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

COURT (CHAMBER)

CASE OF DE CUBBER v. BELGIUM

(Application no. 9186/80)

JUDGMENT

STRASBOURG

26 October 1984

In the De Cubber case[*],

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

Mr. G. WIARDA, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Sir Vincent EVANS,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 May and 2 October 1984,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1983, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9186/80) against the Kingdom of Belgium lodged with the Commission on 10 October 1980 under Article 25 (art. 25) by a Belgian citizen, Mr. Albert De Cubber.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in

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[*] The case is numbered 8/1983/64/99. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

[**] The revised Rules of Court, which entered into force on1 January 1983, are applicable to the present case.

the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 27 October 1983, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. M. Zekia, Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. F. Gölcüklü and Mr. F. Matscher (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Sir Vincent Evans and Mr. R. Bernhardt, substitute judges, replaced Mr. Zekia and Mr. Lagergren, who were prevented from taking part in the consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5) and having on each occasion consulted, through the Registrar, the Agent of the Belgian Government ("the Government"), the Commission's Delegate and Mr. De Cubber's lawyer, Mr. Wiarda

- decided, on 17 November 1983, that there was no call at that stage for memorials to be filed (Rule 37 para. 1);

- directed, on 9 February 1984, that the oral proceedings should open on 23 May (Rule 38).

On 16 April, the Registrar received, from the applicant's lawyer, her client's claims under Article 50 (art. 50) of the Convention.

5. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. J. NISET, Legal Adviser
the Ministry of Justice, *Agent*,
Mr. André DE BLUTS, avocat, *Counsel*;

- for the Commission

Mr. M. MELCHIOR, *Delegate*;

- for the applicant

Mrs. F. De CROO-DESGUIN, avocat, *Counsel*.

The Court heard addresses by Mr. De Bluts for the Government, by Mr. Melchior for the Commission and by Mrs. De Croo-Desguin for the applicant, as well as their replies to questions put by it and by several of its members.

6. On 4 April and on 7, 14, 18 and 23 May, the Commission, the Government and the applicant, as the case may be, filed various documents, either on their own initiative or in response to a request made by the Registrar in accordance with the President's instructions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a Belgian citizen born in 1926. He lives in Brussels and is a sales manager.

8. On 4 April 1977, he was arrested by the police at his home and taken to Oudenaarde where he was questioned in connection with a car theft.

Warrants of arrest for forgery and uttering forged documents were issued against the applicant on the following day, on 6 May and on 23 September 1977. The first warrant - notice no. 10.971/76 - was issued by Mr. Pilate, an investigating judge at the Oudenaarde criminal court (tribunal correctionnel), and the second and third - notices nos. 3136/77 and 6622/77 - by Mr. Van Kerkhoven, the other investigating judge at the same court.

9. Prior to that, in the capacity of judge (juge assesseur) of the same court sitting either on appeal (judgment of 3 May 1968) or at first instance (judgments of 17 January, 7 March and 28 November 1969), Mr. Pilate had already dealt with criminal proceedings brought against Mr. De Cubber in connection with a number of offences; those proceedings had led variously to an unconditional or conditional discharge (relaxe) (17 January and 7 March 1969, respectively) or to conviction.

More recently, Mr. Pilate had had to examine, in his capacity of investigating judge, a criminal complaint filed by Mr. De Cubber (16 November 1973) and, in his capacity of judge dealing with the attachment of property (juge des saisies), certain civil cases concerning him (1974-1976). In regard to each of these cases, the applicant had applied to the Court of Cassation to have the case removed, on the ground of bias (suspicion légitime; Article 648 of the Judicial Code), from Mr. Pilate or from the Oudenaarde court as a whole; each of these requests had been held inadmissible or unfounded.

10. At the outset Mr. Van Kerkhoven dealt with cases nos. 3136/77 and 6622/77 but he was on several occasions prevented by illness from attending his chambers. He was replaced, initially on an occasional and temporary basis and, as from October 1977, on a permanent basis, by Mr. Pilate, who retained responsibility for case no. 10.971/76.

11. In case no. 6622/77, a single-judge chamber of the Oudenaarde court (Mr. De Wynter) sentenced Mr. De Cubber on 11 May 1978 to one year’s imprisonment and a fine of 4,000 BF. He did not appeal against this decision.

