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

GRAND CHAMBER

CASE OF MARTINIE v. FRANCE

(Application no. 58675/00)

JUDGMENT

STRASBOURG

12 April 2006

In the case of Martinie v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President*,
Christos Rozakis,
Jean-Paul Costa,
Nicolas Bratza,
Lucius Caflisch,
Ireneu Cabral Barreto,
Françoise Tulkens,
Peer Lorenzen,
Karel Jungwiert,
Volodymyr Butkevych,
András Baka,
Rait Maruste,
Snejana Botoucharova,
Antonella Mularoni,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Khanlar Hajiyev, *judges*,

and Lawrence Early, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 16 November 2005 and 8 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 58675/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Michel Martinie ("the applicant"), on 15 February 1999.

2. The applicant was represented by Mr M. Meyer, a lawyer practising in Strasbourg. The French Government ("the Government") were represented by their Agent, Ms E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 13 January 2004 it was declared partly admissible by a Chamber of that Section composed of Gaukur Jörundsson, President, Jean-Paul Costa, Loukis Loucaides, Karel Jungwiert, Volodymyr Butkevych, Wilhelmina Thomassen and Mindia Ugrekhelidze, judges, and Lawrence Early, Deputy Section Registrar. On 3 May 2005 a

Chamber of that Section composed of András Baka, President, Jean-Paul Costa, Ireneu Cabral Barreto, Rıza Türmen, Karel Jungwiert, Antonella Mularoni and Elisabet Fura-Sandström, judges, and Sally Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

5. The applicant and the Government each filed observations on the merits.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 November 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms E. BELLIARD, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Ms A.-F. TISSIER, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs,
Ms C. JOLY, Drafting Secretary, Human Rights Section,
Legal Affairs Department, Ministry of Foreign Affairs,
Mr B. GENEVOIS, President of the Judicial Division,
Conseil d'Etat,
Mr J.-Y. BERTUCCI, Principal Advocate-General
at the Court of Audit,
Mr O. ORTIZ, President of the Regional Audit
Office of Alsace, *Advisers*;

(b) *for the applicant*
Mr M. MEYER, lawyer,
Ms V. LECHEVALLIER, lawyer, *Counsel*.

The Court heard addresses by Mr Meyer and Ms Belliard and by Mr Genevois and Mr Bertucci.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, who is a civil servant in the State education service, was born in 1948 and lives in Papeete.

8. In June 1987 the Lycée René-Cassin in Bayonne – of which the applicant had been appointed accountant by a decision of the Director of Education for Bordeaux – and the French Federation of Basque Pelota signed an agreement to set up a centre at the school which would allow young athletes to continue studying during their training: the Basque Pelota National Training Centre (*Centre national d'entraînement à la pelote basque* – "the CNEA"). The CNEA, which had no separate legal personality, was attached to the school's budget. The headmaster of the school was the director and authorising officer in respect of expenditure, and the applicant, who was appointed general secretary of the centre, was the accountant. In December 1987 the headmaster instituted a fixed monthly allowance in favour of the director of the CNEA and its general secretary.

9. On an audit of the accounts submitted by the applicant for the years 1989 to 1993, the Aquitaine Regional Audit Office gave interim rulings on 3 May 1996 and 11 March 1997 ordering the applicant to produce certain supplementary evidence.

In a judgment of 17 October 1997, the Aquitaine Regional Audit Office declared that the applicant owed the school the following amounts plus interest: 191,893.09 French francs (FRF), FRF 11,407.75 and FRF 17,806.60. Those amounts corresponded to payments made by the applicant in his capacity as public accountant of the school for the years 1989 to 1993. The first sum related to the fixed monthly allowance paid to the headmaster of the school in his capacity as director of the CNEA and to the applicant himself as general secretary; the second sum concerned a cashier's indemnity paid to the applicant himself out of funds managed by the CNEA's separate accounting department; and the third concerned the transfer of holiday compensation into the CNEA's separate accounting department in favour of the director of the centre and the applicant himself. In its judgment, the Regional Audit Office noted that there was no resolution by the board of governors of the Lycée René-Cassin authorising these allowances – whereas that was the only body with power to set up a system of allowances – and, referring to the relevant provisions, pointed out that "the public accountant must satisfy himself that the documents he submits in support of the payments for which he takes charge are issued by the appropriate authority".

10. The applicant appealed to the Court of Audit, which gave judgment on 20 October 1998 upholding the main parts of the Regional Audit Office's judgment but partly varying the total amount to be repaid, which it reduced to FRF 191,893.09.

11. In a decision of 22 October 1999, the *Conseil d'Etat* declared an appeal on points of law lodged by the applicant "inadmissible". The decision is worded as follows:

> "Under section 11 of the Law of 31 December 1987 reforming administrative proceedings, 'an appeal on points of law to the *Conseil d'Etat* is first subjected to an admissibility procedure. Leave to appeal is refused by judicial decision if the appeal is inadmissible or not based on a genuine ground of appeal'.
>
> In applying for the judgment of 20 October 1998 [of] the Court of Audit ... to be set aside, Mr Martinie submitted that the judgment had been given in breach of the provisions of Article 6 § 1 of the Convention ..., since he had neither been summoned to appear nor invited to submit his observations; he had not been aware of the date of the hearing fixed by the Court of Audit; and the reporting judge and counter-reporting judge had taken part in the deliberations of the Court of Audit. In his submission, the Court had misdirected itself in law in considering that only an executory resolution of the school's board of governors could have constituted justification for the payment; the accountant could not be held liable for the expenditure paid by the [CNEA] prior to 21 February 1992, which was the date of his appointment as accountant of the 'direct accounting department' that had borne the irregular expenditure; and, lastly, the Court of Audit had further misdirected itself in law by ordering repayment of the sum in question to the Lycée René-Cassin.
>
> None of these grounds justifies granting leave to appeal."

12. On 7 June 2001, on a non-contentious application, the Minister of Finance granted the applicant partial remission of the surcharge levied by the Court of Audit, in the sum of 21,953.91 euros (EUR), with EUR 762.25 thus remaining payable by him.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The personal and financial liability of public accountants

13. Section 60-I of Finance Law no. 63-156 of 23 February 1963 provides that public accountants are personally and financially liable for the audits they are required to carry out of income, expenditure and assets on the terms set forth in the general public accounting rules. In that connection, Articles 12 and 13 of Decree no. 62-1587 of 29 December 1962, which lay down general rules governing public accounting, provide as follows:

Article 12

"Accountants are required:

...

B – in connection with expenditure, to check

that the authorising officer or his delegate has the requisite capacity to act;

that the funds are available;

that the expenditure is accurately attributed to the appropriate heads, in accordance with its nature or purpose;

that the claims are valid according to the terms set forth in Article 13 below;

that payment has been effected in accordance with the statutory conditions for discharging the debtor.

..."

Article 13

"With regard to the validity of the claims, accountants shall check

that the service has actually been rendered and the amounts accurately calculated;

that the statutory controls have been effected and the supporting documents produced.

In addition, in so far as provided by the rules specific to each public institution, public accountants shall check that the financial controllers' stamp of approval has been affixed to the liabilities and payment authorisations issued by the main authorising officers.

Public accountants shall also check that the rules on limitation periods have been applied."

Public accountants who have been found liable or whose liability is in issue may, in cases of *force majeure*, be fully or partly discharged from liability; they may also obtain remission, on a non-contentious application, in respect of amounts for which they remain liable (section 60-IX of Law no. 63-156). The Government indicated that decisions on this type of application were made by the Minister of Finance, who "differentiated between what was a personal failing and what was a case of *force majeure* or circumstances capable of mitigating the accountant's liability (such as inadequacy of the resources attached to the post)".

2. Judicial scrutiny of accounts rendered by public accountants of local authorities and their public institutions

(a) Regional audit offices

14. Accounts rendered by public accountants are subjected to judicial scrutiny. This task is entrusted to regional audit offices in respect of accounts rendered by public accountants of territorial authorities and their public institutions (Articles L. 211-1 et seq. of the Financial Judicature Code). They carry out a judicial inspection of the regularity of operations by accountants regarding both revenue and expenditure. The procedure is a mandatory one in which the regional audit offices give judgment clearing and settling the accounts irrespective of whether or not irregularities have been disclosed. The purpose of the inspection is not only to check that the accounts are in order, but also that the accountant has properly carried out all the necessary checks concerning, *inter alia*, the basis and the amount of any revenue or expenditure, and has not negligently caused a loss to the local authority.

Final judgments discharge the accountant or levy a surcharge against him, that is, require him to pay a sum back to the local authority (Article L. 231-7 of the Financial Judicature Code) and thus personally bear the financial consequences of an irregularity in management of the accounts.

This judicial scrutiny is conducted in the following stages: production of the accounts by the local public accountant; adversarial investigation; report by the investigating judge; deliberations by the regional audit office; interim ruling; accountant's reply; deliberations by the regional audit office; final judgment (discharge or surcharge).

