CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71555/01
by Ira Samuel EINHORN
against France

The European Court of Human Rights (Third Section), sitting on 16 October 2001 as a Chamber composed of

Mr L. LOUCAIDES, *President*,
Mr J.-P. COSTA,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged and registered on 12 July 2001,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court on 12 July 2001 and lifted on 19 July 2001,

Having regard to the observations submitted by the parties,

Having deliberated, decides as follows:

THE FACTS

1. The applicant is an American national born in 1940. He is represented before the Court by Ms C. Waquet, of the *Conseil d'Etat* and Court of Cassation Bar.

A. The circumstances of the case

2. The applicant formerly lived in Pennsylvania (United States of America), a State in which the death penalty was reintroduced by a statute of 13 September 1978.

He was arrested there on 28 March 1979 after the mummified body of his girlfriend, who had disappeared in 1977, was discovered at his home. On 3 April 1979 he was released on bail, and on 17 April 1979 an information was filed against him. In 1981, while the proceedings were taking their course, the applicant left the United States.

A trial was held *in absentia*, and on 29 September 1993 the Philadelphia Court of Common Pleas found the applicant guilty of first-degree murder and sentenced him to life imprisonment. The applicant's lawyer applied to have the conviction reviewed but without success. He subsequently appealed to the Pennsylvania Superior Court, which declared the appeal inadmissible on the ground that the applicant had not appeared in court; a petition to the Pennsylvania Supreme Court for review of that decision was dismissed on the same ground.

3. The applicant was placed on Interpol's wanted list and was tracked down in France, where he was arrested in June 1997. On 12 June 1997 the United States Government requested the French Government to extradite him so that he could serve the sentence imposed on him *in absentia*. He was taken into custody pending a ruling on his extradition.

4. In a judgment of 4 December 1997 the Indictment Division of the Bordeaux Court of Appeal ruled against extradition and ordered the applicant's release. Basing its judgment on Article 6 §§ 1 and 3 (c), the Indictment Division held, in particular, that the applicant had not unequivocally waived the right to defend himself in person or through legal assistance of his own choosing, that he had been tried and convicted *in absentia* without being able to obtain from a court which had heard him a fresh determination of the merits of the charge in respect of both law and fact, and that the extradition treaty between France and the United States did not entail any obligation to extradite where the proceedings in issue contravened French public policy or the requirements of the European Convention on Human Rights. The French authorities did not proceed with the extradition.

5. By a statute which came into force on 27 January 1998 the Pennsylvania legislature made a change to the relevant procedure so that persons convicted *in absentia* could, in certain cases, be granted a retrial.

In a diplomatic note of 2 July 1998 the United States Government submitted a further request for the applicant's extradition, stating that he would be granted a new trial if he so requested and that the death penalty would not be sought, imposed or executed. The applicant was taken into custody pending a ruling on his extradition.

6. On 18 February 1999 the Indictment Division of the Bordeaux Court of Appeal ruled in favour of the applicant's extradition and ordered him to be released and placed under court supervision. The following conditions were attached to the Indictment Division's ruling: the applicant was to be granted a new and fair trial, if he so requested, on returning to Pennsylvania, and to be able to avail himself of the remedies provided by the requesting State, and the death penalty was not to be sought and, if imposed, was not to be carried out. On 27 May 1999 the Court of Cassation dismissed an appeal on points of law against that ruling.

7. In a decree of 24 July 2000 the French Prime Minister granted the extradition on condition that, pursuant to the statute of 27 January 1998, the applicant was given a new and fair trial if he so requested on returning to Pennsylvania, and that the death penalty was not sought, imposed or carried out. The decree stated, *inter alia*:

> "According to the assurances given by the District Attorney of Philadelphia County on behalf of the Commonwealth of Pennsylvania, Ira Samuel Einhorn will be retried, if he so requests, and will be able to avail himself of the remedies provided by the requesting State.
>
> The death penalty may not be sought, imposed or executed in respect of Ira Samuel Einhorn."

8. The applicant applied to the Prime Minister to reconsider his decision; that application was dismissed on 4 October 2000. On the same day he applied to the *Conseil d'Etat* to quash both decisions.

In support of his application, he argued in particular that the Commonwealth of Pennsylvania's statute of 27 January 1998 contravened the principle of separation of powers enshrined in the Pennsylvania Constitution and that its constitutionality should normally be raised by the courts of their own motion or might be raised by the civil parties to the proceedings or by any citizen. That would be an obstacle to his being granted a new trial in conditions complying with Article 6 of the Convention. He further submitted that his extradition had been granted by the French Government on the basis of a specially passed law with retrospective effect (the statute of 27 January 1998), which had been enacted with the sole aim of influencing the judicial outcome of the extradition proceedings against him, thereby breaching his right to a fair

trial. He added that in any event, in view of the "pressure of legal and media attention" which the case had generated in the United States and which a jury would be not have been able to avoid, he would not be retried in Pennsylvania in conditions satisfying the requirements of Article 6 of the Convention. He further maintained that his extradition would contravene Article 3 of the Convention in that he would, in any event, be likely to have to serve a full life sentence without any genuine prospect of remission or parole. In addition, he alleged that, in view of the fact that the victim's body had been found after the death penalty had been restored in Pennsylvania, it was not to be excluded that he would be sentenced to death, especially as it had not been established that the death penalty could not be imposed by a court where it had not been sought by the prosecution; there were therefore substantial grounds for believing that he faced a real risk of being sentenced to death and hence of being exposed to the "death-row phenomenon", so that his extradition would breach Article 3 of the Convention.

9. In a judgment of 12 July 2001 the *Conseil d'Etat* dismissed Mr Einhorn's applications. With regard to the first of the above-mentioned grounds, the *Conseil d'Etat* held that it was not for it to rule whether enactments applicable within the territory of the requesting State were in conformity with that State's Constitution; matters could only be otherwise if the impugned enactment had already been declared unconstitutional by means of a final decision in that State or if there had been "such serious irregularities [in its adoption] that it must be regarded as invalid". With regard to the second ground, the *Conseil d'Etat* held that the statute of 27 January 1998 was "applicable in exactly the same manner to all persons tried and convicted *in absentia* who have fled to a foreign country which refuses to extradite them because they were convicted *in absentia*" and that the applicant had not furnished any information enabling it to assess whether there was any foundation for his statement that a retrial would not be fair on account of the circumstances in which the statute in issue had been enacted. With regard to the third ground, the *Conseil d'Etat* held that in any event, "the extradition of a person who faces a sentence of life imprisonment without any possibility of early release is not contrary to French public policy or Article 3 of the Convention". The fourth ground was dismissed for the following reason:

> "The extradition request ... relates to acts committed in September 1977, before the enactment ... of the statute of the Commonwealth of Pennsylvania in which the death penalty was introduced; the evidence shows that that statute cannot be applied to offences committed before it came into force.
>
> Even supposing that ... the offence of which [the applicant] is accused might be regarded at a new trial as having been committed after the statute of 13 September 1978 came into force in view of the fact that the victim's body was not discovered until 28 March 1979, the Government of the United States of America gave an assurance in its request of 2 July 1998 that if [the applicant's] extradition was agreed

> to, the death penalty would not be sought, imposed or carried out. The District Attorney of Philadelphia County has twice given an undertaking that the death penalty will not be sought in respect of [the applicant]. In an affidavit of 23 June 1997 she gave a formal assurance that in the Commonwealth of Pennsylvania the death penalty could not be imposed if it had not been sought. Consequently, there is no basis for [the applicant's] submission that, despite the conditions attached to the impugned order, his extradition had been granted without sufficient guarantees being offered and was therefore contrary to French public policy."

On the same day, after the judgment had been delivered, the applicant cut his throat and slashed his left wrist.

On 17 July 2001 the Government produced to the Court a medical certificate dated 12 July 2001, which attested that the applicant's state of health was compatible with his transfer to the United States.

10. On 19 July 2001 the Court lifted the interim measure it had indicated to the respondent Government under Rule 39 on 12 July 2001. The applicant was extradited to the United States on the same day.

B. Extract from the statute enacted by the Pennsylvania legislature, which came into force on 27 January 1998

11. The statute which came into force on 27 January 1998 (42 Pennsylvania Criminal Statutes (PaCS), section 9543(c)), provides:

> "Extradition. – If the petitioner's conviction and sentence resulted from a trial conducted in his absence, and if the petitioner has fled to a foreign country that refuses to extradite him because a trial *in absentia* was employed, the petitioner shall be entitled to the grant of a new trial if the refusing country agrees by virtue of this provision to return him, and if the petitioner upon such return to this jurisdiction so requests. This subsection shall apply notwithstanding any other law or judgment to the contrary."

C. Statements and other documents produced by the parties

1. Affidavits of Ms Lynne Abraham, District Attorney of Philadelphia County

12. In an affidavit dated 23 June 1997 the District Attorney, Ms Abraham, gave the following undertaking:

> "I, Lynne Abraham, District Attorney for the City and County of Philadelphia, Commonwealth of Pennsylvania, do hereby state that the death penalty has not been sought in this case at any time, nor can it be legally imposed in this case. The District Attorney's Office will not seek the death penalty in any future action regarding this case, nor can it legally do so. Further, the Court cannot pronounce the death penalty in this case on its own motion under Pennsylvania law."

Following the entry into force of the statute of 27 January 1998, Ms Abraham swore a further affidavit, on 10 June 1998, "in support of

request for extradition from France". The affidavit stated that it was "binding on the Commonwealth and [the District Attorney's] Office" and that "the District Attorney's Office now can, and does, give full assurances that Einhorn will receive a new trial at his request upon his return to Pennsylvania". The District Attorney further stated: "The Philadelphia District Attorney's Office will fully support Einhorn's right to a new trial under this statute. Under United States law, which applies to the Commonwealth of Pennsylvania, this promise binds not only the present District Attorney, but all future District Attorneys and every prosecutor who may be responsible for the prosecution."

The District Attorney added: "... under Pennsylvania law, it is impossible for a court to impose the death penalty for murders committed prior to the enactment of the death penalty statute on September 13, 1978. Because Einhorn murdered [the victim] in 1977, he is not subject to the death penalty as a matter of law". She also stated the following:

> "The United States Constitution prohibition against ex post facto laws in Article 1, Section 9, protects a person from the imposition of a penalty that was increased after he committed his criminal acts. The Supreme Court of the United States has explained that the ex post facto clause bars a legislature from retroactively altering the definition of crimes or increasing the punishment for criminal acts. Consequently, Pennsylvania cannot change its law to impose the death penalty for any murder prior to the enactment of the statute. Therefore, the statute applies only to murders committed after its enactment. The case of *Commonwealth v. Truesdale*, decided by the Pennsylvania Supreme Court on September 15, 1983, unequivocally prohibits imposition of the death penalty for murders which were committed before the passage of the death penalty statute on September 13, 1978. The opinion binds all Pennsylvania courts, District Attorneys and prosecutors regarding the imposition of the death penalty. ...
>
> The death penalty has never been sought or imposed by the Commonwealth of Pennsylvania in this case. The District Attorney has submitted an affidavit that no death penalty can be imposed, nor will the death penalty be sought... Any representation that the death penalty is a possibility is false. Under United States law, which binds the Commonwealth of Pennsylvania, the District Attorney's promise binds not only the present District Attorney, but all future District Attorneys and every prosecutor who may be responsible for the prosecution."

2. Diplomatic notes from the United States Embassy in France

13. In a diplomatic note of 2 July 1998 to the French Government, the United States embassy stated: "The new statute, 42 Pennsylvania Criminal Statutes (PACS) Section 9543 (c), enacted January 27, 1998, guarantees Ira Einhorn the right to a new trial for the murder of [the victim]". It provided the following clarifications:

> "Under the new statute, the Commonwealth of Pennsylvania, through its District Attorney, is now able to and does guarantee that Ira Einhorn will receive a second trial, with all attendant rights, if he were extradited from France and if he requested a new trial. Consequently, the U.S. Government provides its assurances that, if the

> Government of France extradites Ira Einhorn to the United States [in connection with the murder of the victim in 1977 in the] Commonwealth of Pennsylvania, Ira Einhorn will receive a new trial on the merits with all attendant rights.
>
> In addition, the U.S. Government provides its assurances that if the Government of France extradites Ira Einhorn to the United States to stand trial for murder in the Commonwealth of Pennsylvania, the death penalty will not be sought, imposed or executed against Ira Einhorn for this offense. The sworn affidavit of District Attorney Lynne Abraham, dated June 10, 1998, and an earlier assurance by Abraham sworn June 23, 1997, affirms that under Pennsylvania law it is legally impossible for a prosecutor to seek or a court on its own motion to impose [the] death penalty for murders committed in Pennsylvania prior to September 13, 1978. The Pennsylvania Supreme Court decision, *Commonwealth v. Truesdale*, dated September 15, 1983, unequivocally prohibits the imposition of the death penalty for murders committed prior to the enactment of the Pennsylvania Death Penalty Statute on September 13, 1978. This decision binds all Pennsylvania courts, district attorneys and prosecutors regarding the imposition of the death penalty. ..."

