



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

CASE OF HIGGINS AND OTHERS v. FRANCE

(134/1996/753/952)

JUDGMENT

STRASBOURG

19 February 1998

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SUMMARY¹

Judgment delivered by a Chamber

France – Court of Cassation’s failure to give reasons for decision on complaint that a court of appeal was not impartial

I. ARTICLE 6 § 1 OF THE CONVENTION

A. Government’s preliminary objections*1. Application lodged out of time*

Complaint of lack of impartiality concerned Papeete Court of Appeal judgment of 7 December 1989, which had been considered by Court of Cassation in its decision of 17 December 1991 – latter decision was the one to be taken into account for purposes of calculating when six-month time-limit expired.

Conclusion: objection dismissed (unanimously).

2. Non-exhaustion of domestic remedies

In view of overlapping of various sets of proceedings, issue of exhaustion of domestic remedies had to be considered in light of proceedings as a whole – admittedly, grounds set out in full pleading in support of appeal on points of law against judgment of 7 December 1989 had contained no reference either to Article 6 of Convention or to a lack of impartiality – nevertheless, applicants had drawn attention to issue submitted to Convention institutions by filing submissions to effect that it was unnecessary to decide their appeal and by seeking a stay from Papeete Court of Appeal because they had filed an application for transfer of proceedings to another court on grounds of bias.

Conclusion: objection dismissed (unanimously).

B. Merits of the complaints

Extent of courts’ duty to give reasons for their decisions could vary according to nature of decision and had to be determined in light of circumstances of individual case.

Court of Cassation, ruling on two applications for removal of three sets of proceedings concerning same succession dispute from Papeete Court of Appeal, ordered transfer of two sets of proceedings but made no mention of third notwithstanding that it was closely linked to other two – nothing in Court of Cassation’s judgment to indicate why outcome in respect of those proceedings had been different.

Conclusion: violation (eight votes to one).

1. This summary by the registry does not bind the Court.

II. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage: claim dismissed.

B. Additional claim: Court had no jurisdiction.

C. Costs and expenses: reimbursed on an equitable basis.

Conclusion: respondent State to pay applicants specified sum for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

19.3.1991, Cardot v. France; 19.4.1994, Van de Hurk v. the Netherlands; 9.12.1994, Ruiz Torija v. Spain; 9.12.1994, Hiro Balani v. Spain; 17.12.1996, Vacher v. France

In the case of Higgins and Others v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr L.-E. PETTITI,

Mr J. DE MEYER,

Mr J.M. MORENILLA,

Mr G. MIFSUD BONNICI,

Mr D. GOTCHEV,

Mr K. JUNGWIERT,

Mr E. LEVITS,

Mr T. PANTIRU,

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

Having deliberated in private on 29 August and 27 October 1997 and 28 January 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 28 October 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 20124/92) against the French Republic lodged with the Commission under Article 25 by Mrs Denise Higgins-Brown Petersen, a French national, and twenty-two other French nationals (see paragraph 7 below), on 1 June 1992.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to

Notes by the Registrar

1. The case is numbered 134/1996/753/952. 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 of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (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), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 29 October 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr J. De Meyer, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr D. Gotchev, Mr K. Jungwiert, Mr E. Levits and Mr T. Pantiru (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 4 April 1997. The Delegate of the Commission did not file any written observations.

5. On 11 July 1997 the Commission produced the documents 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 26 August 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr B. NEDELEC, <i>magistrat</i> , on secondment to the Legal Affairs Department, Ministry of Foreign Affairs,	<i>Agent</i> ,
Mr A. BUCHET, <i>magistrat</i> , on secondment to the Department of European and International Affairs, Ministry of Justice,	<i>Adviser</i> ;

(b) *for the Commission*

Mr L. LOUCAIDES,	<i>Delegate</i> ;
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(c) *for the applicants*

Mr J.-C. LOLLICHON, of the Papeete Bar,	<i>Counsel</i> .
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The Court heard addresses by Mr Loucaides, Mr Lollichon and Mr Nedelec.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The background to the case

7. The case concerns a dispute over the succession to the estates of Mary-Ann Higgins, who died on 22 February 1961, and her husband Charles Brown-Petersen, who died on 13 March 1962. The applicants are entitled to a share in the estates of the deceased either by will or on intestacy and are all French citizens. Their names are:

- (1) Mrs Denise Higgins-Brown Petersen, born on 7 October 1926;
- (2) Mr Charles Higgins, born on 4 March 1924;
- (3) Mrs Louise Petre, née Higgins, born on 6 May 1917;
- (4) Mrs Alice Higgins, born on 9 June 1921;
- (5) Mr Steve Juventin, born on 4 October 1951;
- (6) Mr Robert Brown, born on 27 November 1929;
- (7) Mr Jean-Pierre Constant, born on 1 November 1938;
- (8) Mrs Hilda Hugon, née Walker, born on 20 November 1928;
- (9) Mrs Marjorie Tetuaetara, née Walker, born on 7 November 1930;
- (10–15) Mr Sunny Walker, born on 18 May 1955, acting in his own right as one of the heirs to the late Mr Clet Walker and as the representative of the other heirs, namely:
 - (a) Mrs Lydie Teaurua, née Walker, born on 25 July 1953;
 - (b) Mr Rommel Walker, born on 12 October 1956;
 - (c) Mr Rodrigue Walker, born on 19 April 1959;
 - (d) Mr Mateau Walker, born on 17 December 1960; and
 - (e) Mr Dayf Agodor, born on 28 February 1971;
- (16) Mr Francis Walker, born on 4 October 1936;
- (17) Mr Johnnie Walker, born on 24 January 1938;
- (18) Mr Alphonse Walker, born on 6 October 1942;
- (19) Mr Ernest Walker, born on 4 February 1944;
- (20) Mr Lionel Sanne, born on 3 March 1936;
- (21) Mrs Madeleine Lerebours, née Sanne, born on 19 March 1938;
- (22) Miss Monette Sanne, born on 4 September 1940; and
- (23) Mrs Mauriroroarii Huaatua, née Tuahiva, born on 19 March 1926.

