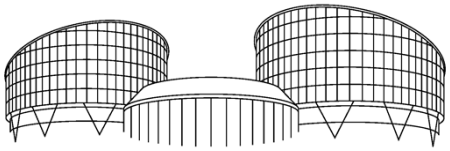

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF THIAM v. FRANCE

(Application no. 80018/12)

JUDGMENT

STRASBOURG

18 October 2018

FINAL

18/01/2019

This judgment is final but it may be subject to editorial revision.

In the case of Thiam v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 25 September 2018,

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

PROCEDURE

1. The case originated in an application (no. 80018/12) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Mauritanian national, Mr Abdoul Aziz Thiam ("the applicant"), on 13 December 2012.

2. The applicant, who had been granted legal aid, was represented by Ms E. Ganem a lawyer practising in Neuilly-sur-Seine. The French Government ("the Government") were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of Europe and Foreign Affairs.

3. The applicant alleged that the civil proceedings brought by the President of France had breached his right to a fair trial.

4. On 31 August 2015 notice was given to the Government of the complaints concerning the equality of arms and the independence and impartiality of the tribunal. The remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Limay.

6. On 24 September 2008 the Société Générale bank lodged a criminal complaint against a person or persons unknown for forgery, uttering forged documents, and fraud, following complaints by Mr Nicolas Sarkozy, the then President of France, about four fraudulent payments to mobile telephone companies from his bank account for a total amount of 176 euros (EUR).

7. On 25 September 2008 the preliminary investigation was entrusted jointly to the fraud squad and the serious crime squad. On the same day Mr Sarkozy himself filed a criminal complaint, which was joined to the investigation. On 23 October 2008 the public prosecutor of Nanterre opened a judicial investigation in respect of fraud committed as a premeditated joint enterprise, to the detriment of the companies concerned, Mr Sarkozy and eight other individuals including relatives of his. During the judicial investigation Mr Sarkozy applied to join the proceedings as a civil party.

8. On 11 June 2009 the investigating judge committed the applicant and six other individuals to stand trial before the Nanterre Criminal Court on a charge of fraud committed as a premeditated joint enterprise. They were accused of having obtained 148 telephone lines, mobile telephones and the payment of subscriptions using the references of payment cards and bank accounts belonging to a third party.

9. Before the trial court, the applicant claimed that Mr Sarkozy's application to join the proceedings as a civil party was inadmissible. He argued, first, that the possibility for the serving President to intervene as a civil party, when it was impossible to bring proceedings against him or to have him summoned as a witness during his term of office (see Article 67 of the Constitution, paragraph 17 below), would create an imbalance in the proceedings. Secondly, he contended that the President's power to appoint judges and prosecutors under Articles 64 and 65 of the Constitution (see paragraphs 17, 22 and 25 below) cast doubt on the impartiality of the judicial proceedings to which he was a party.

10. In a judgment of 7 July 2009 the court found the applicant guilty of the charges against him and sentenced him to one year's imprisonment, after establishing his participation in the preparatory acts and his role in the organisation of the fraud. It held that Mr Sarkozy's application to join the proceedings as a civil party was admissible on the basis of his right of access to a court, but deferred its decision on his claim for damages until the expiry of a one-month period after the end of his term as President (see Article 67 of the Constitution, paragraph 17 below). The court took the view, with reference to Article 6 of the Convention, that the President's status before the court would entail a breach of the equality of arms principle because, as a civil party, he could not, for the duration of his term of office, be the subject of any sanction for bringing unjustified proceedings or be prosecuted for malicious or rash accusations, or be questioned or confronted with the defendant (ibid., see also, paragraph 31 below). It

further emphasised that the President's power to appoint judges and prosecutors was capable of creating the appearance, for the defendant, that he was not being tried by an independent and impartial tribunal.

