APPLICATION N° 28897/95

Alexandre MOUSSA v/FRANCE

DECISION of 21 May 1997 on the admissibility of the application

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Article 5, paragraph 3 of the Convention

a) The reasonableness of the length of detention on remand must be assessed essentially on the basis of the reasons given in the decisions on applications for release and of the true facts mentioned by the applicant in his appeals

b) The amount of the guarantee referred to in this provision must be assessed principally by reference to the accused and his assets However, it is not unreasonable to take into consideration the amount of the loss imputed to the accused where this results from alleged offences involving the misappropriation of substantial funds

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THE FACTS

The applicant is a French national, born in Djibouti in 1945, and lives in Pré Saint-Gervais (France) He was represented before the Commission by Mr Olivier de Nervo, a lawyer practising in Paris

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

The applicant was one of the founders in 1982 of the Interprofessional Committee for Housing in the French Regions ("CILRIF"), an association governed by the 1901 Law, whose object was to collect employers' contributions to the construction industry

The applicant was a director of this association before becoming the Chief Executive in 1984, a post which he occupied until 1993

From 1986 to 1989 CILRIF ran a building programme through subsidiaries (property companies)

On 3 June 1993 the Housing Minister instructed the authority in charge of monitoring this type of association - on that authority's recommendation - to take all necessary interim measures following the collective resignation of the Board of Directors of CILRIF, then, on 24 December 1993, he withdrew the association's licence to collect funds and ordered it to be dissolved

In the light of the evidence obtained in the course of the inquiry ordered by the public prosecutor, a judicial investigation was opened and the applicant was charged, on 21 September 1994, with forging documents and misappropriating funds On the same day the applicant was placed in detention on remand where he remained for six months before being released in March 1995

On 12 December 1994 the applicant lodged an application for bail In an order of 16 December 1994, the investigating judge granted his application, but attached a condition that he report once a month to the Paris Bail Office and a further condition that he deposit security of one million francs in two instalments the first of 750,000 French francs (FRF), payable prior to his release, and the second of FRF 250,000, on 15 January 1995

The applicant appealed against that order, arguing that he had stopped receiving unemployment benefit since he had been in detention on remand, that his wife's only income was her monthly salary of FRF 15,000 and that the loan repayments on one of his bungalows, which was valued at FRF 2,500,000, amounted to FRF 270,000 a year He relied on Article 5 para 3 of the Convention in support of his request for reconsideration of his bail conditions and offered security of FRF 50,000 for his presence at trial

The Indictments Chamber of Paris Court of Appeal dismissed his appeal on 6 January 1995 In its judgment, the chamber noted that, according to the results of the inquiry, the applicant, aware of CILRIF's disastrous financial situation, had arranged for his own and his secretary's dismissal in November 1992 and had misappropriated funds amounting to one third of CILRIF's annual intake The inquiry also showed that, on dismissal, the applicant had received FRF 3,559,129 in compensation for premature termination of contract and in full and final settlement of all claims An additional FRF 2,255,639 was paid into his personal account on the very day he was dismissed, and thus before he had served out his notice, from the proceeds of a sale of unit trusts (SICAV) on the applicant's instructions It also emerged that in April 1993 the applicant had awarded himself *"ex gratia"* from CILRIF a Lancia Thema Turbo car worth FRF 230,000 and that he had allocated himself an extra month's salary in one year in breach of his employment contract and the collective agreement The inquiry

showed, finally, that the applicant had entered into a number of financial transactions detrimental to CILRIF but advantageous to himself or to companies of which he was a director

The Indictments Chamber dismissed his complaint under Article 5 para 3 of the Convention on the following grounds:

> " . the court acted correctly in attaching conditions to bail, requiring, *inter alia*, the deposit of security, payable partly prior to release, in order to guarantee - in addition to compensation for the loss sustained - his appearance for trial, and the payment of fines as stipulated in sections 138 and 142 of the Code of Criminal Procedure;
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> Whereas, in view of the aforementioned factors, there is strong evidence that Mr Moussa committed the offences with which he has been charged in these proceedings,
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> Whereas his bail conditions are justified by the requirements of the investigation and as a preventive measure,
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> Whereas the security is not excessive, having regard to the sums allegedly misappropriated and to the applicant's assets "

