COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF CIULLA v. ITALY

(Application no. 11152/84)

JUDGMENT

STRASBOURG

22 February 1989

In the Ciulla case*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 30 September 1988 and 26 January 1989,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 15 July 1987, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 11152/84)

* Note by the Registrar. The case is numbered 9/1987/132/183. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

against the Italian Republic lodged with the Commission on 5 June 1984 under Article 25 (art. 25) by an Italian citizen, Mr Salvatore Ciulla.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 paras. 1 and 5 (art. 5-1, art. 5-5).

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 pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr B. Walsh, Mr R. Macdonald and Mr A.M. Donner (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr J. De Meyer, substitute judge, replaced Mr Donner, who had resigned and whose successor at the Court had taken up his duties before the hearing (Rule 2 para. 3 and Rule 22 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Italian Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with his Order, the registry received the applicant's memorial, on 5 October 1987, and the Government's memorial, on 29 December.

In a letter received by the Registrar on 5 February 1988, the Secretary to the Commission indicated that the Delegate would submit his observations at the hearing.

5. On 25 September 1987, the President granted the applicant leave to use the Italian language in the proceedings (Rule 27 para. 3).

6. On 23 March 1988, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

7. On the same day, having consulted - through the Registrar - those who would be appearing before the Court, the President directed that the oral proceedings should open on 24 May 1988 (Rule 38). On that date, the Court adjourned the hearing as counsel for the applicant did not appear; and on 1 July, the President set down the hearing for 28 September.

8. 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 L. FERRARI BRAVO, Head
of the Diplomatic Legal Service, Ministry of Foreign Affairs, *Agent*,
Mr G. GRASSO, avvocato,
Mr G. RAIMONDI, magistrato, *Counsel*;
- for the Commission
Mr A. WEITZEL, *Delegate*;
- for the applicant
Mr M. CATALANO, avvocato, *Counsel*.

The Court heard addresses by Mr Ferrari Bravo, Mr Grasso and Mr Raimondi for the Government, by Mr Weitzel for the Commission and by Mr Catalano for Mr Ciulla, as well as their replies to the questions put by the Court and its President.

9. The Commission, the Government and the lawyer for the applicant filed a series of documents on 11 May, 20 May, 20 September, 28 September and 25 October 1988.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. Mr Salvatore Ciulla, who was born in Palermo in 1950, was prosecuted in Italy by various public prosecutors' offices and was also the subject of "preventive" proceedings (prevenzione). Although the present case is not concerned with the prosecutions, some particulars should be given of one of them (which was started in Milan) as it is bound up with the circumstances of this case.

A. The criminal proceedings in Milan

11. The applicant was arrested in April 1982 in connection with offences under the drugs legislation. On 9 December 1982, during the judicial investigation of his case, he was released subject to court supervision.

12. On 24 October 1983, the Milan District Court sentenced him to eleven years and six months' imprisonment, imposed a fine of 70 million lire and, as a security measure (misura di sicurezza), made a supervision order to last for eight years.

13. On 8 November 1983, at the Public Prosecutor's request and pursuant to Article 277 of the Code of Criminal Procedure, the same court in consequence revoked the applicant's release and issued a new arrest warrant on the ground that there was a risk that he would abscond.

On an application by Mr Ciulla and after concurring submissions had been made by the Principal Public Prosecutor, the Court of Cassation set aside the latter decision on 30 January 1984. It held that the revocation of the order made on 9 December 1982 for the applicant's release was "unlawful" because it had not been included in the judgment whereby the applicant had been convicted and sentenced. As for the new warrant, it was "bad for lack of reasons" as neither the severity of the penalty imposed nor the fact that co-defendants had absconded amounted to a relevant and sufficient justification. On the first of these issues, the Court of Cassation remitted the case to the Milan District Court; no information as to any action taken by the latter court has been provided by those appearing in the present proceedings.

The applicant was immediately released.

14. On 1 February 1985, the Milan Court of Appeal varied the judgment of 24 October 1983 by reducing the sentence to nine years' imprisonment and a fine of 50 million lire. On 22 January 1986, the Court of Cassation dismissed an appeal on points of law by Mr Ciulla and held that an appeal on points of law by the Public Prosecutor was inadmissible.

