In the case of Van Orshoven v. Belgium (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr J.M. Morenilla,
Sir John Freeland,
Mr A.B. Baka,
Mr G. Mifsud Bonnici,
Mr E. Levits,
Mr M. Storme, ad hoc judge,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 25 January and 30 May 1997,

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

Notes by the Registrar

1. The case is numbered 95/1995/601/689. 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.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 25 October 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 20122/92) against the Kingdom of Belgium lodged with the Commission under Article 25 (art. 25) by a Belgian national, Mr Yvo Van Orshoven, on 13 March 1992.

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 object of the request 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 of the Convention (art. 6-1).

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). Initially referred to as I.V.O., he subsequently consented to the disclosure of his identity.

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. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 3 November 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr J.M. Morenilla, Sir John Freeland, Mr A.B. Baka, Mr G. Mifsud Bonnici and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

On 20 November 1995 Mr De Meyer stated that he wished to withdraw from the case pursuant to Rule 24 para. 2, because it raised issues similar to those which had arisen 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 and Vermeulen v. Belgium, from which he had withdrawn (judgments of 30 October 1991, Series A no. 214-B, p. 25, para. 3, and 20 February 1996, Reports of Judgments and Decisions 1996-I, p. 227, para. 3). On 22 December 1995 the Agent of the Belgian Government ("the Government") informed the Registrar that Mr M. Storme, Professor of Law at Ghent University, 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. 6), Mr Bernhardt, 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 Government's and the applicant's memorials on 31 May 1996. On 2 July 1996 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing. On 23 August he supplied various documents, as requested by the Registrar on the instructions of the President.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Lathouwers, Deputy Legal Adviser,
Head of Division, Ministry of Justice, Agent,
Mr E. Jakhian, of the Brussels Bar, Counsel;

(b) for the Commission

Mr L. Loucaides, Delegate;

(c) for the applicant

Mr J. Coch, of the Hasselt Bar,
Mr P. Thiery, of the Hasselt Bar, Counsel.

The Court heard addresses by Mr Loucaides, Mr Coch, Mr Thiery and Mr Jakhian.

AS TO THE FACTS

I. Particular circumstances of the case

6. Mr Yvo Van Orshoven, a Belgian citizen born in 1940, lives at Neerglabbeek (province of Limburg), where he has a private practice as a doctor.

7. At the beginning of 1987 he was the subject of an

administrative inquiry by the National Institute for Sickness and Disability Insurance (Institut national d'assurance maladie-invalidité ("INAMI")) following a complaint by a mutual insurance company, which accused him of supplying treatment without a prescription and claiming payment for treatment that had not been given or in respect of which the conditions laid down by law had not been satisfied.

8. On 19 August 1987 the INAMI sent the file to the Limburg Provincial Council of the Ordre des médecins (Medical Association), annexing complaints by three of the applicant's patients who accused him of professional misconduct towards them.

9. After interviewing the applicant on 2 February 1988, the Executive Committee of the Provincial Council decided to look into the matter.

On 24 March 1988 the Provincial Council held a hearing, which Mr Van Orshoven did not attend despite being summoned to do so. The council joined the INAMI case and the patients' complaints and on 28 April 1988, in the applicant's absence, ordered that he should be struck off the register of the Ordre.

10. On 11 May 1989, on an application by the applicant to have that decision set aside, the Provincial Council substituted a penalty of suspension from practising medicine for 18 days in respect of the administrative matter and 129 days in respect of the complaints.

11. The applicant appealed against that decision to the Dutch-language Appeals Board of the Ordre, which on 25 June 1990 ordered that he be struck off the register.

12. Mr Van Orshoven then lodged an appeal on points of law with the Court of Cassation. On 13 September 1991 a hearing was held at which the court heard in turn the reporting judge (Mr Verougstraete), counsel for the applicant, counsel for the other side (the Ordre des médecins) and the avocat général (Mr du Jardin), who after making his submissions - the content of which has not been communicated to the Court - took part in the court of Cassation's deliberations. On the same day the court dismissed the appeal.

II. Relevant domestic law

A. Disciplinary rules

13. The Ordre des médecins and its councils are governed by Royal Decree no. 79 of 10 November 1967 on the Ordre des médecins and the Royal Decree of 6 February 1970 on the organisation and functioning of the councils of the Ordre.

