CASE OF PELLEGRIN v. FRANCE

(Application no. 28541/95)

JUDGMENT

STRASBOURG

8 December 1999

In the case of Pellegrin v. France,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mrs E. Palm, *President*,
Mr A. Pastor Ridruejo,
Mr L. Ferrari Bravo,
Mr L. Caflisch,
Mr J.-P. Costa,
Mrs F. Tulkens,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr M. Fischbach,
Mr V. Butkevych,
Mr J. Casadevall,
Mr B. Zupančič,
Mrs N. Vajić,
Mr J. Hedigan,
Mrs W. Thomassen,
Mr T. Panţîru,
Mr K. Traja,
and also of Mrs M. de Boer-Buquicchio, *Deputy Registrar*,

Having deliberated in private on 10 June and 17 November 1999,

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 9 December 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 28541/95) against the French Republic lodged with the Commission under former Article 25 by a French national, Mr Gilles Pellegrin, on 8 July 1995.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (former Article 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 § 1 of the Convention.

2. On 6 January 1999 the applicant designated the lawyer who would represent him (Rule 36 § 3).

3. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr J.-P. Costa, the judge elected in respect of France (Article 27 § 2 of the Convention and Rule 24 § 4),

Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr M. Fischbach, Vice-President of Section (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr J. Casadevall, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panțîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3).

4. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr J.-C. Geus, to take part in the proceedings before the Grand Chamber.

5. The Registrar received the memorial of the applicant on 7 April 1999 and the memorial of the French Government ("the Government") on 16 April.

6. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 10 June 1999.

There appeared before the Court:

(a) *for the Government*
Mr J.-F. Dobelle, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr P. Boussaroque, Human Rights Section,
Legal Affairs Department,
Ministry of Foreign Affairs, *Counsel*;

(b) *for the applicant*
Mr C. Pettiti, of the Paris Bar, *Counsel*;

(c) *for the Commission*
Mr J.-C. Geus, *Delegate*,
Ms M.-T. Schoepfer, *Secretary to the Commission.*

The Court heard addresses by Mr Geus, Mr Pettiti and Mr Dobelle.

7. Mr Wildhaber, who was unable to attend the hearing, was replaced as President of the Grand Chamber by Mrs Palm (Rule 10), his place as a member of the Grand Chamber being taken by Mrs F. Tulkens, substitute judge (Rule 24 § 5 (b)). Mr Levits, who was likewise unable to attend the hearing, was replaced by Mr V. Butkevych, substitute judge (above-mentioned Rule 24 § 5 (b)). Mrs Tsatsa-Nikolovska, who was unable to attend the deliberations on 17 November 1999, was replaced by Mr A. Pastor Ridruejo, substitute judge (above-mentioned Rule 24 § 5 (b)).

THE FACTS

I. The circumstances of the case

A. The relevant facts

8. Until 1989 the applicant was employed in the private sector, working mainly as a management and accountancy consultant. On the basis of the professional experience he had thus acquired, he applied for a job working for the French State under the overseas cooperation programme.

9. The French Ministry of Cooperation and Development recruited him – under a contract signed on 13 March 1989 – as a technical adviser to the Minister for the Economy, Planning and Trade of Equatorial Guinea. As head of project, he was to be responsible for drawing up the budget of State investment for 1990 and was to participate in the preparation of the three-year plan and the three-year programme of public investment, in liaison with Guinean civil servants and international organisations.

10. The contract stipulated that the applicant was to be placed at the disposal of the government of the Republic of Equatorial Guinea for two ten-month spells separated by a period of home leave calculated on the basis of five days for each month worked. The contract also laid down the conditions of his remuneration and in respect of all other matters referred to the regulations issued pursuant to the Law of 13 July 1972 (see paragraph 36 below).

11. On 9 January 1990, following a number of local disagreements, the Guinean authorities placed the applicant once more at the disposal of the French authorities. This caused the termination of his contract on expiry of his period of home leave (see paragraph 31 below).

12. The Ministry intended to give the applicant a new contract when he had completed his home leave, assigning him to duties in Gabon. To be eligible, he had to satisfy two prior conditions, as required of all other applicants for cooperation posts: firstly, candidates had to obtain the approval of the authorities of the country where they were to serve; secondly, they had to be certified medically fit to serve overseas.

13. As the approval of the Gabonese authorities was slow in coming, the Ministry of Cooperation and Development notified the applicant – by a letter of 2 February 1990 – that his contract was to be terminated and informed him that he would subsequently be removed from the Ministry's establishment with effect from 15 March 1990.

14. The Gabonese authorities' approval was later given for a post of financial analyst at the Ministry of Public Sector Reform. By a letter of 7 February 1990 the Ministry of Cooperation and Development noted this approval and accordingly declared the striking-off decision announced on 2 February null and void. The applicant was then summoned to attend the compulsory medical examination to assess his fitness to serve.

15. On 22 February 1990 the doctor responsible for the interministerial medical service, a specialist in tropical medicine, examined the applicant and ordered an additional psychiatric report. In the light of the results of the additional diagnosis, the doctor declared on 15 March 1990 that the applicant was permanently unfit to serve overseas.

16. On 23 March 1990 the Ministry of Cooperation and Development noted that opinion and accordingly informed the applicant that his name was to be removed from the list of the Ministry's establishment with effect from 15 March 1990.

B. The proceedings in issue

17. On 16 May 1990 the applicant lodged an application with the Paris Administrative Court to set aside the decision of 23 March 1990 as being unlawful.

18. On 9 November 1990 the Minister for Cooperation and Development filed his defence.

19. By an interlocutory judgment of 16 April 1992 the Paris Administrative Court ordered a medical report in order to ascertain whether, on account of his state of health, the applicant had been unfit in March 1990 to serve as a technical adviser under the overseas cooperation programme.

