CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 56271/00
by Horacio SARDINAS ALBO
against Italy

The European Court of Human Rights (First Section), sitting on 8 January 2004 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs F. TULKENS,
Mr E. LEVITS,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 8 June 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the parties' oral submissions at the hearing on 8 January 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Horacio Sardinas Albo, was born in 1948 and is currently detained in Voghera. The applicant was represented by Mrs B. Sartirana, a lawyer practising in Milan. The respondent Government were represented by their agent, Mr I.M. Braguglia, and by Mr F. Crisafulli, co-agent.

A. The circumstances of the case

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

1. The applicant's arrest and the criminal proceedings against him

On 6 August 1996 the applicant, accused of international drug-trafficking, was arrested in Milan. He was in possession of a false passport in the name of José Luis Troccoli Perdomo.

On 7 August 1996 the applicant was questioned by the Milan Public Prosecutor. Criminal proceedings were instituted against José Luis Troccoli Perdomo.

By an order of 9 August 1996, the Milan investigating judge remanded the applicant in custody. He observed that there was strong evidence of guilt against the applicant, who was in possession of documents showing that he was in contact with persons connected to drug-trafficking. Given the amount of cocaine (104 kilograms) imported by those persons and the fact that they were probably part of a major criminal organisation, the investigating judge considered that there was a serious risk of re-offending and a risk of tampering with evidence. Moreover, the applicant had declared that he was a tourist and that he had no links whatsoever to Italy. It was therefore reasonable to believe that he would try to abscond in order to avoid the consequences of the legal proceedings commenced against him.

The applicant challenged the order before the Milan District Court, which dismissed his appeal on 23 September 1996. The District Court observed that new evidence had emerged against the applicant, who had been recognised as the person who had rented a deposit box in which the cocaine had been found, had helped to move a container into the deposit box and was facing another set of proceedings for drug-trafficking pending in Bassano del Grappa. The Milan District Court held that there was a serious risk of his re-offending, as evidenced by the fact that the applicant was part of a powerful criminal organisation. Moreover, if he were released, the applicant might try to get in touch with the other members of the organisation in order to tell them about the investigations with a view to tampering with the evidence. Finally, there was a risk of his absconding,

confirmed by the fact that the applicant had given a different name to the Bassano del Grappa judicial authorities.

The applicant did not appeal on points of law to the Court of Cassation against the order of 23 September 1996.

On 27 May 1997 the Milan Public Prosecutor's Office requested that the applicant and twelve other persons be committed for trial. The preliminary hearing was scheduled for 23 June 1997, on which date the applicant was committed for trial, to begin on 2 April 1998 before the Milan District Court.

In a judgment of 22 April 1998, filed with the registry on 27 April 1998, the Milan District Court declared that the case was outside its jurisdiction *ratione loci* and ordered the transmission of the case-file to the Genoa Public Prosecutor's Office.

In a decision of 8 May 1998 the Genoa investigating judge extended the applicant's detention on remand. After confirming the observations made in the orders of 9 August and 23 September 1996, he noted that further investigation had revealed that the applicant had played an active role in renting the deposit box where the cocaine had been found and in sending the container in which it was concealed and had kept in contact with the other defendants who had been caught by the police in the act of removing the cocaine from the container. The investigating judge considered moreover that there was a risk of his re-offending and absconding after having committed the offence. He noted in that respect that another set of criminal proceedings had been instituted against the applicant in Bassano del Grappa, and that the accused had tried to abscond, producing false identification papers.

The applicant did not appeal against the decision of 8 May 1998.

On 4 November 1998 the Public Prosecutor attached to the Genoa District Court forwarded the case-file to the Como Public Prosecutor's Office.

In a judgment of 7 October 1999, filed with the registry on 28 October 1999, the Como District Court found the applicant guilty of the charges against him and sentenced him to fifteen years' imprisonment and imposed a fine of 130,000,000 Italian lire (ITL - approximately 67,139 euros). The applicant's name was established as being in reality Horacio Sardinas Albo.

On 20 December 1999 the applicant appealed against that judgment. He challenged, in particular, the jurisdiction of the Como District Court.

The hearing was scheduled for 16 March 2000. On that date, the applicant signed a document stating that he wished to renounce the assistance of an interpreter. He then concluded a plea bargain (*applicazione della pena su richiesta delle parti*) with the Public Prosecutor attached to the Milan Court of Appeal. The applicant agreed to withdraw his appeal in return for a reduction in his sentence.

In a judgment of 16 March 2000, the Milan Court of Appeal recognized the agreement reached by the parties and reduced the applicant's sentence to eleven years' imprisonment and a fine of ITL 100,000,000 (approximately 51,645 euros).

