



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

FIRST SECTION

CASE OF AUGUSTO v. FRANCE

(Application no. 71665/01)

JUDGMENT
[Extracts]

STRASBOURG

11 January 2007

FINAL

11/04/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Augusto v. France,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mr J.-P. COSTA,

Mrs F. TULKENS

Mrs E. STEINER

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 7 December 2006,

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

PROCEDURE

1. The case originated in an application (no. 71665/01) 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, Ms Gisèle Augusto (“the applicant”), on 31 August 2000.

2. The applicant was represented by Mr A. Lyon-Caen, a lawyer practising in Paris. The French Government (“the Government”) were represented by their Agent, Mr R. Abraham, then by his successor, Ms E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. On 18 November 2004 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1936 and lives in Vouziers.

5. By a decision of 17 May 1996 the occupational counselling and redeployment board (“the COTOREP”) gave the applicant a 50 to 79% disability rating and issued her with a card certifying that she found it difficult to remain in a standing position.

6. On 6 August 1996, the regional health insurance fund (“the CRAM”) for the North-East region rejected the applicant’s request for a retirement pension as of 1 June 1996 on the basis of her incapacity to work, on the ground that she was not at least 50% disabled.

7. On 13 December 1996 the disability claims tribunal upheld the CRAM’s decision.

8. The applicant appealed to the national tribunal for claims relating to disability and level of insurance coverage for accidents at work (“the CNITAAT”), submitting a number of medical certificates attesting to her state of health and relying on the COTOREP’s decision of 17 May 1996.

9. In a decision of 24 November 1997, the CNITAAT upheld the decision of the disability claims tribunal, stating the following reasons:

“The rate of disability comprised between 50% and 79% acknowledged for the purposes of issuing the card certifying that it is “difficult to remain in a standing position” is not calculated using the same assessment criteria as the rate applicable in the present case, so this ground of appeal cannot be upheld;

The accredited doctor of the national tribunal for claims relating to disability and level of insurance coverage for accidents at work observes the following:

‘The subject shows signs of preexisting injuries: fracture of the 4th sacral vertebra in 1965, fracture of the left kneecap that was pinned and wired in 1990, fracture of the lower right tibia in 1994.

No after-effects in the region of the sacrum are mentioned. The left knee is slightly limited in flexion and shows mild gonarthrosis, and there is lateral calcification of the patella. No after-effects in the left ankle are reported.

There is arthrosis of the whole spinal column, with degenerative discopathy at L5-S1. It is mild arthrosis, not unusual at the subject’s age, with only a slight loss of flexibility of the different segments of the spine. Episodic onsets of sciatica and cervico-brachial neuralgia are reported in the case history. There are no signs of herniated lumbar disk .

There is calcifying periarthrosis of the left shoulder, but it does not restrict movement. The same applies to the arthrosis at the base of the right thumb.’

He concludes that:

‘On 1 June 1996 the subject was in a fit state to carry on working without seriously jeopardising her health and, considering her physical and mental fitness for work, did not suffer from a permanent incapacity to work of at least 50%’;

In the light of the above medical opinion, the documents in the file and the criteria laid down in Articles L. 351-7 and R. 351-21 of the Social Security Code, the national tribunal for claims relating to disability and level of insurance coverage for accidents at work decides to uphold the impugned decision ...”

10. The applicant lodged a notice of appeal on points of law on 27 May 1998. In further pleadings her lawyer filed with the Court of Cassation on

23 October 1998, she invoked, *inter alia*, a violation of “the requirements of the rights of the defence” and of “equality of arms in a fair trial within the meaning of Article 6” of the Convention, in that the report by the CNITAAT’s accredited doctor, drawn up solely on the basis of documents, had not been made available to her or to the doctor she had appointed to submit observations.

