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

CASE OF F.E. v. FRANCE

(60/1998/963/1178)

JUDGMENT

STRASBOURG

30 October 1998

In the case of F.E. v. France[1],

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 A[2], as a Chamber composed of the following judges:

Mr THÓR VILHJÁLMSSON, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr T. PANTIRU,

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

Having deliberated in private on 24 August and 29 October 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 27 May 1998, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 38212/97) against the French Republic lodged with the Commission under Article 25 by a French national, Mr F.E., on 26 September 1997. The applicant asked the Court not to reveal his identity.

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

Notes by the Registrar

1. The case is numbered 60/1998/963/1178. 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.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated Ms S. Hubin-Paugam of the Paris Bar as 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), and Mr Thór Vilhjálmsson, the Vice-President of the Court (Rule 21 § 4 (b)). On 9 June 1998, in the presence of the Registrar, the President of the Court, Mr R. Bernhardt, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mrs E. Palm, Mr R. Pekkanen, Mr D. Gotchev, Mr B. Repik, Mr U. Lõhmus and Mr T. Pantiru (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr C. Russo, substitute judge, replaced Mr Lõhmus, who was unable to take part in the further consideration of the case (Rule 22 §§ 1 and 2 and Rule 24 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Thór Vilhjálmsson, acting through the Registrar, consulted Mr Y. Charpentier, the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission, Mr J.-C. Geus, on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 16 and 21 July 1998 respectively. The applicant and the Government submitted observations on their respective memorials on 4 and 3 August 1998. In a letter of 21 August 1998 the Secretary to the Commission sent the Registrar the Delegate's observations.

5. In the meantime, on 26 June 1998, the Chamber had decided to dispense with a hearing in the case, having noted that the conditions for this derogation from its usual procedure had been met (Rules 26 and 38).

6. On 20 July 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1971. On 27 October 1985, when he was 14, he was admitted to a clinic for a tonsillectomy. During the operation, on 29 October 1985, the surgeon, with the anaesthetist's agreement, gave him a transfusion of three packs of fresh plasma and one ampoule of PPSB (a

blood product containing coagulation factors) supplied by the blood transfusion centre of Colmar Hospital (*département* of Haut-Rhin).

8. Blood tests carried out on 26 November 1985 revealed anomalies in the composition of the applicant's blood.

9. In 1987 infectious mononucleosis was diagnosed.

10. On 7 December 1988 and 27 January 1989 serological tests for the human immunodeficiency virus (HIV) gave positive results.

A. The applications for compensation

1. The application to the civil courts

11. By a decision of 4 October 1991 the President of the Colmar *tribunal de grande instance* ordered an expert opinion. In a report of 28 February 1992 the medical expert concluded that there was a strong probability of a causal connection between the administration of the ampoule of PPSB to Mr F.E. and his infection with HIV.

12. Relying on this report, the applicant applied to the Colmar *tribunal de grande instance* and, by a decision of 25 May 1992, was given leave to institute civil proceedings in that court against the Fondation Saint-Marc, owners of the clinic, the Strasbourg Primary Health Insurance Office and the mutual insurance scheme of the national education service. He asked the court to rule that the Fondation Saint-Marc bore sole liability for his infection and order it to pay him full compensation for the consequences.

13. By a judgment of 26 August 1992, following a hearing on 23 June 1992, the court held that proof of a causal connection had not been established as there was still serious doubt as to the cause of the infection. It accordingly dismissed the applicant's claim as ill-founded.

14. On 14 September 1992 the applicant appealed. In his statement of the grounds of appeal, of 28 December 1992, he assessed the damage he had sustained at 2,500,000 French francs (FRF) and asked the Colmar Court of Appeal to take note of the fact that he had applied to the Compensation Fund for Transfusion Patients and Haemophiliacs ("the Fund" – see paragraph 23 below). He pointed out that the Fund had not yet taken a decision but that the sums of compensation it had proposed were lower than those awarded by the courts. The Fund joined the proceedings on its own initiative on 10 June 1993 in order to preserve its right by subrogation to pursue a claim in the event of the Fondation Saint-Marc being declared negligent.

15. On 6 December 1994 the Colmar Court of Appeal set aside the impugned judgment. On the merits of the case, the Court of Appeal found the Fondation Saint-Marc liable in respect of the applicant's infection and awarded him compensation in the sum of FRF 2,500,000, with the Fund being subrogated to his right to the first FRF 1,500,000 of compensation (see paragraph 24 below). It therefore ordered the clinic to pay Mr F.E. FRF 1,000,000, corresponding to that portion of the damage for which no compensation had been paid by the Fund. In response to the Fondation Saint-Marc's argument that section 47 of the Act of 31 December 1991 (see paragraph 31 below) excluded any possibility of compensation other than that provided by the Fund, since the latter paid full compensation, the Court of Appeal ruled as follows:

> "Before any other analysis, reference should be made to section 47 of the Act …, subsection (III) of which provides for 'full' compensation to be paid by the Fund set up for that purpose in respect of damage sustained by the victims of infection by the human immunodeficiency virus (HIV) during transfusion of blood products where such transfusion has been carried out within the territory of the French Republic.
>
> However, section 47(VI) requires the victim to 'inform the Fund of any judicial proceedings pending' and 'if any legal proceedings are brought'. Section 47(IX) provides: 'The Fund shall be subrogated, for an amount no higher than the sums paid out, to the victim's rights against the person liable for the damage and against persons required, for whatever reason, to make full or partial reparation for that damage, within the limits of those persons' liabilities. However, the Fund may institute proceedings on the basis of that subrogation only where the damage is attributable to negligence.'
>
> The victim's obligation to inform the Fund of judicial proceedings pending or if legal proceedings are brought, like subrogation of the Fund 'for an amount no higher than the sum paid out' to the victim, show that in providing victims with an expedited compensation procedure Parliament did not intend to do away with the possibility of direct applications by the victims against any persons they considered responsible.
>
> The Act did not exclude the possibility of damage being assessed by the courts applied to at a higher figure than the sum awarded by the Fund, but was intended to prevent compensation being paid twice over (both through the obligation to provide information about pending proceedings and through subrogation of the Fund).
>
> This is all the more incontestable since, the Fund not being a 'court', its decisions are not binding. The documents that it requires the patients who accept its proposals to sign refer to section 47(VI) and the obligation to 'inform it of any pending or future judicial proceedings'.
>
> In the present case, moreover, E. and co-plaintiffs all declared, in the letter they sent on 21 April 1993 to the Compensation Fund for Transfusion Patients and Haemophiliacs, that they accepted 'for the present' the sums proposed but made it clear that they considered them 'insufficient' and F.E., who formally accepted the proposal, went on to say: 'I retain the right to bring proceedings against any liable third party, it being my responsibility in that case to inform the Fund, which shall be