On an unspecified date the applicant appealed on points of law, alleging that the Court of Appeal had failed to check whether there was anything in the case-file which might lead to an acquittal. He also repeated the complaints made in his appeal of 20 December 1999.

In a judgment of 2 February 2001 the Court of Cassation declared the applicant's appeal inadmissible.

The expiry of the applicant's sentence was set for 10 August 2006.

2. The first set of extradition proceedings

Meanwhile, on 14 May 1998, the Ministry of Justice had requested that the applicant be placed in detention with a view to his extradition to the United States. In an order of 15 May 1998 the Brescia Court of Appeal had provisionally granted the request.

On 22 May 1998 the applicant was interviewed by the President of the Brescia Court of Appeal. He declared that he did not agree to be extradited since the absence of diplomatic relations between Cuba and the United States could result in his being detained for an indefinite period of time (a situation commonly known as “limbo incarceration” - see below, under relevant domestic law and practice, section 6).

On 22 May 1998 the applicant challenged the order of 15 May 1998. He contested in particular the authorities' assumption that it was necessary to prevent him from absconding before the extradition decision could be enforced. By an order of 26 May 1998 the Brescia Court of Appeal rejected his claim. The order indicated that the applicant was a United States citizen. The applicant's appeal on points of law was declared inadmissible.

On 22 June 1998 the United States authorities requested the applicant's extradition for offences related to drug-trafficking (importation and possession of 425 kilograms of cocaine).

On 25 August 1998 the Brescia Public Prosecutor's Office requested that extradition be granted. It was noted that an arrest warrant had been issued against the applicant on 9 June 1993 by the Porto Rico District Court and that in the light of the evidence produced by the United States authorities it was reasonable to believe that the applicant was guilty of the offences with which he had been charged.

The hearing before the Brescia Court of Appeal was held on 2 October 1998. On that occasion the applicant observed that the Italian authorities had failed to ascertain whether there was a treaty of co-operation in the field of criminal justice between Cuba and the United States.

In a judgment of 2 October 1998, filed with the registry on 6 October 1998, the Brescia Court of Appeal ruled in favour of extradition. It noted that the applicant had acquired United States citizenship and considered that the existence of a treaty of co-operation was not relevant.

On 27 October 1998 the applicant appealed on points of law. He challenged, in particular, the assumption that he had acquired United States citizenship and submitted that Cuban nationals incurred a serious risk of indefinite detention in the United States.

By a judgment of 29 January 1999, filed with the registry on 29 March 1999, the Court of Cassation dismissed the applicant's appeal. It observed that the authorities of the State seeking his extradition had officially declared that the applicant was a United States citizen. The declaration was not inconsistent with the fact that the applicant had a Cuban passport or that in documents issued before the extradition request, the United States authorities had treated the applicant as an alien. As to the ill-treatment which the applicant allegedly risked in the United States, the Court of Cassation observed that the documents submitted described, in a confused manner, some perverse effects produced in specific cases by United States immigration legislation. As the conditions for the application of the legislation were unclear, the applicant could not be said to have produced positive evidence of the facts he had alleged.

On 12 May 1999 the Ministry of Justice granted the extradition request. It observed that the Brescia Court of Appeal's decision of 2 October 1998 had become final, that the offences with which the applicant had been charged were not of a political nature and that the extradition was not aimed at persecuting him on racial, religious or political grounds. However, noting that criminal proceedings against the applicant were then pending before the Como District Court, the Ministry decided, according to Article 709 of the Code of Criminal Procedure (hereinafter, the “CCP”), to suspend the enforcement of the extradition.

The order of 12 May 1999 was served on the applicant on 24 May 1999.

3. The second set of extradition proceedings

Meanwhile the United States authorities had once again requested the applicant's extradition in relation to a charge of false statements. The applicant had allegedly declared that his name was Gilberto Ramos in order to obtain a United States passport and had produced evidence corroborating the assertion.

By an order of 4 June 1999 the Brescia Court of Appeal decided that the applicant should be detained with a view to extradition. It noted, in particular, that the applicant had already left the jurisdiction of the Florida courts and that there was a specific risk of his absconding. The order indicated that the applicant was a Cuban citizen who, in February 1973, had obtained a permanent residence permit in the United States.

On 10 June 1999 the applicant was interviewed by the President of the Brescia Court of Appeal. He declared that he did not agree to be extradited, that he was a Cuban national and that he had never acquired United States citizenship.

On 8 July 1999 the applicant appealed on points of law against the order of 4 June 1999.

By a judgment of 19 August 1999, filed with the registry on 1 September 1999, the Court of Cassation declared the applicant's appeal inadmissible because it had been lodged out of time.

The extradition hearing before the Brescia Court of Appeal took place on 9 March 2000. On that occasion the applicant reiterated his objections concerning the risk of indefinite detention in the United States.