12. After preliminary investigations lasting more than two years, a chamber of the court (the chambre du conseil) ordered the joinder of cases nos. 10.971/76 and 3136/77 and on 11 May 1979 committed Mr. De Cubber for trial. These cases related to several hundred alleged offences committed

by fifteen accused, headed by the applicant; there were no less than nineteen persons intervening to claim damages (parties civiles).

For the purpose of the trial, the court, which over the years had nine or ten titular judges, sat as a chamber composed of a president and two judges, including Mr. Pilate. Mr. De Cubber stated that he protested orally against the latter's presence, but he did not have recourse to any of the legal remedies open to him for this purpose, such as a formal challenge (procédure de récusation; Article 828 of the Judicial Code).

After a hearing which lasted two half-days on 8 and 22 June 1979, the court gave judgment on 29 June 1979. Mr. De Cubber was acquitted on two counts and convicted on the remainder, note being taken of the fact that he was a recidivist. He was accordingly sentenced, in respect of one matter, to five years' imprisonment and a fine of 60,000 BF and, in respect of another, to one year's imprisonment and a fine of 8,000 BF; his immediate arrest was ordered.

13. Both the applicant and the public prosecutor's department appealed. On 4 February 1980, the Ghent Court of Appeal reduced the first sentence to three years' imprisonment and a fine of 20,000 BF and upheld the second. In addition, it unanimously imposed a third sentence, namely one month's imprisonment and a fiscal fine (amende fiscale), for offences which the Oudenaarde court had - wrongly, in the Court of Appeal's view - treated as being linked with others by reason of a single criminal intent.

14. Mr. De Cubber appealed to the Court of Cassation, raising some ten different points of law. One of his grounds, based on Article 292 of the Judicial Code (see paragraph 19 below) and Article 6 para. 1 (art. 6-1) of the Convention, was that Mr. Pilate had been both judge and party in the case since after conducting the preliminary investigation he had acted as one of the trial judges.

The Court of Cassation gave judgment on 15 April 1980 (Pasicrisie 1980, I, pp. 1006-1011). It held that this combination of functions violated neither Article 292 of the Judicial Code nor any other legal provision - such as Article 6 para. 1 (art. 6-1) of the Convention - nor the rights of the defence. On the other hand, the Court of Cassation upheld a plea concerning the confiscation of certain items of evidence and, to this extent, referred the case back to the Antwerp Court of Appeal; the latter court has in the meantime (on 4 November 1981) directed that the items in question be returned. The Court of Cassation also quashed, of its own motion and without referring the case back, the decision under appeal in so far as the appellant had been sentenced to a fiscal fine. The remainder of the appeal was dismissed.

II. THE RELEVANT LEGISLATION

A. Status and powers of investigating judges

15. Investigating judges, who are appointed by the Crown "from among the judges of the court of first instance" (Article 79 of the Judicial Code), conduct the preparatory judicial investigation (Articles 61 et seq. of the Code of Criminal Procedure). The object of this procedure is to assemble the evidence and to establish any proof against the accused as well as any circumstances that may tell in his favour, so as to provide the chambre du conseil or the chambre des mises en accusation, as the case may be, with the material which it needs to decide whether the accused should be committed for trial. The procedure is secret; it is not conducted in the presence of both parties (non contradictoire) nor is there any legal representation.

The investigating judge also has the status of officer of the criminal investigation police (police judiciaire). In this capacity, he is empowered to inquire into serious and lesser offences (crimes et délits), to assemble evidence and to receive complaints from any person claiming to have been prejudiced by such offences (Articles 8, 9 in fine and 63 of the Code of Criminal Procedure). When so acting, he is placed under the "supervision of the procureur général (State prosecutor)" (Article 279 of the Code of Criminal Procedure and Article 148 of the Judicial Code), although this does not include a power to give directions. "In all cases where the suspected offender is deemed to have been caught in the act", the investigating judge may take "directly" and in person "any action which the procureur du Roi (public prosecutor) is empowered to take" (Article 59 of the Code of Criminal Procedure).

16. Save in the latter category of case, the investigating judge can take action only after the matter has been referred to him either by means of a formal request from the procureur du Roi for the opening of an inquiry (Articles 47, 54, 60, 61, 64 and 138 of the Code of Criminal Procedure) or by means of a criminal complaint coupled with a claim for damages (constitution de partie civile; Articles 63 and 70).

