CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF REMLI v. FRANCE

(Application no. 16839/90)

JUDGMENT

STRASBOURG

23 April 1996

In the case of Remli v. France [1],

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

Mr R. RYSSDAL, *President*,
Mr THÓR VILHJÁLMSSON,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. PEKKANEN,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr B. REPIK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*, having deliberated in private on 23 November 1995 and 30 March 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 January 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 16839/90) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr Saïd André Remli, on 16 May 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

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[1] The case is numbered 4/1995/510/593. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr R. Pekkanen, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr G. Mifsud Bonnici and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the registry received the applicant's and the Government's memorials and the Delegate's written observations on 7 August, 25 August and 2 October 1995 respectively. On 8 June 1995 the Secretary to the Commission had supplied the Registrar with various documents he had requested on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 November 1995. The Court had held a preparatory meeting beforehand. There appeared before the Court:

(a) for the Government

Mr M. Perrin de Brichambaut, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs M. Dubrocard, magistrat, on secondment to the Legal
Affairs Department, Ministry of Foreign Affairs,
Mr F. Fèvre, magistrat, on secondment to the Department
of Criminal Affairs and Pardons, Ministry of Justice,
Mr P. Mollard, judge of the Metz District Court, *Counsel*;

(b) for the Commission

Mr J.-C. Geus, *Delegate*;

(c) for the applicant

Ms C. Waquet, of the Conseil d'Etat and Court of
Cassation Bar, *Counsel*.

The Court heard addresses by Mr Geus, Ms Waquet and Mr Perrin de Brichambaut and also replies by the latter two to a question put by one of its members.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Saïd André Remli, a French national of Algerian origin, is currently in custody at Les Baumettes Prison in Marseilles.

A. Background to the case

7. On 16 April 1985, while attempting to escape from Lyons-Montluc Prison, the applicant and a fellow prisoner of Algerian nationality, Mr Boumédienne Merdji, knocked out a warder, who died four months later as a result of the blows he had received.

8. The two prisoners were charged with intentional homicide for the purpose of facilitating, preparing or executing the offences of escape and attempted escape. In a judgment of 12 August 1988 the Indictment Division of the Lyons Court of Appeal committed them for trial at the Rhône Assize Court. On 5 December 1988 the Court of Cassation dismissed an appeal on points of law that Mr Remli had lodged against the decision to commit him for trial.

B. Proceedings in the Rhône Assize Court

9. The trial at the Assize Court took place on 12, 13 and 14 April 1989. On the first day, when the sitting began, the members of the jury and two additional jurors were drawn by lot. The defendants challenged five of them, the legal maximum, and the prosecution two of them. The jury was subsequently finally empanelled and the hearing of witnesses began.

10. On 13 April 1989, at about 1.50 p.m., as the sitting resumed, counsel for the applicant filed submissions in which they requested the court to take formal note of a remark made by one of the jurors on 12 April, before the hearing began, which had been overheard by a third person, Mrs M., and to append her written statement, together with their submissions, to the record of the trial.

11. Mrs M.'s statement of 13 April read as follows:

> "I, the undersigned Mrs [M.], declare on my honour that I witnessed the following facts:
>
> I was at the door of the court at about 1 p.m., next to a group of people. From their conversation, I chanced to overhear that they were members of the jury drawn by lot in the Merdji [and] Remli against Pahon case.
>
> One of them then let slip the following remark: 'What's more, I'm a racist.'

I do not know that person's name, but I can state that he was on the left of the juror sitting immediately to the left of the judge on the presiding judge's left.

Being unable to attend the hearing to confirm the facts as my daughter has recently gone into hospital, but being at the court's disposal if it proves essential to call me as a witness, I have drawn up this statement to be used for the appropriate legal purposes."

12. The court, composed in this instance solely of the judges, withdrew to deliberate and then delivered the following judgment:

"...

According to the handwritten statement of a Mrs [M.] of 13 April 1989, one of the members of the jury in the present case said 'What's more, I'm a racist' at the door of the court at about 1 p.m.

According to this statement and the written submissions, these words were spoken before the beginning of the first hearing in the instant case and not in the presence of the judges of the Court.

The Court is thus not able to take formal note of events alleged to have occurred out of its presence.

For these reasons,

it Refuses the application made to it for formal note to be taken;

Holds that the applicants' written submissions and the statement of Mrs [M.] are to be appended to the record of the trial;

..."

13. On 14 April 1989 the Assize Court sentenced Mr Remli to life imprisonment and Mr Merdji to a twenty-year term, for two-thirds of which he would not be liable to any form of release.

