



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

COURT (PLENARY)

CASE OF H. v. BELGIUM

(Application no. 8950/80)

JUDGMENT

STRASBOURG

30 November 1987

In the case of H v. Belgium*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,
Mr. J. A. CARRILLO SALCEDO,
Mr. N. VALTICOS,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 November 1986, 22 April, 22 and 25 June and 27 and 28 October 1987,

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

PROCEDURE

1. The case was brought before the Court by the European Commission of Human Rights ("the Commission") on 28 January 1986, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 8950/80)

* Note by the Registrar. The case is numbered 1/1986/99/147. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

against the Kingdom of Belgium lodged with the Commission under Article 25 (art. 25) of the Convention by Mr. H on 20 March 1980. The applicant, who is a Belgian national, has requested the Court not to disclose his identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration by Belgium recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included ex officio Mr. J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 19 March 1986, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. J. Cremona, Mr. G. Lagergren, Mr. R. Bernhardt, Mr. A. Donner and Mr. J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Belgian Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1). In accordance with the orders made in consequence, the registry received:

- the applicant's memorial, on 10 June 1986; and
- the Government's memorial, on 7 July.

The Secretary to the Commission informed the Registrar in a letter received on 14 September 1986 that the Delegate would submit his observations at the hearing.

5. Having consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, the President directed on 1 July 1986 that the oral proceedings should open on 24 November 1986 (Rule 38).

6. On 23 October 1986, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

7. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. J. NISSET, Legal Adviser

at the Ministry of Justice,

Agent,

Mr. G. KIRSCHEN, sometime leader
of the Brussels Bar and former Chairman of the National
Council of the Ordre des avocats,
Mr. J.M. NELISSEN GRADE, avocat
at the Court of Cassation, *Counsel*;
- for the Commission
Mr. G. TENEKIDES, *Delegate*;
- for the applicant
Mr. A. DE CLERCQ, avocat, *Counsel*.

The Court heard addresses by Mr. Kirschen and Mr. Nelissen Grade for the Government, Mr. Tenekides for the Commission and Mr. De Clercq for the applicant, as well as their replies to its questions. The Government produced several documents at the hearing.

8. On 19 January 1987, the Agent of the Government sent the Registrar some documents he had asked for on 3 December 1986 on the Court's instructions.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, who is a Belgian citizen born in 1929, has a doctorate in law and lives in Antwerp. He was struck off the Bar roll of that city and has twice applied unsuccessfully to be reinstated.

1. Removal from the Antwerp Bar roll

10. In 1957, after completing the prescribed period as a pupil avocat in Antwerp, H was entered on the roll and took chambers.

11. In May 1963, the Council of the Ordre des avocats of Antwerp commenced disciplinary action against him for having deliberately given false information to clients.

On 10 June 1963, it struck him off the roll, having satisfied itself that he had wrongly persuaded a client that he (the client) risked arrest if he did not immediately pay a sum of 20,000 BF. The Council had previously dismissed the other charges against H.

On appeal by H, the Brussels Court of Appeal, in a judgment on 31 December 1963, affirmed the decision to strike him off; and on 22 June 1964, the Court of Cassation dismissed H's appeal on points of law.

12. H was subsequently prosecuted for fraud and unlawfully holding himself out as an avocat; he was in custody pending trial from 2 July to 2 August 1965 and many of his files were seized. He was acquitted by the

Antwerp Criminal Court on 19 January 1968 and made an unsuccessful claim for compensation.

13. In 1970, the applicant set up as a legal and tax adviser, after having worked for some time as a commercial traveller.

14. On 25 February 1977, when he was about to apply to have his name restored to the roll, the police again seized documents at his office. On 29 November 1978, the chambre du conseil of the Antwerp Court of First Instance committed him for trial in the Criminal Court for forgery and fraudulent conversion, but the prosecution ended in an acquittal on 18 October 1979.

15. H has no criminal convictions.

2. Applications for restoration to the Antwerp Bar roll

(a) First application

16. By a letter of 3 December 1979, the applicant requested the Council of the Ordre des avocats of Antwerp to restore his name to the roll. This application was based on Article 471 of the Judicial Code (see paragraph 30 below).

17. On 17 December, at a sitting of the Council, the bâtonnier (leader) of the Antwerp Bar appointed a rapporteur.

After deliberating on 7 and 28 January 1980, the Council decided to hear the applicant and his counsel.

18. The hearing was held on 18 February. According to H's counsel, the "exceptional circumstances" justifying his restoration to the roll consisted essentially in the great professional and family difficulties his client had experienced over the previous fifteen years, particularly as he had to confine himself to his occupation as a legal and tax adviser; furthermore his disbarment had not been followed up with any criminal proceedings and the later prosecutions had ended in acquittals.

19. The Council of the Ordre dismissed the application on the same day; although more than ten years had elapsed since H had been struck off, the explanations offered orally by H's counsel did not disclose any exceptional circumstances such as would justify restoring his name to the roll.

(b) Second application

20. On 9 February 1981, the applicant renewed his application. He appended a memorandum criticising the 1963 decision and to which was attached an opinion by a retired procureur général (Principal Crown Prosecutor), B. According to B, the Council of the Ordre should, under Article 29 of the Code of Criminal Procedure, have reported to the Antwerp procureur du Roi (Crown Prosecutor) the matters of which the applicant

stood accused; that would have entailed suspending the disciplinary proceedings until the final decision in the criminal trial was known.

21. The Council of the Ordre heard H and his counsel on 21 April 1981. Counsel submitted that the decision to disbar H had been based on the uncorroborated evidence of one of H's clients, and that from 1963 to 1980 H had run his legal and tax consultancy very satisfactorily. He added that in 1963 the Council of the Ordre had not reported the facts to the procureur du Roi, with the result that no prosecution had been brought and H had not had a chance of securing an acquittal. He also emphasised H's family difficulties. In addition, he filed a memorandum in which the applicant explained why the retired procureur général B was entitled to give an opinion.

22. The Council of the Ordre dismissed the application at the end of its sitting on 11 May 1981, holding that H had not established that there were exceptional circumstances; in particular, the consequences of disbarment did not constitute such circumstances. In response to the memorandum of 9 February 1981 (see paragraph 20 above), it stated that the relevant procureur général was aware of the facts before the decision was given and had ordered a judicial investigation.

The decision was served on the applicant on 16 June 1981.

II. RELEVANT DOMESTIC LAW

23. In Belgium the councils of the Ordre des avocats have exclusive jurisdiction to decide on applications for restoration to the roll.

1. The Council of the Ordre des avocats

24. For each of the Bars the Council of the Ordre, together with the bâtonnier and the general assembly, is an administrative organ of the profession of avocat.

25. It consists of the bâtonnier and from two to sixteen other members, according to the number of avocats on the Bar roll and the list of pupil avocats; the Antwerp Council has sixteen members in addition to the bâtonnier.

The members are directly elected by the general assembly of the Ordre, to which all avocats on the roll are convened (Article 450 of the Judicial Code); the election is held before the end of each judicial year.

26. The Council exercises numerous functions of an administrative, regulatory, adjudicative, advisory and disciplinary nature. In the instant case it is sufficient to mention the following.