11. In a judgment of 8 January 2010 the Versailles Court of Appeal varied the judgment and sentenced the applicant to eight months' imprisonment. It found the applicant guilty, based on his own confessions and the statements of other defendants, together with the material discovered during searches. In respect of the civil claim, it ordered the applicant to pay EUR 1 to Mr Sarkozy in respect of non-pecuniary damage and, jointly with the other defendants, EUR 2,500 for costs at first instance and on appeal:

> "... L.S., [the applicant] and F.T. contend that the special status of the Head of State rules out, in the present proceedings, any summons, interview, confrontation, investigative act or adversarial debate concerning Mr Sarkozy. It is not so much the securing of equality in the factual or legal arguments which matters, but the equal opportunity, for each of the parties, to submit its own 'arms' and to discuss those of the other party. In the present case, it is clear that this submission and discussion were effective throughout the proceedings, both during the judicial investigation and first-instance proceedings and before this court. A fair hearing has thus been guaranteed, not only in the balance between the parties but also through the effectiveness of the adversarial debate.
>
> As regards the second aspect, concerning the impartiality of the tribunal which has allegedly been undermined by the supposed partiality of the public prosecutor and the President's intervention in the proceedings when he is the guarantor of judicial independence and authority, a distinction must be made. On that first point, the submissions by the public prosecutor of Nanterre rightly observe that the criminal proceedings were brought by the public prosecutor's office, which is not subject to any application for withdrawal, and the proceedings did not therefore depend on a civil-party intervention. On the second point, many civil or criminal courts, in particular in press-related matters, have, on many occasions, admitted proceedings brought by the serving President of the Republic, who in that capacity is also chair of the National Legal Service Commission, without at any time considering that he was in any way contravening his constitutional duties."

The Court of Appeal further sought to ascertain whether the impartiality of the tribunal could also be called into question in the light of the theory of appearances. It pointed out the ambiguity of the Head of State's status, which "[came] from the fact that it [was] wholly intended to protect him from attacks before the courts, but [did] not prevent him from acting as an ordinary litigant when he decide[d] to have recourse to judicial proceedings". It emphasised, however, that the public prosecutor's office was not affected by the guarantee of the right to an impartial tribunal and that the President's powers of appointment had not infringed the right to a fair trial:

> "... the fact that, in the present case, the public prosecutor's offices both of Nanterre and of Versailles had endeavoured to ensure that the case was examined as quickly as possible, and exceptional means of investigation were deployed (serious crime squad and fraud squad), could no doubt be attributed to the identity of the victim, but also to

the fact that members of his family were affected by the same offences, those factors suggesting that a large-scale action targeting the Head of State and his family was likely to have been organised on account of their identity.

Thus, without there being any evidence that the President intervened directly in the proceedings, it is certain that the local public prosecutor's office, of its own initiative, showed a manifest zeal, which could not, however, have undermined the legitimate interests and fundamental rights of those concerned. The defendants have not demonstrated that they have suffered as a result of any breach by the French institutions of the principles which must govern a fair trial.

Moreover, ... Article 64 of the Constitution states ... that the President is the guarantor of the judicial authority, and this provision legitimises, at the highest level of the hierarchy of legal norms – and even when the President of the Republic is a party to the proceedings – his powers over the public prosecutor's office, while also ruling out any doubt as to the independence of the judiciary ... [The applicant] cannot dispute the President's capacity to act as an ordinary citizen.

In addition, even supposing that French judicial organisation and the Convention are incompatible, only a reform of the Constitution would be capable of resolving that contradiction.

In those conditions, as there is nothing to show that the public prosecutor's office or the power to appoint judges and prosecutors caused any concrete impairment of the independence or impartiality of the judges, the objection is unfounded."

12. The applicant appealed on points of law and, in addition to complaining of a breach of his right to a fair trial, argued that Article 2 of the Code of Criminal Procedure (see paragraph 31 below) was unconstitutional as it did not preclude the President of the Republic from joining criminal proceedings as a civil party. In the meantime, in pleadings of 16 August 2010, the applicant asked the Court of Cassation to refer a question to the Constitutional Council for a preliminary ruling on constitutionality (*question prioritaire de constitutionnalité* – "QPC") relating to the compatibility of the above-mentioned Article 2 with the principle of the separation of powers and the rights of the defence, and with the right to a fair trial.

13. In a judgment of 10 November 2010 (*Bull crim.*, no. 180) the Court of Cassation decided not to seek a preliminary ruling on constitutionality on the following grounds:

"The question, which does not pertain to the interpretation of a constitutional provision that the Constitutional Court has not yet had occasion to apply, is not a new one.

The question raised does not have any serious merit in so far as it seeks, in reality, to clarify the scope of Article 2 of the Code of Criminal Procedure, in the light of Article 67 of the Constitution, and thus falls within the jurisdiction of the ordinary courts."

14. In his opinion before the Court of Cassation, the Advocate-General called for the partial quashing of the judgment of the Court of Appeal in so far as it had not stayed its ruling on Mr Sarkozy's civil action until the end of his term of office. The Advocate-General took the view that the fact that

no proceedings could be brought against the President (for malicious, improper or *de facto* fanciful accusation), or that he could not be summoned to testify, had not created, in the circumstances of the case, any inequality between the parties, while acknowledging that this inability could cause serious difficulties in other proceedings if mainly based on accusations or evidence emanating from the President. However, in the Advocate-General's view, the President's power to appoint judges and prosecutors was such as to cast doubt on the objective impartiality of any private disputes to which the President might be a party during his term of office. He nevertheless indicated that the fact of declaring inadmissible the President's application to join the proceedings as a civil party would have the effect of depriving him of his right of access to a court and concluded that it was necessary to opt for a compromise solution in the form of suspending any civil action brought by the President for the defence of his personal interests until the end of his term of office.

15. In a judgment of 15 June 2012 the Plenary Court of Cassation quashed the Court of Appeal's judgment in so far as it had not given sufficient reasons for the prison sentence handed down against the applicant. For the remainder, it found as follows:

> "First, the President of the Republic who, in his status as victim, is entitled, under Article 2 of the Code of Criminal Procedure, to exercise his rights as a civil party during his term of office, joined proceedings that had already been initiated by the public prosecutor, and the appellant has not been granted a discontinuance or an acquittal.
>
> Secondly, the judgment observes that the appellant was found guilty on the basis of both his own confessions and the statements of other defendants, together with the evidence gathered during searches.
>
> Thirdly, the Court of Appeal, in assessing, without contradiction, the particulars of the case, found that the public prosecutor's action had not breached either the legitimate interests or the fundamental rights of the accused persons.
>
> Fourthly, the judgment finds in precise terms that the guarantee of the right to an independent and impartial tribunal, under Article 6 § 1 of the Convention, applies only to judges and not to the prosecution.
>
> Lastly, the mere fact that judges are appointed by the President does not render them subordinate to him, since once they have been appointed, they enjoy tenure and are not subjected to any pressure or instructions in the exercise of their judicial duties. After finding that each party was able to present its arguments and discuss those of the opposite party throughout the judicial pre-trial investigation and the hearings both at first instance and before the Court of Appeal, the judgment indicates that the defendant had not demonstrated that he had sustained a breach of his right to a fair trial on the part of the French institutions. The Court of Appeal thus rightly concluded that the principle of the equality of arms had not been infringed. ..."

16. In a judgment of 24 January 2014 the Versailles Court of Appeal set aside the applicant's sentence, replacing it with a suspended term of ten months' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution and other relevant provisions governing the appointment, promotion and disciplinary regime of judges and prosecutors and the National Legal Service Commission

1. The Constitution

17. Articles 64, 65 and 67 of the Constitution read as follows:

Article 64

"The President of the Republic shall be the guarantor of the independence of the judicial authority.

He shall be assisted by the National Legal Service Commission (*Conseil supérieur de la magistrature*).

An Institutional Law shall determine the status of judges and prosecutors.

Judges shall enjoy security of tenure."

Article 65

(in force until 31 January 2011 [see paragraph 19 below])

"The National Legal Service Commission shall be chaired by the President of the Republic. The Minister of Justice shall be its *ex officio* vice-chair. He may deputise for the President of the Republic.