20. On 21 November 1992 the medical expert filed his report, having interviewed the applicant and given him a medical, psychological and neuropsychiatric examination on 3 September 1992. He gave it as his opinion that the Ministry of Cooperation and Development's administrative reaction had been excessive and that the applicant's state of health had not made him unfit to resume his duties after three months' sick-leave, after which he could have gone before a medical board.

21. On 22 December 1992 the applicant filed a compensation claim, seeking an order requiring the State to pay him two different sums. Firstly, he claimed 550,000 French francs (FRF), which he considered to be the amount of remuneration he would have received if he had remained in post; secondly, he claimed FRF 500,000 in compensation for the personal, pecuniary and non-pecuniary damage he considered he had sustained on account of being struck off.

22. By a decision of 4 January 1993 the Paris Administrative Court fixed the amount payable in costs for the medical report. By a decision of 1 March 1993 it corrected a clerical error in the operative provisions of the first decision.

23. On 8 March 1993 the Minister for Cooperation and Development submitted his observations on the medical report.

24. On 14 April 1993 the applicant filed a reply.

25. On 3 May 1993 the Minister for Cooperation and Development submitted his defence to the applicant's compensation claim of 22 December 1992, arguing that it was unfounded.

26. On 14 September and 4 October 1994 the Minister for Cooperation and Development filed a rejoinder and a number of documents.

27. On 13 December 1994 the applicant filed a reply.

28. The case was set down for hearing on 19 January 1995. On 9 January 1995 the applicant was informed that the case had been put off to a date to be determined later.

29. On 11 and 18 January 1995 the Minister for Cooperation and Development submitted additional observations and a number of documents.

30. On 16 February 1995 the applicant submitted a reply.

31. By a judgment of 23 October 1997, following a hearing on 25 September 1997, the Paris Administrative Court dismissed the applicant's application, as regards both the request to have the striking-off decision set aside and the compensation claim. It held in particular:

"*... As to the application to set aside the Minister for Cooperation's decision of [23] March 1990*

Firstly, the documents in the file show that Mr Pellegrin's contract with the State to work in Equatorial Guinea as a participant in the cooperation programme was terminated when the Guinean authorities placed him once more at the disposal of the French State. Although, by a letter of 7 February 1990, the Minister declared null and void the decision of 2 February 1990 announcing that

Mr Pellegrin's name would be removed from the list of the Ministry's establishment with effect from 15 March 1990, which he did with a view to the signing of a new contract, he did not intend to reactivate the contract under which Mr Pellegrin had been assigned to duties in Equatorial Guinea, since that contract had been automatically terminated when the foreign State placed him once more at the disposal of the French State. Consequently, Mr Pellegrin may not validly argue that the decision of [23] March 1990 unlawfully rescinded the decision of 7 [February] 1990.

Secondly, in deciding to remove the applicant's name from the list of the Ministry's establishment with effect from 15 March 1990, the Minister was merely drawing the consequences of the fact that the contract assigning Mr Pellegrin to duties in Equatorial Guinea expired on that date and of the fact that no new contract had been signed. Consequently, his decision was not invalidated by any unlawful retrospectiveness; ...

Thirdly, the medical report of 21 November 1992 shows that on [23] March 1990 Mr Pellegrin did not satisfy the physical fitness conditions for service overseas. Consequently, he may not validly maintain that the decision of [23] March 1990, which cited the … opinion that he was unfit as ground for refusing him a new contract for the cooperation service in Gabon, was vitiated by an error of judgment; ...

As to the compensation claim

It follows from the rejection of Mr Pellegrin's arguments in support of his application to set aside the decision of [23] March 1990 that he may not rely on any culpable unlawfulness making the State liable. Consequently, his claim for compensation from the State for prejudice caused by the decision of [23] March 1990 must be dismissed ..."

32. On 16 January 1998 the applicant gave notice of appeal against the above judgment, which had been served on him on 13 January, and filed his statement of the grounds of appeal.

33. On 10 June 1998 the Minister for Cooperation and Development filed a pleading.

34. On 30 June 1998 the applicant filed a further pleading.

35. The case is pending in the Paris Administrative Court of Appeal.

II. relevant domestic law

Law no. 72-659 of 13 July 1972 on the position of civilian cultural, scientific and technical cooperation staff in post in foreign States

36. The relevant provisions of the law governing the position of civilian cultural, scientific and technical cooperation staff in post in foreign States (in respect of which two implementing decrees were promulgated on 25 April 1978) provide:

Section 1

"The civilian staff on whom the State calls to perform cultural, scientific or technical cooperation duties outside French territory at the service of foreign States, particularly by virtue of agreements between France and those States, shall be governed by the provisions of the present Law ..."

Section 3

"Without prejudice to the rules governing the exercise of judicial functions, the staff contemplated by the present Law shall serve, while performing their duties, under the authority of the Government of the foreign State or the body at whose service they have been placed, under conditions laid down by agreement between the French Government and the foreign authorities concerned.

They shall be required to maintain the propriety and discretion befitting persons performing their duties in the territory of a foreign State and inherent in the public-service nature of the tasks they carry out ... They shall be forbidden to engage in any act or participate in any event which might be damaging to the French State, local public policy or the relations the French State maintains with foreign States.

In the event of failure to respect the obligations contemplated in the previous two paragraphs, their turn of duty may be terminated immediately, without prior formalities, and without prejudice to any administrative proceedings that may be brought against them on their return to France."

III. COMPARATIVE LAW: PUBLIC SERVANTS IN EEC LAW

> "Freedom of movement of workers and access to employment in the public service of the Member States – Commission action in respect of the application of Article 48(4) of the EEC Treaty" (Communication from the Commission of the European Communities published in OJEC no. C 72 of 18 March 1988)

37. Article 48(4)[2] of the Treaty of 25 March 1957 instituting the European Economic Community ("the EEC Treaty") provides for a derogation from the principle of freedom of movement for workers within the Community in respect of "employment in the public service".

