



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

COURT (CHAMBER)

CASE OF VACHER v. FRANCE

(Application no. 20368/92)

JUDGMENT

STRASBOURG

17 December 1996

In the case of Vacher v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

MM. R. BERNHARDT, *President*,

L.-E. PETTITI,

C. RUSSO,

J. DE MEYER

Mrs E. PALM,

MM. A.N. LOIZOU,

A.B. BAKA,

J. MAKARCZYK,

E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 June 1996 and 29 November 1996,

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

PROCEDURE

1. The case was referred to the Court by the French Government ("the Government") on 7 August 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 20368/92) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by a French national, Mr Gérard Vacher, on 18 November 1991.

The Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the application 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 para. 1 of the Convention (art. 6-1).

¹ The case is numbered 64/1995/570/656. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 September 1995, in the presence of the Registrar, the President of the Court, Mr Ryssdal, drew by lot the names of the other seven members, namely Mr C. Russo, Mr J. De Meyer, Mrs E. Palm, Mr A.N. Loizou, Mr A.B. Baka, Mr J. Makarczyk and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 11 March 1996 and the Government's memorial on 29 March 1996. On 30 April 1996 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 7 May 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J.-F. DOBELLE, Deputy Director of Legal
Affairs, Ministry of Foreign Affairs, *Agent;*

Mr B. NEDELEC, magistrat, on secondment to
the Legal Affairs Department, Ministry
of Foreign Affairs,

Mr G. BITTI, member of the Human Rights Office,
European and International Affairs Department,
Ministry of Justice, *Counsel;*

- for the Commission

Mr J.-C. SOYER, *Delegate;*

- for the applicant

Mr M. RICARD, of the Paris Bar, *Counsel.*

The Court heard addresses by Mr Soyer, Mr Ricard and Mr Dobelle, and also their replies to its questions.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mr Gérard Vacher, a French national, is a company director and lives at Neuilly-sur-Seine.

8. On 21 September 1988 the Public Works Department of the département of Hauts-de-Seine lodged a criminal complaint against the applicant alleging offences under the Town Planning Code and, more particularly, that he had built a wall without first obtaining planning permission.

9. On 9 February 1990 the Nanterre Criminal Court sentenced the applicant to a fine of 8,000 French francs (FRF), payment of which was suspended, and ordered him to alter the wall so that it complied with regulations.

10. On 23 May 1991, following an appeal brought by Mr Vacher on 16 February 1990 and a subsequent cross-appeal by the prosecution, the Versailles Court of Appeal upheld the judgment of the court below in its entirety and further ordered that the wall should be altered to comply with regulations within a period of four months from the date of its judgment, on penalty of FRF 200 per day's delay starting at the end of that period. It also ordered the applicant to pay the civil party claiming damages FRF 3,000 in respect of the costs incurred by that party.

11. On 28 May 1991 Mr Vacher lodged a notice of appeal on points of law against the judgment of the Versailles Court of Appeal with that court's registry (Article 576 of the Code of Criminal Procedure - see paragraph 13 below).

On 19 June 1991 the case file for the appeal was registered by the Court of Cassation registry. On 14 August 1991 the applicant filed a pleading in support of his appeal.

12. On 3 September 1991 the chief registrar of the Court of Cassation sent Mr Vacher the following letter:

"Further to your letter, I have to inform you that the Criminal Division of the Court of Cassation delivered a judgment on 6 August 1991 dismissing your appeal.

Consequently, the pleading received from you at the criminal registry on 14 August 1991 will be disregarded as being out of time."

The judgment in question, which was served on the applicant on 30 October 1995, was based on the following ground:

"No ground of appeal has been filed in support of the appeal; the judgment appealed against is in the proper form and the findings of fact, which cannot be appealed against, justify both the classification of the offence and the sentence."

II. RELEVANT DOMESTIC LAW

13. The main provisions of the Code of Criminal Procedure referred to in the present case are the following:

Article 568

"The prosecuting authority and all the parties shall have five clear days in which to appeal to the Court of Cassation after delivery of the judgment appealed against.

..."

Article 576

"Notice of appeal shall be given to the registrar of the court which delivered the judgment appealed against.

