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

Case of Kress v. France

(*Application no. 39594/98*)

Judgment

Strasbourg, 7 June 2001

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EUROPEAN COURT OF HUMAN RIGHTS

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(*Application no. 39594/98*)

JUDGMENT

STRASBOURG

7 June 2001

In the case of Kress v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Mr G. RESS,
Mr J.-P. COSTA,
Mr B. CONFORTI,
Mr A. PASTOR RIDRUEJO,
Mr P. KURIS,
Mrs F. TULKENS,
Mrs V. STRÁZNICKÁ,
Mr C. BÎRSAN,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 11 October 2000 and 16 May 2001,

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

PROCEDURE

1. The case originated in an application (no. 39594/98) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mrs Marlène Kress ("the applicant"), on 30 December 1997.

2. The applicant was represented by her counsel. The French Government ("the Government") were represented by their Agent.

3. Relying on Article 6 § 1 of the Convention, the applicant complained of the excessive length of administrative proceedings she had brought against Strasbourg Hospital. She also complained under Article 6 of the Convention that she had not had a fair trial, because it had been impossible to inspect the submissions of the Government Commissioner (*commissaire du gouvernement*) before the hearing and reply to them at the hearing, and because the Commissioner had taken part in the deliberations.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. It was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). In a decision of 2 February 1999 the Third Section decided to communicate the application to the Government for written observations.

6. On 29 February 2000, in the light of the observations submitted by the parties, the application was declared admissible by a Chamber of the Third Section, composed of the following judges: Sir Nicolas Bratza, *President*, Mr J.-P. Costa, Mrs F. Tulkens, Mr W. Fuhrmann, Mr K. Jungwiert, Mr K. Traja, Mr M. Ugrekhelidze, and also of Mrs S. Dollé, *Section Registrar* [*Note by the Registry.* The Court's decision is obtainable from the Registry]. On the same day, the Section announced its intention of relinquishing jurisdiction in favour of the Grand Chamber, under Article 30 of the Convention.

7. On 23 May 2000, there having been no objections from the parties, the Third Section confirmed its decision to relinquish jurisdiction, in accordance with Rule 72 § 2.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. On 18 April 2000 the Court of Cassation and the *Conseil d'Etat* Bar applied for leave to intervene under Article 36 § 2 of the Convention and Rule 61. The President of the Court gave leave and the Bar produced a memorial on 3 July 2000.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 11 October 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr R. ABRAHAM, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*;

(b) *for the applicant*
Mr A. SCHWAB, of the Saverne Bar, *Counsel*.

The Court heard addresses by them.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. On 8 April 1986 the applicant, who was then aged 44, underwent a gynaecological operation under general anaesthetic at Strasbourg Hospital.

12. On wakening, she suffered a neurological syndrome. In the days that followed she suffered a further vascular accident and her shoulder was scalded when a cup of tea was upset. Since then she has been 90% disabled; she is hemiplegic, has difficulty coordinating her upper limbs, can speak only with difficulty and suffers from double vision.

13. On 27 May 1986 the applicant made an urgent application to the President of the Strasbourg Administrative Court seeking the appointment of an expert. In an order of 28 May 1986 the President appointed an expert, who filed a report on 2 June 1986 in which he concluded that there had not been any medical error.

14. On 6 August 1987 (after a preliminary claim of 22 June 1987 had been refused) the applicant brought an action for damages against Strasbourg Hospital in the Strasbourg Administrative Court.

15. In submissions of 21 October 1987 the applicant criticised the findings set out in the report of 2 June 1986 and applied for a detailed, thorough expert opinion.

16. In letters of 10 November 1988 and 11 January 1989 the applicant's lawyers sought to have the case set down for hearing. The clerk of the Administrative Court replied (in letters of 18 November 1988 and 13 January 1989) that on account of the backlog of work, it was not currently possible to foresee the date on which the case might be set down for hearing.

17. The hearing was eventually listed for 19 April 1990.

18. In a judgment delivered on 25 May 1990 the Strasbourg Administrative Court ordered further inquiries into the facts with a view to commissioning a report from a panel of two experts.

19. On 23 October 1990 the experts filed the following findings:

> "As regards the cerebral arterial thromboses that occurred on 8 April and 17 April 1986, nothing in Mrs Kress's clinical condition or in the results of the tests made them foreseeable. The treatment of this complication was appropriate to the patient's state of health and in accordance with the current state of scientific knowledge. As regards the scald on the left shoulder, the experts attribute it to a lack of assistance and organisation in the department."

20. The applicant criticised that expert report and in reasoned submissions of 22 March 1991 quantified the damage she had sustained.

21. At the request of Strasbourg Hospital the hearing set down for 4 April 1991 was postponed to 13 June 1991.

22. In a judgment delivered on 5 September 1991 the Strasbourg Administrative Court assessed the amount of damage sustained by the applicant as a result of her scalded shoulder at 5,000 French francs and dismissed the rest of the claim for damages.

23. The applicant appealed against that judgment to the Nancy Administrative Court of Appeal. In a judgment of 8 April 1993 that court dismissed the appeal on the ground that whatever the seriousness of the consequences of the surgical operation, the circumstances of the hospitalisation had not disclosed any failure to provide information about the nature of the operation and its foreseeable consequences or any negligence or presumption of negligence in the organisation or running of the relevant department.

24. On 11 June 1993 the applicant, represented by a member of the Court of Cassation and *Conseil d'Etat* Bar, appealed on points of law against that judgment to the *Conseil d'Etat* and filed full pleadings on 11 October 1993. She referred to a judgment of the Judicial Assembly of the *Conseil d'Etat* of 9 April 1993 that had been delivered in the meantime (the Bianchi judgment of 9 April 1993, *Revue française de droit administratif* 1993, p. 574), in which no-fault liability in hospital cases had been extended to cover the risks of treatment, and in her sole ground of appeal relied on the fact that the hospital should in her case have been found liable without fault. She submitted that there had been a causal link between the operation and the damage, that the existence of the risk had been known, even if it was statistically only a very slight one, and that she had, within the meaning of the Bianchi judgment, sustained extremely serious special damage.

25. Strasbourg Hospital filed a defence on 12 September 1994 and the applicant replied on 16 January 1995. The hospital lodged a rejoinder on 10 March 1995.

26. The case was heard in public on 18 June 1997 by the 5th and 3rd sections sitting together and considered on the basis of a report by the 5th section. After hearing the observations of the reporting judge, those of the parties' lawyers and, last, the Government Commissioner's submissions, the *Conseil d'Etat* reserved judgment. Counsel for the applicant then produced a memorandum for the deliberations (*note en délibéré*) in which it was argued that the Government Commissioner had wrongly expressed doubts as to the extreme seriousness of the applicant's afflictions since the operation of 8 April 1986.

27. In a judgment delivered on 30 July 1997 the *Conseil d'Etat* dismissed the applicant's appeal on the following grounds:

> "It appears from the evidence submitted to the courts below that Mrs Kress underwent a hysterectomy on 8 April 1986 at the Strasbourg Regional Hospital Centre. Following that operation, which took place normally, post-operative complications, which supervened twice, caused serious, disabling after-effects and damage for which Mr and Mrs Kress sought compensation, relying in the courts below on mistakes that they alleged had been made by the hospital. Before this Court Mr and

Mrs Kress have maintained for the first time that the hospital should have been held liable without fault.

On the basis of the unappealable assessment it made of the facts, the Nancy Administrative Court of Appeal inevitably held that no-fault liability on the part of the Strasbourg Regional Hospital Centre for the damage relied on by Mrs Kress had not been made out. In so doing, that court did not make any error of law, seeing that it is apparent from the evidence submitted to the courts below that the circumstances in which such liability could be incurred did not obtain."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Origins and development of the administrative courts

28. The history of France's administrative courts is essentially that of the *Conseil d'Etat*. In 1790 the Constituent Assembly implemented the theory of the separation of powers and organised matters so that the executive would not be subject to the judiciary. It preserved the *ancien régime* principle that administrative authorities should be tried by a special court, in accordance with the idea that judging the administrative authorities was "also an administrative act". Such a special court was set up by the Consulate in 1799. This was the *Conseil d'Etat*, which was instituted by Article 52 of the Constitution of 22 Frimaire Year VIII (13 December 1799). It was given responsibilities in two areas: administrative (contributing to the drafting of major enactments) and judicial (settling disputes connected with the administrative authorities).