11. By a judgment of 2 March 2000 the Employment and Welfare Division of the Court of Cassation dismissed the applicant’s appeal in the following terms:

“... on the one hand, the accredited doctor instructed, under the terms of Article R. 143-28 of the Social Security Code then in force, to carry out a preliminary review of the case, simply gives an opinion to the national disability tribunal without submitting an expert report for adversarial discussion by the parties;

Without laying itself open to the objection raised in the ground of appeal, the national disability tribunal, in the light of the findings of its accredited doctor and having analysed the different evidence adduced, considered, as it was within its exclusive jurisdiction to do, that Ms Augusto’s disability rate – the COTOREP evaluation of which was not binding on it – was less than 50%, and that the applicant was therefore not entitled to a retirement pension on the ground of incapacity to work;

For these reasons,

the appeal ... is dismissed.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. The rules governing the powers, organisation and operation of social security courts and procedure before them are laid down in the Social Security Code. Alongside the general social security claims department there is a “technical claims” department which deals with claims concerning the existence or seriousness of a disability, the rate of permanent disability in the event of an occupational accident or disease and the incapacity to work taken into account by the old-age insurance scheme. Such claims are submitted in the first instance to the disability claims tribunal, and appeals are heard by the CNITAAT, whose decisions are in turn subject to appeal on points of law.

1. Relevant legislation and case-law at the time of lodging of the applicant’s appeal with the Court of Cassation (23 October 1998)

a) Legislation

13. Articles L. 143-3, R. 143-15, R. 143-16, R. 143-30 and R. 143-32 of the Social Security Code stipulate that the CNITAAT is composed of sections, each with five members, as follows:

- one president, who is a practising or honorary administrative or ordinary court judge and is appointed for an indefinite period by joint decision of the Minister of Justice and the Minister responsible for Social Security or Agriculture (depending on the nature of the case being considered);

- two members who are practising or honorary administrative or ordinary court judges or A-grade civil servants from the Ministry responsible for Social Security or for Agriculture, appointed by joint decision of the Minister of Justice and the Minister responsible for Social Security or Agriculture;

- two non-presiding judges (*assesseurs*), one a salaried employee and one an employer or self-employed person, appointed for five years from a list drawn up by the Minister responsible for Social Security or Agriculture, from candidates nominated by the most representative trade organisations concerned.

14. Article R. 143-25 stipulates that upon receipt of the notice of appeal the secretary of the tribunal shall invite the parties to present their written observations, in memorial form, within twenty days, together, where applicable, with those of the doctor they have appointed to assist or represent them. The secretary is also responsible for transmitting the documents to the parties, or to the doctors appointed by them if the documents contain medical information. The parties may then submit further observations in reply within twenty days.

15. The section president appoints a rapporteur for each case from among the members of the section or possibly from a list of people drawn up by order of the Minister responsible for Social Security or Agriculture, as appropriate. Rapporteurs who are not members of the section do not vote (Article R. 143-27).

16. The CNITAAT must have any file submitted to it on appeal examined initially by an accredited doctor, chosen from a list drawn up by order of the Minister responsible for Social Security or Agriculture. It may also consult qualified experts as and when deemed necessary. If it does this, the experts' reports are communicated to each party, or to the doctors appointed by them if they are medical reports (Articles R. 143-28 and R. 143-29).

17. By virtue of Article R. 143-19 the ministers responsible for Social Security or Agriculture or their representatives "may present written or oral observations" to the court.

18. Under Article R. 143-29 the CNITAAT "shall rule solely on the basis of documents". No provision of the Social Security Code provides for the communication to the insured party of the report by the rapporteur or the opinion of the qualified doctor, who are appointed by the court under the above-mentioned Articles R. 143-27 and R. 143-28.

19. The CNITAAT delivers its judgment at a public hearing (Article R. 143-33).

b. Case-law

20. The Employment and Welfare Division of the Court of Cassation has ruled that the procedure before the CNITAAT did not infringe the rights of the defence in that it ruled on the basis of documents without informing the parties of the accredited doctor's opinion (*Cass. soc.* 10 October 1996, *D.* 1996, IR 256) and, in eight judgments delivered on the same day in 1998, that the procedure was in conformity with the requirements of Article 6 § 1 of the Convention in respect of both the right to an independent and impartial tribunal – with reference to the composition of the CNITAAT – and the adversarial principle – with regard to medical documents on which it had based its decision and which were not communicated to the parties (*Cass. soc.* 28 May 1998, *Bull.* no. 290; *RJS* 1998, no. 921; *JCP E* 1998, pan. p. 1123, obs. F. Taquet). The Court of Cassation has also decided that ground relating to the lack of a public hearing before the CNITAAT could not be upheld where it had been invoked before it for the first time as a ground of appeal and the insured party had not requested a public hearing in the pleadings before the CNITAAT (*Cass. soc.* 15 May 1997, *RJS* 1997, no. 754).