By a judgment of 9 March 2000, filed with the registry on 21 March 2000, the Brescia Court of Appeal ruled in favour of extradition. It observed that according to Article XVI of the Bilateral Extradition Treaty between Italy and the United States, the person extradited should not be detained, judged or punished for crimes other than the ones for which the extradition request had been granted. The Court of Appeal therefore considered that the Bilateral Treaty offered substantial guarantees against indefinite detention. The judgment indicated that the applicant was a Cuban national with a permanent residence permit in the United States.

The applicant appealed on points of law.

By a judgment of 19 September 2000, filed with the registry on 30 October 2000, the Court of Cassation, considering that the Court of Appeal had duly given reasons for its decision, dismissed the applicant's appeal.

By an order of 3 November 2000 the Ministry of Justice granted the extradition request. It observed that the Brescia Court of Appeal's judgment of 9 March 2000 had become final, that the offences of which the applicant was accused were not of a political nature and that the extradition was not aimed at persecuting him on racial, religious or political grounds. However, noting that criminal proceedings against the applicant were still pending, the Ministry decided to suspend enforcement of the extradition.

The applicant alleged that the Ministry's order of 3 November 2000 had never been served on him.

4. The applicant's citizenship and immigration status in the United States of America

The applicant claimed to be a Cuban national; however, a number of documents indicated that he had acquired United States citizenship. According to other documents (in particular, an affidavit of 13 August 1998 made by the Public Prosecutor attached to the United States Department of Justice), the applicant was a Cuban citizen who, in 1973, had been granted the status of permanent resident in the United States. The applicant alleged

that his permanent residence permit was eventually revoked. In that respect, he produced a document, dated 29 June 1993, in which an immigration judge of the State of Florida ordered his deportation to Cuba. The applicant emphasised that no permanent resident could be deported to a foreign country and considered that his real immigration status in the United States was that of a deportable alien.

In a note of 30 November 2001 the U.S. Department of Justice pointed out that the applicant had entered the United States in February 1973 as an immigrant. In 1977, he had adjusted his status to lawful permanent resident under the Cuban Adjustment Act. He had never been granted U.S. citizenship. The applicant had been convicted in the United States of the aggravated felony of drug-trafficking and had lost his status as a lawful permanent resident on issuance of an administratively final deportation order issued on 29 June 1993. However, the applicant had been released from custody in the United States after posting a 100,000 US dollars bond since removal was not practicable as the Government of Cuba had refused to accept him. He had subsequently left the United States, as later evidenced by his presence in Italy.

B. Relevant domestic law and practice

1. Appeals available against an order for detention on remand and main legal grounds for deprivation of liberty pending trial

A decision concerning a person's detention on remand may be challenged before the competent District Court (*tribunale della libertà e del riesame*), which may deal with questions of fact and law (Articles 309 and 310 of the Code of Criminal Procedure ("CCP"), or before the Court of Cassation (Articles 311 and 568 § 2 of the CCP). According to Articles 311 § 2 and 606 § 1 (b), (c) and (e) of the CCP, the latter may annul the impugned decision if it lacks proper and logical reasons, or if it was adopted in violation of the provisions of the Criminal Code or of the CCP.

A detained person may rely, in particular, on Article 273 of the CCP, which sets out the conditions for precautionary measures (*misure cautelari*), namely the existence of serious evidence of guilt (*gravi indizi di colpevolezza*), and on Article 274 of the CCP which provides, in addition, that precautionary measures may be ordered for the following reasons (*esigenze cautelari*): preventing interference with the course of justice (Article 274 (a)), danger of absconding (274 (b)) and preventing the possibility of re-offending (274 (c)).

Under Article 275 of the CCP, precautionary measures should be adapted, in each individual case, to the nature and degree of the conditions set out in Article 274; they must be proportionate to the seriousness of the offence and to the sanction which is likely to be applied. Detention pending

trial may be ordered only if all other precautionary measures appear to be inadequate.

Article 292 CCP provides *inter alia* that a detention order must contain an explanation of the actual grounds for the precautionary measure and of the specific evidence of guilt, including the factual elements on which the evidence is based and the grounds for its relevance, and must also take into account the time elapsed since the offence was committed.

According to the Court of Cassation's case-law, the existence of evidence of guilt and of the reasons for detention set out in Article 274 of the CCP should be re-examined in the light of any new relevant facts, such as the time elapsed since the beginning of the enforcement of the precautionary measure (see the Fourth Section's judgment no. 2395 of 16 October 1997 in the case of *Luise*).