29. In 1849 an Act vested it with the administration of "delegated" justice (*la justice déléguée*), and thereafter it accordingly gave its rulings "in the name of the French people". During the Third Republic the *Conseil d'Etat* acquired an organisational pattern that it still largely has today. Its function was laid down in the Act of 24 May 1872, which amended the 1849 Act and established delegated justice permanently.

30. The main feature of the post-war period was the organisation of the administrative jurisdiction. In 1953 the administrative courts (of first instance) succeeded the prefectural councils, which had existed since 1799. The 1958 Constitution, which contains only three Articles – 64, 65 and 66 – relating to the judiciary, in particular, to provide that judges (but not members of State Counsel's offices) are irremovable, does not mention the *Conseil d'Etat* or the other administrative courts under this head. The Act of 31 December 1987, which came into force in 1989, added to the courts vested with administrative jurisdiction the administrative courts of appeal, to which the bulk of the appellate jurisdiction was transferred. From these new courts and various specialised courts, such as the Court of Audit, an appeal on points of law lies to the *Conseil d'Etat* as the supreme administrative court.

B. Status of judges of the administrative courts

31. The judges of the administrative courts have a special status different from that of the judges of the ordinary courts and the members of State Counsel's Office at those courts. They are governed by the general rules on the civil service; however, they are in practice both independent and irremovable (see paragraph 35 below). In 1980 a decision of the Constitutional Council (22 July 1980, Official Gazette of 24 July, p. 1868) established the existence and independence of the administrative jurisdiction as being among the fundamental principles recognised in the laws of the Republic having constitutional rank.

32. The *Conseil d'Etat* has about 300 members, two-thirds of whom work within the *Conseil* and one-third outside it. Its nominal President is the Prime Minister and in practice the Vice-President of the *Conseil d'Etat* presides. By Article 13, third paragraph, of the Constitution, concerning the powers of appointment of the President of the Republic, all the senior members of the *Conseil d'Etat* (*conseillers d'Etat*) are appointed by decree of the President of the Republic adopted in Cabinet, while the junior legal assistants (*auditeurs*) and the middle-ranking *maîtres des requêtes* are appointed by an ordinary presidential decree, under section 2 of the Ordinance of 28 November 1958 on civil and military appointments.

1. *Recruitment of members of the* Conseil d'Etat

33. The members of the *Conseil d'Etat* are recruited in one of two ways: through competitive examination or directly from other parts of the civil service. Legal assistants, recruited through competitive examination, are promoted to the rank of *maître des requêtes* after about three years' service and become *conseillers d'Etat* about twelve years later. External appointments are subject to approval by the Vice-President of the *Conseil d'Etat.*

2. *Guarantees of independence*

34. The status of the members of the *Conseil d'Etat* is not so much laid down in writing as guaranteed in practice. As regards written rules, mention must be made of the decree of 30 July 1963 laying down the rights and duties of members of the *Conseil d'Etat*. These rights and duties are very similar to those applying to the civil service (and, in particular, no provision is made for irremovability), with a number of exceptions: no provision is made for assessment, no promotions table is drawn up and an advisory committee replaces both the Joint Administrative Committee and the Joint Technical Committee.

35. It is thus, rather, practice which provides the guarantees enjoyed by the members of the *Conseil d'Etat*. Three traditional practices are both very long-standing and decisive: firstly, the *Conseil d'Etat* and its members are

managed internally by the Executive Committee (*bureau*) of the *Conseil d'Etat*, consisting of the Vice-President, the six division presidents and the Secretary-General of the *Conseil d'Etat*, without any outside interference. In particular, there is no distinction in the *Conseil d'Etat* between judges and members of State Counsel's Office as there is in the ordinary courts, where the members of State Counsel's Office are subordinated to the Minister of Justice.

Secondly, even though there is no written provision guaranteeing the irremovability of members of the *Conseil*, that guarantee exists in practice. Lastly, while promotion is theoretically by selection, it is in practice – by a custom which goes back to the middle of the nineteenth century – strictly by seniority, and this guarantees the members of the *Conseil d'Etat* great independence, *vis-à-vis* both the political authorities and the authorities of the *Conseil d'Etat* themselves.

36. Most duties within the *Conseil d'Etat* can be performed by members of any grade. Thus the duties of Government Commissioner, although generally given to *maîtres des requêtes*, can also be carried out by *auditeurs* or *conseillers d'Etat*.

37. The Act of 31 December 1987 instituted a National Council of Administrative Courts and Administrative Courts of Appeal, whose membership ensures that it is independent and representative. The Council has a general advisory role in relation to matters concerning the staff of all the administrative courts (individual measures affecting judges' careers, promotion and discipline).

C. Judicial work

38. Procedure in the administrative courts has developed essentially under the influence of the courts themselves. It attempts to achieve a compromise between the public interest – represented in the proceedings by the administrative authorities – and the interests of individuals, who must be effectively protected from misuse of public authority. The procedure is inquisitorial, written and inexpensive, and its distinctive feature is that one of the parties is a public body.

39. The *Conseil d'Etat* consists of five administrative divisions (Interior, Finance, Public Works, Social, and Report and Research) and a Judicial Division, itself subdivided into ten sections (*sous-sections*).

D. The course of proceedings in the *Conseil d'Etat*

1. The role of the reporting judge

40. Where a case has been assigned to a section, the president of the section appoints one of its members as reporting judge to examine the case. After careful study of the file the reporting judge draws up a draft decision. The draft is accompanied by a memorandum whose purpose is to set out the reasoning leading from the application to the draft. The memorandum includes a consideration of admissibility issues (including jurisdiction and verification that there is no defect rendering the application inadmissible as a matter of public policy) and must answer each ground raised in the application, with reference either to the evidence or to legal provisions or to case-law. The reporting judge appends to the memorandum a copy of the provisions and case-law relied on in the draft decision.

The file subsequently goes to the reviser, an office assumed in each section by the president or one of the other two *assesseurs* constituting the bench. The reviser re-examines the evidence and forms a view as to how the case should be decided. He may himself prepare another draft decision in the event of disagreement with the reporting judge. Once the draft decision has been revised, the case is listed for consideration at a preparatory sitting of the section, at which it will be discussed in the presence of the Government Commissioner, who does not, however, take part in the vote on the draft. Only when the draft decision has been adopted by the section will the file be forwarded to the Government Commissioner to enable him either to prepare his submissions or to ask for a fresh preparatory sitting to be convened or for the case to be transferred to a differently constituted court.

2. The role of the Government Commissioner

41. The institution of Government Commissioner dates from an ordinance of 12 March 1831. Originally, as its name indicates, it was designed to represent the government's point of view, but that function very rapidly disappeared (at the latest in 1852). The title has remained but is now a misnomer. Since then the institution has become, to the outside observer, one of the most distinctive features of French administrative justice, in particular because Government Commissioners rapidly established themselves as judicial officers totally independent of the parties.

The Government Commissioner plays a traditionally very important role in the creation of administrative case-law and most of the major judicial innovations have come about as a result of celebrated submissions by the Government Commissioner. Furthermore, given that the judgments of the *Conseil d'Etat* are always drafted very elliptically, it is often only by reading the submissions of the Government Commissioner, where published, that one can discern the *ratio decidendi* of the judgments.

