



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

GRAND CHAMBER

CASE OF BOULOIS v. LUXEMBOURG

(Application no. 37575/04)

JUDGMENT

STRASBOURG

3 April 2012

In the case of Boulois v. Luxembourg,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Boštjan M. Zupančič,
Elisabet Fura,
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Ganna Yudkivska,
Vincent A. De Gaetano, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 31 August 2011 and 22 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 37575/04) against the Grand Duchy of Luxembourg lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Thomas Boulois (“the applicant”), on 16 October 2004.

2. The applicant was represented by Mr O. Lang, a lawyer practising in Luxembourg. The Luxembourg Government (“the Government”) were represented by their counsel, Mr N. Decker, a lawyer practising in Luxembourg.

3. The applicant alleged, in particular, that he had been deprived of his right to a fair hearing and his right of access to a court in connection with the decisions refusing his requests for prison leave.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Dean Spielmann, the judge elected in respect of Luxembourg, withdrew from sitting in the case (Rule 28) and the

respondent Government waived their right to appoint a replacement. A Chamber of that Section accordingly appointed Françoise Tulkens, the judge elected in respect of Belgium, to sit in his place (Article 26 § 4 of the Convention and Rule 29 §§ 1 and 2). On 7 December 2006 a Chamber of the same Section, composed of Christos Rozakis, President, Loukis Loucaides, Françoise Tulkens, Nina Vajić, Elisabeth Steiner, Khanlar Hajiyev and Sverre Erik Jebens, judges, and Søren Nielsen, Section Registrar, decided to give notice of the application to the Government.

5. Having been informed on 12 December 2006 that they could submit written observations under Article 36 § 1 of the Convention and Rule 44, the French Government indicated on 27 March 2007 that they did not intend to exercise their right in that regard.

6. On 2 September 2008 the Court decided to adjourn examination of the case pending the outcome of the case in *Enea v. Italy* (no. 74912/01), which was then pending before the Grand Chamber.

7. On 14 December 2010, following a change in the composition of the Sections, a Chamber of the Second Section, composed of Ireneu Cabral Barreto, President, Françoise Tulkens, Danutė Jočienė, Dragoljub Popović, András Sajó, Işıl Karakaş and Guido Raimondi, judges, and Stanley Naismith, Section Registrar, declared the application admissible by a majority. It held, by four votes to three, that there had been a violation of Article 6 of the Convention.

8. On 4 March 2011 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73. A panel of the Grand Chamber granted that request on 11 April 2011.

9. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Jean-Paul Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

10. The applicant and the Government each filed a memorial.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 31 August 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr N. DECKER, lawyer,

Ms A. FERREIRA DA SILVA, lawyer,

Mr J. WALLENDORF, judge, Court of Appeal,

Counsel,

Advisers;

(b) *for the applicant*

Mr O. LANG, lawyer,
Mr R. SCHONS, lawyer,
Mr T. BOULOIS,

*Counsel,
Adviser,
Applicant.*

The Court heard addresses by Mr Lang and Mr Decker.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant, who was born in 1972, was detained in Schrassig (Luxembourg) Prison on the date the application was lodged. He is currently living in Peppange (Luxembourg).

13. On 15 December 1998 he was remanded in custody.

14. In a judgment of 22 October 2001, the Criminal Division of the Court of Appeal sentenced him to fifteen years' imprisonment, of which three years were suspended, for assault occasioning actual bodily harm, rape and false imprisonment accompanied by acts of torture, committed on 10 December 1998.

15. The applicant provided the Court with copies of several court decisions, given between 14 June 2001 and 13 April 2005, concerning the issue of his visiting rights in respect of his three minor children following his divorce, made final on 19 October 2000.

16. While in prison, the applicant submitted requests for conditional release, transfer to Givenich semi-open prison and temporary leave of absence ("prison leave"). The requests for prison leave are the subject of the present case.

A. The first request for prison leave

17. The applicant stated that he had submitted a request for prison leave to the Attorney-General in October 2003.

18. At the request of the counselling service's psychologist, the applicant explained on 16 October 2003 that he was requesting prison leave for one day and had no objection to being escorted while on leave. He stated that the reason for the request was to complete certain administrative formalities, which he listed as follows:

“(i) go to a photographer or photo booth to obtain passport photos;

- (ii) go to the Transport Ministry to renew my driving licence (medical certificate already obtained);
- (iii) go to the embassy to renew my consular registration card;
- (iv) go to see Mr [B.] at Luxembourg police station, investigations division, to pick up an envelope containing documents needed by a former client;
- (v) go to see the manager of [B.] bank in Esch/Alzette;
- (vi) go to the tax office in Esch/Alzette;
- (vii) meet a group of friends in a restaurant near Esch/Alzette;
- (viii) go to my flat in Differdange to collect the remaining documents for the same client;
- (ix) take some measurements for items I might make in the [prison] workshop;
- (x) go to Differdange town hall for a personal meeting with the mayor;
- (xi) go to the home of Ms [S.] in Luxembourg to meet her husband;
- (xii) go to my lawyer's office to hand over the missing documents for my former client;
- (xiii) if possible, go to the bookshop near [S.]'s house."

In his reply, the applicant stated further:

"... Unfortunately, the civil damages are still far from being paid, as I have not even had enough funds to make a down-payment. At the moment I am still busy repaying my loans and other debts to the various authorities under the arrangements entered into with the legal departments in order to avoid an unending series of seizures of my property. ..."

19. On 29 October 2003 a psychologist issued a certificate stating that the applicant had begun a course of psychotherapy on 19 May 1999 which had been discontinued on 30 September 2002 for reasons beyond his control. She stressed that the applicant was anxious to understand what had driven him to commit the offences and to do everything possible to avoid reoffending. On 25 November 2003 a second psychologist, who certified that he had had regular meetings with the applicant since the beginning of 2003, agreed with the comments made in the certificate of 29 October 2003.

20. On 5 November 2003 the Attorney-General's representative sent a memorandum to the prison governor stating, in particular, as follows:

"... please inform the prisoner Thomas Boulois
that by decision of the Prison Board

[the] request for prison leave ... [is] refused in view of the risk of deportation (an application was made to the Ministry of Justice on 25 June 2003, but no decision has yet been taken). There is also a risk that the prisoner might abscond, given that he has failed to reflect on his crime. Before being allowed any privileges he must begin to pay the civil party.”

B. The second request for prison leave

21. On 17 January 2004 the applicant reiterated his request, giving the same reasons and the same programme for the day’s prison leave. On 27 January 2004 his lawyer confirmed the request and added, *inter alia*, the following:

“... granting [the applicant] a day’s prison leave during which he could begin to put his affairs in order with a view to leading an independent life [outside] prison, [would] not only aid [the applicant’s] rehabilitation and reintegration into society, but [would] also enable him to start paying damages to the civil party as quickly as possible. ...”

