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

COUR (GRAND CHAMBER)

CASE OF VERMEULEN v. BELGIUM

(Application no. 19075/91)

JUDGMENT

STRASBOURG

20 February 1996

In the case of Vermeulen v. Belgium [1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A [2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. MACDONALD,
Mr C. RUSSO,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr K. JUNGWIERT,
Mr P. KURIS,
Mr J. VAN COMPERNOLLE, *ad hoc judge*,

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

Having deliberated in private on 1 September 1995 and 22 January 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Kingdom of Belgium ("the Government") on 8 December 1994 and 9 January 1995,

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[1] The case is numbered 58/1994/505/587. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 19075/91) against Belgium lodged with the Commission under Article 25 (art. 25) by a Belgian national, Mr Frans Vermeulen, on 6 November 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr I. Foighel, Mr A.N. Loizou, Sir John Freeland, Mr A.B. Baka, Mr M.A. Lopes Rocha and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

On 6 February 1995 Mr De Meyer withdrew pursuant to Rule 24 para. 2, as the case raised issues similar to those in the cases of Delcourt v. Belgium - in which he had acted as Agent and Counsel for the Government (judgment of 17 January 1970, Series A no. 11, p. 5, para. 7) - and Borgers v. Belgium, from which he had withdrawn (judgment of 30 October 1991, Series A no. 214-B, p. 25, para. 3). On 31 March 1995 the delegate of the Agent of the Government informed the Registrar that Professor J. Van Compernolle had been appointed to sit as ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 12 May 1995 and the Government's memorial on 15 May.

5. On 2 February 1995 the President decided in the interests of the proper administration of justice that the instant case and the case of Lobo Machado v. Portugal (21/1994/468/549) should be heard on the same day.

6. On 24 May 1995 the Chamber relinquished jurisdiction in favour of a Grand Chamber (Rule 51). In accordance with Rule 51 para. 2 (a) and (b), the President and the Vice-President (Mr Ryssdal and Mr R. Bernhardt), together with the other members of the original Chamber, became members of the Grand Chamber. On 8 June 1995, in the presence of the Registrar, the President drew by lot the names of the additional judges, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Macdonald, Mr C. Russo, Mrs E. Palm, Mr R. Pekkanen, Mr J.M. Morenilla and Mr P. Kuris.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 30 August 1995. The Court had held a preparatory meeting beforehand.

8. There appeared before the Court:

(a) for the Government

Mr C. DEBRULLE, Head of Department,
Ministry of Justice, *Agent*,
Mr L. SIMONT, avocat,
Mr E. JAKHIAN, avocat, *Counsel*;

(b) for the Commission

Mr H. DANELIUS, *Delegate*;

(c) for the applicant

Mr M. DE BOEl, avocat,
Mr P. TRAEST, avocat, *Counsel*.

The Court heard addresses by Mr Danelius, Mr De Boel, Mr Traest, MrJakhian and Mr Simont, and also their replies to a question put by one of its members.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

9. Mr Vermeulen is a Belgian citizen who lives at Diksmuide (West Flanders).

10. On 6 May 1987, on an application by the department of the procureur du Roi and without any adversarial hearing, the Furnes Commercial Court adjudicated the applicant bankrupt and declared his company - Vermeulen & Verstraete Business Consultancy, Ltd (Zakenkantoor Vermeulen & Verstraete p.v.b.a.) - insolvent. It had heard the opinion of the deputy procureur du Roi but had not heard the applicant himself, who was in custody in Ghent prison on account of criminal proceedings against him for forgery, uttering, fraud and misappropriation.

The applicant applied to the court to set aside that judgment and rehear the case.

11. On 4 May 1988 the court declared the application admissible, ordered that the proceedings should be reopened and put the case on the special list pending the outcome of the criminal investigation that was under way in respect of Mr Vermeulen.

In a written opinion that was read out at the hearing of the case on 6 April 1988, the deputy procureur du Roi had submitted that the application to set aside was admissible but unfounded.

