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COUR EUROPÉENNE DES DROITS DE L'HOMME

**RESEARCH DIVISION**  
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*The role of public prosecutor outside  
the criminal law field in the case-law  
of the European Court of Human Rights*

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## **INTRODUCTION**

1. This paper will present an overview of the case-law of the European Court of Human Rights concerning the role of public prosecutors outside the criminal field. In the light of the case-law studied for the first version of this report (dated 9 June 2008), the Court did not seem to have a specific approach as regards the activities of public prosecutors in civil or administrative proceedings. Nor did it seem to establish as a general rule that those Member States whose prosecutors are empowered to act in non-criminal areas have an inappropriate practice or should reconsider changing their systems. In fact, the Court seemed to apply the same general requirements of the rule of law and the Convention in those cases in which public prosecutors intervened in non-penal areas of law.

2. However, since 2009, the Court has delivered three judgments against Russia concerning the role of public prosecutors in civil proceedings. In two of these judgments the Court has referred to the Opinion no. 3 (2008) adopted by the Consultative Council of European Prosecutors for which this report had been initially prepared.

3. We will distinguish between the different substantive rights which may come into play when public prosecutors intervene, all derived from Article 6 of the Convention: the right to an independent and impartial tribunal; the right to adversarial proceedings; the right to equality of arms; and the right of access to a court. The principle of legal certainty, inherent in Article 6 of the Convention, has also important implications for the role of the public prosecutor in the context of supervisory review proceedings. Finally, we will examine the role of public prosecutors in a specific domain of family law: establishment and disavowal of paternity.

## **I. THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL**

4. The Court has generally refused to consider public prosecutors as an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. For different reasons: their intervention lacks the guarantees of a judicial procedure (such as the participation of the person concerned or the holding of hearings); they make decisions of their own motion, whereas a tribunal would normally become competent to deal with a matter if it is referred to it by another person or entity; they enjoy considerable discretion in determining what course of action to pursue; and finally, they can hardly be deemed as sufficiently impartial since they may

subsequently act in proceedings against the person concerned. The fact that appeals can be made against their decisions to the higher levels of the Prosecutor's Office can in no way compensate the lack of judicial guarantees, since the hierarchical superiors are part of the same centralised system and they are not attended by due procedural safeguards either. According to the Court, "*the mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status of independent and impartial actors*" (*Zlinsat, spol. s r.o., v. Bulgaria*, no. 57785/00, § 78, 15 June 2006).

5. In order to comply with Article 6, the prosecutor's decisions should be subject to review by a judicial body having full jurisdiction. That was not the case in *Zlinsat, spol. s r.o., v. Bulgaria* in which the suspension of the performance of a privatisation contract made by the Sofia City Prosecutor's Office of its own motion was not subject to judicial review. In *Vasilescu v. Romania*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, the Court held that the fact that a member of the Procurator-General's department had sole jurisdiction to deal with an application for restitution amounted to a violation of Article 6 of the Convention.

6. For similar reasons, the detention of a person of unsound mind ordered by a prosecutor, who subsequently became a party to proceedings against him seeking his psychiatric internment, and whose order was subject to appeal solely to higher prosecutors, was held to breach Article 5 § 4 of the Convention (*Varbanov v. Bulgaria*, no. 31365/96, ECHR 2000-X). In fact, this provision guarantees to every detained person the right to appeal to a court, and not only in criminal matters (in this case the detention was ordered on the basis of the Public Health Act).

7. It follows from the case-law of the Court that prosecutors should not have in principle decision-making powers when taking measures concerning "*civil rights and obligations*", unless their measures are subject to full judicial review.

## II. THE RIGHT TO ADVERSARIAL PROCEEDINGS

8. This right, as construed by the Court, means in principle the opportunity for the parties to a trial to have knowledge and comment on all evidence adduced or observations filed, "*even by an independent member of the national legal service*", with a view to influencing the court's decision. After applying these principles to criminal proceedings (the role of the Advocate-General at the Court of Cassation in *Borgers v. Belgium*, judgment of 30 October 1991, Series A no. 214-B), the Court has extended this requirement to non-criminal proceedings (the Counsel for the State in constitutional proceedings in the case of *Ruiz-Mateos v. Spain*, judgment of

23 June 1993, Series A no. 262; the Attorney-General at the Supreme Court in employment disputes, *Lobo Machado v. Portugal*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I; the Advocate-General at the Court of Cassation in bankruptcy proceedings, *Vermeulen v. Belgium*, judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I; the Advocate-General at the Court of Cassation in disciplinary proceedings, *Van Orshoven v. Belgium*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III; the Advocate-General at the Supreme Court in civil proceedings, *K.D.B. v. the Netherlands*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II; the Government Commissioner at the *Conseil d'Etat* in administrative proceedings, *Kress v. France* [GC], no. 39594/98, ECHR 2001-VI; the Public Prosecutor before the Court of Cassation in proceedings concerning compensation for unlawful detention, *Göç v. Turkey* [GC], no. 36590/97, ECHR 2002-V; the Public Prosecutor before the Council of State in administrative proceedings concerning the refusal to register the applicant as a student in a faculty, *Emine Araç v. Turkey*, no. 9907/02, § 27, 23 September 2008; the Public Prosecutor before the Supreme Military Administrative Court proceedings concerning the applicant's dismissal from military school, *Miran v. Turkey*, no. 43980/04, § 18, 21 April 2009).

9. In all these cases, the Court has examined whether the submissions of the “*independent member of the national legal service*” have been communicated to the applicant/party and whether the parties have had the possibility of replying to them. However, the fact that the lawyers of the parties have the possibility to ask the “*prosecutor*” to indicate the general tenor of his submissions in advance and reply to him by means of a memorandum for the deliberations, or the possibility of adjourning the case to enable the parties to comment on a new point raised by the “*independent member*”, may lead the Court to find no violation of the adversarial principle (see *Kress v. France*, § 76; *APBP v. France*, judgment of 21 March 2002). This is more difficult when the court does not hold an oral hearing (see for instance *Göç v. Turkey*, § 56).

10. To apply these principles, it is irrelevant whether the “*independent member of the national legal service*” is or is not regarded as a “*party*”. In most of the cases cited above, the prosecutor was not strictly a party to the proceedings, but an *amicus curiae* acting in the public interest or to ensure that the case-law was consistent.

### III. THE RIGHT TO EQUALITY OF ARMS

11. Applying the “theory of appearances” and looking at the part actually played in the proceedings by the prosecutor/officer, the Court has considered that that officer, in recommending that an appeal on points of law should be allowed or dismissed, “*became objectively speaking the ally or opponent of the parties*”. Therefore, his presence at the deliberations affords him, “*if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction*” (*Vermeulen*, § 34; *Lobo Machado*, § 32; *Kress*, § 82). This may create a “*feeling of inequality*” to the party and thus amounts to a violation of Article 6 § 1 of the Convention (see also *F.W. v. France*, no. 61517/00, § 27, 31 March 2005). The Court has clarified that the mere presence of the prosecutor/officer at the deliberations, be it “*active*” (for instance, in an advisory capacity) or “*passive*”, is deemed to be a violation of this provision (*Martinie*, § 53).

12. The Court has further considered that the disclosure of submissions or information to the prosecutor or independent officer, and not to the parties, breaches the principle of equality of arms (see for instance the communication of the reporting judge’s report to the Advocate-General at the Court of Cassation while it was not communicated to the parties in a criminal case, *Reinhardt and Slimane-Kaid v. France*, judgment of 31 March 1998, *Reports of Judgments and Decisions* 1998-II). The same applies to non-criminal proceedings (commercial disputes before the Court of Cassation in *Lilly France v. France*, no. 53892/00, § 25, 14 October 2003).

13. The Court takes into account the global position of the prosecutor in the proceedings, not only with regard to his presence at the deliberations or the fact that he is informed beforehand of the reporting judge’s report. For instance, in *Martinie v. France*, the Court noted that the State Counsel’s position in the proceedings before the Court of Audit created an “*imbalance*” between him and the party (the accountant), since, among other reasons, the State Counsel was present at the hearing and fully participated in the proceedings expressing his own point of view orally, without being contradicted by the accountant. In *Ruiz-Mateos v. Spain*, the Court found that the non-participation of the applicant in the Constitutional Court proceedings (preliminary question submitted by a judge on the constitutionality of a law which affected the applicant personally), whereas the Counsel for the State was able to comment on his arguments in the last instance before that court, amounted to a violation of Article 6 § 1. In *Yvon v. France*, judgment of 24 April 2003, the Court considered that the Government Commissioner’s position in expropriation proceedings, acting as an expert and a party to these proceedings, created an imbalance

detrimental to the expropriated party which was incompatible with the principle of equality of arms.

14. The privileged position of the public prosecutor as regards reimbursement of litigation costs may also raise an issue under the right to a fair trial. While it is true that such a privilege may be justified for the protection of the legal order, “*it should not be applied so as to put the party to civil proceedings at an undue disadvantage vis-à-vis the prosecuting authorities*” (see the non-reimbursement of litigation costs by the prosecutor in civil proceedings unsuccessfully brought against an individual, which was held to breach Article 6 in *Stankiewicz v. Poland*, no. 46917/99, ECHR 2006-VI).

15. The rule that time ceases to run against the State (State Legal Council) during the judicial vacation for the purposes of statutory time-limits, whereas it still runs for the civil party, has also been held to create a substantial disadvantage incompatible with Article 6 (*Platakou v. Greece*, no. 38460/97, ECHR 2001-I, and *Karapanagiotou and Others v. Greece*, no. 1571/08, 28 October 2010).

16. However, not every inequality or imbalance between the parties and the public prosecutor or State Counsel is considered to be incompatible with the Convention. For instance, in criminal matters, the fact that the time-limit for an appeal is notably shorter for private parties than for the Principal Public Prosecutor cannot, in the Court’s opinion, place the former at a “*substantial disadvantage*” vis-à-vis the latter (*Guigue and SGEN-CFDT v. France* (dec.), no. 59821/00, 6 January 2004). The Court has also considered that the principle of equality of arms was not infringed by the fact that the time-limit for the deposition of private parties’ submissions for appeal was more restrictive than for the Public Prosecutor’s Office (*Ewert v. Luxembourg*, no. 49375/07, § 98, 22 July 2010). In the same context of criminal law, the fact that the civil party alone cannot appeal to the Court of Cassation if the prosecution does not appeal does not necessarily infringe the principle of equality of arms, since the former cannot be regarded as either the opponent or the ally of the prosecution (*Berger v. France*, no. 48221/99, ECHR 2002-X). The fact that only the prosecutor can lodge an appeal against an inadmissibility decision by the Spanish Constitutional Court in *amparo* proceedings does not breach either Article 6 § 1 of the Convention (*Blanco Callejas v. Spain* (dec.), no. 64100/00, 18 June 2002).

17. Since 2009, the Court has developed a specific jurisprudence concerning the participation of public prosecutors in cases outside the sphere of criminal law. In three judgments against Russia, it has examined whether the prosecutor’s participation in the civil proceedings on the side of the applicant’s adversary had breached the principle of equality of arms.

18. In *Menchinskaya v. Russia*, no. 42454/02, 15 January 2009, referring to the Venice Commission’s Opinion on the Prosecutor’s Offices Act (2005) and to the Parliamentary Assembly’s Resolution 1604 (2003) on the

Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law, the Court established that support by the prosecutor of one of the parties in civil proceedings may be justified in certain circumstances, "for example the protection of rights vulnerable groups – children, disabled people and so on - who are assumed unable to protect their interest themselves, or where numerous citizens are affected by the wrongdoing concerned, or where State interests need to be protected" (§ 35). In this case the prosecutor had filed an appeal (*protest*) submitting that the first-instance court had erroneously applied provisions of civil law to labour law and therefore unlawfully granted interest on belated payments (unemployment allowances) in the applicant's favour. The Court considered that there were no special circumstances justifying the prosecutor's intervention and that his intervention had undermined the appearances of a fair trial and the principle of equality of arms (concluding that there had been a violation of Article 6 § 1 of the Convention). It is to be observed that in this case, unlike in the previous cases examined (*Martinie, Lobo Machado*), the prosecutor had not participated in the deliberations of the appeal court and his *protest* had been communicated to the applicant, who used the opportunity to reply to the prosecutor's arguments. Consequently, the Court considered that the mere intervention of the public prosecutor in the civil proceedings on the side of the applicant's adversary (the Employment Centre) undermined the principle of equality of arms.

19. In the recent case of *Korolev v. Russia (no. 2)*, no. 5447/03, 1 April 2010, the Court reached the same conclusion. The prosecutor had intervened in the appeal proceedings, supporting the applicant's opponents, military authorities, on the the compensation claims brought by the applicant (officer on leave) in relation to the refusal of reimbursment of a plane ticket. The only difference with the previous case is that the applicant was not afforded an opportunity to comment on the statement made by the prosecutor at the end of the hearing. The Court referred to the Opinion no. 3 (2008) adopted by the Consultative Council of European Prosecutors (see relevant Council of Europe documents, § 18).

20. By contrast, in *Batsanina v. Russia*, no. 3932/02, 26 May 2009, the Court accepted the prosecutor's participation in the proceedings. Although the applicant's opponents (a State-owned organisation and a private person) had both been represented in the proceedings, the Court considered that the prosecutor had acted in the public interest when he brought proceedings against the applicant. The prosecutor, acting on behalf of the Oceanology Institute of the Russian Academy of Sciences and a private person, had brought proceedings against the applicant and her husband to evict them from the flat granted to them. The applicant's husband, a staff member of the Institute, had signed an exchange agreement with his employer to obtain a larger flat from the Institute, by which it was agreed that the applicant would transfer title to her own flat to the Institute. The Institute

subsequently discovered that the applicant had already sold her flat. Therefore, the prosecutor had intervened to protect State assets at stake.

21. These cases show that the Court does not examine *in abstracto* the prosecutor's participation in ordinary civil proceedings. On a case-by-case basis, it examines whether the prosecutor's participation in the proceedings respected the principle of equality of arms.

#### IV. THE RIGHT OF ACCESS TO A COURT

22. The public prosecutor may be appointed in some circumstances as the representative of an individual before the domestic courts. Therefore, the way he exercises this official function vested in him may engage the responsibility of the State with regard to the Convention. For instance, the fact that the public prosecutor who represented the applicant informed the latter of the judgment served on him only after it became final, thus preventing the applicant from lodging an appeal, may impair the right of access to a court derived from Article 6 of the Convention (*Ferreira Alves v. Portugal* (no. 3), no. 25053/05, 21 June 2007).

23. In a recent case where the applicants, who were minors at the time, complained about the failure of the Public Prosecutor's Office to discharge its legal obligation under Article 45 of the Romanian Code of Civil Procedure to represent their interests over the course of the domestic proceedings and ask for compensation in their names, the Court held that the relevant provision provided in the case of minor or incapacitated individuals that the Public Prosecutor's Office "can" lodge a civil action if it considers that an action is required for the protection of the rights and best interest of the minor or incapacitated person. Accordingly, it considered that the Public Prosecutor's Office did not have a legal obligation to lodge proceedings in order to protect all minors and incapacitated people in general. It was simply legally possible to exercise such a right, which the Public Prosecutor's Office did not consider necessary in the applicants' case. The Court noting further that, all the applicants had parents or legal representatives who were either themselves parties to the proceedings or could have introduced the applicants as parties to the civil proceedings, but who failed to do so, considered that no restriction was imposed on the applicants' right of access to court (see *Moldovan and Others v. Romania* (dec.), no. 8229/04 and other applications, §§ 153-155, 15 February 2011).