It must be signed by the registrar and by the appellant himself or by a lawyer [avoué] at the court which gave judgment, or by a specially authorised person ...

The appeal shall be recorded in a special public register and any person shall be entitled to obtain a copy of it."

Article 584

"An appellant on points of law may lodge a pleading bearing his signature and containing the grounds of his appeal with the registry of the court against whose judgment he is appealing either when he gives notice of appeal or within the following ten days. The registrar shall issue him with a receipt."

Article 585

"After expiry of that time-limit, a convicted appellant may send his pleading directly to the Court of Cassation; the other parties may not avail themselves of this provision without retaining a member of the Court of Cassation Bar.

..."

Law no. 93-1013 of 24 August 1993, which came into force on 2 September 1993, inserted Article 585-1, which provides:

"Save where the President of the Criminal Division decides otherwise, a convicted appellant shall lodge his pleading with the registry of the Court of Cassation no later than one month from the date of the notice of appeal."

In his report of 23 June 1993 presented to the National Assembly on behalf of the Committee on Constitutional Law, Legislation and the General Administration of the Republic, Mr Jean Tibéri justified the insertion of the new Article 585-1 as follows:

"The new Article 585-1 is intended to resolve a difficulty which has appeared in recent years. The Court of Cassation frequently dismisses appeals on points of law because no pleadings have been filed in support of them. As the Law does not lay down a time-limit for filing a pleading, a convicted appellant's pleading may reach the court a few days after his appeal has been dismissed. Indeed, applications are pending before the European Commission of Human Rights on this question. So as to avoid such situations recurring, the new Article 585-1 provides that convicted appellants shall have a period of one month, which may be extended by the President of the Criminal Division, in which to file their pleadings."

Article 586

"On pain of a 50-franc civil fine imposed by the Court of Cassation, the registrar shall, within a maximum period of twenty days from the date of the notice of appeal, number and initial the documents in the case file and place in the case file an office copy of the judgment appealed against, an office copy of the notice of appeal and, where relevant, the appellant's pleading. He shall draw up a schedule of the whole case file."

Article 587

"When the case file has been made ready in the manner described above, the registrar shall deliver it to the representative of the public prosecutor's office, who shall immediately send it to the procureur général at the Court of Cassation, who shall, turn, forward it to the registry of the Criminal Division.

The President of that Division shall designate a judge to report on the case."

Article 588

"Where one or more counsel have been instructed, the reporting judge shall set a time-limit for pleadings to be filed with the registrar of the Criminal Division."

Article 590

"The pleadings shall contain the grounds of appeal and cite the legal provisions alleged to have been infringed.

...

They must be lodged within the prescribed time-limit. No further pleadings may be added to them once the reporting judge has filed his report. Any pleading setting out additional grounds that is lodged out of time may be declared inadmissible."

Article 604

"In cases concerning any category of criminal offence, the Court of Cassation may give judgment on the appeal on points of law as soon as ten days have elapsed after receipt of the case file by the Court of Cassation.

..."

PROCEEDINGS BEFORE THE COMMISSION

14. Mr Vacher applied to the Commission on 18 November 1991. Relying on paragraphs 1 and 3 (b) and (c) of Article 6 of the Convention (art. 6-1, art. 6-3-b, art. 6-3-c), he complained that he had not had a fair hearing and that he had not been able to put his case, in that the Court of Cassation, without having given him a time-limit for lodging his pleading, dismissed his appeal approximately two and a half months after it had been brought because he had not filed grounds of appeal.

15. The Commission declared the application (no. 20368/92) admissible on 17 May 1994. In its report of 5 April 1995 (Article 31) (art. 31), it expressed the opinion by eight votes to four that there had been a violation of Article 6 (art. 6). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment³

FINAL SUBMISSIONS TO THE COURT

16. In their memorial the Government asked the Court "to dismiss Mr Vacher's application".

17. The applicant requested the Court to hold "that he [had] not had a fair hearing within the meaning of Article 6 paras. 1 and 3 (b) and (c) of the Convention (art. 6-1, art. 6-3-b, art. 6-3-c)".