8. In this complex succession dispute the applicants were parties to three sets of proceedings against a number of other people, including a Mr L., a notary in Papeete (French Polynesia). Those proceedings were:

- (i) an action for payment of a legacy;
- (ii) a third-party application to reopen proceedings in which the Papeete Court of Appeal had on 10 September 1964 refused an application to set aside Charles Brown-Petersen's will of 19 December 1961;
- (iii) an application to have set aside as fraudulent a transfer of a property development known as the "Bloc Vaima" to the Brown Building Corporation ("BBC") and for payment of rent and other income derived from that property since 1961.

9. In the last set of proceedings – the only one in issue – the Papeete Civil Court of First Instance found in favour of the applicants in a judgment of 16 December 1988. It ordered that the rent should be paid to a receiver and held that BBC had been formed for an illegal purpose. It held that the Higginses and the other applicants were in principle entitled to have the transfer set aside but deferred judgment on that point until the Court of Appeal had given its decision in the action for payment of a legacy. On 4 January 1989 BBC appealed against the judgment to the Papeete Court of Appeal (see paragraph 17 below).

10. While that appeal was pending, the applicants applied for transfer of the case to another court on grounds of bias.

B. Applications for transfer of the case to another court on grounds of bias

11. In an application (no. T-89-15.690) registered on 1 June 1989, the applicants asked the Court of Cassation (Second Civil Division) to order transfer of the proceedings pending against BBC to a court other than the Papeete Court of Appeal. They also requested the Papeete Court of Appeal to defer judgment until the Court of Cassation had delivered its decision (see paragraph 17 below).

Before making that application, the applicants had, on 25 May 1989, made an initial application (no. N-89-15.409) to the same division of the Court of Cassation for the proceedings in the action for payment of a legacy and those relating to the third-party application, both of which were pending in the Papeete Court of Appeal, to be transferred to another court on grounds of bias (see paragraph 8 above).

12. The application of 1 June 1989 read as follows:

"There are currently pending before the Papeete Court of Appeal

- (i) proceedings for payment of ... legacies...; and
- (ii) a third-party application to reopen proceedings...

In application no. 89-15.409 registered on 25 May 1989 at the registry of the Court of Cassation the applicants requested transfer of those two sets of proceedings from the Papeete Court of Appeal to another court.

...

... The Higginses and the other applicants brought an action ... against the Brown Building Corporation in which they sought a declaration that the transfer of the property concerned to the company ... was fraudulent...

...

... the case is to be considered on the merits by the Papeete Court of Appeal; the applicants request its transfer to another court.

The applicants expressly refer to the grounds on which they relied in application no. 89-15.409. A transfer is justified for the same reasons in the proceedings against the Brown Building Corporation..."

As regards the grounds for suspecting bias, the applicants made, *inter alia*, the following submissions in their application of 1 June 1989:

"The Papeete Court of Appeal comprises only six members: the President, three other judges, a Principal State Counsel and an Assistant Principal State Counsel.

The applicants are entitled to question whether objectively the court that is to rule in their various proceedings against the Bambridges, Mr L. and the Brown Building Corporation – a mere emanation of the Bambridges – is impartial.

Firstly, Mr L. has held a prominent position in Papeete and enjoyed privileged, friendly relations with a number of the judicial officers of the Court of Appeal.

Several judicial officers, including some from the Court of Appeal, have enjoyed special relations with the parties for a very long time, Mr J. and Mr A. were close friends of Phineas Bambridge (at the latter's funeral his widow was supported by Mr A.).

...

It has to be noted, furthermore, that the atmosphere of tranquillity in which judicial business ought necessarily to be conducted has in fact been seriously disturbed by the sudden turn of events in the case and its repercussions. In particular, the Higginses and the other applicants, aware that their share in the estate was about to be squandered, applied for – and in several cases obtained from the court of first instance – orders for some of the assets of the estate to be delivered to a receiver. They also secured a like measure over Mr L.'s assets... He reacted very violently when the measure was ordered, publicly declaring it to be 'an act of judicial terrorism'. The local judicial officers became divided and State Counsel at the Papeete Court of First Instance reflected the disarray in an application to have the case transferred that he made to the Criminal Division on 24 September 1987.

In other words some judicial officers in Papeete, divided among themselves, whose actions have been publicly called into question and who have taken up a position on events closely connected with the proceedings, which are still pending, feel that, over and above their goodwill their impartiality may be objectively called into question and that the decisions they render may legitimately fall under suspicion...

...

Taken as a whole, these factors cast unacceptable doubt on the impartiality of the judicial officers of the Court of Appeal and render it 'questionable' or suspect.

The Court of Cassation will prefer to avoid any ambiguity or suspicion and to order that the case be removed from the Papeete Court of Appeal."

13. On 22 March 1990 the Court of Cassation (Second Civil Division) held:

"As to the applications dated 25 May and 1 June 1989 ... for an order for transfer on grounds of bias to a court other than the Papeete Court of Appeal of the proceedings between them and (i) the Bambridges and another, (ii) Mr L. and (iii) the Brown Building Corporation property company;

The Court ...

...

Having considered the applications and the documents lodged with the Court of Cassation registry on 25 May and 1 June 1989 on behalf of the Higginses and the other applicants;

...

In their applications the Higginses and the other applicants seek transfer to another court of appeal on grounds of bias of the cases pending before the Papeete Court of Appeal to which they are parties, namely:

(1) proceedings for payment of a legacy following an appeal against a judgment of the Papeete Civil Court of First Instance dated 19 March 1986; and

(2) a third-party application to reopen proceedings with a view to securing an order setting aside a judgment of 10 September 1964 of the Papeete Court of Appeal; those applications are connected and must be joined.

While it has not been shown that the members of the Papeete Court of Appeal have taken up a position on the outcome of the proceedings before them, it is apparent from the alleged facts and the documents produced that the Higginses and the other applicants may entertain doubts as to the impartiality of the court that is to try their cases; the cases should therefore be transferred to another court, whose decision will command respect and have the authority that court decisions must possess.

FOR THESE REASONS,

JOINS applications nos. N-89-15.409 and T-89-15.690;

DECLARES the applications admissible; and

ORDERS transfer of the following cases to the Paris Court of Appeal: (1) proceedings for the payment of a legacy...; (2) a third-party application for proceedings to be reopened...; the applications are connected and must be joined...”