2. Applicability of Article 5 § 3 of the Convention to the proceedings before the Italian courts

In 1989 the Court of Cassation held that the Convention provisions were applicable in Italy, provided that they were drafted in sufficiently precise terms (see the Plenary Court's judgment no. 15 of 8 May 1989 in the case of *Polo Castro*). According to the Constitutional Court, the Convention is a special source of law which cannot be modified by ordinary law (judgment no. 10 of 19 January 1993).

However, in more recent decisions, the Court of Cassation has held that Article 5 § 3 of the Convention is not directly applicable in Italy, by reason of its general and indeterminate character (*natura programmatica* - see, in particular, the following judgments: no. 2549 of 28 May 1996 (First Section) in the case of *Persico*; no. 2550 of 31 May 1997 (First Section) in the case of *Esposito*; no. 1439 of 21 May 1998 (Fourth Section) in the case of *Scattolin*).

3. Suspension of the enforcement of extradition

According to Article 709 of the CCP "The enforcement of extradition shall be suspended if the person to be extradited ought to be judged [in Italy] or must serve [in Italy] a sentence imposed on him or her for offences committed before or after the offence in respect of which the extradition has been granted ...".

4. Powers of the administrative courts in reviewing the lawfulness of an extradition order

According to Section 21(1) of Act No. 1034 of 6 December 1971, within a period of sixty days, starting on the date of service of the Ministry's extradition order or on a different date on which the person concerned had

notice of it, the order may be challenged before the Regional Administrative Court (*Tribunale amministrativo regionale*, hereinafter called "T.A.R.").

An application to the T.A.R. does not automatically suspend the enforcement of the impugned order. However, a stay of enforcement may be requested by the applicant and allowed by the T.A.R. on two conditions: that the application is not manifestly ill-founded (*fumus bonis juris*) and that enforcement of the order may have irreversible adverse effects (see Section 21(8) of Act No. 1034 of 1971).

Since 1996 the T.A.R.s have acknowledged that the Ministry's extradition orders are "acts of high administration" (*atti di alta amministrazione*"), which are administrative in nature and may be reviewed on the following grounds: lack of jurisdiction, unlawfulness and abuse of power (see, in particular, the decisions of the Lazio T.A.R. (First Section) of 22 March 1996 in the case of *Venezia* and of 30 May 2001 in the case of *Pirrottina*). Moreover, after the entry into force of Act No. 241 of 1990, which introduced the rule whereby reasons must be given for all administrative acts, a breach of the law may be invoked on the ground that the reasons given for the impugned act are not sufficient or adequate.

However, the T.A.R. does not have jurisdiction to review the decisions by which the ordinary courts rule in favour of the extradition and which constitute a precondition for the Ministry's order (see, for instance, the decisions of the Lazio T.A.R. (First Section) of 31 March 1992, no. 467 and of 9 June 1999, no. 2171, as well as the decision of the *Consiglio di Stato* (Fourth Section) of 6 April 2000, no. 1996).

According to Article 698 of the CCP, extradition cannot be granted

> "when there are reasons to believe that the accused or convicted person will be subjected to acts which are persecutory or discriminatory on the basis of race, religion, sex, nationality, language, political opinions or personal or social conditions, or to punishment or treatment [which is] cruel, inhuman or degrading, or, in any case, to acts which amount to a violation of one of that person's fundamental human rights".

According to Article 699 of the CCP, the requesting country must not deprive the extradited person of liberty on the basis of events which occurred prior to the extradition and are different from the ones in respect of which the extradition has been granted (rule known as "speciality principle" - *principio di specialità*).

5. The Pinto Act

Act No. 89 of 24 March 2001, which entered into force on 18 April 2001 (hereinafter called the "Pinto Act"), has introduced in the Italian legal system a remedy against the excessive length of judicial proceedings. The provisions of this law are described in *Brusco v. Italy* (dec.), no. 69789/01, 6 September 2001, ECHR 2001-IX.

6. The risk of indefinite detention

Certain documents and newspaper reports produced by the applicant showed that Cuban nationals extradited to the United States could be held in indefinite confinement in county jails or detention centres (situation commonly known as "limbo incarceration"). In fact, United States law requires the deportation of non-U.S. citizens convicted of certain felonies, even if they have already served the sentence imposed for their offences. Instead of being deported, some Cuban nationals have been detained indefinitely by the Immigration and Naturalisation Service ("INS"), because the United States may not deport immigrants to countries – such as Cuba – with which it has no diplomatic relations. In May 1999, the mothers of some Cuban nationals held in a Miami detention centre went on hunger strike to protest against that practice.

