CASE OF

SALABIAKU v. FRANCE

(Application no. 10519/83)

JUDGMENT

7 October 1988

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 23 October 1987, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10519/83) against the Republic of France lodged with the Commission under Article 25 (art. 25) by a Zaïrese national, Mr Amosi Salabiaku, on 29 July 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 2 (art. 6-1, art. 6-2).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 November 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher and Mr B. Walsh (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and Mr Salabiaku's lawyers on the need for a written procedure (Rule 37 para. 1). In accordance with his orders and directives, the registry received the Government's memorial on 21 March 1988 and the applicant's claims under Article 50 (art. 50) of the Convention on 20 June. By a letter dated 27 April, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted – through the Registrar – those who would be appearing before the Court, the President directed on 28 April 1988 that the oral proceedings should commence on 20 June 1988 (Rule 38).

6. On 26 May, and subsequently 20 and 29 June, the Government and the Commission communicated to the Registrar various documents whose production the President of the Court had requested.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

– for the Government
Mr J.-P. Puissochet, Director
of Legal Affairs at the Ministry of Foreign Affairs,
Agent and *Counsel*,
Mr J.-C. Chouvet, Assistant Director
of Human Rights, in the same Directorate,
Mr M. Dobkine, Magistrat, Directorate
of Criminal Affairs and Pardons, Ministry of Justice,
Mr C. Merlin, Assistant Secretary,
Legal and Litigation Department, Directorate-General of
Customs and Indirect Taxes of the Ministry of the Economy,
Finances and the Budget, *Advisers*;

– for the Commission
Mr A. Weitzel, *Delegate*;

– for the applicant
Mr J.-P. Combenègre, avocat, *Counsel*.

The Court heard addresses by Mr Puissochet and Mr Chouvet for the Government, Mr Weitzel for the Commission and Mr Combenègre for the applicant, as well as their replies to its questions and to that of one of its members.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Mr Amosi Salabiaku, a Zaïrese national born in 1951, resides in Paris with his family.

9. On 28 July 1979, Mr Salabiaku went to Roissy Airport to collect a parcel which he had been informed by telex message was to arrive on board an Air Zaïre flight. According to the applicant, he expected the parcel to contain samples of African food sent to him through the intermediary of one of his relatives who

was an Air Zaïre employee. As he was unable to find it, he approached an airline official who directed him to a padlocked trunk which had remained uncollected and bore an Air Zaïre luggage ticket but no name. The official, acting on the advice of police officers watching the trunk, suggested that he left it where it was, intimating to him that it might contain prohibited goods.

The applicant took possession of it nevertheless, and passed through customs without difficulty. He had chosen to go through the "green channel" for passengers having nothing to declare. He was accompanied by three other Zaïrese nationals whom he had met there for the first time. Immediately afterwards he telephoned to his brother Lupia to come and meet him at a terminal near their home in order to help him since the package had proved heavier than expected.

10. Customs officials then detained Mr Amosi Salabiaku and his three companions as they were about to board the Air France terminal coach. Mr Salabiaku identified himself as the person for whom the trunk had been intended and denied that it was anything to do with his three compatriots who were immediately released.

Customs officials forced the lock of the trunk and found, lying underneath victuals, a welded false bottom which concealed 10 kg of herbal and seed cannabis. The applicant asserted that he was unaware of the presence of the cannabis and that he had mistaken the trunk for the parcel of whose arrival he had been advised. His brother was also arrested at the Porte Maillot (Paris).

11. On 30 July 1979, Air Zaïre telephoned to Mr Amosi and Mr Lupia Salabiaku's landlord, informing him that a parcel bearing the applicant's name and his address in Paris had arrived by mistake in Brussels. It was opened by an investigating judge but was found to contain only manioc flour, palm oil, pimento and peanut butter.

12. Mr Amosi and Mr Lupia Salabiaku were released on 2 August 1979 and, together with a certain K., also a Zaïrese national, were charged with both the criminal offence of illegally importing narcotics (Articles L. 626, L. 627, L. 629, L. 630-1, R. 5165 et seq. of the Public Health Code) and the customs offence of smuggling prohibited goods (Articles 38, 215, 414, 417, 419 and 435 of the Customs Code, Articles 42, 43-1 et seq. and 44 of the Penal Code). By an order dated 25 August 1980, they were committed for trial before the Tribunal de Grande Instance, Bobigny.

