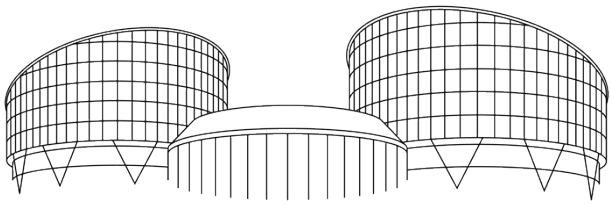

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

**CASE OF BOULOIS v. LUXEMBOURG**

*(Application no. 37575/04)*

JUDGMENT

STRASBOURG

14 December 2010

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 03/04/2012

*This judgment may be subject to editorial revision.*

**In the case of** Boulois v. Luxembourg**,**

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

Ireneu Cabral Barreto, *President,*
Françoise Tulkens, appointed to sit in respect of Luxembourg,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 23 November 2010,

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

# PROCEDURE

1. The case originated in an application (no. 37575/04) against the Grand Duchy of Luxembourg 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 Thomas Boulois ("the applicant"), on 16 October 2004.

2. The applicant was represented by Mr O. Lang, a lawyer practising in Luxembourg. The Luxembourg Government ("the Government") were represented by their counsel, Mr N. Decker, a lawyer practising in Luxembourg.

3. Dean Spielmann, the judge elected in respect of Luxembourg, withdrew from sitting in the case (Rule 28 of the Rules of Court) and the respondent Government waived their right to appoint a replacement. The Chamber accordingly appointed Françoise Tulkens, the judge elected in respect of Belgium, to sit in his place (Article 26 § 4 of the Convention and Rule 29 §§ 1 and 2).

4. The applicant alleged, in particular, that he had been deprived of his right to a fair hearing and his right of access to a court in connection with the decisions refusing his applications for prison leave.

5. On 7 December 2006 the Court decided to give notice of the application to the Government.

6. Having been informed on 12 December 2006 of the possibility of submitting written observations under Article 36 § 1 of the Convention and Rule 44, the French Government indicated on 27 March 2007 that they did not intend to exercise their right in that regard.

7. On 2 September 2008 the Court decided to adjourn examination of the case pending the outcome of the case *Enea v. Italy* (no. 74912/01), which was then pending before the Grand Chamber.

8. On 16 October 2009 the parties were invited to submit additional observations in the light of the judgment in *Enea v. Italy* ([GC], no. 74912/01, ECHR 2009-...), which had been delivered in the meantime.

9. On 11 May 2010 it was decided that the Chamber would examine the admissibility and merits of the application at the same time (Article 29 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1972. When the application was lodged he was being held in Schrassig Prison. He is currently being held under a semi-custodial regime in Givenich Prison.

11. On 15 December 1998 the applicant was remanded in custody.

12. In a judgment of 22 October 2001 the Criminal Division of the Court of Appeal sentenced him to fifteen years' imprisonment, of which three years were suspended, for assault occasioning actual bodily harm, rape and false imprisonment accompanied by acts of torture, committed on 10 December 1998.

13. The applicant was granted a divorce on 19 October 2000. He provided the Court with various judicial decisions given between 14 June 2001 and 13 April 2005 concerning his right of contact with his three minor children.

14. While in prison the applicant submitted several requests for temporary leave of absence ("prison leave"), which are the subject of the present case.

### A. The first request for prison leave

15. The applicant stated that he had submitted a request for prison leave to the Attorney General in October 2003.

16. At the request of the counselling service's psychologist the applicant explained on 16 October 2003 that he was requesting prison leave for one day and had no objection to being escorted while on leave. He stated that the reason for the request was to complete certain administrative formalities, which he detailed as follows:

> "- go to a photographer or photo booth to obtain passport photos;

- go to the Transport Ministry to renew my driving licence (medical certificate already obtained);

- go to the Embassy to renew my consular registration card;

- go to see Mr [B.] at Luxembourg police station, Investigations Division, to pick up an envelope containing documents needed by a former client;

- go to see the manager of [B.] bank in Esch/Alzette;

- go to the taxation office in Esch/Alzette;

- meet a group of friends in a restaurant near Esch/Alzette;

- go to my flat in Differdange to collect the remaining documents for the same client;

- take some measurements for items I might make in the [prison] workshop;

- go to Differdange town hall for a personal interview with the mayor;

- go to the home of Mrs [S.] in Luxembourg to meet her husband;

- go to my lawyer's office to hand over the missing documents for my former client;

- if possible, go to the bookshop near [S.]'s house."

In his letter, the applicant stated further:

"... Unfortunately, the civil damages are still far from being paid, as I have not even had enough funds to make a down-payment. At the moment I am still engaged in repaying my loans and other debts to the various authorities under the arrangements entered into with the legal service in order to avoid an unending series of seizures of my property. ..."

17. On 29 October 2003 a psychologist issued a certificate (confirmed on 25 November 2003 by a second psychologist) stating that the applicant had begun a course of psychotherapy on 19 May 1999 which had been discontinued on 30 September 2002 for reasons beyond his control. The psychologist stressed that the applicant had been anxious to understand what had driven him to commit the offences and to do everything possible to avoid reoffending.

18. On 5 November 2003 the Attorney General's representative sent a memorandum to the prison governor worded as follows:

"...please inform the prisoner Thomas Boulois

that by decision of the Prison Board

[the] request for prison leave ... [is] refused in view of the risk of deportation (an application was made to the Ministry of Justice on 25 June 2003, but no decision has yet been taken). There is also a risk that the prisoner might abscond, given that he has

failed to reflect on his crime. Before being allowed any privileges he must begin to pay the civil party."

## B. The second request for prison leave

19. On 17 January 2004 the applicant reiterated his request, stating that the reasons and the itinerary for the day's prison leave remained the same. On 27 January 2004 his lawyer submitted arguments in support of the applicant's request and concluded as follows:

"... granting [the applicant] a day's prison leave during which he could begin to put his affairs in order with a view to leading an independent life [outside] prison, [would] not only aid [the applicant's] rehabilitation and reintegration into society, but [would] also enable him to start paying compensation to the civil party as quickly as possible. ..."