22. On 17 March 2004 the Attorney-General’s representative sent a memorandum to the prison governor containing the following passage:

“... please inform the prisoner Thomas Boulois

that by decision of the Prison Board

the decision of 5 November 2003 refusing his request for prison leave ... remains valid.”

C. Application to the administrative courts following the refusal of the two requests for prison leave

23. On 25 May 2004 the applicant lodged an application with the Administrative Court (*tribunal administratif*) for judicial review of the decisions of the Prison Board of 5 November 2003 and 17 March 2004.

24. At a hearing held on 6 December 2004, the Administrative Court raised of its own motion the question whether it had jurisdiction to examine the application for judicial review. The government, who had not raised an objection alleging lack of jurisdiction, left the matter to the discretion of the court. The applicant pleaded that the latter had jurisdiction.

25. On 23 December 2004 the Administrative Court declined jurisdiction to examine the application for judicial review, for the following reasons:

“... A distinction must be made between administrative measures relating to the treatment of prisoners in prison (such as a decision to place them in a more secure wing of the prison, and in particular imposing a strict confinement regime – see Administrative Court ruling no. 14568 of 10 July 2002), which are administrative decisions taken in the context of the running of the prison service, and decisions

which may alter the nature or scope of a sentence imposed by the ordinary courts, which should be regarded as judicial rather than administrative decisions.

In the instant case it should be noted that the granting or refusal of the privilege of prison leave constitutes a measure which alters the ‘scope’ of the sentence imposed on the applicant by the ordinary court.

Hence, the two decisions in question are judicial in nature.

Accordingly, having regard to their nature as identified above, the impugned decisions cannot be the subject of an application to the administrative courts ...”

26. On 14 April 2005 the Higher Administrative Court (*cour administrative*) upheld that ruling in the following terms:

“The [applicant] submitted that the court had erred in declining jurisdiction to examine his application for judicial review, arguing that: no other remedy existed in respect of such refusal, with the result that section 2(1) of the Law of 7 November 1996 on the organisation of the administrative courts should be applied; the impugned decisions did not alter the scope of the sentence; and the court had denied him justice in breach of Article [6 § 1] of the [Convention] by depriving him of a fair hearing.

... The [applicant]’s case concerns a request for prison leave, in other words, a decision which alters the terms of execution of the sentence imposed by the ordinary courts and which should therefore be classified as a judicial rather than an administrative decision.

The expression ‘*the scope of the sentence imposed*’, used by the court, is not to be understood in the present case as the length of the sentence but as the manner of its execution in a broad sense.

The Administrative Court was therefore correct in declining jurisdiction to examine the application.

A finding by the administrative courts that they lack jurisdiction cannot be construed as a declaration of unwillingness on their part to rule on the issue; the allegation of a denial of justice should therefore be dismissed as unfounded.

Article [6 § 1] of the [Convention] is not applicable in respect of a body which has no power to rule on the merits. ...”

D. Further requests for prison leave submitted by the applicant and refused by the Prison Board

27. On 11 August 2004 the applicant submitted a third request for prison leave, stating, *inter alia*, as follows:

“... I have successfully attended several classes run by the CEP-L [Chamber of Employees] and would like to continue with a view to obtaining the corresponding diplomas.

The diplomas concerned are in accounting and computer (PC) use. I completed the previous courses successfully, but if I am to achieve my aim it is now essential for me to be able to attend the classes of the autumn session at the CEP-L itself. ...”

28. In a decision of 21 September 2004, the request was refused on the ground that the applicant could attend courses in prison and that he had as yet made no substantial efforts towards paying compensation to the victim. The decision also referred to the reasoning of the decision of 5 November 2003.

29. On 14 October 2004 the applicant submitted a fourth request for prison leave – which he produced for the first time before the Grand Chamber – seeking permission to spend a day with his children over the St Nicholas weekend.

30. In a decision of 14 December 2004, the request was refused on the ground that the applicant’s visiting rights in respect of his children had not yet been clearly established.

31. In a fifth request submitted on 24 February 2005, the applicant stated, among other things, that he could not understand why, in view of the need for him to reintegrate into society, he had been refused permission to attend the final classes required in order to obtain the diplomas in accounting and computing. He added that the reason he had requested prison leave was to renew his identity papers and driving licence and find a solution regarding the repayment of his debts to the various institutions and the civil party.

32. On 23 March 2005 his request was refused for failure to give reasons.

33. On 12 July 2005 a sixth request for prison leave was refused on the ground that there was a risk that the applicant would not return to prison.

34. On 4 May 2006 a seventh request for prison leave was refused on the grounds that the applicant had been making no efforts, especially with regard to paying compensation to the civil party, and had been refusing to abide by the conditions imposed on him.

E. Subsequent developments until the applicant’s release from prison

35. Following the refusal of 4 May 2006, the applicant applied to the Attorney-General’s Department on five occasions between 10 May and 29 October 2006. He requested assistance in putting in place a repayment plan appropriate to his circumstances and the demands of the civil party, and sought an explanation of the conditions imposed on him with a view to his reintegration into society, so that he could comply with them. On 6 November 2006 the Attorney-General’s representative wrote to the applicant informing him that, as matters stood, he did not intend to reply to the various letters, which, in his view, did not call for any comment.

36. On 20 November 2006 the Attorney-General acknowledged receipt of a request from the applicant for an interview and said that he would meet him during one of his forthcoming visits to the prison. According to the applicant, the meeting never took place.

37. On 31 October 2008 the Prison Board granted the applicant one day's prison leave, subject to the condition that he would be collected from the prison and brought back there by his new girlfriend, at whose home he was to spend the day.

38. Between 12 December 2008 and 19 June 2009 the applicant was granted five periods of prison leave of two consecutive days, to be spent with his girlfriend.

39. On 20 March 2009 the applicant was transferred to Givenich semi-open prison. The same day, in a separate decision, he was granted ten days' prison leave in order to look for work and complete various administrative formalities; it was also decided to place him under the semi-custodial regime once he had found work.

40. On 24 June 2009 the applicant signed a vocational rehabilitation contract as a cook.

41. On 25 September 2009 his request for conditional release was granted.

42. In three decisions (dated 25 September and 11 December 2009 and 26 February 2010), the requests made by the applicant for suspension of his sentence, due to end on 12 October 2010, were refused.