13. On 27 March 1981, the 16th Chamber of this court acquitted Mr Lupia Salabiaku and K. giving them the benefit of the doubt but found the applicant guilty. It stated in particular:

> "The accused's bad faith is evidenced by the fact that he showed no surprise when the first package opened in his presence turned out to contain none of the foodstuffs contained in the second package, although he described clearly what he claimed to be expecting from Zaïre and received in the second.
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> The latter package arrived in Brussels in circumstances which it has not been possible to determine and its existence cannot rebut presumptions which are sufficiently serious, precise and concordant to justify a conviction ...."

Consequently, the court imposed on Mr Amosi Salabiaku a sentence of two years' imprisonment and a definitive prohibition on residing in French territory. Furthermore, in respect of the customs offence, it imposed on him a fine of 100,000 French francs (FF), under Article 414 of the Customs Code, to be paid to the customs authorities, which had joined the proceedings as a civil party.

14. The applicant and the Public Prosecutor appealed.

On 9 February 1982, the Paris Court of Appeal (10th Chamber) set aside the judgment with regard to the criminal offence of illegal importation of narcotics, on the following grounds:

> "... the facts alleged against the accused are not sufficiently proven; ... in fact, although Mr Amosi Salabiaku, who had been expecting only a parcel of victuals, took possession of a very heavy trunk secured by a padlock to which he did not have the keys, which bore no name of any addressee and for which he did not have the corresponding luggage ticket counterfoil, it has been established that a package in his name containing victuals arrived two days afterwards in Brussels on an Air Zaïre flight from Kinshasa. This package had apparently been sent to Brussels in error, its intended destination being Paris;
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> ... in those circumstances, it is not impossible that Mr Amosi Salabiaku might have believed, on taking the trunk, that it was really intended for him; ... there is at least a doubt the benefit of which should be granted to him, resulting in his acquittal ..."

The court, on the other hand, upheld the first-instance decision as regards the customs offence of smuggling prohibited goods:

> "... any person in possession (détention) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him; such force majeure may arise only as a result of an event beyond human control which could be neither foreseen nor averted ...;
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> ...
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> ... Mr Amosi Salabiaku went through customs with the trunk and declared to the customs officials that it was his property; ... he was therefore in possession of the trunk containing drugs;
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> ... he cannot plead unavoidable error because he was warned by an official of Air Zaïre ... not to take possession of the trunk unless he was sure that it belonged to him, particularly as he would have to open it at customs. Thus, before declaring himself to be the owner of it and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods;
>
> ... by failing to do so and by having in his possession a trunk containing 10 kg of herbal and seed cannabis, he committed the customs offence of smuggling prohibited goods ..."

The Court of Appeal also confirmed the fine of 100,000 FF imposed on the applicant; it fixed at the minimum period the duration of imprisonment for non-payment.

15. Mr Amosi Salabiaku appealed on points of law. He relied on paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2) of the Convention: in his submission, by placing upon him an "almost irrebuttable presumption of guilt", which "operated in favour of the customs authorities", the Court of Appeal had violated both his right to a fair trial and his right to be presumed innocent until proved guilty.

The Court of Cassation (Criminal Chamber) dismissed the appeal on 21 February 1983, finding that the judgment appealed against had "properly" applied Article 392 para. 1 of the Customs Code, under the terms of which "the person in possession of contraband goods shall be deemed liable for the offence":

> "... contrary to what is alleged, the aforementioned Article was not repealed by implication by France's adhesion to the Convention ... and had to be applied since the Court of Appeal, which reached its decision on the basis of the evidence adduced by the parties before it, found that the accused was in possession of the trunk and inferred from the fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid."

II. THE RELEVANT LEGISLATION AND CASE-LAW

16. Infringements under the French Customs Code constitute criminal offences with various specific characteristics.

The Customs Code essentially prohibits smuggling (Articles 417 to 422) and undeclared importation or exportation (Articles 423 to 429). This case is concerned solely with smuggling. The notion of smuggling covers "any importation or exportation effected outside official customs premises and any infringement of the provisions or regulations concerning the possession and transport of goods within the customs territory" (Article 417 para. 1), for example, but not exclusively, where the goods concerned are "prohibited on importation" (Article 418 para. 1, to be read in conjunction with Article 38).