27. Under Article 432 of the 1967 Judicial Code, which enshrines the case-law of the Court of Cassation on the subject (judgment of 15 January 1920, Pasicrisie 1920, I, p. 24), the Council draws up the roll of avocats and the list of pupil avocats, and no appeal lies from its decisions in this matter.

The principle of the Council's having responsibility for its roll is justified by the need to restrict access to the profession to persons of unimpeachable integrity.

28. It is also the Council's duty to "protect the honour of the Ordre" and to "maintain the principles of dignity, probity and scrupulousness on which the profession is founded" (Article 456).

29. As a disciplinary body, it punishes "offences and misconduct" (*ibid.*). It will hear such cases "on an application by the bâtonnier, either of his own motion or following a complaint or after receipt of a written accusation from the procureur général" (Article 457).

The avocat concerned is summoned within two weeks by registered letter and, if he so requests, is granted time to prepare his defence (Article 465). Within eight days of the decision's being given, it is notified by registered post to the procureur général and the avocat concerned (Article 466).

The main penalties which the Council may impose are warning, censure, reprimand, suspension for not more than one year and striking off the roll or the list of pupil avocats (Article 460). The avocat concerned has a right both of objection (opposition) (Article 467) and, like the procureur général, of appeal (*appel*) (Article 468). At the time the events in this case occurred (see paragraph 11 above), appeal lay to the Court of Appeal (Article 29 of the Imperial Decree of 14 December 1810 regulating the practice of the profession of avocat and the discipline of the Bar). Today, this jurisdiction is exercised by disciplinary appeals boards, consisting of the President of the Court of Appeal, who presides, and four avocats sitting as assessors (Article 473 of the Judicial Code).

Decisions of the courts of appeal in such matters could be appealed against on points of law (section 15(1) of the Judicature Act of 4 August 1832). The same now applies to decisions of the disciplinary appeals boards (Article 614 § 1 of the Judicial Code).

2. Restoration to the roll after disbarment

30. Restoration to the roll of an avocat who has been struck off it is governed by Article 471 of the Judicial Code:

"No avocat who has been disbarred may be entered on a roll of the Ordre or on a list of pupil avocats until ten years have elapsed from the date on which the decision to strike off became final and unless exceptional circumstances warrant it.

No such entry shall be permitted without the reasoned consent of the Council of the Ordre to which the avocat belonged or, as the case may be, the leave of the relevant disciplinary appeal authority if the disbarment was ordered by it.

No appeal shall lie against a refusal to restore to the roll."

This text reproduces with minor variations Article 1 of a resolution adopted on 13 February 1962 by the Council of the Brussels Ordre. That

resolution went some way towards removing the finality of disbarment and read as follows:

"The Council of the Ordre may ..., on his application, restore to the roll an avocat who has been struck off.

This measure, which is of an exceptional nature and lies wholly within the discretion of the Council of the Ordre, regard being had to the higher interests of the Bar and to whether reformation of the person concerned is clearly established, shall be permissible only after ten years have elapsed from the time when the disbarment penalty became final.

The Council shall take its decision in accordance with the procedure provided for in Rule 32 of the Rules of Procedure, as in the case of the admission of a pupil avocat. ..."

31. Although Article 471 of the Judicial Code is the last provision in Book III ("The Bar"), Section I ("General provisions"), Chapter IV ("Disciplinary matters"), the Council does not use the disciplinary procedure (Article 465-469) when dealing with an application for restoration to the roll; nor is its decision a disciplinary one (Cass. 18 March 1965, *Pasicrisie* 1965, I, p. 734). The general law does not make any specific provisions; and the Antwerp Bar did not have any internal rules of procedure at the relevant time. The Council normally takes its decision in the same way and following the same procedure as on an application for admission.

32. According to figures provided by the Government (and which were not disputed), 47 avocats have been struck off in Belgium since the Judicial Code came into force on 10 October 1967. Of the five applications for restoration to the roll made by avocats who have been struck off, three have been successful (Oudenaarde, Charleroi and Courtrai Bars). The Antwerp Bar has had to deal only with H's applications, which were unsuccessful. None of the decisions in question is available to the public.

PROCEEDINGS BEFORE THE COMMISSION

33. H lodged his application (no. 8950/80) with the Commission on 20 March 1980. He alleged that the procedure followed by the Council of the Ordre des avocats of Antwerp when considering his applications for restoration to the roll had infringed Article 6 (art. 6) of the Convention.

34. The Commission declared the application admissible on 16 May 1984.

In its report of 8 October 1985 (made under Article 31) (art. 31), it expressed the opinion (by 10 votes to 2) that there had been a violation of Article 6 § 1 (art. 6-1) in that the applicant had not been able to have his case heard by a tribunal within the meaning of that provision.

The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

35. At the hearing on 24 November 1986, the Government reiterated the final submissions made in their memorial, in which they requested the Court

"to hold that the facts in the present case do not disclose any violation by Belgium of its obligations under the European Convention on Human Rights".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

36. The applicant contended that the Council of the Ordre des avocats of Antwerp did not hear his case in a manner consonant with Article 6 § 1 (art. 6-1) of the Convention, which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

In view of the submissions made, the first issue to be resolved is the applicability of Article 6 § 1 (art. 6-1).

A. Applicability of Article 6 § 1 (art. 6-1)

1. Existence of a "contestatation" (dispute) over a right

37. As to whether there was a "contestatation" (dispute) over a right, the Court would refer to the principles that have been laid down in its earlier decisions, notably the Benthem judgment of 23 October 1985 (Series A no. 97, pp. 14-15, § 32).

38. In seeking to be restored to the roll of the Ordre in accordance with Article 471 of the Judicial Code in 1979 and again in 1981, the applicant raised a matter relating to the determination of a right. Restoration to the roll

was a prerequisite of resuming practice as an *avocat*, which he had been prohibited from doing since being struck off in 1963. The Council of the *Ordre* decided the question on each occasion against him.

39. The applicant claimed that he had the right to resume practice of the profession of *avocat* if the legal requirements were satisfied; the Commission agreed that he had such a right.

The Government argued that decisions on admission and a fortiori readmission to the roll came within the discretionary power of the councils of the *Ordre*, in accordance with the traditional principle of responsibility for the roll (see paragraph 27 above). Such decisions were final, no appeal lying either to the ordinary courts or to the *Conseil d'Etat*. In short, the Government claimed, Belgian law did not provide for any right of admission to the Bar, still less any right of readmission.

40. In the instant case the Court is not called upon to rule on the general question of the right of access to the profession of *avocat* in Belgium. The only issue before it relates to the procedure for restoration to the roll of the *Ordre* of an *avocat* who has been struck off.

Article 6 § 1 (art. 6-1) extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States (see, for example, the *W v. the United Kingdom* judgment of 8 July 1987, Series A no. 121, pp. 32-33, § 73).

In order to ascertain whether or not the right claimed by the applicant exists in Belgium, the Court must consider the nature both of disbarment and of the reasons justifying subsequent readmission.

41. Striking off is ordered for professional misconduct and is a disciplinary sanction - the heaviest one available to the Council of the *Ordre*.

In the Government's view, this is a permanent sanction, as the Council is never under any obligation to readmit to the roll.

The Court notes, however, that Article 471 of the Judicial Code permits an *avocat* who has been struck off to seek readmission after "ten years have elapsed from the date on which the decision to strike off became final and [if] exceptional circumstances warrant it" (see paragraph 30 above).

