact ... "

- *Les grands arrêts du droit criminel*, Vol. 2, J. Pradel and A. Varinard, publ. Dalloz, 1995, p. 223: "How does the Criminal Division deal with [Article 5 para. 3 of the Convention], vague though its provisions may be, when invoked by defendants whose detention on remand has been upheld or determined by an indictments division? In its most recent judgments ... it has held that such an appeal raises a question of fact, which is not subject to its scrutiny. Prior to that, it had rendered judgments in the same vein, holding that the grounds involved a mixture of fact and law The Court of Cassation leaves the issue to be determined by the investigating judges and indictments divisions "

- *Procédure pénale*, M.-L. Rassat, publ. PUF, 1995, p. 631, no. 396: " ... The Court of Cassation has hitherto taken refuge behind procedural arguments in order to avoid taking a stance on the issue of whether, in the light of the Convention, detention on remand in this country is excessive. It holds an appeal based on this ground raises questions of pure fact, or, at best, a mixture of fact and law ... "

- *Libertés publiques*, J. Robert, assisted by J. Duffar, publ. Montchrestien, 6th ed., 1996, p. 301: "[the Court of Cassation] will review only the legality and reasoning of a lower court's decision: it leaves it to the trial court to assess the reasons for keeping a person in detention on remand. 'This review of the conditions of detention on remand is sorely inadequate to protect individual liberty ... the Criminal Division has hitherto allowed the judicial investigating authorities to detain defendants on remand unjustifiably and sometimes to do so as a means of subjecting them to psychological pressure' (J. Bore: *La Cassation en matière pénale*, L.G.D.J., 1985, pp. 95-96 and references)."

COMPLAINT

The applicant complains that the length of his detention on remand is excessive. He invokes Article 5 para. 3 of the Convention.

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THE LAW

The applicant complains that the length of his detention on remand is excessive. He invokes Article 5 para 3 of the Convention, which provides

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

1. The respondent Government raise a preliminary objection that domestic remedies have not been exhausted, since the applicant has not appealed to a Court of Appeal or the Court of Cassation. The Government submit at the outset that the applicant should have appealed against the order of 7 October 1993 remanding him in custody, the order of 4 October 1994 extending his detention on remand for one year and the order of 29 September 1995 dismissing his application for bail.

The Government do not deny that the applicant appealed against the other orders dismissing his applications for bail (decisions of 3 June, 5 August and 9 September 1994 and 17 August 1995). However, they note that the applicant failed to lodge an appeal with the Court of Cassation against the judgments of the Indictments Division, other than one which was in any event dismissed, in a judgment of 4 October 1994, for failure to comply with the statutory requirements. The Government refer to a number of decisions of the European Commission, including the *Varga Hirsch v France* case (No 9559/81, Dec 9 5 83, D R 33, p 158).

The Government submit that an appeal to the Court of Cassation is an effective remedy which has to be exhausted, as held by the Criminal Division of the Court of Cassation in a series of judgments in 1995 relating to detention in remand (see *inter alia*, judgments of 11 1 95/appeal no B 94-85 155 PF, of 15 2 95/appeal no C 94 85 570 PF, of 22 2 95/appeal no T 94-85 791 PF, of 27 2 95/appeal no Y 94-85 957 D, of 12 4 95/appeal no A 95-80 328 D, of 25 4 95/appeal no K 95-80 682 D, of 10 5 95/appeal no D 95 80 975, of 8 8 95/appeal no C 95-82 561 PF, of 23 5 95/appeal no W 95-80 945, of 14 6 95/appeal no W 95 81 474, of 25 7 95/appeal no T 95 82 713 PF, of 21 8 95/appeal no Q 95-83 124 D, of 17 10 95/appeal no F 95 84 151 D, of 30 10 95/appeal no E 95-83 115 PF, of 15 11 95/appeal no H 95-84 543 D and of 12 12 95/appeal no Y 95 84 949 D).

Lastly, the Government consider that the applicant should have exhausted the remedy provided for in section 175 1 of the Code of Criminal Procedure, given its indirect effect on the length of detention on remand. They refer to, *inter alia*, the Commission's decision in the *Redoutey v France* case (No 22608/93, Dec 20 1 95) and submit that the reasoning in relation to Article 6 para 1 in that case could be applied to the complaint submitted under Article 5 para 3 of the Convention.

The applicant, for his part, considers that he has exhausted all effective remedies

The Commission recalls that it may only deal with a matter after all domestic remedies have been exhausted, according to Article 26 of the Convention. An applicant must therefore use such remedies as are normally available and sufficient to enable him to obtain compensation for the violations which he alleges. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Eur. Court HR, Vernillo v France* judgment of 20 February 1991, Series A no 198, pp 11-12, para 27, *Akdivar and Others v Turkey* judgment of 16 September 1996, to be published in Reports of Judgments and Decisions 1996).