B. The compulsory residence order made against the applicant as a preventive measure (misura di prevenzione)

15. On 1 and 10 October 1983, when the proceedings at first instance were drawing to an end (see paragraph 12 above), the Commissioner of Police (questore) and the Public Prosecutor in Milan asked the Milan District Court to order "special supervision" (sorveglianza speciale) of the applicant as a preventive measure and at the same time to prohibit him from residing in certain areas. They also sought ancillary orders of a financial nature, namely the seizure and confiscation of assets. In the first part of their application they relied on section 3 of Law no. 1423 of 27 December 1956; and in the second part, on Law no. 575 of 31 May 1965 (see paragraphs 19-20 below).

16. On 19 December 1983, the District Court (Sixth Division) held an initial hearing but had to adjourn the proceedings owing to an irregularity in the service of some of the summonses.

The case was subsequently relisted for hearing on 5 March 1984. In the meantime, on 29 February, the prosecution had amended its submissions; it now sought a compulsory residence (soggiorno obbligato) order, likewise provided for in the 1956 Law.

The applicant failed to appear at the hearing on 5 March. As the prosecution's new submissions had to be communicated to him, the court again adjourned the case.

The hearing eventually took place on 8 May, with Mr Ciulla present, and at it the prosecution applied for Mr Ciulla's arrest under section 6 of the 1956 Law (see paragraph 19 below). The president of the Sixth Division granted the application and Mr Ciulla was taken into custody at Milan Prison that same day.

In order to establish that there were "particularly serious grounds" within the meaning of section 6, the prosecution had cited, among other things, the heavy sentence already imposed by the same court (see paragraph 12 above). The president's decision was couched in the following terms (translated from the Italian):

> "The president of the Sixth Criminal Division,
>
> Having regard to the Public Prosecutor's application of 8 May 1984 for Salvatore Ciulla to be taken into custody under section 6 of Law no. 1423 of 1956,
>
> Noting that an application has been made for an order requiring Salvatore Ciulla to reside in a specified locality and that there are particularly serious grounds for this measure, namely all the evidence set forth in the application of the Commissioner of Police and the Public Prosecutor and the recent sentence of eleven years and six months' imprisonment and fine of 70 million lire imposed on [Ciulla] for serious drug offences; that Salvatore Ciulla, a person suspected of belonging to Mafia-type associations, is shown by all the evidence in the file to be deeply involved in illegal international drug-trafficking; and that it thus appears on present evidence and for the purpose of this order sufficiently proved that he constitutes a danger to society; and having regard further to the Public Prosecutor's submissions in support of his application,
>
> For these reasons, having regard to section 6 of Law no. 1423 of 1956,
>
> ORDERS
>
> that Salvatore Ciulla, born in Palermo on 21 February 1950, shall be held in custody in Milan Prison until the decision to be taken in the present proceedings becomes enforceable.
>
> ..."

Counsel for Mr Ciulla immediately applied for the provisional release of his client, but the court reserved its decision on this application.

17. On 24 May, the Sixth Division of the court ordered that the applicant should be restricted to a specified place of residence for five years, under section 3 of the 1956 Law, and that some of his assets should be confiscated.

On 25 May, the police took Mr Ciulla to a small town in the province of Ancona. He remained there only until 24 October 1984, when he was

arrested under a warrant issued by the investigating judge of Palermo in connection with other proceedings.

18. The applicant is currently serving the sentence passed on him by the Milan Court of Appeal (see paragraph 14 above).

II. THE RELEVANT NATIONAL LEGISLATION AND CASE-LAW

A. The legislation in force at the time

19. Law no. 1423 of 27 December 1956 ("the 1956 Law") enables preventive measures to be taken against "persons presenting a danger to safety and public morals". That Law is summarised in its essentials in the Guzzardi judgment of 6 November 1980 (Series A no. 39, pp. 17-19, paras. 45-51), and it will accordingly suffice to cite here only section 6, as amended by Law no. 152 of 22 May 1975 (translated from the Italian):

> "If the application [for a preventive measure] is for an order for compulsory residence in a specified locality, the presiding judge of the District Court, during the procedure ..., may, where there are particularly serious grounds, make a reasoned order (provvedimento motivato) that the applicant be held in prison until the preventive measure has become final.
>
> At the same time as it makes the order for compulsory residence in a specified locality, the court shall order that [the person concerned] be taken by the police from the prison in which he is being held to the place of compulsory residence and handed over to the local police authorities."