Those assurances were reiterated in a diplomatic note of 24 September 1999, in which it was also stated that the Supreme Court had held that laws enacted after a criminal judgment had been delivered, particularly where they might benefit the accused, were not inconsistent with the prohibition on *ex post facto* laws (see *Collins v. Youngblood*, 497 U.S. 37-1990), a fact which served to confirm the constitutionality of the 1998 Pennsylvania statute guaranteeing the applicant a new trial on his return to the United States.

3. Other statements produced by the parties

(a) The possibility of seeking the death penalty for offences committed before the enactment of the statute of 13 September 1978

14. In an affidavit of 22 May 2001, however, Norris E. Gelman, the lawyer who had represented the applicant at his trial *in absentia* in the Philadelphia Court of Common Pleas, affirmed that in the *Charles Diggs* case in 1992 the District Attorney of Philadelphia County had sought the death penalty for offences committed before the statute of 13 September 1978 restoring the death penalty in Pennsylvania had been enacted. Mr Gelman stated:

> "In spite of all the governing authority being against retroactive application of the 1979 death penalty, Judge O'Keefe, who presided over Diggs' trial, ruled that the Commonwealth of Pennsylvania could seek the death penalty and question potential jurors about their views on the death penalty.
>
> The prosecutor never retreated from his position that he was entitled to seek the death penalty. The judge never reconsidered his ruling. ... Diggs was found not guilty, and that was the end of the case. The penalty portion of the case was never reached because of the acquittals.

I never understood how the Commonwealth of Pennsylvania as represented by the District Attorney's Office in Philadelphia successfully argued the right of the State to use the death penalty retroactively as to Diggs, and still do not understand how that happened."

(b) The conformity of the statute of 27 January 1998 with the Pennsylvania Constitution

15. In an affidavit of 20 April 1998 Leonard Sosnov, a member of the Bars of Pennsylvania, the Federal District Court, the Third Circuit Court of Appeals and the United States Supreme Court and an associate professor at Widener University School of Law, argued that the statute of 27 January 1998 was unconstitutional. He stated, *inter alia*:

"In my professional opinion, the provision is clearly, without a doubt, unconstitutional. As a matter of separation of powers under the Pennsylvania Constitution, it has been well established for almost one hundred and fifty years in Pennsylvania that the legislature has no power to disturb final judgments of conviction and sentence. In *De Chastellux v. Fairchild*, 15 Pa. 18 (1850), the Pennsylvania Supreme Court held that a statute purporting to grant a new trial to a litigant was unconstitutional. Likewise, in *Commonwealth v. Sutley*, 378 A.2d 789 (1977), the Pennsylvania Supreme Court held unconstitutional a statute which purported to reduce penalties for defendants who had already been sentenced for marijuana possession. ...

The statute is also clearly unconstitutional because it violates Article V, § 10 (c) of the Pennsylvania Constitution which gives the Pennsylvania Supreme Court exclusive power to control matters of practice and procedure in the courts, while providing *no* power for the legislature. ...

There are other potential constitutional problems with the statute. For example, the provision does not grant a new trial to all defendants convicted *in absentia*, but only to those who have been refused extradition, notably only Mr Einhorn. The courts may view this statute as an arbitrary and capricious legislative enactment which is a violation of due process or a prohibited legislative bill of attainder directed to a particular individual. However, it should be unnecessary for a court to reach these issues because of its palpable unconstitutionality on separation of powers and Article V, § 10 (c) grounds."

He reiterated that conclusion in affidavits of 10 September and 10 November 1998, stating, *inter alia* (extract from the affidavit of 10 September):

"... The legislature is without authority to change final judgments of the courts. ...

In my expert opinion, the Commonwealth of Pennsylvania and Philadelphia District Attorney's Office have no power at all to insulate this law from judicial review. Because ... the legislative attempt to overturn a court's judgment of conviction on a murder case and life sentence is obviously violative of Article V, § 10 (c) and separation of powers under the Pennsylvania Constitution, a court will ultimately invalidate [the impugned statute] and hold that it is void. If France extradites Mr Einhorn to Pennsylvania it is extremely likely, despite the new Pennsylvania law, that he will be ordered to serve his life sentence without parole, received after his trial *in absentia*, without ever receiving a new trial.

... even when the parties in a criminal case agree to a result, judicial review and acceptance is always a prerequisite. ...

If Mr Einhorn is returned to Pennsylvania and neither party challenges [the impugned statute], purportedly granting him a new trial, it is very likely that the family of the murder victim, or even any taxpayer in Pennsylvania, could successfully bring a challenge to this clearly unconstitutional law. ...

If Mr Einhorn is ordered extradited to the United States, it is very likely that there will be a challenge to the constitutionality of [the impugned statute] which will be heard by the courts, which in turn will then declare the statute unconstitutional null and void. The original conviction and sentence, life without parole for Mr Einhorn, will be held to be valid and enforceable under Pennsylvania law."

16. In an affidavit of 24 September 1998 John W. Packel, of the Philadelphia Bar and Chief of the Appeals Division of the Philadelphia Public Defender Office, reached the same conclusion. He stated, *inter alia*:

"... if Mr. Einhorn returns to Pennsylvania and asserts the right granted to him – and him alone – the Pennsylvania Supreme Court will invalidate the statute and Mr. Einhorn will be recommitted, without a new trial, to serve the life sentence imposed after a trial at which he was not present, a sentencing at which he was not present, and an appeal he was not permitted to litigate."

In an affidavit of 27 November 1998 he declared:

"... Frankly, I am appalled, but not surprised, by the District Attorney's 'guarantee' which refers to the statute granting a new trial but makes no reference whatsoever to controlling decisions of the Pennsylvania Supreme Court unequivocally holding that any such statute is invalid. Furthermore, I am surprised and disappointed by the State Department's blind endorsement of this deliberately misleading document.

Although including citations to legal authority addressing issues that are not germane to the principal issues the District Attorney ignores, making absolutely no reference to, clear and compelling authority establishing that the statute it drafted is unconstitutional, unenforceable and invalid. ...

Given 150 years of contrary unbroken precedent it is impossible to see how the District Attorney can 'guarantee' that the Pennsylvania Supreme Court will allow the statute in question to stand and allow or order a retrial. In the light of any real consideration the District Attorney's 'guarantee' must be dismissed as, at the least, misleading. ..."