14. At first instance disciplinary action is taken by the provincial councils of the Ordre, which are required to "ensure that the rules of professional conduct are complied with and that the reputation, discretion, probity and dignity of ... medical practitioners ... are upheld. To this end, they shall be responsible for imposing disciplinary penalties for misconduct by ... medical practitioners in the performance of their professional duties, as well as serious misconduct unconnected with their professional duties where such misconduct is likely to damage the reputation or dignity of the profession" (Article 6, second sub-paragraph, of Royal Decree no. 79).

15. The members of the provincial councils are elected by the medical practitioners registered with the Ordre who are not suspended from practising. They are assisted in their task by an assessor who sits in an advisory capacity only. Assessors are appointed by the Crown from among the judges of the tribunaux de première instance (regional courts of first instance), excluding the investigating judges and members of the prosecution (Article 7).

16. The provincial councils may institute proceedings either of their own motion or at the request of the National Council, the Minister responsible for public health, the procureurs du Roi or the provincial medical boards, or on a complaint from a doctor or other person. The executive committee of the provincial council starts an investigation into the matter and appoints a reporting member. At the end of the investigative stage, either the committee or the reporting member reports to the council (Article 20 para. 1), which may decide to discontinue the proceedings, to order further inquiries into the facts or to summon the doctor under investigation to appear in person at an adversarial hearing (Articles 24 and 26 of the Royal Decree of 6 February 1970).

17. The council may impose the following penalties: a warning, a censure, a reprimand, suspension of the right to practise medicine for up to two years and striking off the register (Article 16, first paragraph, of Royal Decree no. 79).

18. Appeals against such decisions of provincial councils lie to appeals boards and may be brought by the doctor on whom the disciplinary penalty has been imposed or the provincial council assessor or by the Chairman of the National Council of the Ordre des médecins acting jointly with one of the vice-chairmen (Article 21 of Royal Decree no. 79). The appeals boards are composed of equal numbers of doctors elected by the provincial councils and judges of the courts of appeal appointed by the King (Article 12). The procedure is adversarial and the doctor, who is entitled to be assisted by his counsel, has the right to address the board. Appeals boards can only impose a penalty where none has been imposed by the provincial council, or impose a heavier penalty than that imposed by the council, by a two-thirds majority (Article 25 para. 4, second sub-paragraph).

19. An appeal lies from the appeals boards to the Court of Cassation and may be brought by the doctor on whom the disciplinary penalty has been imposed or the Minister responsible for public health or by the Chairman of the National Council of the Ordre acting jointly with one of the vice-chairmen (Article 23, first paragraph). Proceedings in the Court of Cassation are governed by the rules of civil procedure, save in three respects relating to the time-limit for appeals, the form in which they must be lodged and service of the Court of Cassation's judgment (Article 26).

B. The Judicial Code

20. 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."

21. 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."

Examples of the - relatively rare - cases in which the Court of Cassation acts as a tribunal of fact include: trials of Ministers (Article 90 of the Constitution), actions against judges for

misuse of authority (Articles 613 (2) and 1140 to 1147 of the Judicial Code) and disciplinary proceedings against certain judicial officers.

In all other cases, the procureur général's department acts, with complete independence, as an adviser to the court.

22. 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."

23. With regard to the procedure before the Court of Cassation in both civil and criminal matters 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 itself lodge appeals 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).

24. Since the aforementioned Borgers and Vermeulen judgments

(see paragraph 3 above), appellants in the Court of Cassation have been entitled, in both criminal and civil proceedings, to address the court after the representative of the procureur général's department, who does not then attend the court's deliberations.

PROCEEDINGS BEFORE THE COMMISSION

25. In his application of 13 March 1992 to the Commission (no. 20122/92) Mr Van Orshoven complained of various breaches of his right to a fair hearing as guaranteed by Article 6 para. 1 of the Convention (art. 6-1).

26. On 7 April 1994 and 27 February 1995 the Commission declared admissible the complaint relating to the fact that it was impossible for the applicant to reply to the procureur général's submissions at the hearing in the Court of Cassation and declared the remainder of the application inadmissible. In its report of 15 September 1995 (Article 31) (art. 31), it expressed the opinion by twenty votes to seven that there had been a violation of Article 6 para. 1 (art. 6-1), after indicating that it would not examine the complaint that a member of the procureur général's department had taken part in the Court of Cassation's deliberations, which had been made late. The full text of the Commission's opinion and of the seven separate opinions contained in the report is reproduced as an annex to this judgment (1).

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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 1997-III), but a copy of the Commission's report is obtainable from the registry.

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27. In its request of 25 October 1995 bringing the case before the Court, which was signed by its President, the Commission said, in particular:

> "The subject matter of the request is the presence of a member of the procureur général's department at the Court of Cassation at that court's deliberations in disciplinary proceedings against a doctor and the question whether that situation complies with the requirements of Article 6 para. 1 of the Convention (art. 6-1)."

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the Government submitted:

> "May it please the Court,
>
> As our primary submission, with respect to the Court's jurisdiction,
>
> To hold that it has no jurisdiction to hear the present case, as the issue referred to it by the Commission was declared inadmissible by implication and the Court cannot extend its jurisdiction beyond the scope of the application or request whereby the case was referred to it;
>
> In the alternative, on the merits,
>
> To hold that generally in civil matters the fact that it is impossible to reply to the submissions of the procureur général's department at the Court of Cassation (and its representative's presence at the court's deliberations) do not amount to a breach of the principle of equality of arms where due process has been complied with before the courts

below;

In the further alternative, to hold that in the present case the fact that it was impossible to reply to the submissions of the procureur général's department at the Court of Cassation (and its representative's presence at its deliberations) did not amount to a violation of Article 6 para. 1 of the Convention (art. 6-1) as the applicant's appeal on points of law in the present case could not have affected his legal position and the applicant could not reasonably have mistaken the role of the procureur général's department at the Court of Cassation."

29. At the hearing before the Court, Mr Van Orshoven's counsel invited the Court to declare the application admissible and to "find against" the Belgian State.

AS TO THE LAW

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

30. Mr Van Orshoven submitted that there had been a breach of Article 6 para. 1 of the Convention (art. 6-1), which provides:

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

Referring to the Borgers v. Belgium judgment of 30 October 1991 (Series A no. 214-B), 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 13 September 1991 before the Court of Cassation; and, secondly, that the representative of the procureur général's department had taken part in the deliberations that had followed immediately afterwards (see paragraph 12 above).

A. The Government's preliminary objection

31. The Government noted that the only complaint in the Commission's request bringing the case before the Court was based on the fact that a member of the procureur général's department had taken part in the Court of Cassation's deliberations. Yet in its report of 15 September 1995 the Commission had implicitly declared that complaint inadmissible because it had been made out of time (see paragraphs 26 and 27 above). That being so, the Court had no jurisdiction to hear it. As to the complaint based on the fact that it had been impossible to reply to the avocat général's submissions, the Court had no jurisdiction to hear that either as it had not been included in the Commission's request.

32. At the hearing the Delegate of the Commission indicated that the complaint concerning the Court of Cassation's deliberations, which the Commission had rejected as being out of time, had been mentioned in the request by mistake. The only issue before the Court was the avocat général's being the last to address the Belgian Court of Cassation at the hearing.

33. The Court reiterates that in accordance with its settled case-law the scope of the case before it is determined by the Commission's decision on admissibility (see, as a recent authority, the Mauer v. Austria judgment of 18 February 1997, Reports of Judgments and Decisions 1997-I, pp. 82-83, para. 28).

In the instant case the only complaint declared admissible by the Commission was that it had been impossible for Mr Van Orshoven to reply to the submissions of the procureur général's department

(see paragraph 26 above). That complaint therefore constitutes the sole subject matter of the case.

Consequently, the Government's preliminary objection must be dismissed.

B. Merits of the complaint

34. Mr Van Orshoven said that at no stage in the proceedings before the Court of Cassation had he been able to reply to the avocat général's submissions, which furthermore had not been communicated to him. Yet the avocat général's opinion could not be considered impartial as he had advocated dismissing the appeal. The applicant had therefore had a definite interest in being able to reply before the hearing came to an end, particularly as much was at stake in the appeal, namely the right to practise as a doctor.