12. On 29 June 1989, on an appeal by the applicant against the judgment of 4 May 1988, in which the Commercial Court had not rescinded the bankruptcy order, the Ghent Court of Appeal, exercising its power to determine also the merits of the case, upheld the judgment of 6 May 1987 (see paragraph 10 above), having heard the submissions to that effect of the deputy procureur du Roi that had been read out at the hearing of the case on 27 April 1989.

13. The applicant lodged an appeal on points of law against the Court of Appeal's judgment, but the Court of Cassation dismissed it on 10 May 1991. At the hearing on the same day it had heard in turn Mr Caenepeel, the judge rapporteur, Mr Vermeulen's lawyer and Mr du Jardin, the avocat général (a member of the procureur général's department). The avocat général made oral submissions and subsequently took part in the court's deliberations.

14. On 17 March 1995 the Antwerp Court of Appeal acquitted the applicant of all the criminal offences with which he had been charged (see paragraph 10 above).

II. RELEVANT DOMESTIC LAW

A. Insolvency declared by the court of its own motion

15. The relevant Articles of the Commercial Code provide:

Article 437

"Any trader who ceases payments and whose credit has been impaired shall be considered insolvent.

..."

Article 442

"Insolvency shall be declared in a judgment of the Commercial Court delivered either on the bankrupt's own admission or on a petition by one or more creditors or of the court's own motion.

..."

16. Proceedings for a declaration of insolvency by the court of its own motion are opened at the instance of the Commercial Court. The procureur du Roi or a member of his department delivers an opinion, in accordance with Article 764, 9°, of the Judicial Code (see paragraph 18 below).

B. The procureurs' and auditeurs' departments (ministère public)

17. Article 138 of the Judicial Code provides:

"Subject to the provisions of Article 141, the department of the procureur du Roi shall act as prosecuting authority in the manner laid down by law.

In civil matters it shall intervene by way of legal proceedings, applications or opinions. It shall act of its own motion in the instances prescribed by law and also on each occasion that public policy requires its intervention."

18. Article 764 of the Judicial Code lists the cases which, unless they are being tried by a magistrate, are to be referred to the procureur du Roi, failing which the proceedings will be null and void. They include, at 9°, those relating to insolvency, compositions with creditors and extensions of time for payments.

19. By Article 141 of the Judicial Code,

"The procureur général at the Court of Cassation shall not act as prosecuting authority except where he has instituted proceedings in which the decision on the merits falls to the Court of Cassation."

The fairly rare instances in which the Court of Cassation hears a case on its merits include trials of ministers (Article 90 of the Constitution), actions against judges for misuse of their authority (Articles 613, 2°, and 1140 to 1147 of the Judicial Code) and disciplinary proceedings against certain judges or other members of the national legal service (Articles 409, 410 and 615 of the same Code).

Other than in these circumstances, the procureur général's department at the Court of Cassation carries out, with complete independence, the duties of adviser to the court.

20. As to the disciplinary hierarchy of the ministère public, the following provisions of the Judicial Code should be mentioned:

Article 400

"The Minister of Justice shall exercise supervisory authority over all the officials of the ministère public; the procureur général at the Court of Cassation likewise over his counterparts at the courts of appeal; and the latter over the members of their own departments and of those of the auditeurs généraux at the Industrial Appeals Tribunals and over the procureurs du Roi attached to the lower courts, the auditeurs attached to the industrial tribunals and their deputies."

Article 414

"The procureur général at the Court of Appeal may impose on the officials of the ministère public subordinate to him the penalties of a warning, a reprimand or a reprimand with suspension of salary.

The procureur général at the Court of Cassation shall have the same powers in regard to the avocats généraux at that court and the procureurs généraux at the courts of appeal.

The Minister of Justice may likewise warn and reprimand any official of the ministère public or recommend to the King his suspension or dismissal."

C. Procedure in the Court of Cassation

21. In respect of the procedure to be followed in the Court of Cassation, in both civil and criminal proceedings, the Judicial Code provides:

Article 1107

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

The procureur général's department shall then make its submissions, after which no further documents shall be accepted."