17. In an affidavit of 10 November 1998 Richard S. Wasserbly, an attorney admitted to practise law in the Commonwealth of Pennsylvania and before the Federal District Court, the Federal Third Circuit Court of Appeals and the United States Supreme Court and the author of the reference work entitled *Pennsylvania Criminal Practice*, stated:

"... I have reached the same inexorable conclusions as were reached by Professor Sosnov and Mr Packel, to wit: that this legislation runs afoul of the Pennsylvania Constitution as a violation of the separation of powers. In addition, this legislation violates Article V, section 10(c), and it may also be a violation of due process and a

prohibited legislative bill of attainder since it is directed apparently exclusively to the extradition matter involving Mr Einhorn.

Should an extradition be granted and Mr Einhorn is returned to the Commonwealth of Pennsylvania, if Mr Einhorn requests the grant of a new trial pursuant to 42 Pa.C.S. § 9543(c), the court must act constitutionally and the court has the power and authority to raise the constitutionality of the statute *sua sponte* (of its own will; without prompting or suggestion) and rule it unconstitutional, refuse to apply that statute, and refuse Mr Einhorn a new trial, irregardless of any position, motion, request or assent by the Commonwealth. In other words, the District Attorney of Philadelphia does not have the ability to authorize or promise the grant of a new trial pursuant to 42 Pa.C.S. § 9543(c).

It is my opinion that if extradition is granted pursuant to 42 Pa.C.S. § 9543(c), there can be no guarantee of a new trial. Instead if viewed in the light of its clear unconstitutionality, 42 Pa.C.S. § 9543(c) will not be upheld and Mr Einhorn will not be given a new trial requiring him to serve the sentence already imposed."

18. In an affidavit of 25 November 1998 Theodore Simon, a member of the Board of Directors of the National Association of Criminal Defense Lawyers and counsel for the applicant in the extradition proceedings, affirmed, *inter alia*:

"... it becomes apparent and a distinct possibility that even if the District Attorney should fulfill her promise, and thereafter, even if a trial court should act or be about to act in a manner inconsistent with its ability to assume jurisdiction (i.e. by seeking to grant Einhorn a new trial) then the Supreme Court could, *sua sponte* (on its own motion), reach out and take jurisdiction to demonstrate that the Einhorn law is unconstitutional, and a lower court is not authorized to accept jurisdiction and vacate a final judgment pursuant to this 'Einhorn law'."

19. In an affidavit of 21 November 1998 Norris E. Gelman likewise argued that the statute of 27 January 1998 was "clearly unconstitutional" and that consequently, notwithstanding the pledge given by the District Attorney, Ms Abraham, no court had jurisdiction to apply the statute and the applicant could not be granted a new trial. In a further affidavit of 16 July 2001 he affirmed, *inter alia*:

"The Commonwealth of Pennsylvania is relying exclusively on the 'Einhorn law', passed on January 21, 1998 to assure France that Einhorn will be granted a new trial by a Pennsylvania court. It is my opinion, and the opinion of many other scholars, that a court will not, and indeed, cannot grant Einhorn a new trial pursuant to this statute or for any other reason. ...

Merely because the law is not an *ex post facto* law does not make it constitutional. The constitutional defects in the Einhorn law render it unenforceable. It is unenforceable because it violates the constitutional separation of powers principles long established by both the United States Supreme Court and the Pennsylvania Supreme Court. See *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977) and *Plaut v. Spendthrift Farm*, 514 U.S. 211, 131 L.Ed.2d 328, 115 S.Ct. 1447 (1995).

The legislature cannot grant a new trial. It is as simple as that. The legislature cannot impair, alter, amend or vacate the final judgement of a court of law. The

legislature can no more grant a new trial for Einhorn than it can for Timothy McVeigh, or the Watergate defendants.

Should Einhorn be brought to the United States and the District Attorney, as promised, asked the court to grant him a new trial, the court would have to refuse to do so. The court would have to state that it could not act unconstitutionally and to grant a new trial pursuant to this statute, or for any other reason, would be to act in violation of the separation of powers concept and therefore unconstitutionally. ...

... [E]qually well settled ... is the rule that a law repugnant to the Constitution is void and that it is not only the right but the duty of a court so to declare when the violation unequivocably appears: see *Respublica v. Duquest*, 2 Yeats (Pa.) 429, 501 (1799)..., *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 33, 58 A.2d 464, 469 (1948).

... Wherefore, the above accurately states my position and the position of several of the most respected constitutional scholars in Pennsylvania, amongst whose number are Len Sosnov, Esquire (Professor of Law, University of Delaware Law School); John Packel, Esquire (Head of the Appeals Division of the Philadelphia Public Defender's Office) and Emmett Fitzpatrick, Esquire (former District Attorney of Philadelphia)."

(c) The possibility of having life sentences commuted

20. In an affidavit dated 1997 Joel Rosen, Chief of the Major Trials Unit, Philadelphia District Attorney's Office, affirmed in particular that if the applicant was sentenced to life imprisonment, he would have the possibility of applying for release or for commutation of his sentence. Power to release prisoners or to commute their sentences was vested in the Governor of Pennsylvania (see Article IV, section 9, of the Pennsylvania Constitution, and section 299 of the Administrative Code). Any applications for release or for commutation of sentences were first examined by a Board of Pardons, comprising the Lieutenant Governor of Pennsylvania, the Attorney General of Pennsylvania and three members appointed by the Governor and approved by vote of the Pennsylvania Senate (one of the three being a member of the Bar, one a penologist, and one a doctor of medicine, a psychiatrist or a psychologist). When the Board examined an application from a prisoner serving a life sentence, it was required to interview the prisoner. If the Board recommended commutation of a sentence and the Governor agreed, the decision was not subject to appeal. Mr Rosen pointed out, in particular, that between 1987 and 1994 the procedure had resulted in "302 releases, and 26 commutations of life-sentenced prisoners". He concluded: "These statistics suggest that, although Einhorn may have little chance in the short run for gubernatorial relief, his longer term prospects are of a different nature. ... Were he to apply for release or commutation in the years immediately after his return, relief would be unlikely and, indeed, unjust. History indicates, however, that, by the time Einhorn has spent some considerable period in prison, the climate will have changed, and an application will be received in a different light."