20. On 17 March 2004 the Attorney General's representative sent a memorandum to the prison governor containing the following passages:

"... please inform the prisoner Thomas Boulois

that by decision of the Prison Board

the decision of 5 November 2003 refusing his request for prison leave ... remains valid."

## C. Application to the administrative courts following the refusal of the two requests for prison leave

21. On 25 May 2004 the applicant lodged an application with the Administrative Court (*tribunal administratif*) for judicial review of the decisions of the Prison Board of 5 November 2003 and 17 March 2004.

22. At a hearing held on 6 December 2004 the Administrative Court raised of its own motion the question whether it had jurisdiction to examine the application for judicial review. The Government, which had not raised an objection alleging lack of jurisdiction, left the matter to the discretion of the court.

23. On 23 December 2004 the Administrative Court ruled that it did not have jurisdiction to examine the application for judicial review, for the following reasons:

"... A distinction must be made between administrative measures relating to the treatment of prisoners in prison (such as a decision to place them in a more secure part of the prison, and in particular imposing a strict confinement regime – see Administrative Court ruling no. 14568 of 10 July 2002), which are taken in the context of enforcement by the prison service, and decisions which may alter the nature or scope of a sentence handed down by the ordinary courts, which are to be classified as judicial rather than administrative decisions.

In the instant case it must be acknowledged that the granting or refusal of the privilege of prison leave constitutes a measure which alters the 'scope' of the sentence imposed on the applicant by the ordinary court.

Hence, the two decisions in question are judicial in nature.

Accordingly, bearing in mind their nature as identified above, the impugned decisions cannot be the subject of an application to the administrative courts... ."

24. On 14 April 2005 the Higher Administrative Court (*cour administrative*) upheld this ruling, as follows:

"The [applicant] submitted that the court erred in finding that it did not have jurisdiction to examine his application for judicial review, arguing that: no other remedy existed in respect of such refusal, with the result that section 2(1) of the Law of 7 November 1996 on the organisation of the administrative courts should be applied; the impugned decisions did not alter the scope of the sentence; the court had denied him justice in breach of Article [6 § 1] of the [Convention] by depriving him of a fair hearing.

... The [applicant]'s case concerns a request for prison leave, in other words, a decision which alters the nature of the execution of the sentence handed down by the ordinary courts and which should therefore be classified as a judicial rather than an administrative decision.

The expression 'the scope of the sentence imposed', used by the court, is not to be understood in the present case as the length of the sentence but as the manner of its execution in a broad sense.

The administrative court was therefore correct in ruling that it did not have jurisdiction to examine the application.

A finding by the administrative courts that they lack jurisdiction cannot be construed as a declaration of unwillingness on their part to rule on the issue; the allegation of a denial of justice should therefore be dismissed as unfounded.

Article [6 § 1] of the [Convention] is not applicable in relation to a body which has no power to rule on the merits. ..."

## D. Further requests by the applicant

25. On 11 August 2004 the applicant submitted a third request for prison leave, in the following terms:

"... I have successfully attended several courses run by the CEP-L [Chamber of Commerce] and would like to continue with a view to obtaining the corresponding diplomas.

The diplomas concerned are in accounting and computer (PC) use. I completed the previous courses successfully, but for the sake of feasibility it is now essential for me to be able to attend the courses of the autumn session at the CEP-L itself. ..."

26. In a decision of 21 September 2004 the request was refused on the ground that the applicant could attend courses in prison and that he had made no substantial efforts to date towards paying compensation to the victim. The decision also referred to the reasoning of the decision of 5 November 2003.

27. In a fourth request, submitted on 24 February 2005, the applicant observed, among other things, that he could not understand why, in view of the need for him to reintegrate into society, he had been refused permission to attend the final classes required in order to obtain the diplomas in accounting and computing. He added that the reason he had requested prison leave was to renew his identity papers and driving licence and make arrangements for the repayment of his debts to the various institutions and the civil party.

28. On 23 March 2005 his request was refused for failure to give reasons.

29. On 12 July 2005 a fifth request for prison leave (not provided to the Court) was refused on the ground that there was a risk that the applicant would not return to prison.

30. On 4 May 2006 a sixth request for prison leave (not provided to the Court) was refused on the ground that the applicant had been making no efforts, in particular with regard to paying the civil damages, and was refusing to abide by the conditions imposed on him.

31. Following the refusal of this request, the applicant applied to the Attorney General's Department on five occasions between 10 May and 29 October 2006. He requested assistance in putting in place a repayment plan appropriate to his circumstances and the demands of the civil party, and sought an explanation of the requirements he was expected to meet with a view to his reintegration in society, so that he could take steps to comply with them. On 6 November 2006 the Attorney General's representative decided that he would not, as matters stood, reply to the various letters, which did not call for any comment.

32. On 20 November 2006 the Attorney General acknowledged receipt of a request from the applicant for an interview and said that he would meet him during one of his forthcoming visits to the prison. The applicant claimed that the meeting had never taken place.

33. According to the case file, in April 2009 the applicant was transferred to a semi-custodial regime in Givenich Prison, where he carried on paid work as a cook. On 10 February 2010 he started up a business as a sole trader.

# II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

## A. National legislation

### *1. Execution of custodial sentences*

34. Section 1 of the Law of 26 July 1986 on certain methods of execution of custodial sentences (hereafter "the 1986 Law") lists the various arrangements which execution of a custodial sentence may entail:

> "The execution of a custodial sentence may entail one of the following: execution in instalments, semi-custodial regime, prison leave, suspension of sentence, early release."

