



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

SECOND SECTION

**CASE OF WYNEN AND CENTRE HOSPITALIER
INTERRÉGIONAL EDITH-CAVELL v. BELGIUM**

(Application no. 32576/96)

FINAL

05/02/2003

JUDGMENT

STRASBOURG

5 November 2002

In the case of Wynen and Centre hospitalier interrégional Edith-Cavell v. Belgium,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr C. BÎRSAN,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mr K. JUNGWIERT, *judges*,

Mr P. LEMMENS, *ad hoc judge*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 8 October 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 32576/96) against the Kingdom of Belgium lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Belgian national, Dr André Wynen, and the Centre Hospitalier Interrégional Edith-Cavell (CHIREC, formerly the Institut Médical Edith-Cavell –IMEC), a non-profit-making association with its registered office in Brussels (“the applicants”), on 12 July 1996.

2. Before the Court the applicants were represented by Ms C. Calewaert, Ms F. Roggen, Mr B. Cambier and Mr L. Cambier, all of the Brussels Bar. The Belgian Government (“the Government”) were represented by their Agent, Mr C. Debrulle, Director of Administration at the Ministry of Justice.

3. The applicants alleged, in particular, that their right to a fair hearing (Article 6 § 1 of the Convention) had been infringed on several counts.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mrs F. Tulkens, the judge elected in respect of Belgium, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr P. Lemmens to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 18 September 2001 the Chamber declared the application partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1). Subsequently Mr A.B. Baka replaced Mr L. Loucaides, who was unable to take part in the further consideration of the case (Rule 28 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant was born in 1923 and lives in Braine-l'Alleud. The second applicant has its registered office in Brussels.

10. In October 1990 a magnetic-resonance imaging (MRI or NMR) unit with a built-in electronic calculator – a high-technology medical device – was installed at the IMEC. In accordance with a royal decree of 27 October 1989, a department in which an MRI unit was installed was regarded as a “high-cost medico-technical service” within the meaning of section 44 of the Hospitals Act, consolidated on 7 August 1987. Pursuant to that statutory provision, such services had to be approved. The criteria for approval were laid down in the royal decree. The relevant department at the IMEC had not, however, obtained the necessary approval.

11. On 15 March 1991 the Ministers of Public Health for the Brussels-Capital bilingual region lodged a complaint with the public prosecutor against the first applicant for installing high-cost medical equipment without the prior approval of the minister responsible for public health. In January 1993 the first applicant and the IMEC, his employer, which was civilly liable for his acts, were summoned to appear in the Brussels Criminal Court. The Belgian State subsequently applied to join the proceedings as a civil party.

12. On 22 March 1994 the Brussels Criminal Court acquitted the first applicant and cleared the IMEC.

13. On 31 March 1994 that judgment prompted the following speech by a member of Parliament during the passage of a bill amending the Hospitals Act:

“I was shocked by the court ruling last week in the *Wynen* case. Everyone knows Dr Wynen's habit of not caring about legislation. He illegally installs high-cost

scanners at his hospital, the Edith-Cavell, and justifies his actions with arguments about medical ethics.” (summary record, House of Representatives, 1993/94 ordinary session, sitting of 31 March 1994)

14. State Counsel’s Office and the civil party appealed against the judgment of 22 March 1994.

In their appeal submissions the applicants argued, among other things, that the royal decree of 27 October 1989, which had formed the basis for the prosecution, was unlawful, particularly as it concerned a matter dealt with by legislation at community rather than federal level. They pointed out in that connection:

“Section 44 of the Hospitals Act empowers the King to lay down approval and planning criteria for the installation of magnetic-resonance imaging (MRI) units with built-in electronic calculators, with a view to controlling public expenditure.

The decree lays down a number of conditions relating to:

(1) the department in which the equipment is installed; (2) the number of employees and their qualifications; (3) the safety of the equipment and of the surrounding area; (4) quality control of the work carried out by users; (5) the geographical location of the equipment (the requirements vary according to the power of the equipment); and (6) the number of beds.

At best, only the fifth criterion can possibly come under the responsibility of the Federal Ministry of Social Affairs. The other conditions pursue a quite different aim, namely that of regulating the provision of health care, responsibility for which currently falls to the Communities by virtue of section 5(1)(I)(1) of the Special Law of 8 August 1980 on institutional reform.

Seeing that four of the five conditions it lays down do not come under the responsibility of the national authorities, the royal decree of 27 October 1989 should be declared unlawful in its entirety since it cannot be applied only in part.”

The applicants also submitted that the complaint, civil-party application and appeal by the Belgian State were unlawful, inadmissible and void; that the complaint by the Belgian State infringed the principle of equality enshrined in Articles 10 and 11 of the Constitution in that the public authorities, without applying any objective or reasonable criteria proportionate to the aim pursued, had refrained from reporting other similar offences to the public prosecutor; that the royal decree of 27 October 1989 and, at the very least, the penalty for which it provided, had been tacitly repealed; and, lastly, that the decree infringed several fundamental rights, including the right to life and health, freedom of choice with regard to medical treatment and the prohibition of inhuman and degrading treatment.

15. On 12 January 1995 the Brussels Court of Appeal reversed the judgment, imposed a suspended fine of 2,340 Belgian francs on the first applicant and ordered him to pay costs, applying, *inter alia*, sections 37 to 42 and 44 of the Hospitals Act. The IMEC was held to be jointly and severally liable for payment of the fine and the costs. In particular, the Court

of Appeal dismissed the applicants' arguments that the royal decree of 27 October 1989 had been tacitly repealed or was unlawful.

16. The applicants appealed to the Court of Cassation against that judgment. In their pleadings they relied on, *inter alia*, Articles 6 and 7 of the Convention, their main arguments being that the Court of Appeal had based its judgment on contradictory and inconsistent reasoning and had, in particular, applied section 116(8) of the Hospitals Act (which concerned high-cost medical "equipment"), whereas, pursuant to the royal decree of 27 October 1989, an MRI unit constituted a high-cost medico-technical "service", the setting up or operation of which came under section 16(10) of that Act; that the Court of Appeal had omitted to examine whether the royal decree of 27 October 1989 was compatible with the Special Law of 8 August 1980 on institutional reform, which had apportioned powers among the State, the Communities and the Regions, or with the principle of equality enshrined in Articles 10 and 11 of the Constitution, and that it had failed to refer the matter to the Administrative Jurisdiction and Procedure Court; that it had infringed the general principle of the burden of proof and the presumption of innocence; that the lawfulness of the royal decree of 27 October 1989, which the Court of Appeal had applied, had not been established; and that, in any event, the penalty for which it provided had been tacitly abolished by a subsequent provision, namely section 120(1) of the Law of 22 December 1989.