17. At the material time Article 408 classified these infringements in five classes of petty offences (contraventions) and three of more serious offences (délits). Articles 410 to 416 imposed "primary penalties" which varied according to the gravity of the infringement: such penalties included fines fixed either within set maximum and minimum limits (Articles 410 para. 1, 412 and 413 bis) or at "between one and three times the amount of duty and taxes evaded or unpaid" (Article 411 para. 1), "the value of the disputed goods" (Article 413), of "the contraband article" (Articles 414 and 415) or of "the confiscated articles" (Article 416), with a fixed minimum (Article 437); confiscation of "the disputed goods" (Article 412) or "the contraband article", "the means of transport" and "articles used to conceal the offence" (Articles 414, 415 and 416); and imprisonment for terms of up to one month (Article 413 bis), three months (Article 414), one year (Article 415) or three years (Article 416), according to the type of offence involved.

Mr Salabiaku was charged under Article 414, according to which:

> "Any act of smuggling and any undeclared importation or exportation of goods falling within the category of goods which are prohibited ..., on importation, ..., shall be punishable by the confiscation of the contraband article, confiscation of the means of transport employed, confiscation of articles used to conceal the offence, a fine of not less than the value of the contraband article and not more than three times its value and a term of imprisonment of up to three months."

Certain of these punitive measures – fines not fixed in advance and confiscations – are also described as "fiscal penalties" (Articles 343 para. 2 and 415). In general they are regarded as being compensatory in nature in so far as they are intended to make good loss sustained by the customs authorities.

There are also a number of "additional penalties" (Articles 430 to 433), including in particular measures of disqualification (Article 432).

Both primary and additional penalties may give rise to an entry in the criminal record of the person concerned.

18. Seizure "reports" drawn up "by a customs officer or any other official" may constitute – and usually do – evidence of customs offences (Articles 323 to 333). Depending on whether they are issued by one or more officials, they attest "the facts which they record" merely until "the contrary is proved" or until "forgery proceedings have been instituted" (Articles 336 para. 1 and 337 para. 1). They are "remitted to the Public Prosecutor and the persons charged with the offence are brought" before him (Article 333 para. 1).

The initiative for instituting prosecution lies with the Public Prosecutor's Office for "criminal penalties", stricto sensu, and with the customs authorities – or the Public Prosecutor's Office, "in conjunction with the criminal proceedings" – for "fiscal penalties" (Article 343). District courts have jurisdiction to try petty customs offences, and criminal courts, more serious customs offences (Articles 356 and 357). In principle the procedure follows the rules of the ordinary law (Articles 363, 365 and 366).

19. The offence with which the applicant was charged – the smuggling of narcotics, "prohibited goods" (Article 414) – does not necessarily require possession. However, where possession is established, "the person in possession ... is deemed liable for the offence", without prejudice to any penalties which may be incurred by other persons, for example any accomplices (Article 398) or "persons with an interest in the offence" (Article 399). This principle is set out in Article 392 para. 1.

The provision in question appears in Chapter V ("Liability and Joint Liability") of Title XII ("Contentious Proceedings") of the Customs Code, at the beginning of Section I ("Criminal Liability"), and not among the "punitive provisions" of Chapter VI. It is a general clause which applies both to smuggling offences and undeclared importation or exportation as well as to any "unlawfully imported or exported goods", irrespective of whether they are prohibited as such.

Read strictly this provision would appear to lay down an irrebuttable presumption, but, in any event, its severity has been to some extent moderated by the decisions of the courts. Thus the Court of Cassation now upholds the trial court's unfettered power of assessment with regard to "evidence adduced by the parties before it" (see, for example, the Abadie judgment of 11 October 1972, Bulletin no. 280, p. 723) and recognises that the accused may exculpate himself by establishing "a case of force majeure" resulting "from an event responsibility for which is not attributable" to him and which "it was absolutely impossible for him to avoid", such as "the absolute impossibility ... of knowing the contents of [a] package" (see, for example, the Massamba Mikissi and Dzekissa judgment of 25 January 1982, Gazette du Palais, 1982, jurisprudence, pp. 404-405, and the judgment delivered in this case on 21 February 1983, paragraph 15 above; see further Court of Appeal, Paris, 10 March 1986, Chen Man Ming and Others, Gazette du Palais, 1986, jurisprudence, pp. 442-444). At the same time Article 399, which concerns third parties "with an interest in the offence" and not "persons in possession", states in paragraph 3 thereof that "the interest in the offence cannot be imputed to a person who has acted out of necessity or as a result of unavoidable error".