## V. THE PRINCIPLE OF LEGAL CERTAINTY

24. The supervisory review proceedings existing in some countries of Eastern Europe such as Russia, Moldova or Ukraine have raised some issues under Article 6 of the Convention and the principle of legal certainty (see *Ryabykh v. Russia*, no. 52854/99, ECHR 2003-IX). The Court has generally found that the quashing of final judgments in these systems (not only in criminal law) violates the principles of *res judicata* and legal certainty and consequently Article 6. However, the violation stems from the judicial decisions quashing the final judgments and not from the particular position of the Prosecutor General in these proceedings. In fact, the supervisory review proceedings can be set in motion either by the Public Prosecutor, even if he was not party to the proceedings, or by the President or Vice-Presidents of the Supreme Court (see *Ryabykh v. Russia*). The Court does not seem to have a specific approach in cases in which the proceedings have been set in motion by the Prosecutor General (see for instance *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; *Roseltrans v. Russia*, no. 60974/00, 21 July 2005; *Asito v. Moldova*, no. 40663/98, 8 November 2005).

25. However, in a Grand Chamber case concerning the fairness of criminal proceedings where the Russian Government challenged the victim status of the applicant following the reopening of the proceedings, the Court noted that in a number of Russian cases domestic criminal and civil proceedings were reopened shortly after the communication of a case to the Government, but many months or even years after the closure of the original case. In this connection, it mentioned that in one case (*Nurmagomedov v. Russia* (dec.), no. 30138/02, 16 September 2004) it was not until the Court intervened that the prosecutor lodged an application for supervisory review of a court's ruling, whereas earlier the same prosecutor had dismissed the applicant's complaint about that very ruling saying that it had been "*well-reasoned and lawful*". It also took note that in the case before it the applicant's own efforts to obtain supervisory review of the first judgment were futile until such time as the Prosecutor General's office felt compelled to intervene following notification that the applicant had turned to this Court for redress. It therefore considered that the domestic proceedings were reopened at the instigation of the Russian authorities after they had learned that the case has been admitted for examination in Strasbourg. Having regard to the ease with which the Government uses this procedure, the Court considered that there was a risk of abuse. In this connection, it held that if it were to accept unconditionally that the mere fact of reopening the proceedings was to have the automatic effect of removing the applicant's victim status, the respondent State would be capable of thwarting the examination of any pending case by having repeated recourse to supervisory-review proceedings, rather than correcting the past violations

by giving the applicant a fair trial. Consequently, the Government's objection as regards the victim status was dismissed by the Court (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 79- 84, 2 November 2010).

## VI. THE INTERVENTION OF PUBLIC PROSECUTORS IN FAMILY LAW: ESTABLISHMENT AND DISAVOWAL OF PATERNITY

26. Finally, it is worth mentioning some cases in which the Court has examined the role of the public prosecutor in disputes relating to the establishment and disavowal of paternity under Article 8 of the Convention (right to respect for private and family life). In these cases, the public prosecutor acts in the public interest or the interests of the child. The prosecutor may be vested with the power to challenge the paternity after the expiry of the relevant time-limit in which the father himself could initiate the proceedings. In this context, the public prosecutor is under the obligation to strike a fair balance between the interests of the applicant (the presumed father) and those of society, taking into consideration circumstances such as the age, personal situation and attitude of the parties concerned. For instance, the public prosecutor's refusal to introduce proceedings to challenge the paternity may not impair the applicant's right to respect for private life where a child risked losing her maintenance claim against the applicant and the determination of her natural father's identity remained uncertain (*Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999) or where applicant's action denying paternity submitted to the prosecutor was unsupported by any evidence (*Darmon v. Poland* (dec.), no. 7802/05, 17 November 2009). By contrast, in *Paulík v. Slovakia* (no. 10699/05, ECHR 2006-XI), the prosecutor's refusal to introduce proceedings to challenge the paternity violated the applicant's right to respect for his private life, since his putative daughter was almost 40 years old, was not dependent on him for maintenance and had no objection to his disclaiming paternity.

27. Furthermore, in some systems, public prosecutors may lodge an action for the establishment of paternity on the father's behalf (see *Róžański v. Poland*, no. 55339/00, 18 May 2006).<sup>1</sup> In these cases, prosecution authorities should also take into account the interests of the applicant as a biological father, as well as those of the child and the legal family. They are under the obligation of examining these interests against the factual background without rejecting automatically the applicant's requests on the

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<sup>1</sup> This mechanism is not available to the father in that he cannot launch it himself (see *Róžański*, § 73).

sole basis that paternity has already been recognised by a third person (*Róžański v. Poland*).

28. While it is true that the Court does not call into question the discretionary powers vested on prosecutors in this type of disputes as such, it nevertheless requires that prosecutors intervening in these matters take into account the different interests and rights at stake under Article 8 of the Convention.

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## ANNEX

### List of Cases

#### ***Ruiz-Mateos v. Spain, judgment of 23 June 1993, Series A no. 262***

65. In November 1984 and November 1989 the Counsel for the State filed with the Constitutional Court, by virtue of Article 37 para. 2 of Institutional Law no. 2/1979 (see paragraph 27 above), observations affirming the constitutional validity of Law no. 7/1983 (see paragraphs 16 and 22 above). The applicants were not given an opportunity to reply thereto, although it would clearly have been in their interests to be able to do so before the final decision.

66. According to the Government, the Constitutional Court was able to examine the applicants' arguments by referring to the very voluminous memorials which the latter had submitted in the civil courts pursuant to Article 35 para. 2 of Institutional Law no. 2/1979 (see paragraphs 14 and 22 above) inasmuch as the full files of the proceedings in those courts had been transmitted to it.

67. The Court does not find this argument convincing.

In the first place, Article 35 para. 2 fixes for the parties - in this instance the applicants and the Counsel for the State - and for the Attorney General's department a single time-limit for putting forward their views on the appropriateness of submitting a preliminary question. Whereas the applicants' written submissions also raised substantive issues, those of the Counsel for the State, which were very short, dealt only with procedural questions. In any event, even if the latter had also given his opinion on the merits, the applicants would not have been able to challenge it in the civil courts or in the Constitutional Court. On the other hand, the Counsel for the State had advance knowledge of their arguments and was able to comment on them in the last instance before the Constitutional Court.

68. There has accordingly been a violation of Article 6 para. 1 (art. 6-1).

#### ***Lobo Machado v. Portugal, judgment of 20 February 1996***

28. The Court notes, firstly, that the dispute in question related to social rights and was between two clearly defined parties: the applicant, as plaintiff, and Petrogal as defendant.

In that context the duty of the Attorney-General's department at the Supreme Court is mainly to assist the court and to help ensure that its case-law is consistent. Given that the rights were social in nature, the department's intervention in the proceedings was more particularly justified for the purposes of upholding the public interest.

It must be observed, secondly, that Portuguese legislation gives no indication as to how the representative of the Attorney-General's department attached to the Employment Division of the Supreme Court is to perform his role when that division sits in private (contrast the Borgers judgment previously cited, p. 28, para. 17, and p. 32, para. 28).

31. Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Supreme Court and to the nature of the Deputy Attorney-General's opinion, in which it was advocated that the appeal should be dismissed (see paragraph 14 above), the fact that it was impossible for Mr Lobo Machado to obtain a copy of it and reply to it before judgment was given infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see, among other authorities and mutatis mutandis, the following judgments: *Ruiz-Mateos*, previously cited, p. 25, para. 63; *McMichael v. the United Kingdom*, 24 February 1995, Series A no. 307-B, pp. 53-54, para. 80; and *Kerojärvi v. Finland*, 19 July 1995, Series A no. 322, p. 16, para. 42).

The Court finds that this fact in itself amounts to a breach of Article 6 para. 1 (art. 6-1).

32. The breach in question was aggravated by the presence of the Deputy Attorney-General at the Supreme Court's private sitting. Even if he had no kind of say, whether advisory or any other (see paragraphs 26 and 28 above), it afforded him, if only to outward appearances, an additional opportunity to bolster his opinion in private, without fear of contradiction (see the Borgers judgment previously cited, p. 32, para. 28).

The fact that his presence gave the Attorney-General's department the chance to contribute to maintaining the consistency of the case-law cannot alter that finding, since having a member present is not the only means of furthering that aim, as is shown by the practice of most other member States of the Council of Europe.

There has therefore been a breach of Article 6 para. 1 (art. 6-1) in this respect also.

### ***Vermeulen v. Belgium*, judgment of 20 February 1996**

29. The Court notes, firstly, that the nature of the functions of the procureur général's department at the Court of Cassation - as the Government agreed - does not vary according as the case is a civil or a criminal one. In both instances its main duty, at the hearing as at the deliberations, is to assist the Court of Cassation and to help ensure that its case-law is consistent. The fact that it cannot raise grounds of appeal of its own motion concerns only the scope of its functions, not their nature.

30. It should be noted, secondly, that the procureur général's department acts with the strictest objectivity. On this point, the findings in the Delcourt and Borgers judgments (see pp. 17-19, paras. 32-38, and p. 31, para. 24, respectively) regarding the independence and impartiality of the Court of Cassation and its procureur général's department remain wholly valid.

31. As in its judgment in the Borgers case (see p. 32, para. 26), the Court considers, however, that great importance must be attached to the part actually played in the proceedings by the member of the procureur général's department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the procureur général's department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation. In this connection, the Government emphasised the importance of the department's contribution to ensuring the consistency of the court's case-law.

32. In its judgment in the Delcourt case the Court noted in its reasons for holding that Article 6 para. 1 (art. 6-1) was applicable that "the judgment of the Court of Cassation ... may rebound in different degrees on the position of the person concerned" (pp. 13-14, para. 25). It has reiterated that idea on several occasions (see, mutatis mutandis, the following judgments: *Pakelli v. Germany*, 25 April 1983, Series A no. 64, p. 17, para. 36; *Pham Hoang v. France*, 25 September 1992, Series A no. 243, p. 23, para. 40; and *Ruiz-Mateos v. Spain*, 23 June 1993, Series A no. 262, p. 25, para. 63). The same applies in the instant case, since the appeal on points of law bore on the lawfulness of Mr Vermeulen's bankruptcy.

33. Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Court of Cassation and to the nature of the submissions made by Mr du Jardin, the avocet général, the fact that it was impossible for Mr Vermeulen to reply to them before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see, among other authorities and mutatis mutandis, the following judgments: *Ruiz-Mateos*, previously cited, p. 25, para. 63; *McMichael v. the United Kingdom*, 24 February 1995, Series A no. 307-B, pp. 53-54, para. 80; and *Kerojärvi v. Finland*, 19 July 1995, Series A no. 322, p. 16, para. 42).

The Court finds that this fact in itself amounts to a breach of Article 6 para. 1 (art. 6-1).

34. The breach in question was aggravated by the avocet général's participation in the court's deliberations, albeit only in an advisory capacity. The deliberations afforded the avocet général, if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction (see the Borgers judgment previously cited, p. 32, para. 28).

The fact that his presence gave the procureur général's department the chance to contribute to maintaining the consistency of the case-law cannot alter that finding, since having a member present is not the only means of furthering that aim, as is shown by the practice of most other member States of the Council of Europe.

There has therefore been a breach of Article 6 para. 1 (art. 6-1) in this respect also.

### ***Van Orshoven v. Belgium, judgment of 25 June 1997***

37. The Court notes, firstly, that independently of whether the case is a civil, criminal or disciplinary one, the main duty of the procureur général's department at the Court of Cassation at the hearing - as at the deliberations - is always to assist the Court of Cassation and to help ensure that its case-law is consistent.

38. It should be noted, secondly, that the procureur général's department acts with the strictest objectivity. On this point, the findings in the *Delcourt v. Belgium* judgment of 17 January 1970 (Series A no. 11, pp. 17-19, paras. 32-38) and the *Borgers* (p. 31, para. 24) and *Vermeulen* (p. 233, para. 30) judgments cited above regarding the independence and impartiality of the Court of Cassation and its procureur général's department remain wholly valid.

39. As in its judgments in the *Borgers* case (see p. 32, para. 26) and the *Vermeulen* case (see p. 233, para. 31), the Court considers, however, that great importance must be attached to the part actually played in the proceedings by the member of the procureur général's department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the procureur général's department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation. In this connection, the Government emphasised the importance of the department's contribution to ensuring the consistency of the Court of Cassation's case-law.

40. In its judgment in the *Delcourt* case the Court noted in its reasons for holding that Article 6 para. 1 (art. 6-1) was applicable that "the judgment of the Court of Cassation ... may rebound in different degrees on the position of the persons concerned" (pp. 13-14, para. 25). It has reached a similar conclusion in several other cases concerning different countries (see, *mutatis mutandis*, the following judgments: *Pakelli v. Germany*, 25 April 1983, Series A no. 64, p. 17, para. 36; *Pham Hoang v. France*, 25 September 1992, Series A no. 243, p. 23, para. 40; *Ruiz-Mateos v. Spain*, 23 June 1993, Series A no. 262, p. 25, para. 63; *Lobo Machado v. Portugal* cited above, p. 206, para. 30; and *Vermeulen v. Belgium* cited above, p. 233, para. 32). The same applies in the instant case, since the appeal on points of law concerned the lawfulness of the applicant's removal from the register and the consequential ban on his practising medicine.

41. Regard being had, therefore, to what was at stake and to the nature of the submissions made by the avocat général, the fact that it was impossible for the applicant to reply to them before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed (see, among other authorities and *mutatis mutandis*, the *Vermeulen* judgment cited above, p. 234, para. 33; and the *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, Reports 1997-I, p. 108, para. 24).

42. Accordingly, there has been a violation of Article 6 para. 1 (art. 6-1).

### ***K.D.B. v. the Netherlands, judgment of 27 March 1998***

43. The Court notes that for present purposes the essential features of the procedure of the Netherlands Supreme Court and that of the Belgian Court of Cassation are similar. Firstly, the purpose of the advocate-general's advisory opinion is to assist the Supreme Court and to help ensure that its case-law is consistent. Secondly, it is the duty of the Procurator-General's department at the Supreme Court to act with the strictest objectivity (see *inter alia* and *mutatis mutandis*, the *Vermeulen v. Belgium* judgment of 20 February 1996, Reports 1996-I, p. 233, §§ 29 and 30, and the *Van Orshoven v. Belgium* judgment of 25 June 1997, Reports 1997-III, pp. 1050-51, §§ 37 and 38).

As in the Belgian cases referred to, the Court considers, however, that great importance must be attached to the part played in the proceedings before the Supreme Court by the member of the Procurator-General's department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the Procurator-General's department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Supreme Court (see the above-mentioned Vermeulen judgment, p. 233, § 31, and Van Orshoven judgment, p. 1051, § 39).