42. While the first of these two conditions can scarcely give rise to any difficulties, the second condition - that there must be "exceptional circumstances" - is capable of being interpreted and applied in a wide variety of ways in the absence of a more precise statutory definition of such circumstances.

Nor do previous decisions of the councils of the *Ordre* clarify the issue. These decisions are very few in number and they remain inaccessible to the public, including disbarred *avocats* contemplating submitting an application for readmission (see paragraph 32 above). Furthermore, from what the

Court has been able to see, the reasoning given in them scarcely seems to provide any information.

43. Having regard to the terms of Article 471, the applicant could arguably maintain that in Belgian law he had the right to practise the profession of avocat again, since he had satisfied the conditions prescribed in that Article. This is true even though the Council of the Ordre had some discretion in deciding whether one of the conditions - whether there were "exceptional circumstances" justifying readmission - had been met. In support of his application H raised matters of law and fact susceptible of judicial assessment.

The Council of the Antwerp Ordre therefore had to determine a "contestation" (dispute) concerning a right asserted by H.

2. Whether the disputed right was a civil one

44. The applicant and the Commission regarded the right in issue as a civil one. The Government maintained the contrary on account of the fundamental differences which they claimed distinguished the profession of avocat from the other professions, such as the medical profession.

45. As in previous cases, the Court does not consider that it has in the present proceedings to give an abstract definition of the concept of "civil rights and obligations". Rather, it must analyse the special characteristics of the profession of avocat in Belgium, since the disputed right is indissolubly bound up with that profession.

46. Such an analysis admittedly discloses features of public law.

(a) In the first place, the Belgian State itself laid down the way in which the Bars should be organised and the conditions attaching to the practice of the profession of avocat, such as access, rights, duties and so on (see the Van der Mussele judgment of 23 November 1983, Series A no. 70, p. 15, § 29).

State intervention by means of a statute or delegated legislation has nonetheless not prevented the Court from holding - notably in several cases relating to the medical profession (König; Le Compte, Van Leuven and De Meyere; and Albert and Le Compte) - that the right in issue had a civil character. In the instant case likewise, such intervention cannot suffice to establish that the right asserted by the applicant did not have this character.

(b) In the second place, the contribution of avocats to the administration of justice involves them in the operation of a public service.

The Government maintained that avocats, who are traditionally described as "officers of the court" (*auxiliaires de la justice*), are, rather, agents of the judicial system in the same way as judges. As evidence of this, the Government cited in particular the monopoly of the right of audience; the possibility of being officially assigned by the court in both criminal and civil proceedings; the duty in some cases to stand in for judges and members of Crown prosecutors' departments; and the duty of the Council of

the Ordre to set up a Legal Advice and Defence Office to assist persons of limited means.

The Court notes that as regards certain of its functions the Bar in Belgium is in a sense part of the judicial system, as the provisions in the 1967 Code concerning the Bar (Articles 428-506) appear in the part entitled "Judicial Organisation". This attachment is not decisive, however. It does not preclude the practice of the profession of *avocat*, as such, from having a civil character. Moreover, there is no concomitant joint or individual subordination to the country's courts. On the contrary, in virtue of its traditional independence, the Bar has complete responsibility for its roll, on the one hand, and for discipline, on the other. Under the Judicial Code, which enshrines the Court of Cassation's case-law on the subject, the Council of the Ordre draws up the roll, and no appeal lies from its decisions in this matter (see paragraph 27 above). The power of determining appeals against disciplinary decisions by the Council of the Ordre has been vested since 1967 in disciplinary appeals boards consisting of the President of the Court of Appeal and four *avocats*; previously it had been vested in the Court of Appeal (see paragraph 29 above).

47. Whilst the foregoing two factors do not, therefore, suffice to establish that Article 6 (art. 6) is inapplicable, several considerations weigh in favour of the opposite conclusion.

(a) To begin with, the profession of *avocat* has traditionally been treated as one of the independent professions in Belgium. According to the terms of Article 444 of the Judicial Code, "*avocats* perform the duties of their office freely in the interests of justice and truth". Once entered on the roll of the Ordre, a member of the Bar is free to practise or not. Unless officially assigned to a case by the court, he has clients whom he chooses voluntarily and directly, without any intervention by a public authority; he can refuse to act if his conscience so dictates and even for other reasons. The instructions to act which bind him to his client are revocable at will by either party and constitute a private-law relationship. As to fees, the *avocat* fixes them himself "with the judiciousness to be expected of [his] office" (Article 459 of the Judicial Code) and subject to the client's agreement, except that the Council of the Ordre may intervene on grounds of excessive charging (*ibid.*).

(b) In the second place, the chambers and clientèle of an *avocat* constitute property interests and as such come within the ambit of the right of property, which is a civil right within the meaning of Article 6 § 1 (art. 6-1) (see, *mutatis mutandis*, the *Van Marle and Others* judgment of 26 June 1986, Series A no. 101, p. 13, § 41).

(c) It may also be noted that while *avocats* enjoy an exclusive right of audience in the courts, they perform numerous important duties out of court, acting as advisers, conciliators and even arbitrators. These duties, which sometimes take up a great deal of time, are a traditional and normal feature

of the profession. Yet they often have no connection with judicial proceedings. That being so, the work of members of the Bar cannot be said to consist solely in contributing to the functioning of the country's courts.

48. Having thus examined the various aspects of the profession of avocat in Belgium, the Court finds that they confer on the asserted right the character of a civil right within the meaning of Article 6 § 1 (art. 6-1), which was thus applicable.

B. Compliance with Article 6 § 1 (art. 6-1)

49. It must accordingly be ascertained whether the applicant enjoyed the "right to a fair hearing" (see the Golder judgment of 21 February 1975, Series A no. 18, p. 18, § 36). As no appeal lay against the decisions of the Council of the Ordre des avocats of Antwerp (see paragraph 30 above), it must be determined whether the Council satisfied the requirements of Article 6 § 1 (art. 6-1), and in particular whether it was in fact an "independent" and "impartial" "tribunal", and whether it gave H a "fair" and "public" hearing. It was not disputed in the instant case that the Council was an institution "established by law" and that it heard the case "within a reasonable time".

50. The applicant and the Commission took the view that the Council of the Ordre did not afford the safeguards inherent in the concept of a "tribunal", while the Government contended that, although the body in question was not usually a "tribunal", it had acted as one in the instant case.

According to the Court's case-law, 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, *inter alia*, the Sramek judgment of 22 October 1984, Series A no. 84, p. 17, § 36).

The Council of the Ordre des avocats performs many functions - administrative, regulatory, adjudicative, advisory and disciplinary (see paragraph 26 above). This variety of functions provided the main ground for the Commission's conclusion that the Council was not a "tribunal".

The Court does not share this view, which is at variance with its case-law (see in particular the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no. 43, pp. 14 and 24, §§ 26 and 55, and the *Campbell and Fell* judgment of 28 June 1984, Series A no. 80, pp. 18-19 and 40-41, §§ 33 and 81). This kind of plurality of powers cannot in itself preclude an institution from being a "tribunal" in respect of some of them.

Moreover, the Council of the Ordre, when taking its decision on the application for readmission made by the applicant (who had been struck off in 1963), was performing a judicial function further to its disciplinary responsibilities. It took action in the case on occasions that were separated

by a considerable lapse of time (in 1963 and then in 1979-81) and in different contexts (disbarment and application for readmission).