38. The Court of Justice of the European Communities has developed a restrictive interpretation of this derogation. In its judgment of 17 December 1980 in the case of Commission v. Belgium (C-149/79, ECR 3881) it decided that the derogation concerned only posts which involved direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities, and which thus presumed on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which formed the foundation of the bond of nationality.

39. The European Commission, to which the EEC Treaty assigned responsibility for ensuring the correct application of Community rules, noted that a large number of posts likely to be caught by the derogation had in reality no bearing on the exercise of powers conferred by public law or protection of the general interests of the State.

40. In a communication of 18 March 1988 it set itself the task of listing separately those activities which are covered by the derogation and those which are not. It thus established two distinct categories of activities according to whether or not they involved "direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State". These categories were defined as follows:

"*Exclusion of specific activities in the national public service* [from freedom of movement for workers]

On the basis of current Court of Justice rulings, and bearing in mind the present conditions for establishing the single market, the Commission considers that the derogation in Article 48(4) covers

specific functions of the State and similar bodies such as the armed forces, the police and other forces for the maintenance of order, the judiciary, the tax authorities and the diplomatic corps. This derogation is also seen as covering posts in State Ministries, regional government authorities, local authorities and other similar bodies, central banks and other public bodies, where the duties of the post involve the exercise of State authority, such as the preparation of legal acts, the implementation of such acts, monitoring of their application and supervision of subordinate bodies ...

Activities concerned by action in the public service sector

The Commission considers that the functions involved in certain forms of public employment are for the most part sufficiently remote from the specific activities of the public service as defined by the Court of Justice that they would only in very rare cases be covered by the exception in Article 48(4) of the Treaty.

The Commission proposes therefore to implement its action in the following areas by order of priority:

– bodies responsible for administering commercial services (e.g. public transport, electricity and gas supply, airline and shipping companies, posts and telecommunications, radio and television companies),

– public health care services,

– teaching in State educational establishments,

– research for non-military purposes in public establishments.

Each of these activities also exists in the private sector, to which Article 48(4) does not apply, or may be exercised in the public sector without the imposition of nationality requirements ..."

Where the second category is concerned, the Commission has left it open to EEC member States to try to show that the duties of a given post involve the specific activities of the public service; this would, exceptionally, justify application of the derogation.

Case-law of the Court of Justice of the European Communities

41. The Court of Justice has applied and developed these principles in a number of judgments. In its judgment of 2 July 1996 in the case of European Commission v. the Grand Duchy of Luxembourg (C-473/93, ECR I-3248), it held:

"§ 27 ... in order to determine whether posts fall within the scope of Article 48(4) of the Treaty, it is necessary to consider whether or not the posts in question typify the specific activities of the public service in so far as it exercises powers conferred by public law and has responsibility for safeguarding the general interests of the State or of other public bodies. For that reason, the criterion for determining whether Article 48(4) of the Treaty is applicable must be functional and must take account of the nature of the tasks and responsibilities inherent in the post, in order to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement of workers and equal treatment of nationals of all Member States is not restricted by interpretations of the concept of public service which are based on domestic law alone and which would obstruct application of Community rules (judgment in Case 307/84 Commission v. France [1986] ECR 1725, paragraph 12).

…

§ 31 ... the generality of posts in the areas of research, health, inland transport, posts and telecommunications and in the water, gas and electricity supply services are remote from the specific activities of the public service because they do not involve direct or indirect participation in the exercise of powers conferred by public law or duties designed to safeguard the general interests of the State or of other public authorities (see, in particular, as regards the area of health, the judgment in Case 307/84 Commission v. France, and, as regards research for civil purposes, the judgment in Case 225/85 Commission v. Italy [1987] ECR 2625).

…

§ 33 ... the Court has already stated that the very strict conditions which posts must satisfy in order to come within the exception laid down in Article 48(4) of the Treaty are not fulfilled in the case of trainee teachers (judgment in Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraph 28), in the case of foreign-language assistants (judgment in Case 33/88 Allué and Coonan [1989] ECR 1591, paragraph 9) or in the case of secondary school teachers (judgment in Case C-4/91 Bleis [1991] ECR I-5627, paragraph 7).

§ 34 For the same reasons, the same applies to primary school teachers ..."

PROCEEDINGS BEFORE THE COMMISSION

42. Mr Pellegrin applied to the Commission on 8 July 1995. He complained that his case had not been heard within a reasonable time as required by Article 6 § 1 of the Convention. He also relied on Articles 3 and 13.

43. On 21 May 1997 the Commission declared the application (no. 28541/95) partly admissible. In its report of 17 September 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 6 § 1 (eighteen votes to fourteen). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

44. In their memorial the Government asked the Court, as their principal submission, to dismiss the application lodged by Mr Pellegrin as being incompatible *ratione materiae* with the provisions of the Convention. In the alternative, they left the question as to the reasonableness of the length of the proceedings to the Court's discretion.

45. The applicant asked the Court to find a violation of Article 6 § 1 and to award him just satisfaction.

THE LAW

Alleged violation of Article 6 § 1 of the Convention

46. The applicant complained of the length of the proceedings which are pending in the Paris Administrative Court of Appeal. He relied on Article 6 § 1 of the Convention, which provides:

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

47. The Court must determine whether that Article is applicable to the present case. The applicant and the Commission argued that it was applicable; the Government submitted that it was not.