subrogated for an amount no higher than the sums paid out, as provided in section 47 of the Act of 31 December 1991', which shows that he always considered that full compensation had not been paid for the damage he sustained and that he therefore still had an interest giving him standing to bring proceedings. In any case, the agreement reached could not be classed as a settlement within the meaning of Article 2052 of the Civil Code.

Consequently, [F.E.]'s action is admissible and his acceptance of the compensation offered by the Fund does not deprive him of standing."

16. On 1 March 1995 the Fondation Saint-Marc gave notice of intention to appeal on points of law. It filed its statement of the grounds of appeal on 1 August. The applicant replied on 19 August 1995. By a pleading of 26 October 1995 the Strasbourg Primary Health Insurance Office lodged a third-party cross-appeal against the same judgment. The blood transfusion centre filed submissions on 2 November 1995. Mr F.E. filed additional observations on 10 January 1996 and his reply to the third-party cross-appeal on 13 February 1996.

The case was allocated to the Second Civil Division of the Court of Cassation on 21 February 1996. After the reporting judge had made his report and this had been transmitted to the Advocate–General, the Division considered the case on 29 January 1997 and decided that it should be referred to the plenary court, regard being had to the Bellet judgment delivered by the European Court of Human Rights (4 December 1995, Series A no. 333-B).

17. On 6 June 1997 the Court of Cassation, sitting in plenary, quashed and annulled the judgment of 6 December 1994 without remitting the case for reconsideration. It gave the following reasons:

"Having regard to section 47 of the Act of 31 December 1991 and Article 1382 of the Civil Code;

Whereas these texts require the Compensation Fund for Transfusion Patients and Haemophiliacs infected with the human immunodeficiency virus ('the Fund') to pay victims full compensation for the damage they have sustained; whereas victims who do not accept the Fund's proposals may bring proceedings in the Paris Court of Appeal; whereas they may obtain compensation from the ordinary courts only in respect of heads of damage for which they have not already been compensated by the Fund;

Whereas, according to the impugned judgment, [F.E.] was infected with the human immunodeficiency virus when a blood product was administered to him during an operation carried out at the Fondation Saint-Marc; whereas he instituted proceedings against the Fondation Saint-Marc for compensation in respect of the specific damage caused by his infection; whereas he subsequently accepted the compensation offered by the Fund on that account;

Whereas, in upholding [F.E.]'s action against the clinic, the judgment stated that the Act did not exclude the possibility of damage being assessed by the courts applied to at a higher figure than the sum awarded by the Fund and that [F.E.]'s acceptance of

the compensation offered by the Fund did not deprive him of an interest giving him standing to bring proceedings;

Whereas in so doing the Court of Appeal misapplied the provisions cited above;

And having regard to Article 627 § 1 of the New Code of Civil Procedure;

Whereas the quashing of a judgment does not imply that the case should be remitted for reconsideration;

For these reasons and without finding it necessary to rule on the second ground of appeal,

[The Court] quashes and declares null and void in all its provisions the judgment delivered on 6 December 1994 between the parties by the Colmar Court of Appeal;

Holds that the case shall not be remitted for reconsideration."

18. The applicant was obliged to pay back the sum of FRF 1,000,000, which had been paid to him in execution of the Colmar Court of Appeal's judgment.

2. The application to the administrative courts

19. In the meantime, by an application of 30 December 1992, the applicant, his parents, his two sisters and his partner, who became his wife in July 1993, had asked the Strasbourg Administrative Court to order Colmar Hospital – which ran the blood transfusion centre (see paragraph 7 above) – to pay them compensation totalling FRF 4,000,000 in respect of the damage they had sustained on account of the applicant's HIV infection.

20. By a judgment of 10 February 1994 the Administrative Court ruled that the hospital was liable in respect of the applicant's HIV infection and deferred its decision on damages in order to give the Fund (see paragraphs 23 and 31 below) time to produce observations on the compensation claims.

21. By a judgment of 23 March 1995 the same court ordered Colmar Hospital to pay the Fund the compensation it had awarded to the applicant, his parents and his two sisters and to pay the applicant's wife, to whom the Fund had made no award, the sum of FRF 40,000.

22. On appeal by Colmar Hospital against both judgments and by the applicant and his family against the last-mentioned judgment, the Nancy Administrative Court of Appeal, in a judgment of 27 June 1996, set aside both judgments and dismissed the claims of the applicant and his family on the ground that Colmar Hospital could not be held liable for the damage resulting from the infection.

B. The claim submitted to the Compensation Fund

23. On 24 November 1992, in proceedings brought concurrently with his civil and administrative actions, the applicant applied to the Compensation Fund for Transfusion Patients and Haemophiliacs, set up by the Act of 31 December 1991 (see paragraph 31 below).

24. On 19 March 1993 the Fund offered him compensation in the sum of FRF 2,000,000, of which FRF 1,500,000 were to be payable on acceptance of the proposal and FRF 500,000 if and when the onset of Aids was diagnosed. The Fund also offered compensation of FRF 150,000 for each of his parents and FRF 20,000 for each of his sisters.