If a court includes several investigating judges, it is for the presiding judge to allocate cases amongst them. In principle, cases are assigned to them in turn, from week to week; however, this is not an inflexible rule and the presiding judge may depart therefrom, for example if the matter is urgent or if a new case has some connection with one that has already been allocated.

17. In order to facilitate the ascertainment of the truth, the investigating judge is invested with wide powers; according to the case-law of the Court of Cassation, he may "take any steps which are not forbidden by law or incompatible with the standing of his office" (judgment of 2 May 1960, Pasicrisie 1960, I, p. 1020). He can, inter alia, summon the accused to appear or issue a warrant for his detention, production before a court or arrest (Articles 91 et seq. of the Code of Criminal Procedure); question the

accused, hear witnesses (Articles 71 to 86 and 92 of the same Code), confront witnesses with each other (Article 942 of the Judicial Code), visit the scene of the crime (Article 62 of the Code of Criminal Procedure), visit and search premises (Articles 87 and 88 of the same Code), take possession of evidence (Article 89), and so on. The investigating judge has to report to the chambre du conseil on the cases with which he is dealing (Article 127); he takes, by means of an order, decisions on the expediency of measures requested by the public prosecutor's department, such orders being subject to an appeal to the chambre des mises en accusation of the Court of Appeal.

18. When the investigation is completed, the investigating judge transmits the case-file to the procureur du Roi, who will return it to him with his submissions (Article 61, first paragraph).

It is then for the chambre du conseil, which is composed of a single judge belonging to the court of first instance (Acts of 25 October 1919, 26 July 1927 and 18 August 1928), to decide - unless it considers it should order further inquiries - whether to discharge the accused (non-lieu; Article 128 of the Code of Criminal Procedure), to commit him for trial before a district court (tribunal de police; Article 129) or a criminal court (tribunal correctionnel; Article 130) or to send the papers to the procureur général attached to the Court of Appeal (Article 133), depending upon the circumstances.

Unlike his French counterpart, the Belgian investigating judge is thus never empowered to refer a case to the trial court himself. Before taking its decision, the chambre du conseil - which sits in camera - will hear the investigating judge's report. This report will take the form of an oral account of the state of the investigations; the investigating judge will express no opinion therein as to the accused's guilt, it being for the public prosecutor's department to deliver concluding submissions calling for one decision or another.

B. Investigating judges and incompatibilities

19. Article 292 of the 1967 Judicial Code prohibits "the concurrent exercise of different judicial functions ... except where otherwise provided by law"; it lays down that "any decision given by a judge who has previously dealt with the case in the exercise of some other judicial function" shall be null and void.

This rule applies to investigating judges, amongst others. Article 127 specifies that "proceedings before an assize court shall be null and void if the presiding judge or another judge sitting is a judicial officer who has acted in the case as investigating judge ...".

Neither can an investigating judge sit as an appeal-court judge, for otherwise he would have "to review on appeal, and thus as last-instance trial judge, the legality of investigation measures ... which [he] had taken or

ordered at first instance" (Court of Cassation, 18 March 1981, Pasicrisie 1981, I, p. 770, and Revue de droit pénal et de criminologie, 1981, pp. 703-719).

20. On the other hand, under the third paragraph of Article 79 of the Judicial Code, as amended by an Act of 30 June 1976, "investigating judges may continue to sit, in accordance with their seniority, to try cases brought before a court of first instance". According to the drafting history and decided case-law on this provision, it is immaterial that the cases are ones previously investigated by the judges in question: they would in that event be exercising, not "some other judicial function" within the meaning of Article 292, but rather the same function of judge on the court of first instance; it would be only their assignment that had changed (Parliamentary Documents, House of Representatives, no. 59/49 of 1 June 1967; Court of Cassation, 8 February 1977, Pasicrisie 1977, I, p. 622-623; Court of Cassation judgment of 15 April 1980 in the present case, see paragraph 14 above).

