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

CASE OF AÏT-MOUHOUB v. FRANCE

(103/1997/887/1099)

JUDGMENT

STRASBOURG

28 October 1998

In the case of Aït-Mouhoub v. France[1],

The European Court of Human Rights, sitting, in accordance with Article 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 J. DE MEYER,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr L. WILDHABER,
Mr V. BUTKEVYCH,

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

Having deliberated in private on 23 June, 27 August and 25 September 1998,

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") on 29 October 1997 and by the French Government ("the Government") on 7 January 1998, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22924/93) against the French Republic lodged with the Commission under Article 25 by a French national, Mr Areski Aït-Mouhoub, on 9 November 1992.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to

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Notes by the Registrar

1. The case is numbered 103/1997/887/1099. 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 of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

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

3. The Chamber to be constituted included *ex officio* Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 28 November 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr J. De Meyer, Mr N. Valticos, Mr I. Foighel, Mr R. Pekkanen, Mr A.N. Loizou and Mr V. Butkevych (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr R. Bernhardt, the Vice-President of the Court at the time, replaced Mr Ryssdal, who had died on 18 February 1998 (Rule 21 § 6, second sub-paragraph), and Mr L. Wildhaber, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 15 and 27 May 1998 respectively. On 2 June 1998 the Commission produced the file on the proceedings before it as the Registrar had requested on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 June 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mrs M. DUBROCARD, *magistrat*, on secondment to the Legal Affairs Department, Ministry of Foreign Affairs, *Agent*,
Mr A. BUCHET, *magistrat*, Head of the Human Rights Office, European and International Affairs Department, Ministry of Justice,
Mr B. DALLES, *magistrat*, on secondment to the Office of Criminal Justice and Liberties of the Subject, Criminal Affairs and Pardons Department, Ministry of Justice, *Advisers*;

(b) *for the Commission*
Mr J.-C. SOYER, *Delegate*;

(c) *for the applicant*
Mr P. MAGNE, of the Alès Bar, *Counsel.*

The Court heard addresses by Mr Soyer, Mr Magne and Mrs Dubrocard.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. Mr Areski Aït-Mouhoub, a French national born in 1951, is currently in prison in Montpellier.

A. Background

7. On 1 July 1992 the Indictment Division of the Nîmes Court of Appeal committed the applicant, together with his son and daughter, who had been minors at the material time, for trial at the Gard Youth Assize Court for aiding and abetting armed robbery, for aggravated theft and for handling stolen goods.

8. On 11 December 1992 the Assize Court sentenced him to twelve years' imprisonment for aiding and abetting armed robbery and for aggravated handling and ordered that he should not be eligible for any form of release for seven years.

9. On 14 December 1992 the applicant lodged an appeal on points of law against his conviction.

B. The applicant's criminal complaints and his applications for legal aid

1. The first complaint and the application for legal aid in respect of it

10. On 28 December 1992 Mr Aït-Mouhoub lodged a criminal complaint, together with a civil-party application, against two gendarmes (Mr Maurin and Mr Seguin) who had taken part in the judicial investigation that had led to the applicant's being found guilty and sentenced by the Youth Assize Court.

In it the applicant accused Mr Maurin of subornation of perjury, forgery of documents and uttering, malfeasance, abuse of office, extortion and aiding and abetting theft, and Mr Seguin of forgery of documents and uttering.

11. The complaint in question read as follows:

> "I am lodging with you a complaint, together with a civil-party application, against Gendarmerie Staff Sergeant Jean-Paul Maurin, head of the Nîmes investigation section, in respect of the following judicial offences and exactions: subornation of perjury, forgery and uttering, bringing proceedings to challenge officially recorded documents as forgeries, forgery of documents and uttering, aiding and abetting theft, malfeasance, abuse of office and extortion.
>
> I am lodging a complaint, together with a civil-party application, against Gendarme Seguin in respect of the following judicial offences and exactions: forgery of documents and uttering, forgery of a report, bogus interview, imitating the signature of a witness.
>
> Naturally I hold all the evidence and testimony to support each of my accusations.
>
> I am sending a copy of these complaints to Nîmes Legal Aid Office."