44. Regard being had to what was at stake for the applicant in the proceedings and to the nature of the advisory opinion of the advocate-general, the fact that it was impossible for the applicant to reply to it before the Supreme Court took its decision infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see the above-mentioned Vermeulen judgment, p. 234, § 33, and Van Orshoven judgment, p. 1051, § 41).

There has accordingly been a violation of Article 6 § 1.

### ***Vasilescu v. Romania*, judgment of 22 May 1998**

Dans son arrêt du 20 octobre 1994, celle-ci a considéré que la revendication de la requérante revenait à attaquer une mesure d'instruction pénale. En conséquence, elle a estimé que l'affaire échappait à la compétence des juridictions civiles et que seul le procureur du département d'Argeş pouvait connaître de la demande. Il ne fait aucun doute cependant – et aucun des comparants n'en disconvient – que l'action de la requérante relevait de l'article 6 dans sa branche civile, dès lors qu'elle visait à obtenir la restitution de biens dont l'intéressée s'était vue dépossédée (paragraphe 14 ci-dessus).

La Cour relève que M<sup>me</sup> Vasilescu s'était déjà adressée au procureur d'Argeş, puis au procureur général. Quelles que soient l'issue de ces démarches (paragraphe 11 et 12 ci-dessus) et celle de nouvelles procédures que, conformément à l'arrêt de la Cour suprême de justice, la requérante pourrait éventuellement entamer devant le procureur d'Argeş, il faut, pour que l'article 6 soit respecté, que les autorités saisies puissent passer pour un « tribunal » au sens de cette disposition. La Cour recherchera dès lors s'il en va bien ainsi.

40. La Cour note que le ministère public, qui, par l'effet de la loi n° 92 du 4 août 1992, a remplacé l'ancienne *procuratura*, est constitué de magistrats qui exercent tous leurs fonctions sous l'autorité du procureur général. Le ministre de la Justice exerce son contrôle sur tous les membres du ministère public, y compris le procureur général.

Même lorsqu'il exerce, comme en l'espèce, une attribution de nature contentieuse, un procureur de département agit en qualité de magistrat du ministère public, subordonné d'abord au procureur général, puis au ministre de la Justice.

41. La Cour rappelle que seul mérite l'appellation de « tribunal » au sens de l'article 6 § 1 un organe jouissant de la plénitude de juridiction et répondant à une série d'exigences telles que l'indépendance à l'égard de l'exécutif comme des parties en cause (voir, parmi d'autres, l'arrêt Beaumartin c. France du 24 novembre 1994, série A n° 296-B, p. 63, § 38). Tel n'est pas le cas du procureur du département d'Argeş ni du procureur général.

Il y a donc eu méconnaissance de l'article 6 § 1.

### ***Millan i Tornes v. Andorra (friendly settlement)*, no. 35052/97, ECHR 1999-IV**

21. The Court takes note of the friendly settlement reached between the Government and Mr Millan i Tornes. In that connection, it observes that a statute amending the Constitutional Court Act of 3 July 1993 came into force on 20 May 1999 and affords litigants direct access to the Constitutional Court through an *empara* appeal without having to obtain prior permission from State Counsel's Office. It further notes that under paragraph 2 of the transitional provision of that statute, anyone who had been refused permission to

lodge an *empara* appeal by State Counsel's Office was entitled to lodge such an appeal with the Constitutional Court within fifteen days after the statute came into force.

***Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII**

61. The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.

62. In the present case the Court notes that at the material time the Procurator-General of Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed. The Court notes that the exercise of that power by the Procurator-General was not subject to any time-limit, so that judgments were liable to challenge indefinitely.

The Court observes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice's words – a judicial decision that was "irreversible" and thus *res judicata* – and which had, moreover, been executed.

In applying the provisions of Article 330 in that manner, the Supreme Court of Justice infringed the principle of legal certainty. On the facts of the present case, that action breached the applicant's right to a fair hearing under Article 6 § 1 of the Convention.

There has thus been a violation of that Article.

***Yildirim v. Austria* (dec.), no. 34308/96, 19 October 1999**

The Court notes that the applicant complains in essence about a lack of access to court. However, he does not raise this complaint as regards the one-year limitation period which applies to a husband's action for contesting the legitimacy of a child born in wedlock, but asserts that he should have had access to court as regards the Public Prosecutor's refusal to bring such an action after the expiry of the said time-limit.

...

The Court notes that, according to section 158 of the Civil Code, the Public Prosecutor may contest the legitimacy of the child following the expiry of the one-year time-limit for the husband's action, if he deems that this is required in the public interest or in the interests of the child or its descendants. Having regard to the wording of this provision and its interpretation by the domestic authorities, including the Administrative Court, which clearly stated that the applicant's own action was time-barred and that he did not have a right to have such proceedings introduced by the Public Prosecutor, the Court finds that the applicant asserts a "right" which cannot arguably be said to be recognised under Austrian law. Therefore, Article 6 § 1 of the Convention does not apply in the present case.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 § 3 of the Convention.

The Court notes that section 156 of the Austrian Civil Code provides a possibility for the husband to rebut the presumption of legitimacy within a one-year time-limit. Thereafter only the Public Prosecutor can do so under section 158 of the Civil Code, if it appears necessary in the public interest or in the interests of the child. In the present case, the applicant failed to bring proceedings within the statutory time-limit and subsequently requested the Public Prosecutor to do so. The domestic authorities carefully examined his argument that he had not been aware of the limitation period but concluded that, in the circumstances of the case, he could have been expected to seek adequate legal advice. Further, the domestic authorities pointed out that the introduction of such proceedings by the public prosecutor would not have served the interests of the child, who risked losing her maintenance claim against the applicant, whilst the determination of her natural father's identity remained uncertain. Thus, the present application differs fundamentally from the

above-mentioned Kroon and Others case, which concerned biological parents and their child which was born some seven years after its mother had separated from her husband and lost contact with him, where the presumption of legitimacy could not be disproved by those concerned and hindered the intended recognition of the child by its biological father, without actually benefiting anyone (loc. cit., p. 58, § 40).

In sum, the Court finds that the relevant law as applied to the applicant struck a fair balance between the different interests involved. In particular, it appears justified that, once the limitation-period for the applicant's own claim to contest his paternity had expired, greater weight was given to the interests of the child than to the applicant's interest in disproving his paternity. Thus, the Public Prosecutor's refusal to introduce proceedings to contest the legitimacy of the child, does not disclose a lack of respect for the applicant's private life. It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

### ***Varbanov v. Bulgaria*, no. 31365/96, ECHR 2000-X**

48. In the present case the applicant was detained pursuant to a prosecutor's order which had been issued without consulting a medical expert. It is true that the purpose of the applicant's detention was precisely to obtain a medical opinion, in order to assess the need for instituting judicial proceedings with a view to his psychiatric internment.

The Court is of the opinion, however, that a prior appraisal by a psychiatrist, at least on the basis of the available documentary evidence, was possible and indispensable. There was no claim that the case involved an emergency. The applicant did not have a history of mental illness and had apparently presented a medical opinion to the effect that he was mentally healthy. In these circumstances, the Court cannot accept that in the absence of an assessment by a psychiatrist the views of a prosecutor and a police officer on the applicant's mental health, which were moreover based on evidence dating from 1993 and 1994, sufficed to justify an order for his arrest, let alone his detention for twenty-five days in August and September 1995.

It is also true that when he was arrested the applicant was taken to a psychiatric clinic where he was seen by doctors.

However, there is no indication that an opinion as to whether or not the applicant needed to be detained for an examination was sought from the doctors who admitted him to the psychiatric hospital on 31 August 1995. The applicant's detention for an initial period of twenty days, later prolonged, had already been decided by a prosecutor on 27 January 1995, without the involvement of a medical expert.

It follows that the applicant was not reliably shown to be of unsound mind.

49. The Court therefore finds that the applicant's detention was not "the lawful detention ... of [a person] of unsound mind" within the meaning of Article 5 § 1 (e) as it was ordered without seeking a medical opinion.

50. Furthermore, the Court observes, like the Commission, that the Public Health Act, as in force at the relevant time, did not contain any provision empowering prosecutors to commit a person for compulsory confinement to a psychiatric clinic for the purpose of effecting a psychiatric examination.

...

60. The Court notes in this respect that the applicant's detention was ordered by a district prosecutor, who subsequently became a party to proceedings against him, seeking his psychiatric internment (see paragraphs 15 and 27 above). The district prosecutor's order was subject to appeal solely to higher prosecutors.

It cannot be considered, therefore, that the remedy required by Article 5 § 4 of the Convention was available to the applicant. That provision guarantees to every arrested or detained person the right to appeal to a court. The necessary supervision of lawfulness was thus neither incorporated in the initial decision for the applicant's detention nor ensured through the existing possibilities to appeal.

61. The Court therefore finds that there has been a violation of Article 5 § 4 of the Convention in that the applicant was deprived of his right to have the lawfulness of his detention reviewed by a court.

***Kress v. France* [GC], no. 39594/98, ECHR 2001-VI**

1) *Recapitulation of the relevant case-law*

64. The Court notes that on the points mentioned above the application raises, *mutatis mutandis*, issues similar to those examined by the Court in several cases concerning the role of the Advocate-General or similar officers at the Court of Cassation or Supreme Court in Belgium, Portugal, the Netherlands and France (see the following judgments: *Borgers*, *Vermeulen*, and *Lobo Machado*, cited above; *Van Orshoven v. Belgium*, 25 June 1997, *Reports* 1997-III; and *J.J. v. the Netherlands* and *K.D.B. v. the Netherlands*, 27 March 1998, *Reports* 1998-II; see also *Reinhardt and Slimane-Kaid*, cited above).

65. In all these cases the Court held that there had been a violation of Article 6 § 1 of the Convention on account of the failure to disclose in advance either the submissions of the officer concerned or those contained in the reporting judge's report and the impossibility of replying to them. The Court also points out that in *Borgers*, which concerned the role of the Advocate-General at the Court of Cassation in criminal proceedings, it held that there had been a breach of Article 6 § 1 of the Convention, principally because of the Advocate-General's participation in the Court of Cassation's deliberations, which had infringed the principle of equality of arms. Subsequently, the aggravating factor of the relevant officer's participation in the deliberations was taken into account only in *Vermeulen* and *Lobo Machado* (cited above, p. 234, § 34, and p. 207, § 32, respectively), in which it had been raised by the applicants; in all the other cases, the Court has emphasised the need to respect the right to adversarial procedure, noting that this entails the parties' right to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service.

Lastly, the Court points out that *Borgers*, *J.J. v. the Netherlands* and *Reinhardt and Slimane-Kaid* concerned criminal proceedings or ones with a criminal connotation. *Vermeulen*, *Lobo Machado* and *K.D.B. v. the Netherlands* were concerned with civil proceedings or ones with a civil connotation, while *Van Orshoven* concerned disciplinary procedures against a doctor.

2) *As to the alleged special character of the administrative courts*

66. None of those cases concerned a dispute brought before the administrative courts, and the Court must therefore consider whether the principles identified in its case-law as recapitulated above apply in the instant case.

67. It observes that since *Borgers*, cited above, all the governments have endeavoured to show before the Court that in their legal systems their advocates-general or principal State counsel were different from the Belgian *procureur général*, from the point of view both of organisation and of function. Their role was said, for instance, to differ according to the nature of the proceedings (criminal, civil or even disciplinary); they were said not to be parties to the proceedings or the adversaries of anyone; their independence was said to be guaranteed and their role limited to that of an *amicus curiae* acting in the public interest or to ensure that case-law was consistent.

68. The Government are no exception. They too maintained that the institution of Government Commissioner in French administrative proceedings differed from the other institutions criticised in the judgments cited above, because there was no distinction between the bench and State Counsel's Office within the administrative courts; because the Government Commissioner, from the point of view of his status, was a judge in the same way as all the other members of the *Conseil d'Etat*; and because, from the point of view of his function, he was in exactly the same position as the reporting judge, except that he expressed his opinion publicly but did not vote.

69. The Court accepts that, in comparison with the ordinary courts, the administrative courts in France display a number of special features, for historical reasons.

Admittedly, the very establishment and existence of administrative courts can be hailed as one of the most conspicuous achievements of a State based on the rule of law, in particular because the jurisdiction of those courts to adjudicate on acts of the administrative authorities was not accepted without a struggle. Even today, the way in which administrative judges are recruited, their special status, distinct from that of the ordinary judiciary, and the special features of the way in which the system of administrative justice

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works (see paragraphs 33-52 above) show how difficult it was for the executive to accept that its acts should be subject to review by the courts.

As to the Government Commissioner, the Court equally accepts that it is undisputed that his role is not that of a State counsel's office and that it is a *sui generis* institution peculiar to the organisation of administrative-court proceedings in France.

70. However, the mere fact that the administrative courts, and the Government Commissioner in particular, have existed for more than a century and, according to the Government, function to everyone's satisfaction cannot justify a failure to comply with the present requirements of European law (see *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, p. 19, § 36). The Court reiterates in this connection that the Convention is a living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 28).

71. No one has ever cast doubt on the independence or impartiality of the Government Commissioner, and the Court considers that his existence and institutional status are not in question under the Convention. However, the Court is of the view that the Commissioner's independence and the fact that he is not responsible to any hierarchical superior, which is not disputed, are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a fair trial.

Indeed, great importance must be attached to the part actually played in the proceedings by the Government Commissioner, and more particularly to the content and effects of his submissions (see, by analogy, among many other authorities, *Van Orshoven*, cited above, p. 1051, § 39).

3) As regards the non-disclosure of the Government Commissioner's submissions in advance and the impossibility of replying to them at the hearing

72. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, pp. 107-08, § 23).

73. Irrespective of the fact that in most cases the Government Commissioner's submissions are not committed to writing, the Court notes that it is clear from the description of the course of proceedings in the *Conseil d'Etat* (see paragraphs 40-52 above) that the Government Commissioner makes his submissions for the first time orally at the public hearing of the case and that the parties to the proceedings, the judges and the public all learn of their content and the recommendation made in them on that occasion.

The applicant cannot derive from the right to equality of arms that is conferred by Article 6 § 1 of the Convention a right to have disclosed to her, before the hearing, submissions which have not been disclosed to the other party to the proceedings or to the reporting judge or to the judges of the trial bench (see *Nideröst-Huber*, cited above, *ibid.*). No breach of equality of arms has therefore been made out.

74. However, the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see the following judgments, cited above: *Vermeulen*, p. 234, § 33; *Lobo Machado*, pp. 206-07, § 31; *Van Orshoven*, p. 1051, § 41; *K.D.B.*, p. 631, § 44; and *Nideröst-Huber*, p. 108, § 24).