In a memorandum of 30 November 2001 the U.S. Department of Justice pointed out that the applicant would be subject to detention after being prosecuted for breach of U.S. criminal and immigration law. Such detention would not be indefinite but would end when the legal proceedings had finished or, if the alien were convicted of a criminal offence, after the prison sentence had been served. Subsequently, an alien against whom an administratively final deportation order had been issued must be removed within 90 days. During that period detention of most criminal aliens was mandatory. Further detention after the removal period was authorised, but not mandatory (it may mandatory, in particular, if the Attorney General is of the opinion that the alien may constitute a danger to the community or is unlikely to comply with the removal order).

The U.S. Department of Justice emphasised that as the applicant had no immigration status, if he remained in the United States after the conclusion of the legal proceedings on which his extradition had been based, it was possible that he would be returned to immigration custody and face immigration removal proceedings as an inadmissible alien. Assuming that an order for his removal to Cuba was issued and that the order could not be enforced due to the Cuban authorities' refusal to accept him, the applicant would be subject to further immigration detention. However, the detention would not be indefinite, as the law provided for automatic administrative custody review procedures scheduled at regular intervals. Each case was reviewed annually to determine whether the detainee could be removed, should remain in detention or be released. The detainee was afforded the opportunity to present evidence in support of his release. Under that system, aliens were routinely released from custody.

The U.S. Department of Justice pointed out moreover that the detention of aliens had never been properly characterised as "indefinite". The United States did remove Cuban detainees who could be repatriated to Cuba pursuant to a 1984 agreement with that country. In addition, the United

States had always been willing to permit any detained Cuban who could obtain admission to a third country to leave.

In the case of *Zadvydas v. Davis* (533 U.S. 678 (2001)), the U.S. Supreme Court considered that a statute which permitted the indefinite detention of an alien raised a serious constitutional problem under the Fifth Amendment's Due Process Clause. It therefore held that such detention should not extend beyond a period reasonably necessary to secure removal. However, the United States Court of Appeals for the Eighth Circuit considered that the principle expressed in Zadvydas did not apply to inadmissible aliens (see the case of *Borrero v. Aljetis*, No. 02-1506, 15 April 2003).

COMPLAINTS

1. Relying on Article 5 § 3 of the Convention, the applicant complained of the length of his detention on remand.

2. The applicant invoked Article 5 § 4 of the Convention, without clearly stating the reasons supporting his claim.

3. Relying on Articles 4 and 6 of the Convention, the applicant complained of the length and unfairness of the criminal and extradition proceedings against him.

4. Relying on Articles 3, 5 § 1 and 14 of the Convention, the applicant complained about the decision to grant the United States extradition request and alleged that if he was extradited to the United States he would face a real risk of being indefinitely deprived of his liberty because of his Cuban origin.

THE LAW

1. The applicant complained of the length of his detention on remand. He relied on Article 5 § 3 of the Convention. In its relevant parts, Article 5 of the Convention provides 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; ...
>
> (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; ...

(f) the lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition. ...

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

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. ..."

1. The Government's objection of non-exhaustion of domestic remedies

The Government first objected that the applicant had not exhausted the remedies available to him under Italian law. In particular, he had failed to raise the issue of the length of his pre-trial detention before the Court of Cassation which, according to the relevant case-law, could have provided an effective review of the duration of his deprivation of liberty.

The applicant alleged that under the Italian legal system a detainee could not challenge the length of his detention before the Court of Cassation, whose jurisdiction was confined to points of law rather than fact.

The Court recalls that according to Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33, and *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 571, § 33). Thus the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. Nevertheless, the only remedies that must be exhausted are those that relate to the breaches alleged and are also available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, in particular, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11-12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1212, § 71, and *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, Series A no. 40, p. 18, § 37).

The Court also reiterates that an appeal to the Court of Cassation is one of the remedies that should in principle be exhausted in order to comply with Article 35 (see the *Remli* judgment cited above, p. 572, § 42).

In that connection, the Court has already had the opportunity to emphasise the crucial role of proceedings in cassation, which form a special stage of criminal proceedings whose consequences may prove decisive for the accused (see *Omar and Guérin v. France*, judgments of 29 July 1998, *Reports* 1998-V, p. 1841, § 41, and p. 1869, § 44, respectively).

In this case the Court notes that the applicant did not appeal against the Milan District Court's decision of 23 September 1996 or the Genoa investigating judge's order of 8 May 1998 remanding him in custody. Therefore, as far as his detention on remand is concerned, the applicant never challenged the length of his deprivation of liberty before the Court of Cassation and never claimed that the time elapsed since his arrest had weakened the reasons for the precautionary measure imposed on him.