2. Relevant domestic legislation and case-law following the lodging of the applicant's appeal with the Court of Cassation

21. In a judgment of 17 December 1998 (*RJS* 1999, no. 436), the Employment and Welfare Division of the Court of Cassation found that the disability claims tribunal was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention, as it was chaired by a civil servant answering to a hierarchy linked to the health insurance fund, which was a party to the claim.

22. In his submissions in that case, for the attention of the Court of Cassation, the Advocate-General P. Lyon-Caen stated, *inter alia* (see *Liaisons sociales*, 1999, jurisp. no. 637):

“This is not the first time [Article 6 § 1 of the Convention] has been invoked before you in respect of the social security's technical claims departments. Hitherto, however, you have considered the complaints unfounded, particularly with regard to the national tribunal for claims relating to disability and level of insurance coverage for accidents at work ...”

23. In its 1998 annual report (p. 19, section on suggestions for legislative or regulatory amendments), published in April 1999, the Court of Cassation expressed doubts as to the compatibility of the procedure before the CNITAAT with the guarantees of the right to a fair trial enshrined in Article 6 § 1 of the Convention, in respect of:

- the composition of the tribunal, whose members include civil servants who are part of a hierarchy, in violation of the right to an independent and impartial tribunal;
- the fact that it rules solely on the basis of documents, in violation of the principle of the public character of proceedings;
- the prior examination of the file by an accredited doctor, which circumvents the adversarial principle if the opinion is not communicated to the parties. In this connection the Court of Cassation considered that even if the accredited doctor did not have expert status, the communication of his opinion to a doctor the interested party has been invited to designate should be envisaged.

24. In five judgments on 22 December 2000 (*Bull.* no. 12; *RJS* 2001, no. 366), the Court of Cassation, sitting as a full court, departed from its case-law and found the procedure applicable before the CNITAAT incompatible with Article 6 § 1 of the Convention on the three points singled out by the Court of Cassation in its above-mentioned report.

25. In his submissions on four of these cases, for the attention of the Court of Cassation, Advocate-General P. Lyon-Caen explained, *inter alia*:

“It is evident not only that the civil servants who sit on the CNITAAT enjoy no specific guarantee as to their freedom of decision in the discharge of their judicial duties, but that the minister in charge of the administrative entity to which they belong has control over the Social Security through a directorate of his ministry and the regional directors of health and social affairs, who themselves, on behalf of the State and under the authority of the regional Prefect, have control over the primary social security funds and the areas they cover.

However, the decisions challenged before the CNITAAT are decisions of the social security funds, and these funds are more often than not also parties to the proceedings.
...

The fact that these civil servants are appointed for unlimited periods and that their judicial activities may be terminated at any time makes their situation more precarious and adds concern about their independence to the doubts about their impartiality.

... As regards the other categories of members of the CNITAAT, their appointment by the Minister responsible for Social Security or the fact that the minister draws up the list from which they are chosen, even if the trade organisations do make proposals – leaving the possibility for the minister to make choices – , the fact that they are all appointed for an unlimited period, which means that the minister can remove them at any time, including judges, who are therefore not irremovable, with the exception of those representing employees and employers, who are appointed for five years but whose term of office the minister may or may not renew, and the lack of guarantees in the discharge of their judicial duties are all factors that undermine the independence and impartiality of this tribunal.

... What clearly applies to the composition of the CNITAAT also applies to how it operates and could also be raised of the tribunal’s own motion.

Thus does the national court actually operate with the compulsory assistance, in every case, of an “accredited doctor” and a rapporteur, who is generally not a member of the tribunal: however, not only are these collaborators remunerated on a case-by-case basis, from the budget of the Ministry in charge of Social Security, but they are chosen from lists drawn up by the same ministry, and most of the rapporteurs are active or retired members of the ministry’s staff, or active or former employees of the social security funds ...

Furthermore, Article R. 143-19 of the Social Security Code provides for the minister responsible for Social Security – whose powers over this court are to all appearances already great – to be able to submit written or oral observations to the CNITAAT. This provision – which he does not seem to have made use of in any of the cases before you – is clearly an infringement of equality of arms, and therefore of the right to a fair trial and Article 6.1. In particular, this possibility of presenting oral observations means that the minister must be informed of the hearing and familiar with the accredited doctor’s opinion and the report, two “privileges” denied to the other parties ...”