Under the second limb of their second ground of appeal, the applicants asserted that the Court of Appeal had breached section 26(1) of the Special Law on the Administrative Jurisdiction and Procedure Court (see paragraph 28 below) by refusing to refer a preliminary question to that court as to whether section 44 of the Hospitals Act contravened the rules laid down by or pursuant to the Constitution to determine the respective powers of the (federal) State, the Communities and the Regions. They submitted in that connection:

"The appellant argued in his appeal submissions that the royal decree of 27 October 1989 did not comply with the Special Law of 8 August 1980 on institutional reform in that it laid down approval criteria relating to health-care policy, a matter which is the responsibility of the Communities.

The judgment appealed against should not merely have assessed whether the royal decree of 27 October 1989 was compatible with the consolidated Hospitals Act which it implemented, since the King is not entitled to stay or dispense with the enforcement of the laws on institutional reform; moreover, the consolidated Hospitals Act does not confer, and could not possibly have conferred, on him the authority to derogate from the laws on the distribution of powers. ...

Furthermore, seeing that [the Court of Appeal] held that the royal decree complied with the consolidated Hospitals Act, it was required by section 26(1) of the Special Law of 6 January 1989 to submit a preliminary question to the Administrative

Jurisdiction and Procedure Court as to whether the Act contravened the rules on the distribution of powers between the State, the Communities and the Regions.”

The applicants accordingly asked the Court of Cassation to submit the following question to the Administrative Jurisdiction and Procedure Court:

“In so far as section 44 of the consolidated Hospitals Act of 7 August 1987 is to be construed as empowering the King to lay down the rules set out in the royal decree of 27 October 1989 ‘establishing standards which a service that has installed a magnetic-resonance imaging unit with a built-in electronic calculator must satisfy in order to be approved as a high-cost medical service within the meaning of section 44 of the Hospitals Act, consolidated on 7 August 1987’, does that provision contravene:

(1) the rules on the distribution of powers, seeing that by virtue of, *inter alia*, section 5(1)(I)(1), policy on the provision of health care within and outside health institutions is the responsibility of the Communities; ...”

Under the third limb of the second ground of appeal, based on Article 149 of the Constitution, which lays down the obligation to give reasons for judgments and decisions, the applicants asked the Court of Cassation to submit a further preliminary question to the Administrative Jurisdiction and Procedure Court as to whether section 44 of the Hospitals Act breached Articles 10 and 11 of the Constitution, which safeguarded the principle of equality and non-discrimination.

17. The civil party, which was the respondent before the Court of Cassation, filed pleadings in reply on 8 September 1995.

18. On 19 October 1995 the applicants filed supplementary pleadings in which, among other things, they set out four fresh grounds of appeal – based, in their submission, on public policy – alleging violations of various provisions of the Constitution and the Convention, in particular Articles 2 and 3. In their new grounds they submitted that the royal decree of 27 October 1989 was unlawful; that the principle of equality had been infringed in that, among the many hospitals that possessed the equipment in issue, only the applicants had been prosecuted; that the penalty set forth in the Hospitals Act had been abolished; and, lastly, that a number of fundamental rights, including the right to life, had been infringed. The applicants also reiterated their request to have the preliminary question cited above submitted to the Administrative Jurisdiction and Procedure Court.

19. On 8 January 1996 the date set for the hearing was entered on the list displayed at the registry and in the courtroom of the Court of Cassation.

20. The Court of Cassation held a public hearing on 24 January 1996. The applicants assert that they were not notified of the date of the hearing, such an omission being in accordance with Article 420 *ter*, second paragraph, of the Code of Criminal Procedure (CCP), which provided that dates set for hearings in the Court of Cassation were entered on the list of pending cases at least fifteen days in advance, without any further notification. As is apparent from the record of the hearing, the court heard evidence from the reporting judge, the representative of Principal State

Counsel's Office and counsel for the civil party. State Counsel did not attend the deliberations that took place after the hearing. On the same day, after the deliberations, the Court of Cassation dismissed the applicants' appeal, having declared their supplementary pleadings inadmissible as being out of time, pursuant to Article 420 *bis*, second paragraph, of the CCP, which provided that persons appealing to the Court of Cassation could not file any pleadings once two months had elapsed from the date on which the case was entered on the general list.

21. In its judgment, delivered on the same day, the Court of Cassation held, in particular, that the reasoning given in the judgment appealed against had not been contradictory and that the contention that the Court of Appeal had applied section 116(8) instead of section 116(10) of the Hospitals Act amounted to complaining of an incorrect reference to the applicable legal provision, an error that had no bearing on the penalty imposed since the two provisions in question provided for the same penalty. It further held that the complaint that the royal decree was incompatible with the Special Law of 8 August 1980 amounted to challenging the Law's constitutionality, a question outside the Court of Appeal's jurisdiction. Furthermore, the Court of Appeal was under no obligation to submit a preliminary question to the Administrative Jurisdiction and Procedure Court if it considered that the reply to the question was not essential for it to be able to give judgment.

The Court of Cassation further noted that the Court of Appeal had not infringed the rules on the burden of proof as, in dismissing the complaints that the royal decree of 27 October 1989 was unlawful, it had based its decision not on the appellants' arguments but on the consideration that it was not for the courts to take the place of the executive in assessing the appropriateness of a measure falling within the executive's sphere of competence.

The Court of Cassation also dismissed the argument that the royal decree in question was unlawful or had been repealed, holding that section 120 of the Law of 22 December 1989 was in no way incompatible with the Hospitals Act of 7 August 1987 as it merely provided for an additional sanction in the form of a limit on fees and, consequently, had not tacitly abolished the criminal penalties provided for in that Act.

Lastly, the Court of Cassation refused the request to submit a preliminary question to the Administrative Jurisdiction and Procedure Court. In so far as the question concerned the compatibility of section 44 of the Hospitals Act with the rules on the distribution of powers, the Court of Cassation held:

"Furthermore, in so far as the appellant asked the Court to submit a preliminary question to the Administrative Jurisdiction and Procedure Court as to whether section 44 of the Hospitals Act, consolidated on 7 August 1987, contravenes the 'rules on the distribution of powers, seeing that by virtue of section 5(1)(I)(1), policy on the provision of health care within and outside health institutions is the responsibility of the Communities', he did not state the precise nature of the alleged contravention.

Under the aforementioned section 5(1)(I)(1) of the Special Law of 8 August 1980 on institutional reform, policy on the provision of health care is a ‘person-related matter’ falling within the responsibility of the Communities [*matière personnalisable*], but only subject to certain exceptions, such as legislation laying down organisational principles, or funding arrangements, where these are governed by such legislation.