12. The applicant applied for legal aid to pursue this complaint.

13. On 28 June 1993 the Legal Aid Office at the Nîmes *tribunal de grande instance* refused the application on the ground that although the applicant's means had been assessed at nil, the application was inadmissible because the applicant's appeal on points of law against the Youth Assize Court's judgment of 11 December 1992 was still pending.

14. On 24 July 1993 Mr Aït-Mouhoub appealed to the Legal Aid Office against that decision. He confirmed his appeal in a letter of 1 October 1993.

15. In an order of 24 August 1993 the senior investigating judge of the *tribunal de grande instance*, noting that the applicant had not obtained legal aid, directed that he should pay into court 80,000 French francs (FRF) as security for costs in respect of the complaint against the two gendarmes. He set 28 September 1993 as the time-limit for paying the security, failing which the complaint would be inadmissible.

16. The applicant did not challenge the amount by appealing to the Indictment Division against the order.

17. On 9 September 1993 Mr Aït-Mouhoub wrote to the senior investigating judge to inform him that he had appealed against the decision not to grant him legal aid.

18. On 21 September 1993 the Court of Cassation dismissed the applicant's appeal on points of law against the Gard Youth Assize Court's judgment of 11 December 1992.

19. On 18 October 1993 the applicant, having heard nothing from the Legal Aid Office, renewed his application for legal aid. He pointed out that the ground of inadmissibility relied on in the refusal of 28 June 1993 had ceased to be valid as the Court of Cassation had given judgment in the meantime.

20. In an order of 29 December 1993 the senior investigating judge ruled that the applicant's complaint was inadmissible on the following grounds:

> "By Articles 88 and R. 236 of the Code of Criminal Procedure, a party who has not obtained legal aid is required to pay into court a sum to cover the costs of the proceedings where he has not joined existing proceedings brought by the public prosecutor, failing which his criminal complaint will be inadmissible.
>
> As the civil party has not paid within the time allowed the sum specified in the aforementioned order and the public prosecutor does not consider it necessary to institute criminal proceedings,
>
> I declare Mr Areski Aït-Mouhoub's application to become a civil party to criminal proceedings inadmissible."

The applicant did not appeal against that order.

21. On 15 March 1994 the Legal Aid Office dismissed Mr Aït-Mouhoub's appeal against the refusal of 28 June 1993.

2. The second complaint and the application for legal aid in respect of it

22. On 2 January 1993 the applicant lodged a second criminal complaint and civil-party application against two other persons (Mr Dumas, a prosecution witness at his trial, and Mr Eut, the brother-in-law of a gendarme). The complaint read as follows:

> "I am lodging a complaint, together with a civil-party application, against the following individuals:
>
> Georges Dumas of Quartier des Usines, Gagnières, in respect of incitement of a minor to immorality, selling military weapons and munitions to a minor, impeding apprehension or prosecution, perjury, and failure to obey a summons to appear as a witness at the Gard Assize Court. The presiding judge of the Assize Court publicly issued a warrant for him to be brought before the court. This person boasts that it was 'bogus', that he had immediately been told by a senior gendarme to be absent, that he was no longer at the address indicated, whereas he had never left home. I lodged a complaint a year ago, on which no action has been taken, thanks to a judicial intervention of which he likewise boasts.
>
> I have at your disposal all the evidence in support of my accusations, which I will summarise for you in a pleading as soon as the judicial investigation has been opened.
>
> Jacky Eut, living at Saint-Florent-sur-Auzonet.
>
> Theft, blackmail, threatening behaviour.

This individual, who claims to be the brother-in-law of a gendarmerie sergeant against whom I have also lodged a criminal complaint in respect of malfeasance, forgery and uttering, on the basis of irrefutable evidence, paid a visit to my home, with a gendarme, at the time of my arrest and took away all the furniture from my bar and restaurant. Subsequently, he took away all the furniture belonging to my under-age daughter. Despite my complaints, I was warned to watch my step if I didn't want to blow up … and my under-age daughter, who had recently tried to complain to this individual, was told:

'You'd better not make any claims at all … your mother owes me much more, thanks to me and my brother-in-law, she didn't go to prison, we managed to get her off the hook … so you be careful little girl … you might get done too.'

Naturally I hold all the evidence and testimony to support my accusations.

I am sending a copy of this complaint to Nîmes Legal Aid Office in order to apply for legal aid, since I am ruined."

23. The applicant applied for legal aid to pursue this complaint also, but the Legal Aid Office took no decision on the application.

24. In an order of 24 August 1993 the senior investigating judge, noting that the applicant had not obtained legal aid, set the security payable in respect of the complaint against Mr Dumas and Mr Eut likewise at FRF 80,000, on the ground that "the evidence and … the existence of another complaint justify applying Articles 88-1 and 91 of the Code of Criminal Procedure [see paragraph 32 below]". He set 28 September 1993 as the time-limit for paying the security, failing which the complaint would be inadmissible.

25. The applicant did not challenge the amount by appealing to the Indictment Division against the order.

26. On 9 September 1993 Mr Aït-Mouhoub wrote to the senior investigating judge to inform him that he had not yet had any reply concerning legal aid.

27. On 18 October 1993 the applicant, having still heard nothing from the Legal Aid Office, renewed his application.

28. In an order of 29 December 1993 the senior investigating judge ruled that the applicant's complaint was inadmissible on the following grounds:

"By Articles 88 and R. 236 of the Code of Criminal Procedure, a party who has not obtained legal aid is required to pay into court a sum to cover the costs of the proceedings where he has not joined existing proceedings brought by the public prosecutor, failing which his criminal complaint will be inadmissible.

As the civil party has not paid within the time allowed the sum specified in the aforementioned order and the public prosecutor does not consider it necessary to institute criminal proceedings,

I declare Mr Areski Aït-Mouhoub's application to become a civil party to criminal proceedings inadmissible."

The applicant did not appeal against that order.

II. RELEVANT DOMESTIC LAW

A. Legal aid

29. Section 2 of the Law of 10 July 1991 on legal aid provides:

> "Natural persons whose means are insufficient to enable them to assert their rights in the courts may be granted legal aid. They may be aided in whole or in part.
>
> …"

Section 7 of the same Law imposes a further condition on persons who are not civilly liable and have not been either charged with or convicted of a criminal offence and are not defendants in criminal proceedings or assisted witnesses: the action must not appear to be "manifestly inadmissible or unfounded" (see also section 22 of the Law).

30. Applications for legal aid are examined by boards called legal-aid offices, which consist of lawyers, representatives of the State and users (sections 12 et seq. of the same Law). These offices are attached to courts and determine applications relating to cases brought before those same courts.

Legal-aid offices may order any useful information to be provided, in particular on the financial position of persons making applications, and may also have any persons interviewed (section 21 of the aforementioned Law and Article 42 of the implementing decree of 19 December 1991).

B. Joining criminal proceedings as a civil party

31. In French law the victim of an offence may join criminal proceedings as a civil party either by applying to the investigating judge, the Indictment Division or the trial court, if proceedings are already under way, or by bringing proceedings by directly summoning the accused before the trial court or lodging a complaint and civil-party application with the investigating judge, if the public prosecutor has not instituted criminal proceedings.

32. The relevant provisions of the Code of Criminal Procedure ("CCP") are worded as follows:

Article 2

"Anyone who has personally suffered from damage directly caused by a criminal offence may bring civil-party proceedings to seek compensation for such damage.

Discontinuance of such proceedings can neither terminate nor stay the criminal proceedings, without prejudice to the cases provided for in paragraph 3 of Article 6 [CCP]."

Article 79

"A judicial investigation shall be mandatory in cases of serious crime (*crime*)…"

Article 85

"Anyone who claims to have suffered damage as a result of a serious crime (*crime*) or other serious offence (*délit*) may, by lodging a criminal complaint, join the criminal proceedings as a civil party on application to the appropriate investigating judge."

Article 88

"The investigating judge shall record in an order the lodging of the complaint. According to the civil party's means, he shall determine the amount of security for costs which that party must, if he has not obtained legal aid, deposit at the registry and the time-limit for doing so if the complaint is not to be declared inadmissible. He may exempt the civil party from paying security."

Article 88-1

"The security set pursuant to Article 88 shall guarantee payment of the civil fine which may be imposed pursuant to the first paragraph of Article 91.

The sum paid into court shall be returned where the proceedings based on that provision are time-barred or have resulted in a decision that has become final to the effect that the civil-party application was neither an abuse of process nor intended purely to gain time."

Article 91 § 1

"Where, after a judicial investigation begun on a criminal complaint and civil-party application, a decision has been taken that there is no case to answer, the public prosecutor may summon the civil party before the Criminal Court in which the case was investigated. If the complaint and civil-party application are held to have been an abuse of process or to have been intended purely to gain time, the court may impose a civil fine, the amount of which shall not exceed FRF 100,000…"

PROCEEDINGS BEFORE THE COMMISSION

33. Mr Aït-Mouhoub applied to the Commission on 9 November 1992. Relying on Articles 5, 6, 13 and 17 of the Convention, he complained, *inter alia*, that he had not had an effective remedy before a national court, as his criminal complaints and civil-party applications had been declared inadmissible because of his inability to pay the amount of the security for costs.

34. On 17 January 1995 the Commission adjourned consideration of the complaint of refusal of access to a court (Article 6 § 1 of the Convention) and declared the remainder of the application (no. 22924/93) inadmissible. On 21 October 1996 it declared the application admissible with respect to the complaint in question. On 12 April 1997, following further observations by the Government as to non-exhaustion of domestic remedies, the Commission decided that there were no grounds for applying Article 29 of the Convention. In its report of 9 September 1997 (Article 31), it expressed the opinion by twenty-two votes to eight that there had been a violation of Article 6 § 1. The full text of its opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

35. In his memorial the applicant asked the Court to "find that the French State had infringed Article 6 § 1 of the Convention to his detriment and [order it] to make redress for all the consequences".

36. The Government asked the Court to "hold that Article 6 § 1 of the Convention [did] not apply in the instant case and, in the alternative, that there ha[d] been no violation of [that] Article".

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

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

37. Mr Aït-Mouhoub maintained that he had not enjoyed the right of access to a "tribunal", as both of his criminal complaints and civil-party applications had been declared inadmissible because of his inability to pay the amount of the security for costs, amounting to 80,000 French francs (FRF) in each instance. He relied on Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations …, everyone is entitled to a fair … hearing … by [a] … tribunal…"

A. Applicability of Article 6 § 1

38. In the applicant's submission, Article 6 § 1 applied in the case as criminal complaints with civil-party applications were concerned.

39. The Government maintained that the proceedings in issue could not fall within the concept of a "*contestation*" (dispute) over "civil rights and obligations". The applicant's two complaints had been purely vindictive, without any compensatory purpose; their intention had been solely to call in question his own conviction. A reading of them showed, moreover, that he had never sought damages. Furthermore, Mr Aït-Mouhoub had had the opportunity of taking direct action in the civil courts to secure compensation under Articles 1382 and 1383 of the Civil Code.

40. The Commission considered that, in view of the criminal nature of the event that had given rise to the loss (the thefts) and of the complaint against the police, which made a judicial investigation necessary, the outcome of the proceedings, which were concerned with a "civil" right, was decisive, for the purposes of Article 6 § 1, for establishing the applicant's right to compensation. Article 6 § 1 therefore applied.

41. The Court notes that the applicant initially lodged a complaint and civil-party application on 28 December 1992 against two gendarmes who had taken part in the judicial investigation that had led to his conviction by the Youth Assize Court; the complaint referred to offences in connection with the criminal proceedings that had been taken against him (see paragraphs 10 and 11 above). On 2 January 1993 he lodged a second complaint and civil-party application against a prosecution witness and another person in which he alleged, in particular, that he had been ruined by

the thefts of his business and personal furniture that had been committed by one of them (see paragraph 22 above).

42. The Court will first consider the second criminal complaint.

43. According to the principles laid down in its case-law (see, in particular, the Acquaviva v. France judgment of 21 November 1995, Series A no. 333-A, p. 14, § 46), it must ascertain whether there was a dispute ("*contestation*") over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. Furthermore, the outcome of the proceedings must be directly decisive for the right in question.

44. The Court notes that in his second complaint the applicant expressly mentioned the financial loss caused by the alleged offences, since he considered that he had been ruined on account of thefts of his property (see paragraph 22 above). The complaint therefore concerned a civil right. The fact that he did not quantify his loss at the time of lodging the complaint is irrelevant, since in French law it was open to him to submit a claim for damages up to and during the trial (see the Acquaviva judgment cited above, pp. 14–15, § 47).

45. The Court also considers that the complaint, which was lodged by the applicant under Article 85 of the Code of Criminal Procedure (see paragraph 32 above), was designed to set in motion judicial criminal proceedings in order to secure a conviction that could have enabled him to exercise his civil rights in regard to the alleged offences and, in particular, to obtain compensation for the financial loss. The outcome of the proceedings was therefore, for the purposes of Article 6 § 1 of the Convention, decisive for establishing Mr Aït-Mouhoub's right to compensation (see the Tomasi v. France judgment of 27 August 1992, Series A no. 241-A, p. 43, § 121, and the Acquaviva judgment cited above, pp. 14–15, § 47).

46. Article 6 § 1 consequently applies to the proceedings in issue as regards the second criminal complaint.

47. As regards the first criminal complaint, the Court notes that despite a number of differences, it is linked to the second one, which mentioned*, inter alia*, thefts committed with the complicity of one of the gendarmes against whom the first complaint had been lodged (see paragraph 22 above). Article 6 § 1 therefore likewise applies.

B. Compliance with Article 6 § 1

48. In the applicant's submission, the amount of the security for costs was manifestly excessive in view of his lack of means and was designed, in particular, to prevent him from lodging a complaint against policemen.

49. The Government maintained that the amount of the security for costs set by the senior investigating judge was fully justified by the need to avoid wrongful proceedings and to guarantee payment of the civil fines that might be imposed upon the person concerned. The Legal Aid Office, moreover, had been entitled to refuse Mr Aït-Mouhoub's applications, in order to discourage the bringing of wrongful proceedings. Lastly, the applicant could have appealed against the two orders setting the amount of security for costs and against those whereby his civil-party applications had been declared inadmissible.

50. In the Commission's view, guaranteeing payment of a possible civil fine could not justify setting such a disproportionate sum, which could be seen as a "prejudgment" that did not seem to be required by Articles 88 and 91 § 1 of the Code of Criminal Procedure.

51. The Court notes, firstly, that it cannot examine the Government's last submission, as it is a preliminary objection raised before the Commission after the latter's decision on admissibility (see paragraph 34 above).

52. As to the merits, it reiterates that the "right to a court", of which the right of access constitutes one aspect (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36) is not absolute but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired, and they will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, the Bellet v. France judgment of 4 December 1995, Series A no. 333-B, p. 41, § 31, and the Levages Prestations Services v. France judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1543, § 40). Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 12–13, § 24).

53. As the Court indicated earlier (see paragraph 42 above), it will initially confine itself to looking at the second criminal complaint.

54. In his order of 24 August 1993 (see paragraph 24 above) the senior investigating judge, after noting that the applicant had not received legal aid, set the amount of the security at FRF 80,000, on the ground that "the evidence and … the existence of another complaint justify applying Articles 88-1 and 91 of the Code of Criminal Procedure".

Those provisions are designed to ensure, among other things, the payment of a civil fine not exceeding FRF 100,000 in the event of the civil-party application's being held to have been an abuse of process or to have been intended purely to gain time.

55. The applicant's income, however, had been assessed by the Legal Aid Office at nil in connection with his first complaint; despite his renewed application of 18 October 1993 (see paragraph 27 above), Mr Aït-Mouhoub never received a reply from the Legal Aid Office in connection with his second complaint, although his position had not changed.

56. In an order of 29 December 1993 (see paragraph 28 above) the senior investigating judge, after noting that the applicant had not received legal aid, declared the civil-party application relating to his second complaint inadmissible as he had not paid the sum required.

57. It is not for the Court to assess the merits of the complaint lodged by the applicant with the appropriate judge. It considers, however, that the setting of such a large sum by the senior investigating judge was disproportionate seeing that Mr Aït-Mouhoub – who had never received a reply from the Legal Aid Office, as he had informed the judge in a letter of 9 September 1993 (see paragraph 26 above) – had no financial resources whatsoever. Requiring the applicant to pay such a large sum amounted in practice to depriving him of his recourse before the investigating judge (see, *mutatis mutandis*, the Aerts v. Belgium judgment of 30 July 1998, *Reports* 1998-V, pp. 1964–65, § 60).

58. Having regard to all these factors, the Court concludes that the applicant's right of access to a "tribunal" within the meaning of Article 6 § 1 was infringed.

59. There has consequently been a violation of that provision as regards the second criminal complaint.

60. As to the first complaint, the Court notes that the senior investigating judge made orders in respect of it on the same dates as he made those relating to the second complaint (24 August and 29 December 1993); they had an identical purpose (same amount of security for costs and same time-limit for payment), contained identical reasoning and led to an identical result (inadmissibility).

The case of the first complaint differs from that of the second only in that the Legal Aid Office expressly refused to grant the applicant legal aid, on the ground that his appeal on points of law against the judgment of the Youth Assize Court was still pending (see paragraph 13 above). The senior investigating judge, after noting that Mr Aït-Mouhoub had not received legal aid, declared his civil-party application relating to his first complaint

inadmissible in an order of 29 December 1993 (see paragraph 20 above) as Mr Aït-Mouhoub had not paid the sum required. However, the Legal Aid Office's final decision, on the applicant's appeal, was not taken until 15 March 1994 (see paragraph 21 above).

61. As with the second complaint, the key fact is that in view of the applicant's total lack of means, which the senior investigating judge could not be unaware of, setting such a large sum in practice deprived the applicant of his recourse before that judge.

62. That being so, the Court holds that there has been a violation of Article 6 § 1 as regards the first complaint likewise.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

63. Article 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

64. Mr Aït-Mouhoub sought the sum of FRF 768,000 in respect of the pecuniary damage corresponding to a loss of income sustained following the collapse of his business. He also claimed FRF 200,000 to compensate for non-pecuniary damage arising from the numerous legal applications he had had to make and from the fact that the proceedings against him had had a serious adverse effect on his family circumstances.

65. The Court shares the Government's view and considers that there is no causal link between the violation found and the alleged pecuniary damage. It regards any non-pecuniary damage as being sufficiently compensated by this judgment.

B. Costs and expenses

66. The applicant also sought FRF 49,120 in respect of costs and expenses, FRF 15,000 of which were for expenses he had incurred personally and FRF 34,120 of which, not including value-added tax (VAT), were for lawyer's fees in the proceedings before the Court.

67. The Government left the matter to the Court's discretion.

68. Making its assessment on an equitable basis, and having regard to its usual criteria, the Court awards the applicant FRF 30,000, not including VAT.

C. Default interest

69. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.36% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that as regards the second criminal complaint, Article 6 § 1 of the Convention applies to the proceedings in issue and that there has been a violation of it;

2. *Holds* by eight votes to one that as regards the first criminal complaint, Article 6 § 1 of the Convention applies to the proceedings in issue and that there has been a violation of it;

3. *Holds* unanimously that the present judgment in itself constitutes sufficient just satisfaction for any non-pecuniary damage;

4. *Holds* unanimously that the respondent State is to pay the applicant, within three months, 30,000 (thirty thousand) French francs, value-added tax not included, for costs and expenses, on which sum simple interest at an annual rate of 3.36% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claim.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr De Meyer;

(b) partly dissenting opinion of Mr Pettiti.