75. As regards the fact that it is not possible for parties to reply to the Government Commissioner's submissions at the end of the hearing, the Court refers to *Reinhardt and Slimane-Kaid*, cited above. In that case the Court found a breach of Article 6 § 1 because the reporting judge's report, which had been disclosed to the Advocate-General, had not been communicated to the parties (*ibid.*, pp. 665-66, § 105). On the other hand, with respect to the Advocate-General's submissions, the Court stated:

*“The fact that the Advocate-General's submissions were not communicated to the applicants is likewise questionable.*

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*Admittedly, current practice is for the Advocate-General to inform the parties' lawyers no later than the day preceding the hearing of the tenor of his submissions and in cases where, at the request of the lawyers, there is an oral hearing, they are entitled to reply to his submissions orally and by a note sent to the court in deliberations ... In the light of the fact that only questions of pure law are argued before the Court of Cassation and that the parties are represented in that court by highly specialised lawyers, that practice affords parties an opportunity of apprising themselves of the Advocate-General's submissions and commenting on them in a satisfactory manner. It has not, however, been shown that such a practice existed at the material time."* (p. 666, § 106)

76. Contrary to the position in *Reinhardt and Slimane-Kaïd*, it is not disputed that in proceedings in the *Conseil d'Etat* lawyers who so wish can ask the Government Commissioner, before the hearing, to indicate the general tenor of his submissions. Nor is it contested that the parties may reply to the Government Commissioner's submissions by means of a memorandum for the deliberations, a practice which – and this is vital in the Court's view – helps to ensure compliance with the adversarial principle. That was in fact what the applicant's lawyer did in the instant case (see paragraph 26 above).

Lastly, in the event of the Government Commissioner's raising orally at the hearing a ground not raised by the parties, the presiding judge would adjourn the case to enable the parties to present argument on the point (see paragraph 49 above).

That being so, the Court considers that the procedure followed in the *Conseil d'Etat* affords litigants sufficient safeguards and that no problem arises from the point of view of the right to a fair trial as regards compliance with the principle that proceedings should be adversarial.

There has consequently been no violation of Article 6 § 1 of the Convention in this respect.

4) *As regards the presence of the Government Commissioner at the Conseil d'Etat's deliberations*

77. The Court notes that the Government's approach to this question is to say that since the Government Commissioner is a full member of the trial bench, on which he functions, in a manner of speaking, like a second reporting judge, there should be no objection to his attending the deliberations or even to his voting.

78. The fact that a member of the trial bench has publicly expressed his view of a case could then be regarded as contributing to the transparency of the decision-making process. This transparency is likely to promote a more willing acceptance of the decision by litigants and the public inasmuch as the Government Commissioner's submissions, if they are accepted by the trial bench, constitute a kind of commentary on the judgment. Where they are not so accepted and the Government Commissioner's submissions are not reflected in the decision adopted in the judgment, they constitute a kind of dissenting opinion which will provide food for thought for future litigants and legal writers.

Furthermore, this public presentation of a judge's opinion would not breach the duty of impartiality inasmuch as the Government Commissioner, during the deliberations, is only one judge among others and his view cannot affect the decision of the other judges where he is in a minority, whatever type of bench is considering the case (section, combined sections, Division or Assembly). It should also be noted that in the instant case the applicant did not in any way call in question the Government Commissioner's subjective impartiality or independence.

79. However, the Court observes that this approach is not consistent with the fact that although the Government Commissioner attends the deliberations, he has no right to vote. The Court considers that by forbidding him to vote, on the ground that the secrecy of the deliberations must be preserved, domestic law considerably weakens the Government's argument that the Government Commissioner is truly a judge, as a judge cannot abstain from voting unless he stands down. Moreover, it is hard to accept the idea that some judges may express their views in public while the others may do so only during secret deliberations.

80. Furthermore, in examining, above, the applicant's complaint concerning the failure to disclose the Government Commissioner's submissions in advance and the impossibility of replying to him, the Court accepted that the role played by the Commissioner during administrative proceedings requires procedural safeguards to be applied with a view to ensuring that the adversarial principle is observed (see paragraph 76 above). The reason why the Court concluded that there had been no violation of Article 6 on this point was not the Commissioner's neutrality *vis-à-vis* the parties but the fact that the applicant enjoyed sufficient safeguards to counterbalance the Commissioner's power. The Court considers that that finding is also relevant to the complaint concerning the Government Commissioner's participation in the deliberations.

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ANNEX

81. Lastly, the doctrine of appearances must also come into play. In publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the Government Commissioner could legitimately be regarded by the parties as taking sides with one or other of them.

In the Court's view, a litigant not familiar with the mysteries of administrative proceedings may quite naturally be inclined to view as an adversary a Government Commissioner who submits that his appeal on points of law should be dismissed. Conversely, a litigant whose case is supported by the Commissioner would see him as his ally.

The Court can also imagine that a party may have a feeling of inequality if, after hearing the Commissioner make submissions unfavourable to his case at the end of the public hearing, he sees him withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers (see, *mutatis mutandis*, *Delcourt*, cited above, pp. 16-17, § 30).

82. Since *Delcourt*, the Court has noted on numerous occasions that while the independence and impartiality of the Advocate-General or similar officer at certain supreme courts were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances (see *Borgers*, cited above, p. 31, § 24).

It is for this reason that the Court has held that regardless of the acknowledged objectivity of the Advocate-General or his equivalent, that officer, in recommending that an appeal on points of law should be allowed or dismissed, became objectively speaking the ally or opponent of one of the parties and that his presence at the deliberations afforded him, if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction (see *Borgers*, *Vermeulen* and *Lobo Machado*, cited above, pp. 31-32, § 26, p. 234, § 34, and p. 207, § 32, respectively).

83. The Court sees no reason to depart from the settled case-law referred to above, even though it is the Government Commissioner who is in issue, whose opinion does not derive its authority from that of a State counsel's office (see, *mutatis mutandis*, *J.J.* and *K.D.B.*, cited above, pp. 612-13, § 42, and p. 631, § 43, respectively).

84. The Court also observes that it was not argued, as in *Vermeulen* and *Lobo Machado*, that the Government Commissioner's presence was necessary to help ensure the consistency of case-law or to assist in the final drafting of the judgment (see, *mutatis mutandis*, *Borgers*, cited above, p. 32, § 28). It is clear from the Government's explanations that the presence of the Government Commissioner is justified by the fact that, having been the last person to have seen and studied the file, he will be in a position during the deliberations to answer any question which might be put to him about the case.

85. In the Court's opinion, the benefit for the trial bench of this purely technical assistance is to be weighed against the higher interest of the litigant, who must have a guarantee that the Government Commissioner will not be able, through his presence at the deliberations, to influence their outcome. That guarantee is not afforded by the current French system.

86. The Court is confirmed in this approach by the fact that at the Court of Justice of the European Communities the Advocate General, whose role is closely modelled on that of the Government Commissioner, does not attend the deliberations (Article 27 of the Rules of Procedure of the Court of Justice).

87. In conclusion, there has been a violation of Article 6 § 1 of the Convention on account of the Government Commissioner's participation in the deliberations of the trial bench.

### ***Platakou v. Greece*, no. 38460/97, ECHR 2001-I**

45. The Government observed that the State is represented judicially by a State body, namely the State Legal Council, whose staff take their annual holidays as required during the judicial vacation period. Thus, during that period, the State functioned with a reduced staff. Litigants and their representatives, on the other hand, were free to decide on their holiday periods and to defend their interests effectively during such periods. It was therefore right that time should not run against the State during the judicial vacation.

46. The applicant replied that it was precisely because the State Legal Council was a State body that continuity of service was assured, even during the judicial vacation. She said that, like agents of the State, litigants and their lawyers took their holidays in the summer.

47. The Court reiterates that the principle of equality of arms is part of the wider concept of a fair hearing. It implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 33).

48. In the instant case, the Court observes that, had time ceased to run against the applicant also, her application for the assessment of the final unit amount for compensation would not have been deemed to be outside the statutory time-limit. It accordingly finds that she was at a substantial disadvantage compared to the State.

### ***APBP v. France*, no. 38436/97, 21 March 2002**

26. Pour ce qui est de l'impossibilité pour les parties de répondre aux conclusions du commissaire du Gouvernement à l'issue de l'audience de jugement, la Cour a déjà relevé qu'à la différence de l'affaire Reinhardt et Slimane-Kaïd (arrêt c. France du 31 mars 1998, *Recueil* 1998-II), il n'est pas contesté que dans la procédure devant le Conseil d'État, les avocats qui le souhaitent peuvent demander au commissaire du Gouvernement, avant l'audience, le sens général de ses conclusions. Il n'est pas davantage contesté que les parties peuvent répliquer par une note en délibéré, aux conclusions du commissaire du Gouvernement, ce qui permet, et c'est essentiel aux yeux de la Cour, de contribuer au respect du principe du contradictoire. Enfin, au cas où le commissaire du Gouvernement invoquerait oralement lors de l'audience un moyen non soulevé par les parties, le président de la formation de jugement ajournerait l'affaire pour permettre aux parties d'en débattre (arrêt Kress précité, § 76).

27. Reste que, de l'avis de la Cour, le dépôt d'une note en délibéré contribue au respect du principe du contradictoire à certaines conditions. En particulier, les justiciables doivent pouvoir déposer une telle note indépendamment de la décision éventuelle du président d'ajourner l'affaire, tout en disposant d'un délai suffisant pour la rédiger. Par ailleurs, afin d'éviter tout litige quant à sa prise en compte par la haute juridiction administrative, la Cour estime que l'arrêt devrait expressément viser l'existence d'une note en délibéré, comme c'est déjà le cas s'agissant de la mention, dans les arrêts du Conseil d'État, de la requête ou du recours enregistré auprès de son secrétariat, des autres pièces du dossier et des interventions en audience publique (rapporteur, conseils des parties et commissaire du Gouvernement).

En l'espèce, la Cour relève que la société requérante n'a pas fait usage de la possibilité de déposer une note en délibéré, ce qu'elle ne saurait justifier par les seuls doutes qu'elle émet quant à une telle pratique.

Dans ces conditions, la Cour estime que la procédure suivie devant le Conseil d'État a offert suffisamment de garanties à la requérante et qu'aucun problème ne se pose sous l'angle du droit à un procès équitable pour ce qui est du respect du contradictoire.

Partant, il n'y a pas eu violation de l'article 6 § 1 de la Convention à cet égard.

### ***Blanco Callejas v. Spain* (dec.), no. 64100/00, 18 June 2002**

Dans la mesure où le requérant se plaint que seul le ministère public peut présenter des recours contre les décisions d'irrecevabilité prononcées par le Tribunal constitutionnel, la Cour relève qu'en droit espagnol, la tâche du ministère public dans la procédure d'*amparo*, est celle de défendre la légalité, les droits des citoyens, et l'intérêt public protégé par la loi. Il n'est donc pas partie à la procédure. En l'espèce, le fait que le ministère public n'ait pas présenté le recours mentionné, ne saurait porter atteinte au droit du requérant à l'équité de la procédure, qui a d'ailleurs bénéficié du principe du contradictoire tout au long de la procédure interne. Il s'ensuit que ce grief est manifestement mal fondé et doit être rejeté en application de l'article 35 § 4 de la Convention.

**Göç v. Turkey [GC], no. 36590/97, ECHR 2002-V**

55. The Court sees no reason to depart from the Chamber's finding that Article 6 § 1 was violated on account of the non-communication to the applicant of the Principal Public Prosecutor's opinion to the competent division of the Court of Cassation. In its judgment, the Chamber reasoned:

"33. The Court observes that the role of the Principal Public Prosecutor before the Court of Cassation was to advise on the merits of the appeals brought by the applicant and the Treasury. The Principal Public Prosecutor submitted in writing his view that the award of damages made by the first-instance court should be upheld. His opinion was accordingly intended to influence the outcome of the Court of Cassation's decision.

34. In the Court's opinion, having regard to the nature of the Principal Public Prosecutor's submissions and to the fact that the applicant was not given an opportunity to make written observations in reply there has been an infringement of the applicant's right to adversarial proceedings. That right means in principle the opportunity for the parties to a civil or criminal trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, such as the Principal Public Prosecutor in the instant case, with a view to influencing the court's decision (see, among many other authorities, *J.J. v. the Netherlands*, judgment of 27 March 1998, *Reports* 1998-II, p. 613, § 43).

35. It is true that the Principal Public Prosecutor also advised in favour of the rejection of the Treasury's appeal. However, while this neutral approach may have ensured equality of arms between the parties at the appeal stage it still remained the case that the applicant disputed the amount of damages awarded by the lower court. He was therefore entitled to have full knowledge of any submissions which undermined his prospects of success before the Court of Cassation."

...

56. In endorsing this reasoning, the Court disagrees with the Government's view that its ruling in *Kress*, cited above, taken together with their argument regarding the accessibility of the Principal Public Prosecutor's opinion should lead to a different conclusion. In *Kress* the Court reaffirmed its case-law on the scope of the right to an adversarial procedure in circumstances where the submissions of an independent legal officer in a civil or criminal case are not disclosed in advance to the parties and the latter have no possibility of replying to them. The Court referred in this judgment (*ibid.*, §§ 64-65), among other authorities, to *J.J. v. the Netherlands* relied on by the Chamber in its reasoning. Although it is true that the Court found no violation of Article 6 § 1 on the facts in *Kress*, it must be stressed that the circumstances of the instant case are different. In *Kress*, the Court noted that the Government Commissioner made his submissions for the first time orally at the public hearing of a case before the *Conseil d'Etat* and that the parties to the proceedings, the judges and the public all learned of their content and the recommendation made in them on that occasion (*ibid.*, § 73). Furthermore, in *Kress* it was not contested that a lawyer who so wishes can ask the Government Commissioner, before the hearing, to indicate the general tenor of his submissions and reply to the Commissioner's submissions by means of a memorandum and in the event of the latter raising orally at the hearing a ground not raised by the parties the presiding judge would adjourn the case to enable the parties to reply (*ibid.*, § 76). However, these safeguards were absent in the instant case given that the Court of Cassation considered the parties' grounds of appeal without holding an oral hearing.

57. As to the argument that the applicant could have consulted the case file at the Court of Cassation and obtained a copy of the Principal Public Prosecutor's opinion, the Court is of the view that this of itself is not a sufficient safeguard to ensure the applicant's right to an adversarial procedure. In its view, and as a matter of fairness, it was incumbent on the registry of the Court of Cassation to inform the applicant that the opinion had been filed and that he could, if he so wished, comment on it in writing. It appears to the Court that this requirement is not secured in domestic law. The Government have contended that the applicant's lawyer should have known that consultation of the case file was possible as a matter of practice. However, the Court considers that to require the applicant's lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file would amount to imposing a disproportionate burden on him and would not necessarily have guaranteed a real opportunity to comment on the opinion since he was never made aware of the timetable for the processing of the appeal (see, *mutatis mutandis*, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § 67). It notes in this connection that the opinion was drawn up on 17 October 1996 and submitted to the competent division on 21 October 1996 along with the case file. The division reached its decision on 7 November 1996.

58. Having regard to the above considerations, the Court, like the Chamber, finds that Article 6 § 1 has been violated on account of the non-communication to the applicant of the Principal Public Prosecutor's opinion.

**Yvon v. France, no. 44962/98, ECHR 2003**

29. Le requérant dénonce en premier lieu une rupture de l'égalité des armes entre les parties dans la procédure en fixation des indemnités d'expropriation, résultant de la position privilégiée dont jouirait le commissaire du Gouvernement.

30. La Cour relève que le commissaire du Gouvernement prend part à toutes les instances en fixation des indemnités devant les juridictions de l'expropriation. Il n'est pas membre de ces juridictions et ne participe pas au délibéré de la formation de jugement. Il est par ailleurs distinct du ministère public (articles R. 13-8 et R. 13-9 du code de l'expropriation) et de l'expropriant (il ne représente pas ce dernier et dépose des conclusions séparées).