The compensation proposal sent to the applicant contained the following information:

> "At its sitting on 25 February 1993 the Compensation Board decided to make you an offer of compensation corresponding to the whole of your specific damage resulting from infection, that is to say the current and future damage resulting from HIV infection, and thereafter, if applicable, from the onset of Aids.
>
> On the basis of your actual, personal and individual situation and with reference to the compensation awarded to date in similar cases, the Board has decided to offer you compensation amounting in total to FRF 2,000,000.
>
> ...
>
> If you accept this offer, you should do so by registered letter with recorded delivery...
>
> Naturally, the award of this compensation does not prevent you from claiming other compensation in respect of pecuniary damage you may sustain or already have sustained, provided, of course, that you can furnish proof of it.
>
> If this proposal is not acceptable to you, you may bring legal proceedings in the Paris Court of Appeal and have two months from notification of the present proposal in which to do so...
>
> I would draw your attention to the provisions of section 47(VI) of Law no. 91-1406 of 31 December 1991, which require you to inform the Fund of any judicial proceedings brought on account of your infection, whether pending or still to come."

25. In a letter of 21 April 1993 the applicant and his family declared that they accepted the various sums offered, but added the following proviso:

> "… I consider that these sums are insufficient. I must accept them for the present in view of the financial situation in which my family and I find ourselves.

> Consequently, I formally accept your proposal but retain the right to bring proceedings against any liable third party, it being my responsibility in that case to inform the Fund, which shall be subrogated for an amount no higher than the sums actually paid out, as provided in section 47 of the Act of 31 December 1991.
>
> …"

26. After receiving this acceptance, the Fund paid FRF 1,500,000 to the applicant, who acknowledged receipt on 11 May 1993.

II. THE COMPENSATION SCHEME

A. Legislative history of the Act of 31 December 1991

1. National Assembly

27. In a report of 5 December 1991 that he laid before the National Assembly on behalf of the Cultural, Family and Social Affairs Committee, Mr Boulard, MP, indicated that a victim could seek better compensation after accepting an offer from the Fund:

> "That the compensation procedure is quite distinct is confirmed by the fact that it is possible for victims or their heirs to continue civil or criminal actions they may have brought in the administrative courts or even to institute them where they did not do so when submitting a claim to the Fund. Compensation by the Fund is therefore not a 'settlement' which precludes judicial remedies, unlike the aid granted by the public and private funds set up in 1989, but a compensation scheme based on the concept of risk and independent of any attempt to determine fault.
>
> A victim must, however, inform the Fund and the court of the various actions brought. This provision is necessary because the Fund is subrogated to the victim's rights against the person liable for the damage or against those who are, for one reason or another, under a duty to provide compensation."

28. During the debate in the National Assembly on 9 December 1991 several speakers advocated making it possible to bring proceedings in the ordinary courts after acceptance of a compensation proposal. The official summary report of proceedings contains the following contributions:

> "Mr Chamard: '… it must remain possible to take legal proceedings.'
>
> Mr Préel: 'In any case, infected persons must be able to continue the proceedings they have brought against the transfusion centres. And what will happen if the sum they are awarded by the court is higher than the sum they have been paid in compensation?'

Mr Bianco, Minister of Social Affairs and Integration: 'It is clear that the compensation proposal does not deprive victims of the right to bring proceedings, particularly for the purpose of determining liability… It would be inconceivable for acceptance of compensation offered by the Fund to bar a victim's entitlement to a larger sum awarded by a court. Its decisions are therefore not binding and there is accordingly nothing to prevent a court from awarding additional compensation, it being understood that the Fund will be subrogated to the victim's rights *vis-à-vis* the causer of the damage.'"

29. On 28 April 1994, following the Court of Cassation's judgment of 26 January 1994 in the Bellet case (see paragraph 34 below), Mr Mazeaud, MP, proposed an interpretative Act in order to remove the drafting ambiguities which had given rise to that judgment. He considered that it had interpreted the Act of 31 December 1991 in a way that achieved a result opposite to the one sought by the legislature. The bill was not passed.

2. Senate

30. In the opinion of 12 December 1991 that was submitted to the Senate on the bill then before it on behalf of the Committee on the Constitution, Legislation, Universal Suffrage, Regulations and General Administration, Senator Thyraud wrote, *inter alia*:

"The bill is a response to an exceptional situation. The arrangements it proposes may be regarded as being likewise exceptional. Independently of the current investigation into the apportionment of liability, including criminal liability, the community must afford the best redress it can for the consequences of such a tragedy.

...

As indicated in the introduction to this commentary, the intention of those who have framed the bill was to set up a fully independent scheme that could not be interpreted as in any way validating recent trends in the case-law on this matter. Simultaneously, victims' possibility of resorting to the procedures of ordinary law, whether in the civil or administrative courts or in the criminal courts, has been preserved.

However, the bill's wording is not fully explicit on this subject, and the text before us is silent as to the possible effects of earlier court decisions on the Compensation Board's decisions, and also as to the effects of the Board's decisions on subsequent judgments of other courts. The bill does not, for example, make it possible to determine whether or not the Board's decisions imply recognition of liability or a presumption of guilt. Similarly, it does not state whether the Board is bound by earlier decisions of the courts."