51. There can be no question about the independence of the members of the Council of the *Ordre des avocats*. They are elected by their peers (see paragraph 25 above) and are not subject to any authority, being answerable only to their own consciences.

52. Similarly, the Court sees nothing in the evidence before it to give it any reason to doubt their personal impartiality. Having regard to what follows, it does not consider it necessary to express a view on the structural impartiality of the Council of the *Ordre*.

53. As regards the fairness of the proceedings, H was able to have the assistance of a lawyer to represent him and was able to appear in person when his two applications for readmission were considered; he also filed pleadings in support of his second application (see paragraphs 17-18 and 20 above).

Nonetheless, the relevant procedure of the Council of the *Ordre des avocats* of Antwerp is open to criticism in two respects.

In the first place, it was very difficult for the applicant to adduce appropriate evidence of the "exceptional circumstances" which might, in law, have brought about his restoration to the roll and, more generally, to argue his case with the requisite effectiveness; in particular, neither the applicable provisions nor the previous decisions of the councils of the *Ordre* gave any indication of what could amount to "exceptional circumstances" (see paragraph 30 above).

At the same time, he had cause to fear that there was some risk of being dealt with arbitrarily, especially as there was no provision allowing him a right of challenge (cf. the *Le Compte, Van Leuven and De Meyere* judgment previously cited, Series A no. 43, pp. 16 and 25, §§ 31 and 58) and as the Antwerp Bar did not have any internal rules of procedure (see paragraph 31 above).

The procedural safeguards thus appear unduly limited. Their inadequacy is of especial importance in view of the seriousness of what is at stake when a disbarred *avocat* seeks restoration to the roll (see, *mutatis mutandis*, the *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, pp. 42-43, § 79) and the imprecise nature of the statutory concept of "exceptional circumstances".

Furthermore, this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional.

54. As to whether the proceedings were public, the Judicial Code provides that in some circumstances decisions of the Council of the *Ordre* in disciplinary matters may be given in public (Article 460 § 3) and that

proceedings before disciplinary appeals boards may be held in public (Article 476); but it is silent in respect of restoration to the roll. In the instant case, H's applications were not heard in public, nor were the decisions of the Council of the Ordre "pronounced" in public.

Unless cured at a later stage of the procedure, such a defect may deprive the person concerned of one of the safeguards set forth in the first sentence of Article 6 § 1 (art. 6-1) of the Convention (see, *mutatis mutandis*, the Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 18, § 34).

The grounds for H's applications related directly to the practice of the profession of *avocat*, which might conceivably raise questions coming within the exceptions allowed for in Article 6 § 1 (art. 6-1). However, the material before the Court does not suffice to show that the circumstances were such as to warrant the hearings' not being held in public (*ibid.*).

The rule requiring a public hearing, as embodied in Article 6 § 1 (art. 6-1), may also yield in certain circumstances to the will of the person concerned. Admittedly, the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them, but the same cannot be said of certain other rights. Thus neither the letter nor the spirit of Article 6 § 1 (art. 6-1) prevents an *avocat* from waiving, of his own free will and in an unequivocal manner, the entitlement to have his case heard in public; conducting disciplinary proceedings of this kind in private does not contravene the Convention (*loc. cit.*, p. 19, § 35).

The evidence adduced does not establish that H intended to waive his right to a public hearing (*ibid.*). He cannot be blamed for not having demanded to exercise a right which was not afforded him by the practice of the Belgian Bars and that he had little prospect of securing. As to the fact that H wished to remain anonymous in the proceedings before the Convention institutions, it is not decisive in this context, as those proceedings are quite different both in their purpose and in their nature and scope.

55. In short, the Council of the Ordre did not in the instant case satisfy the requirements of Article 6 § 1 (art. 6-1), and there was therefore a breach of that provision.

II. APPLICATION OF ARTICLE 50 (art. 50)

56. The applicant claimed just satisfaction in respect of prejudice sustained and of costs and expenses. He relied on Article 50 (art. 50), which reads:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or

measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Prejudice

57. At the hearing on 24 November 1986, counsel for H emphasised the extent of the damage his client had allegedly suffered as a result of having been struck off the roll.

Non-pecuniary damage was evaluated at 50 million Belgian francs (BF); this was said to have arisen from the ordeal the applicant and his family had gone through. Pecuniary damage was assessed at 52 million BF; this corresponded to the income which the applicant would have earned over a period of twenty-six years (beginning ten years after he was struck off and ending on his seventieth birthday) if he had been able to resume practising his profession.

The Government disputed that there had been any pecuniary damage, which at all events could only be assessed as from the refusal of readmission. In their submission, H had carried on another occupation after he had been struck off and nothing showed that he would have secured readmission to the Bar if he had had a remedy before a tribunal satisfying the conditions of Article 6 § 1 (art. 6-1). As to non-pecuniary damage, a finding that the Convention had been violated would constitute sufficient satisfaction.

For his part, the Delegate of the Commission recommended compensation for considerable prejudice.

58. The Court would point out, firstly, that in the instant case an award of just satisfaction can only be based on the fact that the applicant was not afforded some of the safeguards provided for in Article 6 § 1 (art. 6-1) when his applications for readmission were considered by the Council of the *Ordre des avocats* of Antwerp (see, *mutatis mutandis*, the *Le Compte, Van Leuven and De Meyere* judgment of 18 October 1982, Series A no. 54, pp. 7-8, § 15, and the *Bönisch* judgment of 2 June 1968, Series A no. 103, p. 8, § 11). There are accordingly no grounds for taking the disbarment and its consequences into consideration.

59. As regards pecuniary damage, the evidence does not establish a causal link between the breach of the Convention and any deterioration in H's financial position.

60. On the other hand, the applicant did suffer non-pecuniary damage, in respect of which the Court, making its assessment on an equitable basis as required by Article 50 (art. 50), awards him compensation in the sum of 250,000 BF.

B. Costs and expenses

61. Counsel for the applicant sought on behalf of his client reimbursement of costs and lawyer's fees; he assessed costs at 200,000 BF and the fees at 5 per cent of the amount the Court might award in respect of damages. Despite a written question by the Court, he did not provide further particulars or any supporting documents.

The Government confined themselves to expressing doubts as to the method of calculation proposed for the fees. The Delegate of the Commission submitted that the applicant should be paid the costs and expenses incurred during the successive proceedings.

62. In the instant case, only the costs and fees relating to the proceedings before the Commission and the Court fall to be taken into account (see, *mutatis mutandis*, the *Le Compte, Van Leuven and De Meyere* judgment previously cited, Series A no. 54, p. 9, § 19).