The Court notes that the Italian Court of Cassation has clarified that the relevance and the continued applicability of the reasons supporting detention on remand should also be evaluated in the light of the time elapsed since the enforcement of the precautionary measure (see above, under relevant domestic law and practice, section 1). However, as it has in some cases refused to apply Article 5 § 3 of the Convention directly, it is not established that the Court of Cassation may take into account the diligence displayed by the competent national authorities in the conduct of the proceedings, a factor to which the Court has attached special relevance (see *Muller v. France*, judgment of 17 March 1997, *Reports* 1997-II, p. 388, § 35, and *I.A. v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2979, §102) and which could have played a crucial role in the particular circumstances of the applicant's case. Moreover, the Government have failed to produce any example of such an appeal on points of law being successfully used to challenge the length of detention on remand with reference to the criteria laid down in this Court's case-law.

In these circumstances, the Court cannot conclude that the remedy invoked by the Government was sufficient and certain in practice.

It follows that this part of the application cannot be rejected for non-exhaustion of domestic remedies and that the Government's objection should be dismissed.

2. The merits of the complaint

As to the merits of the applicant's complaint, the Government observed that the length of the applicant's pre-trial detention was compatible with Article 5 § 3 of the Convention. They pointed out that the deprivation of liberty at issue was based on two simultaneously occurring grounds: the reasonable suspicion that the applicant had committed crimes in Italy and the extradition proceedings pending against him. In the circumstances of the

present case, where the domestic jurisdictions explained in detail the reasons supporting the continuation of the applicant's detention on remand, an overall period of three years and two months cannot be considered excessive. Lastly, the Government asked the Court to take into account the actual outcome of the trial. The applicant had been found guilty and his pre-trial detention had been deducted from the sentence he had to serve. He could therefore no longer claim to be the victim of a violation of Article 5 § 3 of the Convention on the ground of the duration of his detention pending trial.

The applicant disagreed with the Government's arguments.

The Court notes that the applicant was arrested on 6 August 1996 and was deprived of his liberty according to Article 5 § 1 (c) and (f) of the Convention until 7 October 1999, when the Como District Court sentenced him to fifteen years' imprisonment. His detention before trial and extradition thus lasted three years, two months and one day. After the date of the Como District Court's judgment, the applicant's deprivation of liberty was based on Article 5 § 1 (a) of the Convention as "the lawful detention of a person after conviction by a competent court" and cannot therefore be taken into account for the purposes of Article 5 § 3 of the Convention (see, for instance, *B. v. Austria*, judgment of 28 March 1990, Series A no. 175, p. 14, § 36).

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant invoked Article 5 § 4 of the Convention, without clearly stating the reasons supporting his claim.

The Court first notes that the applicant has not substantiated his complaint. In any case, it observes that the applicant had the opportunity of having the lawfulness of his detention reviewed by the Italian judicial authorities, and indeed challenged on many occasions the legal grounds justifying his deprivations of liberty. The fact that his claims were not successful cannot in itself disclose any appearance of a violation of Article 5 § 4.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. The applicant complained of the length and the unfairness of the criminal and extradition proceedings directed against him. He relied on Articles 4 and 6 of the Convention, which, in so far as relevant, read as follows:

> Article 4
>
> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour. ..."
>
> Article 6
>
> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

(a) The Court first notes that the applicant's allegations under Article 4 of the Convention are unsubstantiated. In any case, it finds that the facts of the present application do not disclose any appearance of a violation of this provision.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(b) As to the extradition proceedings, the Court recalls that the words "determination ... of a criminal charge" in Article 6 § 1 of the Convention relate to the full process of the examination of an individual's guilt or innocence in relation to an offence, and not merely to the process of determining whether or not a person may be extradited to a foreign country (see *Raf v. Spain* (dec.), no. 53652/00, 21 November 2000, and *A.B. v. Poland* (dec.), no. 33878/96, 18 October 2001). Moreover, it has constantly been held that decisions regarding the entry, right to remain and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention (see *Maaouia v. France* [GC], no. 39652/98, §§ 33-41, ECHR 2000-X). This provision is therefore not applicable to the first and second set of proceedings concerning the extradition of the applicant to the United States.

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

(c) As concerns the length of the criminal proceedings for international drug-trafficking instituted in Italy, the Court observes that the applicant failed to make use of the remedy introduced by the Pinto Act, which the Court has already found to be accessible and effective. Moreover, it is now clear that, given the wording of the Act and the background to its adoption, the remedy in question must be exhausted also by those persons who introduced their claims in Strasbourg before the date of its entry into force (see, amongst other authorities, *Brusco v. Italy* (dec.), no. 69789/01, 6 September 2001, ECHR 2001-IX).

It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(d) As concerns the fairness of the criminal proceedings for international drug-trafficking, the applicant challenged the evidence on which his conviction was based, complained that there had been no interpreter at the hearing of 16 March 2000 before the Brescia Court of Appeal and stressed that the Genoa investigating judge had not authorised the Cuban consul to visit him in prison.