B. Legislation

31. Law no. 91-1406 of 31 December 1991 "making miscellaneous social-welfare provisions" set up a special scheme for the compensation of haemophiliacs and transfusion patients who had been infected following injections of blood products. The distinctive feature of the system, which is based on solidarity, is that it enables reparation to be made for the consequences of HIV infection independently of the investigation of liability. Section 47 provides:

> "I. Victims of damage resulting from infection with the human immunodeficiency virus caused by transfusion of blood products or injection of blood derivatives carried out within the territory of the French Republic shall be compensated in the manner set out below.
>
> II. No final settlement clause whereby a victim undertakes not to pursue any proceedings or action against any third party in respect of his infection shall be a bar to the procedure herein provided for.
>
> III. Full compensation for the damage defined in subsection (I) shall be provided by a Compensation Fund, having legal personality, presided over by a serving or retired divisional president or judge of the Court of Cassation and administered by a compensation board.
>
> A council whose members shall include representatives of the associations concerned shall be established to assist the chairman of the Fund.
>
> IV. In their claims for compensation, victims or their heirs shall provide proof of their infection with the human immunodeficiency virus and of the transfusion of blood products or injections of blood derivatives.
>
> ...
>
> Victims or their heirs shall communicate to the Fund all the information in their possession.
>
> Within three months of the receipt of a claim, a period which may be extended at the request of the victim or his heirs, the Fund shall consider whether the conditions for payment of compensation have been fulfilled. It shall investigate the circumstances under which the victim was infected and make any necessary inquiries, which may not be resisted on grounds of professional secrecy.
>
> ...
>
> V. The Fund shall be required to make an offer of compensation to any victim referred to in subsection (I) within a time-limit laid down by decree, which may not exceed six months from the day on which the Fund receives full proof of the damage...
>
> ...

VI. The victim shall inform the Fund of any judicial proceedings pending. If legal proceedings are brought, the victim shall inform the court of his application to the Fund.

VII. ...

VIII. The victim shall not be entitled to take legal action against the Compensation Fund unless his claim for compensation has been dismissed, no offer has been made to him within the time-limit referred to in the first paragraph of subsection (V), or he has not accepted an offer made to him. Proceedings shall be brought in the Paris Court of Appeal.

IX. The Fund shall be subrogated, for an amount no higher than the sums paid out, to the victim's rights against the person liable for the damage and against persons required, for whatever reason, to make full or partial reparation for that damage, within the limits of those persons' liabilities. However, the Fund may institute proceedings on the basis of that subrogation only where the damage is attributable to negligence.

The Fund may intervene in proceedings in the criminal courts, even if it does not do so until the appeal stage, where the victim or his heirs have claimed compensation as a civil party in proceedings pending against the person or persons responsible for the damage defined in subsection (I). In such cases it shall be considered a full party to the proceedings and may have recourse to all the remedies available in law.

If the acts which caused the damage have given rise to criminal proceedings, the civil court shall not be required to defer its decision until there has been a final decision by the criminal court.

X. Unless otherwise provided, the provisions governing the implementation of this section shall be laid down in a decree issued after consultation of the *Conseil d'Etat*.

XI. ...

XII. The Compensation Fund's sources of revenue shall be specified in a subsequent Act.

XIII. ...

XIV. ..."

C. The position of the *Conseil d'Etat*

1. The judgments of 9 April 1993

32. In three judgments of 9 April 1993 the Judicial Assembly of the *Conseil d'Etat* ruled that "the State is wholly liable in respect of persons infected with the human immunodeficiency virus following a transfusion of

non-heat-treated blood products between 22 November 1984 and 20 October 1985".

2. The opinion of 15 October 1993

33. At the request of the Paris Administrative Court in respect of the Vallée case, on which the European Court has had to rule (Vallée v. France judgment of 26 April 1994, Series A no. 289-A), the *Conseil d'Etat* gave its view on the consequences of bringing concurrent proceedings in the administrative courts and before the Compensation Fund. Sitting in its judicial capacity on 15 October 1993, it gave the following opinion:

> "1. The decree of 12 July 1993 ..., which is applicable to cases pending at the date of its publication, ... provides a solution to the problem raised by the Administrative Court.
>
> 2. ... An administrative court asked to make such an award should raise of its own motion the fact that the damage complained of has already been wholly or partly indemnified by a third party, when the evidence shows this to be the case, even if that party does not file submissions – on the basis of its subrogation to the rights of the victim – seeking reimbursement of the amounts it has paid as compensation for the damage suffered by the latter.
>
> Accordingly, an administrative court to which a claim for compensation for damage suffered as a result of infection with the human immunodeficiency virus has been submitted must, when it has been informed by one of the parties that the victim or his heirs have already received compensation for the damage complained of, deduct of its own motion such compensation from the amount payable in respect of the damage.
>
> ...
>
> Where the sum offered by the Fund has been accepted by the claimants, ... it should be held that all or part of the damage complained of has been actually and finally compensated for by the Fund. Consequently, it is incumbent on an administrative court which has been informed that this is the case to deduct, of its own motion, the amount thus owed by the Fund from the compensation which it orders the public authority liable for the damage to pay to the victim."

D. The position of the Court of Cassation

34. By a judgment delivered on 26 January 1994 in the Bellet case, the Court of Cassation (Second Civil Division) gave a ruling for the first time on the question whether a person who had accepted a proposal of compensation from the Fund still had standing to bring judicial proceedings, holding as follows:

> "The Court of Appeal, having found that the damage compensated by the Fund was the same as that for which compensation was being sought from the [National Blood Transfusion Foundation] and that acceptance of the offer of compensation for the specific damage resulting from infection that had been made to him by the Fund fully compensated Mr Bellet, rightly concluded – on that sole ground and without infringing Article 6 § 1 of the European Convention on Human Rights, as it had been open to the victim to apply to a court to have compensation assessed for his damage – that Mr Bellet's action was inadmissible as he lacked any interest enabling him to bring proceedings."

The Social Division of the Court of Cassation, in a judgment of 26 January 1995 (*Bull*. 1995, no. 42, p. 30), adopted the same reasoning. It held that acceptance of an offer from the Fund barred any subsequent appeal against a judgment refusing the victim compensation in respect of the specific damage caused by his infection. The First Civil Division followed the same line on 9 July 1996 (D-1996, 20). Criticising a judgment of the Rouen Court of Appeal, it ruled as follows:

> "The victim's acceptance of a compensation proposal – which, according to the provisions of section 47(III) of the Act of 31 December 1991, constitutes full compensation for the specific damage caused by his infection – deprives him of standing to claim further compensation under the same head of damage; it follows that the Court of Appeal, which found that the non-pecuniary damage it held to have been established corresponded to the specific damage resulting from infection, did not draw the correct legal conclusions from its own findings."