Le commissaire du Gouvernement participe cependant entièrement à l'instance en fixation des indemnités devant ces juridictions : il prend part à la visite des lieux, à l'instar de l'exproprié et de l'expropriant (article R. 13-27 du code de l'expropriation), il « est entendu en ses observations et dépose ses conclusions », et il se prononce sur l'évaluation des indemnités d'expropriation (article R. 13-32 du code de l'expropriation) ; il reçoit notification du jugement de première instance (article R. 13-36 du code de l'expropriation) et peut interjeter appel contre ce jugement (articles R. 13-47 et R. 13-49 du code de l'expropriation).

La Cour en déduit que le commissaire du Gouvernement est « partie » à l'instance en fixation des indemnités, qualité que la haute juridiction administrative française lui reconnaît d'ailleurs (paragraphe 16 ci-dessus) et que, au demeurant, le Gouvernement ne lui dénie pas. Les modalités de sa participation à l'instance sont en conséquence susceptibles de poser une question sous l'angle du principe de l'égalité des armes.

31. La Cour rappelle que ce principe est l'un des éléments de la notion plus large de procès équitable, au sens de l'article 6 § 1 de la Convention. Il exige un « juste équilibre entre les parties » : chacune doit se voir offrir une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son ou ses adversaires (voir, parmi d'autres, les arrêts *Ankerl c. Suisse*, du 23 octobre 1996, *Recueil des arrêts et décisions* 1996-V, pp. 1567-1568, § 38, *Nideröst-Huber c. Suisse*, du 18 février 1997, *Recueil* 1997-I, pp. 107-108, § 23, et *Kress c. France* [GC], n° 39594/98, § 72, CEDH 2001-VI).

32. La Cour constate que le commissaire du Gouvernement a essentiellement pour mission de garantir le bon emploi des deniers publics et, à ce titre, de veiller notamment à ce que l'indemnité de dépossession allouée n'excède pas la valeur réelle des biens expropriés. Il défend donc des intérêts similaires à ceux défendus par l'expropriant, tendant vers une évaluation modérée des indemnités. Il est en outre parfois, comme en l'espèce, issu de la même administration, voire du même service départemental que le représentant de l'expropriant. Les fonctions de commissaire du Gouvernement sont en effet confiées au directeur des services fiscaux (domaine) du département dans lequel la juridiction de l'expropriation a son siège ou, par suppléance, à un autre fonctionnaire de cette administration (article R. 13-7 du code de l'expropriation). L'Etat expropriant est quant à lui, dans certains départements – dont la Charente-Maritime –, représenté par des fonctionnaires de la même direction départementale des services fiscaux (domaine) (articles R. 178 et R. 179 du code du domaine de l'Etat). Il peut ainsi se produire des situations où, comme cela semble avoir été le cas en l'espèce, le commissaire du Gouvernement est le supérieur hiérarchique du représentant de l'Etat expropriant, et où s'installe une certaine confusion entre ces deux parties.

Ces circonstances – que l'on y voie un dédoublement de la représentation des intérêts de la collectivité dans la procédure en fixation des indemnités ou le renforcement de la position d'une partie par l'intervention d'une autre – affaiblissent sans doute la position de l'exproprié. Elles ne suffisent cependant pas à elles seules à caractériser une méconnaissance du principe de l'égalité des armes. Il s'agit en effet d'une situation qui se produit couramment devant les juridictions des Etats membres du Conseil de l'Europe, soit que l'une des parties ait en face d'elle plusieurs parties principales défendant des intérêts similaires ou concomitants, soit que la partie adverse principale et une partie jointe défendent la même cause.

En d'autres termes, le fait qu'un point de vue semblable est défendu par plusieurs parties à une instance juridictionnelle ne met pas nécessairement la partie adverse dans une situation de « net désavantage » pour la présentation de sa cause.

33. Il reste à vérifier si, en l'espèce, au vu des modalités de la participation du commissaire du Gouvernement à l'instance, le « juste équilibre » qui doit régner entre les parties a été respecté.

34. Au cours de la procédure, les parties présentent chacune une évaluation du bien exproprié – c'est là le cœur des débats –, laquelle est fonction du marché immobilier. Pour ce faire, elles doivent soumettre au juge des termes de comparaison tirés de mutations immobilières effectives ; le juge retient, parmi les éléments soumis par les parties, ceux qui lui paraissent les plus représentatifs du marché immobilier.

Or, comme cela a été relevé plus haut, les fonctions de commissaire du Gouvernement sont confiées au directeur des services fiscaux (domaine) du département dans lequel la juridiction de l'expropriation a son siège ou, par suppléance, à un autre fonctionnaire de cette administration. A ce titre –comme d'ailleurs l'expropriant –, il a accès au fichier immobilier, sur lequel sont répertoriées toutes les mutations. L'exproprié, quant à lui, ne dispose que d'un accès restreint au fichier, celui-ci n'étant pas ouvert à la libre consultation des particuliers : ils ne peuvent recevoir d'informations et d'extraits qu'à la condition de bien circonscrire les références recherchées (article 39 du décret n° 55-1350 du 14 octobre 1955). Ainsi, déjà à ce stade, l'exproprié se trouve désavantagé par rapport à ses adversaires.

35. Par ailleurs, en première instance, aucun texte n'oblige le commissaire du Gouvernement, contrairement aux autres parties (articles R. 13-22 et R. 13-23 du code de l'expropriation), à notifier ses écritures ; il lui suffit de les déposer au greffe, et il n'est pas même tenu d'informer les autres parties de ce dépôt. Il prend en outre la parole en dernier, en appel comme en première instance (articles R. 13-31 et R. 13-32 du code de l'expropriation).

36. Enfin et surtout, en appel comme en première instance (article R. 15-53 du code de l'expropriation), les conclusions du commissaire du Gouvernement prennent un poids particulier lorsqu'elles tendent à une évaluation inférieure à celle proposée par l'expropriant.

Il résulte en effet de l'article R. 13-35 du code de l'expropriation que « le juge statue dans la limite des conclusions des parties (...) et de celles du commissaire du Gouvernement si celui-ci propose une évaluation inférieure à celle de l'expropriant » ; l'article R. 13-36 du même code ajoute que, dans un tel cas de figure, « [s]i le jugement écarte les conclusions du commissaire du Gouvernement (...), il doit indiquer spécialement les motifs de ce rejet ».

La Cour comprend l'esprit de cette règle et la logique sur laquelle elle repose : les fonctions de commissaire du Gouvernement sont confiées au directeur des services fiscaux (domaine), lequel, par ses attributions administratives, fiscales et domaniales, est rompu aux techniques de l'évaluation et de l'expertise immobilières, et a accès aux informations les plus pertinentes en la matière ; il apparaît ainsi comme le mieux placé pour éclairer le juge sur la valeur des biens expropriés, et intervient auprès de lui dans le cadre d'une sorte de mission d'« expertise ».

Il n'en reste pas moins que cette règle a pour effet de lier dans une grande mesure le juge, qui n'a pas nécessairement la même pratique de l'évaluation domaniale que le directeur des services fiscaux, qui ne peut désigner un autre expert en première instance (article R. 13-28 du code de l'expropriation) et qui ne peut faire procéder à une expertise en appel qu'« exceptionnellement (...) sur arrêt motivé » (article R. 13-52 du code de l'expropriation). L'exproprié a certes la possibilité de produire, à ses frais, sa propre expertise, mais le juge n'est pas tenu de la prendre en compte de la même manière que des conclusions du commissaire du Gouvernement.

A cela il faut ajouter que cette règle joue nécessairement en défaveur de l'exproprié, le juge n'étant pas obligé de motiver spécialement le rejet de conclusions du commissaire du Gouvernement contenant une évaluation supérieure à celle retenue par l'expropriant.

37. En résumé, dans la procédure en fixation des indemnités, l'exproprié se trouve confronté non seulement à l'autorité expropriante mais aussi au commissaire du Gouvernement ; le commissaire du Gouvernement et l'expropriant – lequel est dans certains cas représenté par un fonctionnaire issu des mêmes services que le premier – bénéficient d'avantages notables dans l'accès aux informations pertinentes ; en outre, le commissaire du Gouvernement, à la fois expert et partie, occupe une position dominante dans la procédure et exerce une influence importante sur l'appréciation du juge (voir, *mutatis mutandis*, *Bönisch c. Autriche*, arrêt du 6 mai 1985, série A n° 92). Selon la Cour, tout cela crée, au détriment de l'exproprié, un déséquilibre incompatible avec le principe de l'égalité des armes. Elle conclut en conséquence à une méconnaissance en l'espèce de ce principe et à une violation de l'article 6 § 1 de la Convention.

***F.W. v. France*, no. 61517/00, 31 March 2005**

25. Quant au grief pris en sa seconde branche, la Cour constate que le Gouvernement ne prétend pas que l'avocat général n'assista pas au délibéré. La Cour tient donc pour acquis que l'avocat général était présent au délibéré.

26. Ceci étant, elle rappelle que, sur le fondement notamment de la théorie dite « des apparences », elle a jugé contraire à l'article 6 § 1 la participation de l'avocat général au délibéré de la Cour de cassation de Belgique, avec voix consultative (arrêt *Borgers c. Belgique* du 30 octobre 1991, série A n° 214-B §§ 28-29, et arrêt *Vermeulen c. Belgique* du 20 février 1996, *Recueil* 1996-I, § 34), la présence du procureur général adjoint au délibéré de la Cour Suprême portugaise, quand bien même il n'y disposait d'aucune voix consultative ou autre (*Lobo Machado c. Portugal*, arrêt du 20 février 1996, *Recueil* 1996-I, § 32).

27. La Cour en déduit que la seule présence de l'avocat général au délibéré de la chambre civile de la Cour de cassation est incompatible avec l'article 6 § 1 de la Convention (voir arrêt *Slimane-Kaïd* (n° 2) *c. France*, n° 48943/99, § 20, 27 novembre 2003). Partant, il y a eu également violation de l'article 6 § 1 de ce fait.

***Cabezas Rectoret v. Spain* (dec.), no. 27228/03, 5 April 2005**

La Cour note qu'en droit espagnol, la tâche du ministère public dans la procédure d'*amparo* est celle de défendre la légalité, les droits des citoyens, et l'intérêt public protégé par la loi (article 47 § 2 de la Loi organique relative au Tribunal constitutionnel). Il n'est donc pas partie à la procédure du point de vue du droit interne (voir *mutatis mutandis*, *Blanco Callejas c. Espagne* (déc.), n° 64100/00, 18 juin 2002). En effet, conformément à la Loi organique relative au Tribunal constitutionnel, le ministère public ne participe pas au délibéré du recours d'*amparo* (la loi ne prévoit pas la possibilité de la tenue d'une audience publique à ce stade de la procédure), ni bénéficie d'une voix consultative auprès de la haute juridiction. Par ailleurs, dans l'affaire *Gorráiz Lizarraga et autres c. Espagne* (n° 62543/00, § 60, 27 avril 2004), la Cour conclut à la non-violation de l'article 6 § 1, au motif que le fait que la procédure portant sur la constitutionnalité d'une loi (devant le Tribunal constitutionnel) ne prévoit pas un échange des mémoires produites, ne constitue pas une violation du principe de l'égalité des armes. Dès lors, de l'avis de la Cour, le fait que la loi prévoit un délai commun de présentation d'observations lors du dépôt du recours d'*amparo*, ne saurait placer le requérant en situation de « net désavantage » par rapport au ministère public.

En conséquence, le grief doit être rejeté comme étant manifestement mal fondé, conformément à l'article 35 § 3 de la Convention.

***Roseltrans v. Russia*, no. 60974/00, 21 July 2005**

27. In the present case, the supervisory review of the judgment of 17 May 2000, which had become final and binding under Article 208 of the Code of Civil Procedure, was set in motion by the Moscow public prosecutor. The latter was not a party to the proceedings. He enjoyed the power to intervene by virtue of Articles 319 and 320 of the Code of Civil Procedure, and could exercise it without any time-limit. By its decision of 10 May 2001, the Presidium of the Moscow City Court quashed the judgment of 17 May 2000 and ordered a fresh examination of the case, putting forward reasons which appear to represent a view on the subject matter of the dispute which was not shared by the other domestic courts involved in determining the case (see paragraphs 12, 18 and 19 above). It is true that as a result of the fresh examination of the case the applicant's claims were granted by the judgment of the Commercial Court of Moscow of 25 March 2003. However, the applicant had to endure legal uncertainty for more than a year and ten months after the final judgment of 17 May 2000 was quashed.

28. The Court finds no reason to depart from its judgment in the aforementioned *Ryabykh* case. It concludes that the setting aside of the judgment of 17 May 2000 in supervisory review proceedings violated Article 6 § 1 of the Convention.

***Asito v. Moldova*, no. 40663/98, 8 November 2005**

46. Legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (*ibid.*, § 25).

47. In the present case the Court notes that the request for annulment was a procedure by which the Prosecutor General could challenge any final decision. The procedure was provided for in Article 38 § 3 of the Law on Economic Courts (see paragraph 38 above). Until 25 February 1998, the Prosecutor General could exercise this prerogative only within one year; however, any new final decision which resulted from such an exercise was likewise susceptible of being challenged with a request for annulment by the Prosecutor General. After that date, however, his power became unlimited in time (see paragraph 39 above).

48. The Court further notes that, by allowing the request lodged by the Prosecutor General under that power, the Appeal on Points of Law Chamber of the Economic Court and the Supreme Court of Justice set at naught two entire judicial processes which had ended in final and enforceable judicial decisions.

49. In applying the provisions of Article 38 § 3, the Appeal on Points of Law Chamber of the Economic Court and the Supreme Court of Justice infringed the principle of legal certainty. That action breached the applicant company's right to a fair hearing under Article 6 § 1 of the Convention (see *Brumărescu v. Romania* [GC], no. 28342/95, §§ 61 and 62, ECHR 1999-VII).

50. The Court does not attach decisive importance to the fact that at the time of the quashing of the final judgments, the Prosecutor General's power was limited in time because the time limit did not prevent him from repeating his challenge against any new judgment. Moreover, even that time limit was later abolished. In such circumstances, the system based on Article 38 § 3 cannot be regarded as being compatible with the rule of law.

51. There has thus been a violation of Article 6 § 1 of the Convention.

...

54. The Court notes that according to Article 5 (2) of the Code of Civil Procedure in force at the material time, the prosecutor could have initiated civil proceedings, *inter alia*, for the protection of the State's interest, or for annulment of acts and activities of corruption and protectionism. In the present case it can be argued that the State could have had an interest in the protection of small commercial enterprises from abuse by large companies. It would therefore appear that the Prosecutor General's application was in conformity with domestic law. Furthermore, there is no indication that the Prosecutor General enjoyed a dominant position in the proceedings (see paragraphs 24-31 above). The action introduced by him was subject to the same procedural provisions as any other action introduced by a private or legal person; it was subject to full judicial scrutiny and the applicant company could present its case in conditions that did not place it at a disadvantage vis-à-vis its opponent. It was only the Prosecutor General's subsequent intervention by way of a request for annulment that placed the applicant at disadvantage (see paragraphs 43-51 above).