A. Arguments of the parties

1. The applicant

48. The applicant submitted that his status as a non-established civil service employee under contract more closely resembled that of an employee under private law than that of a civil servant. The fact that in the event of a dispute the administrative courts had jurisdiction (as for civil servants) did not in itself confer on him a status which could be assimilated with civil servant status. The Court’s case-law on civil servants was therefore not applicable in his case.

49. Were the Court nevertheless to assimilate him with a civil servant and apply its case-law on the question, he argued that the dispute in issue did not concern his recruitment, his career or the termination of his employment in the civil service. He asserted that the object of the dispute was not to obtain his reinstatement as a member of the establishment from which he had been struck off, but to obtain a ruling that the striking-off decision was unlawful with the sole aim of obtaining compensation for the damage caused by that decision.

50. In the applicant’s submission, the dispute therefore had a “purely economic” purpose, namely to obtain the payment of compensation, firstly for the remuneration he would have received if he had remained in post, and secondly for the personal, pecuniary and non-pecuniary damage that he considered he had sustained on account of being struck off. Referring to the Le Calvez v. France judgment of 29 July 1998 (*Reports of Judgments and Decisions* 1998-V, pp. 1900-01, § 58), he argued that his “means of subsistence” had been affected, since the decision to strike him off had deprived him of the monthly salary which formed his only income.

51. The applicant further submitted that the duties he had performed in Equatorial Guinea had not involved the exercise of powers conferred by public law, as it had been possible for them to be performed by a private consultant. The purpose of recruiting a participant in the cooperation programme remunerated by the French administrative authorities was to provide financial assistance to the host State by placing a qualified person at its disposal without obligation.

2. The Government

52. The Government submitted that the applicant’s status as a civil service employee under contract could be assimilated with civil servant status. Firstly, the contract did not play a significant role in the relationship between the employee concerned and the administrative authority which employed him; its signing was not the result of negotiation between the parties about the employee’s conditions of service but a mere manifestation of agreement on both sides which entailed application of pre-existing statutory and regulatory conditions of service (laid down in the present case by the Law of 13 July 1972 and its two implementing decrees). Secondly, the conditions for the performance of the duties of employees under contract, termination of their service and their remuneration were very similar to those applicable to civil servants since, just like those conditions, they were determined by the constraints of public service. Lastly, in the event of a dispute, the administrative courts had jurisdiction and applied rules which – derogating from those applied to other administrative contracts – were similar to those governing civil servants.

53. The Government argued on that basis that the Court's case-law on civil servants should be applied. Referring to the Fusco v. Italy judgment of 2 September 1997 (*Reports* 1997-V, p. 1732, § 20), they submitted that the dispute manifestly concerned termination of the applicant's employment in the civil service. He had initially confined himself to lodging an application to set aside the striking-off decision. It was only two and a half years later that he had added a compensation claim to that application.

54. Moreover, in the Government's submission, payment of that compensation depended on a prior finding of the unlawfulness of the striking-off decision. As the Court had ruled in its Neigel v. France judgment of 17 March 1997 (*Reports* 1997-II, p. 411, § 44), in such a case what was at stake in the dispute was not "purely or essentially economic".

55. The Government further submitted that the impugned decision was taken under conditions derogating from the position in ordinary law (see, to the converse effect, the Francesco Lombardo v. Italy judgment of 26 November 1992, Series A no. 249-B, pp. 26-27, § 17). The State to which the applicant had been assigned had availed itself of its right, at any time and for reasons of expediency, to place the applicant once more at the disposal of the French authorities, who had no alternative but to take note of that decision. This automatically caused the unilateral termination of the contract.

56. In the Government's submission, this situation fell outside the scope of ordinary law on account of the specific nature of the diplomatic responsibilities entrusted to the applicant, which required him to participate, in both the States concerned, in the exercise of functions which were a matter of national sovereignty and could accordingly not be delegated by the administrative authorities. As an employee of the Ministry of Cooperation and Development engaged in the cooperation programme, the applicant had taken part in a public-service assignment for the French State; as a technical adviser at the Ministry of the Economy, Planning and Trade of Equatorial Guinea, he had taken part in the exercise of that State's sovereignty.

3. The Commission

57. The Delegate of the Commission considered that the object of the dispute was mainly economic. Firstly, the striking-off decision had deprived the applicant of his "means of subsistence" (see the previously cited Le Calvez judgment, pp. 1900-01, § 58). Secondly, the dispute concerned the lawfulness of the decision to strike him off. In the event of a ruling that it was not lawful, he would be entitled to compensation. Accordingly, what was at issue in the proceedings was the existence of a debt in the applicant's favour, which was a "civil" right according to the Court's case-law (see the Cazenave de la Roche v. France judgment of 9 June 1998, *Reports* 1998-III, p. 1327, § 43).

B. The Court's assessment

58. The facts of the present case raise the problem of the applicability of Article 6 § 1 to disputes raised by servants of the State over their conditions of service.

1. Existing case-law

59. As the Court has noted in previous cases, in the law of many member States of the Council of Europe there is a basic distinction between civil servants and employees governed by private law. This has led the Court to hold that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1" (see, for example, the Massa v. Italy judgment of 24 August 1993, Series A no. 265-B, p. 20, § 26).

This general principle of exclusion has however been limited and clarified in a number of judgments. Thus, in the Massa case (ibid.) the applicant applied for a reversionary pension following the death of his wife, who had been a headmistress. In the Francesco Lombardo case (judgment cited above) a *carabiniere* who had been invalided out of the service because of disability and who maintained that the disability was "due to his service" applied for an "enhanced ordinary pension". The Court considered that the applicants' complaints related neither to the "recruitment" nor to the "careers" of civil servants and only indirectly to "termination of service" as they consisted in claims for purely pecuniary rights arising in law after termination of service. In those circumstances and in view of the fact that the Italian State was not using "discretionary powers" in performing its obligation to pay the pensions in issue and could be compared to an employer who was a party to a contract of employment governed by private law, the Court held that the applicants' claims were civil ones within the meaning of Article 6 § 1.