Taking its decision on an equitable basis and applying the criteria laid down in its case-law, the Court considers that legal costs and travel and subsistence expenses may be assessed at 100,000 BF.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to six that Article 6 § 1 (art. 6-1) applied in the instant case;
2. Holds by twelve votes to six that Article 6 § 1 (art. 6-1) has been violated;
3. Holds by sixteen votes to two that the Kingdom of Belgium is to pay the applicant the sum of 250,000 (two hundred and fifty thousand) BF in respect of non-pecuniary damage;
4. Holds unanimously that the Kingdom of Belgium is to reimburse the applicant 100,000 (one hundred thousand) BF in respect of costs and expenses;
5. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 November 1987.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

A declaration by Mr. Matscher and, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- concurring opinion of Mr. Ryssdal;
- concurring opinion of Mr. Thór Vilhjálmsson;
- joint concurring opinion of Mr. Lagergren, Mr. Pettiti and Mr. Macdonald;
- joint dissenting opinion of Mr. Gölcüklü, Mr. Matscher, Sir Vincent Evans, Mr. Bernhardt and Mr. Gersing;
- dissenting opinion of Mr. Pinheiro Farinha;
- separate opinion of Mr. Bernhardt;
- separate opinion of Mr. Gersing;
- separate opinion of Mr. De Meyer.

R.R.
M.-A.E.

DECLARATION BY JUDGE MATSCHER

(Translation)

As, for reasons explained in the joint dissenting opinion, I voted that Article 6 (art. 6) of the Convention was not applicable in the instant case, I could not hold that there had been a breach of that provision.

I should, however, like to point out that if I had considered that Article 6 (art. 6) was applicable, I would have had no hesitation in finding that there had been a violation, as the proceedings before the Council of the Ordre did not satisfy the requirements of Article 6 (art. 6) of the Convention in several respects.

CONCURRING OPINION OF JUDGE RYSSDAL

(Translation)

I concur in the judgment to the extent that it concerns the applicability of Article 6 § 1 (art. 6-1) of the Convention. On the other hand, I regret that I cannot fully endorse it as regards compliance with that provision, as I consider that several points in the reasoning call for a slightly different emphasis.

In the first place, greater attention should have been paid in the judgment to two circumstances which illustrate the large measure of discretion enjoyed by the Council of the Ordre des avocats when considering applications for restoration to the roll. Firstly, the Judicial Code itself, whilst making provision for a readmission procedure quite distinct from the disciplinary procedure, gives no more than a bare outline of what the readmission procedure is to consist of. Secondly, the Antwerp Bar did not have any internal rules of procedure at the material time. The procedure to be followed in a given case was accordingly left almost entirely to the Council.

As to the reasoning in the impugned decisions, the judgment goes no further than noting that it was inadequate. The judgment ought to have drawn attention to the fact that the Antwerp Bar Council was under no legal obligation to set out the grounds which prompted it to reject H's applications for readmission.

Lastly, it may be queried whether it was appropriate to mention the issue of waiving publicity, albeit only to conclude that the applicant had not apparently contemplated exercising that option. The practice of the Belgian Bar in fact totally precluded the possibility of the hearings being held in public or the decision being delivered in public.

These brief observations in no way alter my conclusion that the Council of the Ordre did not in the instant case satisfy the requirements of Article 6 § 1 (art. 6-1).

I would add that I consider it unfortunate that the Council of the Ordre, which has the power of decision as authority of first and last instance, is composed exclusively of practising lawyers.

H. v. BELGIUM JUDGMENT
CONCURRING OPINION OF JUDGE THÓR VILHJÁLMSSON
CONCURRING OPINION OF JUDGE THÓR
VILHJÁLMSSON

My reasons for voting for the applicability of Article 6 § 1 (art. 6-1) are those set out in the judgment.

On the other hand, when I voted to the effect that there had been a violation of this provision, I did so for reasons that are not completely the same as those stated in the judgment. On this point I want to make the following remarks.

The applicant requested the Council of the Antwerp Ordre to restore his name to the roll of the Bar of that city. This request was rejected by the Council. No appeal lay against this decision. The Council was, according to the information before the Court, composed of the bâtonnier, or leader of the Bar, and sixteen other *avocats* selected each year by an assembly of the Ordre.

In my opinion, the membership of the Council, the method used to select the members, and their brief tenure of office result in a lack of what might be called structural impartiality. I find here a situation comparable to the lack of independence dealt with in paragraph 42 of the judgment of our Court in the *Sramek* case, where it is stated that "appearances may also be of importance". As was found in that case with regard to the independence of the institution in question, I find in this case that the Council of the Ordre may give litigants reasons to "entertain a legitimate doubt" about its impartiality. And, to quote further from the *Sramek* judgment, "such a situation seriously affects the confidence which the courts must inspire in a democratic society".

As regards the fairness of the proceedings (paragraph 53 of the judgment), I am of the opinion that the most relevant point is the fact that the applicant had an opportunity to present his case to the Council. It is true, as stated in the judgment, that the procedure was in other respects open to criticism and this is of some relevance in the case. It should, nevertheless, be taken into account that the general rule in Belgian law was that a lawyer who had been struck off the roll could only be readmitted if there were exceptional circumstances. It was for the applicant to show that there were such exceptional circumstances in his case. The arguments that he or his representatives put forward may or may not have been substantial, but I find that they did not by their nature necessitate lengthy discussion in the decision of the Council.

Finally, I agree with what is stated in the judgment on the lack of publicity (paragraph 54).

JOINT CONCURRING OPINION OF JUDGES LAGERGREN,
PETTITI AND MACDONALD

The present judgment recognises the important requirement that judgments of courts and tribunals should adequately state the reasons on which they are based. In this respect the judgment follows a statement of the International Court of Justice in its Advisory Opinion of 12 July 1973*. In that opinion the International Court stated that (paragraph 92):

"[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision."

In paragraph 95 of the same Advisory Opinion the International Court further stated that:

"While a statement of reasons is thus necessary to the validity of a judgement of the Tribunal, the question remains as to what form and degree of reasoning will satisfy this requirement. The applicant appears to assume that, for a judgment to be adequately reasoned, every particular plea has to be discussed and reasons given for upholding or rejecting each one. But neither practice nor principle warrants so rigorous an interpretation of the rule, which appears generally to be understood as simply requiring that a judgment shall be supported by a stated process of reasoning. This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole."

* Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports, p. 166.

H. v. BELGIUM JUDGMENT
JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ, MATSCHER SIR
VINCENT EVANS, BERNHARDT AND GERSING
JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ,
MATSCHER SIR VINCENT EVANS, BERNHARDT AND
GERSING

We share the starting-point of the present judgment that Article 6 § 1 (art. 6-1) extends only to disputes over civil rights and obligations which can be said, on arguable grounds, to be recognised under domestic law (see paragraph 40 of the judgment). But in our opinion this condition is not fulfilled in the present case.

The wording of Article 471 of the Belgian Judicial Code makes it quite clear that the power of the Council of the *Ordre des avocats* to readmit a person to the Bar is a discretionary one which however can only be exercised if certain conditions are satisfied. The relevant conditions are:

- (a) ten years must have elapsed since the decision to strike the *avocat* from the roll; and
- (b) exceptional circumstances must warrant readmission (when such circumstances exist, has never been clarified by law or practice).

If these conditions are fulfilled, restoration to the roll may be granted. In view of this legal situation, it does not appear that any right can be considered to exist under domestic law.

This view is supported by the history of the relevant provision of Belgian law (see paragraph 30 of the judgment and the memorial of the Government) as well as by the express exclusion of any appeal.

Even if one considers the Belgian law concerning readmission to the Bar to be highly unsatisfactory, it is not up to the international judge to interpret the internal law in contradiction to its wording and the relevant national practice.

Since, in our opinion, no right exists, the question does not arise whether such rights could be qualified as civil rights under Article 6 § 1 (art. 6-1) of the Convention.