Article 1109

"The procureur général or a member of his department shall be entitled to attend the deliberations unless the appeal on points of law has been lodged by the procureur général's department itself; he shall not be entitled to vote in the deliberations."

The procureur général's department may lodge an appeal on points of law either "in the interests of the law" (Articles 1089 and 1090 of the Judicial Code and Article 442 of the Code of Criminal Procedure) or following a complaint by the Minister of Justice (Article 1088 of the Judicial Code and Article 441 of the Code of Criminal Procedure).

22. Since 30 October 1991, when the European Court of Human Rights gave judgment in the Borgers case previously cited, an appellant in the

Court of Cassation has been able, at least in criminal cases, to address the court after the representative of the procureur général's department, who does not subsequently attend the court's deliberations.

PROCEEDINGS BEFORE THE COMMISSION

23. In his application of 6 November 1991 to the Commission (no. 19075/91), Mr Vermeulen complained that the Furnes Commercial Court had not given him a hearing before adjudicating him bankrupt of its own motion and that the representative of the procureur général's department had attended the Court of Cassation's deliberations; he relied on Article 6 para. 1 (art. 6-1) of the Convention.

24. In decisions of 29 June 1992 and 19 October 1993 the Commission declared the complaint concerning the proceedings in the Court of Cassation admissible and the remainder of the application inadmissible. In its report of 11 October 1994 (Article 31) (art. 31), it expressed the opinion by eleven votes to five that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

25. In their memorial the Government asked the Court to hold that

> "the presence of a representative of the procureur général's department at the deliberations of the Court of Cassation cannot amount to a breach of Article 6 para. 1 (art. 6-1) of the Convention, either in civil proceedings in general or in the instant case".

26. The applicant asked the Court to

> "find a breach of Article 6 para. 1 (art. 6-1) of the Convention and award just satisfaction pursuant to Article 50 (art. 50) of the Convention".

[3] Note by the Registrar 1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

27. Mr Vermeulen alleged a breach of Article 6 para. 1 (art. 6-1) of the Convention, which provides:

> "In the determination of his civil rights and obligations
>
> ..., everyone is entitled to a fair ... hearing ... by an
>
> ... impartial tribunal ..."

He complained, firstly, that he had not been able to reply, through his lawyer, to the avocat général's submissions or to address the court last at the hearing on 10 May 1991 before the Court of Cassation (see paragraph 13 above); and, secondly, that the representative of the procureur général's department had taken part in the deliberations that had followed immediately afterwards. Although the instant case was a civil one, it could not, he maintained, be distinguished to such an extent from the Borgers case (see paragraph 3 above) that it had to be decided differently.

The Commission accepted these submissions in substance.

28. The Government argued that the fundamental differences between criminal and civil proceedings in the Court of Cassation dictated that the Borgers precedent should not be followed. While, in criminal proceedings, an uninformed accused might take the member of the procureur général's department for his "ally" or his "opponent" objectively speaking (see the Borgers judgment previously cited, p. 32, para. 26), this would seem to be ruled out in civil proceedings, where the true role of the procureur général's department could not give rise to any misunderstanding; in such proceedings appearances corresponded better with the reality.

In criminal proceedings the department of the procureur du Roi which conducted the prosecution in the lower courts was not represented; the appellant consequently appeared before the Court of Cassation opposite a member of the procureur général's department. At a civil hearing, on the other hand, nothing of the kind occurred; appellant and respondent were both represented by a member of the Court of Cassation Bar, so that neither of them - even supposing they were present, which they rarely were - could confuse the procureur général's department with the opposing side. Matters had been no different in the instant case, as Mr Vermeulen, the appellant before the Court of Cassation, had had the trustee in bankruptcy as his opponent (see paragraph 10 above).

In criminal as in civil proceedings, the procureur général's department at the Court of Cassation had no other function than to advise that court

neutrally and objectively as an amicus curiae, so that he might even make different submissions on each of the grounds raised by one and the same appellant. That proved that in reality he was nobody's "opponent" or "ally".