21. In an affidavit of 7 October 1997 Professor Leonard Sosnov gave his opinion on the likelihood of a life sentence being commuted. He stated that it would be virtually impossible for the applicant ever to be released from prison after being given a life sentence in Pennsylvania. In that connection, he explained that prisoners serving a life sentence were not eligible for parole unless the State Governor first commuted the sentence to another one of a duration which afforded that possibility. Under Article IV, section 9, of the Pennsylvania Constitution, the Governor could only consider commutation if the Board of Pardons had recommended it. Prisoners serving life sentences had to apply to the Board for permission to be interviewed by it; the decision whether or not to grant a hearing was taken by a majority. If a hearing was granted, the Board made a recommendation, again by a majority. Even supposing a prisoner serving a life sentence managed to overcome those obstacles and received an order from the Governor granting commutation, he would still have to serve at least one year in a pre-release centre before an application for parole could be considered. Decisions on admitting inmates to a pre-release centre were taken by the prison authorities, who had complete discretion in the matter. Even if an inmate was admitted to a pre-release centre, the Parole Board could refuse parole on any ground; that decision was not subject to review. Professor Sosnov added, among other things, that between 1979 and 1995 "there was an average of approximately three inmates a year whose life sentences were commuted", whereas 2,400 inmates were currently serving life sentences in Pennsylvania. He concluded by stating:

> "Because Mr Einhorn has been a fugitive and has not as yet served any time on his Pennsylvania life sentence, there is no doubt, given the governing laws and the practical application of those laws, that a life sentence for Mr Einhorn in Pennsylvania would mean that he would eventually die in prison."

COMPLAINTS

22. The applicant submitted that his extradition had been granted in breach of Article 3 of the Convention in that there were substantial grounds for believing that he faced a real risk of being sentenced to death and hence of being exposed to the "death-row phenomenon", a source of inhuman or degrading treatment or punishment.

Relying on the same provision of the Convention, he argued that, in any event, he was likely to have to serve a life sentence without any real possibility of remission or parole.

Relying on Article 6 § 1 of the Convention and his right to a fair trial, the applicant criticised the French State for granting his extradition on the basis of a specially passed law with retrospective effect, which had been enacted

by the Pennsylvania legislature with the sole aim of influencing the judicial outcome of the extradition proceedings instituted against him in France.

Relying on the same provision and on Article 6 § 3 (c) of the Convention, the applicant submitted that his extradition had been agreed to in the absence of effective and sufficient guarantees that he would be entitled to a new trial in Pennsylvania at which he would be granted a hearing on the merits of the charge against him.

Lastly, supposing that he could in fact have a new trial in Pennsylvania, he argued that his extradition was nonetheless unlawful in that such a trial would not satisfy the requirements of Article 6 of the Convention.

THE LAW

A. Article 3 of the Convention

23. The applicant submitted that his extradition had been granted in breach of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Firstly, there were substantial grounds for believing that he faced a real risk of being sentenced to death and hence of being exposed to the "death-row phenomenon", a source of inhuman or degrading treatment or punishment. In that connection, the applicant pointed out that he had been prosecuted, convicted and sentenced in Pennsylvania for the offence of first-degree murder, committed on 15 September 1977; in view of the fact that the victim's body had not been found until 1979, the judge at a new trial might consider the murder to have been committed after the statute of 13 September 1978 restoring the death penalty in Pennsylvania had come into force. The applicant produced documents which showed that in the *Charles Diggs* case in 1992 the District Attorney of Philadelphia County had sought the death penalty for offences committed in 1973. He acknowledged that in his own case the Philadelphia District Attorney had undertaken not to seek the death penalty, but pointed out that it had not been established that the death penalty could not lawfully be imposed by a court where it had not been sought by the prosecution. That being so, and in any event since no assurance had been given by the authority in whom the prerogative of mercy was vested, his extradition should not have been granted.

Secondly, the applicant submitted that at all events he was likely to have to serve a life sentence in Pennsylvania without any real possibility of remission or parole, and argued that such a sentence was contrary to

Article 3. He relied on the general report on the treatment of long-term prisoners, which had been produced by Sub-Committee no. XXV of the Council of Europe's European Committee on Crime Problems, and indicated that all prisoners should in principle be entitled to parole and that nobody should be denied the possibility of being released. He also relied on Resolution (76) 2 of the Council of Europe's Committee of Ministers on the treatment of long-term prisoners, which included the recommendation that member States should ensure that all prisoners had the possibility of applying for conditional release. He asserted that, while the Governor of Pennsylvania had the authority to release, or to commute the sentence of, an "accused", all applications for release or commutation of sentence had first to be examined by a Board of Pardons, whose five members had to make their recommendation unanimously; and life prisoners could not be released on parole unless the Governor, on the basis of the unanimous recommendation of the Board, first commuted the life sentence to another one of a duration which afforded the possibility of parole. Furthermore, even when they overcame those obstacles, prisoners still had to serve at least one year in a pre-release centre before being entitled to any form of release. Decisions on admitting inmates to a pre-release centre were at the discretion of the prison authorities. As a result, the release rate among prisoners serving life sentences in Pennsylvania was lower than 0.1%.

24. The Government replied that the applicant was not at risk of the death penalty, as it had not been in force in Pennsylvania at the material time; the maximum sentence that could be passed on him after a new trial was life imprisonment. They added that they had obtained formal assurances from the American authorities that the death penalty would not be sought, imposed or carried out when the applicant was granted a new trial on returning to Pennsylvania. They relied on the affidavits of the District Attorney, Ms Abraham, who had stated that the prosecution would not seek the death penalty, and to the United States embassy's diplomatic note of 2 July 1998, which had indicated that the death penalty could not be sought for offences committed before 13 September 1978 and that in any event, it would not be imposed or carried out. They also pointed out that in Pennsylvania a court could not impose the death penalty if the prosecution had not sought it, and referred in that connection to Ms Abraham's affidavit of 23 June 1997. Lastly, they submitted that the extradition order had specified that the American authorities' request for the applicant's extradition had been granted on condition, *inter alia*, that the death penalty was not "sought, imposed or executed" in respect of him. In accordance with the general principles of international law, the American authorities were under an obligation to comply with the conditions laid down by France, which they had accepted in the diplomatic notes from the United States embassy.

The Government added that if the applicant was sentenced to life imprisonment, it would be possible for him to have his sentence adjusted or for him to be released on parole. It followed from Article IV, section 9, of the Pennsylvania Constitution and from the relevant provisions and regulations (71 PaCSA, section 299) that anyone sentenced to life imprisonment by a criminal court in the Commonwealth of Pennsylvania was lawfully entitled to apply for adjustment of the sentence or for parole. The affidavit of Mr Joel Rosen, Chief of the Major Trials Unit, Philadelphia District Attorney's Office, had indicated that in the past twenty-five years "825 applications for release [had been] granted for all categories of crime taken together and 284 prisoners serving life sentences [had] had their sentence commuted, with 302 releases and 26 commutations between 1987 and 1994".

25. 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 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 the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, § 88).

26. With regard to the applicant's first complaint under Article 3, the Court reiterates that the fact, after being sentenced to death, prisoners are exposed to the "death-row phenomenon" can, in certain cases and having regard in particular to the time spent in extreme conditions, the ever-present and mounting anguish of awaiting execution, and the personal circumstances of the prisoner in question, be regarded as a form of treatment that goes beyond the threshold set by Article 3 of the Convention (see, among other authorities, and *mutatis mutandis*, the Soering judgment cited above, pp. 44-45, § 111, and *Nivette v. France* (dec.), no. 44190/98, 14 December 2000).