C. Proceedings in the Court of Cassation

14. Mr Remli appealed on points of law. He argued mainly that the Assize Court had made a mistake of law and had disregarded Article 6 para. 1 (art. 6-1) of the Convention in holding that it was "not able to take formal note of events alleged to have occurred out of its presence" when it had power to do so.

15. In a judgment of 22 November 1989 the Court of Cassation dismissed the appeal. It gave the following reason in particular:

"The Assize Court rightly refused to take formal note of events which, assuming they were established, had taken place outside the hearing, such that it could not have been in a position to note them."

II. RELEVANT DOMESTIC LAW

16. Procedure in the Assize Court is governed by Articles 231 to 380 of the Code of Criminal Procedure ("CCP").

The Assize Court consists of the court properly speaking - the presiding judge and, normally, two other judges - and the jury, composed of citizens who satisfy the conditions of eligibility laid down by law. It tries mainly serious criminal cases sent to it by the Indictment Division and related or inseparable lesser offences. No reasons are given in its judgments, which are appealable only on points of law.

A. The Assize Court jury

1. Constitution of the jury

17. For each case on the Assize Court's list a jury is empanelled at the beginning of the trial. It contains nine jurors, drawn by lot from a session list. This list contains thirty-five names drawn by lot every three months from an annual list, itself consisting of a variable number of names drawn by lot from preparatory lists that are compiled in each municipality after an initial drawing of names by lot from the electoral register.

One or more additional jurors are also drawn by lot and attend the trial in order that they may, if necessary, replace any juror who is unable to sit.

The jury is constituted at the point when the names of nine jurors who have not been challenged and the names of the additional jurors have all been drawn by lot.

2. Challenges

18. As the names of the jurors are being drawn, the defendant or defendants are entitled to challenge up to five of them and the prosecution up to four. Their grounds for doing so cannot be given.

19. Article 668 CCP provides:

> "Any judge may be challenged on any of the following grounds:
>
> 1. Where the judge or his spouse is a blood relative or a relative by marriage of one of the parties or of a party's spouse, up to the degree of second cousin inclusive. The challenge may be made against the judge even in the event of divorce from his spouse or the latter's death where the spouse was a relative by marriage of one of the parties, up to the second degree inclusive;
>
> 2. Where the judge or his spouse, or a person in respect of whom either acts as guardian (tuteur), supervisory guardian (subrogé tuteur) or court-appointed administrator, or a company or association in whose management or supervision either takes part has an interest in the dispute;

3. Where the judge or his spouse is a blood relative or relative by marriage, to the degree indicated above, of the guardian, supervisory guardian or court-appointed administrator of one of the parties or of a director or manager of a company that is a party to the proceedings;

4. Where the judge or his spouse is dependent on one of the parties;

5. Where the judge has dealt with the case as a judge, arbitrator or legal adviser, or where he has given evidence as a witness relating to the facts of the case;

6. Where there has been litigation between the judge, his spouse or their lineal blood relatives or relatives by marriage and one of the parties, his spouse or his lineal blood relatives or relatives by marriage;

7. Where the judge or his spouse is litigating in a court of which one of the parties is a judge;

8. Where the judge or his spouse or their lineal blood relatives or relatives by marriage are in dispute over an issue similar to that between the parties;

9. Where there have been any disagreements between the judge or his spouse and one of the parties sufficiently serious to cast doubt on his impartiality."

Article 669 CCP provides:

"A charged person, accused or any party to the proceedings who wishes to challenge an investigating judge, a judge of the police court or one or more or all of the judges of the Criminal Court, the Court of Appeal or the Assize Court must, if the challenge is to be valid, make an application to the President of the Court of Appeal.

Members of State Counsel's Office cannot be challenged.

The application must mention by name the judge or judges being challenged and set out the grounds relied on, together with all the supporting evidence.

A party who has willingly proceeded in a court or before an investigating judge shall be entitled to make a challenge only on grounds of circumstances that have arisen since, where they are such as to constitute a ground for challenge."

In the case of the Assize Court these provisions apply only to the judges and not to the jurors.

3. Taking of the oath

20. The members of the jury, standing bareheaded, are addressed by the presiding judge as follows:

"You swear and promise to consider the charges that will be brought against X ... with the greatest care; not to betray either the interests of the accused or those of society, which is accusing him/her; not to communicate with anyone until you have returned your verdict; not to be swayed by hatred or spitefulness or by fear or

affection; to reach your verdict in the light of the charges and the defence, according to your conscience and your innermost conviction, with the impartiality and firmness that befit a free man of integrity; and to preserve the secrecy of the deliberations, even after you have discharged your office."