55. There has thus been no violation of Article 6 § 1 of the Convention in this respect.

***Martinie v. France* [GC], no. 58675/00, ECHR 2006-VI**

50. In conclusion, whilst it is important not to lose sight of the procedural safeguards referred to by the Government that are available to public accountants who risk being surcharged, the Court considers that there is an imbalance detrimental to public accountants on account of State Counsel's position in the proceedings: unlike the accountant, he is present at the hearing, is informed beforehand of the reporting judge's point of view, hears the latter's submissions (and those of the counter-reporting judge) at the

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hearing, fully participates in the proceedings and can express his own point of view orally without being contradicted by the accountant; from that standpoint, it is irrelevant whether State Counsel is or is not regarded as a “party”, since he is in a position, for these reasons together with the authority conferred on him by his functions, to influence the bench’s decision whether to levy a surcharge in a manner that may be unfavourable to the accountant. In the Court’s view, that imbalance is accentuated by the fact that the hearing is not public and is therefore conducted in the absence of any scrutiny either by the accountant concerned or by the public.

The Court accordingly concludes that there has been a breach of Article 6 § 1 under this head.

...

53. The Court points out first of all that, although in the operative provisions (point 2) of the *Kress* judgment it held that there had been a breach of Article 6 § 1 of the Convention on account of the Government Commissioner’s “participation” in the *Conseil d’Etat*’s deliberations, in the main body of the judgment both that term (see paragraphs 80 and 87) and the term “presence” are used (title 4 and paragraphs 82, 84 and 85), or, alternatively, the terms “assistance”, “assists” or “attends the deliberations” (see paragraphs 77, 79, 81, 85 and 86). Nevertheless, it is clear from the facts of the case, the arguments submitted by the parties and the reasons given in the Court’s judgment, together with the operative part of the judgment, that the *Kress* judgment uses these terms as synonyms, and that the mere presence of the Government Commissioner at the deliberations, be it “active” or “passive”, is deemed to be a violation. Paragraphs 84 and 85, for example, are particularly enlightening in this respect: examining the Government’s argument that the “presence” of the Government Commissioner was justified by the fact that, having been the last person to have seen and studied the file, he would be in a position during the deliberations to answer any question which might be put to him about the case, the Court replied that the benefit for the trial bench of this purely technical assistance was to be weighed against the higher interest of the litigant, who had to have a guarantee that the Government Commissioner would not be able, through his “presence” at the deliberations, to influence their outcome, and found that that guarantee was not afforded by the French system.

This is, moreover, the sense that must be given to that judgment in the light of the Court’s case-law, as the Court has found a violation not only in respect of the participation, in an advisory capacity, of the advocate-general at the deliberations of the Belgian Court of Cassation (see *Borgers* and *Vermeulen*, cited above) but also the presence of the Deputy Attorney-General at the deliberations of the Portuguese Supreme Court even though he had no consultative or other type of vote (see *Lobo Machado*, cited above) and the mere presence of the advocate-general at the deliberations of the Criminal Division of the French Court of Cassation (see *Slimane-Kaïd (no. 2)*, cited above). That case-law is largely based on the doctrine of appearances and the fact that, like the Government Commissioner before the French administrative courts, the advocates-general and Attorney-General in question express their view publicly on the case prior to the deliberations.

54. That being so, the Court reiterates that while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases – even if, the Convention being first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

In the present case the Court does not find any reason to satisfy it that there is a need to depart from its decision in *Kress*.

55. Accordingly, there has, in the applicant’s case, been a breach of Article 6 § 1 of the Convention on account of the presence of the Government Commissioner at the deliberations of the bench of the *Conseil d’Etat*.

***Stankiewicz v. Poland*, no. 46917/99, ECHR 2006-VI**

46. The applicants complained that the refusal to reimburse the costs of litigation they had incurred in respect of the civil action which the prosecuting authorities had unsuccessfully brought against them was in breach of their right to a fair hearing as guaranteed by Article 6 of the Convention.

...

62. In that connection, the Court first notes that under Article 98 § 2 of the Polish Code of Civil Procedure the unsuccessful party in a civil case is normally obliged to reimburse the litigation costs to the successful party, provided that those costs were “necessary for the effective conduct of a case”.

63. The Court observes that the situation of the prosecutor in respect to litigation costs in Polish civil procedure constitutes an exception to this principle. Under Article 106 of the Code of Civil Procedure, the principle in question is not applicable when the prosecutor participates in civil proceedings in his or her capacity as guardian of the legal order.

64. The Court further notes the case-law of the Polish Supreme Court, according to which this provision is applicable only if the prosecutor joins a party in the course of the proceedings and not if he institutes them him or herself (see paragraph 34 above). It further notes that the Supreme Court also held that the term “State Treasury” used in Article 106 of the Code of Civil Procedure in no sense implied that an award of costs for or against the State Treasury was ruled out in situations in which the prosecuting authorities were acting in a civil case representing the financial interests of the State Treasury (see paragraph 35 above).

65. It is true that the Court’s power to review compliance with domestic law is limited (see, *mutatis mutandis*, *Fredin v. Sweden* (no. 1), judgment of 18 February 1991, Series A no. 192, pp. 16-17, § 50). Nevertheless, the Court observes, having regard to the case-law of the Supreme Court, that in the present case the exception referred to in paragraph 63 above was applied by the second-instance court. That court gave its decision in respect of costs without regard to the fact that Article 102 of the Code of Civil Procedure expressly stipulates that the court may order an unsuccessful party to civil proceedings to pay only a part of the litigation costs, or may exempt it altogether from the obligation to pay them, when the particular circumstances of the case justify such a decision.

66. The Court further notes that the case-law of the Supreme Court in this regard allows the courts to apply the relevant provisions of the Code of Civil Procedure in such a way as to mitigate the privileged position of the prosecuting authorities and thus better take account of the particular features of each individual case and the legitimate interests of the individual.

67. The Court observes that no such mitigation on the grounds of equity was available to the applicants under the decision of the appellate court. That court overturned the decision of the first-instance court in respect of costs only because the prosecuting authorities had been the opposing party in the civil case and despite the fact that the courts, in both the first and second-instance judgments, had found against the public prosecutor as to the merits.

68. The Court further notes that the prosecuting authorities enjoy *ab initio* a privileged position with respect to the costs of civil proceedings. In that connection, the Court also notes the applicants’ argument that the prosecuting authorities in any event have at their disposal legal expertise and ample financial means exceeding those available to any individual.

69. It is true that such a privilege may be justified for the protection of the legal order. However, it should not be applied so as to put a party to civil proceedings at an undue disadvantage vis-à-vis the prosecuting authorities.

70. Further, in the Court’s view, the general factual and legal background to the case should not be overlooked in the assessment of whether the applicants in the present case had a fair hearing within the meaning of Article 6 of the Convention. The Court recalls in this respect its judgment in *Broniowski v. Poland*, in which it found that there had been a violation of Article 1 of Protocol No. 1 to the Convention, originating in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the “right to credit” of Bug River claimants (see *Broniowski v. Poland* [GC], no. 31443/96, §§ 180-187, ECHR 2004-V).

71. In the present case, the Court notes that the applicants managed to have their “right to credit” for the property in Trembowla recognised by purchasing the property from the State Treasury in 1992 by auction. Subsequently, the legal certainty of the ownership they had thus acquired was threatened by the prosecutor’s civil action. Had the action of the prosecuting authorities been successful, the applicants would have had to reimburse the full price they had received when in 1994 they had sold to a third party the property purchased in exchange for their “right to credit” (see paragraph 18 above).

72. The Court further notes that expert opinions were commissioned by the first-instance court in order to establish the value of the property purchased by the applicants and of the abandoned property. The Court observes that the law did not determine the method of estimating the price of the abandoned property, as observed by the court in its judgment of 18 December 1997 (see paragraphs 14-15 above). Hence, it was left to the court to determine the values concerned, choosing a method which it judged best suited to the circumstances of the case, one which involved obtaining the opinion of experts in the valuation of real property.

73. Having regard to all these factors taken together (see paragraphs 70-72 above), the Court is of the view that the case before the civil courts was a complex one.

74. The Court is further of the opinion that in such circumstances, and having regard also to the substantial amount of money involved in the case, the applicants’ decision to have professional legal representation cannot be said to have been unwarranted.

75. The Court further considers that it was not shown by the Government that the legal fees incurred in the case were excessive. In particular, no evidence was adduced to demonstrate that the legal fees which the applicants paid for legal representation before two judicial instances were inconsistent with the legal fees charged at the relevant time in cases of a similar character. In the circumstances, the Court considers that the costs of professional legal assistance in the civil case were not incurred recklessly or without proper justification.

76. Having regard to the foregoing considerations and to the circumstances of the case as a whole, the Court concludes that there has been a violation of Article 6 § 1 of the Convention.

### ***Zlinsat, spol. s r.o., v. Bulgaria, no. 57785/00, 15 June 2006***

76. The Court notes that the Prosecutor’s Office is independent of the executive and that prosecutors enjoy the same tenure and immunities as do judges (see paragraph 33 above). However, that cannot be seen as dispositive, as an independent and impartial tribunal within the meaning of Article 6 § 1 exhibits other essential characteristics – such as the guarantees of judicial procedure (see *Bentham v. the Netherlands*, judgment of 23 October 1985, Series A no. 97, p. 18, § 43 *in limine*) – which are lacking here. It should firstly be noted in this connection that the Sofia City Prosecutor’s Office made the impugned decisions of its own motion, whereas a tribunal would normally become competent to deal with a matter if it is referred to it by another person or entity. Moreover, it appears that the making of the decisions did not have to be – and was, in fact, not – attended by any sort of proceedings involving the participation of the entity concerned, i.e. the applicant company. The law made no provision for the holding of hearings, and did not lay down any rules on such matters as the admissibility of evidence or the manner in which the proceedings were to be conducted (see *H.*, cited above, p. 35, § 53). Finally, it appears from the wording of the relevant legal provisions (see paragraphs 37 and 38 above) that the Sofia City Prosecutor’s Office enjoyed considerable latitude in determining what course of action to pursue, which appears hardly compatible with the notions of the rule of law and legal certainty inherent in judicial proceedings (see, *mutatis mutandis*, *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 82, ECHR 2002-VII).

77. It is true that appeals could be made against these decisions to the higher levels of the Prosecutor’s Office. However, they were the hierarchical superiors of the Sofia City Prosecutor’s Office (see, *mutatis mutandis*, *Bentham*, cited above, p. 18, § 43 *in fine*) and part and parcel of the same centralised system under the overall authority of the Chief Prosecutor (see paragraph 34 above; see also, *mutatis mutandis*, *Vasilescu v. Romania*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1075-76, § 40; and, as an example to the contrary, *H. v. Belgium*, cited above, p. 35, § 51). In this connection, the Court notes that it found, albeit in a different context, that similar appeals to the various levels of the Prosecutor’s Office were not an effective remedy under Article 13 of the Convention, as they were, *inter alia*, hierarchical (see *Djangozov v. Bulgaria*, no. 45950/99, § 56, 8 July 2004; and *Osmanov and Yuseinov*

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*v. Bulgaria*, nos. 54178/00 and 59901/00, § 39, 23 September 2004). Moreover, it appears that the appeals procedure was not attended by due procedural safeguards (see paragraph 42 above; and *H. v. Belgium*, cited above, p. 35, § 53).

78. The Court further notes that in its judgment in the case of *Assenov and Others v. Bulgaria* it found that Bulgarian prosecutors could not be considered as officers authorised by law to exercise judicial power, within the meaning of Article 5 § 3 of the Convention, as they could subsequently act in criminal proceedings against the person whose detention they had confirmed (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, pp. 2298-99, §§ 144-50). It considers that a similar rationale should apply in the present case. The decisions ordering the suspension of the performance of the privatisation contract and the applicant company's eviction from the hotel were made by the Sofia City Prosecutor's Office of its own motion. It then brought, in exercise of its powers under Article 27 § 1 of the CCP, a civil action against the company, seeking the annulment of that same privatisation contract (see paragraphs 8, 15 and 18 above). It could thus hardly be deemed as sufficiently impartial for the purposes of Article 6 § 1 (see, *mutatis mutandis*, *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326, p. 16, § 45). The same goes for the higher levels of the Prosecutor's Office, which upheld these decisions and subsequently acted against the applicant company in the proceedings before the Sofia Court of Appeals and the Supreme Court of Cassation (see paragraphs 23 and 24 above). The mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status or the status of independent and impartial actors (see, *mutatis mutandis*, *Merit v. Ukraine*, no. 66561/01, § 63, 30 March 2004).

79. In view of the foregoing, the Court concludes that the various prosecutor's offices involved cannot, in the circumstances, be regarded as independent and impartial tribunals providing the guarantees required by Article 6 § 1.

80. It follows that in order for the obtaining situation to be in compliance with that provision, the prosecutors' decisions should have been subject to review by a judicial body having full jurisdiction. However, the Court notes that domestic law, as is apparent from the wording of the relevant provisions and from their reading by the Supreme Administrative Court, excludes judicial review of prosecutors' decisions made in exercise of their powers under the provisions on which they relied in the instant case (see paragraphs 41 and 43 above).

81. Insofar as the respondent Government argued that the requisite degree of judicial scrutiny was afforded through the civil action brought by the Sofia City Prosecutor's Office against the applicant company, the Court notes that the Sofia City Court expressly refused to examine the lawfulness of the prosecutors' decisions in these proceedings (see paragraph 19 above). This was only natural, as the issue to be decided therein – whether the privatisation contract with the applicant company had been made under manifestly disadvantageous conditions – was entirely different from that of the lawfulness of the impugned prosecutors' decisions. Consequently, the courts did not touch upon that issue in their reasoning or in the operative provisions of their judgments. Therefore, the respondent Government's suggestion that these proceedings could in a way be regarded as an appeal against the Sofia City Prosecutor's Office's decisions cannot be accepted by the Court (see, *mutatis mutandis*, *Werner v. Austria*, judgment of 24 November 1997, *Reports* 1997-VII, p. 2511, § 49). It is true that after their completion the Sofia City Prosecutor's Office eventually stated that its decisions were no longer operative (see paragraphs 31 and 32 above). However, this was by no means a direct result of a binding decision of the courts in these proceedings.

82. The Court is similarly unable to accept the respondent Government's averment that judicial review was available in the form of an appeal against the prosecutors' decisions to a criminal court if and when the criminal proceedings would reach the judicial stage. The decisions in issue were not made in the context, but prior to the institution of any criminal proceedings, and the respondent Government did not provide any examples from the national courts' case-law which would indicate that they are indeed reviewable in such proceedings. On the contrary, it appears from the Supreme Administrative Court's jurisprudence that only a limited number of prosecutors' decisions made after the institution of criminal proceedings were reviewable by a court, pursuant to express provisions of the CCRP (see paragraph 43 above). The existence of an alleged judicial remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 6 § 1 (see *I.D. v. Bulgaria*, no. 43578/98, § 54, 28 April 2005; and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 106, 24 November 2005).

83. The Court thus finds that the prosecutors' decisions in the case at hand – which were decisive for the applicant company's use and possession of the hotel at least until the end of the civil action against it – were not subject to judicial scrutiny, as required by Article 6 § 1.