35. In the explanatory memorandum to the draft of the 1986 Law, the purpose of the legislation is explained as follows:

> "... the time seems right to provide a sound legal basis for arrangements for the execution of custodial sentences which, within certain limits, allow convicted prisoners to make trips outside prison or to serve their sentence in instalments, so that they can maintain or resume social and professional contacts. Since sentencing lost its expiatory character and took on an essentially sociological role with a near-therapeutic aspect, the efforts of the authorities responsible for the execution of sentences have been directed mainly at the social rehabilitation of prisoners and at helping them settle or resettle in a stable social environment. In striving to achieve this, it is important in particular to ensure that prisoners can maintain their family and social ties, where such exist, and to prepare them for release by enabling them, possibly by means of preparations for an occupation or profession, to find work and adapt to responsible life outside prison. ..."

#### (a) Definition of prison leave

36. Section 6 of the 1986 Law defines prison leave as follows:

> "Prison leave shall consist of permission to leave prison either for part of the day or for periods of twenty-four hours. The time shall count towards the length of the sentence."

#### (b) Conditions for entitlement to prison leave

37. Section 7 of the 1986 Law provides:

> "This privilege may be granted to prisoners who are domiciled or resident in the country, either for family reasons or to make preparations for their rehabilitation and reintegration into professional life, or on a trial basis with a view to their release on licence."

38. Section 8 of the 1986 Law provides that prison leave may be granted to prisoners convicted of a first offence once a third of their sentence has been served.

39. Under Section 13, consideration must be given to the personality of the prisoner, his or her progress and the risk of a repeat offence.

40. Under the terms of the Grand-Ducal Regulation of 19 January 1989 laying down the arrangements for the granting of prison leave, such leave may be granted at the request of the prisoner concerned or his or her representative (Article 4); the request must be made in writing, unless the prisoner is incapacitated or unable to write. The interval between periods of leave must be at least one month, except in special circumstances (Article 5). Where a request for prison leave is refused, no new request may be made within two months, unless new evidence comes to light (Article 6).

**(c) Procedure applicable to prison leave requests**

41. Section 12 of the 1986 Law states:

> "In the case of custodial sentences of over two years ... the measures provided for by this Law ... shall be taken by the Attorney General or his or her representative in accordance with a majority decision of a board comprising, in addition to the Attorney General or his or her representative, a judge and a public prosecutor. ...
>
> The board shall be convened by the Attorney General or his or her representative and shall be chaired by the judge.
>
> With the exception of the Attorney General or his or her representative, the full members and their substitutes shall be appointed by ministerial order for a renewable three-year term."

*2. Jurisdiction of the administrative courts*

42. Section 2 of the Law of 7 November 1996 on the organisation of the administrative courts provides as follows:

> "(1) The Administrative Court shall rule on applications alleging incompetence, excess or misuse of authority and breaches of the law or procedures designed to protect private interests, lodged in respect of any administrative decision for which no other remedy exists under the laws and regulations.
>
> ...
>
> (3) Unless otherwise provided by law, an appeal may be lodged with the Higher Administrative Court against the decisions of the Administrative Court referred to above."

## B. Recommendation No. 30 of the Ombudsman of the Grand Duchy of Luxembourg on changes to the division of powers in respect of the execution of custodial sentences

43. In his activity report on the year from 1 October 2007 to 30 September 2008 the Ombudsman outlined the terms of Recommendation No. 30, the relevant parts of which read as follows:

> "... the decision-making procedures regarding the execution of sentences, which are currently the sole responsibility of the Attorney General's representative or the Prison Board ..., are no longer compatible with the adversarial principle and the right of appeal before an independent and impartial body;
>
> ... along the lines of what has been done in other countries, and in particular in France, a thorough overhaul of the system of execution of sentences is called for.
>
> ... [it is necessary] to review the organisation of the prison service as a whole and to consider creating the office of post-sentencing judge and an autonomous Directorate-General of Prisons which is separate from the Attorney General's Department.
>
> ... Each District Court would have a post-sentencing judge; for appeal cases before the Supreme Court of Justice there would be a post-sentencing adviser.
>
> These judicial officers would be responsible for ruling on all applications submitted to them under Article 100 of the Criminal Code, applications for transfer from [the closed prison] to the [semi-open prison], requests for prison leave...
>
> ... The adversarial procedure would be triggered by an application to be lodged by the prisoner or his or her lawyer. After hearing the public prosecutor's address and the submissions of the prisoner, assisted by his or her representative if appropriate, the post-sentencing judge would give a decision against which the prisoner and the public prosecutor could appeal within a period to be specified. ..."

44. In his activity report on the year from 1 October 2009 to 30 September 2010 the Ombudsman described the following developments:

> "... On 20 September 2009 the new Minister of Justice proposed a meeting with the Ombudsman with a view to discussing the action to be taken in response to the latter's recommendation. This invitation followed the undertaking given by the Government to examine in detail the various recommendations made by the Ombudsman concerning the functioning of the judicial system and in particular the introduction of a post-sentencing judge. ...
>
> On 17 March 2010 the Minister of Justice outlined to the press the planned reform of the prison system.
>
> The Ombudsman welcomes the initiative taken by the Minister towards a thorough reform of the prison system aimed at creating a prison environment conducive to the social rehabilitation of prisoners with a view to their future reintegration into society.

The Ombudsman welcomes the Minister's intention to act upon his recommendation...

As regards the execution of sentences and more specifically the decisions falling within the remit of the representative responsible for the execution of sentences or the Prison Board, the Ombudsman intends to pursue the idea of instituting a post-sentencing judge.

The Ombudsman notes that in a recent statement in a Luxembourg daily newspaper, the Minister spoke in favour of handing over to a judicial body some of the powers currently exercised by the Attorney General's representative responsible for the execution of sentences or by the Prison Board."

## C. International instruments

### *1. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (adopted on 11 January 2006)*

45. The relevant parts of the Recommendation read as follows:

"The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Stressing that the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ... offer[ing] ... treatment programmes to inmates, thus preparing them for their reintegration into society;

...

Endorsing once again the standards contained in the recommendations of the Committee of Ministers of the Council of Europe, ... and in particular ... Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners;

...

103.2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release.

103.3 Sentenced prisoners shall be encouraged to participate in drawing up their individual sentence plans.

103.4 Such plans shall as far as is practicable include:

...

d. preparation for release.