Since the consolidated Act of 7 August 1987 lays down organisational principles governing hospitals and, in particular, their funding, the appellant should have explained in the preliminary question he intended to have submitted to the Administrative Jurisdiction and Procedure Court precisely why he considered that section 44 of the Act was not covered by the exceptions whereby legislation laying down organisational principles, and the funding arrangements made in such legislation, are not ‘person-related matters’ for which responsibility is assigned to the Communities by Article 128 § 1 (former Article 59 *bis* § 2 *bis*) of the Constitution, but are matters which under the Constitution remain the preserve of federal legislation.

Accordingly, the request for the submission of a preliminary question in relation to this limb of the ground of appeal is inadmissible as being insufficiently precise. ...”

The Court of Cassation also declared the preliminary question inadmissible in so far as it concerned the compatibility of section 44 of the Act with Articles 10 and 11 of the Constitution, on the ground that the question was “extraneous both to Article 149 of the Constitution, the only provision alleged to have been infringed in this limb of the ground of appeal, and to the failure to reply to the appellant’s submissions, the only complaint raised in the limb in question”.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure (CCP)

22. At the material time Article 420 *bis* of the CCP provided:

“Appellants wishing to make oral submissions in the Court of Cassation shall set out their grounds of appeal in pleadings which must be communicated in advance to Principal State Counsel’s Office at least eight days before the hearing.

However, they may not produce any pleadings or documents – other than those concerning the discontinuance or resumption of the proceedings or indicating that the appeal has become devoid of purpose – once two months have elapsed from the date on which the case was entered on the general list. ...”

23. At the material time Article 420 *ter* of the CCP provided:

“Proceedings shall be governed by the provisions of Articles 1105 to 1109 of the Judicial Code.

Nevertheless, by way of derogation to the second paragraph of Article 1106 of the Code, the date set for a hearing shall, without any further notification, be entered on the list of cases pending before the court at least fifteen days prior to the hearing.

The list shall be displayed at the registry and in the courtroom and shall contain the names of the parties, the lawyers and the representative of Principal State Counsel's Office instructed to make submissions in the case."

In practice, however, the parties and their lawyers were entitled to ascertain the date of the hearing by telephoning the registry of the Court of Cassation or requesting it by ordinary mail to inform them of the date in writing. That practice was long established and its existence was reiterated in the Court of Cassation's annual report for 1997/98.

However, the Law of 14 November 2000 (see paragraph 26 below) repealed the second and third paragraphs of Article 420 *ter* of the CCP, bringing the arrangements for notifying the parties of hearings in criminal cases into line with those laid down in the second paragraph of Article 1106 of the Judicial Code.

B. The Judicial Code

24. At the material time Article 1107 of the Judicial Code provided:

"After the report has been read out, submissions shall be heard from the lawyers present at the hearing. Their addresses shall relate exclusively to the issues of law raised in the grounds of appeal or to objections to the admissibility of the appeal.

Principal State Counsel's Office shall then make its submissions, after which no further documents shall be accepted."

However, since *Borgers v. Belgium* (judgment of 30 October 1991, Series A no. 214-B), the Court of Cassation had allowed the parties or their lawyers to address the court a second time after State Counsel had made his submissions. The parties could also seek an adjournment in order to give themselves additional time to prepare their submissions in reply, which could, moreover, take the form of a memorandum for the deliberations (*note en délibéré*). Such requests were systematically allowed by the Court of Cassation. In the rare cases in which State Counsel's submissions had been prepared in writing and communicated to the court before the hearing, a copy was also sent to the parties before the hearing. The Committee of Ministers of the Council of Europe took note of those judicially initiated procedural amendments in its Interim Resolution DH (98) 133 of 22 April 1998.

25. In a letter of 22 November 2001 to the Minister of Justice, Principal State Counsel at the Court of Cassation made the following observations in relation to the present case:

"In the instant case the submissions were made orally and the parties did not reply to them, either orally or by submitting a memorandum for the deliberations, as they were entitled to do, if necessary after an adjournment which they would have been granted in accordance with standard practice if they had requested it. By establishing this practice in a statutory instrument, the Law of 14 November 2000 confirmed that the practice complied with the requirements of European case-law."

26. A law of 14 November 2000, which came into force on 29 December 2000, amended Article 1107 of the Judicial Code as follows:

“After the report has been read out, Principal State Counsel’s Office shall make its submissions. Submissions shall then be heard from the parties. Their addresses shall relate exclusively to the issues of law raised in the grounds of appeal or to objections to the admissibility of the appeal or of particular grounds.

Where the submissions of Principal State Counsel’s Office are in writing, the parties may, at the very latest during the hearing and solely in reply to those submissions, submit a memorandum in which they may not raise any new grounds of appeal.

At the hearing each party may seek an adjournment in order to reply orally or by means of a memorandum to the written or oral submissions of Principal State Counsel’s Office. The Court shall fix the time-limit for submitting the memorandum.”

27. Other relevant provisions of the Judicial Code read as follows:

Article 2

“The rules set out in this Code shall apply to all proceedings, except such as are governed by statutory provisions which have not been expressly repealed or by principles of law whose application is not compatible with that of the provisions of this Code.”

Article 721

“The file shall include the following:

...

6. State Counsel’s opinion;

...

A list of documents, kept up to date by the registrar and indicating the date on which the documents were submitted, shall be appended to the file.”

Article 1042

“In so far as no derogation is laid down in the provisions of this Book, the rules concerning first-instance procedure shall be applicable to appeal proceedings.”

C. Preliminary questions to the Administrative Jurisdiction and Procedure Court

28. Section 26 of the Special Law of 6 January 1989 on the Administrative Jurisdiction and Procedure Court, as worded at the material time, provided:

“(1) The Administrative Jurisdiction and Procedure Court shall give a preliminary ruling, in the form of a judgment, on questions concerning

(i) contravention by one of the statutes, decrees or rules contemplated by Article 134 of the Constitution of the rules laid down by or pursuant to the Constitution to determine the respective powers of the State, the Communities and the Regions;

(ii) without prejudice to (i) above, any conflict between decrees or rules as contemplated by Article 134 of the Constitution promulgated by different legislative authorities, provided that the conflict stems from the scope of the decrees or rules in question; and

(iii) contravention of Articles 10, 11 and 24 of the Constitution by one of the statutes, decrees or rules contemplated by Article 134 of the Constitution.

(2) A court before which a preliminary question has been raised must seek a ruling on the matter from the Administrative Jurisdiction and Procedure Court.