That, the Government continued, was all the more true in civil proceedings, as in those the argument was strictly confined to the grounds raised by the appellant and the procureur général's department could not of its own motion raise any others, even ones based on public policy. The latter's role was therefore even more distinct from that of the only true adversaries, the parties to the case.

In short, as the procureur général's department at the Court of Cassation was not a party to the proceedings, there was no occasion to apply to it the principle of equality of arms, at least not in civil cases.

29. The Court notes, firstly, that the nature of the functions of the procureur général's department at the Court of Cassation - as the Government agreed - does not vary according as the case is a civil or a criminal one. In both instances its main duty, at the hearing as at the deliberations, is to assist the Court of Cassation and to help ensure that its case-law is consistent. The fact that it cannot raise grounds of appeal of its own motion concerns only the scope of its functions, not their nature.

30. It should be noted, secondly, that the procureur général's department acts with the strictest objectivity. On this point, the findings in the Delcourt and Borgers judgments (see pp. 17-19, paras. 32-38, and p. 31, para. 24, respectively) regarding the independence and impartiality of the Court of Cassation and its procureur général's department remain wholly valid.

31. As in its judgment in the Borgers case (see p. 32, para. 26), the Court considers, however, that great importance must be attached to the part actually played in the proceedings by the member of the procureur général's department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the procureur général's department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation. In this connection, the Government emphasised the importance of the department's contribution to ensuring the consistency of the court's case-law.

32. In its judgment in the Delcourt case the Court noted in its reasons for holding that Article 6 para. 1 (art. 6-1) was applicable that "the judgment of the Court of Cassation ... may rebound in different degrees on the position of the person concerned" (pp. 13-14, para. 25). It has reiterated that idea on several occasions (see, mutatis mutandis, the following judgments: Pakelli v. Germany, 25 April 1983, Series A no. 64, p. 17, para. 36; Pham Hoang v. France, 25 September 1992, Series A no. 243, p. 23, para. 40; and Ruiz-Mateos v. Spain, 23 June 1993, Series A no. 262, p. 25, para. 63). The

same applies in the instant case, since the appeal on points of law bore on the lawfulness of Mr Vermeulen's bankruptcy.

33. Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Court of Cassation and to the nature of the submissions made by Mr du Jardin, the avocat général, the fact that it was impossible for Mr Vermeulen to reply to them before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see, among other authorities and mutatis mutandis, the following judgments: Ruiz-Mateos, previously cited, p. 25, para. 63; McMichael v. the United Kingdom, 24 February 1995, Series A no. 307-B, pp. 53-54, para. 80; and Kerojärvi v. Finland, 19 July 1995, Series A no. 322, p. 16, para. 42).

The Court finds that this fact in itself amounts to a breach of Article 6 para. 1 (art. 6-1).

34. The breach in question was aggravated by the avocat général's participation in the court's deliberations, albeit only in an advisory capacity. The deliberations afforded the avocat général, if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction (see the Borgers judgment previously cited, p. 32, para. 28).

The fact that his presence gave the procureur général's department the chance to contribute to maintaining the consistency of the case-law cannot alter that finding, since having a member present is not the only means of furthering that aim, as is shown by the practice of most other member States of the Council of Europe.

There has therefore been a breach of Article 6 para. 1 (art. 6-1) in this respect also.

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

35. Article 50 (art. 50) of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

36. Mr Vermeulen claimed 93,957,922 Belgian francs (BEF) in compensation for the pecuniary damage resulting from the fact that he had not been able to exercise his profession "in a dignified manner" after he had been adjudicated bankrupt.

He also sought "a considerable sum" in respect of the non-pecuniary damage stemming from the professional and family difficulties which had followed the Court of Cassation's dismissal of his appeal.