After the plenary court's judgment of 6 June 1997 in the present case, the Second Civil Division of the Court of Cassation, in a judgment of 14 January 1998 (*Bull*. 1998, no. 16, p. 11), followed the same line, pointing out that if a victim claimed compensation in an ordinary court under heads of damage different from those for which the Fund had paid compensation, the court concerned could not declare the action inadmissible but was obliged to rule on its merits. It ruled as follows:

> "Section 47 of the Act of 31 December 1991 states that the Fund provides full compensation to victims in respect of the specific damage they have sustained. Victims who do not accept the Fund's proposals may bring proceedings in the Paris Court of Appeal. They may not obtain compensation in the ordinary courts except in respect of heads of damage for which they have not already received compensation from the Fund."

III. RELEVANT PROCEDURAL LAW

35. Decree no. 93-906 of 12 July 1993 adds Articles 15–20 to Decree no. 92-759 of 31 July 1992 on proceedings brought in the Paris Court of Appeal under section 47 of Law no. 91-1406 of 31 December 1991 (see paragraph 31 above). It applies to all proceedings pending at the date of its publication, 17 July 1993.

"PART II

Provisions relating to actions seeking to establish liability brought against those responsible for the damage defined in subsection (I) of section 47 of the aforementioned Act of 31 December 1991

Article 15

In order to bring the action by subrogation provided for in subsection (IX) of section 47 of the aforementioned Act of 31 December 1991, the Fund may intervene in proceedings in any of the administrative or ordinary courts, even if it does not do so until the appeal stage. In such cases it shall be considered a full party to the proceedings and may have recourse to all the remedies available in law.

Article 16

The registries of the administrative and ordinary courts shall send the Fund by registered post with recorded delivery a copy of the procedural documents submitting to those courts any initial or additional claim for compensation of the damage defined in subsection (I) of section 47 of the aforementioned Act of 31 December 1991.

Article 17

Within one month of receipt of the letter referred to in Article 16, the Fund shall inform the president of the relevant court by ordinary mail whether or not it has received a claim for compensation with the same purpose and, if so, what stage the procedure has reached. It shall also state whether or not it intends to intervene in the proceedings.

Where the victim has accepted the offer made by the Fund, the latter shall send the president of the court a copy of the documents in which the offer was made and by which it was accepted. The Fund shall, where relevant, indicate the stage reached in proceedings instituted in the Paris Court of Appeal under the provisions of Part I of this decree and forward any judgment delivered by that court.

The registry shall notify the parties of the information communicated by the Fund.

Article 18

The registry shall send the Fund copies of the decisions given at first instance and, where relevant, on appeal in proceedings in which the Fund has not intervened.

Article 19

...

Article 20

The provisions of Articles 15 to 19 shall be applicable to cases pending on the date of entry into force of [this] decree...”

PROCEEDINGS BEFORE THE COMMISSION

36. Mr F.E. applied to the Commission on 26 September 1997. He relied on Article 6 § 1 of the Convention, complaining that he had not had effective access to the civil courts in order to assert his right to compensation. He also complained of the length of the proceedings in the Court of Cassation, regard being had to what was at stake in the proceedings.

37. The Commission (Second Chamber) declared the application (no. 38212/97) admissible on 10 March 1998. In its report of 22 April 1998 (Article 31), it expressed the unanimous opinion that in respect of both complaints there had been breaches of Article 6 § 1 of the Convention. The full text of the Commission’s opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

38. In his memorial the applicant requested the Court:

“to rule that the French State [had] failed to comply with Article 6 § 1 of the … Convention…;

to award [him] one million francs in compensation for pecuniary damage; and

to award [him] one million francs in compensation for non-pecuniary damage.”

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 obtainable from the registry.

39. In their memorial the Government requested the Court to dismiss the application on the ground that it was "manifestly ill-founded" as regards the first allegation of a violation of Article 6 § 1, concerning the right of effective access to a court.

As regards violation of the right to a hearing within a reasonable time, the Government left the matter "to the Court's discretion".

AS TO THE LAW

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

40. Mr F.E. asserted that he was the victim of breaches of Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations …, everyone is entitled to a … hearing within a reasonable time by [a] … tribunal…"

A. The right of access to a court

41. The applicant complained that he had not had direct, practical and effective access to the civil courts. The compensation scheme set up by the Act of 31 December 1991 was based on solidarity and made it possible for compensation to be paid for the consequences of infection irrespective of any determination of liability. The history of the legislation concerned showed that Parliament had never intended to deprive victims, even those who had already been compensated by the Compensation Fund for Transfusion Patients and Haemophiliacs, of the possibility of obtaining additional compensation in the ordinary courts. Subsections (VI) and (IX) of section 47 clearly provided for that possibility. Moreover, that was how the *Conseil d'Etat* interpreted the provisions in question.

In the present case, as the Fund was not a court, F.E. had not had effective access to a civil court, since on 6 June 1997 the Court of Cassation had quashed the Court of Appeal's judgment without remitting the case, thus precluding any possibility of reconsideration of the merits of his claim for additional compensation in respect of the damage caused by his infection. The same court had also refused to apply the Bellet judgment, delivered on 4 December 1995 by the European Court, which held that France had breached the Convention in a similar case. On the date when F.E. accepted the Fund's offer (21 April 1993) neither he nor his lawyer could have had any knowledge of the way the Court of Cassation would

interpret the Act of 31 December 1991 in the Bellet case, since the judgment in question had not been delivered until 26 January 1994 (see paragraph 34 above).