However, the court shall be exempted from this obligation where the action is inadmissible for procedural reasons based on rules which are not themselves the subject of an application for a preliminary ruling.

A court whose decisions are open to challenge in the form of an ordinary appeal, a petition to reopen proceedings, an appeal on points of law or an application for judicial review in the *Conseil d'Etat* shall also be exempted from this obligation

(i) where the Administrative Jurisdiction and Procedure Court has already given a ruling on a question or appeal having the same object;

(ii) where it considers that the reply to the preliminary question is not essential for it to be able to give judgment; or

(iii) where it is manifestly apparent that the law, decree or rule contemplated in Article 134 of the Constitution does not contravene any rule or Article of the Constitution contemplated in section 26(1).”

THE LAW

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

29. The applicants alleged a number of violations of 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 [a] ... tribunal ...”

They complained that (a) their supplementary pleadings had been declared inadmissible by the Court of Cassation; (b) they had not been summoned to attend the hearing in that court, as required by Article 6 § 1; (c) State Counsel's submissions had not been communicated to them in advance and it had been impossible for them to reply to them; and (d) the Court of Cassation had refused to refer a preliminary question to the Administrative Jurisdiction and Procedure Court.

A. Inadmissibility of the supplementary pleadings

30. The applicants complained, firstly, that their supplementary pleadings of 19 October 1995 had been declared inadmissible by the Court of Cassation as being out of time. They pointed out that the parties to criminal proceedings in the Court of Cassation had to comply with radically different time-limits in filing their pleadings, observations or submissions. Whereas appellants intending to make oral representations had a maximum of two months to file "pleadings in support" of their appeal, the respondent party did not have to comply with any time-limit in filing its own pleadings, a fact that had direct consequences for the opportunity afforded to the appellant to reply to the respondent's observations. The effect of Article 420 *bis*, second paragraph, of the CCP was that appellants were dependent on the speed with which the respondent acted if they were to have the opportunity to file supplementary pleadings; in practice, it proved impossible to do so. State Counsel was not subject to any time-limit either, and was therefore able merely to make oral submissions on the day of the hearing.

In the instant case the Belgian State had taken nearly five months to file pleadings and the applicants had filed their supplementary pleadings one and a half months afterwards, three months before the date of the hearing. In declaring those pleadings inadmissible, the Court of Cassation had deprived the applicants of their only opportunity to reply to their opponents' arguments since, in the absence of any information about the date of the hearing, they had been unable to attend. If a provision such as Article 420 *bis*, second paragraph, of the CCP had really been essential to the proper administration of justice, it should have been reproduced in the statutory instruments governing procedure in the country's other courts, such as the *Conseil d'Etat* and the Administrative Jurisdiction and Procedure Court, but that was not the case.

31. In the Government's submission, the Court of Cassation had done no more than adhere scrupulously to Article 420 *bis*, second paragraph, of the CCP, which provided that appellants could not produce any further pleadings once two months had elapsed from the date on which the case was entered on the general list. In the instant case the applicants' supplementary pleadings had been filed after that point. The Government considered that

the provision in issue belonged to the measures taken in domestic law to regulate legal remedies and to lay down conditions for their use, with a view to ensuring the proper administration of justice. In practical terms, the provision in issue served to limit the number of pleadings that could be submitted by the various parties, thereby preventing them from being able to continue replying to each other's submissions right up to the day before the hearing, a scenario that would paralyse the Court of Cassation's functioning to an unacceptable extent. In any event, measures of that kind fell within the margin of appreciation enjoyed by the authorities in such matters, as they did not impair the effectiveness of the applicants' right of appeal to an extent incompatible with the requirements of Article 6. The Government relied in that connection on the Commission's decision in *Kaufman v. Belgium* (no. 10938/84, 9 December 1986, Decisions and Reports (DR) 50, p. 98).

32. The principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among other authorities, *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

The Court reiterates that Article 6 of the Convention does not prevent the Contracting States from regulating access to appellate courts (see, *mutatis mutandis*, *Levages Prestations Services v. France*, judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, pp. 1544-45, § 48), for example by laying down rules on time-limits with a view to ensuring the proper administration of justice (see *Bricmont v. Belgium*, no. 10857/84, Commission decision of 15 July 1986, DR 48, p. 106, and *Welter v. Sweden*, no. 11122/84, Commission decision of 2 December 1985, DR 45, p. 246).

The Court notes in the instant case that Article 420 *bis* of the CCP requires those appealing to the Court of Cassation to file any pleadings within two months of the date on which the case is placed on the general list, although the respondent party is not subject to a similar time-limit and in this instance took nearly five months to file its own pleadings.

Furthermore, that had the effect of depriving the applicants of the opportunity to reply in writing to the respondent party's pleadings, since their supplementary pleadings were declared inadmissible as being out of time. However, such an opportunity may be essential, since the right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party (see *Ruiz-Mateos v. Spain*, judgment of 23 June 1993, Series A no. 262, p. 25, § 63).

The Court is sensitive to the need emphasised by the Government to ensure that proceedings are not prolonged unnecessarily by allowing a succession of written replies to any pleadings filed, but the principle of equality of arms does not prevent the achievement of such an objective,

provided that one party is not placed at a clear disadvantage. That condition was not satisfied in the instant case. There has therefore been a violation of Article 6 § 1 of the Convention on that account.

B. Notification of the hearing in the Court of Cassation

33. The applicants further submitted that the system for summoning the parties to attend hearings in the Court of Cassation in criminal cases – namely, the entry of the hearing date on the list of pending cases displayed at the registry and in the courtroom of the Court of Cassation – did not comply with the requirements of Article 6 § 1. In their submission, the notification arrangements laid down in Article 420 *ter* of the CCP departed from the procedure followed by all other domestic courts and by the Court of Cassation in civil cases. The system was especially unfair as criminal proceedings were the only kind in which members of the Court of Cassation Bar did not have a monopoly on addressing the court. Moreover, the applicants and their lawyers had not been aware of an informal practice whereby they could have ascertained the date and time of a hearing by telephoning the registry of the Court of Cassation or asking it to send them the information in writing. In any event, that practice itself amounted to an admission by the Court of Cassation that Article 420 *ter* of the CCP was unfair and outmoded.

34. In the Government's submission, the applicants had been notified of the hearing of 24 January 1996 and invited to attend, in accordance with Article 420 *ter* of the CCP and the relevant domestic practice, since on 8 January 1996 the date of the hearing in their case had been entered on the list displayed at the registry and in the courtroom of the Court of Cassation. The applicants had been represented by experienced lawyers who could not reasonably have claimed to be unaware of the clear and simple rules on summoning the parties to attend hearings in such cases, or of the informal practice whereby they could have telephoned the registry of the Court of Cassation to obtain the relevant information or had it sent to them by post. In assessing whether there had been a violation of the Convention, the Court should merely examine the specific case before it and not the applicable law *in abstracto*. In support of that argument, the Government relied on the Court's case-law, in particular *Melin v. France* (judgment of 22 June 1993, Series A no. 261-A).