15. The accountant concerned or his heirs, the local authority or public institution, the Government Commissioner attached to the regional audit office (who acts as State Counsel before the regional audit office and is the correspondent of Principal State Counsel at the Court of Audit (*procureur général près la Cour des Comptes*) – Article L. 212-10 of the Financial Judicature Code), or Principal State Counsel at the Court of Audit may appeal to the Court of Audit against any final judgment delivered by the regional audit office (Articles L. 111-1, L. 211-1, L. 243-1 and R. 243-1 et seq. of the Financial Judicature Code).

16. The appeal is either lodged with the registry of the regional audit office, and an acknowledgment of receipt obtained, or sent to the registry by registered post with recorded delivery. Fifteen days after registration of the appeal, the Government Commissioner communicates it to the other persons having a right of appeal and simultaneously sends a copy to Principal State Counsel at the Court of Audit (Article R. 243-8 of the Financial Judicature Code). The parties have one month from the transmission of the appeal in

which to consult all the documents annexed to the appeal at the registry of the regional audit office and to lodge defence pleadings. During the same period State Counsel (the Government Commissioner) can submit observations. A copy of the pleadings and observations is served by State Counsel on the appellant and the other parties, who may, within one month of transmission, lodge a reply, which is itself sent to the parties, and to which a rejoinder can be lodged within fifteen days. State Counsel may submit observations on the defence pleadings and replies lodged by the various parties. These observations are served on the interested parties (Article R. 243-9 of the Financial Judicature Code). If further documents are added to the file, the appellant and the other parties have fifteen days in which to inspect them and, if they wish, file their observations with the registry of the regional audit office (Article R. 243-10 of the Financial Judicature Code).

Once these time-limits have expired, State Counsel (the Government Commissioner) sends the appeal, a copy of the judgment, the documents produced by the appellant and the pleadings and documents produced by the other parties and the observations by State Counsel to Principal State Counsel at the Court of Audit (Article R. 243-11 of the Financial Judicature Code; since Decree no. 2002-1201 of 27 September 2002 came into force, the Government Commissioner notifies the appellant and the other parties that these documents have been sent to Principal State Counsel).

(b) Features of the proceedings in the Court of Audit on an appeal from a judgment of a regional audit office levying a surcharge against a public accountant

17. Principal State Counsel at the Court of Audit sends the appeal file to the Court of Audit (Article R. 112-8, paragraph 4, of the Financial Judicature Code) in a document which – the Government specify – "is customarily referred to as an 'application' but does not imply any personal initiative on the part of Principal State Counsel (*Conseil d'Etat*, 6 January 1995, *Gouazé*; 27 October 2000, *M^me^ Desvignes*)".

The reporting judge at the court prepares his report on the basis of the appeal file.

Reports relating, *inter alia*, to surcharges and appeals against judgments delivered by regional audit offices have to be sent to Principal State Counsel, who makes written submissions on them (Article R. 112-8, paragraph 5, of the Financial Judicature Code); in doing so, he gives an opinion that the bench is free to follow or reject. He may attend the sessions of the divisions or sections and submit oral observations, but does not take part in the deliberations (Decree no. 2002-1201 of 27 September 2002, codified in Article R. 112-8 *in fine* of the Financial Judicature Code; the Government indicated that, prior to the entry into force of that decree, this principle had already been hallowed by usage).

In the light of the appeal file, the report and the submissions of Principal State Counsel, the counter-reporting judge – who, according to the Government, sits on the bench hearing the appeal – expresses orally, during the hearing, his opinion on the reporting judge's proposals (Article R. 141-8 of the Financial Judicature Code).

18. Where the Court of Audit hears an appeal against a judgment of a regional audit office levying a surcharge against a public accountant, the hearings before it are not public and the parties are not informed in advance of the date of the appeal hearings (the converse situation applies where the Court of Audit gives a final ruling in a case concerning *de facto* management of public funds or the imposition of a fine – Articles R. 141-9 to R. 141-13 of the Financial Judicature Code, added to the Code by Decree no. 2002-1201 of 27 September 2002; Articles L. 131-2 and L. 131-13 of the Financial Judicature Code specify, moreover, that in the former case – *de facto* management – the judgments of the Court of Audit "are deliberated upon after hearing submissions, at their request, from the appellants and other interested parties" and that, in the latter case – imposition of a fine – the same applies in favour of the "persons concerned").

The procedure to be followed at the hearing is set out in Article R. 141-8 of the Financial Judicature Code (as amended by Decree no. 2002-1201):

> "The reporting judge shall present his report to the bench hearing the appeal. The counter-reporting judge shall express his view on each of the proposals submitted.
>
> If the report has been sent to Principal State Counsel, the latter's submissions shall be read out. Where Principal State Counsel, or one of the advocates-general, is present at the hearing, he shall make his submissions and take part in the proceedings.
>
> The bench shall then deliberate. It shall give a decision on each proposal. If a vote has to be taken, the president shall ascertain, in turn, the opinion of the reporting judge, of each of the extraordinary senior members for cases they are empowered to hear under Article L. 112-5, then of each of the senior members in reverse order of seniority at that grade. The president states his opinion last. In the event of an equal number of votes, he shall have the casting vote.
>
> However, in cases concerning *de facto* management or the imposition of a fine, the bench shall deliberate without the reporting judge being present.
>
> ..."

19. Where the Court of Audit rules the appeal inadmissible, its judgment is final. If it considers that the appeal is admissible, it can rule immediately on the merits or order investigative measures by an interim judgment that is served on the accountant and the interested parties. It may order production of the accounts that are the subject of the judgment being appealed and of any documents that it considers necessary to enable it to give a ruling (Article R. 131-41 of the Financial Judicature Code).

3. Case-law of the Conseil d'Etat *on the applicability of Article 6 § 1 of the Convention to proceedings before the Court of Audit*

20. According to the *Conseil d'Etat*, when the Court of Audit scrutinises accounts rendered by public accountants, it does not determine a criminal charge or civil rights and obligations within the meaning of Article 6 § 1 of the Convention (see, *inter alia*, *Conseil d'Etat* ("CE"), 19 June 1991, *Ville d'Annecy c. Dussolier*, *Recueil Lebon*, p. 242, and CE, 3 April 1998, *M^me^ Barthélémy*, *Recueil Lebon*, p. 129). The position is only different when it gives a ruling in cases in which a fine may be imposed (CE, 16 November 1998, *SARL Deltana et M. Perrin*).

4. Decree no. 2005-1586 of 19 December 2005 amending the regulatory section of the Administrative Courts Code

21. Decree no. 2005-1586 of 19 December 2005 is worded as follows:

"...

Chapter II – Provisions relating to the appointment of Government Commissioners

Article 2

The first paragraph of Article R. 122-5 of the Code shall be replaced by the following paragraph:

'Government Commissioners shall be appointed by a decision of the Vice-President of the *Conseil d'Etat* adopted on a proposal by the President of the Judicial Division.'

Article 3

The first paragraph of Article R. 222-9 of the Code shall be replaced by the following paragraph:

'The president shall inform the National Council of Administrative Courts and Administrative Courts of Appeal of his opinion regarding the career progression of the members of the court of which he is president.'

Article 4

The first paragraph of Article R. 222-23 of the Code shall be replaced by the following paragraph:

'In each administrative court, according to its needs, one or more judges or senior judges shall be designated, by a decision of the Vice-President of the *Conseil d'Etat* adopted on a proposal by the president of the court and following approval of the decision by the National Council of Administrative Courts and Administrative Courts of Appeal, to exercise the functions of Government Commissioner.'

Chapter III – Provisions relating to deliberations

Article 5

Title III of Book VII of the Code shall now be entitled 'Conduct of the hearing and deliberations'.

Article 6

The following five Articles shall be inserted after Article R. 731-4 of the Code:

'Art. R. 731-5 – After the Government Commissioner's submissions have been made, any party to the proceedings may send the presiding judge of the bench a memorandum for the deliberations.

Art. R. 731-6 – Deliberations shall take place without the parties being present.

Art. R. 731-7 – The Government Commissioner shall be present at the deliberations. He shall not participate in them.

Art. R. 731-8 – In addition to the members of the court and their assistants, the following persons may be authorised to attend deliberations: judges, trainee lawyers, university professors and lecturers undergoing a period of training at the court or admitted, exceptionally, to follow its activities, be they of French or foreign nationality.

Authorisation shall be issued by the head of the court, after seeking the opinion of the presiding judge of the bench, or, at the *Conseil d'Etat*, by the presiding judge of the bench.

Art. R. 731-9 – Anyone who, in any capacity whatsoever, takes part in or attends deliberations shall be bound to respect the secrecy of the deliberations. Failure to do so may result in the imposition of a penalty under Article 226-13 of the Criminal Code.'

Article 7

The words ‘After deliberations without the parties being present, and’ shall be deleted from Article R. 741-1 of the Code.

Article 8

The following new paragraph shall be inserted after the third paragraph of Article R. 741-2 of the Code:

‘If a memorandum for deliberations is produced, this fact shall also be recorded.’

...”