AS TO THE LAW

I. SCOPE OF THE CASE

18. Before the Court the applicant alleged for the first time that there had been a violation of Article 6 para. 3 (a) of the Convention (art. 6-3-a) in that he had not been informed in detail of the nature of the charge against him or the reason for it.

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-VI), but a copy of the Commission's report is obtainable from the registry.

In the Court's view, however, this complaint is outside the scope of the case as defined by the Commission's decision on admissibility (see, among other authorities, the *Scollo v. Italy* judgment of 28 September 1995, Series A no. 315-C, p. 51, para. 24).

II. ALLEGED VIOLATION OF ARTICLE 6 PARAs. 1 AND 3 (b) AND (c) OF THE CONVENTION (art. 6-1, art. 6-3-b, art. 6-3-c)

19. Mr Vacher complained that he had not had a fair trial as the Court of Cassation had dismissed his appeal on points of law for failure to lodge grounds of appeal, without informing him of the time-limit for filing a pleading. He relied on paragraphs 1 and 3 (b) and (c) of Article 6 of the Convention (art. 6-1, art. 6-3-b, art. 6-3-c), which provide:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

By not laying down a time-limit for lodging a personal pleading - that is to say one that has not been drafted by a member of the Conseil d'Etat and Court of Cassation Bar - the Code of Criminal Procedure had prevented him from exercising his defence rights. His pleading had been received by the registry after his appeal on points of law had been dismissed and had therefore been disregarded as being out of time. Yet his lawyer had lodged it within a reasonable time, in this instance two and a half months after the notice of appeal had been filed. On the Government's own admission, the average time for preparing for hearing an appeal on points of law in which the appellant was not represented by a member of the Conseil d'Etat and Court of Cassation Bar was three months. The Court of Cassation's registry could remedy this statutory shortcoming by informing appellants who did not wish to be represented by a member of the Conseil d'Etat and Court of Cassation Bar of the date on which their appeal would be heard. It was not for convicted appellants to take steps to find out that date. Indeed, the legislature had been conscious of the perverse effects of this legal vacuum,

because the new Article 585-1 of the Code of Criminal Procedure now laid down a one-month time-limit (see paragraph 13 above).

Furthermore, the French system for preparing criminal appeals on points of law for hearing created an inequality of treatment between those appellants who were represented by a member of the Conseil d'Etat and Court of Cassation Bar and those who were not. A member of the Conseil d'Etat and Court of Cassation Bar was given a time-limit that enabled him not only to protect himself from forfeiture of the right to proceed, but also to ensure that his written observations would in fact be considered by the reporting judge. Neither of those safeguards was provided in equivalent conditions to appellants who acted in person or were assisted by a member of the ordinary Bar.

Lastly, there was inequality of arms between the defence and the prosecution. The procureur général at the Court of Cassation was personally advised of the progress of proceedings and of the hearing date, and at the hearing he could make observations without the appellant's being permitted to reply.

20. The Commission essentially agreed with the applicant.

21. In the Government's submission, an appeal to the Court of Cassation was a special form of appeal. The Court of Cassation was not therefore a third level of jurisdiction and special rules applied to criminal proceedings before it. The distinction made in the law between appellants who were represented by a member of the Conseil d'Etat and Court of Cassation Bar and those who were not was justified by the monopoly of representation in proceedings before the Conseil d'Etat and the Court of Cassation. Not imposing a time-limit on unrepresented appellants for filing pleadings gave an advantage to appellants who were not legal practitioners and who consequently were given more time than members of the Conseil d'Etat and Court of Cassation Bar to prepare their case. However, even though unrepresented appellants had more time, they should not remain inactive. On the contrary, they had to be vigilant as, under Article 604, first paragraph, of the Code of Criminal Procedure, the Court of Cassation was entitled to rule on the appeal once ten days had elapsed after the registry had received the case file. The 1993 reform was designed to ensure equality between all appellants.