42. According to the Government, the scheme set up by the Act of 31 December 1991 was particularly favourable to the defence of victims' interests. In the event of a dispute between a claimant and the Fund – where a claim was rejected, where no offer was made within the time-limit or where an offer was refused – a particularly speedy procedure was available in the form of a special application to the Paris Court of Appeal (section 47(VIII)). The latter's rulings on such special applications, like those of the Fund, were "very protective" of victims. However, the latter were entirely free to accept the Fund's offer in respect of one head of damage and to bring an action for damages in an ordinary court in respect of one or more different heads of damage for which they had not been compensated by the Fund. That was precisely what the Court of Cassation had said in its judgment of 6 June 1997 in the present case, which reproduced the reasoning already followed by the Civil Divisions and the Social Division (see paragraph 34 above) The applicant was not entitled to rely on the rulings of the *Conseil d'Etat* in other cases, concerning the State's liability. The interpretation of a statute was a matter for the courts alone, and in the present case for the Court of Cassation. References to the history of the legislation and subsequent proposals for amendments could not eclipse that fundamental rule.

The Government submitted that F.E. was not in the same position as Mr Bellet and could not argue before the Court that he was unaware his application to the ordinary courts could be declared inadmissible; he must have had knowledge of the Court of Cassation's judgment of 26 January 1994 (see paragraph 34 above). The circumstances of the case showed that he had exercised the statutory remedies available to him in full awareness of the relevant facts. Unlike Mr Bellet, F.E. did not apply to the Fund until after he had lost at first instance. Therefore, no restriction of his right of access could have resulted from simultaneous exercise of these two remedies.

In any event, whether F.E. refused or accepted the Fund's offer, access to a court was guaranteed. If he had really considered the Fund's proposal insufficient, he could have refused it and brought proceedings in the Paris Court of Appeal, with the certainty of obtaining compensation at least equal to the sum proposed by the Fund. Even after accepting the offer, he had had a remedy whereby he could have obtained compensation for any damage not made good by the Fund, the onus being on him to prove the existence of such damage.

43. The Commission considered that, as in the Bellet case, the system was not sufficiently clear or sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them.

44. The Court reiterates that the right to a court, of which the right of access is one aspect (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36), is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24–25, § 57). However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (see, among other authorities, the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 49–50, § 65; the Bellet v. France judgment of 4 December 1995, Series A no. 333-B, p. 41, § 31; and the Levages Prestations Services v. France judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1543, § 40).

45. French law undoubtedly afforded the applicant the possibility of bringing judicial proceedings. He availed himself of that possibility by lodging an application with the Strasbourg Administrative Court against the Colmar Hospital blood transfusion centre (see paragraph 19 above) and by bringing a civil action against the Fondation Saint-Marc in the Colmar *tribunal de grande instance* seeking compensation for the damage he had sustained on account of his infection (see paragraph 12 above). When his claim was dismissed by the last-mentioned court (see paragraph 13 above), he appealed, on 14 September 1992, to the Colmar Court of Appeal (see paragraph 14 above). On 24 November 1992, while that appeal was pending, he submitted a compensation claim to the Fund (see paragraph 23 above).

On 21 April 1993 F.E. accepted the Fund's offer. In his letter he stated that he was obliged to accept the sums proposed immediately on account of his financial situation but made it clear that he considered them insufficient and reserved the right to bring proceedings against any liable third party, it being his responsibility in that case to inform the Fund, which was to be subrogated for an amount no higher than the sums actually paid out, as provided in section 47 of the Act of 31 December 1991 (see paragraph 25 above). The Court observes that by accepting the offer the applicant lost the right to bring any action against the Fund, since section 47(VIII) provides that a victim has the right to bring such an action in the Paris Court of Appeal only where a claim has been rejected, where no offer has been made within the statutory time-limit or where an offer has been refused.

On the other hand, F.E. pursued the proceedings in the Colmar Court of Appeal that he had brought on 14 September 1992. Notwithstanding the relatively high sums already awarded by the Fund or the judgment given by the Court of Cassation on 26 January 1994 in the Bellet case (see paragraph 34 above), the Colmar Court of Appeal upheld the applicant's compensation claim on 6 October 1994 (see paragraph 15 above). On 6 June 1997 the Court of Cassation quashed and annulled that judgment without remitting the case for reconsideration (see paragraph 17 above).

46. The Court observes that the fact of having access to domestic remedies, only to be told that one's actions are barred by operation of law does not always satisfy the requirements of Article 6 § 1. The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights (see the Bellet judgment cited above, p. 42, § 36).

47. In the present case, as in the Bellet case, the Court will proceed by determining whether the provisions of the Act afforded the applicant sufficient safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them (see, *mutatis mutandis*, the Bellet judgment cited above, p. 42, § 37).

F.E.'s understanding of the system must be assessed at the time when he accepted the Fund's offer. In that connection, the Court considers that neither the wording of the Act of 31 December 1991 nor its legislative history could have given the applicant any idea what legal inferences the Court of Cassation would draw from his acceptance of the offer, or in other words could have made him think that his acceptance of the Fund's offer on 21 April 1993 could result in his being deprived of standing to bring proceedings against the party responsible for his infection in order to obtain a higher sum in compensation than he had been awarded by the Fund. In addition, it is manifestly clear that at the time when he accepted the offer he did not hide his intention to continue the proceedings he had brought against the Fondation Saint-Marc in the Colmar Court of Appeal (see paragraph 25 above). As to the Court of Cassation's judgment in the Bellet case, in which for the first time it gave a ruling on the question whether a person who had accepted a proposal of compensation from the Fund still had standing to bring judicial proceedings, and which – according to the Government – the applicant could have taken into account in deciding whether to accept the offer, the Court notes that it was delivered on 26 January 1994 (see paragraph 34 above) whereas F.E. accepted the offer on 21 April 1993. The applicant, therefore, could not have known of it at the appropriate time, and, what is more, the Colmar Court of Appeal did not follow it.