THE LAW

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

22. The applicant complained of several breaches of Article 6 § 1 of the Convention, according to which:

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

A. The applicability of Article 6 § 1 and the Government’s preliminary objection

1. The Chamber decision on the admissibility of the application

23. In its decision of 13 January 2004 on the admissibility of the application (ECHR 2004-II), the Chamber dismissed the Government’s preliminary objection based on the inapplicability of Article 6 § 1. In particular, in reaching the conclusion that the “obligation” in question in the proceedings was a “civil” one it weighed the private-law features against the public-law features present in the case and found that the former predominated. Replying to the Government’s submission, with reference to

Pellegrin v. France ([GC], no. 28541/95, ECHR 1999-VIII), that account had to be taken of the fact that the "obligation" in question related to the relationship between public servants exercising powers conferred by public law and the authorities, the Chamber held as follows:

> "The Court ... reiterates that the criterion of 'participation in the exercise of powers conferred by public law' established in *Pellegrin* is solely intended to enable it to be determined whether disputes relating to the recruitment, careers and termination of service of public servants fall outside the scope of Article 6 § 1 under its civil head. That is not the subject of the proceedings in question here. *Pellegrin* is therefore irrelevant to the instant case." (§ 27)

2. The parties' submissions

24. As before the Chamber, the Government submitted as their principal argument that the application was incompatible *ratione materiae* with the provisions of the Convention because Article 6 § 1 was not applicable to the proceedings in question.

They referred in that connection to *Pellegrin* (cited above, § 67) in which the Court held that "no disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law attract the application of Article 6 § 1 ...". In their submission, public accountants "had responsibilities affecting matters of general interest and participated in the exercise of powers conferred by public law, wielding a portion of the sovereign power of the State".

They inferred from paragraph 28 of the Chamber decision of 13 January 2004 that the Chamber had unduly extended the solution adopted by the Court in *Richard-Dubarry v. France* (no. 53929/00, 1 June 2004), concerning *de facto* management of public funds, to the purely objective procedure of examining accounts rendered by public accountants. They pointed out that the internal rules of procedure followed by the public finance courts when auditing accounts were distinct from those followed in cases of *de facto* management of public funds, having regard to the difference in nature and subject of those two types of procedure. In the Government's submission, the position of a public accountant was not comparable to that of a tortfeasor; nor did he incur liability on the basis of obligations comparable to contractual obligations under the civil law. They observed in that connection that judicial audits of accounts were merely intended to check that the accounts rendered were in order.

The Government added that a judicial audit of accounts rendered by a public accountant involved only an indirect pecuniary issue for the public accountant in question. Firstly, his only obligation on a judicial audit of his accounts was to produce proof of the entries in the accounts submitted to the audit office for examination and, secondly, it remained entirely uncertain, after judgment was delivered, that he would be surcharged in respect of the

deficit disclosed. On the latter point the Government pointed out that, where applicable, the judgment was limited to noting the expenditure paid by the accountant – or the outstanding sums due and not collected by him – without proper or adequate reasons and requesting him, not to repay the amounts in question, but to put the accounts in order. Making good the deficit recorded in the judgment from the accountant's own assets was only one method of putting the accounts in order. The accountant's financial position was not determined until a later stage, and then not by the public finance courts but by the Minister of Finance, who had a statutory power to discharge accountants in respect of their accounts or grant them remission, on a non-contentious application, in respect of the deficit in the event of *force majeure* or if there had been no negligence, after assessing any professional failings on the part of the accountant in the exercise of his duties and his ability to contribute to settling the amounts in question. If the Minister decided in the accountant's favour, this amounted to regularisation of the accounts to the extent that the accountant had been discharged of liability or granted remission of the deficit. The Government argued on that basis that it was only at that stage, and not when the accounts were being objectively assessed by the public finance courts, that a civil obligation of the accountant could be regarded as being in issue.

The Government stated that, on the basis both of the foregoing considerations and of their previous observations on admissibility (see admissibility decision of 13 January 2004, cited above, § 20), they still considered that Article 6 § 1 of the Convention was inapplicable to the present case.

25. The applicant asked the Grand Chamber to endorse the Chamber's conclusion with regard to the applicability of Article 6 § 1 in the present case. He laid particular emphasis on the fact that the financial liability of public accountants was akin to contractual obligations under civil law and that the outcome of proceedings relating to a judicial audit of accounts could substantially affect the exercise of property rights by the accountant concerned and his or her assets, since the amount owed corresponded to the capital plus interest. He referred in that connection to the case-law of the Convention institutions (in particular the opinion of the European Commission of Human Rights in *Muyldermans v. Belgium* (23 October 1991, Series A no. 214-A)). In the observations he submitted at the admissibility stage he had also contended that, in accordance with the judgment in *Pellegrin*, cited above, Article 6 § 1 was applicable to his case because, as a civil servant in the State education service appointed as a school's accountant, his employment had not entailed participating in the exercise of powers conferred by public law and the performance of duties designed to safeguard the general interests of the State or of other public bodies.

3. The Court's assessment

26. The Court would emphasise that the issue raised in the present case is, specifically, the applicability of Article 6 § 1 of the Convention to proceedings before the Court of Audit on an appeal from a judgment of a regional audit office levying a surcharge against a public accountant.

It points out in this connection that it is common ground that there was a "dispute" (*contestation*) regarding an "obligation" of the applicant. The question that therefore needs to be determined is whether the "obligation" in question is a "civil" one within the meaning of Article 6 § 1. In order to determine that question, the proper approach, in theory, is to weigh the features of private law and public law present in the case against each other (see, for example, *Feldbrugge v. the Netherlands*, 29 May 1986, §§ 26-40, Series A no. 99).

27. In the case of *Pellegrin*, to which the Government referred, the Court was confronted with the issue of the applicability of Article 6 § 1 of the Convention to a dispute between a non-established civil service employee under contract and the administrative authority employing him. Mr Pellegrin had complained before the domestic courts of the decision removing his name from the establishment list of the Ministry concerned.

In *Pellegrin* (§ 59) the Court began by reiterating the position under the earlier case-law.

According to that case-law, the principle was that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1". However, this principle of exclusion, the Court observed, had been limited and clarified in a number of cases. In particular, Article 6 § 1 had been considered to apply where the claim in issue related to a "purely economic" or "essentially economic" right and did not mainly call in question "the authorities' discretionary powers".

The Court held (see § 60): "[A]s it stands, the above case-law contains a margin of uncertainty for Contracting States as to the scope of their obligations under Article 6 § 1 in disputes raised by employees in the public sector over their conditions of service."

In the circumstances the Court wished to "put an end to the uncertainty which surrounds application of the guarantees of Article 6 § 1 to disputes between States and their servants" (see § 61). It considered that it should "adopt a functional criterion based on the nature of the employee's duties and responsibilities" (see § 64). In its view, "the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities" (see § 66). "In practice, the Court will ascertain, in each case, whether the applicant's post entails – in the light of the nature of the duties

and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities" (ibid.).

28. *Pellegrin* was thus a departure from precedent, and has since been confirmed, regarding the principles it established and the criterion of applicability of Article 6 § 1 it laid down, by a large number of judgments and decisions of the Court (see, for example, among other authorities, *Frydlender v. France* [GC], no. 30979/96, ECHR 2000-VII; *Linde Falero v. Spain* (dec.), no. 51535/99, 22 June 2000; *Rey and Others v. France*, nos. 68406/01, 68408/01, 68410/01 and 68412/01, 5 October 2004; and *Czech v. Poland*, no. 49034/99, 15 November 2005).

29. It therefore needs to be ascertained whether the applicant's post entailed – within the meaning of that case-law – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

30. The Grand Chamber concludes that Article 6 § 1 is applicable, as did the Chamber in its above-mentioned admissibility decision, but by different reasoning. The Chamber mainly had regard to the special nature of the dispute between the applicant and the State in reaching the conclusion that the obligations on the applicant were "civil" ones within the meaning of Article 6 § 1 of the Convention, with private-law features predominating in this case. In the Grand Chamber's view, in the light of the judgment in *Pellegrin* regard should rather be had to the applicant's post, the nature of his duties and the responsibilities attached to the post. The case involved a civil servant in the employ of the State education service who had been appointed by the Director of Education as accountant of a school and was responsible, in that capacity, for the accounts of a secondary school and of those of a centre attached to it that had no separate legal personality. Neither the nature of the duties carried out by the applicant, nor the responsibilities attached to them, support the view that he participated "in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities", unless these concepts are to be construed broadly. The correct approach, however, in accordance with the object and purpose of the Convention, is to adopt a restrictive interpretation of the exceptions to the safeguards afforded by Article 6 § 1 (see *Pellegrin*, cited above, § 64).

Accordingly, the Court concludes that, having regard to the nature of his post, the dispute between the applicant and the State does come within the scope of Article 6 § 1 of the Convention.

B. Merits

1. The complaint relating to a breach of Article 6 § 1 in the proceedings before the Court of Audit

(a) The parties' submissions

31. The applicant complained of a breach, before the Court of Audit, of his right to a "fair and public hearing ... by an ... impartial tribunal" within the meaning of Article 6 § 1 of the Convention. He submitted that, prior to the hearing, neither he nor his lawyer had received the reporting judge's report (whereas it had been sent to State Counsel) and that the reporting judge had taken part in the deliberations of the bench despite having previously been involved in investigating the case. Referring to *Guisset v. France* (no. 33933/96, §§ 72-74, ECHR 2000-IX), he added that he had neither been summoned to the hearing nor invited to submit his observations, nor even informed of the date of the hearing, which, moreover, was not public.