On the other hand under paragraph 2 of Article 369 the courts were required to refrain from "acquitting offenders for lack of intent". While it is true that Law no. 87-502 of 5 July 1987 repealed this provision, clearly this had no effect on the present case.

It is necessary to distinguish between the possibility of a simple acquittal and that provided for in Article 369 para. 1: namely recognition of extenuating circumstances. In such cases the court may, inter alia, "refrain from imposing on the accused the criminal penalties laid down in the ... Code", order that their enforcement be suspended or decide "that the conviction should not be entered in 'Bulletin no. 2' of the criminal record", order the return to the person concerned of certain confiscated goods or reduce the amount of the "fiscal fines".

PROCEEDINGS BEFORE THE COMMISSION

20. In his application of 29 July 1983 to the Commission (no. 10519/83), Mr Salabiaku complained that the way in which Article 392 para. 1 of the Customs Code had been applied to him was incompatible with Article 6 oaras. 1 and 2 (art. 6-1, art. 6-2) of the Convention; he repeated in substance the argument which he had put forward unsuccessfully before the Court of Cassation (see paragraph 15 above).

21. The Commission declared the application admissible on 16 April 1986. In its report of 16 July 1987 (Article 31) (art. 31), it found no breach of paragraph 1 (by ten votes to three) or paragraph 2 (by nine votes to four) of Article 6 (art. 6-1, art. 6-2). The full text of its opinion and of the dissenting opinion accompanying it is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

22. At the hearing on 20 June 1988 the Government essentially confirmed the concluding submission in their memorial to the effect that the application should be dismissed. According to them, the applicant "has not been the victim of a violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention".

For his part Mr Amosi Salabiaku requested the Court, through his counsel, to "find that there has been a violation" of the above-mentioned provisions.

AS TO THE LAW

23. The applicant relied on paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2) of the Convention, which are worded as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ....
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

24. The Government contended that Article 392 para. 1 of the Customs Code establishes not a presumption of guilt, but one of liability. In their view this distinction is "crucial": "the persons in question do not commit the offence themselves", but "answer for it before the courts" (page 4 of the written observations of June 1985 submitted to the Commission). They did not however argue that there was no "criminal charge" within the meaning of paragraph 1 of Article 6 (art. 6-1) of the Convention; nor did they claim that the dispute fell outside the scope of paragraph 2 (art. 6-2) thereof on the ground that this provision referred to the notion of "guilt" and not that of "liability".

It is not therefore disputed that these provisions are applicable in this instance. In any event, the punitive provisions of French Customs law (see paragraphs 16-19 above) may give rise to "criminal charges" for the purposes of Article 6 (art. 6) (see most recently, mutatis mutandis, the Lutz judgment of 25 August 1987, Series A no. 123-A, pp. 21-23, paras. 50-55). In France these provisions are regarded as constituting special criminal law. They list a number of wrongful acts, classify them in various categories of petty or more serious offences and penalise their commission by imposing not only "fiscal penalties", which in certain cases are regarded as compensatory in nature, but also primary or additional "penalties" which are entered in the criminal records of the persons concerned. Such primary or additional penalties may include fines, disqualification and imprisonment for terms of up to three years (Articles 408 to 433 of the Customs Code). In respect of "criminal penalties", the initiative for instituting prosecution lies with the Public Prosecutor's Office, and, in respect of "fiscal penalties", with the customs authorities – or the Public Prosecutor's Office, "in conjunction with the criminal proceedings" – (Article 343). Article 392, for its part, appears in a section entitled "Criminal Liability".

25. The Court proposes in the first place to examine the case under paragraph 2 of Article 6 (art. 6-2). It appears from the argument presented that the

presumption of innocence, which is one aspect of the right to a fair trial secured under paragraph 1 of Article 6 (art. 6-1) (see, inter alia, the Lutz judgment cited above, ibid., p. 22, para. 52), is the essential issue in the case.

I. ALLEGED VIOLATION OF PARAGRAPH 2 OF ARTICLE 6 (art. 6-2)

26. Mr Salabiaku maintained that the "almost irrebuttable" presumption on the basis of which the Bobigny Tribunal de Grande Instance and subsequently the Paris Court of Appeal convicted him of a customs offence was incompatible with Article 6 (art. 6).