20. Law no. 575 of 31 May 1965 ("the 1965 Law"), as amended in 1982, supplements the 1956 Law with procedural and substantive rules (applicable both to persons and to property) directed against individuals whom there are reasons to suspect of belonging to Mafia-type associations. Its provisions do not have any bearing on section 6 of the 1956 Law (see also the Guzzardi judgment previously cited, p. 19, para. 52).

B. The 1988 amendment

21. Since the events in this case, the 1956 and 1965 Laws have been amended by Law no. 327 of 3 August 1988. Under this Law it is no longer possible to hold a person in custody while an application for a compulsory residence order is being considered, and such an order must henceforth be executed in the locality in which he is resident or ordinarily resident (comune di residenza o di dimora abituale). Section 6 of the 1956 Law now reads as follows (translated from the Italian):

> "1. If the application is for special supervision together with a compulsory residence order or an exclusion order, the presiding judge of the District Court, during the

procedure ..., may make an order (decreto) for the temporary withdrawal of the person's passport and for the suspension of the validity of any equivalent document allowing the holder to leave the country.

2. Where there are particularly serious grounds, he may also direct that a temporary compulsory residence or exclusion order should be made against the person concerned until the preventive measure has become final."

C. Case-law on the status of the Convention in the domestic legal order

22. According to documents produced by those appearing before the Court, the Italian courts - the Constitutional Court, the ordinary first-instance and appellate courts and the administrative courts - have given a number of decisions concerning the status of the Convention in Italy's domestic legal order, into which it was incorporated by Law no. 848 of 4 August 1955.

With one exception - a judgment of 27 March 1980 of a full court of the Court of Audit (Foro italiano 1980, III, cols. 352-355) -, these decisions have not recognised that the Convention has any constitutional status. Furthermore, the courts concerned do not seem to have had any opportunity to state whether, as certain legal scholars maintain, the Convention ranks midway between the Constitution and ordinary statutes, that is to say whether it prevails even over statutes enacted after the Convention was ratified by Italy.

23. As regards more particularly Article 5 (art. 5) of the Convention, the Government produced the texts of six decisions, but none of them bore on the 1956 Law.

Firstly, there were four judgments of the Court of Cassation. These variously cited a passage from a Commission report (First Criminal Division, 7 December 1981, Minore case), drew attention to the Convention's usefulness as an interpretative instrument (full court, 13 July 1985, Buda case) and ruled that there had been no breach of paragraph 2 of Article 5 (art. 5-2) (First Criminal Division, 9 July 1982, Signorelli case, and 25 March 1986, Trinco case).

To these were added two judgments of the Rome District Court relating to paragraph 5 (art. 5-5). The first of these (15 May 1973) gave no decision on compensation because the court held there had been no breach of paragraph 1 (art. 5-1) (Luttazzi case, Foro italiano 1973, I, cols. 2933-2936); in the second of them (7 August 1984), on the other hand, the court awarded the plaintiff compensation (Mustacchia case, Temi Romana 1984, pp. 977-980).

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Ciulla applied to the Commission on 5 June 1984 (application no. 11152/84). While he made no complaint about the compulsory residence order as such, he alleged that the deprivation of liberty suffered by him beforehand, from 8 to 25 May 1984 (see paragraphs 16-17 above), was in breach of paragraph 1 of Article 5 (art. 5-1) of the Convention. He also relied on paragraph 5 (art. 5-5) on the ground that he had not been entitled to compensation for his deprivation of liberty.

25. The Commission declared the application admissible on 5 December 1985. Subsequently, the Government again requested the Commission to declare the application inadmissible, but the Commission considered that the conditions for applying Article 29 (art. 29) were not satisfied.

In its report of 8 May 1987 (made under Article 31) (art. 31) it concluded, by ten votes to two, that there had been a breach of Article 5 paras. 1 and 5 (art. 5-1, art. 5-5). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment.