84. The final question which needs to be resolved is whether the impossibility to seek judicial review of these decisions was not warranted in terms of the inherent limitations on the right of access to a court implicit in Article 6 § 1 (see *Capital Bank AD*, cited above, § 109). The Court notes in this connection that the respondent Government did not advance any reasons justifying the lack of access to a court. The rationale applied by the Supreme Administrative Court in rejecting as inadmissible applications for judicial review of prosecutors' decisions was confined to arguments relating to the status of the Prosecutor's Office (see paragraph 43 above). However, as the Court found above, that Office cannot be seen as being an independent and impartial tribunal within the meaning of Article 6 § 1. In these circumstances, the Court finds no justifiable reasons for excluding judicial review of its decisions interfering, as in the present case, with civil rights and obligations.

85. There has therefore been a violation of Article 6 § 1 of the Convention.

### ***Paulík v. Slovakia*, no. 10699/05, ECHR 2006-XI (extracts)**

15. The applicant then requested the prosecution service to challenge his paternity under Article 62 of the Family Code. He maintained that he was not I.'s biological father and that the declaration of his paternity had been made in a final court judgment on the basis of expert evidence that corresponded to the state of scientific knowledge at that time. Although methods for establishing paternity had evolved and he had fresh proof that he was not I.'s father, he had no means, ordinary or extraordinary, available to him under the Family Code or the Code of Civil Procedure for bringing the legal position into line with the biological reality.

16. On 2 December 2004 the Bratislava V. District Prosecutor interviewed I. in connection with the applicant's motion. She stated, *inter alia*, that if the applicant did not want her to be his daughter, she had no objection to his denial of paternity.

...

26. After the expiry of the relevant six-month time-limit, paternity could still be challenged by the Prosecutor General if the interests of society so required (Article 62).

...

46. As to the general interest, it is to be noted that the applicant's putative daughter is currently almost 40 years old, has her own family and is not dependent on the applicant for maintenance (contrast with *Yildirim*, cited above). The general interest in protecting her rights at this stage has lost much of its importance compared to when she was a child. Furthermore, I. initiated the DNA test and said that she had no objection to the applicant's disclaiming paternity. It therefore appears that the lack of a procedure for bringing the legal position into line with the biological reality flies in the face of the wishes of those concerned and does not in fact benefit anyone (see *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297 C, p. 58, § 40).

47. In the light of the foregoing, the Court concludes that a fair balance has not been struck between the interests of the applicant and those of society and that there has, in consequence, been a failure in the domestic legal system to secure to the applicant "respect" for his "private life".

Under the applicable legislative framework, no allowance at all could be made for the specific circumstances of the applicant's case, such as, for example, the age, personal situation and attitude of I. and of the other parties concerned.

...

59. In the light of the above, the Court finds that there was no reasonable relationship of proportionality between the aim sought to be realised and the absolute means employed in the pursuit of it.

It follows that there has been a violation of Article 14, taken in conjunction with Article 8 of the Convention.

***Róžański v. Poland, no. 55339/00, 18 May 2006***

57. The applicant argued that, in the absence of the consent of D's mother, he could pursue two paths to have his legal paternity established. The first one was to have a paternity claim lodged on behalf of the child by a court appointed guardian. On 27 January 1995 the applicant had indeed requested the Gdańsk District Court that such guardian be appointed.

The second one had been a request to the prosecutor for a paternity action to be lodged on the applicant's behalf. The applicant had submitted such a request on 9 January 1995. However, on 9 May 1995 the prosecutor had refused to grant his request on the ground that his earlier request to have a guardian appointed had already been pending at that time and therefore it was not advisable for the prosecutor to consider his request to have the parallel proceedings instituted. This showed, in the applicant's submission, that under domestic law these two paths had been mutually exclusive, or at least had been so considered by the prosecution in the present case. The unfettered discretion that the prosecutor enjoyed as regards institution of paternity proceedings on behalf of a putative father had made it possible for the prosecution authorities to refuse to proceed with the examination of the applicant's request of 9 January 1995 in the light of the other set of proceedings already pending at that time.

58. The applicant further argued that on 8 August 1996 he had renewed his request to have a guardian appointed, but to no avail, because by then J.M. had already become D's legal father, following his acknowledgment of paternity which became effective on 15 July 1996. The authorities considered that the paternity action could not be have been instituted in respect of a child whose legal parentage had already been established.

59. The applicant submitted that another possibility he had would have been to request the prosecutor to institute an action for annulment of recognition of paternity by J.M. However, this action was not available to him personally and was entirely dependent on the prosecutor's discretionary decision.

...

75. As regards the period after 15 July 1996, when D. mother's new partner was recognised as his father following his declaration of 15 March 1996, the Court is of the view that the fact that the authorities enjoyed discretionary powers in deciding whether to institute proceedings in order to challenge the legal paternity established by way of a declaration of paternity by another man is not, in itself, open to criticism. The fact that the authorities had been vested with such discretionary powers was clearly designed to safeguard the best interest of a child in respect of whom paternity had already been recognised and, also, to balance the interests of both the child and the putative biological father.

76. The Court emphasises that when a decision to be given falls within the ambit of discretionary powers of competent authorities, the involvement of a person whose interests are at stake cannot, for obvious reasons, be attended by the same procedural guarantees as those applicable in judicial proceedings, in particular in the area as delicate as establishing a legal filiation with children. However, the Court observes that it has not been either shown or argued by the Government that the domestic law as it stood at the material time contained any guidance as to the way in which the discretion, with which the authorities had been vested by law, should be exercised.

77. In this connection, the Court notes that the prosecuting authorities and the courts reiterated in their decisions given after the child had been recognised by J.M. that the mere fact of this legal recognition by another man was sufficient to refuse the applicant's requests to have his biological paternity recognised (§§ 25, 28, 33 above).

While it was obviously reasonable to take into consideration the fact that the legal paternity of the child had already been established, in the Court's view, there were also other factual elements of the situation which should have been taken into account by the authorities examining the case. In this connection the Court notes that no steps were taken by the authorities to establish the actual circumstances of the child, the mother and the applicant or that any relevant evidence had been taken. It further observes that on no occasion was the applicant interviewed by the authorities in order to have his parental skills established and assessed by the authorities. The reasoning of the decisions given by the authorities was perfunctory, the mere reference to the recognition of paternity by J.M. being the only justification for their refusals to deal with the applicant's repeated requests.

78. In the Court's view, in the circumstances of the present case it would have been reasonable to expect that the authorities, when responding to the applicant's efforts after July 1996 to have J.M.'s paternity challenged, would consider the relative weight of, on the one hand, the interests of the applicant as a putative biological father and, on the other, of the child and the family that the recognition by J.M. had created. While the Court acknowledges that it can be surmised that the authorities, when giving their decisions after the child had been recognised by J. M. might not have wanted to disturb the legal relationship between the child and his mother's new partner, it is open to criticism that no examination of these interests against the factual background of a particular case has been effected or even considered. Moreover, it was not examined at all whether in the circumstances of the case the examination of the applicant's paternity would harm the child's interests or not.

Hence, in the Court's view, the manner in which the discretionary powers of the authorities were exercised in deciding whether to challenge legal paternity established by the declaration made by J.M. in July 1996 i.e. the absence of any steps taken to establish the actual circumstances of the case does not seem to have ensured that the rights and interests of the applicant have been given due consideration.

79. To sum up, when making the assessment of the case the Court had regard to the circumstances of the case seen as a whole. Hence, it has taken into consideration, firstly, the lack of any directly accessible procedure by which the applicant could claim to have his legal paternity established (see § 73 above). Secondly, the Court noted the absence, in the domestic law, of any guidance as to the manner in which discretionary powers vested on the authorities in deciding whether to challenge legal paternity established by way of a declaration made by another man should be exercised (see § 76 above). Thirdly, the Court considered the perfunctory manner in which the authorities exercised their powers when dealing with the applicant's requests to challenge this paternity (see § 77 above). Having examined the manner in which all these elements taken together affected the applicant's situation, the Court concludes that, even having regard to the margin of appreciation left to the State, it failed to secure to the applicant the respect for his family life to which he is entitled under the Convention (*Mizzi v. Malta*, no. 26111/02 § 114, *mutatis mutandis*).

80. There has therefore been a violation of Article 8 of the Convention.

### ***Gregorio de Andrade v. Portugal*, no. 41537/02, 14 November 2006**

37. Se penchant sur le cas d'espèce, la Cour constate d'abord qu'il n'est pas contesté que le requérant s'est vu dans l'impossibilité matérielle de saisir l'assemblée plénière de la Cour suprême administrative, compétente en la matière, d'un recours en harmonisation de jurisprudence, compte tenu de la notification tardive, par l'agent du ministère public qui agissait en tant que son représentant dans la procédure litigieuse, de l'arrêt de la Cour suprême administrative du 5 juin 2002. En effet, lorsque le requérant reçut, le 15 juillet 2002, la lettre de l'agent du ministère public datée du 10 juillet 2002, ledit arrêt du 5 juin 2002 avait déjà acquis force de chose jugée, le délai d'introduction d'un recours en harmonisation de jurisprudence s'étant entre-temps écoulé. La question qui se pose en l'espèce est donc de savoir si cette omission de l'agent du ministère public peut avoir constitué, en tant que telle, une violation du droit d'accès au tribunal du requérant.

38. A cet égard, la Cour constate que les actes et omissions des agents du ministère public, agissant dans le cadre de leurs fonctions officielles, engagent, à n'en pas douter, la responsabilité de l'Etat. Ceci vaut également pour les cas dans lesquels, comme en l'occurrence, l'agent du ministère public est appelé à représenter un simple particulier en justice, une telle représentation étant exercée dans le cadre fixé par la réglementation nationale en la matière. La Cour rappelle à ce titre que les obligations qui incombent à l'Etat en vertu de la Convention peuvent être violées par toute personne exerçant une fonction officielle qui lui a été confiée (*Wille c. Liechtenstein* [GC], n° 28396/95, § 46, CEDH 1999-VII).

...

41. A supposer même cependant que tel était bien le cas, et que l'agent du ministère public était donc d'accord sur le contenu de l'arrêt du 5 juin 2002, il lui incombait alors de prévenir le requérant de sa décision de ne pas présenter un recours en harmonisation de jurisprudence, ce qui aurait permis à ce dernier de s'adresser à un avocat. En omettant de le faire en temps utile, le ministère public a ainsi empêché le requérant d'exercer un recours que ce dernier estimait important, voire déterminant, pour faire valoir ses droits de caractère civil et défendre ses arguments.

42. Un tel obstacle à l'exercice du droit de recours du requérant a porté atteinte à la substance même de son droit d'accès à un tribunal, garanti par l'article 6 § 1 de la Convention, sans que le Gouvernement ait avancé d'autres motifs pertinents pouvant justifier une telle limitation de ce droit.

***Peev v. Bulgaria, no. 64209/01, 26 July 2007***

44. In the present case, the Government did not seek to argue that any provisions had existed at the relevant time, either in general domestic law or in the governing instruments of the Prosecutor's Office, regulating the circumstances in which that office could, in its capacity as employer or otherwise, carry out searches in the offices of its employees outside the context of a criminal investigation. The interference was therefore not "in accordance with the law", as required by Article 8 § 2.

***Ferreira Alves v. Portugal (n° 3), no. 25053/05, 21 June 2007***

35. La Cour constate que dans les pièces en cause, le ministère public se prononça sur des questions importantes de fond comme de procédure. Ainsi, dans les pièces présentées les 3 et 30 mars 2000 – cette dernière soumise par le procureur général du district, c'est-à-dire le supérieur hiérarchique du procureur près le tribunal devant lequel se déroulait le litige – le ministère public se prononça sur une demande de récusation du procureur en cause, annexant par ailleurs à son acte plusieurs documents. Dans son acte du 9 juin 2000, le ministère public invita le juge à convoquer à l'audience des experts.

36. Aucune de ces pièces ne fut communiquée au requérant. Certes, le Gouvernement le souligne, l'on ne saurait dire que le ministère public – représenté par des magistrats indépendants – était en l'espèce une partie à la procédure. Il est vrai également que celle-ci portait sur des questions liées à l'autorité parentale et aux droits de visite sur un mineur, matière délicate dans laquelle l'intérêt de l'enfant revêt assurément une importance primordiale.

37. Il n'en demeure pas moins que le droit à une procédure contradictoire au sens de l'article 6 § 1, tel qu'interprété par la jurisprudence, « implique en principe le droit pour les parties à un procès de se voir communiquer et de discuter toute pièce ou observation présentée au juge, fût-ce par un magistrat indépendant, en vue d'influencer sa décision » (voir *J.J. c. Pays-Bas*, arrêt du 27 mars 1998, *Recueil* 1998-II, p. 613, § 43 *in fine*).

38. Vu sous cet angle, peu importe que le procureur soit ou non qualifié de « partie » dès lors qu'il est à même, surtout de par l'autorité que lui confèrent ses fonctions, d'influencer la décision du tribunal dans un sens éventuellement défavorable à l'intéressé (voir *Martinie c. France* [GC], n° 58675/00, § 50, CEDH 2006-VI).

39. Ces éléments suffisent à la Cour pour conclure à la violation de l'article 6 § 1 de ce chef.

***Menchinskaya v. Russia, no. 42454/02, 15 January 2009***

30. The Court reiterates that the principle of equality of arms is one element of the broader concept of fair trial, within the meaning of Article 6 § 1 of the Convention. It requires "a fair balance between the parties": each party must be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Yvon v. France*, no. 44962/98, § 31, ECHR 2003-V; *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, *Reports of Judgments and Decisions* 1997-I; and *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

31. Referring to its previous case-law on the role of public prosecutors outside the criminal field, the Court reiterates that in a number of cases it clarified that the mere presence of the prosecutor or comparable officer at the courts' deliberations, be it "active" or "passive", is deemed to be a violation of Article 6 § 1 of the Convention (see *Martinie v. France* [GC], no. 58675/00, § 53, ECHR 2006-VI). In many cases the Court has also examined whether the submissions of the advocate-general or similar officer have been communicated to the applicant/party and whether the parties have had the opportunity to reply to them (see *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports of Judgments and Decisions* 1996-I; *K.D.B. v.*

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*the Netherlands*, 27 March 1998, § 43, *Reports of Judgments and Decisions* 1998-II and *Göç v. Turkey* [GC], no. 36590/97, § 55, ECHR 2002-V).

32. The present case, however, raises different issues, since the prosecutor did not participate in the deliberations of the Krasnoyarsk Regional Court; moreover, his *protest* was communicated to the applicant and she used an opportunity to reply to the prosecutor's arguments. Nevertheless, the Court reiterates that since a prosecutor or comparable officer, in recommending that an appeal on points of law should be allowed or dismissed and thereby became the ally or opponent of the parties, his participation is likely to create a feeling of inequality to a party (see *Kress*, cited above, § 81; and *F.W. v. France*, no. 61517/00, § 27, 31 March 2005). In this context, the Court reiterates that while the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances (see *Borgers v. Belgium*, 30 October 1991, § 24, Series A no. 214-B).

