[TRANSLATION]

...

THE FACTS

The applicant, Mr James Dewayne Nivette, is an American national, born in 1942 and currently in custody in Strasbourg-Elsau Prison. He was represented before the Court by Mr D.S. Bergmann, of the Colmar Bar.

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

On 18 November 1997 the Sacramento Municipal Court (California) issued an international warrant for the arrest of the applicant, who was suspected of having murdered his girlfriend on 16 November 1997.

On 20 November 1997 the applicant was arrested at Munster (France) and taken into custody pending extradition proceedings.

On 22 December 1997 the United States authorities filed an extradition request with the French Ministry of Foreign Affairs.

On 29 January 1998 the Indictment Division of the Colmar Court of Appeal ruled in favour of extraditing the applicant provided that the United States authorities gave the French government an assurance that they would neither seek nor apply the death penalty. It referred expressly to the terms of a written declaration made by the Sacramento County District Attorney on 27 January 1998, which stated:

> "... under California law ..., I have the exclusive right to determine whether criminal charges will be filed against any particular defendant, and ... what the charges will be. ...
>
> ...
>
> In the case of James Dewayne Nivette, I have been advised by my deputies and agree that no 'special circumstance' is applicable ... This affidavit may be deemed a commitment by my office to not seek the death penalty against James Dewayne Nivette."

The Indictment Division of the Colmar Court of Appeal pointed out that, while the application of the death penalty to a person whose extradition had been granted by the French government would be contrary to French public policy under the Law of 9 October 1981 abolishing the death penalty and Protocol No. 6 to the European Convention on Human Rights, the same was not true of life imprisonment without the possibility of parole. The court also found that the question whether a limitation period applied to the crime (*crime*) committed did not arise because, even in France, the ten-year period had only just begun.

Lastly, it found that, although the applicant had claimed to be a French national at the hearing, it could not be seriously disputed that he had

American nationality only and so it declined to seek a preliminary ruling on that issue.

On 12 May 1998 the Criminal Division of the Court of Cassation dismissed the applicant's appeal on points of law against the Court of Appeal's decision. It held that the ruling in favour of extradition, together with its proviso, was in accordance with domestic law. It declined, however, to rule on the grounds of appeal relating to nationality and the death-row phenomenon, taking the view that they amounted to criticisms of some of the reasons given in the Court of Appeal's judgment and were therefore inadmissible.

On 25 September 1998 the applicant applied to the Colmar District Court for a declaration of nationality.

On 7 September 1999, at the French government's request, further guarantees were provided by the Sacramento County District Attorney, who stated that:

(a) as District Attorney, she was authorised by law to bind the State of California by her decisions and so the undertaking she had given was binding both on her successors and on the State of California;

(b) her declaration amounted to a commitment and an assurance by the State of California that the death penalty would not be sought or applied against Mr Nivette at any stage in the prosecution or the criminal proceedings instituted against him;

(c) under section 190.2 of the California Penal Code a death sentence for murder could be passed only if at least one of twenty-one special circumstances listed in the section applied;

(d) the laws of the State of California made it legally impossible for the death penalty to be imposed unless a special circumstance was charged by the prosecuting authorities and upheld by the trial court;

(e) the District Attorney alone was entitled to charge a special circumstance; no special circumstance would be charged in this case and therefore no court would be able to impose the death penalty on Mr Nivette;

(f) even if the understanding of the facts in the case were to change in the future, her decision not to seek the death penalty was irrevocable. Even where a special circumstance existed, the District Attorney had a legal right not to charge it and she would not do so in this case even if a special circumstance became apparent at a later stage; it was consequently impossible for the death penalty to be imposed.

That declaration was made "under penalty of perjury".

On 17 December 1998 the United States embassy in Paris forwarded to the French government assurances made by the federal government.

On 21 October 1999 the French Prime Minister issued an extradition order; the applicant appealed to the *Conseil d'Etat*.