Mr Vacher had deliberately chosen not to be assisted by a member of the Conseil d'Etat and Court of Cassation Bar. He should, consequently, have shown a minimum of diligence. In the present case the time available to him to draft his pleading - more than two months (28 May 1991 - 6 August 1991) - should have allowed him to prepare his case. Furthermore, he had been assisted by counsel who, though not a member of the Conseil d'Etat and Court of Cassation Bar, could not legitimately plead his ignorance of current practice in order to complain that the procedure was unfair. He should have taken advice from colleagues who specialised in Court of

Cassation cases and taken one of the following steps: asked the Court of Cassation's registry when the Court of Appeal had forwarded the case file, that being when the ten-day period laid down in Article 604 of the Code of Criminal Procedure began to run; informed the reporting judge of his client's intention to file a pleading and applied to that judge for the case not to be listed for imminent hearing; or found out when the appeal was to be heard. Neither the applicant nor his lawyer had made use of the means available to them for ensuring that they actually enjoyed the rights protected by Article 6 of the Convention (art. 6). In their neglect, identical to that which the Court had found in respect of Mr Melin (see the *Melin v. France* judgment of 22 June 1993, Series A no. 261-A), they had betrayed a distinct lack of interest in the outcome of the proceedings.

There could be no question in the instant case of the principle of equality of arms between the prosecution and the defence having been breached. In view of the special nature of appeals to the Court of Cassation, only the judgment appealed against was being impugned, irrespective of the appellant's status. Far from acting as the prosecution, the role of the procureur général's office at the Court of Cassation was that of an adviser on the law, providing the court with a legal view of the case in the same way as the reporting judge.

Lastly, procedure before the Court of Cassation was essentially written, oral submissions being rare. In that respect there was no objective difference between appellants represented by a member of the Conseil d'Etat and Court of Cassation Bar and those who were not.

22. As the requirements of paragraph 3 (b) and (c) of Article 6 of the Convention (art. 6-3-b, art. 6-3-c) constitute specific aspects of the right to a fair trial, guaranteed under paragraph 1 (art. 6-1), the Court will examine all the complaints under the three provisions taken together (art. 6-1, art. 6-3-b, art. 6-3-c) (see, among other authorities, the *Hadjianastassiou v. Greece* judgment of 16 December 1992, Series A no. 252, p. 16, para. 31).

23. In the instant case the Court does not have to assess the French system for preparing criminal appeals on points of law for hearing. It will confine itself to considering the problem raised by the specific case before it. More particularly, it must ascertain whether the rights relied on by Mr Vacher, which are inherent in the concept of a fair trial, were violated in that - in accordance with the statutory provisions in force at the time - he was not given a time-limit for lodging a pleading, and consequently, not having been informed of the date of the hearing, lodged his observations eight days after the appeal had been dismissed.

24. The manner in which Article 6 (art. 6) applies clearly depends upon the special features of the proceedings involved and, in order to assess whether its requirements have been complied with, account must be taken of the role of the Court of Cassation (see, among other authorities, the *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, pp. 14-15,

paras. 25-26, and the Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A no. 115, p. 22, para. 56).

25. Under Articles 585 and 588 of the Code of Criminal Procedure (see paragraph 13 above), a convicted appellant has the choice between instructing a member of the Conseil d'Etat and Court of Cassation Bar or presenting his own case. However, the reporting judge will only give a time-limit for filing a pleading in the first of those eventualities. In the instant case Mr Vacher, assisted by Mr Ricard (who is not a member of the Conseil d'Etat and Court of Cassation Bar), had until the date of the hearing to file his pleading.

26. The Government submitted that the Court had already held in the Melin case, which was identical to the present one, that the rules applicable to criminal appeals on points of law "were sufficiently coherent and clear" (see the Melin judgment cited above, p. 12, para. 24).

The Court notes that, as is apparent from its judgment in the Melin case, it reached the conclusion that there had been no violation having regard to the very special circumstances of that case. Besides the fact that the complaints primarily concerned a failure to serve a copy of a court of appeal judgment in time, it notes, like the Commission, two points. Firstly, in the Melin case there was a gap of four months and ten days (17 January 1986 - 27 May 1986) between the lodging of the appeal on points of law and its dismissal and no pleading was received by the registry, whereas in the instant case the Court of Cassation dismissed the appeal two months and nine days after it was lodged (28 May 1991 - 6 August 1991) and the pleading was filed on 14 August 1991, two and a half months after the appeal was lodged. Secondly, Mr Melin had practised as a lawyer and had in addition worked in the chambers of a member of the Conseil d'Etat and Court of Cassation Bar.