THE GOVERNMENT'S SUBMISSIONS TO THE COURT

26. In their memorial of 29 December 1987, the Government asked the Court to declare the application inadmissible for failure to exhaust domestic remedies or, in the alternative, to hold that there had been no breach of Article 5 paras. 1 and 5 (art. 5-1, art. 5-5).

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

27. In the Government's submission, Mr Ciulla had four domestic remedies available to him which he did not exhaust. These were:

(a) in respect of the complaint under paragraph 1 of Article 5 (art. 5-1) of the Convention, to appeal on points of law against the disputed decision of 8 May 1984 on grounds of lack or inconsistency of reasons (i) and non-compliance with the paragraph aforesaid (ii), and to apply for a review of the constitutionality of section 6 of the 1956 Law (iii), in order to raise "in substance" the issue of a restriction of personal liberty; and

(b) in respect of the allegations concerning paragraph 5 (art. 5-5), to bring an action for damages against the State (iv).

A. Estoppel

28. The Court will take cognisance of preliminary objections of this kind if and in so far as the respondent State has already raised them before the Commission to the extent that their nature and the circumstances permitted ; this should normally be done at the stage of the initial examination of admissibility (see, inter alia, the Bozano judgment of 18 December 1986, Series A no. 111, p. 19, para. 44).

29. That condition is not satisfied in respect of grounds (ii), (iii) and (iv) of the objection. The Government implied the opposite by referring to the observations they had made at the time, summarised in paragraphs 14 et seq. of the Commission's decision on admissibility of 5 December 1985, but in those they merely pointed out that Mr Ciulla had omitted to appeal on points of law on grounds of "erroneousness" and "lack of reasons". That corresponded to ground (i) of the objection, whose merits must therefore be considered, there being estoppel in respect of the other three grounds.

B. The merits of ground (i) of the objection

30. In the Government's submission, the applicant could and should have applied to the Supreme Court of Cassation to have the decision taken by the president of the Sixth Division of the Milan District Court on 8 May 1984 quashed for lack of legal basis or for inconsistency of the reasons given for it.

31. The only remedies that Article 26 (art. 26) of the Convention requires to be exhausted are those that are available and sufficient and relate to the breaches alleged; the existence of such remedies must be sufficiently certain, failing which they will lack the requisite accessibility and effectiveness (see in particular the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 19, para. 39). It falls to the respondent State, if it pleads non-exhaustion of domestic remedies, to establish that these various conditions are satisfied (see, inter alia, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 22, para. 45).

32. The Government, however, did not adduce the necessary proof. In the first place, the remedy they indicated would not have related to the alleged breach: Mr Ciulla's complaint was not that the president's decision did not contain an adequate statement of grounds, but that it was in breach of Article 5 (art. 5) of the Convention. In addition, the remedy in question would not have been sufficient. The Court of Cassation, which has no jurisdiction to review questions of fact, was not in a position to afford any

relief to Mr Ciulla, who in the proceedings before the Convention institutions did not dispute that the impugned detention order complied with section 6 of the 1956 Law. At all events, that court could not have given a decision within a period shorter than the duration - sixteen days - of the deprivation of liberty complained of. It suffices to note in this connection that it took the Court of Cassation nearly three months to determine another appeal on points of law by Mr Ciulla which concerned the lawfulness of another period of detention (see paragraphs 12-13 above).

C. Recapitulation

33. In sum, the preliminary objection is without foundation as to ground (i) and subject to estoppel with regard to the other three grounds.

II. THE ALLEGED VIOLATIONS OF ARTICLE 5 (art. 5)

34. Mr Ciulla alleged a violation of paragraphs 1 and 5 of Article 5 (art. 5-1, art. 5-5), which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 2.-4. ...
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The detention ordered on 8 May 1984 by the president of the Sixth Division of the Milan District Court was unquestionably a deprivation of liberty, so that Article 5 (art. 5) applies to the case.

A. Paragraph 1 (art. 5-1)

35. The Government relied solely on sub-paragraphs (b) and (c) of Article 5 para. 1 (art. 5-1-b, art. 5-1-c) as justifying the deprivation of liberty in question; the other sub-paragraphs are irrelevant to the present complaints.