26. In the meantime, and subsequently, decrees nos. 99-449 and 2003-614 of 2 June 1999 and 3 July 2003 and Law no. 2002-73 of 17 January 2002 were enacted to reform the procedure applicable before the disability claims tribunal and the CNITAAT (legal and regulatory part of the Social Security Code). Concerning the CNITAAT, the relevant provisions are the following:

(b) Composition

27. Article L. 143-3 stipulates that it shall henceforth be composed of: a president, who is a judge in the court of appeal of the jurisdiction in which the tribunal’s seat is located, appointed for three years in the same way as court of appeal judges are appointed; section presidents, who are judges in the same court of appeal, appointed for three years by order of the president, and judges (*assesseurs*) representing salaried workers on the one hand and employers or self-employed people on the other, appointed for renewable three-year periods by decree of the Minister of Justice from a list drawn up by the President of the Court of Cassation on the proposal of the most representative trade organisations concerned.

28. Each section shall be composed of its president and two *assesseurs* (Article L. 143-6). The withdrawal of an *assesseur* may be requested if he or she has had prior dealings with the case as an adviser or if there is a relationship of subordination between the *assesseur* or his or her spouse and one of the parties and his or her spouse (Article L. 143-8).

B. Procedure

29. By virtue of Article R. 143-25 the procedure for communicating memorials and documents remains unchanged and is the responsibility of the secretariat of the tribunal (see old rules, above). Henceforth the parties may also present new medical evidence in reply.

30. The role of the accredited doctor has disappeared, as has that of the rapporteur. Articles R. 143-27 and R. 143-28 provide henceforth for the president of the section in charge of the case to be able to appoint one or more medical consultants or experts, in an advisory capacity, “to examine the medical file submitted to the [tribunal]”. A copy of the “consultant’s or expert’s report” is then addressed to each party or the doctor appointed by him or her if it is a medical report, who then has twenty days to file written observations.

31. In the same letter the section president informs the parties of the close of the investigation and the date of the hearing, which is public. At the hearing the parties or their representatives may present oral observations once the section president has presented his report (Article R. 143-26).

THE LAW

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

32. The applicant complained of several violations of her right to a fair trial in the proceedings before the CNITAAT. She relied on Article 6 § 1 of the Convention, the relevant provisions of which are as follows:

“1. 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 ...”

33. First of all the applicant complained of failure to communicate to her the opinion of the accredited doctor appointed by the tribunal to carry out a preliminary medical examination of her case, so that she could challenge it.

34. She then claimed that the procedure before the CNITAAT was not fair, as only the Minister responsible for Social Security was allowed to submit written or oral observations – without them being communicated to the other party – which meant that he was given access to the case file and informed of the date of the hearing.

35. She also complained of the lack of independence and impartiality of the tribunal because of its composition, pointing out in particular that its president was appointed by joint decision of the Minister of Justice and the Minister responsible for Social Security, with no guarantee of irremovability and for an unspecified term, that those of its members who were civil servants were directly answerable to an administrative entity closely linked to the CRAM, while those in the salaried employee and self-employed categories were appointed by the Minister responsible for Social Security. She also pointed out that the rapporteur responsible for

investigating the case, when not a member of the tribunal, was appointed from a list of people drawn up by order of the Minister responsible for Social Security, who were more often than not former employees of his department.

36. Lastly, the applicant complained of the lack of a public hearing, in that the case was examined solely on the basis of documents, so she had not even been informed of the date of the hearing.

A. Admissibility

37. On the various points raised by the applicant in her complaint, apart from the failure to communicate the accredited doctor's opinion, the Government considered that she had not exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention. They argued that the applicant could not claim that there had not been any reasonable prospects of success of an appeal on points of law to redress this part of the complaint. As she did raise before the Court of Cassation her complaint that the non-communication of the opinion of the accredited doctor appointed by the court was at variance with Article 6 § 1 of the Convention, she must have considered this a relevant remedy, even though the established domestic case-law at the time dismissed such grounds of appeal (judgments of the Court of Cassation of 10 October 1996 and 28 May 1998, see "Relevant domestic law and practice", paragraph 20, above). The Government further argued that the remedy concerned had been proved relevant by the subsequent changes in the corresponding case-law (in particular the judgment of the Court of Cassation of 17 December 1998, see paragraph 21 above). That being so, the Government considered that the applicant should have raised the other complaints mentioned above before the Court of Cassation, but had neglected to do so.