Like Mr Bellet, F.E. could therefore reasonably believe that it was possible to pursue an action in the civil courts concurrently with his compensation claim to the Fund, even after he had accepted the Fund's offer. In view of the applicant's situation at that time, he cannot be criticised for not refusing a solution which met his most urgent needs, since he was entitled to think that it had not been intended that, in the event of an offer being accepted, the Act should deprive victims of the right to bring proceedings against any liable party.

All in all, on the date when the applicant accepted the offer the system was not sufficiently clear or sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them.

48. Consequently, the Court finds that the applicant did not have a clear, practical opportunity of challenging the amount of compensation in a court. The applicant did not have an effective right of access to a court. There has therefore been a breach of Article 6 § 1.

B. The length of the proceedings

49. The applicant also complained that the length of the proceedings in the Court of Cassation had been excessive, when what was at stake was of crucial importance to him. For more than two and a half years after the judgment of the Colmar Court of Appeal he had been kept in a state of anxiety that was injurious to his health. The judicial authorities had a duty to show exceptional expedition.

50. The Government referred to the criteria for assessing the reasonableness of the length of proceedings. The first-instance proceedings had not been affected by any delay, since the judgment had been delivered three months after leave to institute proceedings had been given. There had been no delay in the appeal proceedings either, regard being had to the complexity of the case and the number of parties. As to the Court of Cassation, the fact that the Second Civil Division had decided to refer the case to the full court bore clear witness to the legal complexity of the case. Moreover, the parties had taken nearly a year to exchange their final submissions. The period complained of by the applicant had therefore been entirely taken up by the exchange of the parties' arguments and the judges' study of the case file.

51. In the Commission's view, regard being had to what was at stake for the applicant and in the light of the Court's previous judgments in cases of this kind, the length of the proceedings in the Court of Cassation was not reasonable. Taking into consideration the proceedings at all three levels of

jurisdiction in the ordinary courts (from 25 May 1992 to 6 June 1997), the Delegate observed that in the present case a period of five years was obviously excessive.

52. The Court notes that in his application F.E. criticised only the length of the proceedings in the Court of Cassation and that only that period was considered by the Commission in its decision on admissibility and its report (see, *inter alia*, the Kalaç v. Turkey judgment of 1 July 1997, *Reports* 1997-IV, p. 1206, § 20). It will therefore take into consideration only those proceedings, which began on 1 March 1995, when the Fondation Saint-Marc filed its notice of intention to appeal on points of law (see paragraph 16 above) and ended with the judgment delivered on 6 June 1997 (see paragraph 17 above), and which therefore lasted just over two years and three months.

53. The Court reiterates that the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. On the latter point, what is at stake for the applicant in the proceedings has to be taken into account (see, *mutatis mutandis*, the X v. France judgment of 31 March 1992, Series A no. 234-C, p. 90, § 32; the Vallée v. France judgment of 26 April 1994, Series A no. 289-A, p. 17, § 34; the Karakaya v. France judgment of 26 August 1994, Series A no. 289-B, p. 43, § 30; and the A. and Others v. Denmark judgment of 8 February 1996, *Reports* 1996-I, p. 103, § 67).

54. In the Court's opinion, the fact that the Court of Cassation decided to refer the case to the plenary court gives a clear indication that it was somewhat complex. However, the Court of Cassation, as the Government pointed out in their memorial (see paragraph 42 above), had already given a ruling on the legal issue raised before its judgment in the present case was delivered by the plenary court.

55. As regards the applicant's conduct, the Court notes that although the exchange of pleadings between all the parties lasted nearly a year, the applicant cannot be held responsible for any delay (see paragraph 16 above).

56. On the other hand, as regards the conduct of the relevant authorities, it should be noted that between the date when the case was referred to the Second Civil Division of the Court of Cassation (21 February 1996) and the end of the proceedings (6 June 1997) more than one year and three months elapsed (see paragraphs 16–17 above).

57. The Court considers that what was at stake, in both pecuniary and non-pecuniary terms, in the proceedings in the Court of Cassation was of crucial importance to the applicant in view of the disease from which he is suffering.

In short, notwithstanding a certain complexity, exceptional expedition was called for in this instance, especially since the facts of the controversy had been known to the Court of Cassation for several years.

58. Consequently, the proceedings before the Court of Cassation did not satisfy the reasonable time requirement and there has been a violation of Article 6 § 1 in this respect also.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

59. Under Article 50 of the Convention,

> "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. Damage

60. In respect of pecuniary damage, the applicant claimed 1,000,000 French francs (FRF), the sum he had sought in the French courts, which corresponded to fair additional compensation for the damage he had suffered on account of his infection. He added that, as a result of the Court of Cassation's decision, he was required to pay back the sums he had been awarded by the Court of Appeal.

In respect of non-pecuniary damage, F.E. also claimed FRF 1,000,000. Given the circumstances of his infection, the Court of Cassation's decision had increased his distress still further. Moreover, the length of the proceedings in the Court of Cassation had kept him in a prolonged state of uncertainty which had caused him acute anxiety injurious to his health.

61. As regards the right of access to a court, the Government could see no reason for the Court to depart from its ruling in the Bellet case, in which it had awarded the applicant the sum of FRF 1,000,000 on account of "a loss of opportunities and undeniable non-pecuniary damage". They accordingly proposed the award of that sum, which corresponded to the difference between what the applicant had actually received from the Fund and what the Court of Appeal had awarded him. As to the length of the proceedings, in the event of a violation being found, they left the decision on just satisfaction to the Court's discretion.

62. The Delegate of the Commission referred to the Court's case-law on the question.

63. The Court considers that, on account of the breaches found in this judgment, F.E. suffered a loss of opportunities and undeniable non-pecuniary damage. Taking into account the various factors and making its assessment on an equitable basis as required by Article 50, it awards him FRF 1,000,000.

B. Costs and expenses

64. The applicant did not submit any claim for costs and expenses incurred before the French courts and the Convention institutions.