43. On 10 February 2010 the applicant started up a business as a sole trader.

44. On 15 July 2010 the applicant's sentence was suspended. According to his submissions, he left Givenich Prison definitively on that date.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legislation concerning the execution of custodial sentences

45. Section 1 of the Law of 26 July 1986 on certain means of executing custodial sentences ("the 1986 Law") lists the various arrangements which execution of a custodial sentence may entail:

"The execution of a custodial sentence may entail one of the following: serving of the sentence in instalments, semi-custodial regime, prison leave, suspension of sentence, early release."

1. Definition of prison leave

46. Section 6 of the 1986 Law defines prison leave as follows:

“Prison leave shall consist of permission to leave prison either for part of a day or for periods of twenty-four hours. The time shall count towards the length of the sentence.”

2. Eligibility for prison leave

47. Section 7 of the 1986 Law provides as follows with regard to the objectives of prison leave:

“This privilege may be granted to prisoners who are domiciled or resident in the country, either for family reasons or to make preparations for their rehabilitation and reintegration into professional life, or on a trial basis with a view to their conditional release.”

48. Section 8 of the 1986 Law provides that this measure may be granted to first offenders once one-third of their sentence has been served.

49. Section 13 of the 1986 Law provides as follows:

“In applying the arrangements provided for by this Law, consideration shall be given to the personality of the prisoner, his or her progress and the risk of a further offence.”

According to the comments on this provision accompanying the relevant bill when it was submitted, the granting of measures relating to the means of executing a sentence “will never be automatic and will ultimately remain at the discretion of the post-sentencing authority, which will decide freely on the basis of the information it has obtained concerning the prisoner”.

50. Under the terms of the Grand-Ducal Regulation of 19 January 1989 laying down, *inter alia*, detailed arrangements for the granting of prison leave, such leave may be granted at the request of the prisoner concerned or his or her representative (Article 4); the request must be made in writing, unless the prisoner is unable or does not know how to write. The interval between periods of leave must be at least one month, except in special circumstances (Article 5). Where a request for prison leave is refused, no new request may be made within two months, unless new evidence comes to light (Article 6).

3. Procedure applicable to prison-leave requests

51. Section 12 of the 1986 Law states as follows:

“In the case of custodial sentences of over two years ... the measures provided for by this Law ... shall be taken by the Attorney-General or his or her representative in accordance with the majority decision of a board comprising, in addition to the Attorney-General or his or her representative, a judge and a public prosecutor.

...

The board shall be convened by the Attorney-General or his or her representative and shall be chaired by the judge.

With the exception of the Attorney-General or his or her representative, the full members and their substitutes shall be appointed by ministerial order for a renewable three-year term.”

4. Recommendation No. 30 of the Ombudsman of the Grand Duchy of Luxembourg on changes to the division of powers in respect of the execution of custodial sentences, and the follow-up thereto

52. In Recommendation No. 30, set out in his activity report on the year from 1 October 2007 to 30 September 2008, the Ombudsman expressed the view that the system for the execution of sentences in Luxembourg needed to be overhauled, and advocated the creation of the office of post-sentencing judge. The latter would give decisions, open to appeal, on applications for prison leave following adversarial proceedings.

53. In his activity report on the year from 1 October 2009 to 30 September 2010, the Ombudsman took note of the fact that the Minister of Justice, in an article published in a Luxembourg daily newspaper, had spoken in favour of handing over to a judicial body some of the powers currently exercised by the Attorney-General’s representative with responsibility for the execution of sentences or by the Prison Board. On 22 December 2011 the Minister of Justice presented the broad outlines of the planned prison reform, which included a bill approved by the government at a Cabinet meeting on 16 December 2011 reforming the system of execution of sentences by establishing, *inter alia*, a post-sentencing court. The bill must now go through the different stages of the legislative procedure.

B. Practice concerning prison leave: statistics supplied by the Government

54. There are two prisons in Luxembourg, with a prison population of around 700. Most prisoners are held in Luxembourg Prison, which is a closed institution. There is also a semi-open prison (Givenich Prison) which mainly houses prisoners approaching the end of their sentences or serving shorter sentences. Most leave the prison each day to go to work.

55. The Government stated that a distinction needed to be made between requests for prison leave made by inmates in Luxembourg Prison and those in Givenich.

1. Requests for prison leave made by persons detained in Luxembourg Prison

56. In 2009, 146 requests for prison leave were granted and 169 refused; for 2010, the figures were 114 and 128 respectively.

57. The Government observed that numerous requests for prison leave were bound to fail as they were submitted before expiry of the statutory period. In other words, the prisoners concerned had not yet served one-third of their sentence (in the case of a first offender) or half their sentence (in the case of a repeat offender), or the request was made less than two months after notification of the refusal of a previous request.

2. Requests for prison leave made by persons detained in Givenich semi-open prison

58. In 2009, 376 requests for prison leave were granted and 192 refused; for 2010, the figures were 409 and 191 respectively.

III. RELEVANT INTERNATIONAL LAW

A. Recommendation No. R (82) 16 of the Committee of Ministers to member States on prison leave (adopted on 24 September 1982)

59. The Recommendation states, *inter alia*, as follows:

“The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Considering that prison leave is one of the means of facilitating the social reintegration of the prisoner;

Having regard to experience in this field,

Recommends the governments of member States:

1. to grant prison leave to the greatest extent possible on medical, educational, occupational, family and other social grounds;

2. to take into consideration for the granting of leave:

– the nature and seriousness of the offence, the length of the sentence passed and the period of detention already completed,

– the personality and behaviour of the prisoner and the risk, if any, he may present to society,

– the prisoner’s family and social situation, which may have changed during his detention,

– the purpose of leave, its duration and its terms and conditions;

3. to grant prison leave as soon and as frequently as possible having regard to the aforementioned factors;

4. to grant prison leave not only to prisoners in open prisons but also to prisoners in closed prisons, provided that it is not incompatible with public safety;

...

9. to inform the prisoner, to the greatest extent possible, of the reasons for a refusal of prison leave;

10. to provide the means by which a refusal can be reviewed;

...”

B. Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations of life sentence and other long-term prisoners (adopted on 9 October 2003)

60. The Recommendation, in its relevant parts, reads as follows:

“The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Bearing in mind the relevance of the principles contained ... in particular [in]:

– Recommendation No. R (82) 16 on prison leave;

...

1. For the purposes of this recommendation, a ... long-term prisoner is one serving a prison sentence or sentences totalling five years or more.

...

2. The aims of the management of ... long-term prisoners should be:

...

– to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release.

...

23.b. Particular efforts should be made to allow for the granting of various forms of prison leave, if necessary under escort, taking into account the principles set out in Recommendation No. R (82) 16 on prison leave.

...”

C. Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules (adopted on 11 January 2006)

61. The Recommendation reads, *inter alia*, as follows:

“The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Stressing that the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ... offer[ing] ... treatment programmes to inmates, thus preparing them for their reintegration into society;

...