35. The Court reiterates that its task is not to review the relevant legislation in the abstract; it has to confine itself, as far as possible, to examining the problems raised by the specific case before it (see, among other authorities, *Melin*, cited above, p. 11, § 22, and *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 30, § 55).

In the instant case the date of the hearing in the Court of Cassation was displayed at the registry and in the courtroom of the Court of Cassation on

8 January 1996, sixteen days before the hearing. The applicants were represented by four lawyers, all of them members of the Brussels Bar – a fundamental difference between the instant case and *Fretté v. France* (no. 36515/97, § 49, ECHR 2002-I). The Court notes that the notification system complained of by the applicants was abolished by the Law of 14 November 2000 (see paragraph 23 above), on the ground that it was an anachronism in the age of the fax and electronic mail (see the drafting history of the bill which became the Law of 14 November 2000, Parliamentary Documents, House of Representatives, no. 50-545/1, p. 5). However, even if they were unusual or outmoded, the applicable rules were apparent from the CCP and were therefore accessible and sufficiently coherent and clear, so that lawyers, being professionally concerned with judicial procedure, cannot legitimately claim to have been unaware of them (see, *mutatis mutandis*, *Melin*, cited above, pp. 11-12, § 24).

Furthermore, and above all, there was a practice whereby the parties and their counsel could request the registry of the Court of Cassation to inform them in writing of the date of the hearing, or to obtain the relevant information by telephone (see paragraph 23 above). The Court considers that it is not unreasonable to require appellants wishing to be personally informed of the date on which their case has been set down for hearing in the Court of Cassation to avail themselves of these additional notification arrangements (see *B. v. Belgium*, no. 9938/82, Commission decision of 15 July 1986, DR 48, p.21).

That being so, the applicants cannot argue that the authorities made it impossible for them to attend the hearing in the Court of Cassation. In conclusion, there has been no violation of Article 6 § 1 of the Convention on that account.

C. State Counsel's submissions

36. The applicants also complained that the submissions of the advocate-general had not been communicated to them in advance and that it had been impossible for them to reply to them. Firstly, they argued that there was no evidence that there had not been a written copy of the submissions. In any event, before the hearing the parties had not known what position State Counsel would adopt. In their opinion, that should be the minimum information which the parties should have at their disposal in order to prepare their reply, in accordance with *Reinhardt and Slimane-Kaïd v. France* (judgment of 31 March 1998, *Reports* 1998-II, pp. 665 and 666, §§ 103 and 106). Furthermore, the applicants had also been unable to reply to the advocate-general's submissions because they had not attended the hearing, not having been given adequate notice of the date on which it was to take place (see paragraph 33 above). As regards the procedure before the Court of Cassation, a number of judicially initiated amendments had

admittedly been made in the light of *Borgers* (cited above), but the Committee of Ministers of the Council of Europe had not taken official note of them until 22 April 1998, more than two years after the hearing in issue (see paragraph 24 above).

37. The Government stated that there had been no written record of State Counsel's submissions in the instant case (see paragraph 25 above). Where criminal proceedings, in particular, were concerned, such submissions only rarely existed in written form, but when they did, they were sent to the lawyers in advance.

However, even supposing that written submissions had existed in the instant case, there would have been no obligation to send a copy of them to the parties because, as the case-law stood at the time, the requirements of Article 6 § 1 of the Convention would have been complied with if the parties had had the opportunity to reply orally under satisfactory conditions to the submissions made by State Counsel at the hearing. In any event, since the judgment of 30 October 1991 in *Borgers*, the Court of Cassation had afforded that opportunity in all criminal proceedings. Where, having regard to the complexity of the matters in issue, the parties considered that they were not in a position to reply on the spot to State Counsel's submissions, they could also seek an adjournment or the opportunity to submit a memorandum for the deliberations (*note en délibéré*) within a specified period, and such requests were systematically allowed by the Court of Cassation. Those judicially initiated procedural amendments, of which the Committee of Ministers of the Council of Europe had taken note in Interim Resolution DH (98) 133 of 22 April 1998, provided the applicants with safeguards that were at least as satisfactory as those deemed sufficient by the Court in *Reinhardt and Slimane-Kaïd*, cited above.

The applicants, who had been represented by four lawyers, some of whom were highly specialised in dealing with criminal cases in the Court of Cassation, could not have been unaware of the existence of those arrangements, of which they could have availed themselves if they had responded to the notification of the hearing, which had been addressed to them in accordance with the statutory procedure. Admittedly, a law enacted on 14 November 2000 had subsequently introduced additional safeguards for the parties to proceedings in the Court of Cassation, but its enactment could not be taken to mean that there had been any violation of Article 6 § 1 in the instant case, seeing that those safeguards in some respects exceeded the level of protection required by that provision.

38. The Court notes that State Counsel's submissions were first made orally at the public hearing in the Court of Cassation (see paragraph 25 above). The parties to the proceedings, the judges and the public all learned of their content and the recommendation made in them on that occasion. Consequently, no breach of the principle of equality of arms has been made out, since the applicants cannot derive from the right to equality of arms a

right to have disclosed to them, before the hearing, submissions which have not been disclosed to the other party to the proceedings or to the reporting judge or to the judges of the trial bench (see, *mutatis mutandis*, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, pp. 107-08, § 23, and *Kress*, cited above, § 73).

As to the opportunity for the parties to reply to State Counsel's submissions, in accordance with the principle of adversarial proceedings, had the applicants attended the hearing they could have either made their observations on that occasion, as counsel for the civil party did (see paragraph 20 above), or sought an adjournment or leave to file a memorandum for the deliberations within a specified period (see paragraphs 24-25 above). As has already been noted, the fact that the applicants and their lawyers were unable to attend the hearing in the instant case cannot be attributed to the conduct of the authorities (see paragraph 35 above).

Consequently, no violation of Article 6 § 1 of the Convention has been established on that account.

D. Refusal to refer a preliminary question to the Administrative Jurisdiction and Procedure Court

39. The applicants complained, lastly, that the Court of Cassation had refused their request to refer a preliminary question to the Administrative Jurisdiction and Procedure Court (see paragraph 21 above). In their submission, by virtue of the Special Law of 6 January 1989 on the Administrative Jurisdiction and Procedure Court (see paragraph 28 above) the Court of Cassation had been under an obligation to allow the request.