It therefore has to be determined in the light of the principles established by the Court's case-law whether the foreseeable consequences of the applicant's return to the United States are such as to attract the application of Article 3. This inquiry must concentrate firstly on whether the applicant runs a real risk of being sentenced to death in Pennsylvania, since the source of the alleged inhuman and degrading treatment or punishment, namely the "death-row phenomenon", lies in the imposition of the death penalty (see, in particular, the Soering judgment cited above, p. 36, § 92).

In this connection, the Court observes at the outset that the applicant was not sentenced to death at his trial *in absentia* in Pennsylvania. It further notes that the offence of which he stood accused was committed in 1977, before the statute of 13 September 1978 restoring the death penalty in Pennsylvania came into force. The principle that the law should not have retrospective effect would therefore preclude his being sentenced to death

after a retrial in that State. That is confirmed by the affidavit sworn by Lynne Abraham, District Attorney of Philadelphia County, on 10 June 1998 (see paragraph 12 above), and by the diplomatic notes of 2 July 1998 and 24 September 1999 from the United States embassy (see paragraph 13 above), which refer to the case-law of the Pennsylvania Supreme Court (*Commonwealth v. Truesdale*, 15 September 1983) unequivocally prohibiting imposition of the death penalty for murders committed before the statute of 13 September 1978 came into force. The embassy's note of 2 July 1998 states that that precedent is binding on all Pennsylvania courts, district attorneys and prosecutors. Furthermore, in its note of 24 September 1999 the United States embassy points out that, under Article I of the United States Constitution, neither Congress nor a federal State may pass an *ex post facto* law, and that the United States Supreme Court has expressly held that a State may not retrospectively impose a heavier penalty than was applicable at the time when the offence was committed; by way of example, it cites *Miller v. Florida* (482 US 423 – 1987).

Even supposing that, as the applicant maintains, in view of the fact that the victim's body was not discovered until 1979, the court in which he was retried might regard the offence as having been committed after the death penalty was restored in Pennsylvania, the Court notes that the Government obtained sufficient guarantees that the death penalty would not be sought, imposed or carried out. Firstly, it is clear from the affidavits sworn by the District Attorney, Ms Abraham, on 23 June 1997 and 10 June 1998 (see paragraph 12 above) that the prosecution will not seek the death penalty in respect of the applicant and that the trial court will be unable to impose the death penalty of its own motion. Ms Abraham states that the affidavit sworn by her in her capacity as District Attorney is binding on her, on all her successors in that post and on any other prosecutors who might deal with the case; that statement is confirmed by the diplomatic notes from the United States embassy. Secondly, the diplomatic note of 2 July 1998 from the United States embassy expressly states that "if the Government of France extradites Ira Einhorn to the United States to stand trial for murder in the Commonwealth of Pennsylvania, the death penalty will not be sought, imposed or executed against Ira Einhorn for this offense".

Consequently, the Court notes that the circumstances of the case and the assurances obtained by the Government are such as to remove the danger of the applicant's being sentenced to death in Pennsylvania. Since, in addition, the decree of 24 July 2000 granting the applicant's extradition expressly provides that "the death penalty may not be sought, imposed or carried out in respect of Ira Samuel Einhorn", the Court considers that the applicant is not exposed to a serious risk of treatment or punishment prohibited under Article 3 of the Convention on account of his extradition to the United States.

27. With regard to the applicant's second complaint, the Court does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the Convention. In this connection, the Council of Europe documents to which the applicant referred (the general report on the treatment of long-term prisoners, drawn up by Sub-Committee no. XXV of the European Committee on Crime Problems (Council of Europe, 1977), and Resolution (76) 2 on the treatment of long-term prisoners, adopted by the Committee of Ministers of the Council of Europe in the context of the Sub-Committee's work) are not without relevance. Consequently, it is likewise not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention (see *Nivette*, cited above, and also the Weeks v. the United Kingdom judgment of 2 March 1987, Series A no. 114, and *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001).

In the instant case, however, the Court notes that in any event it follows from the Pennsylvania Constitution (Article IV, section 9) and from the legislative provisions in force in that State (71 PaCSA, section 299) that the Governor of Pennsylvania may commute a life sentence to another one of a duration which affords the possibility of parole; the Governor's decision is taken in the light of a recommendation adopted by a majority of the five members of the Board of Pardons. A prisoner obtaining a commutation order from the Governor is required to spend at least one year in a pre-release centre – it would appear that decisions on admitting prisoners to such centres are at the discretion of the prison authorities – before an application for parole can be considered.

Admittedly, as the Indictment Division of the Bordeaux Court of Appeal noted in its judgment of 18 February 1999, it follows from the above provisions that the possibility of parole for prisoners serving life sentences in Pennsylvania is limited. It cannot be inferred from that, however, that if the applicant was sentenced to life imprisonment after a new trial in Pennsylvania, he would not be able to be released on parole, and he did not adduce any evidence to warrant such an inference. In this connection, the Court notes that the conclusions set out in Professor Sosnov's affidavit, which was relied on by the applicant (see paragraph 21 above), are contradicted by those in the affidavit of Joel Rosen (Chief of the Major Trials Unit, Philadelphia District Attorney's Office), which was relied on by the Government (see paragraph 20 above).

28. Consequently, inasmuch as it relates to the complaints alleging a violation of Article 3 of the Convention, the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

B. Article 6 of the Convention

29. The applicant also alleged that in granting his extradition, the French authorities had infringed his right to a fair trial and violated Article 6 § 1 of the Convention, which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal..."

Firstly, the French authorities had agreed to his extradition on the basis of a specially passed law with retrospective effect (the statute of 27 January 1998), which had been enacted by the Pennsylvania legislature with the sole aim of influencing the judicial outcome of the extradition proceedings instituted against him in France; the minutes of the relevant parliamentary debates were particularly persuasive in that regard.

Secondly, he submitted that, as the Indictment Division of the Bordeaux Court of Appeal had noted in its judgment of 4 December 1997, he had at no time indicated that he had any intention of waiving his rights, and he had been tried in Pennsylvania without having been able to defend himself either in person or through legal assistance of his own choosing. He added that it followed from the Court's case-law that, unless the accused had unequivocally waived his rights, proceedings *in absentia* were only compatible with the Convention if he could subsequently obtain a retrial by a court. Consequently, by authorising his extradition in the absence of effective and sufficient guarantees that he would be entitled to a new trial in Pennsylvania at which he would be given a hearing on the merits of the charge against him, the Government had violated Article 6 § 1 and also Article 6 § 3 (c), which provides:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing...
>
> ..."