In the case of Blaise, the Court of Cassation confirmed this line of authority in its judgment of 4 April 1984, which followed the submissions presented by the public prosecutor's department. After dismissing various arguments grounded on general principles of law, the Court of Cassation rejected the argument put forward by the appellant on the basis of Article 6 para. 1 (art. 6-1) of the Convention:

> "However, as regards the application of Article 6 para. 1 (art. 6-1) ..., when a case requires a determination of civil rights and obligations or of a criminal charge, the authority hearing the case at first instance and the procedure followed by that authority do not necessarily have to satisfy the conditions laid down by the above-mentioned provision, provided that the party concerned or the accused is able to lodge an appeal against the decision affecting him taken by that authority with a court which does offer all the guarantees stipulated by Article 6 para. 1 (art. 6-1) and has competence to review all questions of fact and of law. In the present case, the appellant does not maintain that the court of appeal which convicted him did not offer those guarantees ...
>
> In any event, the principles and the rule relied on in the ground of appeal do not have the scope therein suggested;
>
> From the sole fact that a trial judge inquired into the case as an investigating judge it cannot be inferred that the accused's right to an impartial court has been violated. It cannot legitimately be feared that the said judge does not offer the guarantees of impartiality to which every accused is entitled.
>
> The investigating judge is not a party adverse to the accused, but a judge of the court of first instance with the responsibility of assembling in an impartial manner evidence in favour of as well as against the accused.
>
> ... ."

PROCEEDINGS BEFORE THE COMMISSION

21. In his application of 10 October 1980 to the Commission (no. 9186/80), Mr. De Cubber raised again several of the pleas which he had unsuccessfully made to the Belgian Court of Cassation. He alleged, inter alia, that the Oudenaarde criminal court had not constituted an impartial tribunal, within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, since one of the judges, Mr. Pilate, had previously acted as investigating judge in the same case.

22. On 9 March 1982, the Commission declared the application admissible as regards this complaint and inadmissible as regards the remainder. In its report of 5 July 1983 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of Article 6 para. 1 (art. 6-1) on the point in question. The full text of the Commission's opinion is reproduced as an annex to the present judgment.

AS TO THE LAW

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

23. Under Article 6 para. 1 (art. 6-1),

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ... ."

One of the three judges of the Oudenaarde criminal court who, on 29 June 1979, had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question: in one case he had done so from the outset and in the other he had replaced a colleague, at first on a temporary and then on a permanent basis (see paragraphs 8, 10 and 12 above). On the strength of this, Mr. De Cubber contended that he had not received a hearing by an "impartial tribunal"; his argument was, in substance, upheld by the Commission.

The Government disagreed. They submitted:

- as their principal plea, that Mr. Pilate's inclusion amongst the members of the trial court had not adversely affected the impartiality of that court and had therefore not violated Article 6 para. 1 (art. 6-1);

- in the alternative, that only the Ghent Court of Appeal, whose impartiality had not been disputed, had to satisfy the requirements of that Article (art. 6-1);

- in the further alternative, that a finding of violation would entail serious consequences for courts, such as the Oudenaarde criminal court, with "limited staff".

A. The Government's principal plea

24. In its Piersack judgment of 1 October 1982, the Court specified that impartiality can "be tested in various ways": a distinction should be drawn "between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect" (Series A no. 53, p. 14, para. 30).

25. As to the subjective approach, the applicant alleged before the Commission that Mr. Pilate had for years shown himself somewhat relentless in regard to his (the applicant's) affairs (see paragraphs 45-47 of the Commission's report), but his lawyer did not maintain this line of argument before the Court; the Commission, for its part, rejected the Government's criticism that it had made a subjective analysis (see paragraphs 63, 68-69 and 72-73 of the report; verbatim record of the hearings held on 23 May 1984).

However this may be, the personal impartiality of a judge is to be presumed until there is proof to the contrary (see the same judgment, loc. cit.), and in the present case no such proof is to be found in the evidence adduced before the Court. In particular, there is nothing to indicate that in previous cases Mr. Pilate had displayed any hostility or ill-will towards Mr. De Cubber (see paragraph 9 above) or that he had "finally arranged", for reasons extraneous to the normal rules governing the allocation of cases, to have assigned to him each of the three preliminary investigations opened in respect of the applicant in 1977 (see paragraphs 8, 10 and 16 above; paragraph 46 of the Commission's report).

26. However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the Delcourt judgment of 17 January 1970 (Series A no. 11, p. 17, para. 31), "justice must not only be done: it must also be seen to be done". As the Belgian Court of Cassation has observed (21 February 1979, Pasicrisie 1979, I, p. 750), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see the above-mentioned judgment of 1 October 1982, pp. 14-15, para. 30).