32. The Government submitted that the procedural rules specific to the public finance courts were such as to provide litigants with comprehensive guarantees regarding the requirements of a fair trial and respect for the rights of the defence. They pointed out that, in accordance with various provisions, proceedings in respect of accounts were adversarial and provided for "exceptionally broad protection" of the accountant's interests. They referred to the following in that connection: the fact that the proceedings were in written form (as provided for in Articles L. 140-7 and R. 241-27 of the Financial Judicature Code), which excluded any reference to oral evidence such as interviews or examinations – except on a judicial audit of accounts rendered by *de facto* accountants – and obliged the court to base its judgment solely on the documents submitted by the accountant in support of the accounts; "the settled principle that a final ruling cannot be adopted unless all the parties have been able to reply in writing to an initial interim ruling (known as the 'double judgment' rule) within a period of not less than one month; access to the documents on which the final judgment or interim ruling was based, including State Counsel's findings but excluding the investigation report (other than in cases of *de facto* management)" (*sic*); the statutory obligation, laid down in Article R. 231-5 of the Financial Judicature Code, to set out and examine, in final judgments, the submissions made by the parties concerned by interim rulings (injunctions, reservations); the absolute principle that decisions are made collegially (Articles L. 241-13, R. 141-1 and R. 241-1 of the Financial Judicature Code), which prevented the reporting judge from taking a decision alone and obliged him, under Article R. 141-7 of the Code, to put forward reasoned proposals in the light of which the court must rule; and the

systematic appointment, before the Court of Audit, of a "counter-reporting" senior judge having, among other duties, the task of giving his opinion on each of the proposals submitted by the reporting judge (Articles R. 141-7 and R. 141-8 of the Financial Judicature Code), this being possible in the regional audit offices as well.

33. The Government acknowledged, nevertheless, that hearings on appeal to the Court of Audit from a judgment of the regional audit office levying a surcharge against a public accountant were not public and that the parties were neither invited to attend nor even notified of the date. They pointed out, however, "as a preliminary point", that, as the applicant had neither requested that the appeal be heard in public nor sought leave to address the Court of Audit before it ruled on his appeal, he was "not justified in complaining of the lack of an oral hearing on the appeal before the Court of Audit". Furthermore, the lack of a public hearing on an appeal against a judicial audit of accounts was not, in any event, they argued, contrary to the requirements of Article 6 § 1 given the "objective" and highly technical nature of judicial audits of public accounts (in connection with this point, the Government referred to the following authorities: *Schuler-Zgraggen v. Switzerland*, 24 June 1993, Series A no. 263; *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003; and *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002). Verification of the voluminous accounts submitted annually by public accountants, and of the existence and validity of the supporting documents produced for every sum spent or unrecovered, was far better dealt with in writing than orally. Moreover, the Government added, compliance with the adversarial character of proceedings was also guaranteed, at first instance, by the aforementioned "double judgment" rule, which protected the rights of the defence in particular. They went on to point out that, generally speaking, the public finance courts did not rule on charges brought against an accountant by a public body, but themselves identified, where applicable, operations that might engage the accountant's liability. They did not reach their decision until the end of adversarial and written proceedings, which placed the parties in a wholly identical position since judgments and interim rulings were served on them in accordance with the same formal requirements and gave them the same opportunity to reply; the public body concerned did not take part in hearings when these were not public either. In short, in the instant case the applicant had not suffered any disadvantage in the presentation of his case before the public finance courts compared with the school of which he was the accountant.

34. The Government also pointed out that making all hearings held by the public finance courts public – which would not meet any need expressed by accountants' associations or by the Directorate-General for Public Accounting – would represent a substantial extra cost for the community,

having regard to the number of decisions given each year (more than 24,000 in 2003).

With regard to the reporting judge's participation in the deliberations of the Court of Audit, the Government contended that on an appeal to the Court of Audit against a judgment levying a surcharge against a public accountant the Court of Audit judge in whom these functions were vested was the "officer" of the bench before which he put forward the submissions relied on by the parties in their pleadings and made proposals on the basis of the file, which were circumscribed by the parties' claims. He did not play any part in instigating the proceedings, formulating the complaints or determining the scope of the court's intervention. His role was not in any way comparable to that of an investigating judge: he did not prepare the appeal for examination by the court, this being the task of the Government Commissioner attached to the regional audit office; nor, being bound by the terms of the investigation, did he have the task of making enquiries designed to identify whether an irregularity had been committed and, if so, by whom. Whilst he was invested with powers under Articles R. 141-2 and R. 141-3 of the Financial Judicature Code, these powers were only exceptionally used on appeal, since the file was complete at that stage. Moreover, in the present case there was nothing to suggest that the reporting judge had needed to use those powers before the Court of Audit. Referring, *mutatis mutandis*, to *Didier v. France* ((dec.), no. 58188/00, ECHR 2002-VII), the Government asked the Court to hold that the reporting judge's participation in the deliberations did not raise any issue under Article 6 of the Convention.

35. Moreover, since the report contained reasoned proposals on which to form a decision and accordingly reflected the opinion of a member of the bench, it was not a document that formed part of the investigative proceedings but related to the function of giving judgment entrusted to the bench of which that judge was a member. It was privileged from disclosure and could not therefore be communicated to the parties. In that connection, moreover, it could be seen from the case-law of the *Conseil d'Etat* (14 December 2001, *Sté Réflexion, Médiations, Ripostes*) that Principal State Counsel could not be regarded as a party unless he had instituted the proceedings, either by means of a formal application or by exercising his right of appeal, which had not been the case here.

Lastly, the Government pointed out that, in accordance with what was already a practice hallowed by usage at the time when the applicant's case was examined by the Court of Audit, Principal State Counsel had not been present at the bench's deliberations.

36. The applicant replied that when the Court of Audit gave judgment in cases concerning *de facto* management of public funds or the imposition of a fine the hearings were public (since the Court of Audit and Regional Audit Offices Act of 21 December 2002 and the decree of 27 September 2002 had

come into force), the parties were informed of the date of the hearing and the appellants and other interested parties could request leave to address the court prior to the deliberations and were able to reply to State Counsel's submissions and the reporting judge's report. He argued on that basis that France had already taken note of the need to hold public hearings and respect the principle of adversarial process before that court in cases involving *de facto* management of public funds or the imposition of a fine. In his submission, nothing absolved it from the duty to apply the same procedural rules to proceedings in which judgment was given levying a surcharge against a public accountant. He added that the double judgment rule relied on by the Government only partially guaranteed an adversarial process since the proceedings continued to be conducted exclusively in writing, and in any event the Court of Audit had not deemed it appropriate to apply it to his appeal.

37. The applicant went on to point out that, before the Court of Audit, Principal State Counsel – State Counsel's Office – had to be regarded either as a "main party" where the State lodged an appeal or as a "joined party" where the appeal had – as in the present case – been lodged by another party. His task was to ensure that accounts were duly produced by the accountants and "satisfy the court regarding his conception of the application of the law", and he formulated his written submissions on the basis of the reports communicated to him (Article R.112-8 of the Financial Judicature Code provided that reports relating to a surcharge had to be sent to Principal State Counsel). Once he gave an opinion he became, objectively speaking, an "ally" or "opponent" within the meaning of the judgment in *Borgers v. Belgium* (30 October 1991, Series A no. 214-B). The fact that, prior to the hearing, the reporting judge's report was sent to him and not to the public accountant concerned was therefore incompatible with the principle of equality of arms. To that should be added not only that Principal State Counsel could participate in division and section hearings and make oral submissions whereas public accountants could not, but also that he had been excluded from deliberations only since the entry into force of Decree no. 2002-1201 of 27 September 2002.

38. With regard to the reporting judge – an "independent judge" who was not a "party" to the proceedings – his main task, like the counter-reporting judge, was to examine the appeal file (arguments for and against). He enjoyed very broad powers in that connection, since he could carry out any investigations he deemed necessary, including ordering inquiries and expert reports, submitting requests for information from all those concerned, and visiting departments being audited. His role extended beyond that, since in addition he "formulated complaints". He then submitted an opinion regarding the appropriate judicial outcome in the case and, if it had been communicated to Principal State Counsel, his report was read out at the beginning of the hearing. Accordingly, since he was in charge of the

investigation and expressed in advance an opinion on the merits, his presence at the bench's deliberations was incompatible with the requirements of Article 6 § 1 of the Convention. The recent amendments to the Financial Judicature Code indicated, moreover, that the government had formally noted that difficulty. Henceforth the reporting judge could no longer participate in the deliberations either in cases in which a fine was imposed or in cases of *de facto* management of public funds (Articles L. 140-7 and R. 141-13 of the Financial Judicature Code).