Endorsing once again the standards contained in the recommendations of the Committee of Ministers of the Council of Europe, ... and in particular ... Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners;

...

103.2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release.

103.3 Sentenced prisoners shall be encouraged to participate in drawing up their individual sentence plans.

103.4 Such plans shall as far as is practicable include:

...

d. preparation for release.

...

103.6 There shall be a system of prison leave as an integral part of the overall regime for sentenced prisoners.

...

107.1 Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.

107.2 In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society.

...”

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

62. The applicant submitted that he had been deprived of his right to a fair hearing and his right of access to a court in connection with the refusal of his requests for prison leave. He alleged a violation of Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing ... by [a] ... tribunal ...”

A. The Chamber judgment

63. In its judgment of 14 December 2010, the Chamber held that Article 6 of the Convention was not applicable under its criminal head. However, it ruled that the applicant’s complaint was compatible *ratione materiae* with the provisions of the Convention, in so far as it related to Article 6 under its civil head. In the Chamber’s view, the applicant could arguably maintain that, as a prisoner, he was entitled to be granted prison leave once he satisfied all the requirements laid down by the legislation. The Chamber further observed that the restrictions on the right to a court to which the applicant claimed to have been subjected in the context of his requests for prison leave related to a set of prisoners’ rights which the Council of Europe had recognised by means of the European Prison Rules, adopted by the Committee of Ministers and clarified in three Recommendations. The Chamber therefore concluded that a dispute over “rights” within the meaning of Article 6 § 1 could be said to have existed. As to whether the rights in question were “civil” rights, it pointed out that the proceedings concerning the applicant’s various requests for prison leave had raised the issue of his interest in reorganising his professional and social life on his release from prison. In the Chamber’s view, the applicant’s requests for prison leave had been motivated by his wish to attend classes with a view to obtaining diplomas in accounting and computer use and to complete certain administrative formalities with his bank and various institutions (including the renewal of his driving licence and his consular registration card). The Chamber considered that the restriction alleged by

the applicant, in addition to its pecuniary implications, related to his personal rights, in view of the significance of his interest in resettling in society. It took the view that the applicant's social rehabilitation was crucial to the protection of his right to lead a private life and develop his social identity. It therefore concluded that the proceedings in question had related to a civil right.

64. The Chamber held that there had been a violation of Article 6 of the Convention, on the grounds that the Prison Board had not satisfied the requirements of a "tribunal" within the meaning of Article 6 § 1 and that the lack of any decision on the merits had nullified the effect of the administrative courts' review of the Prison Board's decisions.

B. The parties' submissions

1. The Government

(a) Applicability of Article 6 of the Convention

65. The Government submitted that Article 6 of the Convention was not applicable to the present case.

66. Referring to the principles established in the Court's case-law in this sphere, they submitted that the applicant had not had a "right" within the meaning of Article 6 § 1 of the Convention.

67. In the Government's submission, it was clear from the wording of the national legislation that the granting of prison leave was merely a *privilege* to which there was no automatic entitlement.

68. A Court of Appeal judgment of 9 February 2000 had ruled indirectly on the nature of decisions relating to the granting of prison leave. The case in question concerned the issue of State liability for damage caused by a prisoner during his prison leave. The Court of Appeal had specified that, in providing that prisoners *might* be eligible for certain measures contributing to the maintenance of their family ties and to making preparations for their resettlement into society, the legislature had created a particular risk for third parties which gave rise to a State duty to afford redress.

69. Furthermore, the Prison Board had full discretion in the matter. The legislature had not imposed an absolute obligation to grant prison leave: even assuming that the various criteria established by section 7 of the 1986 Law were met, the Prison Board was entirely free to assess whether the person concerned merited the privilege. The Government inferred from this that the Chamber had been incorrect in ruling that the applicant could claim entitlement to prison leave once he satisfied the criteria. They took the view that, even in such circumstances, the law authorised the members of the Prison Board to refuse a request. Each case was examined with reference to

the nature and circumstances of the offence committed and the prisoner's personality.

70. The Government added that the Chamber had wrongly concluded that the applicant possessed rights on the basis of the European Prison Rules adopted by the Committee of Ministers. The relevant Recommendations laid down guidelines for the member States with a view to harmonising the rules in force, and as such did not constitute a source of domestic or international law. They left member States a wide margin of appreciation when it came to granting prison leave and were not intended to create an absolute right to prison leave, without specific conditions attached, each time a prisoner requested it. In the Government's view, while member States were required to make provision in their legal systems for the resettlement of prisoners, the manner in which they did so was for them to decide.

71. The Government further disputed the assertion that the "right" claimed by the applicant was in any sense a "civil" right.

72. In their submission, the Chamber had rightly dismissed the family reasons cited by the applicant, since his requests for prison leave had not been based on a wish to see his children. Nor could the applicant claim that the refusal of his requests for prison leave had hampered his efforts to resettle outside prison, as the system in Luxembourg afforded prisoners a wide range of possibilities in that regard, including psychological counselling and training, of which the applicant had been able to take advantage.

73. Lastly, the Government argued that the case of *Enea v. Italy* ([GC], no. 74912/01, ECHR 2009) was distinguishable from the instant case, in which the applicant had been detained under the standard regime and had been subjected only to the restrictions inherent in any custodial sentence.

(b) Merits

74. In the Government's view, the Prison Board satisfied the requirements of Article 6 § 1 of the Convention, in terms of both independence and impartiality. Neither the creation of such a body nor the fact that the administrative courts had declined jurisdiction to examine the applicant's application had impaired the very essence of any right he might have had. The Prison Board issued decisions refusing or granting prison leave on the basis of objective factors and giving reasons, and prisoners could submit as many requests for prison leave as they wished.

2. *The applicant*

(a) **Applicability of Article 6 of the Convention**

75. The applicant submitted that he had possessed a “right” within the meaning of Article 6 of the Convention.

76. He pointed out that prison leave was not automatically granted merely because the objective criteria set out in sections 7 and 8 of the 1986 Law had been met, as section 13 required that the personality of the prisoner, his or her progress and the risk of a further offence also be taken into account. Since the minimum “punitive” period – in other words, the period during which the applicant had to be kept in detention without being eligible for release – had expired on completion of one-third of his sentence (section 8), he could, from that point onwards, claim the right to be granted prison leave, although the Board could still take the view that the criteria of section 13 were not met. While the Government were right, in terms of section 13, to characterise the decision taken by the Board as “discretionary”, the existence of this power, which was legitimate with regard to the execution of sentences, was perfectly consistent with the principle of the rule of law provided it was subject to review. However, where there was no such review, the power became arbitrary. The applicant concluded that once he had met the conditions listed in sections 7 and 8 of the 1986 Law, he had had, at least on arguable grounds, the right to have his request for prison leave considered in the light of the subjective criteria of section 13 of the Law. Hence, the discretionary power of the Prison Board in no sense ruled out the characterisation of the measure in question as a “right” (the applicant cited, *mutatis mutandis*, *H. v. Belgium*, 30 November 1987, § 43, Series A no. 127-B).