...

103.6 There shall be a system of prison leave as an integral part of the overall regime for sentenced prisoners.

...

107.1 Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.

107.2 In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society.

..."

### *2. Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners (adopted on 9 October 2003)*

46. The relevant parts of the Recommendation read as follows:

"The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Bearing in mind the relevance of the principles contained ... in particular [in]:

– Recommendation No. R (82) 16 on prison leave; ...

...

1. For the purposes of this recommendation, a ... long-term prisoner is one serving a prison sentence or sentences totalling five years or more.

...

2. The aims of the management of ... long-term prisoners should be:

...

– to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release.

...

23 b. Particular efforts should be made to allow for the granting of various forms of prison leave, if necessary under escort, taking into account the principles set out in Recommendation No. R (82) 16 on prison leave.

..."

### *3. Recommendation No. R (82) 16 of the Committee of Ministers to member states on prison leave (adopted on 24 September 1982)*

47. The relevant parts of the Recommendation are worded as follows:

"The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Considering that prison leave is one of the means of facilitating the social reintegration of the prisoner;

Having regard to experience in this field,

Recommends the governments of member states:

1. to grant prison leave to the greatest extent possible on medical, educational, occupational, family and other social grounds;

2. to take into consideration for the granting of leave:

- the nature and seriousness of the offence, the length of the sentence passed and the period of detention already completed,

- the personality and behaviour of the prisoner and the risk, if any, he may present to society,

- the prisoner's family and social situation, which may have changed during his detention,

- the purpose of leave, its duration and its terms and conditions;

3. to grant prison leave as soon and as frequently as possible having regard to the aforementioned factors;

4. to grant prison leave not only to prisoners in open prisons but also to prisoners in closed prisons, provided that it is not incompatible with public safety;

...

9. to inform the prisoner, to the greatest extent possible, of the reasons for a refusal of prison leave;

10. to provide the means by which a refusal can be reviewed;

..."

# THE LAW

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

48. The applicant complained that he had been deprived of his right to a fair hearing and his right of access to a court in connection with the decisions refusing his requests for prison leave. He alleged a violation of Article 6 § 1 of the Convention, the relevant parts of which provide:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing ... by [a] ... tribunal..."

49. The Government contested that argument.

### A. Admissibility

#### *1. The parties' submissions*

##### (a) The Government

50. The Government submitted that Article 6 § 1 was inapplicable in the present case.

51. Firstly, the criminal limb of Article 6 § 1 of the Convention did not apply, as the case did not concern criminal charges but rather the implementation of the applicant's sentence and the manner of its execution.

52. The Government also disputed the applicability of the civil limb of Article 6. They pointed out, primarily, that the Court could not create a substantive right which had no legal basis in the country concerned. Luxembourg domestic law did not recognise any "right" on the part of the applicant which could bring Article 6 § 1 into play. Under section 7 of the 1986 Law and Article 4 of the Grand-Ducal Regulation of 19 February 1989, prison leave was not a right but merely a privilege granted to prisoners. The legislature, in giving responsibility for matters relating to the execution of sentences imposed by the criminal courts to the Attorney General or his or her representative, had sought to remove the enforcement of judicial rulings from the control of the ordinary courts, whose task was confined to hearing and determining cases. Hence, the granting of prison leave would remain a matter exclusively for the Attorney General or his or

her representative, ruling, in the case of persons whose sentence exceeded two years, in accordance with the majority decision of the Prison Board. Furthermore, prison leave, including the arrangements for its implementation, fell wholly within the State's powers of discretion in the sphere of justice and penal policy. Thus, a dispute (*contestation*) over "rights" for the purposes of Article 6 of the Convention could not be said to exist. The Government added that prisoners, who had the benefit of the safeguards provided by the Convention throughout the criminal proceedings until their conviction by the courts, had to serve their sentence to its end, forfeiting their liberty in the process. Hence, the applicant had been subjected to generally permissible restrictions applied to prisoners convicted under ordinary criminal law, arising solely out of the custodial sentence imposed on him. In that respect, the present case differed from *Enea v. Italy* ([GC], no. 74912/01, ECHR 2009-...), where the applicant had been placed under a more severe confinement regime entailing more substantial restrictions on his rights compared with other inmates imprisoned under the ordinary criminal law. As to whether the alleged right relied upon was a "civil" right, the Government argued that any supposed right to prison leave did not by its nature have mainly or exclusively pecuniary implications. The applicant's action in the administrative courts had not had a pecuniary aim, as it had sought the setting-aside of the decisions of the Prison Board rather than the recognition of a possible right to prison leave for the applicant. The outcome of the administrative proceedings, moreover, had not been directly decisive for the granting of prison leave, as the administrative courts could not substitute their assessment for that of the Prison Board. Lastly, in so far as the applicant relied on his right to see his children and reintegrate into social and professional life, the Government submitted that, if there had indeed been any restriction in that regard, it had been brought about solely by the offence which the applicant had committed and which had led to his custodial sentence. The Prison Board had taken no measures to prevent the applicant from seeing his children or resuming work. As to his social and professional reintegration, the Government pointed out that the applicant had received vocational training throughout his detention, of which he could make use when he had completed his sentence. The Government concluded that the proceedings before the Prison Board did not fall within the scope of Article 6 of the Convention.

**(b) The applicant**

53. The applicant was of the view that the criminal limb of Article 6 was applicable in the present case. He pointed out that the conduct criticised by the Prison Board (the suspicion that he might abscond, his failure to reflect on the offences and his failure to pay the civil party) had formed the basis for imposing a punishment on him in the form of refusing him prison leave.

The nature and degree of severity of the punishment brought the proceedings before the Prison Board within the criminal sphere.