(b) The Court's assessment

(i) Lack of a public hearing before the Court of Audit

39. The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, among many other authorities, *Axen v. Germany*, 8 December 1983, § 25, Series A no. 72).

40. The right to a public hearing implies a public hearing before the relevant court (see, *inter alia*, *mutatis mutandis*, *Fredin v. Sweden (no. 2)*, 23 February 1994, § 21, Series A no. 283-A, and *Fischer v. Austria*, 26 April 1995, § 44, Series A no. 312). Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, "... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"; holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case (see, for example, *mutatis mutandis*, *Diennet v. France*, 26 September 1995, § 34, Series A no. 325-A).

41. Moreover, the Court has held that exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned (see, *mutatis mutandis*, *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005) may justify dispensing with a public hearing (see, in particular, *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002-V). It thus considers, in particular, that social security proceedings, which are highly technical, are often better dealt with in writing than in oral submissions, and

that, as systematically holding hearings may be an obstacle to the particular diligence required in social security cases, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy (see, for example, *Miller* and *Schuler-Zgraggen*, cited above). It should be pointed out, however, that in the majority of cases concerning proceedings before "civil" courts ruling on the merits in which it has arrived at that conclusion the applicant had had the opportunity of requesting a public hearing.

42. The position is rather different where, both on appeal (if applicable) and at first instance, "civil" proceedings on the merits are conducted in private in accordance with a general and absolute principle, without the litigant being able to request a public hearing on the ground that his case presents special features. Proceedings conducted in that way cannot in principle be regarded as compatible with Article 6 § 1 of the Convention (see, for example, *Diennet* and *Göç*, cited above): other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, though the court may refuse the request and hold the hearing in private on account of the circumstances of the case and for the aforementioned reasons.

43. In the present case the law did not provide the parties with an opportunity to submit such a request, either at first instance before the regional audit office or on appeal before the Court of Audit. It is not therefore open to the Government to argue that the applicant had not requested a public hearing before the Court of Audit since such an application was bound to fail.

That said, the Court does not doubt that checking accounts rendered annually by public accountants and ensuring that the supporting documents have been properly produced in connection with every item of expenditure and every claim that has not been recovered is a highly technical exercise. It therefore accepts that it is in principle better dealt with in writing than in oral argument. It also sympathises with the Government's argument that making all hearings public might prove to be very costly for the community.

The Court consequently considers that, as long as the proceedings are limited to the scrutiny of accounts, Article 6 § 1 – assuming it to be applicable – does not prohibit the holding of private hearings from being established as an absolute principle.

Nevertheless, judicial audits of accounts can lead at first instance to a judgment levying a surcharge against a public accountant; since his financial position is thus directly – and, perhaps, significantly – affected, it is understandable that, faced with such an eventuality, the accountant in question will view the public scrutiny of his accounts as a necessary condition for the protection of the rights that he should be able to rely on, at least at the appeal stage.

In such a case the technical nature of the proceedings does not suffice to justify systematically holding private hearings, and the argument that organising public hearings is a costly exercise becomes irrelevant where it is only a question of the proceedings being public at the appeal stage and then only where the public accountant concerned requests a public hearing.

44. In sum, since proceedings before regional audit offices are conducted in private the Court considers it essential that public accountants be able to request a public hearing before the Court of Audit on appeal from a judgment of the regional audit office levying a surcharge against them. Where no such request is made, the hearing could remain private, having regard, as stated, to the technical nature of the proceedings.

In the present case the applicant was not able to request a public hearing before the Court of Audit. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

(ii) Fairness of the proceedings before the Court of Audit

45. The Court considers it necessary to examine this aspect of the application not from the specific standpoint of adversarial process or equality of arms, as requested by the applicant, but the wider angle of fairness of the proceedings, as it did for example in *Reinhardt and Slimane-Kaïd v. France* (31 March 1998, § 104, *Reports of Judgments and Decisions* 1998-II). To that end it will examine each of the grievances raised by the applicant and then undertake an overall assessment of the fairness of the proceedings before the Court of Audit on an appeal from a judgment levying a surcharge against a public accountant.

46. The Court notes firstly that the public accountant concerned does not have access to the Court of Audit. Although the same is true of the local authority whose accounts are being examined, State Counsel is present and expresses his point of view before the bench, including the issue as to whether or not a surcharge should be levied. Whether State Counsel is regarded as a party or not, he is thus in a position that allows him, after an exchange of written observations, to influence the bench's decision – in a manner that may be unfavourable to the accountant – without there being an opportunity for both sides to submit observations, whereas the concept of a fair trial implies in principle the right for the parties to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see, for example, *Kress v. France* [GC], no. 39594/98, § 74, ECHR 2001-VI).

47. The Court considers that State Counsel's presence at the bench's deliberations would also have been questionable; it does not, however, doubt the veracity of the Government's contention (see paragraph 35 above) that it was already the practice at the material time – subsequently enshrined in written provisions – that this should not happen (see, for example,

mutatis mutandis, *Slimane-Kaïd v. France (no. 2)*, no. 48943/99, § 20, 27 November 2003).

48. The disclosure of the reporting judge's report to State Counsel, and not, among others, to the accountant, is problematic since the report contains an opinion on the merits, including the question of a surcharge. Moreover, the accountant is excluded from the hearing and does not therefore have an opportunity to express a view on the reporting judge's opinion (see, for example, *mutatis mutandis*, *Reinhardt and Slimane-Kaïd*, cited above).

49. The presence of the reporting judge at the deliberations, however, is, as such, legitimate and justified since he is a member of the bench hearing the appeal (see, for example, *mutatis mutandis*, *Slimane-Kaïd (no. 2)*, cited above, § 19), and where the Court of Audit hears an appeal from a judgment levying a surcharge against a public accountant he does not as a general rule order investigative measures but forms an opinion on the basis of a file that has already been investigated. In any event there is nothing to indicate that in the instant case the reporting judge ordered investigative measures capable of causing him to form a prejudiced view (see, for example, *mutatis mutandis*, *Didier*, cited above, unreported on this point).

In that connection the problem stems from the fact that the reporting judge has expressed his point of view on the merits at the hearing, prior to the deliberations (see, for example, *mutatis mutandis*, *Slimane-Kaïd (no. 2)*, cited above, § 19). It is important to consider before whom he has expressed this point of view, however: by definition, he has not expressed it in public, since the hearing is not public; he has expressed it before the bench of which he is a member – which is part of the function of judging – and State Counsel. The question thus comes down to whether a problem arises under Article 6 § 1 merely on account of the fact that the reporting judge, before participating in the deliberations, has expressed his point of view on the merits orally before State Counsel. It therefore appears that, in the very specific context of these proceedings, this question is linked to the prior disclosure of the report to State Counsel.

50. In conclusion, whilst it is important not to lose sight of the procedural safeguards referred to by the Government that are available to public accountants who risk being surcharged, the Court considers that there is an imbalance detrimental to public accountants on account of State Counsel's position in the proceedings: unlike the accountant, he is present at the hearing, is informed beforehand of the reporting judge's point of view, hears the latter's submissions (and those of the counter-reporting judge) at the hearing, fully participates in the proceedings and can express his own point of view orally without being contradicted by the accountant; from that standpoint, it is irrelevant whether State Counsel is or is not regarded as a "party", since he is in a position, for these reasons together with the authority conferred on him by his functions, to influence the bench's

decision whether to levy a surcharge in a manner that may be unfavourable to the accountant. In the Court's view, that imbalance is accentuated by the fact that the hearing is not public and is therefore conducted in the absence of any scrutiny either by the accountant concerned or by the public.

The Court accordingly concludes that there has been a breach of Article 6 § 1 of the Convention under this head.

2. The complaint relating to a breach of Article 6 § 1 in the proceedings before the Conseil d'Etat

(a) The parties' submissions

51. The applicant complained, under Article 6 § 1 of the Convention, of the participation by the Government Commissioner in the deliberations of the bench of the *Conseil d'Etat* designated to hear his case. He referred in that connection to the following judgments: *Kress v. France*, cited above; *Borgers*, cited above; *Vermeulen v. Belgium*, 20 February 1996, *Reports* 1996-I; and *Lobo Machado v. Portugal*, 20 February 1996, *Reports* 1996-I.

52. The Government pointed out that, in *Kress*, the Court concluded that there had been a breach of Article 6 § 1 on account of the Government Commissioner's "participation" in the deliberations of the bench. In their submission, that judgment called into question only the active presence of the Government Commissioner, whereas, they argued, his "passive presence" was still possible. They pointed out, in particular, in that connection that the Government Commissioner, who was a member of the *Conseil d'Etat*, did not have the role of "State Counsel", but that of a "legal adviser" who expressed his personal opinion before the bench prior to the deliberations.