33. The Court considers that whether regarded as a sharing out of representation of the State's interests or as a strengthening of the Employment Centre's position, the Prosecutor's Office intervention undoubtedly weakened the applicant's position (see, *mutatis mutandis*, *Yvon*, cited above, § 32). However, the fact that a similar point of view is defended before a court by several parties does not necessarily place the opposing party in a position of "substantial disadvantage" when presenting his case. It remains to be ascertained whether, in the instant case, in view of the prosecutor's participation in the proceedings, the "fair balance" that ought to prevail between the parties was respected (*ibid.*)

34. To address this issue the Court will use the opinion of the European Commission for Democracy through Law or "Venice Commission" (see paragraph 21) as it did in a number of judgments (see, among other authorities, *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, §§ 70-73, 11 January 2007; *Basque Nationalist Party – Iparralde Regional Organisation v. France*, no. 71251/01, §§ 45-52, 7 June 2007, ECHR 2007-II; and *Çiloğlu and Others v. Turkey*, no. 73333/01, § 17, 6 March 2007). The Court emphasises that it has often used for the purpose of interpreting the scope of the rights and freedoms guaranteed by the Convention intrinsically non-binding instruments of Council of Europe organs to support its reasoning by reference to norms emanating from these organs (see, *mutatis mutandis*, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 74-75, 12 November 2008). It therefore proposes to examine whether in the present case the acts of the Prosecutor's Office were compatible with proposed European standards for the Public Prosecutor's office functioning in a State governed by the rule of law (see paragraph 20 above).

35. The parties to civil proceedings are plaintiff and defendant, who have equal rights, including the right to legal aid. Support by the Prosecutor's Office of one of the parties may undoubtedly be justified in certain circumstances, for example the protection of rights of vulnerable groups – children, disabled people and so on – who are assumed unable to protect their interests themselves, or where numerous citizens are affected by the wrongdoing concerned, or where State interests need to be protected.

36. The applicant's adversary in the proceedings in question was the State body which itself lodged an appeal against the first-instance court's judgment, complaining that domestic law had been wrongfully applied. As the Government underlined, the prosecutor in his *protest* raised the same issues of interpretation of domestic legislation as the Employment Centre did. In fact, no well-founded, recognisable aim or public interest has been specified by the Government for the prosecutor's interference.

37. The Court considers that while the Norilsk Town Prosecutor had legal grounds under the domestic legislation to join the proceedings, the instant case did not present any special circumstances justifying his intervention.

38. The Court sees no reason to speculate on what effect such intervention may have had on the course of the proceedings; however it finds that the mere repeating by the prosecutor of the Employment Centre's arguments on points of law, unless it aimed at influencing the court, appeared meaningless. In this respect the Court also refers to the Parliamentary Assembly's Resolution 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law (see paragraph 19 above), which provides that none of the roles of prosecutors should give rise to any conflict of interest or act as a deterrent to individuals seeking state protection of their rights.

39. Further noting that only the prosecutor, but not the parties, had submitted his arguments orally before the Krasnoyarsk Regional Court, the Court concludes that the prosecutor's intervention in the appeal

proceedings on the applicant's claim undermined the appearances of a fair trial and the principle of equality of arms.

40. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

### ***Batsanina v. Russia*, no. 3932/02, 26 May 2009**

22. The Court reiterates that the principle of equality of arms is one element of the broader concept of fair trial, within the meaning of Article 6 § 1 of the Convention. It requires "a fair balance between the parties", each party must be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Yvon v. France*, no. 44962/98, § 31, ECHR 2003-V; *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, *Reports of Judgments and Decisions* 1997-I; and *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

23. Referring to its previous case-law on the role of public prosecutors outside the criminal law field, the Court reiterates that in a number of cases it has clarified that the mere presence of the prosecutor or comparable officer at the courts' deliberations, be it "active" or "passive", is deemed to be a violation of Article 6 § 1 of the Convention (see *Martinie v. France* [GC], no. 58675/00, § 53, ECHR 2006-VI). In other cases the Court has also examined whether the submissions of the advocate-general or similar officer have been communicated to the applicant/party and whether the parties have had the opportunity to reply to them (see *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports of Judgments and Decisions* 1996-I; *K.D.B. v. the Netherlands*, 27 March 1998, § 43, *Reports of Judgments and Decisions* 1998-II and *Göç v. Turkey* [GC], no. 36590/97, § 55, ECHR 2002-V).

24. The present case, however, raises different issues, since the prosecutor did not participate in the judicial deliberations; his lawsuit was communicated to the applicant and she used the opportunity given to her to reply to the prosecutor's arguments. Nevertheless, the Court reiterates that since a prosecutor or comparable officer, in undertaking the status of a procedural plaintiff, becomes in effect the ally or opponent of one of the parties, his participation was capable of creating a feeling of inequality in respect of one of the parties (see *Kress*, cited above, § 81, and *F.W. v. France*, no. 61517/00, § 27, 31 March 2005). In this context, the Court reiterates that while the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances (see *Borgers v. Belgium*, 30 October 1991, § 24, Series A no. 214-B).

25. The Court considers that the fact that a similar point of view is defended before a court by several parties or even the fact that the proceedings were initiated by a prosecutor does not necessarily place the opposing party in a position of "substantial disadvantage" when presenting her case. It remains to be ascertained whether, in the instant case, in view of the prosecutor's participation in the proceedings, the "fair balance" that ought to prevail between the parties was respected.

26. The Court points out that its task is not to review the relevant domestic law and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of Article 6 § 1 in the present case (see, among other authorities, *Padovani v. Italy*, 26 February 1993, § 24, Series A no. 257-B, and *Hauschildt v. Denmark*, 24 May 1989, § 45, Series A no. 154). Article 6 § 1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision (see, among other authorities, *Sürmeli v. Germany* [GC], no. 75529/01, § 129, ECHR 2006-VII). In order to determine whether the acts of the prosecutor's office in the present case were compatible with Article 6 § 1 of the Convention, the Court has had regard to relevant Council of Europe documents (see paragraphs 15 and 16 above).

27. It is noted that the parties to civil proceedings, the plaintiff and the respondent, should have equal procedural rights. The Court does not exclude that support by the prosecutor's office of one of the parties may be justified in certain circumstances, for instance for the protection of vulnerable persons who are assumed to be unable to protect their interests themselves, or where numerous citizens are affected by the wrongdoing concerned, or where identifiable State assets or interests need to be protected. The Court notes in that connection that the applicant's opponent in the proceedings in question was a State-owned organisation (compare *Yavorivskaya v. Russia*, no. 34687/02, § 25, 21 July 2005). There was also a private person who had a vested interest in the outcome of the proceedings. Although both the Oceanology

Institute and Mr M were represented in the proceedings, the Court considers that the public prosecutor acted in the public interest when he brought proceedings against the applicant and her husband (compare *Menchinskaya v. Russia*, no. 42454/02, §§ 37-40, 15 January 2009). The applicant and her husband were also represented by counsel and made both written and oral submissions to the first-instance court. It was not shown that the prosecutor's decision to initiate civil proceedings had no legal basis under Russian law, or that this decision fell outside the scope of his discretion to bring proceedings on account of the particular circumstances of the case (see paragraphs 11 and 12 above). In the circumstances of the case there is no reason to believe that the institution of the civil proceedings by the public prosecutor was meant or had the effect of unduly influencing the civil court or preventing the applicant from bringing an effective defence (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 67, ECHR 2005-II). Thus, in the Court's opinion, the principle of the equality of arms, requiring a fair balance between the parties, was respected in the present case.

28. There has accordingly been no violation of Article 6 § 1 of the Convention.

### ***Korolev v. Russia (no. 2)*, no. 5447/03, 1 April 2010**

35. Turning to the circumstances of the present case, the Court observes at the outset that the applicant does not complain before the Court about the domestic courts' refusal to examine his action. Instead, the thrust of his complaint is on the public prosecutor's intervention at the appellate stage of those proceedings.

36. The Court notes that the applicant's opponents in the proceedings in question were State agencies. Their interests before national courts were defended by their representatives, at least one of whom was a lawyer. The prosecutor chose to support their position in the appeal proceedings. It appears that in his final statement at the closure of the hearing he upheld the first instance court's conclusions concerning the application of the statutory time-limit in the case.

37. In the present case, the Court does not discern any particular reason which would justify the prosecutor's participation in the appeal hearing in an ordinary civil case. It does not transpire that the prosecutor intended, for instance, to protect any identifiable State assets or interests at stake (see, by contrast, *Batsanina*, cited above, § 27). While it is uncontested that the prosecutor confined his participation in the proceedings to a mere statement of approval of the first-instance decision concerning the application of the statutory time-limit, the Court sees no reason to speculate on what effect such intervention may have had on the course of the proceedings. However it finds that the mere repeating by the prosecutor of the respondents' arguments on points of law, unless it aimed at influencing the court, appeared meaningless (see *Menchinskaya*, cited above, § 38). The foregoing considerations have led the Court to conclude that the principle of the equality of arms, requiring a fair balance between the parties, was not respected in the present case.

38. There has accordingly been a violation of Article 6 § 1 of the Convention.

### ***Ewert v. Luxembourg*, no. 49375/07, § 98, 22 July 2010**

98. Notant d'emblée que le requérant n'a pas soulevé ce grief devant la Cour de cassation, la Cour estime en tout état de cause que le fait que le délai pour le dépôt du mémoire soit plus restrictif pour les parties privées que pour le ministère public, qui se trouve d'ailleurs dans une situation différente, n'a pas privé la partie requérante d'un procès équitable (*mutatis mutandis*, *Guigue et SGEN-CFDT c. France*, no 59821/00, 6 janvier 2004). La différence des délais n'a entraîné, en l'espèce, aucune différence sur la situation du requérant (a contrario, *Wynen c. Belgique*, no 32576/96, § 32, CEDH 2002-VIII), de sorte que la Cour ne relève aucune apparence de violation de la disposition invoquée.

### ***Moldovan and Others v. Romania (dec.)*, no. 8229/04 and other applications, §§ 153-155, 15 February 2011**

153. The Court notes from the outset that some of the applicants raised this complaint after their cases had been communicated to the respondent Government. However, even assuming that all applicants would

have raised this complaint prior to communication, the Court notes that Article 45 of the Romanian Code on Civil Procedure provides in the case of minor or incapacitated individuals that the Public Prosecutor's Office "can" lodge a civil action if it considers that an action is required for the protection of the rights and best interest of the minor or incapacitated person. Consequently, the Public Prosecutor's Office does not have a legal obligation to lodge proceedings in order to protect all minors and incapacitated people in general. It is simply legally possible to exercise such a right, which it did not consider necessary in the applicants' case.

154. At the same time the Court observes that all the applicants had parents or legal representatives who were either themselves parties to the proceedings or could have introduced the applicants as parties to the civil proceedings, but who failed to do so. Consequently, the Court considers that no restriction was imposed on the applicants' right of access to court.

155. Having regard to the above, the Court considers that the applicants' complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

### ***Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 79- 84, 2 November 2010**

79. In the Court's opinion, the mere reopening of the case was not sufficient to deprive the applicant of his victim status. This view is closely linked to the particular features of the Russian system of supervisory review, as it was at the material time (see paragraphs 42-45 above). In the first place, there were no limits as to the number of times and the circumstances in which the case could be reopened. Second, reopening depended on the discretion of the State prosecutor or judge who decided whether a supervisory-review complaint or application deserved to be examined on the merits. Whether it was a prosecutor lodging an application for reopening or the president of the court reversing a decision of a judge not to entertain a supervisory-review complaint, the decision might be taken *proprio motu*. This would make it possible for the respondent State to evade the Court's substantive review by continuously reopening the proceedings.

80. Such a possibility was not only theoretical. In a number of Russian cases domestic criminal proceedings were reopened shortly after the communication of a case to the Government, but many months or even years after the closure of the original case – see, among other examples, the cases of *Zaytsev v. Russia*, no. 22644/02, §§ 9-11, 16 November 2006; *Laryagin and Aristov v. Russia*, nos. 38697/02 and 14711/03, §§ 18-19, 8 January 2009; *Sibgatullin v. Russia*, no. 32165/02, § 13, 23 April 2009; *Baklanov v. Russia* (dec.), no. 68443/01, 6 May 2003; *Mikadze v. Russia* (dec.), no. 52697/99, 3 May 2005; *Gorodnichev v. Russia* (dec.), no. 52058/99, 3 May 2005; *Fedorov v. Russia* (dec.), no. 63997/00, 6 October 2005; *Fedosov*, cited above; and *Makhkyagin v. Russia* (dec.), no. 39537/03, 1 October 2009. Similar examples can be found in the case-law concerning the use of supervisory review in civil cases (see, for instance, *Ryabykh v. Russia*, no. 52854/99, ECHR 2003-IX and follow-up cases). These cases demonstrate a clear link between the communication and the reopening of a case.

81. Further, in certain cases the connection between communication of the case and the reopening has been even more evident. Thus, in the case of *Nurmagomedov v. Russia* ((dec.), no. 30138/02, 16 September 2004) it was not until the European Court intervened that the prosecutor lodged an application for supervisory review of a court's ruling, whereas earlier the same prosecutor had dismissed the applicant's complaint about that very ruling saying that it had been "well-reasoned and lawful". In the case of *Adzhigovich* (cited above, §§ 11 and 12) the applicant's numerous supervisory-review appeals had been rejected several times prior to communication of the case, whereas the same appeals were accepted for examination after the case had been communicated to the respondent Government. Finally, in the present case the applicant's own efforts to obtain supervisory review of the first judgment were futile until such time as the Prosecutor General's office felt compelled to intervene following notification that the applicant had turned to this Court for redress (see paragraphs 24 and 25 above).

82. Against this background the Court has reached the following conclusion. Domestic proceedings are frequently reopened at the instigation of the Russian authorities when they learn that the case has been admitted for examination in Strasbourg. Sometimes it benefits the applicant, in which case the reopening serves a useful purpose. However, given the ease with which the Government uses this procedure, there is also a risk of abuse. If the Court were to accept unconditionally that the mere fact of reopening the proceedings was to have the automatic effect of removing the applicant's victim status, the respondent State would be capable of thwarting the examination of any pending case by having repeated recourse to

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supervisory-review proceedings, rather than correcting the past violations by giving the applicant a fair trial.

83. The Court considers that the reopening of proceedings by itself may not automatically be regarded as sufficient redress capable of depriving the applicant of his victim status. To ascertain whether or not the applicant retained his victim status the Court will consider the proceedings as a whole, including the proceedings which followed the reopening. This approach enables a balance to be struck between the principle of subsidiarity and the effectiveness of the Convention mechanism. On the one hand, it allows the States to reopen and examine anew criminal cases in order to put right past violations of Article 6 of the Convention. On the other hand, new proceedings must be conducted expeditiously and in accordance with the guarantees of Article 6 of the Convention. With this approach the supervisory review can no longer be employed as a means of evading the Court's review thereby preserving the effectiveness of the right of individual petition.

84. In sum, the Court finds that the mere reopening of the proceedings by way of supervisory review failed to provide appropriate and sufficient redress for the applicant. He may therefore still claim to be a victim within the meaning of Article 34 of the Convention. The Court therefore rejects the Government's objections under this head. It must now examine whether the hearing of 29 November 2007 was compatible with the requirements of fairness.