On 6 November 2000 the *Conseil d'Etat* held as follows:

"The death penalty was abolished in France by the Law of 9 October 1981. Under Article 1 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which was incorporated into the domestic legal order following its ratification ..., 'The death penalty shall be abolished. No one shall be condemned to such penalty or executed'. Applying the death penalty to a person whose extradition has been granted by the French government would contravene French public policy. Consequently, if any of the crimes for which extradition is sought from the French authorities is punishable by death under the law of the requesting State, extradition in respect of that crime may legally be granted only on condition that the requesting State gives sufficient assurances that the death penalty will not be imposed or will not be executed. On the other hand, extradition of a person liable to serve a life sentence without any possibility of early release is not contrary to French public policy or Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The government of the United States' request for the extradition of Mr Nivette is based on an act of murder. Under the criminal-law provisions that apply in California, which is the State whose courts have jurisdiction in the case, an accused found guilty of murder is liable to the death penalty.

On 29 January 1998 the Indictment Division of the Colmar Court of Appeal ruled in favour of Mr Nivette's extradition provided that the relevant United States authorities gave assurances to the French government that, even if the death penalty was imposed, it would not be sought or applied.

Under the impugned order of 21 October 1999, the French government acceded to the American authorities' request for the applicant's extradition provided that the death penalty was not sought, imposed or executed. In a diplomatic note of 17 December 1998, the United States embassy made known to the French government the United States government's assurance that, if Mr Nivette's extradition was granted, the death penalty would not be imposed or carried out. The United States authorities also conveyed to the French authorities the undertaking made on behalf of the State of California by the District Attorney of Sacramento County – where Mr Nivette would stand trial – that the relevant prosecuting authority would not apply for the death penalty to be imposed on the applicant, even if new facts were uncovered that could amount to special circumstances. In an affidavit the Sacramento County District Attorney gave a formal assurance that the death penalty could not be imposed unless a special circumstance was charged by the prosecuting authorities. Under these circumstances, the applicant is not justified in maintaining that the impugned order is not attended by adequate safeguards and that his extradition would contravene French public policy.

Contrary to the applicant's allegations, the United States' legal system respects individuals' fundamental rights and freedoms as required by the general principles of extradition law. The impugned order is therefore not in breach of Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Mr Nivette maintained that he was a French national but provided no evidence to support that assertion. In the absence of any serious dispute on this subject, there is no reason to seek a preliminary ruling from the court competent to determine nationality issues.

It follows that Mr Nivette is not justified in seeking to have the impugned order quashed ...”

COMPLAINTS

1. The applicant submitted that his extradition to the United States would be in breach of Article 3 of the Convention if he were to be sentenced to life imprisonment without any possibility of early release.

2. In his observations the applicant also complained that his extradition would contravene Article 6 of the Convention.

THE LAW

1. The applicant complained that his extradition to the United States would breach Article 3 of the Convention if he were to be sentenced to life imprisonment without any possibility of early release.

Article 3 of the Convention provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Government observed at the outset that, as they had mentioned in their observations on the complaint dealt with in the Court’s partial decision of 14 December 2000, section 190.2 of the California Penal Code, which applied in the instant case, provided:

“The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the State prison for life without the possibility of parole if one or more of the following special circumstances has been found ... to be true: ...”

The section went on to list the twenty-one special circumstances which could apply in a murder trial.

The Government further observed that, as the Court had noted in the aforementioned decision, the Sacramento County District Attorney had expressly undertaken, in particular in her declaration of 7 September 1999, not to charge any special circumstance that could give rise to a death penalty. That also made it impossible for the applicant to be sentenced to life imprisonment without the possibility of parole. Such sentences could only be imposed where the same conditions were satisfied as those that could lead to the imposition of a death sentence.

The Government also produced a further declaration by the Sacramento County District Attorney, made under oath and under penalty of perjury on 29 March 2001.

Paragraph 5 of that declaration reads as follows:

> "... However, Mr Nivette cannot and will not be sentenced to death or to life in prison without the possibility of parole because there is no statutorily specified special circumstance alleged in this case that would make him eligible for a sentence of death or life in prison without the possibility of parole."

In the Government's submission, it followed from that additional declaration that the Court's findings concerning the death penalty (see the aforementioned decision of 14 December 2000) also applied to life imprisonment without the possibility of parole. The application of section 190.2 of the California Penal Code and the District Attorney's undertaking not to charge a special circumstance therefore ruled out both penalties.