14. In two judgments dated 16 July 1991 the Court of Cassation (First Civil Division) declared null and void the two judgments that the Papeete Court of Appeal had delivered meanwhile, on 29 June 1989, in the proceedings for payment of a legacy and on the application to reopen proceedings. The Court of Cassation’s two judgments were similarly worded. The one on the appeal against the Papeete Court of Appeal’s judgment in the action for payment of a legacy indicated:

“In the impugned decision of 29 June 1989 the Papeete Court of Appeal gave judgment in an action for payment of a legacy, after holding that it was unnecessary to defer judgment until the Court of Cassation had ruled on an application for the case to be transferred on grounds of bias that had been lodged on 25 May 1989; in a judgment of 22 March 1990 the Court of Cassation granted that application and ordered that the case be transferred to the Paris Court of Appeal; it follows, since that transfer decision must be executed, that the Court of Appeal’s decision in the impugned judgment is null and void; it is therefore unnecessary to rule on the appeal against that judgment.

FOR THESE REASONS

HOLDS that it is unnecessary to rule on the appeal.”

C. Application for rectification of a clerical error

15. On 2 July 1990, being of the view that the Court of Cassation had failed to mention the proceedings against BBC in its judgment of 22 March 1990 by mistake, the applicants made an application for rectification of a clerical error to the Second Civil Division of that court.

16. In a judgment of 23 October 1991 the Second Civil Division dismissed that application in the following terms:

“In a judgment of 22 March 1990 the Second Civil Division of the Court of Cassation transferred to the Paris Court of Appeal, on grounds of bias, two sets of proceedings pending in the Papeete Court of Appeal between, on the one hand, the Higginses and the other applicants and, on the other hand, Mr L.;

On 2 July 1990 the Higginses and the other applicants made an application to the Court of Cassation for rectification of the judgment of 22 March 1990; in support of their application they argued that that decision contained a clerical error, the Court of Cassation having ordered the joinder of two applications before it, registered under nos. N-89-15.409 and T-89-15.690, but having ordered transfer of only the first two cases, to which the first application related;

But on the pretext of rectification, the purpose of the application is to secure a variation of the judgment's clear provisions.

For these reasons

Dismisses the application; and

Holds that it is unnecessary to rectify the judgment of 22 March 1990."

D. Outcome of the proceedings against BBC

17. Meanwhile, having held a hearing on 23 November 1989, the Papeete Court of Appeal ruled on 7 December 1989 that there were no grounds for deferring judgment pending a decision on the application lodged by the applicants on 1 June 1989 for transfer of the case on grounds of bias and reversed the judgment of 16 December 1988 in its entirety. Ruling afresh, it held that it had not been established that the instrument creating BBC was a nullity, and it consequently dismissed the application of the Higginses and the other applicants for an order setting aside the transfer to BBC. As to its refusal to defer judgment, it gave the following reasons:

"The Higginses and the other applicants referred to a challenge but have not shown that one was made and do not even identify the judicial officer or officers concerned; accordingly, the application cannot be granted on that count.

On the other hand, they have shown that on 1 June 1989 they filed an application for transfer on grounds of bias with the Court of Cassation's registry.

By Article 615 of the local Code of Civil Procedure, such applications do not in themselves have suspensive effect and it is for the court concerned to assess whether judgment should be deferred.

Securing the appointment of a receiver in order to paralyse the usual appeals process is contrary to the rights of the defence and is therefore acceptable only in exceptional circumstances.

In their application for a transfer, the Higginses and the other applicants confined themselves to making abstract and vague complaints and only referred in more concrete terms to three judicial officers, who are not (in the case of Mr D.) or are no longer (in the case of Mr A. and Mr J.) members of this Court of Appeal; in practice, execution of the impugned decision is to be levied only on rent from a plot of land, not on the title to that land; in the circumstances, the danger is not such as to make it necessary to defer judgment..."

18. Without waiting for the application for transfer on grounds of bias to be decided (see paragraphs 11–13 above), the applicants appealed to the Court of Cassation and lodged full pleadings on 20 July 1990. The case was allocated to the First Civil Division.

19. On 23 April 1991 – although the time-limit for filing pleadings had expired on 7 September 1990 (see paragraph 22 below) – the applicants lodged observations and submissions to the effect that it was unnecessary to decide the appeal, and produced in support the judgment delivered on 22 March 1990 by the Second Civil Division of the Court of Cassation and the application for rectification of a clerical error. Pointing out that the latter application was pending before the Second Civil Division, they argued before the First Civil Division:

“If that application [for rectification of a clerical error] is allowed, the result will be that the Second Civil Division will be deemed to have granted on 22 March 1990 the applicant’s request for transfer of the case on grounds of bias.

In those circumstances, the judgment delivered in this case by the Papeete Court of Appeal on 7 December 1989 will have to be considered null and void. That judgment was delivered after the applicants had lodged the application for transfer on grounds of bias and before that application was heard by the Second Civil Division. The judgment of the Second Civil Division can only have a declaratory effect and contain a finding that it was impossible for the Papeete Court of Appeal to hear the case. Accordingly, the judgment now impugned must be considered as having been deprived of any legal basis as a result of the judgment of 22 March 1990 (once rectified by the Second Civil Division), whereby removal of the case from the Papeete Court of Appeal was ordered. The First Civil Division will, in consequence, have to hold that the impugned judgment is null and void.”

20. On the same day the applicants’ lawyer sent a letter to the advocate-general dealing with the case to remind him of the history of the proceedings in the First and Second Civil Divisions of the Court of Cassation. He drew the advocate-general’s attention to the judgment of 22 March 1990 and the application for rectification of a clerical error pending in the Second Civil Division of the Court of Cassation and suggested he contact the advocates-general dealing with the other cases.

21. The First Civil Division held a hearing on 5 November 1991. In a judgment of 17 December 1991, after ruling on the two grounds of appeal alleging that the Court of Appeal had not given sufficient reasons, it dismissed the substantive appeal against the judgment of 7 December 1989 without referring to the judgment of 22 March 1990.

II. RELEVANT DOMESTIC LAW

A. Procedure in the Court of Cassation in cases where representation is compulsory

22. Two provisions of the New Code of Civil Procedure are relevant:

Article 978 § 1

“Appellants shall be barred from proceeding with their appeal unless, within five months of giving notice of appeal on points of law, they file at the Court of Cassation’s registry and serve on the respondent a pleading setting out the legal grounds on which they rely in their appeal against the impugned decision.”