(a) Appointment

42. By the terms of Decree no. 63-766 of 30 July 1963 on the organisation and functioning of the *Conseil d'Etat*, Government Commissioners are taken from among the *maîtres des requêtes* and *auditeurs* at the *Conseil d'Etat* or, exceptionally, from among the *conseillers*. By Article R 122-5 of the Administrative Courts Code, they are appointed by a decree of the Prime Minister, adopted on a proposal by the Minister of Justice, after being put forward by the Vice-President of the *Conseil d'Etat* in consultation with the division presidents. In practice, the *Conseil d'Etat*'s proposals are always endorsed. Appointment as Government Commissioner – which is not a rank – is for an unlimited duration but a Government Commissioner cannot remain in post for more than ten years and in practice does not generally do so for more than two or three years.

There are two Government Commissioners for each of the ten sections that make up the Judicial Division but there is no hierarchy of Government Commissioners, who do not constitute a separate "corps".

(b) Role of the Government Commissioner during the preparation of the case for trial

43. The Government Commissioner is a member of the *Conseil d'Etat* who is attached to the section from which the bench designated to hear a case is constituted and he attends – without voting and generally without speaking – the sitting at which the cases are prepared for trial, when the cases are presented by the reporting judges, and he receives a copy of the draft judgment adopted by the section and revised by the reviser. When his view of a case differs from that of the section, he can come and discuss it with the section at another preparatory sitting. If the disagreement remains and he considers that the case is of sufficient importance, he has the right (rarely exercised in practice) to request that the case should be referred to the Judicial Division or to the Judicial Assembly (Article 39 of the decree of 30 July 1963 on the organisation and functioning of the *Conseil d'Etat*). Only after that will he prepare his submissions for the actual trial, which is open to the public. These submissions, which are generally exclusively oral ones, are not communicated either to the parties or to the reporting judge or to the members of the trial bench.

(c) Role of the Government Commissioner at the hearing

44. It has become an established practice to communicate to lawyers who so request, before the hearing, the general tenor of the submissions which the Government Commissioner will make at the hearing. In view of the number of cases to be tried (about 500 a year for each Government Commissioner), the Government Commissioner's submissions, which remain his exclusive property, are often solely oral. He has complete

freedom as to whether or not to place those he has decided to put in writing in the *Conseil d'Etat*'s archives or to publish them in important cases as an annex to *Conseil d'Etat* judgments reported in the official reports or in legal periodicals.

45. At the hearing the Government Commissioner is under an obligation to make his submissions, which must be reasoned, since he is not allowed to say that he wishes to leave matters to the court's discretion.

46. The Government Commissioner's role at the hearing was described as follows by a former member of the *Conseil d'Etat*, T. Sauvel, in 1949:

> "Once the case has reached the public hearing, and the reporting judge has read his report, which is merely a summary of the evidence and makes no mention of the section's opinion, and the lawyers have made oral submissions if they considered it appropriate, the Commissioner stands up and is the one who speaks last, even after counsel for the defence. He sets out the whole case, making a critical analysis of all the grounds and of all the case-law that could be relied on; often he will indicate how the case-law has developed, highlighting the stages it has already gone through and hinting at possible future developments. Lastly, he will submit that the application should be dismissed or allowed. He does so in his own name, without any obligation to share the section's opinion or to take instructions either from Principal State Counsel (for there is none) or from any superior, presiding judge or minister. He is answerable only to his own conscience. He is a vital cog in the machinery of administrative procedure, which perhaps owes its real distinctiveness to him. The submissions in many cases go far beyond the bounds of the individual case and amount to legal treatises, to which litigants and commentators will long refer."

47. In the terms used by the *Conseil d'Etat* itself (10 July 1957, Gervaise, *Recueil Lebon*, p. 466, reiterated on 29 July 1998 in *Esclatine*) the Government Commissioner's function is

> "to set out for the *Conseil* the issues which each application raises for decision and to make known, by making his submissions completely independently, his own assessment, which must be impartial, of the facts of the case and the applicable rules of law, together with his opinion as to whether the manner in which, according to his conscience, the case submitted to the Court to which he belongs should be disposed of."

48. At the hearing, therefore, the parties to the case cannot speak after the Government Commissioner, since he speaks after counsel for the opposing parties have addressed the court. Even if they are not represented by a lawyer, they do, however, have the possibility, hallowed by usage, of sending the trial bench a "memorandum for the deliberations" to supplement the observations they have made orally or to reply to the Government Commissioner's submissions. This memorandum for the deliberations is read out by the reporting judge before he reads out the draft judgment and before the discussion begins.

49. Furthermore, it is settled case-law of the *Conseil d'Etat* that if the Government Commissioner were to raise a ground – even one involving an issue of public policy – that had not been relied on by the parties during the proceedings, the presiding judge would stay the proceedings, communicate

the ground to the parties so that they could present argument on it, and relist the case for a fresh hearing some weeks later, since grounds raised of the court's own motion have to be notified to the parties.

(d) The role of the Government Commissioner during the deliberations

50. After the public hearing it is customary for the Government Commissioner to attend the deliberations but he has no vote. As a general rule, he intervenes orally only to answer any specific questions that are put to him. He is, after all, the member of the Court who has seen the case file most recently and is therefore supposed to have the most detailed knowledge of it.

51. Cases in the *Conseil d'Etat* may be tried either by a single section (and in that event all the members of the trial bench already know the case) or by combined sections (in that event, four members, representing the section which prepared the case for trial, out of the nine judges who have to deliberate on it know the case) or by the Judicial Division or the Judicial Assembly (so-called solemn constitutions of the court for hearing the most important cases), in which only the President and the reporting judge, out of the seventeen or twelve judges who will have to deliberate on it, know the case.

52. Lastly, it should be pointed out that there are Government Commissioners not only at the *Conseil d'Etat* but also at the other administrative courts (of first instance and appeal) and at the Jurisdiction Disputes Court. Furthermore, the function of Advocate General at the Court of Justice of the European Communities was closely modelled on the institution of Government Commissioner, with the difference that under Article 27 § 2 of the Rules of Procedure of the Court of Justice, only the judges who sat at the hearing may take part in the deliberations – to the exclusion, therefore, of the Advocate General.

E. The case-law of the Court of Justice of the European Communities

53. In connection with the hearing of a reference for a preliminary ruling made to the Court of Justice at the European Communities by a Dutch court (the *Arrondissementsrechtbank te 's-Gravenhage*), Emesa Sugar (Free Zone) N.V. (a company), relying on Article 6 § 1 of the Convention, applied on 11 June 1999 to submit written observations after the Advocate General had delivered his opinion at the hearing on 1 June.

54. In an order of 4 February 2000 the Court of Justice refused that application on the following grounds:

"...

11. In accordance with Articles 221 and 222 of the EC Treaty, the Court of Justice consists of Judges and is assisted by Advocates General. Article 223 lays down identical conditions and the same procedure for appointing both Judges and Advocates General. In addition, it is clear from Title I of the EC Statute of the Court of Justice, which, in law, is equal in rank to the Treaty itself, that the Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office, which guarantees their full impartiality and total independence.

12. Moreover, the Advocates General, none of whom is subordinate to any other, are not public prosecutors nor are they subject to any authority, in contrast to the manner in which the administration of justice is organised in certain Member States. They are not entrusted with the defence of any particular interest in the exercise of their duties.

13. The role of the Advocate General must be viewed in that context. In accordance with Article 222 of the EC Treaty, his duty is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaty, the law is observed.

14. Under Article 18 of the EC Statute of the Court of Justice and Article 59 of the Rules of Procedure of the Court, the Opinion of the Advocate General brings the oral procedure to an end. It does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which 'derives its authority from that of the *procureur général*'s department ...' (judgment in *Vermeulen v. Belgium*, cited above, paragraph 31). Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself.

15. The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court's judgment.

16. Having regard to both the organic and the functional link between the Advocate General and the Court ..., the aforesaid case-law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court's Advocates General.