77. In support of this claim the applicant cited the fact that the Chairman of the Bar had granted him legal aid in the proceedings before the Prison Board and the administrative courts (he referred, *mutatis mutandis*, to *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 89, ECHR 2001-V), and the fact that the Government’s representative had agreed without reservation to discuss the merits of the case brought before the Administrative Court. He added that the Ombudsman, in making a case for the creation of the office of post-sentencing judge, appeared to recognise the right to prison leave. The applicant also cited a passage from the preparatory texts of the 1986 Law which placed the emphasis on sentences that prepared prisoners for a future outside prison where a return to the community was possible.

78. The applicant added that prison leave also constituted a right in Luxembourg because it was a measure that reflected a principle of international law generally recognised by the member States of the Council of Europe and even by the United Nations. In his view, the Chamber had

correctly referred to the Court's ruling in *Enea* (cited above) as confirmation of the recognition of a "right" under domestic law. That judgment cited the Recommendations of the Committee of Ministers, which, while they were non-binding, identified a set of prisoners' rights recognised by the member States.

79. The applicant further submitted that his right had been a "civil" right. He criticised the fact that he had been deprived of any prospect of reintegration over the five-year period during which his requests for prison leave had been refused. He stressed that prison leave should promote and encourage the resettlement efforts of convicted prisoners who had been temporarily removed from the community.

(b) Merits

80. In the applicant's submission, none of the guarantees of Article 6 of the Convention had been afforded to him, either before the Prison Board or in the administrative courts. He called into question, in particular, the independence and impartiality of the Prison Board, which included two members of the public prosecution service. He stressed the fact that the Attorney-General's representative responsible for the execution of sentences who had sat on the Prison Board that had refused his first two requests for prison leave had been the same person who, in her capacity as Advocate-General exercising the functions of a public prosecutor, had sought his conviction before the Court of Appeal. From a procedural angle, the applicant complained of the fact that no hearings had been held or oral submissions heard.

C. The Grand Chamber's assessment

1. Applicability of Article 6 of the Convention

81. In the Court's view, the Government's preliminary objection that Article 6 of the Convention is inapplicable is so closely linked to the substance of the applicant's complaint that it should be joined to the merits of the case.

2. Merits

(a) General considerations

82. The Court reaffirms its settled case-law to the effect that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. It is inconceivable that a prisoner should forfeit those rights

and freedoms merely because of his status as a person detained following conviction (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §§ 69-70, ECHR 2005-IX; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 67, ECHR 2007-V; and *Stummer v. Austria* [GC], no. 37452/02, § 99, ECHR 2011).

83. The Court has also had occasion to recognise the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, ECHR 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009; and *Schemkamper v. France*, no. 75833/01, § 31, 18 October 2005).

84. In the instant case the Court observes that the applicant relied on Article 6 of the Convention in complaining of the refusal of his requests for prison leave. The Court's first task is therefore to examine whether the applicant's complaint is compatible *ratione materiae* with Article 6.

85. Like the Chamber, the Grand Chamber considers that Article 6 § 1 of the Convention is not applicable under its criminal head, as the proceedings concerning the prison system did not relate in principle to determination of a "criminal charge" (see *Enea*, cited above, § 97).

86. The Court must therefore consider whether the applicant had a "civil right", in order to assess whether the procedural safeguards afforded by Article 6 § 1 of the Convention were applicable to the proceedings concerning his requests for prison leave.

87. According to the Court's traditional case-law, the examination of requests for temporary release or of issues relating to the manner of execution of a custodial sentence do not fall within the scope of Article 6 § 1 (see *Neumeister v. Austria*, 27 June 1968, p. 19, §§ 22-23, Series A no. 8; *Lorsé and Others v. the Netherlands* (dec.), no. 52750/99, 28 August 2001; and *Montcornet de Caumont v. France* (dec.), no. 59290/00, ECHR 2003-VII).

88. It is true that the Court has recently found a "civil" right to be in issue in relation, for instance, to a prisoner's family visits or correspondence (see *Enea*, cited above, § 119, and *Ganci v. Italy*, no. 41576/98, §§ 20-26, ECHR 2003-XI). In the Court's view, however, this line of case-law does not concern the situation under consideration in the present case.

89. In order to ascertain whether, in the present case, the civil limb of Article 6 § 1 of the Convention was applicable to the proceedings concerning the applicant's requests for prison leave, it must first be determined whether he possessed a "right" within the meaning of that provision.

(b) Existence of a “right”

(i) Recapitulation of the case-law

90. The Court reiterates that for Article 6 § 1 in its “civil” limb to be applicable, there must be a dispute (“*contestation*” in the French text) over a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009).

91. Article 6 § 1 does not guarantee any particular content for (civil) “rights and obligations” in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B, and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X). The starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A, and *Roche*, cited above, § 120). This Court would need strong reasons to differ from the conclusions reached by the superior national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law (*ibid.*).

92. In carrying out this assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50, and *Roche*, cited above, § 121).

93. Whether or not the authorities enjoyed discretion in deciding whether to grant the measure requested by a particular applicant may be taken into consideration and may even be decisive. Hence, in *Masson and Van Zon* (cited above, § 51), the Court concluded that no right existed, whereas in *Szücs v. Austria* (24 November 1997, § 33, *Reports of Judgments and Decisions* 1997-VII) it recognised the existence of a right. Nevertheless, the Court has had occasion to state that the mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right (see *Camps v. France* (dec.), no. 42401/98, 23 November 1999, and *Ellès and Others v. Switzerland*, no. 12573/06, § 16, 16 December 2010).

94. Other criteria which may be taken into consideration by the Court include the recognition of the alleged right in similar circumstances by the domestic courts or the fact that the latter examined the merits of the

applicant's request (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 41, ECHR 2007-II).

(ii) Application of these principles to the present case

95. The Court notes first of all that a “dispute” existed in the present case, concerning the actual existence of the right to prison leave claimed by the applicant.

96. As regards the issue whether such a “right” could be said, at least on arguable grounds, to be recognised in domestic law, the Court observes that section 6 of the 1986 Law defines prison leave as permission to leave prison either for part of a day or for periods of twenty-four hours. Section 7 states that this is a “privilege” which “may be granted” to prisoners in certain circumstances (see paragraphs 47-49 above).