The Government stated that, in implementing the *Kress* judgment, the President of the Judicial Division of the *Conseil d'Etat* had issued two directions, on 23 November 2001 and 13 November 2002, according to which the Government Commissioner could be present at deliberations but could not address the court. The second of those directions described him as a "silent witness". They stated that Decree no. 2005-1586 incorporating the new procedure had been published in the Official Gazette on 20 December 2005, adding in particular Article R. 731-7 to the Administrative Courts Code, according to which "the Government Commissioner shall be present at deliberations[;] he shall not participate in them". It was thus "only exceptionally and on request, [that the Government Commissioner could] be required, in the interests of the proper administration of justice, and as one of the members of the section on the basis of whose report the dispute was examined, having last studied the file, to reply to any question of a technical nature that might arise"; in addition to providing that technical assistance, the Government Commissioner's presence at the deliberations had the advantage of allowing him better to understand the reasons for which the

bench concurred with his point of view or, on the contrary, dissented from it. The knowledge thus acquired of the court's reasoning would enable him, in subsequent submissions, to give a faithful account of the case-law or, if the bench had not convinced him, to prepare in future a new line of case-law and thus contribute to ensuring the consistency, continuity and if necessary the development of the case-law, in the interests of the proper administration of justice, which would first and foremost benefit all litigants. They reiterated that, as understood by the Court, the "doctrine of appearances" was not based exclusively on the concerns that a litigant might have as to the impartiality of a court: such concerns had to be based on objective factors for there to be a breach of Article 6 § 1. For the reasons stated above, such objective factors were not made out on the basis of the mere presence of the Government Commissioner at the deliberations.

In the Government's submission, it would not be judicious, for the sake of respect for appearances, and where the actual impartiality of the Government Commissioner was not being disputed, to undermine an institution that had singularly proved its worth.

(b) The Court's assessment

53. The Court points out first of all that, although in the operative provisions (point 2) of the *Kress* judgment it held that there had been a breach of Article 6 § 1 of the Convention on account of the Government Commissioner's "participation" in the *Conseil d'Etat*'s deliberations, in the main body of the judgment both that term (see §§ 80 and 87) and the term "presence" (title 4 and §§ 82, 84 and 85) are used, or, alternatively, the terms "assistance", "assists" or "attends the deliberations" (see §§ 77, 79, 81, 85 and 86). Nevertheless, it is clear from the facts of the case, the arguments submitted by the parties and the reasons given in the Court's judgment, together with the operative provisions, that the *Kress* judgment uses these terms as synonyms, and that the mere presence of the Government Commissioner at the deliberations, be it "active" or "passive", is deemed to be a violation. Paragraphs 84 and 85, for example, are particularly enlightening in this respect: examining the Government's argument that the "presence" of the Government Commissioner was justified by the fact that, having been the last person to have seen and studied the file, he would be in a position during the deliberations to answer any question which might be put to him about the case, the Court replied that the benefit for the trial bench of this purely technical assistance was to be weighed against the higher interest of the litigant, who had to have a guarantee that the Government Commissioner would not be able, through his "presence" at the deliberations, to influence their outcome, and found that that guarantee was not afforded by the French system.

This is, moreover, the sense that must be given to that judgment in the light of the Court's case-law, as the Court has found a violation not only in

respect of the participation, in an advisory capacity, of the Advocate-General at the deliberations of the Belgian Court of Cassation (see *Borgers* and *Vermeulen*, cited above), but also the presence of the Deputy Attorney-General at the deliberations of the Portuguese Supreme Court even though he had no consultative or other type of vote (see *Lobo Machado*, cited above), and the mere presence of the Advocate-General at the deliberations of the Criminal Division of the French Court of Cassation (see *Slimane-Kaïd (no. 2)*, cited above). That case-law is largely based on the doctrine of appearances and the fact that, like the Government Commissioner before the French administrative courts, the advocates-general and Attorney-General in question express their view publicly on the case prior to the deliberations.

54. That being so, the Court reiterates that, while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases – even if, the Convention being first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

In the present case the Court does not find any reason to satisfy it that there is a need to depart from its decision in *Kress*.

55. Accordingly, there has, in the applicant's case, been a breach of Article 6 § 1 of the Convention on account of the presence of the Government Commissioner at the deliberations of the bench of the *Conseil d'Etat*.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. Under the head of pecuniary damage, the applicant claimed reimbursement of the part of the deficit that he was ultimately required to repay, that is, 762.25 euros (EUR) plus statutory interest. He also claimed EUR 10,000 for non-pecuniary damage, in compensation for the "suffering and inconvenience suffered for more than six years".

58. The Government did not oppose compensation for pecuniary damage in the amount claimed by the applicant. With regard to non-pecuniary damage, they questioned the reality of the "suffering and inconvenience" that the applicant claimed to have endured.

59. The Court considers that the non-pecuniary damage is sufficiently made good by its finding of a breach of Article 6 § 1 of the Convention (see, among many other authorities, *Remli v. France*, 23 April 1996, *Reports* 1996-II; *Mantovanelli v. France*, 18 March 1997, *Reports* 1997-II; *Kress*, cited above; *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, ECHR 2002-VII; and *Yvon v. France*, no. 44962/98, ECHR 2003-V). Furthermore, it cannot speculate as to the outcome of the proceedings had there not been a breach (see, for example, *Mantovanelli* and *Yvon*, cited above); accordingly, the remainder of the applicant's claims must be rejected.

B. Costs and expenses

60. The applicant claimed reimbursement of his costs and expenses before the Court of Audit, namely EUR 593.24, comprising his legal fees (EUR 551.56, including value-added tax (VAT)) and the cost of two train journeys to Pau (EUR 41.68). He also claimed reimbursement of his costs and expenses before the *Conseil d'Etat*, namely EUR 2,168.54, comprising his legal fees (EUR 1,838.54, including VAT) and the cost of two train journeys (EUR 224) and two nights in Paris (EUR 106). Lastly, he claimed reimbursement of his costs and expenses before the Court, namely EUR 8,629.76, comprising his legal fees (EUR 7,500, including VAT), a plane journey from Papeete to Strasbourg (EUR 1,074.76) and an overnight stay in a hotel in Strasbourg (EUR 55).

In support of his claims for reimbursement of his legal fees, he produced a "statement of fees and expenses" dated 12 November 1996, a "statement of sums due" dated 18 March 1999 and an "advance on costs" dated 29 February 2000.

61. The Government pointed out that the applicant had not proved that the costs in respect of which he requested reimbursement had been incurred to prevent or have redressed a violation of the Convention found by the Court. In particular, he could not, on the basis of the evidence he had provided, obtain reimbursement of the travel and hotel costs claimed by him, since he had not shown that it had been necessary to make the journeys in question.

62. The Court reiterates that, where it finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before it but also those incurred before the national courts for prevention or redress of the violation (see, for example, *Hertel v. Switzerland*, 25 August 1998, *Reports* 1998-VI, and *Yvon*, cited above),

provided that they have been proved to be necessary, the requisite receipts have been produced – which is the case here – and the amounts claimed are not unreasonable (see, for example, *Kress*, cited above). That being so, it considers that in the instant case the applicant should be reimbursed for his legal representation before the *Conseil d'Etat* and the Court, but that his claims should be rejected in so far as they relate to the proceedings before the Court of Audit and to his travel and hotel expenses, since these were not incurred on the basis of any procedural requirement. Consequently, the Court awards the applicant EUR 9,338.54, including VAT, for costs and expenses.

C. Default interest

63. 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. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of the applicant's inability to request a public hearing before the Court of Audit;

3. *Holds* by fourteen votes to three that there has been a violation of Article 6 § 1 of the Convention on account of State Counsel's position in the proceedings before the Court of Audit;

4. *Holds* by fourteen votes to three that there has been a violation of Article 6 § 1 of the Convention on account of the presence of the Government Commissioner at the deliberations of the bench of the *Conseil d'Etat*;

5. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

6. *Holds* by fifteen votes to two
   (a) that the respondent State is to pay the applicant, within three months, EUR 9,338.54 (nine thousand three hundred and thirty-eight euros fifty-four cents) in respect of costs and expenses, plus any tax that may be chargeable on that amount;
   (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 applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 April 2006.

Lawrence Early	Luzius Wildhaber
Deputy Registrar	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) declaration of Judge Wildhaber;
(b) joint concurring opinion of Judges Tulkens, Maruste and Fura-Sandström;
(c) joint partly dissenting opinion of Judges Costa, Caflisch and Jungwiert.

L.W.
T.L.E.

DECLARATION OF JUDGE WILDHABER

I was one of the dissenters in the case of *Kress v. France* ([GC], no. 39594/98, pp. 77-80, ECHR 2001-VI). I continue to regret that our Court's case-law on proceedings in European Supreme Courts with long-established traditions "places too much emphasis on appearances, to the detriment of respectable national traditions and, ultimately, of litigants' real interests" (ibid., p. 80). Nevertheless, in this case, I voted with the majority, because I believe that the President of the Court (who represents the Court under Rule 9 of the Rules of Court) should not normally persist in dissenting, but should bend to the views of the majority.

JOINT CONCURRING OPINION OF JUDGES TULKENS, MARUSTE AND FURA-SANDSTRÖM

(Translation)

Our concurring opinion concerns only the issue of the applicability of Article 6 § 1 of the Convention to the dispute which, in this case, was between the applicant and the State. While the Chamber, in its decision of 13 January 2004 (*Martinie v. France* (dec.), no. 58675/00, ECHR 2004-II), based its decision mainly on the special nature of the dispute between the applicant and the State, the Grand Chamber judgment is confined – very classically – to examining the applicant's post and the nature of the functions and responsibilities attached to it (see paragraph 30 of the present judgment).