As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see, among others authorities, *Van Geyseghem v. Belgium [GC]*, no. 26103/95, CEDH 1999-I, § 27).

The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to establish the facts and resolve problems of interpretation of domestic legislation (see, among others authorities, *García Ruiz v. Spain [GC]*, no. 30544/96, CEDH 1999-I, § 28). The Court must ascertain whether the proceedings as a whole were fair (*Van Mechelen and others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 50, and *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 26).

The Court observes that the first-instance judgment was given at the start of adversarial proceedings and on the basis of evidence discussed in a public hearing. Moreover, reasons were duly given for the judgment and there is no indication of arbitrariness.

As concerns the absence of an interpreter at the hearing of 16 March 2000, the Court observes that the applicant signed a document in which he declared that he renounced the assistance of a translator. Moreover, on that day he accepted a plea bargain and nothing in the file shows that such an acceptance was unlawfully imposed on him or otherwise contrary to his defence rights.

Lastly, the Court observes that Article 6 of the Convention does not give a detained accused person the right to receive visits from the consular authorities.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. The applicant complained about the decision to grant the United States extradition request. He relies on Articles 5, 3 and 14 of the Convention. The two last-mentioned provisions read as follows:

> Article 3
>
> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
>
> Article 14
>
> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

The applicant alleged that in the United States he would face a real risk of being indefinitely deprived of his liberty because of his Cuban origin.

1. The Government's objection of non-exhaustion of domestic remedies

The Government first objected that the applicant had not exhausted the remedies available to him under Italian law, as he had failed to challenge the Ministry's extradition orders before the competent T.A.R. In that respect, they observed that the well-established case-law of the administrative courts established that extradition orders were administrative acts which, as such, were subject to judicial review. In particular, the applicant could have argued that the extradition orders should have been declared null and void on the ground that the Ministry of Justice had not properly examined the alleged risk of indefinite detention or had violated Articles 698 and 699 of the CCP. Those provisions prohibited extradition where there was a risk that an individual might be subjected to cruel penalties, that his fundamental rights might be violated or that he might be deprived of his liberty on the basis of events which had occurred prior to the extradition but did not themselves constitute grounds for the extradition.

Moreover, according to the Government the applicant could have expressly raised that issue before the Minister himself who, in assessing the foreseeable consequences of the extradition, exercised a discretionary power which was wider than that of the judiciary authorities.

The Government also observed that Italian law did not oblige the authorities to notify an extradition order to the person to be extradited. Consequently, the sixty day period for challenging the order before the T.A.R. started to run from the day on which the person concerned had notice of it. In any event, the Government underlined that the first extradition order, issued on 12 May 1999, had been served on the applicant on 24 May 1999.

The applicant noted that he had exhausted any possible remedies against the decisions ruling in favour of his extradition. He had not been able to challenge the Ministry's extradition order of 3 November 2000 in the administrative courts because it had never been served on him and had been brought to his notice only when it had been forwarded to him by the Court's registry as an annex to the Government's observations.

In any event, the applicant alleged that, contrary to the Government's assertions, the T.A.R. could not take into account the risk of indefinite detention. In support of his argument, the applicant emphasised that the T.A.R. had no power to review the decisions by which the ordinary courts had ruled in favour of extradition and which, according to him, were binding both on the Ministry and on the administrative courts. In particular, the alleged risk of indefinite detention was relevant to the grounds justifying the extradition and to the protection of the liberty of the person to be extradited, matters which fell within the competence of the ordinary courts. In fact, the question had been raised before both the Brescia Court of Appeal and the Court of Cassation, which had dismissed the applicant's claims.

The Court is called upon to decide whether, in the particular circumstances of the present case, an application to the T.A.R. was an effective and accessible remedy.

In this respect, it should be noted that on 24 May 1999 the first extradition order had been served on the applicant, who was thus provided with a fair opportunity to note its content and to challenge it before the competent administrative authorities. Moreover, as the sixty-day period for bringing the case before the T.A.R. starts to run from the date on which the person concerned has actual notice of the Ministry's order, the fact, alleged by the applicant, that the second order was not served on him but was brought to his attention as an annex to the Government's observations, did not have the effect of limiting his access to the administrative courts.

In the light of the above, the Court considers that the application to the T.A.R. satisfied the requirement of accessibility.

As far as the effectiveness of this remedy is concerned, the Court observes that the Government and the applicant disagree over the possibility of raising the question of the risk of indefinite detention before the T.A.R. In particular, the applicant submitted that, as the administrative court was prevented from reviewing the findings of the ordinary courts which had

dismissed his allegations on this point, a plea based on the treatment he risked being subjected to in the United States would have had no prospects of success.