27. Application of these principles led the European Court, in its Piersack judgment, to find a violation of Article 6 para. 1 (art. 6-1): it considered that where an assize court had been presided over by a judge who had previously acted as head of the very section of the Brussels public prosecutor's department which had been responsible for dealing with the accused's case, the impartiality of the court "was capable of appearing open to doubt" (ibid., pp. 15-16, para. 31). Despite some similarities between the two cases, the Court is faced in the present proceedings with a different legal situation, namely the successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case.

28. The Government put forward a series of arguments to show that this combination of functions, which was unquestionably compatible with the Judicial Code as construed in the light of its drafting history (see paragraph 20, first sub-paragraph, above), was also reconcilable with the Convention. They pointed out that in Belgium an investigating judge is fully independent in the performance of his duties; that unlike the judicial officers in the public prosecutor's department, whose submissions are not binding on him, he does not have the status of a party to criminal proceedings and is not "an instrument of the prosecution"; that "the object of his activity" is not, despite Mr. De Cubber's allegations, "to establish the guilt of the person he believes to be guilty" (see paragraph 44 of the Commission's report), but to "assemble in an impartial manner evidence in favour of as well as against the accused", whilst maintaining "a just balance between prosecution and defence", since he "never ceases to be a judge"; that he does not take the decision whether to commit the accused for trial - he merely presents to the chambre du conseil, of which he is not a member, objective reports describing the progress and state of the preliminary investigations, without expressing any opinion of his own, even assuming he has formed one (see paragraphs 52-54 of the Commission's report and the verbatim record of the hearings held on 23 May 1984).

29. This reasoning no doubt reflects several aspects of the reality of the situation (see paragraphs 15, first sub-paragraph, 17 in fine and 18 above) and the Court recognises its cogency. Nonetheless, it is not in itself decisive and there are various other factors telling in favour of the opposite conclusion.

To begin with, a close examination of the statutory texts shows the distinction between judicial officers in the public prosecutor's department and investigating judges to be less clear-cut than initially appears. An investigating judge, like "procureurs du Roi and their deputies", has the status of officer of the criminal investigation police and, as such, is "placed under the supervision of the procureur général"; furthermore, "an investigating judge" may, in cases "where the suspected offender is deemed to have been caught in the act", "take directly" and in person "any action

which the procureur du Roi is empowered to take" (see paragraph 15, second sub-paragraph, above).

In addition to this, as an investigating judge he has very wide-ranging powers: he can "take any steps which are not forbidden by law or incompatible with the standing of his office" (see paragraph 17 above). Save as regards the warrant of arrest issued against the applicant on 5 April 1977, the Court has only limited information as to the measures taken by Mr. Pilate in the circumstances, but, to judge by the complexity of the case and the duration of the preparatory investigation, they must have been quite extensive (see paragraphs 8 and 12 above).

That is not all. Under Belgian law the preparatory investigation, which is inquisitorial in nature, is secret and is not conducted in the presence of both parties; in this respect it differs from the procedure of investigation followed at the hearing before the trial court, which, in the instant case, took place on 8 and 22 June 1979 before the Oudenaarde court (see paragraphs 12 and 15 above). One can accordingly understand that an accused might feel some unease should he see on the bench of the court called upon to determine the charge against him the judge who had ordered him to be placed in detention on remand and who had interrogated him on numerous occasions during the preparatory investigation, albeit with questions dictated by a concern to ascertain the truth.

Furthermore, through the various means of inquiry which he will have utilised at the investigation stage, the judge in question, unlike his colleagues, will already have acquired well before the hearing a particularly detailed knowledge of the - sometimes voluminous - file or files which he has assembled. Consequently, it is quite conceivable that he might, in the eyes of the accused, appear, firstly, to be in a position enabling him to play a crucial role in the trial court and, secondly, even to have a pre-formed opinion which is liable to weigh heavily in the balance at the moment of the decision. In addition, the criminal court (tribunal correctionnel) may, like the court of appeal (see paragraph 19 in fine above), have to review the lawfulness of measures taken or ordered by the investigating judge. The accused may view with some alarm the prospect of the investigating judge being actively involved in this process of review.