1. Sub-paragraph (b) (art. 5-1-b)

36. The Government did not claim that there had been "non-compliance with the ... order of a court" but submitted that Mr Ciulla's arrest and detention were intended to "secure the fulfilment of [an] obligation prescribed by law".

These latter words denote an obligation, of a specific and concrete nature (see the Guzzardi judgment of 6 November 1980, Series A no. 39, para. 101), already incumbent on the person concerned. But the obligation - in itself a specific and concrete one - to go and live in the designated locality arose only on 24 May 1984 (see paragraph 17 above) and not as early as 8 May 1984, when the impugned decision was given.

2. Sub-paragraph (c) (art. 5-1-c)

37. In the Government's submission, the detention complained of was justified under sub-paragraph (c) (art. 5-1-c) too, as there had been a "reasonable suspicion" that the applicant had "committed an offence" and it had also been "reasonably considered necessary to prevent his committing [one]".

38. The Court points out that sub-paragraph (c) (art. 5-1-c) permits deprivation of liberty only in connection with criminal proceedings. This is apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3 (art. 5-1-c+5-1-a, art. 5-1-c+5-3), which forms a whole with it (on the latter point see, inter alia, the de Jong, Baljet and van den Brink judgment previously cited, Series A no. 77, p. 22, para. 44).

39. The Government submitted, firstly, that there were affinities between criminal proceedings and the preventive procedure provided for in the 1956 Law (see paragraph 19 above); they based their argument on the fact - denied by Mr Ciulla - that the Milan District Court made the compulsory residence order because of Mafia-type behaviour, which was a criminal offence in itself under Article 416 bis of the Criminal Code. The measure so ordered could be equated with a penalty, and Mr Ciulla's detention from 8 to 25 May 1984 was accordingly in response to a person suspected of an offence. It therefore corresponded to the first of the eventualities referred to in sub-paragraph (c) (art. 5-1-c).

In the Court's view, the preventive procedure provided for in the 1956 Law was designed for purposes different from those of criminal

proceedings. The compulsory residence order authorised by section 3 may, unlike a conviction and prison sentence, be based on suspicion rather than proof, and the deprivation of liberty under section 6 which sometimes precedes it (as in the instant case) accordingly cannot be equated with pre-trial detention as governed by Article 5 para. 1 (c) (art. 5-1-c) of the Convention.

The Government also stated that there were criminal proceedings pending against the applicant at the time for an offence under the aforementioned Article 416 bis. Mr Ciulla disputed that. For its part, the Court merely notes that the Italian judicial authorities did not remand the applicant in custody in connection with those proceedings.

40. The Government further submitted that the relevant custodial order had been made also because it was "reasonably considered necessary to prevent" the commission of "an offence".

Even if that argument were to be accepted, the fact would remain that the order in question was not made in the context of criminal proceedings. Indeed, the arrest warrant issued by the Milan District Court on 8 November 1983 following its conviction of Mr Ciulla on 24 October was quashed by the Court of Cassation on 30 January 1984 (see paragraph 13 above). The arrest of the applicant on 8 May 1984 was designed to obviate the risk that he might "evade any preventive measure that might be taken"; as evidence of this, the Court would point to the very terms of the submissions that the prosecution made on the same day and of the decision of the president of the Sixth Division of the Milan District Court, which referred to them (see paragraph 16 above). Neither the prosecution nor the president mentioned any concrete and specific offences - the only ones which are relevant in regard to Article 5 para. 1 (c) (art. 5-1-c) (see the Guzzardi judgment previously cited, Series A no. 39, pp. 38-39, para. 102) - which Mr Ciulla had to be prevented from committing; they relied on the past "serious offences" which had led to the "heavy sentence" passed on him by the Milan District Court (see paragraph 12 above) and on "circumstances" which indicated that he was a "danger to society".

3. Conclusion

41. The Government considered that when interpreting Article 5 para. 1 (art. 5-1) in the instant case, it was necessary to have regard to the general background of the disputed detention.