In the instant case, as regards appealing against the investigating judge's orders dismissing the bail applications, the Commission notes that the applicant appealed four times, that is, against the investigating judge's orders of 3 June, 9 September 1994, 17 August 1995 and, contrary to the respondent Government's assertions, 29 September 1995.

It follows that the Government's objection on this point must be rejected.

As regards the failure to lodge an appeal - or at least a procedurally valid one - with the Court of Cassation, the Commission must examine whether, in the instant case, an appeal to the Court of Cassation was a remedy which should have been exhausted according to Article 26 of the Convention.

The Commission notes that the Government produce judgments relating to detention on remand delivered by the Criminal Division of the Court of Cassation in 1995, but that although those judgments all concern detention on remand, they do not deal with the same 'grounds of appeal'. In assessing whether an appeal would have been effective in the circumstances of this case, a distinction therefore has to be drawn according to the legal issues decided by the Court of Cassation.

Firstly, the Commission notes that the Court of Cassation checks whether the indictments divisions have addressed peremptory pleas, including those based on Article 5 para 3 of the Convention (see the judgments produced by the Government dated 12 April and 12 December 1995), and given reasons for their decision to impose, in compliance with domestic legal requirements, one of the statutory bail conditions (see the judgments produced by the Government dated 22 February, 23 May, 14 June, 25 July and 8 August 1995). The Commission notes, nevertheless, that the reasoning itself - where it exists - is a matter for the unfettered discretion of the trial courts.

Secondly, the Commission notes that the Court of Cassation censures non-compliance with these statutory formalities laid down on pain of nullity (see the judgments produced by the Government dated 25 April, 21 August and 15 November 1995) and errors of law in the interpretation and application of the provisions of the Code of Criminal Procedure (see the judgments produced by the Government dated 11 January, 15 February, 27 February and 10 May 1995).

Lastly, where the only issue, on appeal to the Court of Cassation, concerns the lower court's assessment of submissions under Article 5 para 3 of the Convention and where there is no allegation that the lower court failed to address arguments or to comply with statutory formalities laid down on pain of nullity or that it misdirected itself in law regarding the interpretation and application of the provisions of the Code of Criminal Procedure, the Commission notes that the Criminal Division of the Court of Cassation declines jurisdiction, stating that it is a matter for the lower court's unfettered discretion. The Commission notes that the Court of Cassation considers that a submission under Article 5 para 3 of the Convention is either a point of pure fact or a mixture of fact and law (see judgments of 18 February 1986, *Bull crim* no 66, Dalloz 1986, *Informations Rapides* 305, Pradel's observations 12 Dec 1988, *Bull crim*, no 418, 6 March 1986, *Bull crim*, no 94, Dalloz 1986, p 315, note M Mayer, 12 Dec 1988, *Bull crim*, no 419). The Commission notes that the judgments of the Court of Cassation delivered in 1995 and produced by the Government do not relate to this question and, *a fortiori*, do not cast doubt on this case-law.

In the instant case, the applicant does not complain that his submissions were not addressed, that statutory formalities laid down on pain of nullity were not complied with or that the court misdirected itself in law regarding its interpretation and application of the provisions of the Code of Criminal Procedure. He merely invokes Article 5 para 3 of the Convention, challenging the Indictments Division's unfettered discretion. Thus, having regard to the foregoing, an appeal to the Court of Cassation was not a remedy capable of redressing the violation of which he complains.

It follows that the Government's objection on this point must be rejected.

As regards, lastly, the objection that the applicant failed to exhaust domestic remedies since he did not make an application under section 175 1 of the Code of Criminal Procedure, the Commission recalls that the right to bail is distinguishable from the right to have the case committed for trial or to an order discontinuing the proceedings (No 23438/94, Dec 6 9 95 and No 24245/94 Dec 6 9 95).

It follows that the Government's objection on this point must be rejected.

2 On the merits, the Government consider that there were reasonable grounds for suspecting the applicant of having committed an offence. Stressing the gravity of the offence and the severity of the penalties to which the applicant was liable, they maintain that the detention on remand was justified, having regard to the risk that the applicant would abscond (given that he no longer lived with his family) and to the danger that he would re-offend or intimidate the victims and witnesses or that public order would be disrupted.

The applicant considers that his detention on remand was not necessary for the satisfactory completion of the investigation.

The Commission has undertaken a preliminary examination of this part of the application in the light of the case-law of the Convention organs. It considers that the complaint raises sufficiently complex questions of fact and law to require an examination on the merits. Accordingly, this part of the application cannot be rejected as manifestly ill founded within the meaning of Article 27 para. 2 of the Convention. The Commission also notes that this complaint cannot be rejected on any other ground of inadmissibility.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits.