



Variation in Court of Cassation's case-law entailing inadmissibility of private prosecution was not unforeseeable and therefore did not breach the Convention

In today's **Chamber judgment**¹ in the case of [Allègre v. France](#) (application no. 22008/12) the European Court of Human Rights held, by four votes to three, that there had been:

no violation of Article 6 § 1 (access to court) of the European Convention on Human Rights.

The case concerns the applicant's complaint that she was unable to bring a private prosecution in the criminal courts as the proceedings had already been discontinued.

The Court found, in particular, that in choosing not to appeal against the discontinuance of the case for insufficient evidence, decided 11 years after the opening of a judicial investigation, and thus not to seek the pursuit of the proceedings previously initiated by the public prosecutor, the applicant had taken the risk of bringing a private prosecution against the Atomic Energy Commission's Research Centre (CEA) without any certainty that it would be admissible. It noted that the law on private prosecutions by a former civil party in a judicial investigation had been in a state of flux; the applicant had thus taken a risk even though she already had a remedy in the form of an appeal against discontinuance and therefore access to a court.

As regards the principle of legal certainty, the Court of Cassation's second judgment on 11 October 2011 did not constitute an unforeseeable departure from precedent, as that court had applied its case-law, as established in a judgment of 2 December 2008 in another case, extending the categories of person protected by a discontinuance decision and thus narrowing the civil party's freedom to bring fresh proceedings.

Principal facts

The applicant, Claudette Allègre, is a French national who was born in 1936 and lives in Aix-en-Provence.

In March 1994 Mrs Allègre's husband, who was an engineer with the Atomic Energy Commission's Research Centre (CEA), died in an accidental explosion. During the judicial investigation Mrs Allègre joined the proceedings as a civil party. No individual or entity was formally placed under investigation despite the requests to that effect made by the civil parties.

On 13 July 2005, eleven years after the opening of the judicial investigation, the investigating judge made an order discontinuing the proceedings. Neither Mrs Allègre nor the other civil parties appealed.

On 1 February 2006 Mrs Allègre brought a private prosecution against the CEA, in the form of a direct summons in the criminal court, for unintentional homicide.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 13 March 2007 the Aix-en-Provence Criminal Court declared the direct summons admissible. The CEA and the public prosecutor appealed against that ruling and contested the admissibility of the private prosecution. The Aix-en-Provence Court of Appeal overturned the judgment. Mrs Allègre lodged an appeal on points of law. The Court of Cassation quashed the Court of Appeal's judgment and referred the case back to the same Court of Appeal sitting with a different composition. In a fresh judgment of 2 November 2009 the Court of Appeal again overturned the first-instance decision and declared the private prosecution against the CEA inadmissible. Mrs Allègre lodged a further appeal on points of law, which was dismissed on 11 October 2011.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), the applicant complained of her inability to bring a private prosecution and submit her case to a court. She maintained that this remedy had been effective since the *Botrans* precedent and that the Court of Cassation's judgment of 11 October 2011 had represented an unforeseeable departure from previous case-law.

The application was lodged with the European Court of Human Rights on 6 April 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Erik **Møse** (Norway),
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 6 § 1

Under French law, the victim of an offence had the possibility of intervening in existing criminal proceedings or of bringing a private prosecution. In the latter case, the victim could either lodge a complaint as a civil party with the investigating judge or bring proceedings in the trial court by way of direct summons. However, such a summons could not circumvent a discontinuance decision in previous proceedings and it remained subject to the *ne bis in idem* principle.

The Court of Cassation had invoked the authority of the final discontinuance decision in dismissing Mrs Allègre's appeal. It based its decision on Article 188 of the Code of Criminal Procedure, which precluded further prosecution of persons – except in the event of new evidence – previously placed under judicial investigation where the proceedings against them had been discontinued. By extension, the CEA, which had not been placed under judicial investigation or given the status of legally assisted witness, stood to benefit from the discontinuance, as its criminal liability had already been at issue. In its judgment of 11 October 2011, the Court of Cassation had found that the Court of Appeal was satisfied that the CEA had been “expressly implicated” in the course of the judicial investigation.

In the Government's view, Mrs Allègre could have expected that the CEA would benefit from the authority of the discontinuance decision, which had become final as she had not appealed. The Court noted that Mrs Allègre had deliberately refrained from appealing against that decision,

whereas such an appeal was a clearly accessible remedy through which her claims could have been upheld.

The Court observed that, following the *Botrans* judgment in 1961, the Court of Cassation's case-law had developed with two diverging strands. According to one strand, the use of a direct summons by a former civil party was precluded against only those persons whose status in the criminal proceedings had been clear: assisted witness, person placed under judicial investigation or person named in a criminal complaint with a civil-party application; in a second strand of case-law, the prohibition on such private prosecution by a former civil party had been extended to any person who was "implicated" in the earlier proceedings. The Court thus concluded that the Court of Cassation's case-law had been in a state of flux at the time of the discontinuance decision of 13 July 2005. Mrs Allègre could not therefore have ruled out the possibility that the domestic courts might find her direct summons inadmissible, as that decision had become final.

The Court was of the view that, in choosing not to appeal against the decision to discontinue the case and thus not to seek the pursuit of the proceedings previously initiated by the public prosecutor, Mrs Allègre had taken the risk of bringing a private prosecution against the CEA without any certainty that it would be admissible. It thus found that the interpretation by the domestic courts of Article 188 of the Code of Criminal Procedure and their reliance on the authority of the discontinuance decision in dismissing the applicant's action had not impaired her right of access to a court.

As regards the principle of legal certainty, the Court reiterated that there was no acquired right under the Convention to consistency of case-law. Agreeing with the Government, it found that the Court of Cassation's second judgment of 11 October 2011 had not constituted an unforeseeable departure from precedent, as that court had applied its judgment of 2 December 2008 in another case, extending the beneficiaries of a discontinuance decision and thus narrowing the civil party's freedom to act. Moreover, the Court observed that the judgment of 11 October 2011 had not been rendered by the plenary court, even though it was obliged by the relevant rules to hear, in a case where a judgment had already been quashed, a further appeal on points of law, on the same grounds, against the fresh decision by the court to which the matter had been remitted. The Court reiterated, however, that it avoided any unjustified interference in the exercise by the States of their judicial functions or in the organisation of their judicial systems, that responsibility for the consistency of case-law lay primarily with the domestic courts, and that any intervention by the Court should remain exceptional.

The Court therefore found that the reasoning of the Court of Cassation's judgment of 11 October 2011 had met the requirements of Article 6 § 1 of the Convention and that there had been no breach of the principle of legal certainty - ? 2. *Dit, par quatre voix contre trois, qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention quant au droit d'accès à un tribunal.*

Separate opinion

Judges Grozev, O'Leary and Hüseyinov expressed a joint separate opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.