The applicant appealed to the Court of Cassation, relying on, *inter alia*, Articles 5 and 6 of the Convention In a judgment of 19 April 1995, the Court of Cassation, after setting out the offences with which the applicant was charged, dismissed his appeal on the following grounds:

> " the requirements of Article 5 para 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms are met where the amount of the security is set not solely in relation to the loss imputed to the accused, but also by reference to, among other things, his assets. That was the approach followed in the instant case, "

COMPLAINTS (Extract)

The applicant complains that the French judicial authorities failed to fulfil their obligations under Article 5 para 3 of the Convention He argues that the guarantee to appear for trial provided for in this Article should be set at an amount which ensures that the accused appears for trial and not which compensates for the loss sustained The court should therefore set the security in relation to the accused's assets In his case,

however, the Indictments Chamber quite clearly based its calculation on the amounts allegedly misappropriated and not on his assets, thus making it impossible for him to pay the security.

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THE LAW (Extract)

1 The applicant invokes Article 5 para. 3 of the Convention, complaining that the Indictments Chamber set the amount of the security on the basis of the amounts allegedly misappropriated and not on his assets.

Article 5 para. 3 of the Convention is worded as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial Release may be conditioned by guarantees to appear for trial "

The Commission recalls that, according to the European Court's case law, it falls in the first place to the judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time To this end they must examine "all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 para 3 of the Convention." (see, *inter alia*, Eur Court HR, Letellier v France judgment of 26 June 1991, Series A no 207, p. 18, para 35 and Kemmache v France judgment of 27 November 1991, Series A no 218, p 23, para 45)

In this case, the Commission notes that the applicant was remanded in custody on 21 September 1994 and remained in detention for six months

The Commission observes that the investigating judge made an order on 16 December 1994, which was upheld by the Indictments Chamber of Paris Court of Appeal, granting the applicant's bail application on condition, *inter alia*, that he deposit security of one million francs in two instalments It notes that the applicant failed to deposit the relevant amount and therefore remained in detention on remand until he was released some three months later.

The applicant contends that the domestic courts did not calculate the amount of the security on the basis of his personal assets, but principally on the amount of loss resulting from the offences imputed to him, which is contrary to Article 5 para. 3 of the Convention

The Commission recalls the Court's ruling in the Neumeister case on the determination of the security payable

> "This concern to fix the amount of the guarantee to be furnished by a detained person solely in relation to the amount of the loss imputed to him does not seem to be in conformity with Article 5 (3) of the Convention. The guarantee provided for by that Article is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons who are to provide the security, in other words to the extent to which it is felt that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond." (Eur. Court HR, Neumeister v. Austria judgment of 27 June 1968, Series A no. 8, p 40, para. 14)

The Commission considers that although the European Court held in the aforementioned case that the amount of the guarantee provided for in Article 5 para. 3 of the Convention must be assessed principally by reference to the accused and his assets, it is not unreasonable to take into consideration also the amount of the loss imputed to him where, as in this case, that loss results from alleged offences involving the misappropriation of substantial funds

In this case, the Commission notes that the Indictments Chamber, after setting out in detail the offences with which the applicant was charged - consisting mainly of the misappropriation of substantial sums - and having stressed that there was strong evidence of his guilt, held that the amount of security set by the investigating judge was necessary both to guarantee his appearance for trial and as a preventive measure.

Admittedly, in his appeal to the Indictments Chamber, the applicant submitted that FRF 50,000 was an appropriate security for his appearance for trial in view of his actual assets.

Nevertheless, the Commission recalls that the danger of flight should not be evaluated solely on the basis of considerations relating to the gravity of the penalty likely to be imposed, but on the basis of other factors, such as "the character of the person involved, his morals, his home, his occupation, his assets and his family ties which may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial" (Neumeister v. Austria judgment, op. cit., p 39, para 10). In the instant case, however, the applicant did not submit any evidence, other than that relating to his assets, to enable the court to assess what was necessary to guarantee his appearance for trial

Having regard to the facts of the case, the Commission considers that the domestic courts justified the amount of security set in relation to the applicant on relevant and sufficient grounds The Commission therefore considers that keeping the applicant in detention on remand did not constitute a violation of Article 5 para 3 of the Convention

It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 27 para 2 of the Convention

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