40. The Government argued that section 26(2) of the Special Law, concerning the obligation on the courts to refer preliminary questions to the Administrative Jurisdiction and Procedure Court, had led to the development of settled case-law to the effect that a refusal to refer a preliminary question could be justified by the Court of Cassation's particular rules of procedure concerning the admissibility of appeals and of particular grounds. In the instant case the Court of Cassation's refusal to refer the applicants' preliminary question to the Administrative Jurisdiction and Procedure Court was perfectly consistent with that case-law and, consequently, devoid of any arbitrariness that might have resulted in an infringement of the right to a fair hearing.

41. The Court reiterates, firstly, that the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. It further refers to its case-law to the effect that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State,

which enjoys a certain margin of appreciation in this regard. The right to have a preliminary question referred to a court cannot be absolute either, even where a particular field of law may be interpreted only by a court designated by statute and where the legislation concerned requires other courts to refer to that court, without reservation, all questions relating to that field. It is in accordance with the functioning of such a mechanism for the court to verify whether it is empowered or required to refer a preliminary question, first satisfying itself that the question must be answered before it can determine the case before it. However, it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of a fair trial, as set forth in Article 6 § 1 of the Convention, in particular where such a refusal appears arbitrary (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 114, ECHR 2000-VII).

42. The Court considers that that was not so in the present case. The Court of Cassation took due account of the applicants' complaints relating to the unlawfulness or unconstitutionality of section 44 of the Hospitals Act, and of their request for a preliminary question on the matter to be submitted to the Administrative Jurisdiction and Procedure Court. It then ruled on the request in a decision grounded on sufficient reasons which does not appear to have been arbitrary. The Court further observes that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (*ibid.*, § 115).

43. In conclusion, the refusal to refer the preliminary question to the Administrative Jurisdiction and Procedure Court did not breach Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

45. The applicants claimed 475,753,877 Belgian francs (BEF), equivalent to 11,793,630.55 euros (EUR), in respect of pecuniary damage, corresponding to the total amount of the subsidies withheld from the IMEC as a penalty for the unauthorised installation of the equipment in question. The applicants asked the Court to take into account the loss of their

opportunity to have their arguments upheld by the Court of Cassation, on account of the unfairness of the proceedings.

In respect of non-pecuniary damage, the applicants claimed BEF 10,000,000 (EUR 247,893.52) each. The first applicant referred to the damage sustained as a result of the criticism levelled at him by the media and the political world, the authorities' hounding of him and the effect of his conviction on his image. The second applicant cited similar factors, and also the attack on the reputation of a hospital that had been depicted as being driven by profit.

In the alternative, the applicants considered that "compensation for loss of opportunity should be assessed at half those amounts".

46. The Government considered that the figures submitted by the applicants in support of their claim for pecuniary damage were "utterly incomprehensible". Relying on the Court's case-law, they emphasised that there was no causal link between the violations complained of and the alleged damage. None of the penalties referred to by the applicants had been imposed, or even mentioned, by the Court of Appeal in its judgment of 12 January 1995 against which they had appealed to the Court of Cassation; the fines and costs which the applicants had been ordered to pay by the Court of Appeal had amounted to BEF 10,654 (EUR 264.11), together with a token sum of one franc for non-pecuniary damage. Furthermore, on 30 December 1991 the applicants had sued the State and the National Institute for Sickness and Disability Insurance for the pecuniary damage resulting from the prohibition on using the medical equipment in issue. On that occasion they had claimed the same sums as they were now claiming before the Court in respect of procedural flaws in the Court of Cassation, a fact that offered ample proof that there was no causal link between those flaws and the alleged damage.

47. In accordance with its case-law (see *Vermeulen v. Belgium*, judgment of 20 February 1996, *Reports* 1996-I, p. 235, § 37), the Court considers that it is impossible to speculate as to what the outcome of the proceedings would have been if they had satisfied the requirements of Article 6 § 1. Consequently, no causal link has been established between the violations complained of and the alleged pecuniary damage.

As to non-pecuniary damage, the Court considers that it is sufficiently compensated by the finding of a violation of Article 6 § 1 (*ibid.*; see also *Kress*, cited above, § 96).

B. Costs and expenses

48. The applicants claimed BEF 950,000 (EUR 23,549.88) for the costs and expenses incurred in the proceedings before the Court: BEF 35,000 (EUR 867.63) for costs and BEF 915,000 (EUR 22,682.26) for fees.

49. In the Government's submission, such sums were well in excess of those usually awarded by the Court in respect of the costs incurred before it. They asked the Court to reduce those sums by applying its usual criteria in cases of this kind.

50. According to the Court's case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum (see, for example, *Kress*, cited above, § 102). On an equitable basis, the Court assesses at EUR 5,000 the cost of the applicants' representation before it.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention in that the supplementary pleadings filed by the applicants were declared inadmissible;
2. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention as regards the manner in which the applicants were notified of the hearing in the Court of Cassation;
3. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention as regards the opportunity for the applicants to reply to State Counsel's submissions at the hearing in the Court of Cassation;
4. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention in that the applicants' request to have a preliminary question submitted was declared inadmissible;
5. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;
6. *Holds* unanimously
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to

Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 5 November 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly dissenting, partly concurring opinion of Mr Lemmens;
- (b) partly dissenting opinion of Mrs Thomassen joined by Mr Jungwiert.

J.-P.C.
S.D.

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE LEMMENS

(Translation)

1. To my regret, I am unable to agree with the Court's conclusion regarding the inadmissibility of the applicants' supplementary pleadings.

It seems helpful to give a brief recapitulation of the relevant procedural rules and the manner in which they were applied.

Under Article 373 of the Code of Criminal Procedure, the applicants had fifteen days to inform the registry of the Court of Appeal that they wished to appeal on points of law against the judgment of 12 January 1995. That merely entailed submitting a declaration which did not have to include any reasons. The file was then forwarded to the Court of Cassation, where the case was entered on the general list on 14 February 1995. From that date the applicants had two months to set out their grounds of appeal, if they so wished, in written pleadings (Article 420 *bis*, second paragraph, of the Code of Criminal Procedure). The first applicant, Mr Wynen, availed himself of that opportunity, filing pleadings in support of his appeal on 13 April 1995 and setting out seven grounds. The respondent, the Belgian State, had until the date of the hearing in the Court of Cassation to file pleadings in reply. It did so on 12 September 1995, after approximately five months had elapsed, at a time when the case had not yet been set down for hearing. Those pleadings merely addressed each of the first applicant's grounds of appeal in turn and did not raise any objection to the appeal's admissibility.