In the Neigel case, on the other hand, the decision contested by the applicant, namely the refusal to reinstate her to a permanent post in the civil service, was held by the Court to concern "her 'recruitment', her 'career' and the 'termination of [her] service'". The Court went on to say that the applicant's claim for payment of the salary she would have received if she had been reinstated did not make Article 6 § 1 applicable because an award of such compensation by the administrative court was "directly dependent on a prior finding that the refusal to reinstate [had been] unlawful" (previously cited Neigel judgment, p. 411, § 44). The Court accordingly decided that the dispute did not concern a "civil" right within the meaning of Article 6 § 1. It should be noted that the administrative authorities' refusal to reinstate did not constitute exercise of any discretionary power on their part since, according to the applicable domestic law, either the post was vacant, in which case the applicant would have been entitled to reinstatement, or there was no vacancy and the authorities could not reinstate her.

According to other judgments, Article 6 § 1 applies where the claim in issue relates to a "purely economic" right – such as payment of salary (see the De Santa v. Italy, Lapalorcia v. Italy and Abenavoli v. Italy judgments of 2 September 1997, *Reports* 1997-V, p. 1663, § 18, p. 1677, § 21, and p. 1690, § 16, respectively) – or an "essentially economic" one (see the Nicodemo v. Italy judgment of 2 September 1997, *Reports* 1997-V, p. 1703, § 18) and does not mainly call in question "the authorities' discretionary powers" (see the following judgments: Benkessiouer v. France, 24 August 1998, *Reports* 1998-V, pp. 2287-88, §§ 29-30; Couez v. France, 24 August 1998, *Reports* 1998-V, p. 2265, § 25; Le Calvez, cited above, pp. 1900-01, § 58; and Cazenave de la Roche, cited above, p. 1327, § 43).

2. The limits of the present case-law and its consequences

60. The Court considers that, as it stands, the above case-law contains a margin of uncertainty for Contracting States as to the scope of their obligations under Article 6 § 1 in disputes raised by employees in the public sector over their conditions of service.

In the Neigel case, for example, the criterion of the absence of discretionary power was not taken to be decisive for the applicability of Article 6 § 1 (see paragraph 59 above).

The criterion relating to the economic nature of a dispute, for its part, leaves scope for a degree of arbitrariness, since a decision concerning the "recruitment", "career" or "termination of service" of a civil servant nearly always has pecuniary consequences. This being so, it is difficult to draw a distinction between proceedings of "purely" or "essentially" economic interest and other kinds of proceedings. In the Neigel case, for example, the view could have been taken that the applicant, who had sought payment of the remuneration she would have received if she had been reinstated to

a post in the administrative service she had previously worked for, was submitting an essentially economic claim. In another case the Court held that Article 6 § 1 was applicable on account of the fact that the issue "at the heart of the proceedings" concerned the applicant's "means of subsistence" (see the previously cited Le Calvez judgment, pp. 1900-01, § 58). Yet most proceedings brought by public servants against the administrative authorities which employ them have a bearing on their "means of subsistence", so that, from that point of view too, the "economic" criterion gives rise to doubt. The Court can thus only confirm what it stated in its Pierre-Bloch v. France judgment in relation to electoral disputes, when it held: "proceedings do not become 'civil' merely because they also raise an economic issue" (judgment of 21 October 1997, *Reports* 1997-VI, p. 2223, § 51).

61. The Court therefore wishes to put an end to the uncertainty which surrounds application of the guarantees of Article 6 § 1 to disputes between States and their servants.

62. The parties in the present case derived argument from the distinction which exists in France, as in some other Contracting States, between two categories of staff at the service of the State, namely officials under contract and established civil servants (see paragraphs 48 and 52 above). It is true that in some States officials under contract are governed by private law, unlike established civil servants, who are governed by public law. The Court notes, however, that in the current practice of the Contracting States established civil servants and officials under contract frequently perform equivalent or similar duties. Whether the applicable legal provisions form part of domestic public or private law cannot, according to the Court's established case-law, be decisive in itself, and it would in any event lead to inequality of treatment from one State to another and between persons in State service performing equivalent duties.

63. The Court accordingly considers that it is important, with a view to applying Article 6 § 1, to establish an autonomous interpretation of the term "civil service" which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States Parties to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority (whether stipulated in a contract or governed by statutory and regulatory conditions of service). In addition, this interpretation must take into account the disadvantages engendered by the Court's existing case-law (see paragraph 60 above).

3. New criterion to be applied

64. To that end, in order to determine the applicability of Article 6 § 1 to public servants, whether established or employed under contract, the Court considers that it should adopt a functional criterion based on the nature of the employee's duties and responsibilities. In so doing, it must adopt a restrictive interpretation, in accordance with the object and purpose of the Convention, of the exceptions to the safeguards afforded by Article 6 § 1.

65. The Court notes that in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other posts which do not have this "public administration" aspect, there is no such interest.

66. The Court therefore rules that the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities

of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police. In practice, the Court will ascertain, in each case, whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. In so doing, the Court will have regard, for guidance, to the categories of activities and posts listed by the European Commission in its communication of 18 March 1988 and by the Court of Justice of the European Communities (see paragraphs 37 to 41 above).

67. Accordingly, no disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law attract the application of Article 6 § 1 since the Court intends to establish a functional criterion (see paragraph 64 above). Disputes concerning pensions all come within the ambit of Article 6 § 1 because on retirement employees break the special bond between themselves and the authorities; they, and *a fortiori* those entitled through them, then find themselves in a situation exactly comparable to that of employees under private law in that the special relationship of trust and loyalty binding them to the State has ceased to exist and the employee can no longer wield a portion of the State's sovereign power (see paragraph 65 above).