Initialled: R. B.

Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

(*Translation*)

As to the – fairly obvious – applicability of Article 6 of the Convention to the applicant's complaints, we needlessly repeat in this judgment funest and false forms of words which have already served only too often in the past to interpret the rights guaranteed in this Article narrowly.

Firstly, it was unnecessary to ask ourselves yet again whether it could be "said, at least on arguable grounds," that the alleged right was "recognised under domestic law" and whether the proceedings were "directly decisive" for that right[1]. Anyone who believes, rightly or wrongly, that he is entitled to assert a right must be able to put his case before a court, even if only to be told that he is mistaken.

Secondly, it was unnecessary for us to set out once again – in order to show that it was indeed civil rights that were at stake – considerations based strictly on the financial and economic aspect of the applicant's complaints[2]. Many rights whose civil nature is not disputed by anyone, for example in the sphere of civil and family status, cannot be assessed at all in monetary or economic terms.

In the instant case it would have sufficed to hold that a criminal complaint accompanied by a civil-party application in itself implies bringing against the person or persons against whom it is directed a civil action for damages, joined to the criminal proceedings it is designed to set in motion[3]. If the words are to have any meaning, even interpreted very narrowly, the manifest object and purpose of a civil action is to secure the "determination of … civil rights"[4].

In any case, reparation, like the damage itself, does not necessarily have to be financial or economic. It may just as easily be purely non-pecuniary, like that represented by nominal damages, often claimed by civil parties, or like that which this Court awards to an applicant, as it has done in the instant case, by holding that its judgment in itself constitutes just satisfaction[5].

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1. See paragraph 43 of the judgment.
2. See paragraphs 44, 45 and 47 of the judgment.
3. See Articles 2 and 85 of the Code of Criminal Procedure, quoted in paragraph 32 of the judgment.
4. See the English text of Article 6 § 1 of the Convention.
5. See point 3 of the operative provisions.

PARTLY DISSENTING OPINION OF JUDGE PETTITI

(*Translation*)

I voted in favour of holding that there had been a violation of Article 6 as regards the part of the application relating to the applicant's second complaint, alleging burglary.

I did not vote with the majority on the applicability of Article 6 or the violation they found of it as regards the part of the application concerning the first complaint.

I consider that the Chamber was wrong to accept that there had been a violation, and that it misunderstood domestic law on this point and has altered the interpretation of the European Convention and the Court's case-law without even referring the case to a Grand Chamber.

The European Court's decision in respect of the first complaint contains two manifest factual errors, in my opinion.

(1) The gendarmes referred to as having committed the offences in each complaint were not the same ones, so therefore no link was constituted.

(2) The Legal Aid Office's final refusal in respect of the first complaint was not based on the inadmissibility ground for its initial refusal (on account of the proceedings pending in the Court of Cassation) but came after the appeal on points of law had been dismissed because the grounds of nullity relied on by Mr Aït-Mouhoub had been rejected.

The Legal Aid Office's decision was thus based on the application's being ill-founded (section 22 of the Law of 10 July 1991 on legal aid), a matter within domestic jurisdiction.

It is *clearly* apparent from a mere reading of Mr Aït-Mouhoub's two complaints that there were fundamental, essential substantive differences between them, both as regards their legal nature and as regards the facts themselves. I cannot understand the majority's reading of them. To say that there is a link between the two complaints such as to justify giving the same ruling on both seems to me to be an error, as the burglary (second complaint) has nothing in common with the forgeries alleged in the first complaint.

If the first complaint is analysed in detail, it will be seen that its aim is to call in question the finality of the Court of Cassation's judgment, which is not within the jurisdiction of the European Court.