54. In the applicant's submission, Article 6 of the Convention was also applicable under its civil head. First of all, a substantive right to prison leave indisputably existed in the Luxembourg legal system. Where a prisoner satisfied the criteria and conditions laid down in sections 8 and 13 of the 1986 Law, he or she was entitled to prison leave. This was demonstrated by the fact that the Government's representative had agreed, without any reservations, to discuss the merits of the case brought before the Administrative Court. In contrast to the Government, the applicant concluded that the granting of prison leave could not be regarded merely as a privilege under Luxembourg law, comparable, for instance, to a grand-ducal pardon. It constituted a right under Luxembourg law also by virtue of the fact that it was a measure reflecting a generally recognised principle of international law. The Committee of Ministers of the Council of Europe advocated, in particular, that a system of prison leave should form an integral part of the overall regime for sentenced prisoners (Rec(2006)2, point 103.6). The applicant therefore concluded that, in line with the reasoning followed in *Enea* (cited above, § 101), the matter he had been unable to bring before a court should be characterised as a "dispute" over "rights" for the purposes of Article 6. The applicant further argued that his right to prison leave was a "civil" right and that his action had pursued several pecuniary aims. He pointed out that his requests for prison leave had been made with a view to his professional and social reintegration. He had sought to prepare the ground for securing gainful employment with a view to paying compensation to the victim and settling his debts, but also in order to avoid being a burden on society after leaving prison. The refusals by the Prison Board had been directly decisive for the civil right in question. Prison leave would also have enabled him to exercise outside prison his right of contact with his children, who were reluctant to visit him there. If the administrative courts to which he applied for judicial review had found that they had jurisdiction, they would have reviewed the lawfulness of the impugned decisions. They could then have decided to set aside the decisions and refer the case to the competent authority. The latter would have given a fresh decision which, in its turn, would have been subject to review by the administrative courts. The applicant inferred from this that the decisions of the Prison Board and the administrative courts had been directly decisive for his social rehabilitation and reintegration into the workforce; he stressed in that connection that prison leave was a first step towards qualifying for other measures relating to enforcement of his sentence. Lastly, the applicant pointed out that an individual who considered that his rights had been infringed by an administrative decision was required to have that decision set aside before bringing an action for damages against the State. Accordingly, his action before the administrative courts had also had a

pecuniary aim, as it was a first step towards claiming compensation through the civil courts.

*2. The Court's assessment*

55. The issue raised in the present case is whether the procedural safeguards provided by Article 6 § 1 of the Convention apply to the proceedings concerning the refusal of the applicant's requests for prison leave.

56. The Court points to its case-law to the effect that Article 6 § 1 is not applicable under its criminal head, since the proceedings concerning the prison system did not relate in principle to determination of a "criminal charge" (see *Enea*, cited above, § 97).

57. As to the civil limb of Article 6 § 1, the Convention institutions traditionally took the view that the examination of requests for temporary release or of questions relating to the manner of execution of a custodial sentence did not fall within the scope of Article 6 § 1 (see *Neumeister v. Austria*, 27 June 1968, §§ 22-23, Series A no. 8; *A.B. v. Switzerland*, no. 20872/92, Commission decision of 22 February 1995, Decisions and Reports (DR) 80, p. 66; *Lorsé and Others v. the Netherlands* (dec.), no. 52750/99, 28 August 2001; and *Montcornet de Caumont v. France* (dec.), no. 59290/00, ECHR 2003-VII). However, the case-law has evolved in relation to proceedings concerning detention in prison. Thus, the Court has recently found Article 6 § 1 to be applicable under its civil head to proceedings concerning security and disciplinary measures in prison (see *Enea*, cited above, § 98; *Ganci v. Italy*, no. 41576/98, §§ 20-26, ECHR 2003-XI; *Musumeci v. Italy*, no. 33695/96, § 36, 11 January 2005; *Gülmez v. Turkey*, no. 16330/02, §§ 27-31, 20 May 2008; and *Stegarescu and Bahrin v. Portugal*, no. 46194/06, §§ 35-39, 6 April 2010). In the instant case it has to be ascertained whether the issue of the fairness of the proceedings and of access to a court in order to complain of the refusal to grant prison leave should, in its turn, be examined under the civil head of Article 6 § 1, which secures to everyone the right to have "any claim relating to his civil rights and obligations" brought before a "tribunal".

58. There are two aspects to the question in issue: whether there was a dispute (*contestation*) over a "right" and whether or not the right in question was a "civil" one.

59. As to the first aspect, the Court points out firstly that, according to its consistent case-law, Article 6 § 1 applies only to a genuine and serious "dispute". The dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise and the outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Enea*, cited above, § 99).

60. In the instant case it is clear that a "dispute" arose when the Prison Board refused the various requests for prison leave based on the applicant's plans for his reintegration into society and the workforce. That dispute, which was genuine and serious, related to the actual existence of the right to prison leave asserted by the applicant. By applying to the administrative courts for judicial review, the applicant sought to have the case referred to the competent authority so that the latter could rule afresh on his requests for prison leave. The outcome of the proceedings before the Prison Board and the administrative courts was therefore directly decisive for the alleged right.

61. It remains to be determined whether a "right" existed. Under the 1986 Law and the Grand-Ducal Regulation of 19 January 1989, prison leave may be granted if various criteria are met. Accordingly, the applicant could arguably maintain that, as a prisoner, he was entitled to prison leave provided that he satisfied the conditions laid down by the legislation (see, *mutatis mutandis*, *H. v. Belgium*, 30 November 1987, § 43, Series A no. 127-B). The Court further observes that the restrictions on the right to a court to which the applicant claimed to have been subjected in the context of his requests for prison leave related to a set of prisoners' rights which the Council of Europe has recognised by means of the European Prison Rules, adopted by the Committee of Ministers and elaborated upon in three Recommendations (Rec(2006)2, point 103.6, Rec(2003)23 and R(82)16) (see, *mutatis mutandis*, *Enea*, cited above, § 101). Accordingly, the Court concludes that a dispute over a "right" for the purposes of Article 6 § 1 can be said to have existed in the instant case.

62. As to the second aspect, the Court reiterates that Article 6 § 1 extends to disputes over "civil" rights which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether they are also protected under the Convention (see, among many other authorities, *Enea*, cited above, § 103).