Article 1023 § 1

“The time-limits laid down in Articles 978 and 989 shall be extended:

(a) by one month where the appellant lives ... in an overseas territory...”

B. Challenge and transfer*1. Challenge*

23. Article 341 of the New Code of Civil Procedure provides:

“A judge may be challenged on grounds of bias only for the reasons prescribed by law.

... Save for special provisions that shall apply in certain courts, a judge may be challenged if:

- (1) he or his spouse has a personal interest in the dispute;
2. he or his spouse is a creditor, debtor, heir presumptive or donee of one of the parties;
- (3) he or his spouse is related by blood or by marriage to one of the parties or his spouse up to and including the fourth degree;
- (4) there is or has been litigation between him or his spouse and one of the parties or his spouse;
- (5) he has previously dealt with the case as a judge or arbitrator or has advised one of the parties;
- (6) he or his spouse is responsible for administering the assets of one of the parties;
- (7) he or his spouse is the employer or employee of one of the parties or his spouse;
- (8) it is common knowledge that there is a friendship or hostility between him and one of the parties...”

2. *Transfer*

24. The following rules in the New Code of Civil Procedure apply to transfers:

Article 356

“An application for a case to be transferred on grounds of bias shall be subject to the same conditions as regards admissibility and form as a challenge of a judge for bias.”

Article 360

“Where an application is justified, the case shall be transferred either to a differently composed bench of the same court or to another court of the same type. The decision shall be binding both on the parties and on the court to which the case is transferred. No appeal shall lie.”

Article 361

“Proceedings in the court from which an applicant seeks to have a case transferred shall not be stayed. However, the president of the court to which the application for the case to be transferred is made may, depending on the circumstances, direct the court suspected of bias to stay the proceedings pending a decision on the application.”

3. *Application for rectification of a clerical error*

25. Article 462 of the New Code of Civil Procedure provides:

“Clerical errors and omissions in a judgment, including a final judgment, may in all cases be rectified by the court that delivered it ... on the basis of the evidence in the file or, failing that, of what reason dictates.

Proceedings for rectification may be brought by means of an application by one of the parties or by means of a joint application; the court may also act of its own motion.

The court shall decide the application after hearing the parties or after having given them an opportunity to appear.

The order for rectification of the error or omission shall be noted on the original and execution copies of the judgment. It shall be served in the same way as the judgment.

Where a rectified decision has become final, the order for rectification may be challenged only by an appeal on points of law to the Court of Cassation.”

PROCEEDINGS BEFORE THE COMMISSION

26. The applicants applied to the Commission on 1 June 1992. Relying on Article 6 § 1 of the Convention, they complained that the Papeete Court of Appeal had not been impartial in the proceedings against BBC and that the proceedings before the Court of Cassation had been unfair, as that court had perpetuated the violation committed by the Papeete Court of Appeal by not setting aside the judgment of 7 December 1989.

27. The Commission (Second Chamber) declared the application (no. 20124/92) admissible on 29 November 1995. In its report of 4 September 1996 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 6 § 1. The full text of the Commission's opinion is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the Government submitted that the application of the Higginses and the other applicants should be dismissed.

29. The applicants requested the Court to

“Find that they, and in particular Mrs Denise Higgins-Brown Petersen, have been victims of a violation of Article 6 of the European Convention on Human Rights since their case was heard by a court from which it was accepted it should have been transferred on grounds of bias, whereas no order for transfer was made because the Court of Cassation, though acknowledging that the applicants' suspicion of bias was justified, repeatedly refused to take that factor into account.

In consequence, order the French State to pay the applicants, in respect of the just satisfaction to which they are entitled, an amount corresponding to the value of the property in issue and to the income lost on account of the reversal of the judgment at first instance by a court reasonably suspected of bias, or, at the very least, for loss of opportunity, a sum very close to these amounts.”

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicants submitted that when the Papeete Court of Appeal had delivered its judgment of 7 December 1989 it had not been an impartial tribunal, the Second Civil Division of the Court of Cassation having accepted in its judgment of 22 March 1990 that the applicants could legitimately entertain doubts as to its impartiality. They also complained that the First Civil Division of the Court of Cassation had not set aside of its own motion the judgment of 7 December 1989, as public policy required, and that the Second Civil Division had refused to rectify its own error, thereby perpetuating the breach of the Convention which had occurred at the appeal stage. They relied on Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an ... impartial tribunal...”

31. The Commission expressed the view that there had been a breach of that provision. The Government argued the contrary.

A. The Government’s preliminary objections

32. As they had done before the Commission, the Government raised two preliminary objections under Article 26 of the Convention, which provides:

“The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

1. *Application lodged out of time*

33. The Government argued, firstly, that the application had been lodged out of time. The judgment of the Second Civil Division of the Court of Cassation of 22 March 1990 concerning the applicants’ application for an order for transfer on grounds of bias was the “final decision” within the meaning of Article 26 *in fine*. Even if the judgment of 23 October 1991 in which the Second Civil Division had dismissed the application for rectification of a clerical error could be regarded as the final decision on the alleged violation of Article 6, it had likewise been given more than six months before the application was lodged (see paragraph 26 above). The judgment of the First Civil Division of the Court of Cassation of

17 December 1991 could not constitute the starting-point for the calculation of the six-month time-limit, since an appeal on points of law was not an appropriate remedy for a complaint of bias but a standard remedy for a possible misapplication of the law to the facts of a case.

34. The Court notes that the complaint of lack of impartiality concerns the Papeete Court of Appeal's judgment of 7 December 1989, which was considered by the Court of Cassation in its decision of 17 December 1991. That being so, it is the latter decision that is to be taken into account for the purposes of calculating when the six-month time-limit expired. The preliminary objection that the application was made out of time must therefore be dismissed.