The Court did not even mention the *blatant* lies told by Mr Aït-Mouhoub, who tried to deceive the Convention institutions. It was for him to raise in the Court of Cassation the alleged nullities that he relied on and which he said he knew about and could provide evidence of at the time, but

he did not do so. The majority's decision departs from the case-law on the Convention and the previous interpretation of it, since it results in *recognition of an unlimited right to legal aid on the ground of financial hardship*, however fanciful the application may be. The Convention, however, does not prohibit States from refusing legal aid where the application is manifestly ill-founded, a criterion adopted by the European Commission when ruling on admissibility.

This was certainly the case in this instance as regards the first criminal complaint, when the Legal Aid Office, on the second occasion, after the decision on the appeal on points of law, rightly refused legal aid.

The majority did not appreciate that the French system was a mixed one, it being open to the judge to set security for costs or to decide to waive it, and to the Legal Aid Office to grant legal aid or to refuse it.

It is obvious that if the Legal Aid Office grants legal aid to someone who is destitute, the security set by the judge is paid by the State.

The majority's decision appears to me to be all the more unsatisfactory as most member States of the Council Europe do not have a scheme for granting legal aid as accessible as France's and those that do similarly refuse legal aid in "manifestly ill-founded" cases (see Commission decisions on other applications).

Furthermore, several member States do not afford individuals the possibility of setting a prosecution in motion and other member States do not provide for a criminal complaint together with a civil-party application.

Is there a two-tier Europe in the field of human rights when it comes to procedural requirements?

The first complaint, regarding the alleged "forgeries" of which the police officers were accused, obviously called in question the *finality* in domestic law of the Court of Cassation's judgment, which is binding on the European Court unless the latter finds that the Court of Cassation committed a violation of the Convention.

Only a retrial at national level can call in question a matter that is *res judicata*, by means of the procedure provided in the national code. That procedure is, moreover, free.

If there had been a *forgery*, Mr Aït-Mouhoub or his lawyer should have raised the matter in the Assize Court or, at the latest in the Court of Cassation, with supporting documents, instituted the retrial procedure on the grounds provided for in the code, all of which are compatible with the Convention.

In the instant case the applicant *never* used those means and did not produce any document or so much as a scrap of evidence to support his *a priori* defamatory allegations. He used no means to this end in the Assize Court or in the Court of Cassation.

The applicant, who himself claimed to hold all the documentary and witness evidence at the time, did not produce any. He did not even set out the references, whereas all legal-aid offices in Europe require at least some brief indications.

Granting legal aid for the first complaint would have resulted in *creating an additional ground* on which a retrial can be granted in domestic law, and that has *never* been required by the Convention. Furthermore, the Convention has never conferred a right to automatic retrial after a conviction. Moreover, an allegation of forgery against civil servants cannot be relied on and used without even the slightest piece of credible evidence being adduced. There is no serious *dispute* within the meaning of the European Court's case-law.

If the Court wished to interpret the Convention in such an extravagant way for the first time, through a Grand Chamber, it would first have to answer the following questions:

Under Article 6 of the European Convention:

Is the State obliged to grant legal aid in all cases?

Can it impose restrictions on such a grant?

Is it entitled to organise the arrangements for examining legal-aid applications and accepting them?

Can it refuse legal aid where an application is manifestly ill-founded?

Is it entitled to take no action on a complaint that is an abuse of process?

Must the State in all cases of serious criminal offences allow a private individual to set in motion a public prosecution, which is the privilege of the State (several member States do not even allow individuals to set in motion criminal proceedings by means of a complaint and civil-party application in cases similar to Mr Aït-Mouhoub's)?

A prior comparative-law study would have been necessary in order to adopt such an exponential view. A comparative study would also have shown that in the average member State legal aid *is non-existent in practice or derisory* or is provided for to only a very limited extent, even if only for pressing budgetary reasons. It would have been instructive to have the statistics. Belgium and France are certainly among the States which grant legal aid and ensure access to the courts and to justice in a maximum number of cases, unlike some other member States. The finding by the Chamber that there has been a violation of Article 6 as regards the second criminal complaint containing the allegation of burglary was amply sufficient in terms of the European Convention's requirements.