Finally, the Court notes that a judicial officer who has "acted in the case as investigating judge" may not, under the terms of Article 127 of the Judicial Code, preside over or participate as judge in proceedings before an assize court; nor, as the Court of Cassation has held, may he sit as an appeal-court judge (see paragraph 19 above). Belgian law-makers and case-law have thereby manifested their concern to make assize courts and appeal courts free of any legitimate suspicion of partiality. However, similar considerations apply to courts of first instance.

30. In conclusion, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself

has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation (see paragraph 25 above), it recognises, having regard to the various factors discussed above, that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. Without underestimating the force of the Government's arguments and without adopting a subjective approach (see paragraphs 25 and 28 above), the Court recalls that a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (see the above-mentioned Delcourt judgment, Series A no. 11, pp. 14-15, para. 25 in fine).

B. The Government's first alternative plea

31. In the alternative, the Government submitted, at the hearings on 23 May 1984, that the Court should not disregard its previous case-law; they relied essentially on the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981 and on the Albert and Le Compte judgment of 10 February 1983.

In both of these judgments, the Court held that proceedings instituted against the applicants before the disciplinary organs of the Ordre des médecins (Medical Association) gave rise to a "contestation" (dispute) over "civil rights and obligations" (Series A no. 43, pp. 20-22, paras. 44-49, and Series A no. 58, pp. 14-16, paras. 27-28). Since Article 6 para. 1 (art. 6-1) was therefore applicable, it had to be determined whether the individuals concerned had received a hearing by a "tribunal" satisfying the conditions which that Article lays down. Their cases had been dealt with by three bodies, namely a Provincial Council, an Appeals Council and the Court of Cassation. The European Court did not consider it "indispensable to pursue this point" as regards the Provincial Council, for the reason which, in its judgment of 23 June 1981, was expressed in the following terms:

> "Whilst Article 6 para. 1 (art. 6-1) embodies the 'right to a court' ..., it nevertheless does not oblige the Contracting States to submit 'contestations' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system." (Series A no. 43, pp. 22-23, paras. 50-51)

The judgment of 10 February 1983 developed this reasoning further:

> "In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (art. 6-1) is applicable, conferring powers in this manner does not in itself infringe the Convention.... Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction" - that is to say, which has the competence to furnish "a [judicial] determination ... of the matters in dispute, both for questions of fact and for questions of law" - "and does provide the guarantees of Article 6 para. 1 (art. 6-1)." (Series A no. 58, p. 16, para. 29)

In the Government's submission, the principles thus stated apply equally to "criminal charges" within the meaning of Article 6 para. 1 (art. 6-1). As confirmation of this, the Government cited the Oztürk judgment of 21 February 1984 (Series A no. 73, pp. 21-22, para. 56) in addition to the above-mentioned judgments of 23 June 1981 and 10 February 1983 (Series A no. 43, pp. 23-24, para. 53, and Series A no. 58, pp. 16-17, para. 30).

In the particular circumstances, the Government noted, Mr. De Cubber's complaint was directed solely against the Oudenaarde court; he had no objection to make concerning the Ghent Court of Appeal, which in the present case, so they argued, constituted the "judicial body that has full jurisdiction", as referred to in the above-quoted case-law.

On the whole of this issue, the Government cited the Blaise judgment of 4 April 1984, which the Belgian Court of Cassation had delivered in a similar case, and the concordant submissions of the public prosecutor's department in that case (see paragraph 20 above).

32. The Commission's Delegate did not share this view; the Court agrees in substance with his arguments.

The thrust of the plea summarised above is that the proceedings before the Oudenaarde court fell outside the ambit of 1Article 6 para. 1 (art. 6-1). At first sight, this plea contains an element of paradox. Article 6 para. 1 (art. 6-1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up (see the above-mentioned Delcourt judgment, Series A no. 11, p. 14 in fine, and, as the most recent authority, the Sutter judgment of 22 February 1984, Series A no. 74, p. 13, para. 28). However, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.