38. In addition, concerning the applicant's complaint of a violation of the principle of equality of arms because it was possible for the Minister responsible for Social Security to submit written or oral observations (in application of the former Article R. 143-19 of the Social Security Code), the Government maintained that she could not be considered a victim of the alleged violation within the meaning of Article 34 of the Convention in so far as the minister had not availed himself of that possibility in this case.

39. The applicant replied that the time-limit within which she had had to file her grounds of appeal on points of law had expired on 27 October 1998, before the departure from the case-law mentioned by the Government. And in any event, the above-mentioned judgment of 17 December 1998 of the Court of Cassation concerned the lack of impartiality of the disability claims courts, not the CNITAAT. She therefore considered, in view of the established case-law of the Court of Cassation at the time when she had

appealed on points of law, that she had duly exhausted the domestic remedies available.

40. Regarding the Government's argument that she could not claim to have been a victim in respect of non-equality of arms, the applicant argued that even though the minister had not, in this case, availed himself of the possibility open to him under the above-mentioned Article R. 143-19, the mere fact that he could have done so, whereas the applicant could not, was in itself a violation of the principle of equality of arms.

41. Finally, the applicant pointed out that in spite of the change in the Court of Cassation's case-law on the guarantees of a fair trial before the CNITAAT, in particular the full court's judgments of 22 December 2000 and the Court of Cassation's 1998 annual report, the procedure before the CNITAAT, and its composition, had not been reformed until the Law of 17 January 2002 and the decree of 3 July 2003 (see "Relevant domestic law and practice", paragraphs 26-31 above).

42. The Court reiterates that although an appeal to the Court of Cassation is one of the remedies that should in principle be exhausted in order to comply with Article 35 of the Convention (see, for example, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI), it has also held that an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI).

43. The Court notes that in the present case the applicant appealed on points of law against the CNITAAT's judgment of 24 November 1997, relying in particular on the fact that she had not been informed of the accredited doctor's opinion concerning her case. The applicant's claim was based on Article 6 of the Convention and invited the domestic court to censure the fact that the "requirements of the right to a fair trial" and, more specifically, the principle of equality of arms within the meaning of that Article, had not been respected.

44. While it is true that at the material time the settled case-law of the Court of Cassation rejected that ground of appeal, the Court notes, with the Government, that that did not prevent the applicant from raising one of her complaints in an appeal on points of law in the hope of a departure from the established case-law on that point (see, by contrast, *Juhel and Others v. France* (dec.), no. 28713/95 and eight other applications, 10 September 1997). Considering that the applicant's ground of appeal was based on the requirements of Article 6 of the Convention in the wide sense, it would have been logical for her to invoke in her appeal all the points in respect of which she considered that those requirements had not been met.

45. The Court accordingly considers that the applicant had had what she considered to be an effective means to remedy the violations of the

Convention she wished to complain of, and that she should have raised all her grievances in respect of the proceedings before the CNITAAT in her appeal to the domestic court.

It follows that this part of the complaint must be rejected, under Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

46. As to the part of the complaint concerning the failure to communicate to the applicant the opinion of the accredited doctor appointed by the domestic court to carry out a preliminary medical examination of her case, the Court notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court notes, moreover, that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible with respect to the applicant's complaint under Article 6 § 1 concerning the failure to communicate to the applicant the opinion of the accredited doctor appointed by the CNITAAT to carry out a preliminary medical examination of her case, and the remainder of the application inadmissible;

...

Done in French, and notified in writing on 11 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
President

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Spielmann, joined by Mr Rozakis, is annexed to this judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN
JOINED BY JUDGE ROZAKIS
(*Translation*)

1. After much hesitation I voted in favour of the inadmissibility of the application for non-exhaustion of domestic remedies with respect to the complaints other than that concerning the non-communication to the applicant of the opinion of the accredited doctor appointed by the CNITAAT to carry out a preliminary medical examination of her case.

2. The Court's reasoning is as follows:

First, the Court notes that in the present case the applicant appealed on points of law against the CNITAAT's judgment of 24 November 1997, relying in particular on the fact that she had not been informed of the accredited doctor's opinion concerning her case. The applicant's claim was based on Article 6 of the Convention and invited the domestic court to censure the fact that the "requirements of the right to a fair trial" and, more specifically, the principle of equality of arms within the meaning of that article, had not been respected (paragraph 43 of the judgment).