The Court cannot accept this argument. It notes that, according to the case-law cited by the Government, after 1996 the T.A.R. agreed to examine, in relation to the Ministry's extradition orders, any plea of unlawfulness, abuse of power and insufficient or inadequate reasons. In particular, the applicant could have argued that the orders against him had breached Article 698 of the CCP, which prohibits the grant of extradition where there are reasons to believe that the accused or convicted person will be subjected to punishment or treatment which is cruel, inhuman or degrading or, in any case, to acts which amount to a violation of one of his or her fundamental rights. Moreover, detention for reasons other than the offences in relation to which extradition had been granted could have been seen as an infringement of the speciality principle enshrined in Article 699 of the CCP and in the Bilateral Extradition Treaty between Italy and the United States.

In this respect, it is to be recalled that in a legal system which provides protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection (see, *mutatis mutandis*, *O'Reilly v. Ireland*, no. 24196/94, Commission decision of 22 January 1996, Decisions and Reports (DR) 84, pp. 72, 82).

The Court further notes that the applicant could have argued before the T.A.R. that the Italian authorities had inaccurately determined his citizenship and immigration status in the United States and been careless in evaluating the seriousness of the problem of indefinite detention, a situation which, in the Court's view, gave rise to concern that there was a risk that the applicant's fundamental rights under Articles 3 and 5 of the Convention would be violated. In particular, it should be noted that the Ministry's orders for the applicant's extradition did not expressly address the issue of indefinite detention, nor did they address the point of the speciality principle or explain why it was possible to rule out any risk of his being subjected to acts which might have constituted a violation of his fundamental rights. The applicant could therefore have argued that the Ministry's orders lacked proper and satisfactory reasons.

The Court is not convinced by the applicant's argument that the examination of the above-mentioned pleas was precluded by the findings of the ordinary courts. In that connection it observes that it has been shown in a case previously brought to Strasbourg that the alleged risks of suffering inhuman treatment may be taken into account by the T.A.R. even if the ordinary courts have concluded that all the requirements for the extradition have been satisfied (see, in particular, *Venezia v. Italy*, no. 29966/96, Commission's decision of 21 October 1996, Decisions and Reports (DR) 87, pp. 140-150, in which the risk of the death penalty, dismissed by the Lecce

Court of Appeal and by the Court of Cassation, had been raised before the T.A.R., which had decided to refer the case to the Constitutional Court).

The Court is therefore satisfied that the application to the T.A.R. did not lack reasonable prospects of success and was a remedy capable of providing redress for the alleged violations of the Convention. Had it accepted the applicant's pleas, the T.A.R. could have quashed the Ministry's orders, thus preventing the applicant from being extradited.

What remains to be determined is whether the fact that this remedy does not automatically stay the enforcement of the Ministry's order may affect its effectiveness.

According to the case-law on Article 13 of the Convention, where there are substantial grounds for fearing a real risk of ill-treatment, the concept of an effective remedy requires the possibility of suspending the implementation of the disputed measure (see *Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII). Such a possibility existed in Italy, as according to Section 21 § 8 of Act No. 1034 of 1971, the T.A.R. could have stayed the execution of the extradition orders if it had found that the applicant's claim was not manifestly ill-founded and that potentially irreversible consequences were foreseeable.

It is true that in a previous case concerning the threat of expulsion, the Court held that the extremely urgent procedure before the *Conseil d'État* did not satisfy the requirements of Article 13 by reason of its lack of automatic suspensive effect associated with the fact that the Belgian authorities were not legally bound to await the *Conseil d'État*'s decision before enforcing a deportation order (see *Conka v. Belgium*, no. 51564/99, §§ 79-85, 5 February 2002). However, the ineffectiveness of the application to the *Conseil d'État* in that case was due to the particular situation which the applicants faced, namely that they had only five days to leave the country. In the present case, on the contrary, according to the Ministry's orders and to Article 709 of the CPP, the applicant's extradition was already suspended until such time as he had served the sentence imposed on him in Italy (eleven years' imprisonment). The expiry of the applicant's sentence being fixed for 10 August 2006, it was likely that before that date the T.A.R. would have examined not only an application for a stay of the execution of the extradition orders, but also the merits of the pleas of unlawfulness.

The Court therefore concludes that in the applicant's case an application to the T.A.R. was an effective remedy, which should have been tested before the present complaint was introduced in Strasbourg. In failing to appeal to the T.A.R., the applicant did not provide the Italian courts with the opportunity which is intended in principle to be afforded to Contracting States by Article 35, namely the opportunity of preventing or putting right the violations alleged against them.

It follows that the Government's objection should be accepted and this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court

unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the length of his deprivation of liberty prior to his conviction by the Como District Court;

by a majority

Declares inadmissible the remainder of the application.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President