37. The Government and the Delegate of the Commission rightly submitted that there was no causal link between the breach complained of and the alleged pecuniary damage; it was not, they said, possible to speculate as to what would have been the outcome if the proceedings had satisfied the requirements of Article 6 para. 1 (art. 6-1).

As to the non-pecuniary damage, the Court considers it sufficiently compensated by the finding of a breach.

B. Costs and expenses

38. The applicant also sought BEF 437,739 for costs and expenses occasioned by the bankruptcy proceedings and his representation before the Convention institutions.

39. The Government did not express a view.

40. Like the Delegate of the Commission, the Court considers that of the costs incurred in the proceedings of the national courts, only those relating to the proceedings in the Court of Cassation fall to be taken into account, as the bankruptcy order in respect of the applicant was not, as such, the subject of the present judgment.

On an equitable basis it assesses the costs incurred for Mr Vermeulen's representation in the Court of Cassation and at Strasbourg at BEF 250,000.

C. Default interest

41. According to the information available to the Court, the statutory rate of interest applicable in Belgium at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by fifteen votes to four that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention;

2. Holds unanimously that this judgment constitutes in itself sufficient just satisfaction in respect of the alleged non-pecuniary damage;

3. Holds unanimously that the respondent State is to pay the applicant, within three months, 250,000 (two hundred and fifty thousand) Belgian francs for costs and expenses, on which sum simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 February 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:
(a) joint dissenting opinion of Mr Gölcüklü, Mr Matscher and Mr Pettiti;
(b) dissenting opinion of Mr Van Compernolle.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ, MATSCHER AND PETTITI

(Translation)

It is an old tradition in the legal systems of continental Europe for Crown or State Counsel's department to be represented in the higher courts (of appeal or cassation), both civil and criminal, and to be able to intervene either orally or in writing; the institution goes back to the time when the codes were compiled and is closely bound up with the idea underlying them. The role of the department when discharging this function was to see to it that the law was correctly interpreted and to ensure the uniformity and consistency of the case-law. Whereas in the systems of Germanic origin the role of Crown or State Counsel's department in civil proceedings has been gradually limited to certain aspects of the law of persons and of the family (in the relevant countries the department in practice now acts only as prosecuting authority in criminal proceedings), in the legal systems of Roman origin the department has retained its original role, even in civil proceedings in the Court of Cassation and to some extent also in the courts of appeal. The institution of Advocate-General at the Court of Justice of the European Communities and of the Delegate of the Commission at our Court is based on similar ideas.

Belgian law is of the Roman type and makes provision for the procureur général at the Court of Cassation to be present and to be able to intervene, for the purpose explained above.

In our view, to see the procureur général, when he acts in civil proceedings, as an adversary of either of the parties is to misunderstand the nature of the institution, since his role - of what one might call an amicus curiae - is solely that of a neutral and objective guardian of the lawfulness of the proceedings and of the uniformity and consistency of the case-law. To that extent, his participation in the hearing and - in an advisory capacity - in the deliberations in no way offends against the principle of equality of arms as he is placed above the parties.

As regards systems of civil procedure which reflect traditions that have proved themselves in national law and are well received by legal practitioners, we consider that when interpreting Article 6 (art. 6) in respect of matters such as the role of the procureur général at the Court of Cassation, the European Court must make sure that it does not, through excessive formalism, overturn such traditions.

While saying that, we should also like to point out that, in our view, the relevant legal arrangements in Belgium and in other countries, such as France and Italy, may seem rather strange, and a legal system could well do without them - witness the fact that the custom of having Crown or State Counsel's department represented and able to intervene in civil proceedings

has been almost entirely abandoned in a large number of European countries, without any adverse effect on the case-law.

Nevertheless, we see no reason to criticise legal systems which wish to maintain this practice, as doing so will not lead to better, real protection of parties' interests, especially since, as the Court pointed out in its judgment in the Dombo Beheer B.V. v. the Netherlands case (27 October 1993, Series A no. 274, p. 19, para. 32), the national authorities have a wider margin of appreciation under Article 6 (art. 6) in civil proceedings.