63. The Court must dismiss at the outset the family reasons relied on by the applicant, as it is clear from the documents submitted that the reasons given for his requests for prison leave did not include a meeting with his children.

64. It therefore remains for the Court to examine the reasons relating to the applicant's reintegration. The Court points out that the proceedings concerning the applicant's various requests for prison leave raised the issue of his interest in reorganising his professional and social life on his release from prison. More specifically, his requests for prison leave referred to his wish to take courses with a view to obtaining diplomas in accounting and computer use, and to complete certain administrative formalities with his bank and various institutions (in particular, the renewal of his driving licence and his consular registration card). By so doing the applicant sought to make preparations for his release to enable him to secure paid

employment, settle his various debts and avoid being a burden on society. Whilst it is true that the impact on his private life was indirect, it was nevertheless beyond doubt. It should be pointed out that it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world (see, *mutatis mutandis*, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B, and *Bigaeva v. Greece*, no. 26713/05, § 23, 28 May 2009). In these circumstances the Court considers that the restriction alleged by the applicant, in addition to its pecuniary implications, related to his personal rights, in view of the significance of the applicant's interest in resettling in society. In that connection it is of the view that the applicant's social rehabilitation was crucial to the protection of his right to lead a "private social life" and develop his social identity (see, *mutatis mutandis*, *Bigaeva*, cited above, § 22). The Council of Europe has stressed the vital role and importance of providing prisoners with possibilities for resettling successfully in society and leading a law-abiding life following their release (see Recommendation Rec(2003)23, adopted by the Committee of Ministers on 9 October 2003). The Court therefore concludes that the proceedings in question related to a civil right.

65. In view of the foregoing, the Court considers that the applicant's complaint concerning the restrictions to which he was allegedly subjected on account of the refusal of his requests for prison leave is compatible *ratione materiae* with the provisions of the Convention, since it relates to Article 6 in its civil aspect.

66. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The parties' submissions*

#### (a) The applicant

67. The applicant argued that none of the guarantees provided by Article 6 had been afforded to him, either before the Prison Board or before the administrative courts.

68. In the first place he submitted that his case had not been heard by a court or "tribunal", with the result it was not even possible to assess whether the requirement of a "fair hearing" had been met, in the absence of any proceedings concerning the decisions of the Prison Board. He stressed that the latter, under Luxembourg law, was not an ordinary court, an

administrative court or a jurisdictional organ of a professional association, but rather an administrative authority composed of the Attorney General or his or her representative, a judge and a public prosecutor, who were appointed by ministerial order. Even assuming that the Prison Board could be considered as having a judicial role, none of the due process guarantees imposed by Article 6 had been afforded to him. First of all, the Prison Board could not be said to be independent, *vis-à-vis* the executive or the parties, because of its composition and the way its members were appointed. Furthermore, the impartiality of the Prison Board was open to doubt, given that some of its members had been parties to the criminal proceedings and had been in charge of the applicant's prosecution. Lastly, as to the conduct of the proceedings before the Prison Board, the applicant alleged a breach of the adversarial principle and the principle of respect for the rights of the defence. Moreover, the requirement that the proceedings be conducted in public had not been satisfied, as no hearing had taken place; the applicant had simply lodged his request for prison leave and then been informed of the decision by the prison governor. He had therefore had no opportunity of intervening in any way before the Prison Board.

69. With regard to his application to the administrative courts, the applicant further submitted that the latter's finding that they lacked jurisdiction had impaired the very substance of his right of access to a court. The law did not provide for any remedy whereby a prisoner could apply to the courts for a review of the lawfulness of a decision refusing prison leave. If one proceeded on the assumption, as the administrative courts and the Government did, that a decision refusing prison leave was of a judicial nature, it had to be pointed out that there was no ordinary court with jurisdiction to rule in that regard. As the administrative courts had found that they lacked jurisdiction, and the applicant had had no other remedy available to him in respect of the Prison Board's decisions, he concluded that he had been deprived of his right to have his case heard by a "tribunal" within the meaning of Article 6 of the Convention.

**(b) The Government**

70. The Government were of the view that the Prison Board had not infringed the applicant's right to a fair hearing. They pointed out that there were no formalities to be completed in applying to the Board. Prisoners could make a request simply by using a form provided by the prison or by means of a letter written by themselves or their lawyer. They could attach any items they considered relevant and could make observations at any time. The Board gathered all the available evidence, including the prisoner's file, and took its decision after consulting the guidance committee responsible for supervising the prisoner during his detention. Each case was examined individually, with the Board taking into consideration, among other things, the personality of the prisoner, his or her progress while in

prison and the risk of a repeat offence. Refusals by the Board were accompanied by reasons and were never final, and the prisoner could refer to the reasoning of the decision in order to alter his conduct with a view to submitting a fresh request. Where a request was refused, the prisoner could make another request after two months, or even earlier if new evidence came to light. The Prison Board was made up of three members of the national legal service, appointed for a three-year term, who were independent in accordance with the Luxembourg Constitution. The members of the Board were never the same members of the legal service who had prosecuted or convicted the prisoner in question. Hence, the tasks entailed in membership of the Prison Board were entirely separate from those carried out by the prosecuting authorities. The process of prosecuting and sentencing an individual was unconnected to the mandate of the members of the national legal service appointed to sit on the Prison Board. The Government pointed out that the law had deliberately instituted a collegiate board which issued majority decisions, on the basis of the prisoner's file, with a view to affording him or her the greatest possible guarantees of independence and impartiality. On this last point, they submitted that the applicant had not adduced any actual evidence of a lack of independence or impartiality on the part of the Prison Board's members.