17. Moreover, given the special constraints inherent in Community judicial procedure, connected in particular with its language regime, to confer on the parties the right to submit observations in response to the Opinion of the Advocate General, with a corresponding right for the other parties (and, in preliminary ruling proceedings, which constitute the majority of cases brought before the Court, all the Member States, the Commission and the other institutions concerned) to reply to those observations, would cause serious difficulties and considerably extend the length of the procedure.

18. Admittedly, constraints inherent in the manner in which the administration of justice is organised within the Community cannot justify infringing a fundamental right to adversarial procedure. However, no such situation arises in that, with a view to the very purpose of adversarial procedure, which is to prevent the Court from being

> influenced by arguments which the parties have been unable to discuss, the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties ...
>
> 19. In the instant case, however, Emesa's application does not relate to the reopening of the oral procedure, nor does it rely on any specific factor indicating that it would be either useful or necessary to do so."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION WITH RESPECT TO THE FAIRNESS OF THE PROCEEDINGS

55. Mrs Kress alleged a violation of 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. Submissions of the parties

1. The applicant

56. Referring to *Borgers v. Belgium* (judgment of 30 October 1991, Series A no. 214-B), *Lobo Machado v. Portugal* (judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I) and *Reinhardt and Slimane-Kaïd v. France* (judgment of 31 March 1998, *Reports* 1998-II), the applicant firstly complained that the Government Commissioner's submissions had not been communicated to her before the hearing and that she had not been able to reply to him at the hearing or speak last; secondly, she complained that the fact that the Government Commissioner had been present at the trial bench's deliberations – which were held in private – when he had earlier submitted that her appeal should be dismissed, offended against the principle of equality of arms and cast doubt on the court's impartiality.

She pointed out that at each stage of the proceedings – firstly in the Administrative Court, then in the Administrative Court of Appeal and, lastly, in her appeal on points of law to the *Conseil d'Etat* – a Government Commissioner had intervened at the end of each hearing to express his view

of the case without that view having been known to the parties beforehand and without it being possible to reply.

The fact that the Government Commissioner was not a party to the administrative proceedings did not exclude the application to him of the adversarial principle, according to which, in the applicant's submission, no document could be lawfully submitted to the court without the parties having previously been able to study it. Under the case-law of the European Court, the same was true of observations by a third party intervening in the proceedings, even if that person was an independent judicial officer.

The applicant submitted that the Government Commissioner could not be equated with a member of the trial court since, although he did not vote at the deliberations, the fact that he intervened at the hearing, after the parties and without their having any opportunity to reply, made him, objectively speaking, an ally or an opponent of one of the parties to the proceedings, seeing that at the deliberations he might defend his point of view again in the absence of the parties. The applicant considered that the Government Commissioner's intervention in the proceedings was comparable to that of the Advocate-General in the French Court of Cassation – and in *Reinhardt and Slimane-Kaïd*, cited above, the Court had held that the imbalance created between the parties and the Advocate-General by the disclosure before the hearing to the Advocate-General, but not to the parties, of the report and draft judgment of the reporting judge was not reconcilable with the requirements of a fair trial.

Lastly, the practice of the memorandum for the deliberations did not enable a party to put forward all his arguments again and was therefore not sufficient to ensure that the adversarial principle was respected. It was also clear from the *Conseil d'Etat*'s case-law that memoranda for the deliberations did not form part of the case file.

2. The Government

(a) General observations

57. The Government maintained, firstly, that the judgments relied on by the applicant, which related to an institution – State Counsel's Office at certain supreme courts in Europe – which had nothing to do with the Government Commissioner, were irrelevant authorities in the instant case. The only precedent in which the issue had been directly determined was the decision of the European Commission of Human Rights in *Bazerque v. France* (no. 13672/88, decision of 3 September 1991, unreported). In that decision the plenary Commission had rejected the complaint as manifestly ill-founded, taking the view that the Government Commissioner was a judicial officer who played a totally independent role *vis-à-vis* the parties and that his observations were in the nature solely of an internal working

paper of the court, not communicated to the parties but made available to the judges who had to decide the case.

The Government observed that when the Commission delivered the decision in *Bazerque*, cited above, the hearing in *Borgers*, during which the Commission had asked the Court to find that there had been a violation of Article 6 § 1 of the Convention, had already taken place. It was therefore clear that, in the Commission's view, there had been no contradiction between the finding it had recommended – and which was adopted – in *Borgers* and the one it adopted at the same time, with the force of a unanimous decision, in *Bazerque*.

58. The judgments delivered by the Court since *Borgers*, cited above, in which it had been held that where it was impossible for the parties to reply to submissions by Crown Counsel's Office at the Belgian Court of Cassation and by similar offices at a number of supreme courts, the adversarial principle and therefore also Article 6 of the Convention were contravened related to institutions that were radically different in nature from that of Government Commissioner.

(b) Institutional difference between advocates-general at supreme courts and the Government Commissioner

59. The Government maintained that there was a fundamental difference between the Government Commissioner and a State counsel's office of the type that existed at the Court of Cassation in Belgium or in France in that the Commissioner was quite simply a member of the court, being himself a judge. It was well known that this Commissioner, despite his misleading title, in no way represented the Government or the administrative authorities, who were the defendant in proceedings in the administrative courts. He set out his personal opinion of cases wholly independently and wholly impartially, in the light of the parties' submissions and without being prejudiced in favour of either party.

The Government admitted that that was not sufficient to distinguish him from Principal State Counsel's Office – Principal State Counsel and the advocates-general – at the Court of Cassation, which was likewise independent and impartial, a factor that the European Court had not regarded as a sufficient reason for exempting his submissions from adversarial argument by the parties.

But the Government Commissioner's status was unambiguous in this respect: it was not merely identical with that of the judges but it *was* that of the judges, since the Commissioner was one of them, vested with a particular function in the course of the proceedings. That explained why the Commissioner was chosen from among the members of the court by its President, a procedure that was inconceivable in the case of a State counsel's office, however independent, whose role could not be conferred

on it by the presiding judge of a court since there was an inbuilt structural separation between State Counsel's Office and the court itself.

The Commissioner was part of the court before being appointed to his duties for a limited period of time; he would continue to be part of it when he had ceased to perform those duties and, most important of all, he continued to be part of it throughout the period during which he performed them, just like a reporting judge, neither more nor less.

(c) Functional difference between advocates-general and the Government Commissioner

60. Unlike the function of a State counsel's office, which represented society or the public interest or whose function was to ensure the consistency of case-law, that of the Government Commissioner was, after the parties had finished making their submissions in accordance with the adversarial principle, and once the hearing had ended, to put his personal opinion to his colleagues, inviting them to decide the case in a particular way. In other words, his function was indistinguishable from that of a reporting judge.

At the *Conseil d'Etat* each Government Commissioner belonged to one of the subdivisions (sections) and worked under the operational authority of the section president, while enjoying complete freedom of opinion, like all the judges.

Once the written stage of the proceedings was over, when the case file was complete, the judges of the section met for an initial consideration of the case, after which they adopted a draft judgment, which was purely provisional. The Commissioner took part in that working session, during which the judge who had the title of reporting judge and was in fact the initial rapporteur for the case – the Commissioner being the second one – set out his view. The file was then sent to the Commissioner for him to study thoroughly.

Subsequently, the case would be listed for a public hearing on a date chosen by the Commissioner himself. At that hearing the parties, if they were represented, would be able to address the court through their counsel. Once the oral submissions had been made, the Commissioner would address the court in order to express his personal opinion on the case; these submissions (*conclusions*) were made in public and were not necessarily drawn up in writing in advance.

After that, generally immediately afterwards, the deliberations took place, in which the Commissioner participated as a member of the court, that is to say as naturally as one might expect. It went without saying that if in his submissions the Commissioner raised a fresh issue, on which the parties had not had an opportunity to present argument, and the trial bench considered the issue relevant to the determination of the case, the oral proceedings would be reopened and the case set down for a later hearing. It

was also open to the parties to file a memorandum for the deliberations (*note en délibéré*).

The Government therefore considered that the Commissioner was intimately bound up with the collegial work of the court, of which he was an essential component; his sphere of activity was entirely within the court and his place was among the judges. His submissions were an internal working paper of the court, not because they would not be made public – they were – but because they emanated from a member of the court, who was addressing his colleagues and who, in the wording of *Esclatine* (see paragraph 47 above) "[took] part in the judicial function devolving on the court of which he [was] a member".

The Government pointed out that distinguished authors had stated that the Commissioner was merely a "functional duplication of the reporting judge", that his submissions were a "public report" and, furthermore, that they in actual fact represented the first stage of the deliberations, a distinctive feature of which was that it was public whereas the remaining stage of the deliberations was secret.

It was apparent from *Vermeulen v. Belgium* (judgment of 20 February 1996, *Reports* 1996-I, p. 234, § 33), that the right to observance of the adversarial principle covered only "evidence adduced or observations filed" by a person or body outside the court and not those which came from a judge and were intended for the other members of the bench. More generally, the principle in *Vermeulen* did not apply to the court's internal work, the acts which contributed to the very process of reaching the collegial decision. Thus in *Reinhardt and Slimane-Kaïd* (cited above, pp. 665-66, § 105) the Court had accepted that the reporting judge's report to the Court of Cassation and the draft judgment he had prepared were "legitimately privileged from disclosure as forming part of the deliberations" and that they could therefore not be communicated to the parties or be the subject of argument by them. The fact that such a report was presented in public – an advantage to parties – did not in any way alter the rule.

(d) The Government Commissioner's participation in the deliberations

61. The Government pointed out that it was customary for the Commissioner not to take part in the vote at the end of the deliberations in which he had sat. It should not, however, be inferred that he was not a judge and was to be regarded as an intervener, with the attendant consequences. From the point of view of his status and his position in the proceedings, there was no reason why the Commissioner should not take part in the vote at the deliberations, and his abstention was formal and symbolic rather than real.

The origin of the practice lay in the very demanding and formalistic conception of the secrecy of the deliberations adopted in French law, a

conception according to which no one outside the court was to know the view of any individual judge whose vote had contributed to the collegial decision. That being so, the Commissioner's abstention when the vote was taken made it possible to keep up appearances and to leave intact, at least formally, the principle that the deliberations were secret: since the Commissioner made known his opinion publicly, he did not vote and in that way the principles were preserved. Nevertheless, the Commissioner was definitely a member of the trial bench and took part from start to finish in the collegial consideration of a case that ended in the decision.

So much so, that the judgments in which the *Conseil d'Etat*'s decision corresponded to the Commissioner's submissions were often interpreted in the light of those submissions, which, in a manner of speaking, formed additional reasoning for the judgment. Where the decision went against the submissions, the latter amounted to something that in theory had no place in French law and was even excluded by it, but which was in practice accepted in the administrative courts, namely the opinion of a judge who dissented from the opinion of the majority of his colleagues.

(e) Final remarks

62. The Government accepted that a judge such as the Government Commissioner might, in the eyes of lawyers accustomed to legal systems that had no equivalent, appear to have rather curious features, and perhaps even disconcerting ones. But they considered that the Court's role was not to impose a single judicial pattern but to ensure compliance with the vital principles of a fair system of justice, while respecting the differences between legal systems so long as the differences were consistent with observance of those principles.

The Government Commissioner belonged to the best traditions of French law, and his role in administrative proceedings had been the subject of innumerable studies, each more laudatory than the one before it. The institution had commanded the respect and admiration of generations of French and non-French lawyers.

Firstly, if the manner in which the Commissioner contributed to proceedings infringed the rights of the parties and the fundamental principle of adversarial procedure, the members of the *Conseil d'Etat* Bar, who represented parties in the highest administrative court, would have been the best placed to notice the fact and the first to have complained of it, whereas in fact the Council of the *Conseil d'Etat* and Court of Cassation Bar had intervened in the instant case to support the system in question; not only did the Council not criticise it, but it even considered it to be excellent and wished to retain it.

Secondly, some importance should also be attached to the recent ruling of the Court of Justice of the European Communities concerning the fact

that it was impossible for parties to present argument on the submissions made to that court by the Advocate General.

In an order of 4 February 2000 (Emesa Sugar) the Court of Justice had interpreted *Vermeulen*, to which it referred, in much the same manner as the French *Conseil d'Etat* had done in *Esclatine*, cited earlier. The fact that the parties had no opportunity to reply to the Advocate General did not infringe the principles of a fair trial, the Court of Justice had said, since his submissions did not constitute "an opinion ... which stem[med] from an authority outside the Court" – like the *procureur général*'s department referred to in *Vermeulen* – but the individual reasoned opinion, expressed in open court, of a member of the Court of Justice itself.

That being so, if in the instant case the Court were to hold that there had been a violation of Article 6, it would – admittedly by implication, but necessarily – be condemning, as being contrary to the requirements of a fair trial, the system applied by the Court of Justice at Luxembourg from its inception. That Court, however, had been dispensing justice for nearly half a century, respected and even admired by all, and likewise projected a very good image of European justice, and no one had ever challenged the integrity of its procedure.

The Government therefore submitted that there had been no violation of Article 6 § 1 of the Convention.

B. The Court's assessment

63. The applicant complained, under Article 6 § 1 of the Convention, that she had not had a fair trial in the administrative courts. That complaint had two limbs: firstly, the applicant or her lawyer had not been able to study the Government Commissioner's submissions before the hearing or reply to them after it as the Government Commissioner always spoke last; and secondly, the Commissioner attended the deliberations, even if he did not vote, and that made worse the infringement of the right to a fair trial resulting from the failure to respect the principle of equality of arms and the right to adversarial procedure.

1. Recapitulation of the relevant case-law

64. The Court notes that on the points mentioned above the application raises, *mutatis mutandis*, issues similar to those examined by the Court in several cases concerning the role of the Advocate-General or similar officers at the Court of Cassation or Supreme Court in Belgium, Portugal, the Netherlands and France (see the following judgments: *Borgers*, *Vermeulen*, and *Lobo Machado*, cited above; *Van Orshoven v. Belgium*, 25 June 1997, *Reports* 1997-III; and *J.J. v. the Netherlands* and *K.D.B. v. the Netherlands*, 27 March 1998, *Reports* 1998-II; see also *Reinhardt and Slimane-Kaïd*, cited above).

65. In all these cases the Court held that there had been a violation of Article 6 § 1 of the Convention on account of the failure to disclose in advance either the submissions of the officer concerned or those contained in the reporting judge's report and the impossibility of replying to them. The Court also points out that in *Borgers*, which concerned the role of the Advocate-General at the Court of Cassation in criminal proceedings, it held that there had been a breach of Article 6 § 1 of the Convention, principally because of the Advocate-General's participation in the Court of Cassation's deliberations, which had infringed the principle of equality of arms. Subsequently, the aggravating factor of the relevant officer's participation in the deliberations was taken into account only in *Vermeulen* and *Lobo Machado* (cited above, p. 234, § 34, and p. 207, § 32, respectively), in which it had been raised by the applicants; in all the other cases, the Court has emphasised the need to respect the right to adversarial procedure, noting that this entails the parties' right to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service.

Lastly, the Court points out that *Borgers*, *J.J. v. the Netherlands* and *Reinhardt and Slimane-Kaïd* concerned criminal proceedings or ones with a criminal connotation. *Vermeulen*, *Lobo Machado* and *K.D.B. v. the Netherlands* were concerned with civil proceedings or ones with a civil connotation, while *Van Orshoven* concerned disciplinary procedures against a doctor.

2. As to the alleged special character of the administrative courts

66. None of those cases concerned a dispute brought before the administrative courts, and the Court must therefore consider whether the principles identified in its case-law as recapitulated above apply in the instant case.

67. It observes that since *Borgers*, cited above, all the governments have endeavoured to show before the Court that in their legal systems their advocates-general or principal State counsel were different from the Belgian *procureur général*, from the point of view both of organisation and of function. Their role was said, for instance, to differ according to the nature of the proceedings (criminal, civil or even disciplinary); they were said not to be parties to the proceedings or the adversaries of anyone; their independence was said to be guaranteed and their role limited to that of an *amicus curiae* acting in the public interest or to ensure that case-law was consistent.

68. The Government are no exception. They too maintained that the institution of Government Commissioner in French administrative proceedings differed from the other institutions criticised in the judgments cited above, because there was no distinction between the bench and State Counsel's Office within the administrative courts; because the Government

Commissioner, from the point of view of his status, was a judge in the same way as all the other members of the *Conseil d'Etat*; and because, from the point of view of his function, he was in exactly the same position as the reporting judge, except that he expressed his opinion publicly but did not vote.

69. The Court accepts that, in comparison with the ordinary courts, the administrative courts in France display a number of special features, for historical reasons.

Admittedly, the very establishment and existence of administrative courts can be hailed as one of the most conspicuous achievements of a State based on the rule of law, in particular because the jurisdiction of those courts to adjudicate on acts of the administrative authorities was not accepted without a struggle. Even today, the way in which administrative judges are recruited, their special status, distinct from that of the ordinary judiciary, and the special features of the way in which the system of administrative justice works (see paragraphs 33-52 above) show how difficult it was for the executive to accept that its acts should be subject to review by the courts.

As to the Government Commissioner, the Court equally accepts that it is undisputed that his role is not that of a State counsel's office and that it is a *sui generis* institution peculiar to the organisation of administrative-court proceedings in France.

70. However, the mere fact that the administrative courts, and the Government Commissioner in particular, have existed for more than a century and, according to the Government, function to everyone's satisfaction cannot justify a failure to comply with the present requirements of European law (see *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, p. 19, § 36). The Court reiterates in this connection that the Convention is a living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 28).

71. No one has ever cast doubt on the independence or impartiality of the Government Commissioner, and the Court considers that his existence and institutional status are not in question under the Convention. However, the Court is of the view that the Commissioner's independence and the fact that he is not responsible to any hierarchical superior, which is not disputed, are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principle of a fair trial.

Indeed, great importance must be attached to the part actually played in the proceedings by the Government Commissioner, and more particularly to the content and effects of his submissions (see, by analogy, among many other authorities, *Van Orshoven*, cited above, p. 1051, § 39).

3. As regards the non-disclosure of the Government Commissioner's submissions in advance and the impossibility of replying to them at the hearing

72. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports* 1997-I, pp. 107-08, § 23).

73. Irrespective of the fact that in most cases the Government Commissioner's submissions are not committed to writing, the Court notes that it is clear from the description of the course of proceedings in the *Conseil d'Etat* (see paragraphs 40-52 above) that the Government Commissioner makes his submissions for the first time orally at the public hearing of the case and that the parties to the proceedings, the judges and the public all learn of their content and the recommendation made in them on that occasion.

The applicant cannot derive from the right to equality of arms that is conferred by Article 6 § 1 of the Convention a right to have disclosed to her, before the hearing, submissions which have not been disclosed to the other party to the proceedings or to the reporting judge or to the judges of the trial bench (see *Nideröst-Huber*, cited above, ibid.). No breach of equality of arms has therefore been made out.

74. However, the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see the following judgments, cited above: *Vermeulen*, p. 234, § 33; *Lobo Machado*, pp. 206-07, § 31; *Van Orshoven*, p. 1051, § 41; *K.D.B.*, p. 631, § 44; and *Nideröst-Huber*, p. 108, § 24).

75. As regards the fact that it is not possible for parties to reply to the Government Commissioner's submissions at the end of the hearing, the Court refers to *Reinhardt and Slimane-Kaïd*, cited above. In that case the Court found a breach of Article 6 § 1 because the reporting judge's report, which had been disclosed to the Advocate-General, had not been communicated to the parties (ibid., pp. 665-66, § 105). On the other hand, with respect to the Advocate-General's submissions, the Court stated:

> "The fact that the Advocate-General's submissions were not communicated to the applicants is likewise questionable.
>
> Admittedly, current practice is for the Advocate-General to inform the parties' lawyers no later than the day preceding the hearing of the tenor of his submissions and in cases where, at the request of the lawyers, there is an oral hearing, they are entitled to reply to his submissions orally and by a note sent to the court in deliberations ... In the light of the fact that only questions of pure law are argued before the Court of

> Cassation and that the parties are represented in that court by highly specialised lawyers, that practice affords parties an opportunity of apprising themselves of the Advocate-General's submissions and commenting on them in a satisfactory manner. It has not, however, been shown that such a practice existed at the material time." (p. 666, § 106)

76. Contrary to the position in *Reinhardt and Slimane-Kaïd*, it is not disputed that in proceedings in the *Conseil d'Etat* lawyers who so wish can ask the Government Commissioner, before the hearing, to indicate the general tenor of his submissions. Nor is it contested that the parties may reply to the Government Commissioner's submissions by means of a memorandum for the deliberations, a practice which – and this is vital in the Court's view – helps to ensure compliance with the adversarial principle. That was in fact what the applicant's lawyer did in the instant case (see paragraph 26 above).

Lastly, in the event of the Government Commissioner's raising orally at the hearing a ground not raised by the parties, the presiding judge would adjourn the case to enable the parties to present argument on the point (see paragraph 49 above).

That being so, the Court considers that the procedure followed in the *Conseil d'Etat* affords litigants sufficient safeguards and that no problem arises from the point of view of the right to a fair trial as regards compliance with the principle that proceedings should be adversarial.

There has consequently been no violation of Article 6 § 1 of the Convention in this respect.

4. As regards the presence of the Government Commissioner at the Conseil d'Etat*'s deliberations*

77. The Court notes that the Government's approach to this question is to say that since the Government Commissioner is a full member of the trial bench, on which he functions, in a manner of speaking, like a second reporting judge, there should be no objection to his attending the deliberations or even to his voting.

78. The fact that a member of the trial bench has publicly expressed his view of a case could then be regarded as contributing to the transparency of the decision-making process. This transparency is likely to promote a more willing acceptance of the decision by litigants and the public inasmuch as the Government Commissioner's submissions, if they are accepted by the trial bench, constitute a kind of commentary on the judgment. Where they are not so accepted and the Government Commissioner's submissions are not reflected in the decision adopted in the judgment, they constitute a kind of dissenting opinion which will provide food for thought for future litigants and legal writers.

Furthermore, this public presentation of a judge's opinion would not breach the duty of impartiality inasmuch as the Government Commissioner,

during the deliberations, is only one judge among others and his view cannot affect the decision of the other judges where he is in a minority, whatever type of bench is considering the case (section, combined sections, Division or Assembly). It should also be noted that in the instant case the applicant did not in any way call in question the Government Commissioner's subjective impartiality or independence.

79. However, the Court observes that this approach is not consistent with the fact that although the Government Commissioner attends the deliberations, he has no right to vote. The Court considers that by forbidding him to vote, on the ground that the secrecy of the deliberations must be preserved, domestic law considerably weakens the Government's argument that the Government Commissioner is truly a judge, as a judge cannot abstain from voting unless he stands down. Moreover, it is hard to accept the idea that some judges may express their views in public while the others may do so only during secret deliberations.

80. Furthermore, in examining, above, the applicant's complaint concerning the failure to disclose the Government Commissioner's submissions in advance and the impossibility of replying to him, the Court accepted that the role played by the Commissioner during administrative proceedings requires procedural safeguards to be applied with a view to ensuring that the adversarial principle is observed (see paragraph 76 above). The reason why the Court concluded that there had been no violation of Article 6 on this point was not the Commissioner's neutrality *vis-à-vis* the parties but the fact that the applicant enjoyed sufficient safeguards to counterbalance the Commissioner's power. The Court considers that that finding is also relevant to the complaint concerning the Government Commissioner's participation in the deliberations.

81. Lastly, the doctrine of appearances must also come into play. In publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the Government Commissioner could legitimately be regarded by the parties as taking sides with one or other of them.

In the Court's view, a litigant not familiar with the mysteries of administrative proceedings may quite naturally be inclined to view as an adversary a Government Commissioner who submits that his appeal on points of law should be dismissed. Conversely, a litigant whose case is supported by the Commissioner would see him as his ally.

The Court can also imagine that a party may have a feeling of inequality if, after hearing the Commissioner make submissions unfavourable to his case at the end of the public hearing, he sees him withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers (see, *mutatis mutandis*, *Delcourt*, cited above, pp. 16-17, § 30).

82. Since *Delcourt*, the Court has noted on numerous occasions that while the independence and impartiality of the Advocate-General or similar

officer at certain supreme courts were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances (see *Borgers*, cited above, p. 31, § 24).

It is for this reason that the Court has held that regardless of the acknowledged objectivity of the Advocate-General or his equivalent, that officer, in recommending that an appeal on points of law should be allowed or dismissed, became objectively speaking the ally or opponent of one of the parties and that his presence at the deliberations afforded him, if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction (see *Borgers*, *Vermeulen* and *Lobo Machado*, cited above, pp. 31-32, § 26, p. 234, § 34, and p. 207, § 32, respectively).

83. The Court sees no reason to depart from the settled case-law referred to above, even though it is the Government Commissioner who is in issue, whose opinion does not derive its authority from that of a State counsel's office (see, *mutatis mutandis*, *J.J.* and *K.D.B.*, cited above, pp. 612-13, § 42, and p. 631, § 43, respectively).

84. The Court also observes that it was not argued, as in *Vermeulen* and *Lobo Machado*, that the Government Commissioner's presence was necessary to help ensure the consistency of case-law or to assist in the final drafting of the judgment (see, *mutatis mutandis*, *Borgers*, cited above, p. 32, § 28). It is clear from the Government's explanations that the presence of the Government Commissioner is justified by the fact that, having been the last person to have seen and studied the file, he will be in a position during the deliberations to answer any question which might be put to him about the case.

85. In the Court's opinion, the benefit for the trial bench of this purely technical assistance is to be weighed against the higher interest of the litigant, who must have a guarantee that the Government Commissioner will not be able, through his presence at the deliberations, to influence their outcome. That guarantee is not afforded by the current French system.

86. The Court is confirmed in this approach by the fact that at the Court of Justice of the European Communities the Advocate General, whose role is closely modelled on that of the Government Commissioner, does not attend the deliberations (Article 27 of the Rules of Procedure of the Court of Justice).

87. In conclusion, there has been a violation of Article 6 § 1 of the Convention on account of the Government Commissioner's participation in the deliberations of the trial bench.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS TO THE LENGTH OF THE PROCEEDINGS

88. The applicant complained of the length of the medical-liability proceedings in the administrative courts. She alleged a violation of Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

89. In the Government's submission, the case did not lend itself to a rapid disposal of the proceedings. The Government admitted, however, that the courts of first instance and appeal on points of law had probably been unable to show all the desirable diligence and they stated that they wished to leave the matter to the Court's discretion.

A. Period to be taken into consideration

90. The period to be taken into consideration began on 22 June 1987, when the preliminary compensation claim made to Strasbourg Hospital was refused (see *X v. France*, judgment of 31 March 1992, Series A no. 234-C, p. 90, § 31). It ended on 30 July 1997, with the delivery of the *Conseil d'Etat*'s judgment. It therefore lasted ten years, one month and eight days.

B. Reasonableness of the length of the proceedings

91. The Administrative Court ruled on this case – which, in the Court's opinion, was not especially complex – on 5 September 1991; the Nancy Administrative Court of Appeal ruled on the applicant's appeal on 8 April 1993; lastly, the *Conseil d'Etat* gave its judgment on the appeal on points of law on 30 July 1997. The Court considers that both at first instance and in the appeal on points of law there were substantial delays in the proceedings. The *Conseil d'Etat*'s examination of the applicant's appeal on points of law, in particular, took four years and a little over one month.

92. Having regard to its case-law on the subject, the Court holds that the length of the proceedings in issue did not satisfy the "reasonable time" requirement.

There has consequently been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

94. The applicant sought 200,000 French francs (FRF) in respect of non-pecuniary damage, on account, firstly, of the considerable anxiety she had suffered because of the excessive length of the proceedings and, secondly, of the frustration she had felt at not being able to reply to the Government Commissioner's submissions, which were unfavourable to her.

95. The Government did not express a view.

96. As regards the applicant's complaint concerning the fairness of the proceedings in the *Conseil d'Etat*, the Court considers, in keeping with its case-law (see *Vermeulen*, cited above, p. 235, § 37), that the non-pecuniary damage alleged by the applicant is sufficiently compensated by the finding of a violation in paragraph 85 above.

The applicant has, on the other hand, indisputably sustained non-pecuniary damage on account of the excessive length of the proceedings. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards her FRF 80,000 under this head.

B. Costs and expenses

97. The applicant sought, firstly, reimbursement of that part of the costs of FRF 72,625 incurred in the proceedings in the French courts which was related to the alleged violations (the need to lodge an ordinary appeal and an appeal on points of law).

98. The Government did not express a view.

99. If the Court finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before the Convention institutions but also those incurred in the national courts for the prevention or redress of the violation (see, in particular, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63). In the instant case the Court finds that the applicant did not incur such costs and expenses during the proceedings in issue. It notes, in particular, that at no time did the applicant make any criticism of the Government Commissioner in the three courts that dealt with her case. This part of the claim must consequently be dismissed.

100. The applicant also sought compensation of FRF 20,000 in respect of the costs and expenses she had incurred before the Convention institutions.

101. The Government did not express a view.

102. According to the Court's case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum (see, for example, *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V). In the instant case, having regard to the information before it and the aforementioned criteria, the Court considers the sum of FRF 20,000 reasonable for the proceedings before it and awards the applicant that sum.

C. Default interest

103. 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 4.26% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention with regard to the applicant's complaint that she did not receive the Government Commissioner's submissions in advance of the hearing and was unable to reply to him at the end of it;

2. *Holds* by ten votes to seven that there has been a violation of Article 6 § 1 of the Convention on account of the Government Commissioner's participation in the *Conseil d'Etat*'s deliberations;

3. *Holds* unanimously that there has been a violation of Article 6 § 1 on account of the excessive length of the proceedings;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following sums:
      (i) FRF 80,000 (eighty thousand French francs) in respect of non-pecuniary damage;
      (ii) FRF 20,000 (twenty thousand French francs) in respect of costs and expenses, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 4.26% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 April 2001.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Rozakis, Mrs Tulkens and Mr Casadevall;

(b) joint partly dissenting opinion of Mr Wildhaber, Mr Costa, Mr Pastor Ridruejo, Mr Kuris, Mr Bîrsan, Mrs Botoucharova and Mr Ugrekhelidze.

L.W.
M. de S.

CONCURRING OPINION OF JUDGES ROZAKIS, TULKENS AND CASADEVALL

(Translation)

As regards the applicant's complaint that it was impossible to reply to the Government Commissioner's submissions at the hearing, the Court observes: "Nor was it contested that the parties may reply to the Government Commissioner's submissions by means of a memorandum for the deliberations, a practice which – and this is vital in the Court's view – helps to ensure compliance with the adversarial principle" (see paragraph 76 of the judgment).

Admittedly, we know that as things stand at present, the memorandum for the deliberations is intended mainly to afford an opportunity to raise any omissions on the part of the Government Commissioner and that it is not, as such, meant to guarantee compliance with the adversarial principle. While it therefore does not suffice on its own to guarantee compliance with that principle, the memorandum for the deliberations may, however, *contribute* to doing so; and no doubt it could so contribute even more if, without upsetting the fundamental balance proceedings in the *Conseil d'Etat*, the arrangements governing it were improved and the court were obliged to take it into account.

JOINT PARTLY DISSENTING OPINION OF JUDGES WILDHABER, COSTA, PASTOR RIDRUEJO, KURIS, BÎRSAN, BOTOUCHAROVA AND UGREKHELIDZE

(Translation)

1. The Court unanimously dismissed the applicant's complaint that she had not received the Government Commissioner's submissions in advance of the hearing, and was unable to reply to him at the end of it. But it was by a majority that it found a violation of Article 6 § 1 of the Convention on account of the fact that Government commissioners take part in the deliberations of the administrative courts of which they are members.

2. To our regret, we cannot concur in that conclusion of our colleagues or their analysis. In a subsidiary system of human-rights protection the Court should have left intact an institution that has been respected and acknowledged for over a century and a half and has succeeded in working for the rule of law and human rights, while preserving objective appearances.

3. The finding of a violation of the Convention rests on four main arguments, set out in paragraphs 79 to 86 of the judgment. Firstly, criticism is made of the fact that the Government Commissioner attends the deliberations but has no right to vote. Secondly, it is said that on account of that participation, the applicant did not enjoy procedural safeguards such as those which led the Court unanimously to dismiss the first complaint. Thirdly, it is said that the "doctrine" of appearances must come into play. Lastly, the Advocate General at the Court of Justice of the European Communities does not attend the deliberations.

4. We consider that all those reasons must be refuted.

5. In its first argument, set out in paragraph 79 of the judgment, the majority of the Court criticise the fact that the Government Commissioner participates in the deliberations without voting. That argument strikes us as being paradoxical. Would amending the rules to provide that the Government Commissioner votes on the draft judgment really be sufficient for his attendance at the deliberations to be given the Court's blessing? Secondly, the last sentence of paragraph 79 adds that all judges must express their views in public – or none must. But that statement, which begs the question, is not based on any precedent of our Court and is not founded on any authoritative argument. It is an affirmation pure and simple, and is scarcely persuasive.

6. The second argument rests, in our view, on a false symmetry. We share the opinion of the majority of the Court that litigants in the administrative courts enjoy procedural safeguards since their lawyers can acquaint themselves before the hearing with the tenor of the submissions, can reply to them by means of a memorandum for the deliberations and are protected from the risk that the Commissioner may raise a ground not raised by the parties (see paragraph 76 of the judgment). It was for that reason that the Court dismissed Mrs Kress's first complaint. The majority of the Court infer that a litigant should enjoy similar safeguards in respect of the deliberations. Yes, but what does that mean? That the private party's lawyer, or the representative of the administrative authority in dispute with that party, or both, should also attend the deliberations? They would be silent and passive, as the Government Commissioner is, and yet their presence would neutralise his own? Merely to imagine such possibilities is to demonstrate how unrealistic they are. We therefore consider that this argument is ingenious but contrived.

7. The Court's third argument is based on the doctrine of appearances. According to that doctrine, justice must be seen to be done impartially (even though neither the applicant nor the Court itself has ever cast doubt on the independence or impartiality of the Commissioner or of similar institutions at supreme courts, as the judgment states in paragraphs 71, 79 and 82, and although the judgment states very clearly, in paragraph 73, "No breach of equality of arms has ... been made out").

8. Many authors and even eminent judges of this Court have written that the doctrine of appearances, which is in any case not accepted to the same extent in all the legal systems represented in the Council of Europe, has in the past been pushed much too far, whether *vis-à-vis* the Court of Cassation in Belgium or France, the Supreme Court in Portugal or the Supreme Court of the Netherlands. Despite those criticisms, the majority go further still. It is illogical that the same applicant, who in no way calls in question the subjective impartiality of a judge or his independence (see paragraph 78 of the judgment), may justifiably "have a feeling of inequality" if she sees him "withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers" (see paragraph 81 of the judgment). It is not only illogical; it is open to criticism, since any informed litigant, and at all events any informed lawyer, knows that the participation in the deliberations of someone who has publicly expressed his "*opinio juris*" is not, by the mere fact of his presence, going to increase the impact of that opinion on the judges who have to deliberate and vote. To hold any differently would be to insult the latter and impute to them a lack of independence and impartiality.

9. Even supposing that the doctrine of appearances finds acceptance, does a European court, relying on it, in a system based on subsidiarity and respect for national courts, have to dent the reputation of an institution that

has functioned to general satisfaction for a century and a half, that plays a vital role in a State based on the rule of law and that has done substantial work on behalf of justice and human rights (see on these points paragraphs 41, 46-47 and especially 69-71 of the judgment)?

10. And have the limits of "European supervision" in relation to characteristic national institutions – which are legitimate so long as they fulfil their Convention obligations to produce a specific result – not here been reached or overstepped? In our humble but firm opinion, our Court has already gone very far in this area in the past (since *Borgers v. Belgium*, judgment of 30 October 1991 (Series A no. 214-B), in fact, which represented a departure from doctrine previously established in *Delcourt v. Belgium*, judgment of 17 January 1970 (Series A no. 11)), and the majority of the Grand Chamber in this case go too far, despite the first point of the operative provisions.

11. It is true that the majority resort to a fourth and last argument: at the Luxembourg Court, which made the Emesa Sugar order, according to which the institution of Advocate General is not incompatible with Article 6 § 1, despite *Vermeulen v. Belgium* (judgment of 20 February 1996, *Reports of Judgments and Decisions* 1996-I, Commission decision, p. 246, §§ 53-54), the Advocate General does not attend the deliberations. This is said to confirm the majority's approach (see paragraph 86 of the judgment). The Advocate General at the Court of Justice of the European Communities was indeed "closely modelled" on the Government Commissioner at the French *Conseil d'Etat*. But it is inappropriate to attach any decisive importance to the difference. The mere fact that in its order in the Emesa Sugar case the Court of Justice held that the office of Advocate General, whose holder does not take part in the deliberations, was compatible with fundamental rights does not mean that our Court had to hold that the Commissioner's presence at the deliberations of administrative courts breached Article 6 § 1 of the Convention. Secondly, this incidental difference, which goes back to the 1950s, is certainly not due to some sort of condemnation of the French system by the Luxembourg Court, any more than it is to the fear of any incompatibility with the Convention, to which the judgments of the Court of Justice of the European Communities have referred only since 1975. Lastly, while it is satisfactory that both courts have reached the same conclusion in respect of the complaint which our Court has dismissed, there would be no flagrant contradiction if they condemned neither the Advocate General nor the Government Commissioner, irrespective of whether the latter attended the deliberations or the former did not.

12. In sum, we see no decisive reason to condemn – even on a point that some will deem minor – a system that has proved its worth and whose results, judging by the yardstick of the Convention's objectives, have on the whole been more than satisfactory. We would venture also to draw attention to the determining influence of several Government commissioners,

members of the *Conseil d'Etat*, in regard to the incorporation of the European Convention on Human Rights into the French legal system, whether in the matter of the Convention's primacy over French law, even that enacted subsequently, or in the matter of the case-law on Article 8 and the law on aliens, on Article 10, on Article 1 of Protocol No. 1 and even on Article 6 § 1, in issue in the instant case.

13. The present judgment admittedly makes a praiseworthy effort to be pragmatic and realistic in very clearly dismissing the first complaint in the application. It is regrettable that that effort was not more thoroughgoing, and it would be desirable, in our view, that the Court should review the whole of its case-law on proceedings in supreme courts in Europe, case-law which places too much emphasis on appearances, to the detriment of respectable national traditions and, ultimately, of litigants' real interests.