97. The notion of “privilege” may have different meanings in different contexts; it may refer either to a concession that can be granted or refused as the authorities see fit, or to a measure which the authorities are bound to grant once the person concerned satisfies certain prior conditions.

98. In the instant case the Court is of the view that the term “privilege” as characterised by the legislature should be analysed in conjunction with the phrase “may be granted” and in the light of the comments accompanying the relevant bill, according to which the granting of measures relating to the means of executing a sentence “will never be automatic and will ultimately remain at the discretion of the post-sentencing authority ...” (see paragraph 49 above). Thus it was clearly the legislature's intention to create a privilege in respect of which no remedy was provided. Unlike the case of *Enea* (cited above), which concerned a restriction on the existing scope of rights, the present case concerns a benefit created as an incentive to prisoners.

99. Furthermore, the parties have both acknowledged that, even where the various criteria laid down by section 7 of the 1986 Law are met, the Prison Board enjoys a certain degree of discretion in deciding whether the prisoner concerned merits the privilege in question. It is apparent from the information provided to the Court that the 1986 Law and the Grand-Ducal Regulation of 19 January 1989 lay down the arrangements governing prison leave and the circumstances in which it may, where applicable, be granted. It is within this legal framework that the Prison Board, each time a request is submitted to it, examines the report prepared by a committee (the “guidance committee”) on the prisoner concerned. The Board takes into consideration the personality of the prisoner, his or her progress and the risk of a further offence, in order to assess whether he or she may be granted prison leave. The statistics produced by the Government (see paragraphs 54-58 above) confirm the discretionary nature of the competent authorities' powers. It follows that prisoners in Luxembourg do not have a right to obtain prison leave, even if they formally meet the required criteria.

100. As to the question of the interpretation of the legislation by the domestic courts, the Court observes that the administrative courts declined jurisdiction to examine the applicant's application for judicial review. They held that, since they altered the terms of execution of the sentence imposed by the ordinary courts, the decisions contested by the applicant had been judicial rather than administrative in nature. The parties were unable to produce any other judicial or administrative decision determining an appeal against a decision refusing prison leave (see, conversely, *Vilho Eskelinen and Others*, cited above, § 41, and *Rotaru v. Romania* [GC], no. 28341/95, § 78, ECHR 2000-V). The Court observes that its findings in *Enea* (cited above) cannot validly be transposed to the present case. Whereas the Italian Constitutional Court had found sections 35 and 69 of the Prison Administration Act to be in breach of the Constitution because they did not provide for judicial review of decisions liable to infringe prisoners' rights, the parties in the present case have not produced any ruling by a judicial body in Luxembourg to the same effect (see, conversely, *Enea*, cited above, § 100).

101. It is thus apparent from the terms of the legislation in Luxembourg, and from the information provided on the practice concerning prison leave, that the applicant could not claim, on arguable grounds, to possess a "right" recognised in the domestic legal system.

102. Furthermore, it must be pointed out that, although the Court has recognised the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment (see paragraph 83 above), neither the Convention nor the Protocols thereto expressly provide for a right to prison leave. The Court also notes that the right to prison leave is likewise not recognised, as such, under any principle of international law on which the applicant seeks to rely. Lastly, no consensus exists among the member States regarding the status of prison leave and the arrangements for granting it. In some countries, the decision-making authority is obliged to grant leave once the statutory conditions are met, while in others it enjoys complete discretion in the matter. Similarly, not all States provide avenues of appeal against decisions refusing prison leave. Hence, in this respect also, the present case is distinguishable from *Enea* (cited above).

103. In any event, the Court observes that the Luxembourg authorities, far from being indifferent to the issue of resettlement of prisoners, provide other means of achieving this aim in addition to prison leave. The legislation in Luxembourg draws its inspiration from, among other sources, the Recommendation of the Committee of Ministers on prison leave which, while it advocates providing "the means by which a refusal can be reviewed", also lists different factors which the national authorities may take into consideration when it comes to granting prison leave (see paragraph 59 above). Furthermore, in addition to "a system of prison leave as an integral part of the overall regime for sentenced prisoners",

programmes have been put in place enabling the latter “to make the transition from life in prison to a law-abiding life in the community” (see paragraph 61 above). Lastly, the Court notes with interest the legislative reform which is under way concerning the execution of sentences (see paragraph 53 above).

104. In view of all the foregoing considerations, the Court cannot consider that the applicant’s claims related to a “right” recognised in Luxembourg law or in the Convention. Accordingly, it concludes, like the Government, that Article 6 of the Convention is not applicable.

105. It follows that the Government’s preliminary objection should be allowed. There has therefore been no breach of Article 6 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the Government’s preliminary objection;
2. *Holds* by fifteen votes to two that Article 6 of the Convention is not applicable;
3. *Holds* by fifteen votes to two that there has therefore been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 April 2012.

Vincent Berger
Jurisconsult

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Tulkens and Yudkivska is annexed to this judgment.

N.B.
V.B.

JOINT DISSENTING OPINION OF JUDGES TULKENS AND YUDKIVSKA

(Translation)

With due respect, we do not share the majority's view that Article 6 of the Convention is not applicable and, accordingly, has not been breached.

Subject matter and issue at stake

1. It is important to be clear from the outset as to the subject matter of this case. It concerned, from the standpoint of Article 6 of the Convention, a prisoner's right of access to a court and his right to a fair procedure in order to complain about the decisions of the Prison Board refusing his six requests for prison leave. Thus, our Court's task was in no sense to rule on whether those requests were reasonable and well-founded but solely, in accordance with the subsidiarity principle, to satisfy itself that a domestic court could do so, which was not the position here. That is the issue at stake in this case.

Background

2. The issue before the Court should be seen against the background of the development of the law on execution of sentences which can be observed both at international level and in domestic law and which has the role of providing a legal basis for all matters concerning the execution of sentences which, until recently, fell almost entirely within the responsibility of the executive and the competent administrative authorities.

3. The crucial issue in this case is that of the arrangements for execution of a sentence and, more specifically, prisoners' external legal status, which encompasses the various measures whereby prisoners retain or regain their liberty, whether fully or partially, temporarily or permanently. The measures that may be ordered, from the most limited to the most significant, are temporary leave of absence and prison leave, interruption of the sentence, weekend release, semi-custodial and limited detention regimes, compulsory residence under electronic surveillance, temporary release and conditional release.