Admittedly, the procureur général's department had not in the instant case taken part in the disciplinary proceedings on the merits before the authorities of the Ordre des médecins. Nevertheless, the procureur du Roi could at any time ask a provincial council of the Ordre to commence proceedings against any member of the Ordre. The procureur général's department was therefore to be regarded as every doctor's potential opponent.

In conclusion, Mr Van Orshoven's defence rights had been infringed.

35. The Delegate of the Commission considered that the instant case raised an issue similar to that in the cases of Lobo Machado v. Portugal and Vermeulen v. Belgium (judgments of 20 February 1996, Reports 1996-I, pp. 195 et seq., and 224 et seq.) and that the same solution accordingly had to apply. He consequently submitted that there had been a violation of Article 6 para. 1 (art. 6-1).

36. In the Government's view, the fact that the applicant had not been able to reply to the avocat général's submissions did not mean that the rights of the defence or the principle of equality of arms had been infringed, because the avocat général had not been the applicant's opponent or even a party to the proceedings. In disciplinary matters the department of the procureur du Roi did not take part at any stage or in any capacity in the proceedings before the provincial council or the appeals board of the Ordre des médecins, even when it had originated the proceedings.

Furthermore, the proceedings in the tribunals of fact had satisfied the requirements of Article 6 of the Convention (art. 6), as the Commission had found in its decision of 7 April 1994 on the admissibility of the application (see paragraph 26 above). Relying on the Ekbatani v. Sweden judgment of 26 May 1988 (Series A no. 134) in particular, the Government argued that before the Court of Cassation, whose jurisdiction was limited to questions of law, compliance with the requirements could accordingly be less strict without that necessarily incurring the criticism that there had been a breach of the Convention.

An additional factor was that there had not really been anything at stake for Mr Van Orshoven in the proceedings before the Court of Cassation as the grounds in support of his appeal on points of law were clearly unsustainable, either because they were inadmissible or because they raised legal arguments that were contrary to well-established case-law.

Lastly, the applicant could not reasonably have been under any misapprehension either as to the role of the procureur général's department or as to the identity of his opponent, the Ordre des médecins, since the Ordre was represented at the hearing before the Court of Cassation. Thus, even if the applicant had

perceived the position differently, he could not be considered to have been objectively justified in so doing.

37. The Court notes, firstly, that independently of whether the case is a civil, criminal or disciplinary one, the main duty of the procureur général's department at the Court of Cassation at the hearing - as at the deliberations - is always to assist the Court of Cassation and to help ensure that its case-law is consistent.

38. It should be noted, secondly, that the procureur général's department acts with the strictest objectivity. On this point, the findings in the Delcourt v. Belgium judgment of 17 January 1970 (Series A no. 11, pp. 17-19, paras. 32-38) and the Borgers (p. 31, para. 24) and Vermeulen (p. 233, para. 30) judgments cited above regarding the independence and impartiality of the Court of Cassation and its procureur général's department remain wholly valid.

39. As in its judgments in the Borgers case (see p. 32, para. 26) and the Vermeulen case (see p. 233, para. 31), 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 of Cassation's case-law.

40. 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 persons concerned" (pp. 13-14, para. 25). It has reached a similar conclusion in several other cases concerning different countries (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; Ruiz-Mateos v. Spain, 23 June 1993, Series A no. 262, p. 25, para. 63; Lobo Machado v. Portugal cited above, p. 206, para. 30; and Vermeulen v. Belgium cited above, p. 233, para. 32). The same applies in the instant case, since the appeal on points of law concerned the lawfulness of the applicant's removal from the register and the consequential ban on his practising medicine.

41. Regard being had, therefore, to what was at stake and to the nature of the submissions made by the avocat général, the fact that it was impossible for the applicant 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 trial to have knowledge of and comment on all evidence adduced or observations filed (see, among other authorities and mutatis mutandis, the Vermeulen judgment cited above, p. 234, para. 33; and the Nideröst-Huber v. Switzerland judgment of 18 February 1997, Reports 1997-I, p. 108, para. 24).