In principle, the case was then ready for hearing. However, on 23 October 1995 the applicant filed supplementary pleadings, a possibility not provided for by law, in which he responded to the arguments submitted in reply by the Belgian State and also set out four new grounds of appeal. The Belgian State did not submit a rejoinder.

In its judgment of 24 January 1996 the Court of Cassation explicitly stated that it had not taken into consideration the supplementary pleadings which Mr Wynen had filed outside the period specified in Article 420 *bis*, second paragraph, of the Code of Criminal Procedure.

It is true that the applicants had slightly more than two months in which to file pleadings, whereas the respondent was not subject to any time-limit, so that in the instant case it had more time available. It should be noted that in certain cases it may have less time, namely when the case is set down for hearing less than four or five months after being entered on the Court of Cassation's general list.

The majority of the Court consider that the fact that the two parties did not have an equal, or at the very least similar, amount of time runs counter to the principle of equality of arms. That seems to me to be an excessively rigid approach to the principle.

A fundamental aspect of the present case is that the applicants' grievance would not have been resolved even if the parties had had the same amount of time. Their real problem was that, in practice, the procedure before the Court of Cassation does not provide for the possibility of submitting pleadings in reply. Although the law does not prevent an appellant from filing supplementary pleadings, in practice that possibility exists only if both the appellant's pleadings in support of his appeal and the respondent's pleadings in reply are filed well before the expiry of the two months within which the appellant must file his initial pleadings. If that is the case, the appellant can indeed make use of the remaining time to file supplementary pleadings (or, rather, a rejoinder). In the instant case, as the respondent had not filed its pleadings by 14 April 1995, the last day of the statutory two-month period, it was impossible for the applicants to reply to them in a lawful manner. It is inconsequential whether or not the respondent filed its pleadings within a period equivalent to that available to the applicants.

In my opinion, the fact that the applicants were unable to reply to the respondent's pleadings did not infringe their right to a fair hearing.

Even though, as the Court points out in paragraph 32 of the judgment, the right to adversarial proceedings means that each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party, the special features of the procedure before the Court of Cassation must be taken into account in determining the scope of that right (see, among other authorities, *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, §§ 42-43, ECHR 2002-VII). The Court of Cassation does not deal with the merits of cases and its jurisdiction is limited to examining matters of law. Cases are brought before it after the merits have already been examined at two levels of jurisdiction (in the present case, the first-instance court and the appellate court), on which occasions the parties have had every opportunity to make submissions. The Court of Cassation is able to deal only with arguments that have already been submitted in the trial and appellate courts, with the exception, of course, of new grounds based on public policy, which the court may also raise of its own motion. In order to ensure that proceedings in the Court of Cassation are not prolonged unnecessarily by allowing a succession of written replies to any pleadings filed, as the Government observed, the appellant must submit all his grounds in his pleadings in support of the appeal, and the respondent must raise all its objections and grounds of defence in its pleadings in reply. The appellant consequently knows in advance that he must set out all his arguments in his pleadings in support of the appeal.

In the instant case, the possibility of replying to an objection to the admissibility of an appeal or of a particular ground was not an issue that arose, since no such objection was raised by the respondent. The mere fact that the applicants were unable to reply to the defence put forward in the

respondent's pleadings did not prevent the proceedings from being adversarial. Indeed, as has been explained above, the scope of the dispute before the Court of Cassation was known in advance and there was nothing to stop the applicants from setting out detailed arguments in their pleadings in support of their appeal, ensuring, as the Government rightly emphasised in their memorial, that they anticipated any arguments that might be submitted by their opponent, such arguments being largely familiar to them as they had already been raised in the courts below. Furthermore, the applicants still had the opportunity to address the court at the hearing, where they could have elaborated on the arguments submitted in the pleadings in support of their appeal and addressed the legal considerations set forth in the respondent's pleadings in reply.

In a similar case, cited by the Government, the European Commission of Human Rights considered that the applicants had had the opportunity to present their case in a manner which had been compatible with the principle of adversarial proceedings and which had not placed them at a disadvantage *vis-à-vis* their opponent (see *Kaufman v. Belgium*, no. 10938/84, Commission decision of 9 December 1986, Decisions and Reports 50, pp. 115-16, § 2). Having regard to the role of the Court of Cassation and to the proceedings as a whole, I consider that that conclusion remains valid. In my opinion, the Court of Cassation did not infringe the applicants' right to a fair hearing by refusing to consider their supplementary pleadings.

2. I am fully in agreement with the judgment in so far as it concerns the manner in which the applicants were notified of the hearing in the Court of Cassation.

3. With regard to the complaint that the applicants were not sent a copy of the advocate-general's submissions and were unable to reply to them, the Court refers, in particular, to the fact that the parties had the opportunity to make oral representations at the scheduled hearing or at another hearing in the event of an adjournment, or to submit a memorandum for the deliberations (see paragraph 38 of the judgment, second sub-paragraph).

The Court's recent case-law suggests that the possibility of replying in writing to the submissions of an authority such as the Principal Public Prosecutor's Office at a supreme court, and having the court take the reply into consideration, is an important, if not essential, means of ensuring compliance with the principle of adversarial proceedings (see the following judgments: *Fretté v. France*, no. 36515/97, § 50, ECHR 2002-I; *APBP v. France*, no. 38436/97, §§ 26-27, 21 March 2002; *Immeubles Groupe Kosser v. France*, no. 38748/97, §§ 25-26, 21 March 2002; and *Meftah and Others*, cited above, § 52). In the instant case, however, I am not persuaded that at the time the parties had a genuine opportunity to reply in writing to the advocate-general's submissions. In their memorial of 27 July 1999 the Government did not refer to any such possibility; they first mentioned its existence in a memorandum of 29 November 2001, in reply to a question

from the Court. The applicants referred in their memorial of 28 November 2001 to a Court of Cassation judgment of 16 May 1997 – that is, after the judgment in their case – in which written submissions summarising counsel’s address had again not been taken into consideration.

The question whether there was a possibility of replying in writing at the material time may, however, be left open. The applicants, or their lawyers, did not even avail themselves of the opportunity to reply orally. As the Court notes, the fact that in the instant case the applicants and their lawyers were unable to attend the hearing and, consequently, to seek leave to reply to State Counsel’s submissions cannot be attributed to the conduct of the authorities (see paragraph 38 of the judgment). One cannot speculate as to what would have happened at the hearing if the applicants had been present or been represented.

That being so, I was able to agree with the conclusion that no violation of Article 6 § 1 had been established on that account.