1. Without calling into question the judgment in *Pellegrin* of 8 December 1999 ([GC], no. 28541/95, ECHR 1999-VIII), we think that the reasoning adopted by the Chamber could have been developed by the Grand Chamber which would then have made a useful contribution to the interpretation of that judgment and the case-law that has followed on from it. From that point of view, the following points appear to us to be relevant.

In order to solve the difficulties raised by the previous case-law and put an end to the uncertainty surrounding the application of the guarantees of Article 6 § 1 to disputes between a State and its servants, the Court considered in *Pellegrin* that disputes between the authorities and the public servants in their employ – whether established or employed under contract – were excluded from the scope of Article 6 § 1 if the post in question "entail[ed] – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities" (*Pellegrin*, § 66). The Court specified, however, that "[i]n so doing, [it would] have regard, for guidance, to the categories of activities and posts listed by the European Commission in its communication of 18 March 1988 and by the Court of Justice of the European Communities" (ibid.), in the context of an interpretation of Article 48 of the EEC Treaty on the freedom of movement for workers within the Community. That provision entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work" (Article 48 § 2) and includes, among other things, the right – subject to certain limitations – "to accept offers of employment actually made" (Article 48 § 3). Since Article 48 § 4 specifies that these provisions are not applicable "to employment in the public service", the Court of Justice of the European Communities has held that this derogation applies only to jobs which meet the above criterion, that is to say those that involve direct or

indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities (see *Pellegrin*, §§ 37-41, to which § 66 cross-refers).

The wording of *Pellegrin* and the references to Article 48 of the EEC Treaty and the position adopted by the European Commission and the Luxembourg Court show that the criterion of "participation in the exercise of powers conferred by public law" was established by the Court in order to determine whether a dispute relating to the employment – recruitment, career or termination of service – of a public servant, whether established or employed under contract, falls outside the scope of the "civil" head of Article 6 § 1. This was, moreover, the subject of the domestic proceedings in issue in *Pellegrin* (which mainly concerned an application to have set aside a decision of the Ministry of Cooperation and Development, by whom the applicant was employed, terminating his contract and removing his name from the list of the Ministry's establishment) and in *Frydlender v. France* ([GC], no. 30979/96, ECHR 2000-VII), in which the Grand Chamber of the Court endorsed the decision in *Pellegrin* (the domestic proceedings mainly concerned applications to have set aside decisions of the Ministry of the Economy and Finance, which was the applicant's employer, not to renew his contract).

Where a dispute concerns the recruitment, career or termination of service of public service employees called upon to participate in the exercise of powers conferred by public law, the "rights and obligations" in question are necessarily and directly part of the "special bond of trust and loyalty" that the State has a legitimate interest in requiring of these servants; that is why the "rights" or "obligations" in question have a distinctly "public" aspect rather than a "civil" one for the purposes of Article 6 § 1 of the Convention (see *Pellegrin*, § 65). It cannot be assumed, however, that *all other disputes* between public servants and the administrative authority employing them necessarily concern "rights" or "obligations" relating to a relationship of that type. In other cases, in judging whether or not a "civil" right is in issue, the features of private law and public law present in the case have to be weighed against each other, in accordance with the general method established by the Court; this is all the more necessary since, as the Court stressed in *Pellegrin* (§ 64), the exceptions to the safeguards offered by Article 6 § 1 have to be interpreted restrictively. It should be observed, moreover, *mutatis mutandis*, that on retirement employees break the special bond between themselves and the authorities, and then – as acknowledged in *Pellegrin* – find themselves in a "situation exactly comparable to that of employees under private law in that the special relationship of trust and loyalty binding them to the State has ceased to exist" (§ 67, *in fine*).

In the present case the applicant appealed to the Court of Audit against a judgment of a regional audit office levying a surcharge against him. The Court of Audit had to consider whether the regional audit office had

correctly found that the applicant had negligently caused a loss to the Lycée René-Cassin in Bayonne by failing to carry out all the checks that he was required to undertake as the school's accountant, and was accordingly financially liable to make good the deficit from his own assets. Although the surcharge, which was the subject of the dispute in this case, related to the functions entrusted to the applicant as a public accountant, it was not intended to bear any relation to his career as such and was, clearly, totally unrelated to his recruitment or termination of his service. It could therefore reasonably have been argued that the criterion known as "participation in the exercise of powers conferred by public law", established in *Pellegrin*, was irrelevant here.

2. On a more general level, the fact is that the Court is more and more frequently confronted with the question of the scope or, more specifically, the limits or frontiers of the judgment in *Pellegrin*.

In this case the issue that needs to be determined is whether *any dispute* between a public servant and the authorities employing him or her falls outside the scope of Article 6 where the post involves "direct or indirect participation in the exercise of powers conferred by public law" or only *disputes relating to the post* of the person concerned. Thus, for example, in the former case a policeman or police officer who is in litigation with the authority employing him on grounds of the insalubrious condition of his official residence could not, on account of his status, rely on Article 6 § 1 to claim a right of access to a tribunal. Nor, for example, could a soldier who has obtained judgment awarding him a transport allowance rely on Article 6 § 1 to seek enforcement of it, on account of his status as a soldier. Taken out of context, a literal interpretation of *Pellegrin*, which refers to "no disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law" (§ 67), might well lead to results that are unreasonable and contrary to the purpose and aim of the Convention.

In other cases it needs to be determined, for the purposes of applying Article 6, whether the post *typifies the specific activities of the public service*. As Judge Caflisch observed in a concurring opinion, in which he was joined by Judge Bîrsan, in *Strungariu v. Romania* (no. 23878/02, 29 September 2005), the distinction proposed by the Court's new case-law between duties which participate and those which do not participate in the exercise of powers conferred by public law "is not that easy to apply in all situations" (see point 9). Moreover, the Court does not always agree to exclude automatically members of the police or the armed forces whose activities are, however, presented in *Pellegrin* (§ 66) as "manifest example[s]" of the exercise of powers conferred by public law, and, in *Zisis v. Greece* ((dec.), no. 77658/01, 17 June 2004), it joined the examination of the objection to the merits.

We therefore think that, sooner or later, the Court will again be required to consider the scope of application of Article 6 of the Convention. The application *Eskelinen and Others v. Finland* may give it the opportunity to do so in the sphere of the civil service. For our part, we think that the *raison d'être* and justifications for the exclusion of certain categories of public servants from the guarantees of a fair trial should now be fundamentally reviewed in the light of Article 47 of the Charter of Fundamental Rights of the European Union, which provides: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

JOINT PARTLY DISSENTING OPINION OF JUDGES COSTA, CAFLISCH AND JUNGWIERT

(Translation)

1. This case concerns two of the highest French courts, which are pillars of the rule of law: the Court of Audit (*Cour des Comptes*) and the Supreme Administrative Court (*Conseil d'Etat*). On two points, which are very important in our view, we are unable to subscribe to the reasoning and conclusions of the Grand Chamber judgment and, with all due respect to the majority, we would like to express our profound and resolute disagreement.

2. Before giving a technical explanation – so to speak – of these two points of disagreement, we would like to place this judgment in a more general context. It is part of a long series of judgments of which we are critical both regarding the premises on which they are based and the way in which they have developed.

3. The judgment in *Delcourt v. Belgium* (17 January 1970, Series A no. 11) had augured well, however. In that case the applicant had maintained, among other things, that the presence of a member of the *procureur général*'s department at the deliberations of the Belgian Court of Cassation had infringed the rights protected by Article 6 of the Convention. The Court unanimously dismissed his application, considering that the wide measure of agreement that had existed for a century and a half in favour of that system "would be impossible to explain" if participation at the deliberations was "thought in any single case to open the door to unfairness or abuse" (§ 36). In our opinion, that observation is still valid today.

4. Whatever the force of precedents, we know that there can be departures from them – and there have been. In *Borgers v. Belgium*[1], while reaffirming the independence and impartiality of the Belgian Court of Cassation and the *procureur général*'s department, the Court held that there had been a violation of Article 6 § 1 both because the applicant had been unable to reply to the *avocat général*'s submissions and "[f]urther and above all" on account of the *avocat général*'s participation, in an advisory capacity, in the deliberations (see *Borgers*, § 28). The Court justified this radical departure from precedent on grounds of the developments in the Court's case-law regarding the concept of a fair trial, "notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice" (§ 24). In that particular case it held that "it could reasonably be thought that the deliberations afforded the *avocat général* an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed" (§ 28).

1. 30 October 1991, Series A no. 214-B.

5. To give a non-exhaustive list of examples, the judgment in *Borgers* has been transposed to the participation in deliberations of a member of "State Counsel's Office" at the Supreme Court of Portugal[1], at the French *Conseil d'Etat*[2] and at the French Court of Cassation[3].