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I do not think that Article 6 (art. 6) of the Convention applied in the instant case. H had no right to be restored to the roll of the Ordre des avocats - Article 471 of the Judicial Code is quite clear on this point:

"No avocat who has been disbarred may be entered on a roll of the Ordre or on a list of pupil avocats until ten years have elapsed from the date on which the decision to strike off became final and unless exceptional circumstances warrant it *.

No such entry shall be permitted without the reasoned consent of the Council of the Ordre¹ to which the avocat belonged or, as the case may be, the leave of the relevant disciplinary appeal authority if the disbarment was ordered by it.

No appeal shall lie against a refusal to restore to the roll*."

The requirement of exceptional justifying circumstances, the need for the consent of the Council of the Ordre and the lack of any right of appeal against a refusal to restore to the roll show that the applicant does not have a right to readmission, which is in the discretion of the Council of the Ordre. H had merely a "right of petition": he could and can apply for readmission. Such a right is not in any way a civil right; in the present case it is of a procedural nature and is not protected by Article 6 (art. 6) of the Convention.

2. Having reached the conclusion that there has not been a violation of Article 6 (art. 6), I do not consider it logical - as I said in my dissenting opinion annexed to the Sanchez-Reisse judgment of 21 October 1986 (Series A no. 107, p. 26) - that the applicant should, in the same judgment, be awarded just satisfaction on the basis of facts which do not, in my view, contravene the Convention.

3. On the other hand, I have voted for reimbursement of costs and expenses - assessed on an equitable basis - because they do not flow directly from a breach of the Convention but follow from the Court's judgment.

Such reimbursement does not represent satisfaction for damage but relates to expenses necessarily incurred in securing a favourable decision from the European Court of Human Rights.

* My underlining.

SEPARATE OPINION OF JUDGE BERNHARDT

If the applicant had - or could plausibly claim - a (civil) right to be readmitted to the Bar under Belgian law (which I have denied in the joint dissenting opinion), I would have had little doubt that no tribunal had determined that right and that Article 6 (art. 6) of the Convention had been violated.

In my view, the Council of the Ordre cannot be described as a tribunal in the sense of Article 6 § 1 (art. 6-1) of the Convention. At least when taken together, the following points show that the Council neither is designed to act as a tribunal nor in fact does so act.

(1) The Council has mainly administrative functions. There must be convincing reasons - for instance clear statutory provisions - for considering the same board for certain purposes as a tribunal.

(2) The Council is composed exclusively of practising lawyers and not of professional or ordinary lay judges. The lawyers decide on the capacity of (present or former) colleagues. Such a structure is hardly compatible with the requirements of an impartial tribunal.

(3) The procedure of the Council is left entirely to be determined by the Council itself. Can a tribunal, as required by the Convention, be left without any procedural rules and safeguards?

(4) No publicity is prescribed for the hearings or for the final decisions. Can a body acting exclusively in camera really be described as a tribunal?

(5) The Council need not, and does not, give reasons for its "judgment". Can a board, deciding at first and last instance, be described as a tribunal if its decisions lack any legal reasoning?

At least in their aggregate, these deficiencies amount to cogent reasons for not regarding the Council as a tribunal.

SEPARATE OPINION OF JUDGE GERSING

In a joint dissenting opinion I have, with other colleagues, found Article 6 § 1 (art. 6-1) not to be applicable. Had I shared the view of the majority as to the applicability of Article 6 § 1 (art. 6-1), I would have voted for a violation thereof, mainly for the following reasons.

The Council of the Antwerp Ordre could not be considered to be an impartial tribunal. Its sixteen members were all *avocats*, the chairman being the leader of the Bar. Furthermore, the Council did not have any internal rules of procedure or any provision conferring on the applicant a right of challenge.

SEPARATE OPINION OF JUDGE DE MEYER

(Translation)

Like the majority of my colleagues, but for reasons different from those given in the judgment, I consider that Article 6 § 1 (art. 6-1) of the Convention was applicable in the instant case and that the applicant's right under that provision was violated.

I am further of the view, as regards the application of Article 50 (art. 50) of the Convention, that the applicant should only have been awarded reimbursement of his costs and expenses.

I. As to the applicability of Article 6 § 1 (art. 6-1) of the Convention

1. Like several earlier judgments, the Court's judgment in the instant case gives undue prominence to the concept of "contestatation" (dispute).

I refer to the observations I made on this subject in my separate opinion in the Pudas case and to those I made jointly with Mr. Pettiti in my separate opinion in the Bodén case¹.

I feel bound to reiterate them, the more so as the instant case is concerned precisely with non-contentious proceedings².

Nothing in these proceedings disclosed the existence of a contestation. They concerned merely, as the Court notes, "a matter relating to the determination of a right"³. That sufficed for the applicant to be entitled to the protection of Article 6 § 1 (art. 6-1) of the Convention.

2. The judgment repeats once again the assertion in the James judgment⁴ that Article 6 § 1 (art. 6-1) of the Convention applies "only" in respect of "'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law"⁵.

I regret this. For myself, I can only confirm what I said, with five of my colleagues, about that assertion when it was repeated in the cases of W, B, R and O v. the United Kingdom⁶; what I said subsequently when it was again repeated in the Pudas case; and what I said with Mr. Pettiti when it was yet again repeated in the Bodén case⁷.

¹ Judgments of 27 October 1987, Series A no. 125, pp. 21 and 45.

² See on this point the observations of Mr. Matscher in his separate opinion in the Albert and Le Compte case, judgment of 10 February 1983, Series A no. 58, pp. 26-27, § 2, and in his contribution to the Festschrift für Kurt Wagner, Vienna 1987, pp. 271-281.

³ Paragraph 38 of the judgment.

⁴ Judgment of 21 February 1986, Series A no. 98, p. 46, § 81. (5) Paragraph 40, second sub-paragraph, of the judgment.

⁵ Paragraph 40, second sub-paragraph, of the judgment.

⁶ Judgments of 8 July 1987, Series A no. 120, p. 32, and no. 121, pp. 39, 83 and 128.

⁷ Pudas and Bodén judgments previously cited, loc. cit.

It was unnecessary to repeat the assertion again on this occasion, since it is stated in the judgment that this excessive requirement was satisfied in the instant case⁸.

It was, in my view, inappropriate to repeat pointlessly an assertion on which there is not a sufficient consensus within the Court and which is likely to seriously lessen the scope of the protection afforded by the Convention.

3. In those circumstances, it matters little to me that what the applicant "could maintain" was, in the words of the judgment, "arguabl[e] ... in Belgian law"⁹.

In my opinion, the applicant was entitled purely and simply to have his case heard by a tribunal affording him the safeguards laid down in Article 6 § 1 (art. 6-1) of the Convention; it was for a tribunal of this kind to determine whether the applicant's case could be "arguably" maintained and whether it could so be maintained, not narrowly "in Belgian law", but "in law" tout court.

4. I have no difficulty in holding, with the majority of my colleagues, that the right to be determined in the instant case was a "civil" one. I am increasingly inclined to think that a "civil" character, within the meaning of Article 6 § 1 (art. 6-1) of the Convention, is to be ascribed to all rights and obligations which do not relate, more specifically, to the "determination ... of [a] criminal charge".