In the view of the Government and of the majority of the Commission, he was indeed proved guilty "according to law". They considered that under Article 392 para. 1 of the Customs Code an offence was committed by virtue of the "mere ("objective") fact" of "possession of prohibited goods when passing through customs", "without its being necessary to establish fraudulent intent or negligence" on the part of the "person in possession" (paragraphs 66 and 68 of the Commission's report). It fell to the Public Prosecutor to furnish proof of this fact. In this instance he had done so by producing the customs authorities' report and the accused had not succeeded in establishing a case of "force majeure beyond his control" of such a nature as to "exculpate him" (paragraph 74 of the report). In their view Article 392 para. 1 did not establish an irrebuttable presumption of guilt, but "a rebuttable presumption of fact and liability", "strictly defined by the case-law" and justified "by the very nature of the subject-matter" of the law in question. This implied no more than "a sharing" of the burden of proof and not its "reversal" (memorial of the Government to the Court).

27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.

However, the applicant was not convicted for mere possession of unlawfully imported prohibited goods. Article 392 para. 1 of the Customs Code does not appear under the heading "Classification of Customs Offences" (Title XII, Chapter VI, Section I), but under that of "Criminal Liability" (Title XII, Chapter V, Section I). Under this provision a conclusion is drawn from a simple fact, which in itself does not necessarily constitute a petty or a more serious offence, that the "criminal liability" for the unlawful importation of goods, whether they are prohibited or not, or the failure to declare them, lies with the person in whose possession they are found. It infers therefrom a legal presumption on the basis of which the Bobigny Tribunal de Grande Instance and subsequently the Paris

Court of Appeal found the applicant "guilty ... of smuggling prohibited goods" (see paragraphs 13-14 above), a customs offence for whose commission possession is not essential and which is covered by Articles 414 and 417. Moreover the judgment of 27 March 1981 and that of 9 February 1982 refer, inter alia, to these two provisions and not to Article 392 para. 1.

28. This shift from the idea of accountability in criminal law to the notion of guilt shows the very relative nature of such a distinction. It raises a question with regard to Article 6 para. 2 (art. 6-2) of the Convention.

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. If, as the Commission would appear to consider (paragraph 64 of the report), paragraph 2 of Article 6 (art. 6-2) merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1 (art. 6-1). Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6 (art. 6), which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, para. 55).

Article 6 para. 2 (art. 6-2) 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 Court proposes to consider whether such limits were exceeded to the detriment of Mr Salabiaku.

29. For the purposes of Article 392 para. 1 of the Customs Code it falls to the prosecuting authority to establish possession of the "smuggled goods". This is a simple finding of fact, which in general raises few problems because it is made on the basis of a report which is deemed to constitute sufficient evidence until forgery proceedings are instituted, if it has been drawn up by more than one official (Articles 336 para. 1 and 337 para. 1, paragraph 18 above). In this instance this finding was not challenged.

Even though the "person in possession" is "deemed liable for the offence" this does not mean that he is left entirely without a means of defence. The competent court may accord him the benefit of extenuating circumstances (Article 369 para. 1), and it must acquit him if he succeeds in establishing a case of force majeure.

This last possibility is not to be found in the express wording of the Customs Code, but has evolved from the case-law of the courts in a way which moderates the irrebuttable nature previously attributed by some academic writers to the presumption laid down in Article 392 para. 1. Several decisions to which the

Government referred concerned other provisions, principally Article 399 which covers "persons with an interest in the offence" and not "persons in possession" (see paragraph 19 above), or postdate the contested conviction. On the other hand, one of them concerns Article 392 para. 1 and dates from 11 October 1972. It confirms, in passing, the trial court's unfettered power of assessment with regard to "evidence adduced by the parties before it" (Court of Cassation, Criminal Chamber, Abadie, Bulletin no. 280, p. 723). The Court for its part would cite a judgment of 25 January 1982, also concerning Article 392 para. 1. Reference is made therein to the absence of "a case of force majeure" resulting from "an event responsibility for which is not attributable to the perpetrator of the offence and which it was absolutely impossible for him to avoid", such as "the absolute impossibility ... of knowing the contents of [a] package" (Court of Cassation, Criminal Chamber, Massamba Mikissi and Dzekissa, Gazette du Palais, 1982, jurisprudence, pp. 404-405). A similar formula may be found in the judgment which the Court of Cassation delivered in the present case on 21 February 1983 (see paragraph 15 above). The Paris Court of Appeal repeated it in its Guzman judgment of 12 July 1985, which was cited by the Government. More recently, it has held that "the specific character of [customs] offences does not deprive ... the offender of every possibility of defence since ... the person in possession may exculpate himself by establishing a case of force majeure" and, with regard to third parties with an interest in the offence, such "interest ... cannot be imputed to a person who has acted out of necessity or as a result of unavoidable error" (10 March 1986, Chen Man Ming and Others, Gazette du Palais, 1986, jurisprudence, pp. 442-444).