He produced numerous affidavits sworn by "eminent American legal experts, specialist lawyers or law professors", all of which indicated, in his submission, that the statute of 27 January 1998 contravened the principle of separation of powers embodied in the Pennsylvania Constitution, a principle which, according to him, barred the legislature from challenging a final court decision. The affidavits cite settled case-law of the Pennsylvania Supreme Court to that effect, and the applicant argued that in common-law systems, in accordance with the principle of *stare decisis*, precedents were binding on the courts. The experts point out that, irrespective of the position taken by the prosecuting authorities, the court that retried the applicant pursuant to the statute would have to raise the unconstitutionality of the statute of its own motion, and consequently to hold that it had no jurisdiction; failing that, the victim's family, or any taxpayer in

Pennsylvania, could raise the issue. Accordingly, they continue, only an affidavit by the President of the Philadelphia Court of Common Pleas confirming the validity of the applicant's right to a new trial could have provided a sufficient guarantee. The respondent Government were therefore not in a position to say that they were satisfied that the requesting State's domestic law afforded it the means of fulfilling its undertakings. In that connection, the mere fact that the requesting State's international responsibility was engaged if it failed to fulfil its undertakings or comply with the principle that a person could only be tried for the offence for which he was extradited was not a sufficient basis for presuming that it would be legally or physically possible for that State to fulfil those undertakings in its domestic law. The applicant added that, while, it seemed, the United States had always fulfilled the international undertakings it had given to France in extradition matters, the commitments in question had always concerned non-enforcement of the death penalty; no previous cases had been similar to the present one. Lastly, under this head, he submitted that the Government had not disputed that they had not obtained any assurances as to what would happen to the applicant if he was not granted a retrial in Pennsylvania.

Thirdly, even supposing that he could in fact be retried in Pennsylvania, his extradition would still be unlawful in that the trial would not satisfy the requirements of Article 6 of the Convention. He submitted in that connection: "No trial can be fair, in view of the general press hysteria and the suspicious zeal of the prosecuting authorities (as exemplified by Ms Abraham's attitude and the petition signed by various prosecutors) and even of the courts (exorbitant and grotesque amount of damages awarded in July 1999 [907,000,000 United States dollars])." The *Philadelphia Daily News* and a local radio station had been particularly active in conducting an extremely virulent campaign against the applicant, which had received television coverage. The applicant produced a number of press cuttings and the transcript of a television programme. The jurors at any new trial would not have been able to avoid such media pressure, which had made the applicant appear "guilty beyond all doubt".

30. The Government submitted at the outset that when a State Party received an extradition request, its responsibility under the Convention could not include a general obligation to foresee all the possible consequences, under the requesting State's domestic law, of an international undertaking given to the requested State. All that was necessary was that the guarantees provided by the requesting State should, in their number and strength, constitute grounds for believing that that State's domestic law afforded it the means of complying with the international undertakings it had given to the extraditing State. In the instant case the Government had satisfied themselves, as far as possible, that the United States would be able to guarantee Mr Einhorn a new trial if he requested one. They pointed out in that connection that the Indictment Division of the Bordeaux Court of

Appeal had not ruled in favour of the applicant's extradition until after the Pennsylvania legislature had passed a law in January 1998 enabling him to request a new trial; the Indictment Division's ruling had also taken into account the American authorities' official undertakings to guarantee the applicant a fair trial.

The Government denied that the statute in question had been passed with the sole aim of making it possible for Mr Einhorn to be extradited. As Mr Rosen had emphasised in his affidavit, the relevant provision could be applied to anyone in the same position as the applicant; and in fact twenty-one people who had been convicted *in absentia* in Philadelphia County were entitled to avail themselves of it.

In addition, following the enactment of the statute, the American authorities at both local and federal level had undertaken to ensure that the applicant would be granted a new trial, if he so desired, on his return to the United States. The Government referred in that connection to the affidavit sworn on 10 June 1998 by Ms Abraham, the District Attorney of Philadelphia County, and to Mr Rosen's affidavit (mentioned above), both of which were corroborated by the diplomatic notes of 2 July 1998 and 24 September 1999 from the United States embassy. The Government again pointed out that Ms Abraham had stated in her affidavit that her undertaking was binding on the Commonwealth of Pennsylvania and the prosecuting authorities. The applicant had not adduced any evidence to show that the American authorities intended to depart in the instant case from the approach they had always adopted in their dealings with France, namely one of scrupulous compliance with undertakings they gave under the extradition treaty between the two States.

As regards the conformity of the statute of 27 January 1998 with the Pennsylvania Constitution, the Government submitted that, as the *Conseil d'Etat* had pointed out in its judgment of 12 July 2001, it was not for the French authorities to rule on such a matter. In any event, the diplomatic note of 24 September 1999 from the United States embassy had expressly confirmed that the statute was constitutional.

The Government added that even supposing a Pennsylvania court were to hold that the statute was unconstitutional, such a ruling could not call into question the validity and scope of the undertaking which the United States Federal Government had given France. The diplomatic assurances given to the French authorities came under the "executive agreements" defined in the Federal Constitution's provisions concerning the executive. By Article VI, section 2, of the Federal Constitution, such agreements were binding on the federal Government and the federal States, and in particular on the federal States' courts, notwithstanding any indication to the contrary in the Federal Constitution or the legislation of any federal State. The precedents of the United States Supreme Court were consistent on that point (the Government cited *United States v. Belmont*, 301 US 324 (1937), *United States v. Pink*,

315 US 203 (1941), and *United States v. Rauscher*, 119 US 407 (1886), from the latter of which it appeared, in particular, that anyone extradited to the United States was entitled to ask the federal or State courts to enforce those fundamental rules). The diplomatic notes could also be regarded in public international law as a unilateral international undertaking requiring the United States to fulfil the obligations it had entered into, failing which its international responsibility would be engaged; that position was established in the case-law of the International Court of Justice, and in particular in the "Nuclear Tests" judgment of 20 December 1974 (New Zealand v. France, *ICJ Reports 1974*, §§ 45-63). The Government accordingly inferred that "inasmuch as the fulfilment of the obligation to afford Mr Einhorn the possibility of a new and fair trial [was] an essential prerequisite of his extradition, the French authorities [could not] seek additional guarantees in the event of such an obligation not being be fulfillable".