2. Non-exhaustion of domestic remedies

35. In the alternative, the Government argued that domestic remedies had not been exhausted as the Higginses and the other applicants who had appealed on points of law against the Papeete Court of Appeal's judgment of 7 December 1989 had not submitted their complaint of bias to the First Civil Division of the Court of Cassation. In their full written pleading of 20 July 1990 the applicants had put forward two grounds of appeal on points of pure law arguing that the reasoning set out in the Court of Appeal's judgment was insufficient. The applicants had also filed a pleading on 23 April 1991 concerning purely procedural matters, in which they had requested the First Civil Division to defer judgment pending the decision of the Second Civil Division on the application for rectification of a clerical error.

36. That objection was not accepted by either the applicants or the Commission.

37. The Court observes that in order to obtain a remedy for their complaint the applicants had firstly applied on 1 June 1989 for an order for transfer to another court of the proceedings pending in the Papeete Court of Appeal against BBC. That remedy proved effective in the other two sets of proceedings in which an initial application for transfer on grounds of bias was made, but not in the proceedings now the subject of the complaint to the Court. Believing that the Second Civil Division of the Court of Cassation had omitted to refer to the third set of proceedings by mistake, the applicants sought an order from that Division for rectification of a clerical error; that application was dismissed on 23 October 1991, a few days before the hearing in the First Civil Division on 5 November 1991 of their appeal on points of law against the Papeete Court of Appeal's judgment of 7 December 1989. Meanwhile, on 23 April 1991, the applicants had filed pleadings in the First Civil Division in support of an application for judgment to be deferred and drawn the attention of the advocate-general dealing with that application to the procedural history of the case in the First and Second Civil Divisions.

38. In view of the overlapping of the various sets of proceedings, the Court considers that in determining the issue of exhaustion of domestic remedies, it must have regard to the proceedings as a whole. Admittedly, in the grounds set out in the full pleading of 20 July 1990 in support of the appeal on points of law against the judgment of 7 December 1989, no reference was made either to Article 6 § 1 of the Convention or to a lack of impartiality. Nevertheless, the applicants did draw attention to the issue submitted to the Convention institutions by filing submissions with the First Civil Division to the effect that it was unnecessary to decide their appeal (see paragraph 19 above). Moreover, at the appeal stage of their action against BBC, they also sought (unsuccessfully) a stay from the Papeete Court of Appeal because they had filed an application on 1 June 1989 for transfer of the proceedings to another court on grounds of bias (see paragraphs 11 and 17 above). Furthermore, after the Second Civil Division had dismissed their application for rectification of a clerical error, the applicants found themselves barred from submitting to the First Civil Division a ground of appeal on points of law based on a violation of Article 6, as the time-limit for so doing had expired on 7 September 1990 (see paragraph 19 above).

39. In conclusion, the applicants provided the French courts with the opportunity which is in principle intended to be afforded to Contracting States by Article 26, namely the opportunity of preventing or putting right the violations alleged against them (see the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 19, § 36). Consequently, the objection of failure to exhaust domestic remedies must also be dismissed.

B. Merits of the complaints

40. The Higginses and the other applicants submitted that the Papeete Court of Appeal, when it had given its decision in the proceedings against BBC, had not been an impartial tribunal. In spite of acknowledging in its judgment of 22 March 1990 that the applicants' doubts as to that court's impartiality were legitimate, the Court of Cassation had throughout remained silent both as to the circumstances and as to the effects of its judgment on those proceedings since it had not ordered their transfer. In the proceedings for rectification of a clerical error in that judgment, and in the appeal on points of law against the Papeete Court of Appeal's judgment of 7 December 1989, the Court of Cassation had disregarded the fact that the applicants' suspicions concerning the Papeete Court of Appeal were justified.

41. The Government noted that the applicants had not contested the subjective impartiality of the judicial officers of the Papeete Court of Appeal. Their fears could not be considered to have been objectively justified either. The Second Civil Division of the Court of Cassation had assessed the various factors in each of the three sets of proceedings before it differently. That analysis could explain why different conclusions had been reached in respect of the different sets of proceedings in the Court of Appeal. Thus, there was a very clear connection between the two sets of proceedings which were transferred to another court, as they both related to the validity of one and the same will and the possible liability of the notary who had drawn up the will and administered the estate. In contrast, the third set of proceedings, which was not transferred, concerned neither the validity of the will nor the administration of the estate, but a transfer of property made to a company in 1958, before Mr and Mrs Brown-Petersen died in 1962 and 1961 respectively. In addition, the composition of the Papeete Court of Appeal was not the same in the three sets of proceedings, since at the hearing on 23 November 1989 in the third set of proceedings the court included a judge who had not sat in the other two cases. These differences in the proceedings thus fully explained the different decision in respect of the third set of proceedings.

Furthermore, in dismissing the application for rectification of a clerical error, the Second Civil Division had done no more than apply the relevant domestic law to the facts of the case. For its part, the First Civil Division could not of its own motion have quashed the Papeete Court of Appeal's judgment of 7 December 1989 as the conditions for so doing were not satisfied. Firstly, it had not been conclusively established that the Papeete Court of Appeal was biased. Secondly, the First Civil Division had not deliberately refrained from considering the ground of appeal concerning a violation of the Convention. In the only set of proceedings referred to it, it had no relevant or valid reason to raise of its own motion a ground of nullity since the Higginses and the other applicants had confined themselves to requesting a deferral of judgment and raising two grounds of appeal on points of pure law. In reality, the applicants were seeking to challenge the Court of Cassation's decisions by arguing that they had resulted from an erroneous assessment of the case and were asking the European Court to act as an appellate court.

42. The Court must consider the applicants' complaint relating to the manner in which the Court of Cassation decided their grievances concerning the Papeete Court of Appeal's lack of impartiality in the proceedings against BBC, and more particularly the Court of Cassation's failure to give reasons for its decision on that point.

It reiterates that Article 6 § 1 obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument (see the *Van de Hurk v. the Netherlands* judgment of 19 April 1994, Series A no. 288, p. 20, § 61). The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see the *Ruiz Torija v. Spain* and the *Hiro Balani v. Spain* judgments of 9 December 1994, Series A nos. 303-A and B, p. 12, § 29, and pp. 29–30, § 27).

43. On 25 May and 1 June 1989 the applicants made two applications to the Second Civil Division of the Court of Cassation for removal of the proceedings from the Papeete Court of Appeal on grounds of bias (see paragraph 11 above). The first application concerned two sets of proceedings: the action for payment of a legacy and the third-party application to reopen proceedings; the second, in which reference was made to the first, concerned the application to have a property transfer to BBC set aside, that being the only set of proceedings in issue before the Court (see paragraph 9 above). In both applications similar grounds for suspecting bias were set out (see paragraph 12 above).