27. On the basis of the information supplied by the Government, the average time taken by the Court of Cassation to consider a case is approximately three months from the date of the appeal - two months for the case file to reach the Court of Cassation and one month for the court to deliver judgment. In the instant case the appeal was dismissed within a shorter period without the applicant being informed of the date of the hearing. Mr Vacher may have been taken by surprise by the fact that the proceedings took less time than average and, consequently, believing himself to be within the usual time for filing a pleading, may have seen no reason to worry about the hearing date.

28. The Court emphasises that States must ensure that everyone charged with a criminal offence benefits from the safeguards provided by Article 6 para. 3 (art. 6-3). Putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires is not compatible with the "diligence" which the Contracting States must exercise to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner

(see the *Colozza v. Italy* judgment of 12 February 1985, Series A no. 89, p. 15, para. 28).

29. Furthermore, it is apparent from the explanatory memorandum of the Law of 24 August 1993 that the provision of the Code of Criminal Procedure criticised by the applicant was amended by the French legislature on account of the difficulties caused by the frequent dismissal of appeals on points of law for want of grounds of appeal, and in order to avoid such situations recurring. The new Article 585-1 now requires convicted appellants to file their pleadings within a period of one month, which may be extended (see paragraph 13 above).

30. In conclusion, since there was no fixed date for filing a pleading and the Court of Cassation took less time than usual to hear the appeal, without Mr Vacher being either warned of the fact by the registry or able to foresee it, he was deprived of the possibility of putting his case in the Court of Cassation in a concrete and effective manner.

There has therefore been a violation of Article 6 (art. 6).

31. In view of that conclusion, it is unnecessary for the Court to rule on the complaint of a violation of the principle of equality of arms between the applicant and the prosecution.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

32. Article 50 of the Convention (art. 50) provides:

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

A. Damage

33. Mr Vacher firstly sought pecuniary compensation in the form of a State guarantee to repay the sums paid in penalties for delay, fines or damages (see paragraphs 9 and 10 above). For the non-pecuniary damage caused by having his conviction entered in his record he claimed one franc.

34. The Government and the Delegate of the Commission rightly pointed to the lack of any causal link between the violation complained of and the alleged pecuniary damage; it was not possible to speculate on what the outcome would have been had the proceedings complied with Article 6 (art. 6).

With respect to non-pecuniary damage, the Court considers that the present judgment affords the applicant sufficient reparation.

B. Other claims

35. The applicant also requested publication of the Court's judgment in a national daily newspaper. In the alternative, he indicated that he would be ready to withdraw the preceding claims if the Minister of Justice instructed the procureur général at the Court of Cassation to bring an appeal on points of law against the judgment of the Court of Appeal.

The Government and the Delegate of the Commission considered those claims inadmissible as just satisfaction could only take the form of compensation.

36. The Court notes that it is not empowered under the Convention to require the French State to take the measures sought by Mr Vacher.

C. Costs and expenses

37. Lastly, the applicant claimed reimbursement of the costs and expenses incurred before the Convention institutions. He assessed them at FRF 110,000 net of taxes; of this sum, approximately FRF 10,000 represented travel and subsistence expenses.

In addition to the fact that no vouchers for the disbursements had been produced, the Government and the Delegate of the Commission noted that the sum claimed exceeded the procedural costs generally awarded in similar cases.

38. Making its assessment on an equitable basis and with reference to its relevant case-law, the Court awards Mr Vacher a total sum of FRF 50,000.

D. Default interest

39. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 6.65% per annum.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been a violation of Article 6 of the Convention (art. 6);
2. Holds unanimously with respect to the non-pecuniary damage alleged by the applicant that the present judgment in itself constitutes sufficient just satisfaction for the purposes of Article 50 of the Convention (art. 50);

3. Holds unanimously that the respondent State is to pay to the applicant, within three months, 50,000 (fifty thousand) French francs for costs and expenses, on which sum simple interest at an annual rate of 6.65% shall be payable from the expiry of the above-mentioned three months until settlement;
4. Dismisses unanimously the remainder of the applicant's claim.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 December 1996.