Each of the jurors is individually called upon by the presiding judge and replies, raising his hand: "I swear."

B. Procedural applications or objections during trials and entries in the record

21. Where an event likely to infringe the rights of one of the parties occurs during the trial, the party concerned may ask the Assize Court - composed in this instance of only the judges - to "take formal note" of it. This is the party's only means of having it recorded. The Court of Cassation cannot entertain complaints that have been raised if no application was made to the Assize Court to take formal note of them and they were not entered in the record of the trial (Court of Cassation, Criminal Division, 23 December 1899, Bulletin criminel (Bull. crim.) no. 380; 24 July 1913, Bull. crim. no. 365; 12 May 1921, Bull. crim. no. 211; 31 January 1946, Bull. crim. no. 40; 5 May 1955, Bull. crim. no. 28; 21 November 1973, Bull. crim. no. 427; 22 April 1977, Dalloz-Sirey 1978, p. 28)

The Assize Court may refuse to take formal note of events that are alleged to have occurred outside the hearing. It also has an unfettered discretion to decide whether evidence should be taken to verify them (Court of Cassation, Criminal Division, 16 March 1901, Bull. crim. no. 85; 16 January 1903, Bull. crim. no. 23; 5 August 1909, Bull. crim. no. 422; 29 February 1984, Albarracin; 8 July 1985, Garbidjian).

22. Interlocutory decisions on such matters can be challenged by means of an appeal on points of law, but only at the same time as the judgment on the merits (Article 316 CCP).

C. Transfer of a case on the ground of reasonable suspicion of bias (suspicion légitime)

23. Article 662 CCP provides:

"In matters within the jurisdiction of the Assize Court, the Criminal Court or the police court, the Criminal Division of the Court of Cassation may remove a case from any investigating court or judge or any court of trial and transfer it to another court or judge of the same rank, either where the court that would normally have jurisdiction cannot be composed as required by law or where justice is otherwise prevented from taking its course or on the ground of reasonable suspicion of bias.

An application for transfer may be made either by Principal State Counsel attached to the Court of Cassation or by the prosecutor attached to the court dealing with the case, or by the person charged, or by a civil party to the proceedings.

...

The lodging of an application shall not have any suspensive effect unless the Court of Cassation orders otherwise.

..."

The Criminal Division has unfettered discretion to determine whether such a ground is made out on the alleged facts (Court of Cassation, Criminal Division, 26 November 1931, Bull. crim. no. 272; 9 May 1932, Bull. crim. no. 126; 22 March 1933, Bull. crim. no. 61; 17 November 1964, Bull. crim. no. 301). An applicant is required to establish the existence of circumstances sufficiently weighty to justify serious doubts as to the impartiality of the court in question.

This procedure can be used only in respect of a whole court and not against one or more members of a collegiate court (Court of Cassation, Criminal Division, 25 November 1976, Bull. crim. no. 343; Revue de science criminelle et de droit pénal comparé 1977, p. 603, comments by J. Robert).

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Remli applied to the Commission on 16 May 1990. He complained that he had not had a hearing by an impartial tribunal and that he had also suffered discrimination on the ground of racial origin, contrary to Article 6 para. 1 and Article 14 (art. 6-1, art. 14) of the Convention. He further alleged that he had not had an effective remedy before a national authority as required by Article 13 (art. 13) of the Convention.

25. On 1 April 1994 the Commission adjourned its examination of the complaints based on Article 6 para. 1 (art. 6-1) taken alone and together with Article 14 (art. 6-1+14) and declared the remainder of the application (no. 16839/90) inadmissible. On 12 April it declared the first complaint admissible and decided that it was unnecessary to express an opinion separately on the second complaint, as this was bound up with the issue of the court's impartiality. In its report of 30 November 1994 (Article 31) (art. 31), it expressed the opinion by seven votes to four that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's

opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment [3].

FINAL SUBMISSIONS TO THE COURT

26. In their memorial the Government asked the Court to "dismiss Mr Remli's application".

27. The applicant requested the Court to

> "find that France has breached Articles 6 para. 1 and 14 (art. 6-1, art. 14) of the Convention; and award just satisfaction under Article 50 (art. 50) ..."

AS TO THE LAW

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

28. The applicant maintained that he had been the victim of a breach of Article 6 para. 1 (art. 6-1) of the Convention, which provides:

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

A. The Government's preliminary objections

29. As they had done before the Commission, the Government raised two objections to admissibility.

1. Non-exhaustion of domestic remedies

(a) As to the complaint based on Article 6 (art. 6) of the Convention

30. The Government argued that the domestic remedies had not been exhausted. Not only had Mr Remli's application to the Assize Court for formal note to be taken been inappropriate, but the applicant had also failed either to ask for evidence to be taken or to lodge an application for transfer of the trial on the ground of reasonable suspicion of bias.