Certainly the Court does not underestimate the importance of Italy’s struggle against organised crime, but it observes that the exhaustive list of permissible exceptions in paragraph 1 of Article 5 (art. 5-1) of the Convention must be interpreted strictly (see, as the most recent authority, the Bouamar judgment of 29 February 1988, Series A no. 129, p. 19, para. 43). Moreover, it notes that Law no. 327 of 3 August 1988 amended section 6 of the 1956 Law by doing away with the possibility of detaining a person

before a preventive measure is enforced (see paragraph 21 above). The legislature was able to take that decision without in any way giving up a legitimate campaign.

42. In conclusion, there was a violation of Article 5 para. 1 (art. 5-1).

B. Paragraph 5 (art. 5-5)

43. The applicant also relied on paragraph 5 of Article 5 (art. 5-5) in that Italian law allegedly afforded no means of seeking compensation from the national courts for a breach of paragraph 1 (art. 5-1).

The Government stated that there was indeed such a possibility in the eventuality - which they submitted had not materialised - of such a breach; as he had not availed himself of it, Mr Ciulla could not allege that paragraph 5 (art. 5-5) had been contravened.

44. Unlike the case of Brogan and Others (see the judgment of 29 November 1988, Series A no. 145-B, p. 35, paras. 66-67), the present dispute raises the issue of compliance with this provision by a State which has incorporated the Convention into its domestic legal order.

In support of their submission, the Government cited two decisions of the Rome District Court, given on 15 May 1973 and 7 August 1984 (see paragraph 23 above). Neither of these, however, related to the 1956 Law, which dates from after Italy's ratification of the Convention. The Government maintained that in Italy the Convention had the status of constitutional law or, at the very least, prevailed over all ordinary laws, regardless of date. This argument does not, however, accord with the preponderance of the case-law of Italian first-instance and appellate courts, since none of the decisions brought to the Court's notice expressly recognises that the Convention prevails over later statutes (see paragraph 22 above). That being so, effective enjoyment of the right guaranteed in Article 5 para. 5 (art. 5-5) of the Convention is not, in the circumstances of the case, ensured with a sufficient degree of certainty.

Moreover, as part of a friendly settlement secured by the Commission in 1985 in respect of application no. 9920/82 by Mr Mario Guido Naldi, the Government undertook to "table ... amendments" to a Bill they had laid before the Chamber of Deputies, "to ensure that the principle of a right to compensation ... [was] established with absolute certainty, as prescribed by Article 5 para. 5 (art. 5-5) of the Convention" (report of 11 May 1985, Decisions and Reports no. 42, p. 71).

45. There is therefore also a breach of paragraph 5 (art. 5-5). This finding is without prejudice to the Court's competence under Article 50 (art. 50) in the matter of awarding compensation by way of just satisfaction.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

46. Article 50 (art. 50) provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

47. The applicant did not submit any claim for reimbursement of costs and expenses, and this is not a matter which the Court has to examine of its own motion (see, as the most recent authority, the Brogan and Others judgment previously cited, Series A no. 145-B, p. 36, para. 70).

48. On the other hand, he sought compensation for damage, in an amount which he left to the Court's discretion to determine. On this latter point, the Delegate of the Commission considered that the Guzzardi judgment (previously cited, Series A no. 39, pp. 41-42, paras. 112-114) should be taken as a basis for the decision.

As the Government noted, Mr Ciulla did not provide any particulars or any prima facie evidence as to the nature and extent of the alleged damage in respect of his detention from 8 to 25 May 1984. In his address to the Court, counsel for Mr Ciulla said that his client's main concern was to have his detention declared incompatible with Article 5 (art. 5).

On the other hand, the Court accepts that he may have sustained non-pecuniary damage, but in the circumstances of the case it considers that the finding of violations of Article 5 amounts in itself to adequate just satisfaction for the purposes of Article 50 (art. 50).