Rudolf BERNHARDT
Vice-President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following dissenting opinions are annexed to this judgment:

- dissenting opinion of Mr Pettiti, joined by Mr Russo;
- dissenting opinion of Mr Baka.

R.B.
H.P.

DISSENTING OPINION OF JUDGE PETTITI, JOINED BY
JUDGE RUSSO*(Translation)*

I have not voted with the majority in favour of finding a violation of Article 6 (art. 6). The analysis which led them to their decision seems to me to be contrary to the Court's case-law and to introduce a difference in the appraisal of the procedural systems of the member States.

The European Court has accepted that in proceedings at a third level of jurisdiction strict time-limits for bringing appeals and lodging pleadings could be imposed by the codes. It did not require a public hearing where the written procedure was adversarial or where the possibility of adversarial process was available to the parties. The European Court has accepted, as indeed it is obliged to by the Convention, the legalism and formalism which have been the essence of the codes of procedure in Continental-law countries since the beginnings of Romano-Germanic law, and under the subsequent influence of Jhering. In those systems, time-limits are necessarily laid down for bringing appeals and for lodging pleadings.

The requirement laid down by Article 6 (art. 6) is that those time-limits should be known. In the present case they were set out in the Code, and clarified in the standard case-law.

In comparison with court systems in which there is a third level of jurisdiction, the purpose of the French system of appeals on points of law is to have judgments set aside where the courts below have erred in law, but not to have the facts of the case retried (Article 591 of the Code of Criminal Procedure).

Admittedly, there was some ambiguity in the provisions of the Code of Criminal Procedure. In criminal proceedings the legislature had sought to give an advantage to appellants on points of law who were not represented by a member of the Conseil d'Etat and Court of Cassation Bar (exemption from the requirement that they be represented by a member of that Bar). In practice, appellants in criminal proceedings were allowed to file pleadings in support of their appeals on points of law up to the date of the hearing, in other words beyond the expiry of the time-limits laid down by Articles 584 and 585 of the Code of Criminal Procedure, whereas an appellant represented by a member of the Conseil d'Etat and Court of Cassation Bar must file his pleadings within the time set by the reporting judge. The time-limit for appealing on points of law is specified and the time-limit for filing a pleading follows from those provisions.

However, an appellant who is not represented by a member of the Conseil d'Etat and Court of Cassation Bar does not receive notice of the hearing from the registry and thus remains unaware of the hearing date. On this point the former legislation was open to criticism in that such appellants

were unassisted. The Code had not made express provision for cases where the appellant was a practising lawyer or was represented by a member of the ordinary Bar. That is why the European Court held that there had been no violation of Article 6 (art. 6) in the Melin judgment, Mr Melin having previously been a lawyer and having worked in the chambers of a member of the Conseil d'Etat and Court of Cassation Bar. In Mr Vacher's case, the applicant had been assisted by a lawyer who had represented him and had prepared the pleading.

In this case the Court should, in my opinion, have adopted the same reasoning as in the Melin judgment, even though that judgment also dealt with other complaints made by Mr Melin under Article 6 (art. 6) (see paragraph 26 of the Vacher judgment).

Because of that assistance, Mr Vacher was in a better position to take all appropriate steps to file his pleading. The member of the ordinary Bar was not entitled to rely on the fact that judgments of the Court of Cassation are often delivered three months after the appeal in criminal proceedings. He could not have been unaware that judgments may be given within a month or two. Yet the pleading was not filed until 14 August 1991, that is to say seventy days after the appeal was lodged (28 May), the Court of Cassation having delivered judgment on 6 August 1991.

The reasoning of the European Court should, in my opinion, have taken into account the difference between the situation of an unrepresented appellant and that of an appellant advised by a legal practitioner.

Admittedly, the practice of not giving notice of the hearing date to an appellant not assisted by a member of the Conseil d'Etat and Court of Cassation Bar may be regretted. But that fact was not sufficient in the present case, and in the circumstances referred to above, either to entail a finding of a violation of Article 6 (art. 6) or for adopting a different conclusion from the one reached in the Melin case.

The argument as to foreseeability and legal certainty turns upon whether or not the party is advised by a lawyer.

Familiarity with the time-limits is one of the elementary requisites of practice at the Conseil d'Etat and Court of Cassation Bar, whose members have a monopoly.