4. Application of the above criterion in the instant case

68. The Court notes that at the material time the applicant was employed by the Ministry of Cooperation and Development. As one of the civilian cooperation staff in post in foreign States he was under specific obligations "inherent in the public-service nature" of his duties, as defined in particular in section 3 of the Law of 13 July 1972 on the position of civilian cultural, scientific and technical cooperation staff in post in foreign States (see paragraph 36 above). As evidenced by those obligations, such an activity, which comes under the aegis of a government Ministry and partakes of the conduct of foreign relations, typifies the specific activities of the public service as defined above (see paragraph 66 above).

69. It remains for the Court to examine the particular nature of the applicant's duties and responsibilities in the course of his employment. In that connection, the Court is not persuaded by the applicant's submission (see paragraph 51 above), which was limited to the assertion that, since it had proved possible to entrust his duties to a private consultant, they did not involve powers conferred under public law. It accepts the Government's argument in so far as it is based on the nature of the work performed by the applicant in the States concerned (see paragraph 56 above).

70. The facts of the case show that the tasks assigned to the applicant (see paragraph 9 above) gave him considerable responsibilities in the field of the State's public finances, which is, *par excellence*, a sphere in which States exercise sovereign power. This entailed participating directly in the exercise of powers conferred by public law and the performance of duties designed to safeguard the general interests of the State.

71. Accordingly, Article 6 § 1 is not applicable in the present case.

For these reasons, the court

Holds by thirteen votes to four that Article 6 § 1 of the Convention is not applicable in the present case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 December 1999.

Elisabeth Palm
President
Maud de Boer-Buquicchio
Deputy Registrar

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

(a) concurring opinion of Mr Ferrari Bravo;

(b) separate opinion of Mr Traja;

(c) joint dissenting opinion of Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Thomassen.

concurring opinion
of judge ferrari bravo

(*Translation*)

I voted in favour of the Pellegrin judgment, since I believe it is important for the Court, in the light of the avalanche of applications concerning the economic treatment of public servants, to lay down precise criteria to guide its case-law on Article 6 § 1 of the Convention.

It is therefore a "landmark judgment". But it is precisely for that reason that the Court should confine itself to what is *strictly* necessary to reach its decision. The rationale of landmark judgments imposes on the courts which render them a limitation designed to eliminate what is not really essential so as to enable those courts, when they have to deal with similar but not identical cases (indeed, there are never two identical cases), to add to, correct or review their previous case-law.

In paragraph 67 the sentence concerning pensions was not necessary in the instant case because it did not concern pensions. To express a view on the question, in the paragraphs entitled "New criterion to be applied", is in my opinion at the very least imprudent.

SEPARATE opinion of judge TRAJA

I joined the majority in finding Article 6 § 1 of the Convention inapplicable to the case, but my conclusion stems from a different approach.

The present case once again raises the highly controversial question of the applicability of Article 6 § 1 to "disputes relating to the recruitment, careers and termination of service of civil servants", disputes that have generally been held to be outside the scope of this Article and which the judgment of the Court in the Pellegrin case has excluded on a more principled basis.

The line the Court followed prior to the Pellegrin judgment was a cautious approach as to employees hired under public contracts, keeping away from issues of an administrative nature falling within the discretionary power of the State authorities, while giving paramount consideration to the economic issues likely to arise in this context.

1. In the present judgment the Court seeks to establish an autonomous interpretation of the term "civil service" ruling that "… the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities" (paragraph 66 of the judgment).

This solely functional criterion precludes any economic issue that may arise in the context of a civil service dispute: wherever the employee is bound by a special bond of trust and loyalty to the State authorities, Article 6 does not apply. Only after this bond is broken may economic issues like pensions come within the ambit of Article 6 § 1 of the Convention (paragraph 67 of the judgment).

However, the rationale of the Court's judgment seems to apply not only to the issues in cases related to the discretionary power of the States, namely issues linked to the recruitment, careers and termination of service of public servants. The wording used in paragraph 67 seems to exclude the applicability of Article 6 in *all* cases involving an employee under a special bond of trust and loyalty.

Although I agree that reinstatement in office in those situations where the public authorities are indeed vested with discretionary powers cannot be made a matter to which Article 6 § 1 is applicable, I am not convinced that any related economic issue in such cases does not give rise to a civil right. Issues related to salary are not necessarily linked to reinstatement claims;

one may have an arguable pecuniary claim, but not a consequent right to reinstatement. The only possible ground for the exclusion of such economic claims would be their speculative nature in cases where the State cannot be blamed for committing an illegality, by terminating the public-service contract on unlawful grounds, for example, and where the employee seeks redress to obtain the remuneration he would have had if he had been reinstated to the post (see the Neigel v. France judgment of 17 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 411, § 44).

In my view, economic interests cannot as such be conditioned by the special bond between an employee and the public authority because issues of such a nature are not in the discretion of the public power. No State authority can have discretion as to whether or not to pay the salaries of its serving employees, or to refuse to pay their pensions or any other economic claim derived from their status as civil servants, whether or not they are still bound to the State by such a special bond. These are issues which are not linked to any discretionary power; discretion may be exercised only in relation to recruitment or termination of public contracts, but not to the economic consequences thereof.

Moreover, the classification of civil servants made by the Court through an analogy with what is derived from the EEC Treaty, in which the Court identifies two categories of civil servants, does not, in my opinion, have any impact on Article 6 § 1 civil right doctrine, because civil claims do not depend on any classification of public employees. The fact is that the above-mentioned classification was made in relation to the right of workers to free movement, which is not the same thing as the right to a fair trial, in that while the former may be restricted the latter is more of a derogable nature, i.e. it may not be restricted unless derogated from under the circumstances specified in the Convention.