42. Accordingly, there has been a violation of Article 6 para. 1 (art. 6-1).

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

43. Article 50 of the Convention (art. 50) 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

44. The applicant claimed 7,258,855 Belgian Francs (BEF) for pecuniary damage, to which he added BEF 120,980 per month "from delivery of the judgment until the date on which Mr Van Orshoven's name is restored to the list of medical practitioners in the province of Limburg". Those amounts represented the fees he would have received had he not been permanently suspended.

He also sought BEF 1,000,000 for non-pecuniary damage.

45. The Delegate of the Commission did not express a view.

46. The Government rightly submitted that there was no causal link between the violation complained of and the alleged pecuniary damage; it is indeed not possible to speculate as to the outcome of the proceedings if they had satisfied the requirements of Article 6 para. 1 (art. 6-1).

As to non-pecuniary damage, the Court considers it sufficiently compensated by the finding of a violation (art. 6-1).

B. Costs and expenses

47. The applicant also sought BEF 250,000 for costs and expenses occasioned by the proceedings in the Court of Cassation and his representation before the Convention institutions.

48. The Delegate of the Commission made no observations.

49. Relying on the Welch v. the United Kingdom judgment of 26 February 1996 (Reports 1996-II, p. 386), the Government agreed to pay, if a violation was found, a maximum of one-third of the costs claimed by the applicant.

50. The Court notes that the Welch judgment concerned only claims made under Article 50 (art. 50), which had been rejected. In the instant case, on the other hand, the Court has found a breach of Article 6 para. 1 (art. 6-1).

Making its assessment on an equitable basis, it awards the amount claimed, that is to say BEF 250,000.

C. Default interest

51. 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 7% per annum.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by seven votes to two that there has been a violation of Article 6 para. 1 of the Convention (art. 6-1);

3. Dismisses unanimously the claim for just satisfaction for the alleged pecuniary damage;

4. Holds unanimously that this judgment in itself constitutes sufficient just satisfaction for the alleged non-pecuniary damage;

5. Holds by eight votes to one 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 7% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 25 June 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Mifsud Bonnici;
(b) dissenting opinion of Mr Pettiti;
(c) dissenting opinion of Mr Storme.

Initialled: R. B.

Initialled: H. P.

CONCURRING OPINION OF JUDGE MIFSUD BONNICI

I form part of the majority. However for the sake of precision, I feel bound to note that I do not think it proper for the judgment to contain in its obiter dicta the statements contained in paragraph 38, that is to say, in the first place:

> "... the procureur général's department acts with the strictest objectivity."

The Court, in reality did not have the opportunity of examining whether the procureur général acted objectively or otherwise. Indeed it did not have to as that question was not before it. What was before it was that, since the procureur général had to intervene in the case, then the applicant had the right of reply. To state that that intervention is carried out "with the strictest objectivity" not only hands out an unwarranted blanket certificate on the permanent quality and nature of the modus operandi of the procureur général, but it also weakens the considerations on which the judgment is based because this "strictest objectivity" once it exists would not justify the finding of a violation which is anything else but formal.

The question is further loaded in this objectionable sense when, in the same paragraph, the Court approves what it had said in previous judgments:

> "... regarding the independence and impartiality of the Court of Cassation and its procureur général's department remain wholly valid."

From my point of view, therefore, paragraph 38 should not form part of the judgment.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority in favour of finding that there had

been no violation for the following reasons.

The Court's reasoning, in particular in paragraph 39, seems to me to be couched in terms that are too general with the risk that it may be applied in other cases that are more or less similar, with no account being taken of the individual nature of each national legal order so far as proceedings in the Court of Cassation and the role of that court's procureur général and avocats généraux are concerned.

Criminal and civil proceedings cannot be treated identically where the domestic order makes special arrangements; similarly, it is not possible to treat proceedings where one party (such as a professional body) is opposed to an applicant who is a member of the profession in the same way as other proceedings.

In addition, in the context of disciplinary proceedings following a decision of a professional body, there must be taken into account, in each individual case, the special features of the domestic procedural order at the level of the appellate court below the Court of Cassation, namely the composition of the court and the role of the parties and avocats généraux.