Furthermore, in the Borgers v. Belgium judgment (30 October 1991, Series A no. 214-B) the Court based its finding of a breach of Article 6 para. 1 (art. 6-1) mainly on the combination of two things: the fact that it was impossible for the accused to reply to the submissions of the procureur général's department before the end of the hearing and the presence of that department's representative at the Court of Cassation's deliberations. In the instant case - a civil one, it should be emphasised - the Court finds a breach in each of those features, even taken separately, and thus goes even further than in the Borgers case concerning a criminal matter.

Of course, the situation is different in criminal proceedings, and here we wholly endorse the Court's conclusions in the Borgers v. Belgium judgment.

DISSENTING OPINION OF JUDGE VAN COMPERNOLLE

(Translation)

I regret that I cannot concur in the present judgment.

For its scope to be appreciated, it must be remembered that it was essentially with regard to the principle of equality of arms and the role of appearances that the Court in its judgment in the Borgers case - a criminal one - held that there had been a breach of Article 6 para. 1 (art. 6-1) of the Convention. The central argument underpinning the reasoning in that judgment lay in the consideration that "by recommending that an accused's appeal be allowed or dismissed, the official of the procureur général's department becomes objectively speaking his ally or his opponent" (Borgers judgment of 30 October 1991, Series A no. 214-B, pp. 31-32, para. 26).

In the present judgment - which, it should be emphasised, relates to civil proceedings - this reasoning is not reiterated. The procureur général's department at the Court of Cassation is not regarded as "objectively speaking" an "opponent" in respect of whom the principle of equality of arms would require both that the parties should have a right of reply and that the department should be excluded from any participation in the deliberations. In a statement of principle, it is the right to adversarial proceedings which becomes the keystone of the judgment in its finding of a double breach of Article 6 (art. 6).

Personally, I cannot agree with this analysis.

1. It seems to me to be wrong to apply the adversarial principle to the intervention of an independent member of the national legal service who, after the parties have addressed the court, does no more than give, as an amicus curiae, an opinion on the case whose objectivity and impartiality are indisputable. The fact that the parties cannot reply to that opinion in no way puts in doubt their right to a fair hearing, which was fully exercised in the adversarial proceedings in which they took part as opponents.

It must also be pointed out that in this matter the cassation proceedings governed by the Belgian Judicial Code broadly correspond to the procedure applicable in several international courts, whose rules of procedure likewise provide for submissions to be made, after the parties have addressed the court, by an independent legal officer who is not a member of the bench (see, for instance, Rule 44 of the Rules of Procedure of the Benelux Court of Justice and Article 59 of the Rules of Procedure of the Court of Justice of the European Communities).

2. It seems to me to be equally wrong to link the finding of a breach of Article 6 (art. 6) of the Convention on account of the participation of the procureur général's department in the Court of Cassation's deliberations to the adversarial principle in a civil case.

Seeing that the procureur général's department at the Court of Cassation cannot be perceived as a party to the dispute any more than as objectively speaking the ally or the opponent of any party, the - purely advisory - intervention of an independent and impartial member of the national legal service, in the sole interest of contributing to the uniformity and consistency of the case-law, in no way affects the right to a fair hearing.

3. As Judges Gölcüklü, Matscher and Pettiti judiciously remark in their dissenting opinion, it should also be pointed out - but as a subsidiary observation, as far as I am concerned - that in the aforementioned Borgers judgment the Court based its finding of a breach of Article 6 (art. 6) on the combination of two things: the fact that it was impossible for the accused to reply to the submissions of the procureur général's department before the end of the hearing and the presence of that department's representative at the Court of Cassation's deliberations. In the present judgment - which relates to a civil case - the Court finds a breach in each of those features taken separately. There is nothing, in my opinion, to justify this greater degree of severity when, as the Court held in its judgment in the Dombo Beheer B.V. v. the Netherlands case (27 October 1993, Series A no. 274, p. 19, para. 32), the national authorities have a wider margin of appreciation under Article 6 (art. 6) in civil proceedings.