In its judgment of 22 March 1990 the Second Civil Division acknowledged that the impartiality of the Papeete Court of Appeal was open to doubt. After joining the two applications before it and declaring them admissible, the Second Civil Division ordered a transfer from the Papeete Court of Appeal to the Paris Court of Appeal only of the proceedings concerning the action for payment of a legacy and the third-party application to reopen proceedings; it made no mention of the third set of proceedings in the operative provisions, even though those proceedings were expressly referred to at the beginning of the judgment (see paragraph 13 above).

Yet the third set of proceedings was closely connected to the other two as it formed part of a complex succession dispute which, for practical purposes, concerned the same group of people and the same property (see paragraphs 7 and 8 above). Furthermore, the composition of the Court of Appeal was very similar since, with one exception in the BBC proceedings, all three cases were heard by the same judges (see paragraph 41 above).

There is nothing in the Court of Cassation's judgment of 22 March 1990 to indicate to the Court why the outcome in respect of the proceedings against BBC was different. Neither the proceedings concerning the application for rectification of a clerical error nor the appeal on points of law against the Court of Appeal's judgment of 7 December 1989 provided the applicants with an explanation that was express and specific of the consequences to be drawn from the judgment of 22 March 1990. As a result, it is impossible to know whether the Court of Cassation simply neglected to make an order in respect of the third set of proceedings or whether it decided not to order transfer and, if so, why.

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

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

44. Article 50 of the Convention 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, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Pecuniary damage

45. In the applicants’ submission, the effect of the breach of the Convention was that the Papeete Court of Appeal’s judgment of 7 December 1989, which should have been set aside, had become final. That judgment and the Court of Cassation’s judgment of 17 December 1991 dismissing the appeal had deprived Mrs Denise Higgins-Brown Petersen of her property. Consequently, the Higginses and the other applicants claimed 109,450,000 French francs (FRF), that being the capital value of the “Bloc Vaima”, the subject-matter of the litigation, together with the revenue from that development adjusted as at 20 January 1997, when the annual payment of rent was due.

46. The Government noted that it was impossible to prejudge the decision of the court of appeal to which the case would have been transferred if the Second Civil Division of the Court of Cassation had ordered transfer of the third set of proceedings from the Papeete Court of Appeal.

47. The Delegate of the Commission did not express an opinion.

48. The Court cannot speculate as to the outcome of the domestic proceedings if the requirements of Article 6 had been complied with. As no causal link has been established between the breach of the Convention found in the present case and the alleged pecuniary damage, the claims made under that head must be dismissed.

B. Additional claim

49. The applicants asked the Court for judicial acknowledgment that Mrs Denise Higgins-Brown Petersen had agreed to comply with the private agreements made by the parties, in particular the settlement of 8 December 1988 and the other agreements concerning the distribution of the estate.

50. The Court notes that it is not empowered under the Convention to make the order sought by the applicants (see the *Vacher v. France* judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2150, § 36).

C. Costs and expenses

51. The Higginses and the other applicants claimed FRF 360,317 for the costs they had incurred in the domestic proceedings and FRF 30,000 for their representation before the Court.

52. The Government considered that the latter amount was not unreasonable but said that the former, for which no supporting particulars had been provided, was excessive.

53. The Delegate of the Commission did not express an opinion.

54. The Court observes with regard to the costs incurred in the domestic proceedings that only costs relating to the complaints subsequently raised before the Convention institutions should be taken into account. The Court finds the amount claimed for the proceedings before it to be acceptable. Making its assessment on an equitable basis in the light of the information in its possession and its own case-law, it awards a total sum of FRF 75,000.

D. Default interest

55. 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 3.87% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objections;
2. *Holds* by eight votes to one that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicants, within three months, 75,000 (seventy-five thousand) French francs in respect of costs and expenses; and
 - (b) that simple interest at an annual rate of 3.87% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* 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 19 February 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinion of Mr Pettiti is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted in favour of finding that there has been no violation of Article 6 of the European Convention on Human Rights because I consider that the Chamber misconstrued the procedure followed by the Court of Cassation and its compatibility with Article 6. Like my colleagues, I voted in favour of dismissing the preliminary objections.

The issue before the Court concerned the judgment delivered by the *Second* Civil Division of the Court of Cassation on 22 March 1990. The only reason given by the Court for holding that there has been a breach is set out in paragraph 43 of the judgment:

“There is nothing in the Court of Cassation’s judgment of 22 March 1990 to indicate to the Court why the outcome in respect of the proceedings against BBC was different. Neither the proceedings concerning the application for rectification of a clerical error nor the appeal on points of law against the Court of Appeal’s judgment of 7 December 1989 provided the applicants with an explanation that was express and specific of the consequences to be drawn from the judgment of 22 March 1990. As a result, it is impossible to know whether the Court of Cassation simply neglected to make an order in respect of the third set of proceedings or whether it decided not to order transfer and, if so, why.

There has therefore been a violation of Article 6 § 1.”

The judgment therefore addressed not the issue of the Court of Appeal’s impartiality, but the Court of Cassation’s “failure” to make an order in respect of the third set of proceedings or to give reasons for its decision on that point. It is accordingly necessary to consider the complaints made by the applicants.

In their initial application the applicants briefly complained of the decisions on the merits which, they said, had infringed their rights to a share in the estate; they did not, however, air any specific grievances.

At the Commission’s request, the applicants’ lawyer explained in a letter of 7 April 1993:

“May I thus say with conviction on behalf of my clients that it appears clear that there has been a breach of Article 6 of the European Convention on Human Rights and that my clients have – at considerable expense, moreover – taken all steps that appeared proper and possible in the French courts to curb or limit the consequences.

...

It should be remembered that since, in principle, the French State is responsible for the administration of justice in several Polynesian archipelagos under the terms on which the status of internal autonomy was granted to French Polynesia, it must afford local litigants the guarantee not only that the judiciary is impartial but also that they will receive notice of judicial acts and decisions in good time and have the practical possibility of exercising their rights and availing themselves of remedies.

...