FOR THESE REASONS, THE COURT

1. Holds unanimously that the Government are estopped from relying on the rule of exhaustion of domestic remedies as regards the possibilities of:
   (a) pleading Article 5 (art. 5) of the Convention in support of an appeal on points of law;
   (b) applying for a review of the constitutionality of section 6 of the 1956 Law; and
   (c) bringing an action for damages against the State;

2. Rejects unanimously as unfounded the remainder of the objection that domestic remedies had not been exhausted;

3. Holds by fifteen votes to two that there has been a violation of paragraph 1 of Article 5 (art. 5-1) of the Convention;

4. Holds by thirteen votes to four that there is a violation of paragraph 5 of the same provision (art. 5-5);

5. Holds unanimously that the present judgment constitutes in itself sufficient just satisfaction for the purposes of Article 50 (art. 50).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 February 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Valticos, approved by Mr Matscher;

(b) joint partly dissenting opinion of Mrs Bindschedler-Robert and Mr Gölcüklü.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE VALTICOS, APPROVED BY JUDGE MATSCHER

(Translation)

1. If I do not share the opinion of the majority of the Court, who have held that the Convention has been violated in the instant case, it is not because I disagree with their reasoning on what one might call a "technical" level. Rather, it is because I think that the issue must be looked at in a broader setting.

In my view, it is appropriate to consider as a whole the provisions of Article 5 (art. 5) of the Convention, in their spirit as well as in their letter, and the various proceedings in Italy in the Ciulla case.

As regards Article 5 para. 1 (art. 5-1) of the Convention, that Article is clearly designed mainly to afford individuals judicial safeguards against arbitrary action by the police or the executive which might result in their being deprived of liberty.

As regards the proceedings in Italy in the Ciulla case, there were a number of interwoven prosecutions and decisions which involved courts of different levels and ended with Mr Ciulla’s being sentenced to nine years’ imprisonment. The deprivation of liberty - lasting not more than sixteen days - which he underwent during these complicated proceedings cannot be looked at in isolation and should not be severed from the whole body of judicial proceedings and stages of which it formed part. Furthermore, the fact cannot be overlooked that this deprivation of liberty, even if it was not in itself strictly a decision concerning the application of the law, emanated from a judge who was a member of a judicial body. It seems to me that it would be artificial to isolate this phase from the general course of the trial, however complicated the trial may have been. Looking at the situation as a whole, I find it unreasonable to conclude that there has been a violation of Article 5 para. 1 (art. 5-1) of the Convention.

2. As to Article 5 para. 5 (art. 5-5), firstly, since I take the view that there has not been a breach of Article 5 para. 1 (art. 5-1), I consider that the issue cannot arise. Secondly, the exact import of Article 5 para. 5 (art. 5-5) raises, as has been pointed out in other cases, difficult problems. To give only the briefest idea of these, I will say merely that one must proceed on the principle that the Convention cannot impose a national constitutional system providing for automatic incorporation of the Convention - once ratified - into the domestic legal order, and still less can it require that the Convention prevail over ordinary laws. That being so, the issue of the compensation provided for in Article 5 para. 5 (art. 5-5) must be looked at independently of the issue of incorporating the Convention into the domestic order and on the basis of domestic law, whether or not that incorporates the actual terms of the Convention. In any case, even

supposing that the domestic law incorporates the terms of the Convention, it is difficult to see how a national court could give effect to the terms of Article 5 para. 5 (art. 5-5) unless there were more specific national provisions giving practical expression to the content of those terms. The provision does not seem, subject to the judgment of the national courts, to be self-executing. In the normal course of events, therefore, Article 5 para. 5 (art. 5-5) should be given effect by an express, precise provision of domestic law.

There is also a second series of difficulties, which are logical rather than legal in nature. Can it normally be expected that a government should directly award compensation for an arrest or detention brought about by its authorities in accordance with its own legislation but contrary to Article 5 (art. 5) of the Convention before the Court has held that there has been such a breach (unless the government realises it earlier - which is, to say the least, uncertain)? This suggests that the question of implementing Article 5 para. 5 (art. 5-5) cannot really arise until after the Court has found a violation of the substantive provisions of Article 5 (art. 5) and the government - to whom that finding has been notified - has failed to give effect to paragraph 5 of that Article (art. 5-5). It is difficult to speak of a violation of Article 5 para. 5 (art. 5-5) before these two stages have been completed.

JOINT PARTLY DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT AND GÖLCÜKLÜ

(Translation)

As regards the majority's finding of a breach of paragraph 5 of Article 5 (art. 5-5) of the Convention, we agree with the reasoning set out by Mr Valticos in the second sub-paragraph of paragraph 2 of his dissenting opinion.

We approve the judgment as to the rest.