65. In the absence of such a claim, the Court considers that it is not required to rule on the question of costs and expenses.

C. Default interest

66. 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 3.36% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by seven votes to two that there has been a breach of Article 6 § 1 of the Convention as regards the right of access to a court;

2. *Holds* by eight votes to one that there has been a breach of Article 6 § 1 of the Convention as regards the length of the proceedings;

3. *Holds* unanimously that the respondent State is to pay the applicant, within three months, 1,000,000 (one million) French francs for damage and that simple interest at an annual rate of 3.36% shall be payable on this 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 30 October 1998.

Signed: THÓR VILHJÁLMSSON
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 joined by Mr Gölcüklü is annexed to this judgment.

Initialled: Th. V.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PETTITI JOINED BY JUDGE GÖLCÜKLÜ

(Translation)

I voted against the finding of a violation of Article 6. I took the view that the European Court could not find fault with French law for refusing the principle of two-fold compensation, that is compensation accepted voluntarily from the Fund and paid on a lump-sum basis, in addition to any compensation that might be awarded by a civil court.

This national system is explained and justified by the difference in nature between the two types of compensation. One, in the form of a lump sum, is paid speedily without any obligation to prove negligence or liability; the other requires proof in a criminal or civil court and entails the uncertainty of protracted proceedings.

Few countries have passed legislation on the distressing question of contaminated blood which is so generous and so imbued with the spirit of national solidarity as French legislation.

Moreover, the F.E. case was different from the Bellet case in a number of significant respects, such as the different dates of commencement of the legal proceedings and of submission of the claim to the Fund in relation to the Court of Cassation's decision interpreting the scope of the law, whose drafting history and passage through Parliament left room at the outset for controversy.

Mr Bellet had pursued his civil action. In response to his appeal on points of law, the Second Civil Division of the Court of Cassation gave a ruling for the first time, on 26 January 1994, on the question whether a person who had accepted a proposal of compensation from the Fund still had standing to bring judicial proceedings. It answered that question in the negative as regards the specific damage resulting from infection. In the present case, by a judgment of 6 June 1997, the plenary Court of Cassation followed the same line, thus giving a definitive interpretation of the law which is binding on the European Court of Human Rights.

While the majority could take the view in the Bellet case that there had been a loss of opportunities, that does not apply in the F.E. case.

F.E. could not have been unaware that an appeal lay to the Paris Court of Appeal, under certain conditions, against a decision by the Fund, because he accepted the compensation without prejudice to his right to exercise the remedies open to him. (Was this an acceptance which deprived him of the right to appeal for the purposes of the law concerned?)

The reasoning of the judgment oscillates between the arguments concerning loss of opportunities and refusal of compensation (two-fold or additional).

On the first point, any loss of opportunities should also be examined in connection with the length of the proceedings pending in the Colmar Court of Appeal and the plenary Court of Cassation. F.E., to begin with, asserted that the Fondation Saint-Marc bore sole liability. After 26 January 1994, he could have contended that he had accepted the compensation without prejudice to his right to exercise the remedies open to him, and that there had therefore not been full acceptance in the legal sense of that term, which would perhaps have given him the right to avail himself of the special appeal to the Paris Court of Appeal. He could also have reserved his right to apply for leave to appeal out of time. In any case, unlike Mr Bellet, he was not unaware of the risk of an unfavourable interpretation of the law's scope by the Court of Cassation, even though the decision of 26 January 1994 had been delivered by a Division of the Court of Cassation rather than by the plenary court.

The European Court considered that the Bellet and F.E. cases were almost identical.

But the files show that there were numerous differences concerning both factual and legal questions, since the loss of opportunities depended on the timing of the compensation and the chronology of the procedural steps in relation to interpretation of the law. To reason, as the Court has done, on the basis of misunderstandings or lack of clarity, is, it seems to me, insufficient. Loss of a lawsuit through a mistake on a point of law or procedure does not constitute denial of access to a court; that goes well beyond the requirements of Article 6 and reduces procedural law to a matter of litigants' subjective understanding of the law and procedure.

A litigant's misunderstanding of legislation and its drafting history (see paragraph 47 of the judgment) does not in my opinion constitute a restriction, for the purposes of the Convention, of access to justice. Although Mr Bellet accepted the compensation in the belief that this acceptance would not deprive him of his right to claim additional compensation, F.E., after the Court of Cassation's judgment of 26 January 1994, knowing the risk he ran, could have argued in the Colmar Court of Appeal, and later before the Court of Cassation, that he had accepted the compensation without prejudice to his right to bring judicial proceedings, not once and for all. He had not appealed against the Fund's decision. He could perhaps have tried an application for leave to appeal out of time in respect of the special appeal which lay to the Paris Court of Appeal. He preferred to bring concurrent proceedings in the Colmar Court of Appeal. In such cases victims retain the right to bring proceedings in respect of heads of damage different from those for which the Fund has awarded compensation and on separate grounds, whether civil, criminal or administrative. What the Court of Cassation decided on 6 June 1997, confirming the judgment of 26 January 1994, was that victims could not claim compensation twice over for the same damage (see also Court of

Cassation, First Civil Division, 28 April 1998). It therefore excluded the different interpretation of the law based on its drafting history that it had been possible to hold immediately after its enactment. Admittedly, from the humanitarian point of view, one can only regret such a situation and hope that the member States of the Council of Europe will set up procedures and machinery for double or additional compensation, but this remains within the competence of the States or a special European compensation fund. In the absence of such initiatives and possibilities, the European Convention can only offer the Article 6 approach. But can that approach, in the F.E. case, include, as grounds for finding a violation and as a criterion, "a clear, practical opportunity of challenging the amount of compensation in a court" (see paragraph 48 of the judgment)? Is there not a risk that this recent tendency of some of the Court's judgments will leave too important a place to the subjectivity of litigants to the detriment of procedural principles which are the guarantors of rights?