71. The Government further submitted that the administrative courts' decisions finding that they lacked jurisdiction to examine the applicant's application had not infringed his right of access to a court for the purposes of Article 6 of the Convention. Pointing out that the State had a certain margin of appreciation in this sphere, they asserted that the 1986 Law did not provide for any appeal against measures relating to the execution of sentences taken in accordance with the law. Once the ordinary courts had passed sentence, the Luxembourg legislature, which had not followed the French example of instituting a post-sentencing judge, sought to ensure that the implementation of that judicial decision was not controlled by the courts, and entrusted this task to the executive. This division of powers pursued a legitimate aim, namely the protection of public order and the prevention of crime. In that connection the Government stated that, while the 1986 Law was aimed at the gradual reintegration of prisoners into society, the sentence was designed to protect society from an individual who was liable to commit further offences outside prison. There was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, given that prisoners had the possibility of applying for several periods of prison leave. Lastly, the Government stressed that the 1986 Law provided for other measures benefiting prisoners in the context of the enforcement of sentences, such as the semi-custodial regime.

*2. The Court's assessment*

72. The Court reiterates that, since the dispute over the decisions taken in respect of the applicant has to be regarded as a dispute relating to "civil rights and obligations", he was entitled to have his case heard by a "tribunal" satisfying the conditions laid down in Article 6 § 1 (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 50, Series A no. 43).

73. For the purposes of Article 6 § 1 a tribunal need not be a court of law integrated within the standard judicial machinery. What is important to ensure compliance with Article 6 § 1 are the guarantees, both substantive and procedural, which are in place (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, *Reports of Judgments and Decisions* 1997-IV). A "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see *Argyrou and Others v. Greece*, no. 10468/04, § 24, 15 January 2009). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 itself (see *Demicoli v. Malta*, 27 August 1991, § 39, Series A no. 210).

74. In the present case the 1986 Law makes clear that decisions on requests for prison leave are taken by the Attorney General or his or her representative, in accordance with the majority decision of a board comprising, in addition to the Attorney General or his or her representative, a judge and a public prosecutor. The board is convened by the Attorney General or his or her representative and is chaired by the judge. The 1986 Law does not provide for public hearings before the Prison Board.

75. It cannot but be observed that each time he submitted a request for prison leave, the applicant was informed of the refusal of the request through the intermediary of the prison governor, without the Prison Board having determined the matter "after proceedings conducted in a prescribed manner" (see, conversely, *Argyrou and Others*, cited above, § 25). This is in itself sufficient basis for finding that the Prison Board did not satisfy the requirements of a "tribunal" within the meaning of Article 6 § 1, making it unnecessary for the Court to examine whether the guarantees of independence, impartiality and fairness of the proceedings were complied with.

76. The Court further reiterates that even where an adjudicatory body determining, like the Prison Board, disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (see, *mutatis mutandis*,

*Albert and Le Compte v. Belgium*, 10 February 1983, § 29, Series A no. 58, and *Crompton v. the United Kingdom*, no. 42509/05, § 70, 27 October 2009).

77. In the instant case the applicant had applied for judicial review of the Prison Board's first two refusals, but both the Administrative Court and the Higher Administrative Court found that they did not have jurisdiction to examine the matter.

78. Hence, the administrative courts did not rule on the merits of the application for judicial review lodged by the applicant. Consequently, the Court can only conclude that the lack of any decision on the merits nullified the effect of the administrative courts' review of the Prison Board's decisions (see, *mutatis mutandis*, *Enea*, cited above, § 82, and *Ganci*, cited above, §§ 29 and 30).

79. The Court also observes, and the Government did not dispute, that the 1986 Law does not provide for any other remedy in this sphere of which the applicant could have availed himself.

80. Lastly, the Court takes note of Recommendation No. 30 by the Ombudsman of the Grand Duchy of Luxembourg, who considered that the system of execution of sentences should be thoroughly overhauled and who advocated the creation of a function of post-sentencing judge akin to that found in other countries such as France (see paragraph 43 above). The Court also notes that the Ombudsman recently welcomed the Minister's intention to act upon his recommendation (see paragraph 44 above).

81. In view of the foregoing, the Court concludes that there has been a violation of Article 6 of the Convention.

## II. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

### A. Article 46

82. Article 46 of the Convention, in its relevant parts, provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

83. Before examining the claims for just satisfaction submitted by the applicant under Article 41 of the Convention, and having regard to the circumstances of the case, the Court will examine what consequences may be drawn from Article 46 of the Convention for the respondent State. It reiterates that, under Article 46, the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. One of

the effects of this is that where the Court finds a violation, the respondent State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V).

84. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I, and *Martins Castro and Alves Correia de Castro v. Portugal*, no. 33729/06, § 62, 10 June 2008).

85. The Court points out that the Ombudsman of the Grand Duchy of Luxembourg advocated a thorough overhaul of the system of execution of sentences, and that it has taken note of a recent statement by the Minister in favour of handing over to a judicial body some of the powers currently exercised by the representative with responsibility for the execution of sentences or by the Prison Board (see paragraphs 43, 44 and 80 above).

86. While reiterating that the respondent State remains free, subject to supervision by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Broniowski*, cited above, § 192) and without seeking to determine what measures may be taken by the respondent State in order to comply with its obligations under Article 46 of the Convention, the Court invites the respondent State and its agencies to take all the necessary measures to ensure that requests relating to the execution of sentences can be examined by a "tribunal" satisfying the requirements of Article 6 § 1 of the Convention.

## B. Article 41

87. 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."

### *1. Damage*

88. The applicant claimed 116,681.11 euros (EUR) in respect of pecuniary damage and EUR 30,000 for loss of opportunity: he alleged that, because he had not been granted prison leave, any progress towards a semi-custodial regime had been denied him until April 2009 and he had therefore been unable to engage in paid work prior to that date. He also claimed EUR 50,000 in respect of non-pecuniary damage.

89. The Government disputed these claims, as to both the principle and the amounts.

90. The Court points out that it will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found (see, among other authorities, *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 40, ECHR 2002-IV). In the instant case, the Court cannot speculate on the outcome of the proceedings had the applicant had access to a court. Accordingly, the finding of a violation of Article 6 § 1 does not imply that the decisions refusing the requests for prison leave were not well-founded or that a differently constituted body would have found for the applicant (see, *mutatis mutandis*, *Kingsley*, cited above, 42). The Court does not therefore perceive any causal link between the violation found and the pecuniary damage and loss of opportunity alleged, and rejects these claims.