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[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry

The Rhône Assize Court could not take formal note of events which, even supposing their occurrence was established, had taken place outside the courtroom. Furthermore, by not applying for evidence to be taken as to the truth of the alleged matters, the applicant had deprived himself of a remedy that could have redressed the supposed breach. If the taking of evidence had made it possible to establish the alleged facts, the Assize Court could have replaced the juror in question by one of the additional jurors. If the Assize Court had refused to allow the application for evidence to be taken, Mr Remli could have applied to the Criminal Division of the Court of Cassation for a transfer of the trial on the ground of reasonable suspicion of bias in order to secure the immediate removal of the case from the Rhône Assize Court. Such a procedure could be used only in respect of a whole court and not against one or more members of a collegiate court who were suspected of bias. However, the Government continued, seeing that the juror in question had not been challenged, the impartiality of the Assize Court as a whole might be affected and the procedure of an application for transfer of the trial on the ground of reasonable suspicion of bias was therefore the appropriate one. Under Article 662 of the Code of Criminal Procedure, the Court of Cassation could have ordered that the application should have a suspensive effect.

31. In the applicant's submission, the application for formal note to be taken was the remedy envisaged in Article 26 (art. 26) of the Convention, since it alone afforded the possibility of having the facts in issue recorded. It had been the Assize Court's duty to order evidence to be taken of its own motion if it considered the evidence filed by Mr Remli - Mrs M.'s written statements - to be insufficient. Nor could an application for evidence to be taken be regarded as a remedy for the purposes of Article 26 (art. 26). As to making an application to have the trial transferred on the ground of reasonable suspicion of bias, this was a wholly exceptional procedure and could only be used in respect of a court as a whole and not in respect of a single juror. Since such an application would not have had a suspensive effect, the Assize Court would anyway have continued to sit, so the harm would have been done.

32. The Commission agreed with the applicant's submissions.

33. The Court reiterates that the purpose of Article 26 (art. 26) is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, for example, the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 18, para. 33). Thus the complaint to be submitted to the Commission must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. Nevertheless, the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation (see, among

other authorities, the Pressos Compania S.A. and Others v. Belgium judgment of 20 November 1995, Series A no. 332, p. 19, para. 27).

34. In the instant case the application for formal note to be taken was a prerequisite of any subsequent appeal on points of law, since the Court of Cassation cannot entertain complaints that have not been formally noted by the Assize Court and have not been entered in the record of the trial. Admittedly, the Assize Court can refuse to take formal note of events that have occurred outside the hearing, but it has the power to order evidence to be taken for the purpose of verifying them (see paragraph 21 above). That being so, and regard being had to the fact that by submitting Mrs M.'s written statement to the Assize Court, the applicant put that court in a position to exercise its power to order that evidence should be taken, the Court considers that the application for formal note to be taken was an effective remedy.

An application for transfer of a trial on the ground of reasonable suspicion of bias can only be made in respect of a whole court.

Where the impartiality of a given member of a court is in issue, only the procedure of a challenge is available. In the case of members of the jury, however, a challenge can only be made when the names of the jurors are being drawn by lot, so that it was too late to make one in the circumstances of the instant case.

The objection must therefore fail.

(b) As to the complaint based on Article 14 of the Convention taken together with Article 6 (art. 14+6)

35. The Government maintained that in the national courts Mr Remli had not complained of discrimination on the ground of race or national origin. The applicant was thus relying on Article 14 (art. 14) for the first time before the Convention institutions.

36. In the applicant's submission, a breach of Article 14 (art. 14) could be alleged before the Convention institutions in so far as it was a consequence of the Court of Cassation's judgment itself.

37. In its decision on the admissibility of the application the Commission considered that this complaint was bound up with the one based on Article 6 para. 1 (art. 6-1) and therefore did not require separate examination.

38. Having regard to the purpose of the requirement that domestic remedies must be exhausted (see paragraph 33 above), the Court allows the Government's objection as to the admissibility of the complaint based on Article 14 taken together with Article 6 (art. 14+6).

2. Application out of time

39. The Government also argued, in the alternative, that the application had been out of time. The judgment of 22 November 1989, in which the

appeal on points of law against the refusal to take formal note of events that had occurred outside the courtroom had been dismissed, was not the final decision from whose date the six-month period for applying to the Commission began to run. The Court of Cassation, which ruled on issues of law and not of fact, considered that the Assize Court had unfettered discretion to decide whether or not to take formal note of events that occurred out of its presence. The relevant period had accordingly begun to run on 14 April 1989, when the Assize Court had delivered its interlocutory judgment, and so the applicant had not complied with the time-limit.