Lastly, I believe that it is difficult to escape the conclusion that the Court of Cassation really intended not to set aside the judgment, since in a judgment of the First Civil Division (on that occasion in Charles Wimer's appeal against the Papeete Court of Appeal's judgment of 7 December 1989) it again remained silent on this violation of Article 6 of the European Convention on Human Rights."

The Commission declared admissible the applicants' complaint that they had not had a fair hearing by an impartial tribunal.

In its report it expressed the opinion that the applicants had not had a fair hearing by an impartial tribunal, within the meaning of Article 6 § 1 of the Convention.

The issue before the Court was, therefore, confined to the Court of Cassation's judgment of 22 March 1990. The applicants' submissions concerning the judgment of the First Civil Division of the Court of Cassation of 17 December 1991 were neither admissible nor founded; in addition, *the applicants did not rely* on the complaint of bias in the submissions they filed with the First Division. The fact that reference was made to the First Division's judgment did not constitute a reason for voting in favour of finding a breach.

The central issue in the application and the Commission's opinion was whether the Papeete Court of Appeal had been impartial in each of the sets of proceedings before it.

For the purposes of Article 6, the question of impartiality must be looked at case by case for a given court and according to the nature of the matter, the parties and the composition of the court.

The third set of proceedings (concerning BBC) was not of the same nature as the first two nor were the parties exactly the same. The judges of the Court of Appeal who heard those proceedings had not been challenged either individually or collectively.

The judicial officers whom the applicants said in their initial pleadings they suspected of bias were two members of State Counsel's Office and an officer of the court who was not on the bench that heard the case.

The majority of the Court treated the three sets of proceedings as being alike, whereas the third set was very different and its consequences were not the same.

The application for an order setting aside the transfer of the property development to BBC for fraud (an application made after the action for payment of a legacy was brought) led to a judgment of 16 December 1988, in which the court of first instance accepted that there was a *prima facie* case, but deferred judgment pending the decision of the Court of Appeal in the action for payment of a legacy. On 7 December 1989 the Court of Appeal reversed the judgment of the court of first instance and refused to defer its decision until the application of 1 June 1989 for transfer of the case on grounds of bias had been heard. An appeal on points of law against that decision was lodged with the *First* Civil Division of the Court of Cassation, whose judgment was not in issue before the European Court of Human Rights.

The judgment of 16 December 1988, in which it was held that a *prima facie* case had been made out, concerned the setting aside of a transfer of immovable property to a company, not the setting aside of wills or legacies. It should be noted that in its decision of 7 December 1989 the Papeete Court of Appeal dealt with the argument concerning its impartiality in the following terms:

“In their application for a transfer, the Higginses and the other applicants confined themselves to making abstract and vague complaints and only referred in more concrete terms to three judicial officers, who are not (in the case of Mr D.) or are no longer (in the case of Mr A. and Mr J.) members of this Court of Appeal; in practice, execution of the impugned decision is to be levied only on rent from a plot of land, not on the title to that land; in the circumstances, the danger is not such as to make it necessary to defer judgment...”

In their memorial the applicants did not rely on that part of the decision as a ground for appealing on points of law.

The application of 25 May 1989 for transfer of the case on grounds of bias concerned two sets of proceedings *pending* in the Papeete Court of Appeal to be heard the same day: the action for payment of a legacy and the third-party application to reopen proceedings. The case could have been removed or transferred from the Court of Appeal before a decision was given on the merits in both those sets of proceedings. Even if the Papeete Court of Appeal had proceeded nonetheless, the Court of Cassation, to which an application had been made before a decision on the merits had been delivered, could have acted on that application and ordered a transfer of the case to another court of appeal. The application of 1 June 1989 concerned the BBC proceedings. In those proceedings, however, the

Papeete Court of Appeal ruled on the merits on 7 December 1989, having held that it was unnecessary to defer judgment pending the outcome of the application of 1 June 1989. The final submission in the application of 25 May 1989 to the Second Civil Division of the Court of Cassation for transfer of the case on grounds of bias was worded as follows:

“For these reasons and for such other reasons as may be advanced, inferred or added, the applicants request the Court of Cassation to

Order the transfer of the proceedings currently pending in the Papeete Court of Appeal between Mr Higgins and Mr L. to another court of appeal.”

In the final submission in the application of 1 June 1989 the applicants asked the Court of Cassation to

“Order the transfer of the proceedings currently pending in the Papeete Court of Appeal between, on the one hand, the Higginses and the other applicants and, on the other, the Brown Building Corporation to another court of appeal”.

Chronology and merits of the litigation

Mrs Mary Brown-Petersen, née Higgins, who died on 22 February 1961, left legacies under a will made in 1955; Mr and Mrs Higgins instituted an action for payment of those legacies in 1984.

Mr John Charles Brown-Petersen, who died on 13 March 1962, made wills in 1955 and 1961, which those jointly entitled on intestacy sought to have set aside in 1962; their application was dismissed in a judgment of 10 September 1964. An appeal to the Court of Cassation was dismissed in 1967.

In 1983 they applied to have the proceedings that had culminated in the 1964 judgment reopened on grounds of fraud.

On 20 November 1958 Mr Brown-Petersen had transferred immovable property to BBC. The validity of that transfer was contested by the Higginses and the other applicants entitled by will or on intestacy in proceedings that led to the judgment of 16 December 1988. It will be seen that the transfer was made before the death of Mrs Mary Higgins, in respect of whose estate an action for payment of a legacy was brought in 1984 and before the action for an order setting aside the 1961 wills, which was dismissed in a decision that became final in 1967. The numerous wills and disputes were at the core of the proceedings. Owing to the complexity of those proceedings and the fact that they overlapped each other, a summary is given:

1. Action for payment of a legacy

On an appeal against the Papeete Court of Appeal's judgment on the merits of 29 June 1989, the First Civil Division of the Court of Cassation held, in a judgment of 16 July 1991 (no. 747), that it was unnecessary to decide the appeal since the Court of Cassation had, on 22 March 1990, ordered that the proceedings be transferred to the Paris Court of Appeal.

2. Third-party application to reopen proceedings

On an appeal against the judgment of 29 June 1989 in which the Papeete Court of Appeal ruled on the merits and refused to defer judgment, the First Civil Division of the Court of Cassation held, in a judgment of 16 July 1991 (no. 1229), that it was unnecessary, for the same reasons, to defer judgment.