4. With regard to the complaint concerning the Court of Cassation’s refusal to refer a preliminary question to the Administrative Jurisdiction and Procedure Court (a constitutional court), I also agreed with the conclusion that there had been no violation of Article 6 § 1. However, in my opinion it would have been helpful to qualify somewhat the reasons that led to that conclusion.

Section 26(2) of the Special Law of 6 January 1989 on the Administrative Jurisdiction and Procedure Court in principle requires the Court of Cassation to seek a preliminary ruling when a question is raised as to whether a law contravenes the rules laid down by or pursuant to the Constitution to determine the respective powers of the federal State, the Communities and the Regions (see paragraph 28 of the judgment). In the instant case the Court of Cassation had to decide whether, notwithstanding the requirements of section 26(2), there might be grounds for not referring to the Administrative Jurisdiction and Procedure Court the preliminary question put forward by the applicants (see paragraph 16 of the judgment) as to the constitutionality of section 44 of the consolidated Hospitals Act of 7 August 1987.

The solution reached by the Court of Cassation, which in fact appears to have given its own reply to the question whether section 44 of the Hospitals Act was unconstitutional (see paragraph 21 of the judgment), may be considered surprising. That observation, however, is not a sufficient reason to conclude that the Court of Cassation’s decision infringed the applicants’ right to a fair hearing.

As the Court points out, it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see paragraph 42 of the judgment). The Court itself has the sole duty, according to Article 19 of the Convention, of ensuring the observance of the engagements undertaken by the Contracting States. In particular, it is

not competent to examine applications relating to errors of fact or law allegedly committed by a national court, or to substitute its own assessment for that of the national courts unless and in so far as these errors may have infringed rights and freedoms protected by the Convention (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Kozlova and Smirnova v. Latvia* (dec.), no. 57381/00, ECHR 2001-XI).

In the instant case the Court of Cassation considered the applicants' request for the submission of a preliminary question as to whether the Hospitals Act was unconstitutional. The court's decision to declare the request inadmissible as being insufficiently precise was based on an examination of the relevant provisions of the Constitution and of the Special Law of 8 August 1980 on institutional reform. Even if one were to accept that the Court of Cassation should have left that examination to the Administrative Jurisdiction and Procedure Court – and that is a question which should be addressed by domestic law alone and is not for the European Court to determine – it nonetheless resolved the matter in issue, on the basis of relevant rules of law, and gave reasons for its decision. Even supposing that that decision was questionable from the point of view of domestic law, I fail to see how that could be sufficient to make it arbitrary.

That is why I voted, alongside the other members of the Court, in favour of finding that there had been no violation of Article 6 § 1 on that account.

PARTLY DISSENTING OPINION OF JUDGE THOMASSEN
JOINED BY JUDGE JUNGWIERT*(Translation)*

I am unable to agree with the conclusion reached by the majority of my colleagues that the applicants in the present case did not have a fair hearing on account of certain rules governing procedure in the Court of Cassation.

The majority consider that the principle of equality of arms was breached by the fact that the Court of Cassation declared the appellants' supplementary pleadings inadmissible for failure to comply with the time-limit laid down in Article 420 *bis* of the Code of Criminal Procedure, whereas the civil party was not subject to any time-limit when filing its pleadings.

What was the procedural position of the different parties? Following their conviction in criminal proceedings, the applicants appealed on points of law to the Court of Cassation and filed pleadings setting out their grounds of appeal within the statutory two-month period. After that period had expired, they filed supplementary pleadings, which were declared inadmissible as being out of time. This was the subject of the applicants' complaint: not the two-month time-limit *per se*, but the fact that the civil party to criminal proceedings was not required to comply with a time-limit when filing its pleadings in reply. Consequently, the civil party could file pleadings after the expiry of the time allowed to the appellants, who were thus unable to file supplementary pleadings in reply.

The majority of the Chamber shared the applicants' view that those arrangements contravened the principle of equality of arms, as the difference in the amount of time allowed denied them the opportunity to reply in writing to the respondent party's pleadings (see paragraph 32 of the judgment). The Court thus held that there had been a violation of Article 6 of the Convention.

For my part, I do not agree with that analysis or that conclusion. The fact that the applicants were unable to file supplementary pleadings was due to the application of the statutory provision whereby persons appealing to the Court of Cassation have two months in which to submit all their grounds of appeal in writing. Even if the parties had been granted the same amount of time, say two months, it might still have been impossible for the applicants to reply in writing to the civil party's observations if, for example, the latter had filed its pleadings on the last day of the statutory period.

The procedure in the Belgian Court of Cassation does not really provide for the possibility of submitting written observations in reply (see Judge Lemmens's dissenting opinion), a position which, in my view, is linked to the special nature of proceedings in that court.

By way of comparison, let us consider the procedure in the Netherlands Court of Cassation. Accused persons appealing on points of law are not required to submit grounds of appeal but have two months if they wish to do so. The civil party may also submit grounds of appeal but has only one month in which to do so.

Under the approach adopted by the majority, that difference might likewise raise an issue as regards equality of arms. However, in my opinion, such an approach does not take into account the special nature of proceedings in the Court of Cassation.

In the Court of Cassation it is not really a question of proceedings between the accused and the civil party. Both parties can be said to play a kind of parallel role before the court. The civil party may raise grounds of appeal only in so far as they concern its own position. That may explain why in some countries, such as the Netherlands, there is no right to make submissions in reply, either for the accused in reply to the civil party's grounds or vice versa.

If the applicants in the instant case had attended the hearing in the Court of Cassation, they would have had the opportunity to reply orally to the arguments submitted by the civil party (see Mr Lemmens's dissenting opinion), with which they had already been able to acquaint themselves. At the hearing they would also have had the opportunity to acquaint themselves with, and reply orally to, the submissions of the advocate-general, whose role is to state an opinion on all the grounds of appeal, including the civil party's observations. They could also have sought an adjournment of the hearing in order to give themselves additional time to prepare their submissions in reply, which, moreover, could have taken the form of a memorandum for the deliberations. Such requests were systematically allowed by the Court of Cassation (see paragraph 38 of the judgment). In those circumstances, I find it difficult to accept that in the proceedings in the Court of Cassation the applicants were placed in a less favourable position than the civil party.

In my opinion, the fact that appellants in the Court of Cassation have a statutory period of two months in which to file pleadings falls within the margin of appreciation which States enjoy in determining judicial procedure. It cannot be inferred from Article 6 that the applicants should have been able to file further pleadings after the statutory period had expired. In my opinion, the applicants had a reasonable opportunity to present their case under conditions that did not place them at a substantial disadvantage *vis-à-vis* the civil party (see, *mutatis mutandis*, *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI).

In conclusion, I consider that Article 6 of the Convention was not breached.