6. The argument therefore appears clear: Principal State Counsel, the *avocat général*, the Government Commissioner – all deemed to share the same characteristics, which is a highly debatable supposition – must, in the name of "appearances" and the allegedly "increased sensitivity of the public to the fair administration of justice" (but what is "fair" justice?), yield to the requirements, construed in an extensive and questionable manner, of a fair trial and, in particular, not participate or even be present (a point to which we will return) at the deliberations of the courts of which they are members.

7. We contest the very presuppositions of the judgment in *Borgers* and, therefore, those of its epigones. Appearances are certainly important, but less so than what Freud and others have called the reality principle and, in any event, than reality in the strict sense of the term[4]. That the public are increasingly sensitive to the guarantees of fair justice is both evident and desirable. How, though, does the quality of justice depend on the position of "State Counsel" in the proceedings before the Court of Audit or on the fact that the Government Commissioner takes part in, or is merely present at, the deliberations of the *Conseil d'Etat*? In our view, public sensitivity should not be confused with the fantasies harboured by the occasional litigant or the arguments advanced by certain lawyers.

8. We take particular issue with the illogical and dangerous developments in the case-law. It is illogical to afford the States a *margin of appreciation*, or even a wide margin of appreciation (which derives from the subsidiarity principle and recognises national traditions) where entirely essential rights and liberties are concerned[5] and to attempt to erase often old and respected national traditions in favour of abstract procedural uniformity, which – imperceptibly – reduces the margin of appreciation to nought. There is a dangerous paradox here: it is dangerous to squeeze into a uniform and abstract mould national procedures which have provided satisfaction for all for decades and longer, without taking account of the efforts made by the domestic courts, in all spheres, to draw inspiration from the Strasbourg case-law and conform to it[6]. Beyond the present judgment and the courts in

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1. *Lobo Machado v. Portugal*, 20 February 1996, *Reports of Judgments and Decisions* 1996-I.
2. *Kress v. France*, no. 39594/98, ECHR 2001-VI.
3. *Slimane-Kaïd v. France (no. 2)*, no. 48943/99, 27 November 2003.
4. We refer on this point to the joint partly dissenting opinion of Judges Wildhaber, Costa, Pastor Ridruejo, Kūris, Bîrsan, Botoucharova and Ugrekhelidze in *Kress* (see, in particular, points 7-9).
5. For example, respect for private and family life, the freedoms of religion, expression and association, the peaceful enjoyment of possessions, the right to free elections.

question here, it is illogical and dangerous to bend the Contracting States and their Supreme Courts to procedural rules that are made uniform down to the last detail when there are better things to be done regarding European supervision of respect for the rights guaranteed by the Convention. It is better to accept certain national judicial features and concentrate on harmonising the guarantees which States must provide in respect of substantive rights and liberties: the necessary dialogue between judges will, we think, be greatly facilitated by this, in the interests of all, domestic courts and European Court alike, and will promote justice that is truly "fair".

9. Thus the majority of the Grand Chamber have succumbed to the temptations of uniformity whereas what the judicial institutions of democratic Europe need is to be able to function smoothly, constantly, foreseeably and in conformity with the spirit of the Convention, rather than uniformity. The "purism" shown by the majority is liable to undermine the effectiveness and stability of legal institutions that have proved their worth. The doctrine of appearances does not justify interference of this kind. "If it ain't broke, don't fix it" goes an old American proverb. The majority would have done well to remember that.

10. We will now address, specifically, the more technical points about which we disagree in the *Martinie* case.

11. The first concerns "State Counsel's position in the proceedings before the Court of Audit" (point 3 of the operative provisions of the judgment). That position (as it were) appears to combine a number of specific grievances referred to by the applicant. He criticises, in turn, the presence of "State Counsel" at the Court of Audit hearing to which he himself did not have access, the presence of "State Counsel" at the deliberations (but the judgment dismisses that argument as being factually unsubstantiated, see paragraph 47), the disclosure of the reporting judge's report to State Counsel and not, *inter alia*, to the accountant (which is described in paragraph 48 as "problematic"), and lastly the presence of the reporting judge at the deliberations. On the last point paragraph 49 of the judgment describes his presence as "as such, legitimate and justified" but goes on to find it problematic merely on account of the fact that the reporting judge, before participating in the deliberations, has expressed his point of view on the merits orally before "State Counsel". In sum, the conclusion is reached in paragraph 50 of the judgment that it is the position of "State Counsel" in the proceedings which creates an imbalance

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6. These efforts, which are to be encouraged and which, we hope, will be continued, are fully in evidence in the case of the French courts and in the *Conseil d'Etat* in particular. On this point we refer to an article by Professor Frédéric Sudre, to be published in *Revue française de droit administratif* no. 2 of 2006. This article, which the author has kindly sent us, and for which we thank him, is entitled "Towards a normalisation of relations between the *Conseil d'Etat* and the European Court of Human Rights: the Decree of 19 December 2005 amending the regulatory section of the Administrative Courts Code".

detrimental to public accountants and thus gives rise to a breach of Article 6 § 1. Without going into the terminological imprecisions (Principal State Counsel, State Counsel), we consider the judgment to be flawed on account of the difficulty for the respondent State to abide by it, as required by Article 46 of the Convention. This likely difficulty in execution is coupled, as far as public accountants are concerned, with legal uncertainty in the future. We accept that, in the light of the case-law (even if we do not approve of it), this procedure for appealing against a judgment of a regional audit office levying a surcharge against a public accountant is perhaps not compatible on every point with Article 6 § 1. However, it would have been infinitely better, in the reasoning and the operative provisions of the judgment, to set out the various sub-complaints and indicate which were founded and which were not.

However, as the judgment has lumped all the complaints together and inferred that there has been a breach of Article 6, we have felt unable to follow our colleagues and vote in favour of point 3 of the operative provisions.

12. Regarding point 4 of the operative provisions, we disagree for different reasons. We are among those who disapprove of the part of the judgment in *Kress* relating to the "Government Commissioner's participation in the ... deliberations" (point 2 of the operative provisions of *Kress*)[1]. Since that judgment was delivered, the semantic argument between participation (which implies the possibility of "taking part" in the deliberations, that is, addressing the court) and the mere presence (which prohibits participation in them) has been the subject of a large number of articles and commentaries by legal authors which we regret we are unable to cite here despite their importance. Beyond the question of semantics, however – there are, moreover, a number of internal inconsistencies in *Kress*, both in the French version and between the French and English versions, but there is no point in going back over them here – the main basis of that judgment, descended from *Borgers*, cited above, is the "doctrine" of appearances. In other words, a litigant or lawyer who is not present at the deliberations and does not therefore know what happens there may imagine that the Commissioner, who is present, thus has "if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction"[2].

13. It is this argument, which is hard to refute (since it would be necessary to prove the unprovable), that the French government sought to address (at least for the future, since regulations are not of retrospective effect) by enacting the decree of 19 December 2005 cited in paragraph 21 of

1. Only one of us sat in the *Kress* case. He is one of the co-authors of the joint partly dissenting opinion referred to in footnote 4 on page 36 above.
2. See *Kress*, § 82, which cites in support the following judgments: *Borgers*; *Vermeulen v. Belgium*, 20 February 1996, *Reports* 1996-I; and *Lobo Machado*.

the present judgment and referred to by the Government (see paragraph 52)[1]. Article R. 731-7, added to the Administrative Courts Code by the decree, provides: "The Government Commissioner shall be present at deliberations. He shall not participate in them." Nothing could be clearer. Even the most suspicious litigant will be sure that, in his case, the Commissioner will be present at deliberations but will not have the right to participate in them and will therefore not have "an additional opportunity to bolster his submissions in private". Reference to this new provision could have been made in the "Law" part of the *Martinie* judgment, as was done in *Odièvre v. France*, for example, with regard to the Law of 22 January 2002[2]. By refusing to do so, the Court gives the impression of being deaf to the dialogue between judges and entrenched in a general, abstract and dogmatic position, which is a pity.

14. We consider that the present judgment "drives home" the point made in *Kress* and we regret this. After denting the reputation[3] of the institution of Government Commissioner[4], the *Martinie* judgment may now wound it. This wound is both unjust and gratuitous for we are unable to discern in this inflexible position any progress towards genuine fairness of proceedings, still less towards the defence of human rights to which our Court contributes so effectively in general.

15. Accordingly, we regret to have to say that we find the reasoning and conclusions of the majority, on these two points in any event (and the overall conception underlying them), totally unconvincing.

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1. It is this text which is welcomed by Professor Sudre in his above-mentioned study: he sees it as a "revival", by France and the *Conseil d'Etat*, "of the dialogue between judges".
2. No. 42326/98, § 49, ECHR 2003-III.
3. The image is used in the joint partly dissenting opinion in *Kress* – see point 9.
4. Contrast this with paragraph 71 of *Kress*, where it is stated that "[n]o one has ever cast doubt on the independence or impartiality of the Government Commissioner, and the Court considers that his existence and institutional status are not in question". If that unique institution, which has worked so hard for the protection of liberties, deserves such earnest recognition, is it really necessary to criticise it so insultingly on a minor point?