As the Government argued at the hearing on 20 June 1988, the French courts thus do enjoy a genuine freedom of assessment in this area and "the accused may ... be accorded the benefit of the doubt, even where the offence is one of strict liability". The Law of 8 July 1987, which was adopted and promulgated after the events in this case, significantly extended this freedom by repealing paragraph 2 of Article 369, under which the courts were prevented "from acquitting offenders for lack of intent" (see paragraph 19 above).

30. However, the Court is not called upon to consider in abstracto whether Article 392 para. 1 of the Customs Code conforms to the Convention. Its task is to determine whether it was applied to the applicant in a manner compatible with the presumption of innocence (see most recently, mutatis mutandis, the Bouamar judgment of 29 February 1988, Series A no. 129, p. 20, para. 48).

The Bobigny Tribunal de Grande Instance noted that the accused had "showed no surprise when the first package opened in his presence proved to contain none of the foodstuffs contained in the second", whilst he had "described clearly what he claimed to be expecting from Zaïre and received in the second". This attitude appeared to the court to establish the applicant's "bad faith" and it considered that there were "presumptions ... sufficiently serious, precise and concordant to justify a conviction" (see paragraph 13 above). It is true that the Bobigny court tried the criminal offence stricto sensu (Articles L. 626, L. 627 and L. 630-1 of the Public Health Code) and the customs offence together, which

somewhat reduces the relevance of this decision for the purposes of the present case.

The Paris Court of Appeal, for its part, drew a clear distinction between the criminal offence of unlawful importation of narcotics and the customs offence of smuggling prohibited goods. On the first head, it acquitted Mr Salabiaku, giving him the benefit of the doubt, and in so doing showed scrupulous respect for the presumption of innocence. On the other hand, as regards the second head, it upheld the conviction handed down by the Bobigny court, and did so without contradicting itself because the facts and the action incriminated under this head were different. It noted in particular that he "went through customs with the trunk and declared to the customs officers that it was his property". It added that he could not "plead unavoidable error because he was warned by an Air Zaïre official ... not to take possession of the trunk unless he was sure that it belonged to him, particularly because he would have to open it in customs. Thus, before declaring himself to be the owner of the trunk and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods". The court inferred therefrom that "by failing to do so and by having in his possession a trunk containing 10 kg of herbal and seed cannabis, he committed the customs offence of smuggling prohibited goods" (see paragraph 14 above).

It is clear from the judgment of 27 March 1981 and that of 9 February 1982, that the courts in question were careful to avoid resorting automatically to the presumption laid down in Article 392 para. 1 of the Customs Code. As the Court of Cassation observed in its judgment of 21 February 1983, they exercised their power of assessment "on the basis of the evidence adduced by the parties before [them]". They inferred from the "fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid" (see paragraph 15 above). Moreover, as the Government said, the national courts identified in the circumstances of the case a certain "element of intent", even though legally they were under no obligation to do so in order to convict the applicant.

It follows that in this instance the French courts did not apply Article 392 para. 1 of the Customs Code in a way which conflicted with the presumption of innocence.

II. ALLEGED VIOLATION OF PARAGRAPH 1 OF ARTICLE 6 (art. 6-1)

31. The applicant's complaints under paragraph 1 of Article 6 (art. 6-1) of the Convention to a large extent correspond to those which he formulated under paragraph 2 (art. 6-2) thereof. Essentially he challenges the presumption established in Article 392 para. 1 of the Customs Code "in favour" of the prosecuting authorities, and this complaint has already been examined above. The Court therefore finds no ground for departing, on the basis of the general principle of a fair trial, from the conclusion which it has reached in considering specifically

the presumption of innocence. For the rest, the evidence adduced does not in its view disclose any failure to comply with the various requirements of Article 6 para. 1 (art. 6-1). In particular, the proceedings at first instance, on appeal and in the Court of Cassation were fully judicial and adversarial in nature, which, furthermore, is not contested by the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of either paragraph 2 or paragraph 1 of Article 6 (art. 6-2, art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 October 1988.

Marc-André Eissen
Registrar

Rolv Ryssdal
President