4. In the Grand Duchy of Luxembourg, the Law of 26 July 1986 on certain means of executing custodial sentences makes provision for arrangements designed to mitigate the desocialising effects of detention and to help prisoners maintain contact with family, the workplace and society as far as possible¹. The bill's sponsors felt that preparation for release was

1. See A. and D. Spielmann, *Droit pénal général luxembourgeois*, Brussels, Bruylant, 2nd ed., 2004, pp. 539 et seq.

important. The explanatory memorandum is very clear on this point: “for prisoners who may be expected to reintegrate into society, instead of prison, which ‘disrupts the immediate past and the present, sentences must be found which prepare for the future, a future which will be lived in freedom’”¹.

5. Prison leave forms part of this approach. As stated in the report by the Legal Affairs Committee on the bill, the aim of “this measure is to be viewed in the context of individualised treatment and in the light of a guidance plan. Need it be pointed out that granting such a measure should encourage prisoners’ gradual social rehabilitation and lessen the tensions caused by prison life? ... Prison leave serves as a natural means of transition between prison life and life in the community ... Prison leave is a useful transitional measure which considerably increases the prisoner’s prospects of social reintegration after serving the sentence”². In this connection, prison leave consists initially of occasional short periods of leave which, if the prisoner shows signs of progress, are then granted on a more regular basis for periods of several days, leading to a semi-custodial regime which may be followed by conditional release.

6. The competent authority for granting prison leave is the Attorney-General or his or her representative. For custodial sentences of more than two years, as in the instant case, the decision to grant prison leave is taken in accordance with a majority decision of a prison board comprising, in addition to the Attorney-General or his or her representative, a judge and a public prosecutor (section 12 of the Law of 26 July 1986). However, during the drafting of the Law of 26 July 1986, “the government, not having envisaged amending the regulations on this point, nevertheless took the view that a reform appeared desirable to address criticisms of the quasi-discretionary powers enjoyed by the Attorney-General or his or her representative in ruling on the practical execution of custodial sentences”³. No specific appeal is provided for in the Law of 26 July 1986, for instance to the criminal courts.

7. Lastly, a study of the comparative law reveals that, whatever the competent authority, reasons for the decision are usually required, as is the possibility of review by an administrative or judicial body. In France, for example, prior to the Law of 9 March 2004, which now provides that orders concerning matters such as temporary leave of absence may be challenged

1. Bill on certain means of executing custodial sentences, Explanatory memorandum, Doc. parl., no. 2870, Chamber of Deputies, ordinary session 1984-85, 27 February 1985, p. 4, citing a study by P. Graven, “La réforme pénale européenne et la révision partielle du C.P.S.”, *Rev. pén. suisse*, 1969, pp. 225 et seq.

2. Bill on certain means of executing custodial sentences, Report by the Legal Affairs Committee, Doc. parl., no. 2870, Chamber of Deputies, ordinary session 1985-86, 5 June 1986, p. 3.

3. A. and D. Spielmann, *Droit pénal général luxembourgeois*, op. cit., pp. 541-42. See also Bill on certain means of executing custodial sentences, Explanatory memorandum, Doc. parl., no. 2870, Chamber of Deputies, ordinary session 1984-85, 27 February 1985, p. 3.

by means of an appeal to the post-sentencing division of the Court of Appeal by the prisoner, State Counsel or Principal State Counsel and even by means of an appeal to the Court of Cassation, our Court noted in *Schemkamper v. France* that, at the material time, orders concerning temporary leave of absence could not be challenged by the prisoner, resulting in a violation of Article 13 of the Convention “on account of the absence in domestic law of a remedy by which the applicant could have challenged the decision to refuse him leave of absence”¹.

Article 6 of the Convention

Applicability

8. While the Convention institutions have traditionally taken the view that Article 6 is in principle not applicable to proceedings concerning the execution of sentences, a certain trend can be observed in the case-law regarding proceedings conducted in prison. Thus, the Court recently held that Article 6 § 1 was applicable under its civil head to disputes concerning security measures (placement in a high-security cell or a high-supervision unit)² and disciplinary proceedings³.

9. First of all, as regards the existence of a “right”, the majority dismisses it categorically on the grounds that prison leave is classified in the Law of 26 July 1986 as a “privilege” rather than a right. This argument does not appear to us to be decisive.

10. In the same way as the concept of a “criminal” charge, the term “right” in Article 6 is an autonomous concept which should be defined in the light of the object and purpose of the Convention and does not necessarily depend on the classification adopted in domestic law. Otherwise, this issue would be determined differently in different member States in relation to the same measure. In addition, the Court has already accepted “that the mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a civil right” (see *Lambourdière v. France*, no. 37387/97, § 24, 2 August 2000, and *Camps v. France* (dec.), no. 42401/98, 23 November 1999). Lastly, the prevailing views of experts in criminal law and criminology have changed radically regarding the purposes and functions of sentences. Prison leave is not a special favour, or a privilege, or a concession, or an indulgence; like any other arrangement for the execution of custodial sentences, it is a necessary measure in terms of preparing for and envisaging the prospect of

1. *Schemkamper v. France*, no. 75833/01, § 44, 18 October 2005.

2. *Ganci v. Italy*, no. 41576/98, §§ 20-26, ECHR 2003-XI; *Musumeci v. Italy*, no. 33695/96, § 36, 11 January 2005; *Enea v. Italy* [GC], no. 74912/01, § 107, ECHR 2009; and *Stegarescu and Bahrin v. Portugal*, no. 46194/06, § 39, 6 April 2010.

3. *Gülmez v. Turkey*, no. 16330/02, §§ 27-31, 20 May 2008.

the prisoner's release. If the measure proves a failure, it will not be renewed, and continued supervision and surveillance will thus remain possible. Accordingly, the fact that a post-sentencing measure is classified as a "privilege" in domestic law is not sufficient, in our view, to deprive persons laying claim to it of the right to have their case heard in accordance with the principles enshrined in Article 6 of the Convention.

11. In the present case the existence of such a right has been implicitly acknowledged in domestic law, since the applicant was able to lodge an application with the administrative courts for judicial review of the first two refusals by the Prison Board. Although the administrative courts declined jurisdiction, this was for a different reason, namely because the granting or refusal of the privilege of prison leave was a measure which altered the scope of the sentence imposed on the applicant. Accordingly, the impugned decisions, given their nature, could not be the subject of an application to the administrative courts. The Government's representative had, moreover, agreed, without any reservations, to discuss the merits of the case brought before the Administrative Court. The situation before us could be said to resemble, *mutatis mutandis*, the *Vilho Eskelinen and Others v. Finland* judgment ([GC], no. 63235/00, ECHR 2007-II) concerning the applicability of Article 6 under its civil head to civil servants and State officials, where the Court found that "in very many Contracting States access to a court is accorded to civil servants, allowing them to bring claims for salary and allowances, even dismissal or recruitment, on a similar basis to employees in the private sector" (§ 57). The Court therefore concluded that "in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6 ... the State in its national law must have expressly excluded access to a court for the post or category of staff in question" (*ibid.*, § 62).