40. Mr Remli disputed that submission. An appeal on points of law against interlocutory judgments of the Assize Court was expressly provided in Article 316, last paragraph, of the Code of Criminal Procedure.

41. In its decision on the admissibility of the application the Commission noted the provisions of Article 316 of the Code of Criminal Procedure. It went on to point out that the Court of Cassation had held that it had jurisdiction to rule on possible breaches of the Convention, which was directly applicable in French law; the Government had not shown that the grounds based on the Convention that had been argued in the Court of Cassation were contrary to case-law so settled that the appeal on points of law could not be considered an effective remedy. The Delegate of the Commission also pointed out that the ground of appeal based on a breach of Article 6 (art. 6) of the Convention had not been declared inadmissible by the Court of Cassation. In the Commission's opinion, the relevant date for the purposes of Article 26 (art. 26) was therefore that of the Court of Cassation's judgment, 22 November 1989.

42. The Court reiterates that an appeal to the Court of Cassation is one of the remedies that should in principle be exhausted in order to comply with Article 26 (art. 26). Even supposing that it was probably bound to fail in this specific case, the filing of the appeal was thus not a futile step. It consequently had the effect at the very least of postponing the beginning of the six-month period (see, as the most recent authority, the A. v. France judgment of 23 November 1993, Series A no. 277-B, pp. 47-48, para. 30). The objection that the application was out of time must therefore be dismissed.

B. Merits of the complaint

43. In Mr Remli's submission, if a court trying people of foreign nationality or origin included a juror who, before the hearing, had publicly expressed racist sentiments, it lacked impartiality. The juror in question should not have sat in a case that he was unable to assess with complete objectivity.

The Rhône Assize Court, however, had dismissed his application for formal note to be taken of the remark in issue, although it had had

jurisdiction to allow it. Mrs M.'s written statement had been clear, detailed and free from ambiguity or inconsistency, had accurately reported the remark and had identified the person who had uttered it.

Where, as in the instant case, the alleged facts were such as to cast very serious doubt on the impartiality of one of the jurors, the Assize Court was, the applicant submitted, under an obligation to take formal note of it, failing which it would be denying the accused the opportunity of being tried by an impartial tribunal. In short, the Assize Court and the Court of Cassation should have reacted.

44. The Government conceded that a court containing a juror who had declared himself to be a racist could not be regarded as impartial. Nevertheless, it had to be established with certainty that such racist opinions were really held and evidence had to be brought to show that they could have influenced the conviction. In the instant case, however, Mrs M.'s statement was not, the Government continued, sufficiently reliable or supported to amount to evidence capable of objectively casting doubt on the jury's impartiality. For one thing, it conflicted with what the applicant's lawyers had said and, for another, the sentence "What's more, I'm a racist" was just as likely to have been uttered as a joke or in connection with another case or solely in relation to the applicant's co-defendant, an Algerian national, and not to Mr Remli himself, who had French nationality. It was therefore not possible to consider that it had been established that there was a doubt as to the impartiality of a member of the jury that had tried the applicant.

Furthermore, a court could not be expected to verify all the remarks that a juror might make before being drawn by lot. In the instant case, the juror in question had not been challenged. Thereafter it was the impartiality of the jury itself that was relevant. In the instant case, however, it was difficult to describe the jury as a whole as biased, especially as under the Code of Criminal Procedure any decision unfavourable to an accused had to be taken by a majority of at least eight.

45. In the Commission's opinion, the statement drawn up by Mrs M. contained no inconsistencies and made it possible to identify with accuracy the person who had made the remark. As the Assize Court had not verified the alleged facts, the applicant was reasonably entitled to call the juror's impartiality into question, and his fears in this respect were objectively justified. There had therefore been a breach of Article 6 para. 1 (art. 6-1) of the Convention.

46. The Court refers to the principles laid down in its case-law concerning the independence and impartiality of tribunals, which apply to jurors as they do to professional and lay judges (see the Holm v. Sweden judgment of 25 November 1993, Series A no. 279-A, p. 14, para. 30).

When it is being decided whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the

accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, among other authorities, the Saraiva de Carvalho v. Portugal judgment of 22 April 1994, Series A no. 286-B, p. 38, para. 35, and the Padovani v. Italy judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 27).