In my opinion, it is therefore of little importance that the right at issue displayed "features of public law"¹⁰; even if it had not had any other features, it ought nonetheless to have been covered by the judicial protection guaranteed in the provision in question.

5. Such protection had, therefore, to be provided in the instant case, as the applicant had raised "a matter relating to the determination of a right"¹¹.

II. As to the violation of Article 6 § 1 (art. 6-1) of the Convention

1. The Council of the Ordre, which had to decide on H's application for restoration to the roll, was, as the Court notes, an independent¹² tribunal¹³.

It was also, in my view, an impartial tribunal.

As the Court sees nothing in the evidence before it to give it any reason to doubt the "personal impartiality" of the members of the Council of the

⁸ Paragraph 43, first sub-paragraph, of the judgment.

⁹ Ibid.

¹⁰ Paragraph 46 of the judgment.

¹¹ Paragraph 38 of the judgment.

¹² Paragraph 51 of the judgment.

¹³ Paragraph 50 of the judgment.

Ordre, it leaves open the question of the Council's "structural impartiality"¹⁴.

There is nothing in the evidence, either, to give any reason to doubt the latter any more than the former¹⁵.

The "structural" impartiality of a body such as a council of the Ordre des avocats has to be presumed, just like the "personal" impartiality of its members, until the contrary is proved. In particular, the fact that it contained only members elected by their peers "cannot suffice to bear out a charge of bias"¹⁶.

2. I consider the reasoning given in the judgment as regards the fairness of the proceedings¹⁷ to be unconvincing.

This is particularly so in that it is stated in the judgment that there was no provision allowing the applicant a right of challenge¹⁸, that the Antwerp Bar did not have any internal rules of procedure¹⁹ and that the reasons given for the two impugned decisions were not sufficient²⁰.

3. Whether or not there was a "provision" allowing the applicant a right of challenge, and whether or not there were any "internal rules of procedure"²¹, seem to me to be of very little importance in the instant case.

It may be asked what such "provision" or such "rules" should or could have contained. It may be asked whether it was possible and desirable to regulate everything in advance. It may also be asked in what way the fact that general principles or traditional customary rules were not formulated in writing in laws or in regulations could hinder the applicability (*Geltung*) or application (*Wirkung*) of those principles and rules²².

What mattered was to ascertain whether, with or without any "provision", with or without "internal rules of procedure", everything was properly conducted.

In the instant case nothing warrants the assertion that the lack of such provisions or rules could have prejudiced the applicant.

In particular, as regards the right of challenge, there is nothing to show either that the applicant would have wanted to challenge one or more of the members of the Council of the Ordre²³ or that, if he had done so, he would

¹⁴ Paragraph 52 of the judgment.

¹⁵ See, *mutatis mutandis*, the Albert and Le Compte judgment previously cited, pp. 17-18, § 32.

¹⁶ Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, § 58. See also the Albert and Le Compte judgment previously cited, *loc. cit.*

¹⁷ Paragraph 53 of the judgment.

¹⁸ Paragraph 53, fourth sub-paragraph, of the judgment.

¹⁹ *Ibid.*

²⁰ Paragraph 53, sixth sub-paragraph, of the judgment.

²¹ Paragraph 53, fourth sub-paragraph, of the judgment.

²² See on this point the Sunday Times case of 26 April 1979, Series A no. 30, pp. 30-33, §§ 46-53.

have met with a refusal based on the lack of any "provision" allowing him a right of challenge.

4. The judgment appears to recognise that giving "sufficient reasons" was, in the instant case, one of the requirements that had to be satisfied for the proceedings to be "fair"²⁴.

Like Mr. Lagergren, Mr. Pettiti and Mr. Macdonald, I welcome this and consider that all judicial decisions should give an adequate indication of the reasons on which they are based²⁵.

But I take the view that the Court had "scarcely ... any information"²⁶ enabling it to say or suggest that, as regards the lack of any "exceptional circumstances" within the meaning of Article 471 of the Judicial Code, the reasons given in the two impugned decisions were insufficient²⁷; in this respect, the judgment itself seems to me to be ill-supported by reasoning and, above all, to be ill-founded.

To be convinced of this, it is sufficient to look at the evidence*.

The circumstances which might have justified restoration to the roll were not mentioned in the letters in which the applicant applied for readmission²⁸: both of those letters are terse in the extreme. In the one of 3 December 1979 the applicant applies, in fifteen words, for rehabilitation ("eerherstel") and restoration to the roll ("herinschrijving"). In the one of 9 February 1981 he does no more than apply, in twelve words, for restoration to the roll.

The letter of 3 December 1979 was not accompanied by any supporting documents. It was enlarged on orally at the sitting of the Council of the Ordre on 18 February 1980 by Mr. De Clercq, who, according to the minutes of the sitting, relied on the following:

(a) the major professional and family difficulties the applicant had experienced over the previous fifteen years;

(b) the care the applicant had taken to avoid any misunderstanding or confusion as to the capacity in which he managed his clients' legal and tax affairs;

(c) the fact that the 1963 decision had not been followed up with any criminal proceedings and that the prosecutions brought against the applicant later had ended in acquittals;

²³ See, *mutatis mutandis*, the Le Compte, Van Leuven and De Meyere judgment previously cited, p. 25, § 58.

²⁴ Paragraph 53, sixth sub-paragraph, of the judgment.

²⁵ See their concurring opinion above.

²⁶ Paragraph 42, second sub-paragraph, of the judgment.

²⁷ Paragraph 53, sixth sub-paragraph, of the judgment.

* Note by the Registrar. Appendices 3-12 to the Government's memorial are not available to the public and will not be published (order made by the President of the Court on 26 October 1987 pursuant to Rule 55 of the Rules of Court).

²⁸ Cour (86) 100, addendum, documents 3 and 8.

(d) the courage and idealism the applicant had shown in continuing, so far as was still open to him, to make use of his legal skills and to keep them up through study²⁹.

In its decision given the same day, the Council of the Ordre briefly noted that these explanations did not disclose the existence of any exceptional circumstances such as would persuade the Council that it was appropriate to order restoration to the roll and thus cancel the effects of the disbarment ordered in 1963³⁰.

Was there much more to be said in reply to the arguments put forward by Mr. De Clercq³¹? Was it necessary to invent pointless sentences merely in order to say (according as the reply was affirmative or negative) that the arguments had or had not persuaded the Council that there were "exceptional circumstances"? How, in the instant case should it have been "explain[ed] why the circumstances relied on by the applicant were not to be regarded as exceptional"³²?

The letter of 9 February 1981 was accompanied by a memorandum of 3 February 1981 written at the applicant's request by a retired procureur général, B. This memorandum consisted mainly of a criticism of the procedure followed in 1963; it also contained a few reflections on the consequences the disbarment had had for the applicant and on the difficulties he had encountered since he had been struck off³³.

At the sitting of the Council of the Ordre on 21 April 1981, Mr. De Clercq concentrated on setting out the arguments relating to the 1963 proceedings, and he stated in particular that B's memorandum disclosed "wholly exceptional circumstances which were not known at the time of the first application for restoration to the roll". As for the rest, he pointed out that from 1963 to 1980 the applicant had run his legal and tax consultancy in a manner beyond reproach; reminded the Council of the "major family worries" that the applicant had had to face during the same period; and affirmed the need to put an end to a "disastrous situation", which was, he said, out of all proportion to the offences which had led to disbarment³⁴.