12. As to the civil nature of the right, it is true that in its *Aerts v. Belgium* judgment (30 July 1998, *Reports of Judgments and Decisions* 1998-V) the Court held, in relation to measures for the detention of mentally ill persons, that the right to liberty was a civil right. Unfortunately, it did so with very little explanation, which weakened the judgment's impact. However, we can apply in the instant case the reasoning adopted by the Grand Chamber in *Enea* and reproduced in *Stegarescu and Bahrin* (both cited above), which has become final. Firstly, the Court reiterates that "Article 6 § 1 extends to 'contestations' (disputes) over civil 'rights' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether they are also protected under the Convention". It further observes that "some of the restrictions alleged by the applicant – such as those restricting his contact with his family and those affecting his pecuniary rights – clearly fell within the sphere of personal rights and were therefore civil in nature" (see *Enea*, cited above, § 103).

13. This position certainly corresponds to the present case since it is not disputed that the applicant requested prison leave not only for family reasons but also for professional and social reasons. The right in question is “civil” in nature, particularly on account of the importance of the measures assisting the prisoner’s reintegration into society. What was at stake in the proceedings concerning his various requests for prison leave was therefore his interest in making new arrangements for his professional and social life on his release from prison, a matter falling within the sphere of personal rights. More specifically, the applicant’s requests for prison leave in 2005 were intended to enable him to exercise outside prison his right of contact with his children, who were reluctant to visit him there. His other requests were made with a view to his professional and social reintegration, his aim being to prepare the ground for securing gainful employment, in particular with a view to paying compensation to the victim and settling his debts. The refusals by the Prison Board were directly decisive for the civil right in question.

14. To acknowledge, for the purposes of Article 6, that a prisoner has a “civil right”, particularly in view of the importance of measures to assist the prisoner’s social reintegration, does not entail departing from previous case-law but rather applying and developing it in the context of the prisoner’s external legal status, that is, in the context of measures concerning his gradual return to the community (see paragraph 3 above). Where the first stages of the prisoner’s return to the community depend on another person’s good will (or lack of it), the entire resettlement plan can be thwarted.

15. Lastly, according to the settled case-law of the Convention institutions, Article 6 § 1 is applicable only if there is a genuine and serious “dispute” (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 81, Series A no. 52). The dispute may relate not only to the existence of a right but also to its scope and the manner of its exercise (see, for example, *Zander v. Sweden*, 25 November 1993, § 22, Series A no. 279-B), and the outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, for example, *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 44, Series A no. 327-A, and *Fayed v. the United Kingdom*, 21 September 1994, § 56, Series A no. 294-B). In the present case it seems clear that a “dispute” arose when the Prison Board refused the various requests for prison leave based in particular on the applicant’s plans for his reintegration into society and the workforce. That dispute, which was genuine and serious, related to the actual existence of a civil right, within the meaning of the Convention, asserted by the applicant. By applying to the administrative courts for judicial review, the applicant sought to have the case referred to the competent authority so that the latter could rule afresh on his requests for prison leave. The outcome of the

proceedings before the administrative courts was therefore directly decisive for the right at stake.

Merits

16. Since the dispute over the decisions taken in respect of the applicant has to be regarded as a dispute relating to “civil rights and obligations”, he was entitled to have his case heard by a “tribunal” satisfying the conditions laid down in Article 6 § 1 (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 50, Series A no. 43). However, for the purposes of Article 6 § 1 a tribunal need not be a court of law integrated within the standard judicial machinery. What is important to ensure compliance with Article 6 § 1 are the guarantees, both substantive and procedural, which are in place (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, *Reports* 1997-IV). Thus, a “tribunal” is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see *Argyrou and Others v. Greece*, no. 10468/04, § 24, 15 January 2009). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself (see *Demicoli v. Malta*, 27 August 1991, § 39, Series A no. 210). With that proviso, in the case before us the Prison Board could not in itself be said to satisfy the requirements of a “tribunal” within the meaning of Article 6 § 1.

17. Further to each of the applicant’s requests for prison leave between 2003 and 2006, he was informed through the intermediary of the prison governor of the decisions of 5 November 2003; 17 March, 21 September and 14 December 2004; 23 March and 12 July 2005; and 4 May 2006 refusing the requests, without the Prison Board having determined the matter “after proceedings conducted in a prescribed manner” (see, conversely, *Argyrou and Others*, cited above, § 25). One of the problems here lies in the reasons given. As can be seen, the majority of the requests for prison leave were refused for the reason, in particular, that the applicant had not compensated the victim. This results in a vicious circle since, if the prisoner is unable to engage in gainful employment, the prospect of compensating the victim will become largely illusory. Of course, it is not for our Court to assess the merits of the reasons given, which is the task of the domestic court. However, and this is precisely the problem, the reasons given in the present case were brief in the extreme.

18. In addition, the Attorney-General’s representative responsible for the execution of sentences (who had sat on the Prison Board that had refused the applicant’s first two requests for prison leave) was the same person who, in her capacity as Advocate-General exercising the functions of a public

prosecutor, had sought the applicant's conviction before the Court of Appeal. In more general terms, the Attorney-General or his or her representative, who, according to the law, is the decision-making authority when it comes to the execution of sentences, clearly cannot be considered to be an independent and impartial judicial authority for the purposes of Article 6 (see, *mutatis mutandis*, *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010, and *Moulin v. France*, no. 37104/06, 23 November 2010).

19. There is also the question of appeal. The Government emphasised the discretionary nature of the domestic authorities' decision on requests for prison leave. This implies that even if all the conditions/criteria for granting prison leave are satisfied, the Prison Board may still refuse the request. Even assuming that the existence of such discretionary power is legitimate with regard to the execution of sentences, it cannot be consistent with the principle of the rule of law unless it is subject to review. Where there is no such review, the power becomes arbitrary.

20. The applicant made an application for judicial review of the first two refusals by the Prison Board. The Administrative Court and the Higher Administrative Court both found that they lacked jurisdiction to examine the application on the ground that the granting or refusal of the privilege of prison leave was a measure which altered the scope of the sentence imposed on the applicant. Accordingly, the impugned decisions, given their nature, could not be the subject of an application to the administrative courts. This hints at the need to have a specific post-sentencing judge or court, as is fortunately the case today in many countries. In the present case, the lack of any decision on the merits of the application meant that the administrative courts' review of the Prison Board's decisions was deprived of any effect (see, *mutatis mutandis*, *Enea*, § 82, and *Ganci*, §§ 29-30, both cited above).

21. In conclusion, we are of the view that the application was admissible and that there has been a violation of Article 6 of the Convention.