The Court goes on to admit that at the material time the settled case-law of the Court of Cassation rejected that ground of appeal, while noting, with the Government, that that did not prevent the applicant from hoping for a departure from the case-law on that point. Considering that the applicant's ground of appeal was based on the requirements of Article 6 of the Convention in the wide sense, it would have been logical for her to invoke in her appeal all the points in respect of which she considered that those requirements had not been met (paragraph 44 of the judgment).

Lastly, the Court concludes that the applicant had what she considered to be an effective means to remedy the violations of the Convention she complained of, that she should have raised all her grievances in respect of the proceedings before the CNITAAT in her appeal to the domestic court and that this part of the complaint must accordingly be rejected, under Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies (paragraph 45 of the judgment).

3. This was not a foregone conclusion.

Under the Court's case-law, the only remedies Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various

conditions are satisfied.¹ The case-law of the Court and the former Commission clearly shows that the objection of failure to exhaust domestic remedies must be rejected when the respondent Government are unable to cite a single precedent establishing the effectiveness of the remedy which exists in theory in domestic law².

4. In the present case the applicant's position was not logical. Notwithstanding the Court of Cassation's case-law, which was clearly against her, in her further pleadings on 23 October 1998 she invoked a violation of "the requirements of the rights of the defence" and of "equality of arms in a fair trial within the meaning of Article 6" of the Convention, in that the report by the CNITAAT's accredited doctor, drawn up solely on the basis of documents, had not been made available to her or to the doctor she had appointed to submit observations. She appealed on this ground in spite of the fact that the case-law of the Employment and Welfare Division of the Court of Cassation established that the procedure before the CNITAAT did not violate the rights of the defence (paragraph 20 of the judgment).

5. It is therefore the applicant's subjective attitude that led the Court to declare certain complaints inadmissible for non-exhaustion of domestic remedies. So, in basing itself on the fact that she had what she considered to be an effective means to remedy the violations of the Convention she wished to complain of, and considering that she should have raised all her complaints in respect of the proceedings before the CNITAAT in her appeal to the domestic court, the Court is suggesting that the applicant should have anticipated the departure from case-law that came about in 1998 and in December 2000. In so doing the Court has adopted a subjective approach to the requirement of exhaustion of domestic remedies, an approach that could give rise to uncertainty of the law, whereas the viewpoint of an applicant alone cannot be decisive in determining whether a remedy is objectively ineffectual, theoretical or illusory.

6. If I voted with the majority on this point, it is only because *in this particular case* the departure from the case-law was objectively "in the air" at the time. That distinguishes this case from those where the Court has rejected the objection because a remedy could be regarded as being "bound

¹ See, amongst many other cases, *Rezette v. Luxembourg*, no. 73983/01, § 26, 13 July 2004, *Dattel v. Luxembourg*, no. 13130/02, § 35, 4 August 2005, and *Casse v. Luxembourg*, no. 40327/02, § 36, 27 April 2006.

² See *Berlin v. Luxembourg* (dec.), no. 44978/98, 7 May 2002, and *Rezette and Dattel*, both cited above. See also, *mutatis mutandis*, *G.B. v. France*, no. 23312/94, decision of the Commission of 17 January 1996.

to fail”¹. In this case, on the contrary, there was reason to believe that the remedy might ultimately prosper.

7. To my mind, therefore, it is not so much the applicant’s attitude that led to the conclusion that the remedy before the Court of Cassation was effective, as the fact that the Court of Cassation itself, in its 1998 annual report, published in April 1999, expressed doubts as to the compatibility of the procedure before the CNITAAT with the guarantees of the right to a fair trial (paragraph 23 of the judgment). Had the applicant included the other complaints in her further pleadings filed on 23 October 1998, the Court of Cassation might have accepted them. After all, it did depart from its case-law in its judgment of 17 December 1998, limited though it was to the question of the lack of independence and impartiality of the disability claims tribunals (paragraph 21 of the judgment), and in its five judgments of 22 December 2000 (paragraph 24 of the judgment).

¹ See *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, series A no. 332, p. 20, § 27, citing *mutatis mutandis*, the judgments *Hauschildt v. Denmark* of 24 May 1989, series A no. 154, p. 19, § 41, and *The Holy Monasteries v. Greece* of 9 December 1994, series A no. 301-A, p. 29, § 51.