At the same sitting the applicant filed a memorandum which did not contain any fresh evidence but merely explained why it was B who had been consulted and why it was legitimate to consult him³⁵.

²⁹ Cour (86) 100, addendum, document 7.

³⁰ Ibid.

³¹ In the minutes of the sitting on 18 February 1980 these arguments are reproduced immediately before the text of the Council's decision.

³² Paragraph 53, sixth sub-paragraph, of the judgment.

³³ Cour (86) 100, addendum, document 9. The memorandum begins by reproducing a letter the applicant sent to B on 9 December 1980, in which he refers among other things to the "pitiful suffering" ("erbarmelijke lijdensweg") and the worrying situation ("de toestand is angstwekkend") which he claims the disbarment has entailed for him.

³⁴ Cour (86) 100, addendum, document 10.

³⁵ Ibid., document 11.

The decision of the Council of the Ordre on 11 May 1981 replied at some length to the criticisms concerning the propriety of the disbarment procedure. The Council noted that, as to the rest, the memorandum by B merely repeated the arguments already put forward on 18 February 1980 and that it had not been shown any more convincingly than on that occasion that there were "exceptional circumstances" which might justify restoring the applicant to the roll. It pointed out that disbarment was ordered only where an avocat was deemed unworthy of ever practising his profession again, and that this explained why only "exceptional" circumstances could justify restoration to the roll. The Council added that the seriousness of disbarment and its consequences could not in itself be used as an argument justifying restoration to the roll after some time had elapsed³⁶. Once again, it has to be asked whether it was necessary to say much more on this score³⁷.

In my view, it must not be forgotten that it is for the disbarred avocat to show that there are exceptional circumstances which, in his submission, justify restoring him to the roll.

5. The fact remains, therefore, as regards the fairness of the proceedings, that, as is recorded in the judgment, "it was very difficult for the applicant to adduce appropriate evidence of the 'exceptional circumstances' which might, in law, have brought about his restoration to the roll" and "to argue his case with the requisite effectiveness" and that he was hampered in particular by the fact that "neither the applicable provisions nor the previous decisions of the councils of the Ordre gave any indication of what could amount to 'exceptional circumstances'"³⁸.

³⁶ Ibid., document 12.

³⁷ "While a statement of reasons is thus necessary to the validity of a judgment of the Tribunal, the question remains as to what form and degree of reasoning will satisfy this requirement. The applicant appears to assume that, for a judgment to be adequately reasoned, every particular plea has to be discussed and reasons given for upholding or rejecting each one. But neither practice nor principle warrants so rigorous an interpretation of the rule, which appears generally to be understood as simply requiring that a judgment shall be supported by a stated process of reasoning. This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole." (Advisory Opinion of the International Court of Justice of 12 July 1973 on the Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, § 95, I.C.J. Reports, 1973, pp. 210-211)

³⁸ Paragraph 53, third sub-paragraph, of the judgment.

All this may entail "some risk of being dealt with arbitrarily"³⁹. But that is not enough to warrant saying that the procedure followed in the instant case was unfair.

Statutes and regulations often refer to concepts as vague or almost as vague as, or even vaguer than, the concept of the "exceptional circumstances" mentioned in Article 471 of the Belgian Judicial Code.

The European Convention on Human Rights itself contains quite a large number of references of this kind. This is especially true of Article 6 § 1 (art. 6-1), the very provision at issue in the instant case, in that it requires that cases should be given a "fair" - yes, "fair" - hearing within a "reasonable" time, and also refers to "the interest of morals, public order or national security in a democratic society", to "the interests of juveniles", to "the private life of the parties", to "the interests of justice", to "special circumstances" and to what is "strictly necessary"; these are moreover not the only terms in this provision which may cause problems, as we know. Such words do not necessarily have the effect of invalidating the proceedings of courts which have to interpret and apply the concepts to which the words refer.

Nor does such an effect follow from the fact that there is not - or not yet - any, or enough, case-law on concepts of this kind.

6. I consider nonetheless that the applicant did not receive a fair hearing.

In my opinion, he did not receive one, not because the proceedings before the Council of the Ordre were defective in themselves, but quite simply because he did not have any remedy against the refusal of his applications for readmission.

"In view of the seriousness of what is at stake when a disbarred avocat seeks restoration to the roll ... and the imprecise nature of the statutory concept of 'exceptional circumstances'"⁴⁰, the proceedings were, in the absence of such a remedy, too summary to satisfy the requirements of a fair hearing.

The exercise of such a discretion by the Council of the Ordre in such a matter should have been reviewable by a higher tribunal.

Some avenue of appeal enabling such a review to be made should accordingly have been open to the applicant.

But whereas such an appeal lies in disciplinary matters⁴¹, Belgian legislation makes no provision for one in respect of a refusal to restore to the roll.

It is that, and only that, which leads me to the conclusion that the applicant did not receive a fair hearing and that there was therefore, in this respect, a violation of his fundamental rights.

³⁹ Paragraph 53, fourth sub-paragraph, of the judgment.

⁴⁰ Paragraph 53, fifth sub-paragraph, of the judgment.

⁴¹ See paragraph 29 of the judgment.

7. It remains the case that H's applications were not dealt with in public proceedings⁴².

But the applicant does not appear to have wanted, and did not seek, public proceedings⁴³. Only before the Commission and the Court did he raise this issue, without making any detailed submission on the subject, while indicating a wish that his identity should not be divulged⁴⁴.

Having regard to the applicant's desire for anonymity, to the fact that he did not raise the issue before the Council of the Ordre and to the very nature of the decision that the Council was being asked to take, it seems to me that it should be accepted that the applicant tacitly waived his entitlement to public proceedings and that it was with his agreement that the proceedings took place in private⁴⁵.

In this respect the applicant's fundamental rights do not therefore seem to me to have been violated.

III. As to the application of Article 50 (art. 50) of the Convention

1. I approve what the Court has said about pecuniary damage⁴⁶ and about reimbursement of costs and expenses⁴⁷.

2. As regards non-pecuniary damage⁴⁸, I consider that the judgment in itself constituted sufficient just satisfaction.

In this respect there was no cause to take a different decision in the instant case from the decisions taken in fairly similar circumstances in the *Le Compte, Van Leuven and De Meyere* case⁴⁹ and the *Albert and Le Compte* case⁵⁰.

I therefore think that the award of compensation for non-pecuniary damage was not justified in the instant case.

⁴² Paragraph 54 of the judgment

⁴³ See, *mutatis mutandis*, the *Le Compte, Van Leuven and De Meyere* judgment previously cited, pp. 25-26, § 59.

⁴⁴ Paragraph 1 of the judgment.

⁴⁵ See the *Le Compte, Van Leuven and De Meyere* judgment previously cited, *loc. cit.*, and the *Albert and Le Compte* judgment previously cited, p. 19, § 35.

⁴⁶ Paragraph 59 of the judgment.

⁴⁷ Paragraph 62 of the judgment.

⁴⁸ Paragraph 61 of the judgment.

⁴⁹ Judgment of 18 October 1982, Series A no. 54, p. 8, § 16.

⁵⁰ Judgment of 24 October 1983, Series A no. 68, p. 6, § 8.