As to the sentence to which the applicant was in fact liable, the Government stated that, according to the relevant provisions of the aforementioned Code, it was twenty-five years' imprisonment with a possibility of parole. The applicant could also be sentenced to a further three, four or ten years in prison for personal use of a firearm. He was therefore liable to a maximum penalty of thirty-five years' imprisonment with the possibility of obtaining parole.

The Government submitted that the additional information clearly showed that there was no danger that the applicant would have to serve a life sentence without any possibility of early release as a result of the proceedings that had given rise to the American authorities' extradition request.

The Government also pointed out that, under California's rules on the execution of sentences, the applicant could be granted parole once he had served part of his sentence.

They quoted paragraph 7 of the aforementioned declaration by the Sacramento County District Attorney:

> "In accordance with California law, Mr Nivette would be eligible for parole consideration after serving a specified amount of the prison sentence imposed. Depending on his behaviour while in prison, and the applicability of certain statutes, Mr Nivette's sentence may be reduced anywhere from 15% to 33 1/3% off the lower end of the sentence imposed."

The Government added that under Article 5, section 8, of the California State Constitution, the applicant was entitled to seek a pardon from the Governor of California.

The applicant submitted that the undertakings made by the Sacramento County District Attorney afforded few guarantees. The best guarantee would be one from the State Governor or the President of the United States.

As to the sentence that might be passed on him, the applicant asserted that, although the maximum penalty to which he was liable was thirty-five years' imprisonment, only the main sentence of twenty-five years was reducible; a sentence for use of firearms was not. He added that, according to various studies, a ten-year sentence was imposed in 99% of cases. The

Government disputed that and submitted that remission applied to the entire, 35-year maximum sentence.

The applicant added that what was in issue in the instant case was not parole, which did not exist in the United States, but only remission, and he pointed out that, if he was sentenced to thirty-five years' imprisonment and depending on what remission he was granted, he would come out of prison when he was anything between 86 and 91 years old and would accordingly have no chance of making a new start in life.

The Court reiterates that it would hardly be compatible with the "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble to the Convention refers, were a Contracting State knowingly to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 35, § 88).

In the instant case the Court must begin by determining whether the applicant is at risk of being sentenced to life imprisonment in California without any possibility of early release. The Court considers that the question may legitimately be raised whether and to what extent the declarations by the United States federal government that were conveyed by the United States embassy on 17 December 1998 are binding on the State of California.

It may also be questioned whether and to what extent declarations by the executive may bind the prosecuting and judicial authorities. However, in the Court's opinion, the United States government's declarations are not necessarily inadequate or ineffective on that account, inasmuch as they complement the undertakings made previously and subsequently by the Californian prosecuting authorities. It is the view of the Californian prosecuting authorities that is the decisive factor in this instance.

The Court notes that in the written declaration made by the Sacramento County District Attorney on 27 January 1998, reiterated and supplemented by the same District Attorney on 7 September 1999 and 29 March 2001, the District Attorney gave an undertaking under oath that, whatever the circumstances, the State of California would not charge one of the special circumstances which must be charged for the death penalty or a sentence of life imprisonment without any possibility of early release to be imposable and that her undertaking was binding on her successors and on the State of California.

The Court attaches particular importance to this reiterated undertaking and the fact that, by section 190.2 of the California Penal Code, a sentence of life imprisonment without any possibility of early release cannot be imposed in the instant case if the District Attorney does not charge a special

circumstance and that the Sacramento County District Attorney has undertaken not to do so.

That being so, the Court considers that the assurances obtained by the French government are such as to avert the danger of the applicant's being sentenced to life imprisonment without any possibility of early release. His extradition therefore cannot expose him to a serious risk of treatment or punishment prohibited by Article 3 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicant also alleged that his extradition to the United States would be in breach of Article 6 of the Convention.

He submitted that, were he extradited, it would be for him to pay for a good lawyer if the death penalty was sought. Since he did not have the means to pay for a lawyer in proceedings against the State of California that would be lengthy, difficult and very costly, he could not be granted a fair trial.

The Court points out that in its decision of 14 December 2000 it declared inadmissible the complaint based on the allegation that the applicant would be in danger of being sentenced to death if extradited to the United States.

Consequently, this complaint must also be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.