47. The Court notes that in the instant case the Rhône Assize Court had to try Mr Remli and his co-defendant, both of them of North African origin, and that a third person, Mrs M., certified in writing that she had heard one of the jurors say: "What's more, I'm a racist."

It is not for the Court to rule on the evidential value of Mrs M.'s written statement or on whether the racist remark attributed to the juror in question was actually made. It notes merely that Mrs M.'s statement - which contained a serious allegation in the context of the case - was filed with the Assize Court by the applicant's lawyers, who asked the court to take formal note of it. The court dismissed their application without even examining the evidence submitted to it, on the purely formal ground that it was "not able to take formal note of events alleged to have occurred out of its presence". Nor did it order that evidence should be taken to verify what had been reported - and, if it was established, take formal note of it as requested by the defence - although it could have done so. Consequently, the applicant was unable either to have the juror in question replaced by one of the additional jurors or to rely on the fact in issue in support of his appeal on points of law (see paragraph 21 above). Nor could he challenge the juror, since the jury had been finally empanelled (see paragraph 17 above) and no appeal lay against the Assize Court's judgment other than on points of law (see paragraph 16 above).

48. Like the Commission, the Court considers that Article 6 para. 1 (art. 6-1) of the Convention imposes an obligation on every national court to check whether, as constituted, it is "an impartial tribunal" within the meaning of that provision (art. 6-1) where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.

In the instant case, however, the Rhône Assize Court did not make any such check, thereby depriving Mr Remli of the possibility of remedying, if it proved necessary, a situation contrary to the requirements of the Convention. This finding, regard being had to the confidence which the courts must inspire in those subject to their jurisdiction, suffices for the Court to hold that there has been a breach of Article 6 para. 1 (art. 6-1).

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

49. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with

the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A.Non-pecuniary damage

50. Mr Remli claimed 1,000,000 French francs (FRF) in respect of non-pecuniary damage.

51. The Delegate of the Commission invited the Court to assess that damage on an equitable basis.

52. Like the Government, the Court considers that the finding of a breach of Article 6 para. 1 (art. 6-1) constitutes in itself sufficient just satisfaction.

B. Retrial or reduction of sentence

53. The applicant further sought a retrial by an assize court affording all the guarantees of impartiality or, failing that, a reduction of his life sentence to fifteen years' imprisonment.

54. Like the Government and the Delegate of the Commission, the Court points out that Article 50 (art. 50) does not give it jurisdiction to make such an order against a Contracting State (see, for example, the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 57, para. 47).

C. Costs and expenses

55. Mr Remli sought FRF 166,896 (including value-added tax - VAT) for costs and expenses, that is to say FRF 118,600 for those incurred in the national courts and FRF 48,296 for those incurred before the Convention institutions.

56. The Government maintained that the applicant had not provided vouchers for these expenses, so that the claim should be disallowed or, failing that, the question of the application of Article 50 (art. 50) should be reserved. They added that at all events, costs and expenses incurred in the national courts should not be reimbursed.

57. The Delegate of the Commission considered that the reimbursement of costs and expenses had to be limited to those incurred in the national and international legal systems in order to remedy the alleged breach.

58. The Court notes that the applicant gave particulars of his claims in his memorial and his supplementary observations and, making its assessment on an equitable basis, awards him FRF 60,000, including VAT.

D. Default interest

59. 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 6.65% per annum.

FOR THESE REASONS, THE COURT

1. Dismisses by seven votes to two the Government's preliminary objection based on non-exhaustion of domestic remedies in respect of the complaint under Article 6 (art. 6) of the Convention;

2. Holds unanimously that as domestic remedies have not been exhausted, it cannot entertain the complaint under Article 14 of the Convention taken together with Article 6 (art. 14+6);

3. Dismisses unanimously the Government's preliminary objection based on failure to comply with the six-month time-limit;

4. Holds by five votes to four that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention;

5. Holds unanimously that this judgment constitutes sufficient just satisfaction in respect of the alleged damage;

6. Holds by eight votes to one that the respondent State is to pay the applicant, within three months, 60,000 (sixty thousand) French francs for costs and expenses, on which sum simple interest at an annual rate of 6.65% shall be payable from the expiry of the above-mentioned three months until settlement;

7. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the dissenting opinions of Mr Thór Vilhjálmsson, Mr Pettiti, Mr Lopes Rocha and Mr Mifsud Bonnici are annexed to this judgment.