Where a party forgoes the assistance of a member of the Court of Cassation Bar and retains a member of the ordinary Bar instead, that lawyer is able to find out what the relevant time-limits are.

The European Court cannot, therefore, reason by speculating on the litigant's ignorance, for that would be to affirm a dangerous principle, namely that not being assisted by a lawyer would make it possible subsequently to rely on the unforeseeability of the rule; what an invitation that would be to dishonest litigants! Either the procedural system is clear to professional advisers and complies with Article 6 (art. 6), or the system of

time-limits is "unascertainable" even by practitioners. Only in the latter case can the eventuality of a violation of Article 6 (art. 6) arise.

The second reason for this dissenting opinion relates to the consequences for legal theory. The Court would be creating the risk of having different procedural requirements for:

(i) the appeal systems of States which make appeals – whether on facts and law or on points of law only - subject to judicial leave or even do not allow an appeal on points of law after an initial ordinary appeal or provide an imprecisely defined remedy of "judicial review"; and

(ii) systems in which appeals - whether on facts and law or on points of law only - can be brought freely, subject only to compliance with formal requirements and time-limits.

The former would be less vulnerable to review by the Court, whereas the latter would always be vulnerable in the eyes of legal writers who challenge the formalistic procedural machinery of Continental law. To my mind, there is nothing in the European Convention on Human Rights to authorise such a divergence in the interpretation of Article 6 (art. 6).

In my view, the Chamber is wrong to say in paragraph 28 of the judgment that putting the onus on convicted appellants to find out when an allotted period of time expires is not compatible with the "diligence" required of the Contracting States. In the French system the point at which the time allowed for filing an appeal on points of law starts to run is clearly set out. Thereafter, it is for the convicted appellant to find out the details of procedure, the main provisions of which are already contained in the procedural code.

Such difficulties have ceased to arise since the Law of 24 August 1993, which supplements Article 585-1 by providing a time-limit of one month after the date of the appeal on points of law for a pleading to be filed. However, that progress could not form the basis for finding a violation as States, in the spirit of the Convention, can always improve their national systems even beyond the requirements of the Convention. As Jhering stated, procedural formalism is a safeguard for the citizen.

DISSENTING OPINION OF JUDGE BAKA

I maintain the view expressed in the dissenting opinion in the Melin case that "in criminal matters, the State must ensure that the accused is officially informed of the essential and decisive steps and elements also in cassation procedures, and it cannot put the burden in this respect entirely on the accused or convicted person". In the present case, however, I am unable to share the opinion of the majority that there has been a violation of Article 6 of the Convention (art. 6).

This case is clearly distinguishable from Melin. In the Melin case the judgment which the applicant sought to have challenged before the Court of Cassation had not been served at all. Without it Mr Melin, who was not represented by a lawyer, was not in a position to prepare his memorial setting out the grounds for his appeal. That was my main reason for dissenting from the majority of the Chamber in that case.

In the instant case, on the other hand, Mr Vacher was assisted by a lawyer during the whole legal procedure. His lawyer should have been aware of the procedural requirements. A lawyer cannot legitimately plead ignorance of such important rules.

Furthermore, French law, as far as the time-limit for filing pleadings in support of an appeal to the Court of Cassation is concerned, formerly made a clear distinction between parties who were represented by a certain limited number of lawyers having the exclusive right to plead before that court and those who were not so assisted. The first category of appellants had a time-limit for filing pleadings, while no precise time-limit was set for those who were not assisted by this special body of lawyers.

However, although the former French rules gave certain appellants some procedural advantage, this could not justify complete inactivity on the part of the appellants. In the present case, Mr Vacher did not show the necessary diligence during the appeal procedure, even though the period available to him for filing a pleading was significantly longer than for appellants with legal representatives qualified to represent them before the Court of Cassation. If Mr Vacher was aware of the average time taken by the Court of Cassation to hear an appeal, as suggested by the majority (see paragraph 27 of the judgment), he would - with a little diligence - also have known the starting-point of the prescribed ten-day period after which the court could rule on the appeal or at least how to find out when the appeal would be heard.

Accordingly, I find no violation in the present case.