If, by some extraordinary chance, Mr Einhorn was unable to be retried in Pennsylvania, the Government considered "that he should, in principle, be released by the American authorities". The "speciality rule" of international customary law – whereby the requesting State's authorities were required to comply with the terms of an extradition order and were prohibited from taking any coercive measures against the extradited person other than those permitted by the order – precluded the applicant's being kept in prison in order to serve the sentence that had been imposed on him *in absentia* in 1993.

31. With regard to the applicant's first complaint under Article 6, the Court notes that after the American authorities had submitted an extradition request on 12 June 1997, the French authorities referred the case to the Indictment Division of the Bordeaux Court of Appeal, which in an initial judgment of 4 December 1997 ruled against the applicant's extradition, holding, in particular, that he would be unable to obtain a retrial in Pennsylvania; as a result, the French authorities did not proceed with the extradition. The Pennsylvania legislature subsequently passed a law, which came into force on 27 January 1998, allowing a retrial in certain circumstances for persons convicted *in absentia*. On 2 July 1998, on the basis of that change in the law, the American authorities submitted a further extradition request to the French authorities; the case was again referred to the Indictment Division of the Bordeaux Court of Appeal, which in a judgment of 18 February 1999 ruled in favour of the applicant's extradition, subject to certain conditions (see paragraphs 4 to 6 above).

There is little doubt that the statute of 27 January 1998 can be regarded as a law passed for a special purpose. All the indications are that it was enacted by the Pennsylvania legislature as a consequence of the initial ruling by the Indictment Division of the Bordeaux Court of Appeal. Nevertheless, it is worded in general terms and, as was rightly noted by the

Indictment Division of the Bordeaux Court of Appeal in its judgment of 18 February 1999 and by the *Conseil d'Etat* in its judgment of 12 July 2001, is intended to apply in exactly the same manner to all persons tried and convicted *in absentia* who have fled to a foreign country which refuses to extradite them on the ground that they were convicted *in absentia*.

The Court further notes that the Indictment Division of the Bordeaux Court of Appeal took the view (and its interpretation of the relevant domestic law cannot be challenged before the Court) that the statute of 27 January 1998 constituted a new factor such as to provide a legal ground for referring the case to it for a second time following a fresh extradition request. The proceedings instituted by the French authorities in the light of the change in the law in Pennsylvania and of the extradition request of 2 July 1998 are therefore quite distinct from the first set of proceedings. Consequently, it cannot be argued that the fact of taking into account the statute of 27 January 1998 influenced the outcome of proceedings which were already under way or that, in ruling for a second time on the applicant's extradition, the Indictment Division disregarded the principle of *res judicata*.

32. With respect to the applicant's second and third complaints, the Court reiterates that it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country (see the Soering judgment cited above, p. 45, § 113, and, *mutatis mutandis*, the Drozd and Janousek v. France and Spain judgment of 26 June 1992, Series A no. 240, p. 34, § 110).

33. As to the applicant's second complaint in particular, in the light of the Court's case-law (especially the Poitrimol v. France judgment of 23 November 1993, Series A no. 277-A, pp. 13-14, § 31), a denial of justice undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself. The extradition of the applicant to the United States would therefore be likely to raise an issue under Article 6 of the Convention if there were substantial grounds for believing that he would be unable to obtain a retrial in that country and would be imprisoned there in order to serve the sentence passed on him *in absentia*.

In the instant case the applicant did not dispute that the statute of 27 January 1998 allowed him in principle to be retried in Pennsylvania for the offence of which he had been convicted *in absentia* in 1993. He maintained that the statute offended against the principle of separation of powers enshrined in that State's Constitution and that the court which, pursuant to the statute, was supposed to retry him would be unable to do so.

He produced to the Court, as he had to the domestic courts, a large number of affidavits sworn by lawyers practising in Pennsylvania and academics, who undoubtedly reach the same conclusion (see paragraphs 15 to 19 above).

In the Court's view, while those documents confirm that serious questions arise as to the conformity of the statute of 27 January 1998 with the Pennsylvania Constitution, they do not, in the absence of a finding by the competent courts in Pennsylvania, prove that it is unconstitutional. It cannot be inferred from them, without going thoroughly into the question whether the statute is constitutional, that there are "substantial grounds" for believing that the applicant will be unable to obtain a retrial in Pennsylvania or that the denial of justice he fears is "flagrant". It was patently not for the respondent State to determine such an issue before granting extradition, and it cannot be argued that such a duty arose from its obligations under the Convention.

Accordingly, the respondent State must be considered to have fulfilled its obligations under Article 6 in that it was entitled, in all good faith, to infer from the undertakings given by the appropriate American authorities that, on returning to Pennsylvania, the applicant would not have to serve the sentence that had been imposed on him *in absentia*. In this connection, the United States embassy's diplomatic note of 24 September 1999 to the Government (see paragraph 13 above) stated that the statute in issue was constitutional since it did not conflict with the principle that laws must not have retrospective effect. Although the applicant rightly pointed out that the note did not answer the question whether the statute complied with the principle of separation of powers enshrined by the Pennsylvania Constitution, the note nonetheless makes the unqualified assertion that the applicant will be able to be retried in Pennsylvania by virtue of the statute. The same assurance was given in the diplomatic note of 10 June 1998 and in the affidavit of the District Attorney, Ms Abraham (see paragraphs 12 and 13 above). Furthermore, and above all, the Government agreed to the extradition on condition, *inter alia*, that the applicant was retried if he so requested on returning to Pennsylvania. They could legitimately assume that if the Pennsylvania court to which he applied for a retrial declined jurisdiction on the ground that the statute of 27 January 1998 was unconstitutional, the principle that a person may only be tried for the offence for which he was extradited would prevent him from being kept in prison in the United States in order to serve the sentence that had been imposed on him *in absentia*. The Government's good faith cannot be called in question in this case, seeing that what is in issue is compliance with international law by the United States of America, which cannot be said not to be a State based on the rule of law.

34. With regard to the third complaint, the applicant produced several press cuttings and the transcript of a television programme, from which it is

clear that his case is receiving extremely hostile media coverage in Pennsylvania. In his submission, the jurors at his retrial will not have been able to avoid such influence, so that the trial will not take place in conditions complying with Article 6 of the Convention.

The Court does not exclude the possibility that the fact of being tried in such circumstances may raise an issue under Article 6 § 1 of the Convention. It points out, however, that where extradition proceedings are concerned, an applicant is required to prove the "flagrant" nature of the denial of justice which he fears. In the instant case the applicant did not adduce any evidence to show that, having regard to the relevant American rules of procedure, there are "substantial grounds for believing" that his trial would take place in conditions that contravened Article 6.

35. Consequently, inasmuch as it relates to the complaints alleging a violation of Article 6 of the Convention, the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. DOLLÉ
Registrar

L. LOUCAIDES
President