91. As to non-pecuniary damage the Court points to its finding that the proceedings concerning the refusal of the applicant's requests for prison leave did not satisfy the requirements of Article 6 § 1 of the Convention. It does not appear unreasonable to consider that the applicant sustained non-pecuniary damage for which the finding of a violation of the Convention does not afford sufficient redress (see, *mutatis mutandis*, *Mathony v. Luxembourg*, no. 15048/03, § 42, 15 February 2007). Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, it awards the applicant the sum of EUR 5,000 under this head.

*2. Default interest*

92. 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. *Declares* the application admissible by a majority;

2. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by four votes to three
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 14 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Stanley Naismith<br>Registrar | Ireneu Cabral Barreto<br>President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Raimondi joined by Judges Jočienė and Sajó is annexed to this judgment.

I.C.B.
S.H.N

# DISSENTING OPINION OF JUDGE RAIMONDI JOINED BY JUDGES JOČIENĖ AND SAJÓ

*(Translation)*

1. To my considerable regret I cannot subscribe to the view of the majority in this case.

2. In my opinion, Article 6 § 1 of the Convention is not applicable to the facts submitted by the applicant for the Court's consideration, either under its criminal head – a view shared by the majority (see paragraph 56 of the judgment) – or under its civil head.

3. I willingly acknowledge, like the majority, that the Court's case-law concerning the applicability of the civil limb of Article 6 § 1 has evolved to some extent as regards the consideration of requests for temporary release and issues relating to the manner of execution of custodial sentences (see the case-law cited at paragraph 57 of the judgment). However, it is my opinion that the applicant could not arguably claim to possess a "right".

4. The judgment quite correctly summarises the Court's existing case-law on the issue of whether or not a civil right exists. In particular, according to that case-law, there are two aspects to the question: whether there was a "dispute" (*contestation*) over a "right" and whether that right was a "civil" right.

5. As to the first aspect, as the judgment rightly points out, Article 6 § 1 applies where there is a genuine and serious "dispute". The dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise, and the outcome of the proceedings must be decisive for the right in question.

6. This right may be recognised in the Convention or the Protocols thereto or in domestic law (see, among other authorities, *Gutfreund v. France*, no. 45681/99, § 39, ECHR 2003-VII). Article 6 § 1 of the Convention is not aimed at creating new substantive rights (as the respondent Government points out in its observations), but at providing procedural protection of rights, whether they are recognised in the Convention or the Protocols thereto or in the domestic legal order (see *Zehnalova and Zehnal v. the Czech Republic* (dec.), no. 38621/97, 14 May 2002, and *W. v. the United Kingdom*, 8 July 1987, § 73, Series A no. 121). In the latter judgment the Court observed that "Article 6 § 1 extends only to '*contestations'* (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States".

7. In my view, it is in relation to this first aspect that the situation complained of by the applicant, that is to say, his requests for "prison leave", fails to satisfy the test of applicability of Article 6 § 1 of the

Convention; unlike the majority (see paragraph 61 of the judgment), I do not believe that this situation is indicative of the existence of a "right".

8. It is beyond dispute that no such right is recognised in the Convention or the Protocols thereto. It therefore remains to be ascertained whether it exists in the Luxembourg legal system.

9. In the light of the legislative framework surrounding the system of prison leave in Luxembourg (see paragraphs 34 to 42 of the judgment), I do not believe that the applicant could arguably maintain that he was entitled to prison leave under Luxembourg law, despite the fact that he satisfied the basic requirements for the granting of such leave (being domiciled or resident in the country and having served at least a third of the sentence – see sections 7 and 8 of the 1986 Law) and the fact that the reasons he gave for requesting prison leave were covered by the aforementioned section 7.

10. In my view, the respondent Government were correct in pointing to the discretionary nature of decisions by the domestic authorities concerning requests for prison leave and in concluding that, where the authorities have discretion as to whether or not to grant a particular concession, that concession does not amount to a "right" and, accordingly, Article 6 § 1 of the Convention does not apply to proceedings concerning its granting or otherwise (see *Gutfreund*, cited above, § 43, and, conversely, *Göç v. Turkey* [GC], no. 36590/97, § 41, ECHR 2002-V).

11. This is the case with regard to prison leave as provided for by Luxembourg law, a concession which is even referred to as a "privilege" by section 7 of the 1986 Law.

12. The majority argue in favour of the existence of the right invoked by the applicant by stating that the – alleged – restrictions to which his right to a court was subjected in connection with his requests for prison leave "relate to a set of prisoners' rights which the Council of Europe has recognised by means of the European Prison Rules, adopted by the Committee of Ministers and elaborated upon in three Recommendations" (see paragraph 61 of the judgment). I cannot agree with this approach. Without wishing to underestimate the significance of these texts, which have the considerable merit of guiding the member States of the Council of Europe in devising and implementing increasingly modern and humanitarian penal policies, I would not go so far as to describe them as binding, which, by definition, they are not.

13. In this connection the majority cites the case of *Enea v. Italy* [GC], no. 74912/01, § 101, ECHR 2009-...). In reality, however, that judgment, while reaffirming the non-binding nature, in particular, of Committee of Ministers Recommendation Rec(2006)2 elaborating on the above-mentioned Prison Rules, confines itself to observing that the great majority of the member States recognise that prisoners enjoy most of the rights to which the Recommendation refers, and provide for remedies to protect them. The existence of a right to appeal before the courts against

decisions liable to affect the rights of prisoners in the legal system of the respondent State in question – in that case, Italy – is based on a 1999 Italian Constitutional Court judgment which specifically held that certain parts of the Prison Administration Act, which did not allow prisoners to apply to the courts to complain of a violation of their rights, were in breach of the Constitution (see *Enea*, cited above, § 100).

14. These are the reasons why I believe the Court should have found in the instant case that the applicant could not arguably claim to possess a "right", that Article 6 § 1 was not applicable and that the application was, accordingly, inadmissible *ratione materiae*.