Furthermore, the case-law relied on by the Government has to be viewed in its proper context. The judgments of 23 June 1981, 10 February 1983 and 21 February 1984 concerned litigation which was classified by the domestic

law of the respondent State not as civil or criminal but as disciplinary (Series A no. 43, p. 9, para. 11) or administrative (Series A no. 73, pp. 10-14, paras. 17-33); these judgments related to bodies which, within the national system, were not regarded as courts of the classic kind, for the reason that they were not integrated within the standard judicial machinery of the country. The Court would not have held Article 6 para. 1 (art. 6-1) applicable had it not been for the "autonomy" of the concepts of "civil rights and obligations" and "criminal charge". In the present case, on the other hand, what was involved was a trial which not only the Convention but also Belgian law classified as criminal; the Oudenaarde criminal court was neither an administrative or professional authority, nor a jurisdictional organ of a professional association (see the above-mentioned judgments, Series A no. 43, p. 23, para. 51, Series A no. 58, p. 16, para. 29, and Series A no. 73, pp. 21-22, para. 56), but a proper court in both the formal and the substantive meaning of the term (Decisions and Reports, no. 15, p. 78, paras. 59-60, and p. 87: opinion of the Commission and decision of the Committee of Ministers on application no. 7360/76, Zand v. Austria). The reasoning adopted in the three above-mentioned judgments, to which should be added the Campbell and Fell judgment of 28 June 1984 (Series A no. 80, pp. 34-39, paras. 67-73 and 76), cannot justify reducing the requirements of Article 6 para. 1 (art. 6-1) in its traditional and natural sphere of application. A restrictive interpretation of this kind would not be consonant with the object and purpose of Article 6 para. 1 (art. 6-1) (see paragraph 30 in fine above).

33. At the hearings, the Commission's Delegate and the applicant's lawyer raised a further question, concerning not the applicability of Article 6 para. 1 (art. 6-1) but rather its application to the particular facts: had not "the subsequent intervention" of the Ghent Court of Appeal "made good the wrong" or "purged" the first-instance proceedings of the "defect" that vitiated them?

The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms.

The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention's provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies, contained in Article 26 (art. 26) (see the Guzzardi and the Van Oosterwijck judgments of 6 November 1980, Series A no. 39, p. 27, para. 72, and Series A no. 40, p. 17, para. 34). Thus, the Adolf judgment of 26 March 1982 noted that the Austrian Supreme Court had "cleared ... of any finding of guilt" an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by Article 6 para. 2 (art. 6-2) (Series A no. 49, pp. 17-19, paras. 38-41).

The circumstances of the present case, however, were different. The particular defect in question did not bear solely upon the conduct of the first-instance proceedings: its source being the very composition of the Oudenaarde criminal court, the defect involved matters of internal organisation and the Court of Appeal did not cure that defect since it did not quash on that ground the judgment of 29 June 1979 in its entirety.

C. The Government's further alternative plea

34. In the further alternative, the Government pleaded that a finding by the Court of a violation of Article 6 para. 1 (art. 6-1) would entail serious consequences for Belgian courts with "limited staff", especially if it were to give a judgment "on the general question of principle" rather than a judgment "with reasoning limited to the very special" facts of the case. In this connection, the Government drew attention to the following matters. From 1970 to 1984, the workload of such courts had more than doubled, whereas there had been no increase in the number of judges. At Oudenaarde and at Nivelles, for example, taking account of vacant posts (deaths, resignations, promotions) and occasional absences (holidays, illness, etc.), there were only six or seven judges permanently in attendance, all of whom were "very busy", if not overwhelmed with work. Accordingly, it was virtually inevitable that one of the judges had to deal in turn with different aspects of the same case. To avoid this, it would be necessary either to constitute "special benches" - which would be liable to occasion delays incompatible with the principle of trial "within a reasonable time" - or to create additional posts, an alternative that was scarcely realistic in times of budgetary stringency.

35. The Court recalls that the Contracting States are under the obligation to organise their legal systems "so as to ensure compliance with the requirements of Article 6 para. 1 (art. 6-1)" (see the Guincho judgment of 10 July 1984, Series A no. 81, p. 16, para. 38); impartiality is unquestionably one of the foremost of those requirements. The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilised.

D. Conclusion

36. To sum up, Mr. De Cubber was the victim of a breach of Article 6 para. 1 (art. 6-1).

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

37. The applicant has filed claims for just satisfaction in respect of pecuniary and non-pecuniary damage, but the Government have not yet submitted their observations thereon. Since the question is thus not ready for decision, it is necessary to reserve it and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 para. 1 (art. 6-1);

2. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government to submit to the Court, within the forthcoming two months, their written observations on the said question and, in particular, to notify the Court of any agreement reached between them and the applicant;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 26 October 1984.

Gérard WIARDA
President

Marc-André EISSEN
Registrar