2. I agree with the majority that the economic criterion gives rise to doubt (paragraph 60), but this does not mean that such a criterion must be totally excluded from the Court's examination of a given case. My opinion is that the economic nature of a dispute relating to civil service issues has

hitherto been somewhat taken for granted and accepted without any real thought. And this is for me the basic criterion for distinguishing between justiciable and unjusticiable claims relating to the civil service.

The argument relating to the economic nature of the interest involved in civil service disputes has so far been based on a rather doubtful assumption. A person has a civil right (to payment etc.) if he or she has a right to continue to be employed. But this is a speculative assumption, because a Where no causal link can be established civil right is not necessarily derived from another right the public authority is authorised to grant or not.

between the damage and the action of the public authority, the question of granting the applicant compensation is a matter for mere speculation.

In all those cases where the Court found Article 6 to be applicable, it did so because the applicants had a valid legal interest (unpaid salary, pension) after the termination of the contract (see the following judgments: Massa v. Italy, 24 August 1993, Series A no. 265-B; Francesco Lombardo v. Italy, 26 November 1992, Series A no. 249-B; and De Santa v. Italy and Nicodemo v. Italy, 2 September 1997, *Reports* 1997-V). But here the applicant's economic interest was completely dependent on the question whether the French authorities had illegally decided not to renew his contract.

It seems to me that the Court's approach in the present judgment should apply only to disputes in which the claims are derived from a speculative, future economic interest of the applicant and I would have agreed with everything in the judgment, if it had been confined only to the claims of the applicant in the instant case. But the way the case has been resolved somehow creates *in abstracto* a principle too general to be applied in all cases involving civil service claims.

The implications of this categorical approach will affect the handling of all similar cases in the future, with the risk that differences of importance for the decision might be overlooked, whereas our case-law demonstrates precisely that assessment of the differences between the cases in this category is the basic prerequisite for their solution. Maintaining the latter principle in force would have had the advantage of a case-by-case approach and would have left open the question of the applicability of Article 6 § 1 to civil servants. There are matters to which this Article applies (or may apply) just as there are matters to which it does not.

3. I voted for the inapplicability of Article 6 § 1 because, in the present case, I see no economic interest or civil right of the applicant coming into play. The applicant maintained that the loss of the salary that would have been due to him had he been reinstated by a renewal of the contract of employment constituted a civil right, because the economic nature of the claim was self-evident. But, it is obvious here that payment of his salary is completely dependent on his reinstatement, yet the question of his reinstatement falls within the State's discretionary powers. Furthermore, the contract was ended in a sovereign way by the Guinean authorities and clearly France cannot be held responsible for any unlawful act against the applicant.

There is abundant case-law to the effect that although a claim for salary represents an economic interest *per se*, the assessment of that interest as having a civil nature depends on a prior finding of the unlawfulness of the employer's act (see the Neigel case cited above).

The Court would surely have found, with regard to the question of awarding just satisfaction, that a request for compensation for loss of salary was a matter for speculation. So, no economic interest is at stake, because an economic right which is not capable of being quantified ceases to be a civil right. It is not a question of whether there is an economic interest; the question is rather whether in the instant case such an interest, if any, can be a civil right at all. If the applicant's right to remuneration is economic but cannot be quantified then such a right properly does not exist. It is not sufficient to have only the appearance of a right; what is needed is that the claim be arguable, genuine and actual.

JOINT DISSENTING OPINION OF JUDGES TULKENS,
fischbach, casadevall and thomassen

(*Translation*)

The Court has decided that Article 6 is not applicable in the present case and that the applicant is accordingly not entitled to have the dispute between himself and the administrative authorities, which has lasted more than nine years, heard "within a reasonable time".

As the judgment notes, the Court's case-law on this question has evolved and it has successively adopted a number of different criteria which can be applied to bring the civil service within the scope of Article 6 of the Convention or to exclude it therefrom. In the present case the Court has abandoned the criterion of the economic object of the dispute in favour of a new criterion, namely "participation in the exercise of powers conferred by public law", based on the nature of the official's duties and responsibilities.

We share the majority's desire to "put an end to the uncertainty which surrounds application of the guarantees of Article 6 § 1 [of the Convention] to disputes between States and their servants" (paragraph 61). We also agree with the majority's view, which is consistent with the Court's case-law, that the question whether the applicable legal provisions in domestic law form part of public or private law is not decisive (paragraph 62). With regard to such an important matter as access to a court, a difference in the level of legal protection as between those who have the status of civil servants and other persons recruited under a contract of employment who nonetheless frequently perform the same duties under equivalent or similar conditions is difficult to justify and may be arbitrary for the purposes of Article 14 of the Convention in particular. We therefore concur with the majority in emphasising that it is important to ensure equal treatment among public servants, whatever the nature of the legal relation between them and the administrative authorities (paragraph 63).

Subject to the above reservations, we cannot however concur in the reasoning adopted by the majority, or in the conclusion it leads to, for the following reasons.

1. In general, the rights enshrined in the Convention, including the guarantees set forth in Article 6, should be broadly construed, so that any interpretation that would have the effect of limiting them requires objective reasoning of considerable weight. Moreover, the judgment rightly makes that point in paragraph 64, where the Court affirms that it "must adopt a restrictive interpretation, in accordance with the object and purpose of the Convention, of the exceptions to the safeguards afforded by Article 6 § 1", but in the present case it nevertheless heads off in a quite different direction.

2. For the purposes of applying Article 6 § 1 of the Convention, the Court is going down the road of an autonomous interpretation of the term "civil service" (paragraph 63). Paradoxically, the *result* will be that "no disputes between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law attract the application of Article 6 § 1" (paragraph 67).