Further, there is in my view a contradiction in the reasoning in paragraph 39, which provides that the opinion of the procureur général's department is intended to advise and influence the Court of Cassation. Yet, in the instant case, the judgment of the Court of Cassation merely contains a reference to the fact that it was delivered after the avocat général had made submissions, there being nothing to suggest that he had argued in favour of dismissing the applicant's appeals on points of law or, consequently, that he had exerted any influence on the Court of Cassation that could be considered an infringement of the applicant's right to an adversarial hearing.

With regard to the special nature of the procureur général's department at the Court of Cassation in Belgium, I subscribe to the observations of Judge Storme with reference to the separate opinions in the Borgers and Vermeulen judgments. I also note that the Court has not reiterated the reasoning based on outward appearances or, in paragraph 38, the formulas previously used in the Borgers and Vermeulen judgments.

It is true that in the present case the sole issue concerned the fact that the applicant was unable to reply to the submissions of the procureur général's department.

The Court will no doubt have an opportunity to refine its case-law when dealing with similar proceedings whilst remaining alert to its international impact (particularly with respect to the role of Advocates General at the Court of Justice of the European Communities) and its effect on Court of Cassation proceedings in national systems.

DISSENTING OPINION OF JUDGE STORME

(Translation)

I regret that I am unable to agree with the present judgment as I consider that the fact that it was not possible to reply to the avocat général's submissions did not in the present case infringe the applicant's rights to adversarial proceedings.

I do not intend to reiterate in detail the role of the procureur général's department at the Court of Cassation, which I analysed in my dissenting opinion in the case of Borgers v. Belgium (judgment of 30 October 1991, Series A no. 214-B, pp. 53 et seq.).

It is sufficient to note - as indeed is rightly stated in the judgment - that the function of the procureur général's department is to advise the Court of Cassation on the main principles of law, on compliance with the law and rules governing the form of the procedure and to ensure that the case-law remains consistent.

In the present case, I do not find convincing the argument that the fact that it was not possible to reply to the avocat général's submissions, the content of which is an unknown, meant that the applicant was prejudiced.

It must be emphasised that the words "after submissions" in the Court of Cassation's judgment in the Van Orshoven case have no special meaning, as they do not indicate whether the submissions were in favour of allowing or of dismissing the appeal.

That formula may be used both for submissions in favour of allowing an appeal and submissions in favour of its dismissal. Accordingly, the applicant has not shown any special ground for complaint.

In the present case, it seems to me to be important to highlight certain particular features.

There was no procureur général's department either at first instance or on appeal so that it was unable to take part at any time or in any capacity in the proceedings on the merits.

In the Court of Cassation the applicant had an opponent, namely the Ordre des médecins, which marks an essential difference from the cases of Borgers (cited above) and Vermeulen v. Belgium (judgment of 20 February 1996, Reports of Judgments and Decisions 1996-I). The procureur général could not in the circumstances be the applicant's opponent, that being the role of the Ordre des médecins. Nonetheless, the issue in the judgment is whether the right to adversarial proceedings was infringed (see paragraph 41 of the judgment).

In the present case, the disciplinary proceedings at first instance and on appeal were properly conducted, as was pointed out by the European Commission of Human Rights.

Although the Court appears to have abandoned in its recent case-law the principle of outward appearances, the finding of a violation in the present judgment is in my opinion based on an assessment of the right to adversarial proceedings that is purely formal. Indeed, the Court did not consider whether, in the instant case, the lack of adversarial proceedings could have adversely affected the applicant's interests (compare the Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B; the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267; and the Remli v. France judgment of 23 April 1996, Reports 1996-II: the applicant's fears must be such that they may be held to be objectively justified).

Lastly, it has to be said that the purely formal approach taken in the present judgment will have repercussions not only in Belgium, but also in international proceedings. It seems to me that neither the procureur général's department nor Crown Counsel attached to the industrial tribunals (auditorat du travail) will be entitled to address courts or tribunals - whether civil, commercial or industrial - last, as is provided for by the Belgian Judicial Code.

Similarly, the parties will have to have the right to make observations on the opinion of the representative of the Belgian Conseil d'Etat and on the submissions of the Advocates General at the Court of Justice in Luxembourg.

That of course would be a major change entailing, in my

opinion, unduly protracted proceedings as the inevitable general consequence of the formal principle stated in the present judgment.