These two judgments of the First Division concerned the first two sets of proceedings.

3. Application for transfer on grounds of bias

In a judgment of 23 October 1991 (no. 1017) the Second Division of the Court of Cassation dismissed an application for rectification of a clerical error contained in its judgment of 22 March 1990. The Second Division of the Court of Cassation had ordered, in a judgment of 22 *March 1990* (no. 505/D), the transfer of the first two sets of proceedings to the Paris Court of Appeal (because of doubt as to the impartiality of the Papeete Court of Appeal in those two cases (nos. 1 and 2 cited above)).

Admittedly, no express mention was made in the operative provisions of the judgment of 22 *March 1990* (ultimately the only one in issue before the European Court of Human Rights, although all three cases were referred to in the applications in connection with the impartiality issue) of the legal principle relied on in the third set of proceedings (concerning BBC); however, in the reasoning set out in that judgment the Court of Cassation did say with regard to the first two sets of proceedings that the Higginses and the other applicants had cause to doubt that the court that was to try their case would be impartial.

The inference is that the Second Division did not consider that similar doubt existed in the third set of proceedings (concerning BBC) – which the First Division of the Court of Cassation was to decide in its judgment of 17 December 1991 when it dismissed the appeal, no argument of bias having been raised in the supporting memorial. There was a clear difference between the sets of proceedings, which had reached different stages so far as a possible transfer in the case of the first two and possible invalidity or ineffectiveness in the case of the third set was concerned. The disputes were

different and not inextricably linked (contrast paragraph 43 of the judgment) since the BBC case concerned the composition of the assets of the estate in the event of the transfer being set aside, not challenges to the legacies.

The Court of Cassation's silence on this point is understandable if reference is made to the sequence of events and proceedings, there being successive negotiated settlements in several instances.

In any event, silence is not in itself contrary to Article 6.

The European Court of Human Rights cannot substitute its opinion for that of a national court of cassation where the national court has assessed the facts and has not acted in a way that is contrary to Article 6.

In addition, doubt as to impartiality is based on appearances and subjectivity. Doubt will not be the same for all parties, or from one set of proceedings to another or from one court to another; in the BBC proceedings the parties who were involved at the court of appeal and court of cassation stages were not the same as in the first two sets of proceedings; the BBC proceedings were therefore distinguishable and differences could be found.

Even if silence were regarded as being tantamount to a failure to give reasons, the silence relied on by the European Court of Human Rights does not appear to me to have been sufficiently marked if its case-law directly concerning failure to give reasons is taken into account, since the Court is generally very cautious about intervening in such cases. To my mind, the Court should either have relied in its decision on a finding of bias in the third set of proceedings (there was, however, no evidence of bias in the case files or documents) or held that there had been no breach, while perhaps considering the decision of 22 March 1990 from an intellectually critical standpoint.

Very few member States have available in their court system machinery for the transfer and setting aside of judgments in cases concerning suspicions about a court's impartiality. The French system is therefore highly protective.

An analysis of comparative law might perhaps have revealed that no supreme court or court of cassation in a member State would have set aside the Court of Appeal's judgment in similar circumstances, where, as in the present case:

- (i) there had been no individual or collective challenge;
- (ii) the grounds for suspicion did not concern the judges who heard the case and gave judgment (the suspicions concerned State Counsel, the notary or other officers of the court);

(iii) the fact that suspicion existed in one case could not be relied on:

(a) in all similar or connected cases, especially if the nature and subject matter of the cases were different or the parties involved were not the same; or

(b) in respect of all judgments delivered by a particular court of appeal since the result would be the closure of a regional appellate court (for example, in Polynesia or New Caledonia).

This is a problem to be resolved by a constitutional court, on the basis of reason of State, not by a court of cassation, still less the European Court of Human Rights.

At the Court of Cassation stage

Separating a supreme court or a court of cassation into divisions is permissible under Article 6. It follows that one division may not encroach upon the jurisdiction of another.

There is no requirement under Article 6 for machinery to exist compelling the Court of Cassation to rule of its own motion or as a full court comprising all divisions when considering a problem of suspected bias.

In the Higginses case, it would have been improper for a division of the Court of Cassation to rule *ultra petita* on the issue of bias when no such ground of appeal had been put to it.

As it stands, the judgment can have no effect, save with regard to Article 50, since the proceedings in the Court of Cassation did not infringe Article 6 so as to necessitate a statutory amendment or change in the case-law or any intervention by the State pursuant to the judgment; this position leads to a jurisdictional impasse. Further, at the stage the proceedings, the negotiations for settlement and the most recent appeals to the Court of Cassation have now reached, it is impossible to assess what effect the Court of Cassation's silence in its judgment of 22 March 1990 will have on the applicants' rights thirty-six years after the initial events (a series of wills and estates – testamentary provisions of 1955 retracted in 1960 and amended in 1961), especially in the light of current uncertainty as to how the estate will finally be distributed and wound up if an intention fraudulently to circumvent the rules of succession is ruled out in final judgments. The Court of Cassation considered at the time that it had not been established that Mr Brown-Petersen had intended to benefit the Ah Minhs to the detriment of his wife.

In any event, a case such as the present one illustrates the difficulty of using Article 6, which was imprecisely drafted at the outset, and its ambiguity with regard to the concept of fairness in the English and North-American sense and to the concept of a fair hearing when States and judges are confronted with continental civil-law systems and sophisticated French or Belgian-style courts of cassation and related procedures in which, moreover, no leave is required for appeals on points of law (unlike the position under the legislation of other States or under the Convention).

As the European Court of Human Rights prepares to deliver its last series of judgments before giving way to the new Court, questions are raised as to what quantitative and qualitative importance the Court is to give to Article 6 in its case-law, notwithstanding the risk of its acting as a court of fourth instance. Admittedly, the case-law is founded on the just principle that procedural rules provide the best guarantee that rights will be upheld. However, the ease with which it is possible to find breaches in this sphere by grafting on to it the theory of appearances may have exercised too great an influence on the choice of referrals, perhaps to the detriment of an examination of potential violations in a hard core of cases and by reference to the hierarchy of the fundamental rights.