The new criterion therefore deprives a whole category of persons, those whose duties involve participation in the exercise of powers conferred by public law, of a fundamental safeguard in a State governed by the rule of law, namely the right of access to a court and to a fair hearing. But introducing this exclusion does not form part of the Court's task. The Convention makes no mention of "civil servants", even as a term with an autonomous meaning, with a view to depriving them of their right of access to a court.

Moreover, whereas the distinction between civil servants exercising authority and civil servants employed in an administrative capacity, which is drawn in particular in the case-law of the Court of Justice of the European Communities, founded on Article 48(4) of the EEC Treaty, is relevant in the Community's legal order where it governs exceptions to free movement of persons, it loses most of its relevance where it is a matter of determining what procedural safeguards these two categories should be respectively entitled to. We fail to discern the relation between the criterion used by the Court and the conclusion it seeks to derive from it, except that, over and above any distinction between the private sector and the public sector, the criterion used will create a new type of discrimination between public-sector workers, depending on whether or not they exercise powers conferred by public law.

3. The criterion used by the majority, namely participation in the exercise of powers conferred by public law, is based largely on the reference to a "special bond of trust and loyalty" (paragraph 65). First of all, we do not see how the existence of such a bond can be a sufficiently weighty argument for the purposes of determining the scope of Article 6 since there may be a similar bond in other employment relationships. Why, for example, would it be right for a policeman not to be protected by Article 6 when an employee of a private security service, with the same duties of maintaining order, would be protected? Secondly, we do not understand why someone who participates in the exercise of powers conferred by public law, and who, under domestic law, has access to an independent tribunal in connection with disputes concerning employment, is not entitled to a judicial decision within a reasonable time. Lastly, although loyalty is relevant above all where it is a matter of appointment to or dismissal from the most sensitive public duties, we fail to see why loyalty should make a difference where it is a matter of disputes over salary or other payments.

4. Introduction of the criterion of participation in the exercise of powers conferred by public law does not avoid the risk of arbitrariness and creates a new zone of uncertainty. The present case provides a remarkable illustration of that.

Firstly, if the Court had applied in the present case its case-law on the economic nature of disputes, the applicant would have been protected by the safeguards set forth in Article 6 of the Convention. The object of the claim he submitted to the French courts was economic and the outcome of the proceedings affected economic rights. It was therefore undoubtedly a civil right within the meaning of Article 6 of the Convention and it must accordingly be acknowledged that the applicant has had bad luck...

On the other hand, the task which the judgment sets for the Court, namely to "ascertain, in each case, whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law

and duties designed to safeguard the general interests of the State or of other public authorities" (paragraph 66), is in practice problematic; in the present case it is significant, moreover, that the judgment does not go beyond the very general statement that the tasks assigned to the applicant "gave him considerable responsibilities in the field of the State's public finances, which is, *par excellence*, a sphere in which States exercise sovereign power" (paragraph 70).

Lastly, whereas, for application of the new criterion, the judgment states: "the Court will have regard, for guidance, to the categories of activities and posts listed by the European Commission in its communication of 18 March 1988" (paragraph 66), that approach does not seem to have been followed in the present case. While the European Commission considers that posts in State Ministries involve direct or indirect participation in the exercise of powers conferred by public law, in the present case the judgment merely mentions, as we have just seen, the applicant's "considerable responsibilities". Would the question of the applicability of Article 6 have been framed differently if the applicant, as an employee of the Ministry of Cooperation, had not had such responsibilities?

5. We therefore take the view that the problem should be approached from a different angle, in a manner more consistent with both the spirit and the letter of Article 6 of the Convention.

Article 1 of the Convention requires the rights and freedoms defined in it to be secured to "everyone". The *travaux préparatoires* on Article 6 of the Convention do not provide a decisive argument as to whether there should be a restrictive or narrow interpretation of the concept "civil rights and obligations", equating them with private rights and obligations, whereby a whole category of persons, namely members of the civil service, would be excluded from the safeguards it lays down.

Since Article 6 of the Convention expressly provides: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...", we consider that that provision applies to all disputes that are decisive for a person's legal position, even if he or she is a civil servant. We can see no valid reason for depriving persons in the public service of the legal protection which is regarded for other workers as a safeguard so essential as to constitute a fundamental right. Salaries, dismissals or transfers are matters which may have a profound influence over people's lives, including persons working in the public service.

6. The main reason for the exclusion of civil service disputes from the scope of Article 6, which was to a large extent prompted by a State-centred outlook, was to preserve the public authorities' *ius imperii*, which was supposedly in danger of being undermined by judicialisation of related disputes. But that justification has now largely lost its significance. Of their own accord most member States have "judicialised" civil service disputes, if not entirely then at least for the most part. To avoid discrimination between the subjects of law the procedural safeguards afforded on that account to civil servants must logically be the same as those applicable to other types of dispute, which incontestably fall within the scope of Article 6. Since the Convention acts as a benchmark, it would be surprising if the institutions charged with its supervision afforded fewer safeguards than the domestic courts.

7. In the present case the decision by the administrative authorities to remove the applicant's name from the list of participants in the technical cooperation programmes, with the result that his contract was terminated, was decisive for his legal position. The dispute he raised obviously concerned a civil right. If he had been employed in the private sector, the proceedings he sought to bring would have been subject to the requirements of a fair trial, guaranteed by Article 6 of the Convention. Why should it be otherwise because he was working for the State? The applicant lost

his job and his remuneration. He was entitled to expect that the courts, to which he had been able to submit his case, would deal with it and reach a decision within a reasonable time.

1-2. *Note by the Registry.* Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

1. Now Article 39 of the Treaty of Amsterdam, signed on 2 October 1997, which amended the Treaty on the European Union, the treaties instituting the European Communities and certain related instruments.

3. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.