R. R.
H. P.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

As to the preliminary objections raised by the Government, I agree with the majority of the Court. On the merits of the case, I would like to make the following remarks. If the alleged violation is tested against the everyday experience of those who work as judges or advocates, it seems obvious to me that it is far-fetched and could not have influenced the verdict, even if the facts as set out by the applicant are assumed to be correct. I find, with respect, that the complaint is so trivial that the case falls outside the sphere of human rights. I accordingly disagree with the majority of the Court on the merits of the case and find no violation of the Convention.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority in favour of finding that there had been no breach of the Convention, contrary to the reasoning adopted by the majority of the Chamber. The majority consider that the Assize Court's refusal to take formal note of Mrs M.'s written statement was such as to put in doubt, at least to Mr Remli's mind, the court's impartiality within the meaning of Article 6 (art. 6) of the Convention.

As the basis for reaching this conclusion the Chamber takes the text of Mrs M.'s statement, worded as follows:

> "I, the undersigned Mrs [M.], declare on my honour that I witnessed the following facts:
>
> I was at the door of the court at about 1 p.m., next to a group of people. From their conversation, I chanced to overhear that they were members of the jury drawn by lot in the Merdji [and] Remli against Pahon case.
>
> One of them then let slip the following remark: 'What's more, I'm a racist.'
>
> I do not know that person's name, but I can state that he was on the left of the juror sitting immediately to the left of the judge on the presiding judge's left.
>
> Being unable to attend the hearing to confirm the facts as my daughter has recently gone into hospital, but being at the court's disposal if it proves essential to call me as a witness, I have drawn up this statement to be used for the appropriate legal purposes."

It also takes into account the Assize Court's judgment, which gave the following reasons:

> "...
>
> According to the handwritten statement of a Mrs [M.] of 13 April 1989, one of the members of the jury in the present case said 'What's more, I'm a racist' at the door of the court at about 1 p.m.
>
> According to this statement and the written submissions, these words were spoken before the beginning of the first hearing in the instant case and not in the presence of the judges of the Court.
>
> The Court is thus not able to take formal note of events alleged to have occurred out of its presence.
>
> ..."

Admittedly, the Chamber indicates in paragraph 47 that it is not ruling on the evidential value of the statement, but it accepts it as to date and content, at the risk of contradicting itself. In so doing, the Chamber admits, at least by implication, that the alleged remark was made on 12 April 1989 and thus

called for a response from the Assize Court. But the text of the statement cannot be glossed or interpreted. Taken as it stands, it means that the remark was heard on the 13th. On the 12th it was physically impossible for Mrs M., at the door of the lawcourts before the hearing, to know that the person overheard was one of the jurors in the Remli case, since the drawing of lots did not take place until after 1 p.m. on the 12th.

Counsel for Mr Remli stated in his submissions that the remark had been made on the 12th, which is clearly a mistake. On the 12th, moreover, it would have been possible to challenge the juror when the lots were drawn, as was done in the case of other jurors. On the 13th it was no longer possible. That being so, refusal to make an entry in the record was reasonable. At all events, on the 13th the defence had other means available to them for clearing up the difficulty, namely asking the presiding judge to exercise his discretion to order that Mrs M. should be heard, or else applying for evidence to be taken. If even those applications had been refused, the defence could have acted on those refusals accordingly, but for tactical reasons they decided otherwise. The Chamber (see paragraph 48) criticises the Assize Court for not having made any check. In so doing, it runs the risk of substituting it own assessment of the facts for that of the national court, especially as the nature and bearing of the "hypothetical" remark have not been made explicit in the judgment. At all events, the impossibility of remedying such a situation is, in the Chamber's view, the basis of the ruling that there has been a violation. This seems to me to be open to criticism.

To support such reasoning, the Chamber would have had, in my view, firstly to rule on the failure to request a hearing to apply for evidence to be taken and secondly, and above all, to rule on the possibility which remained open to the defence of applying to the Criminal Division of the Court of Cassation for trial by another court on the ground of reasonable suspicion of bias.

This procedural step was looked at by the Chamber in the context of the objection as to non-exhaustion of domestic remedies in respect of its non-suspensive effect, but was not dealt with in the context of the appropriate remedy for counteracting, if necessary, any risk of non-impartiality or even of an appearance of partiality.

Admittedly, an application for transfer on the ground of reasonable suspicion of bias would not have had a suspensive effect. Admittedly, if it had been allowed by the Criminal Division of the Court of Cassation, the resulting decision would have been directed at the whole court, not only the impugned juror.

But for the purposes of Article 6 (art. 6) of the Convention the remedy for any lack of impartiality may result from an application directed against the court as a whole and not exclusively from one directed against a single judge or juror.

At all events, the Chamber was under an obligation to rule on this point and on the possible outcome of lodging an application for trial by another court on the ground of reasonable suspicion of bias. Furthermore, in the instant case, there was nothing in the domestic proceedings to establish that the remark, if it was made, would have been decisive for the court as a whole and for the jury's vote (see paragraph 44 of the judgment).

The doctrine of appearances in relation to Article 6 (art. 6) of the Convention must not be taken to extremes. In the instant case the Chamber seems to me to have deviated from the Court's traditional line in not taking account of domestic remedies which make it possible to deal at least at last instance with any risks that the rule of impartiality has not been complied with.

DISSENTING OPINION OF JUDGE LOPES ROCHA

(Translation)

I regret that I do not agree with the majority as regards the merits of the case.

Like Judge Pettiti, I believe that in the instant case there is nothing to show that the remark attributed to the juror in question could have thrown any doubt on the impartiality of the Assize Court as a whole; even supposing that the remark was actually made, it did not suffice to call the court's impartiality reasonably in question.

Such a remark, taken out of a context whose details and particular circumstances are unknown, might only have been a "joke". It does not necessarily demonstrate bias capable of influencing the vote of the person who made it at the stage of the collegiate court's decision.

As Judge Thór Vilhjálmsson points out in his dissenting opinion, the complaint is of such triviality in the light of all the facts of the case that it cannot reasonably be convincing as to the existence of a breach of the right to an impartial tribunal.

This is why, in my view, there has not been a breach of Article 6 (art. 6) of the Convention.

DISSENTING OPINION OF JUDGE MIFSUD BONNICI

1. In considering the procedural possibilities open to the applicant after his advocate was informed about the words allegedly heard by Mrs M., I formed the opinion that the application should fail because the domestic procedural remedies had not been exhausted before recourse was had to the Convention organs.

2. The jury of nine and two supplementary jurors had been empanelled and the Assize Court had already begun to hear witnesses. According to the rules in the French Code of Criminal Procedure, at that stage, it was not possible to challenge a juror. The applicant therefore correctly requested the court to take formal note of the incident reported by Mrs M. The court did not accept the request to investigate the allegation but nevertheless ordered that the advocate's written submissions and Mrs M.'s statement should form part of the record of the trial.

3. At this stage of the trial the applicant could have considered the provisions of Article 662 of the Code of Criminal Procedure (paragraph 23 of the judgment) enabling him to apply to the Court of Cassation to move the case to another trial court on the ground of reasonable suspicion of bias. This was possible because of the Assize Court's decision to include in the record of the trial Mrs M.'s statement and the written submissions of the defence. The order of the Assize Court, in fact, could have no other practical purpose but this, taking into account the terms of the domestic rules of criminal procedure.

4. It is of course true that the jurisprudence of the Court of Cassation was in the sense that such a request will not be granted unless the suspicion of bias covers the whole composition of the court and not only one of its members, but I consider that the Court of Cassation should have been put in a position to review its jurisprudence in the matter against the background of the Convention rules which now have to be taken into account by the French courts. The doctrine of precedent is not part of the French legal order.

5. It may be objected that this expects too much from the applicant. However, I am of the opinion that this is the spirit of Article 26 (art. 26) of the Convention, which stipulates that all possible domestic remedies have to be exhausted before recourse is had to the Convention's judicial organs. Every Contracting State has to be given all possible opportunities "of preventing or putting right the violations alleged" as stated in Cardot v. France judgment of 19 March 1991 (Series A no. 200, p. 19, para. 36), which was preceded by the dictum in De Wilde, Ooms and Versyp v. Belgium (judgment of 18 November 1970, Series A no. 12, p. 29, para. 50) "to put matters right through their own legal system". Given the rigidity of the rules of the French Code of Criminal Procedure, I am of the opinion that

the application of Article 26 (art. 26) was more impellent than ever, in a matter such as the one under consideration, which, potentially, can be taken to be of not infrequent occurrence in criminal trials before assize courts in France. My view of the matter is strengthened by the further consideration that the Assize Court could have easily replaced one juror by a supplementary one unless it felt that it could not do this within the ambit of the Code of Criminal Procedure unless directly or indirectly, by implication, it had a direction by, or through, a decision of the Court of Cassation.

6. Taking all this into consideration, I could not proceed further into the case as it appears to me to be disproportionate to consider, even if one were to concede that one out of nine jurors sitting with three judges in the trial nurtured a generic racial prejudice, that this should lead to the conclusion that the trial was not "fair" because the court was not "impartial". The circumstance, in my opinion, when considered against the background of the proceedings taken as a whole (see Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, para. 68), does not justify a holding of a violation of Article 6 para. 1 (art. 6-1) of the Convention.