The National Legal Service Commission shall consist of two sections, one responsible for judges, the other for public prosecutors.

The section responsible for judges shall comprise, in addition to the President of the Republic and the Minister of Justice, five judges and one public prosecutor, one *Conseiller d'État* appointed by the *Conseil d'État*, and three prominent citizens who are not members either of Parliament or of the ordinary courts, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate.

...

The section of the National Legal Service Commission responsible for judges shall make recommendations for the appointment of judges to the Court of Cassation, of the presidents of Courts of Appeal and of the presidents of *tribunaux de grande instance*. The other judges shall be appointed with the binding approval of this section.

This section shall act as the disciplinary board for judges. It shall then be chaired by the President of the Court of Cassation.

..."

Article 65

(amended by Constitutional Law no. 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic, which entered into force on 1 February 2011 [see paragraph 19 below])

"The National Legal Service Commission shall consist of a section responsible for judges and a section responsible for public prosecutors.

The section responsible for judges shall be chaired by the President of the Court of Cassation. It shall comprise, in addition, five judges and one public prosecutor, one *conseiller d'État* appointed by the *Conseil d'État*, one lawyer, and six qualified, prominent citizens who are not members of Parliament, or of the ordinary or administrative courts. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified, prominent citizens. The procedure provided for in the last paragraph of Article 13 shall be applied to the appointments of the qualified, prominent citizens. The appointments made by the President of each Chamber of Parliament shall be submitted solely for the approval of the relevant standing committee in the Chamber concerned.

The section responsible for public prosecutors shall be chaired by the Principal Public Prosecutor at the Court of Cassation. It shall comprise, in addition, five public prosecutors and one judge, together with the *conseiller d'État* and the lawyer, and the six qualified, prominent citizens referred to in the second paragraph.

The section of the National Legal Service Commission responsible for judges shall make proposals for the appointment of judges to the Court of Cassation, the presidents of Courts of Appeal and the presidents of *tribunaux de grande instance*. Other judges shall be appointed with the binding approval of this section.

The section of the National Legal Service Commission responsible for public prosecutors shall give its opinion on the appointment of public prosecutors.

The section of the National Legal Service Commission responsible for judges shall act as the disciplinary board for judges. When acting in such capacity, in addition to the members mentioned in the second paragraph, it shall comprise the judge belonging to the section responsible for public prosecutors.

The section of the National Legal Service Commission responsible for public prosecutors shall give its opinion on disciplinary measures concerning them. When acting in such capacity, it shall comprise, in addition to the members mentioned in paragraph three, the public prosecutor belonging to the section responsible for judges.

The National Legal Service Commission shall meet in its plenary formation to respond to requests for opinions from the President of the Republic under Article 64. It shall give its opinion, in its plenary formation, on questions concerning the ethics of judges or prosecutors or on any question concerning the operation of the justice system that may be referred to it by the Minister of Justice. The plenary formation comprises three of the five judges mentioned in the second paragraph, three of the five prosecutors mentioned in the third paragraph, and the *conseiller d'État*, the lawyer and the six qualified, prominent citizens referred to in the second paragraph. It is chaired by the President of the Court of Cassation who may be replaced in this capacity by the Principal Public Prosecutor at the said court.

The Minister of Justice may participate in all the sittings of the National Legal Service Commission, except those concerning disciplinary matters.

Complaints may be brought to the National Legal Service Commission by individuals under the conditions determined by an Institutional Act.

..."

Article 67

"The President of the Republic shall not be held liable for any acts he performs in that capacity, subject to the provisions of Articles 53-2 and 68 hereof.

Throughout his term of office the President shall not, before any French court of law or administrative authority, be called as a witness or as a defendant in any proceedings, neither shall he be the subject of any pre-trial investigation or prosecution. All statutory limitation periods shall be suspended for the said term.

All actions and proceedings thus stayed may be reactivated or brought against the President one month after the end of his term of office."

2. The National Legal Service Commission

18. Under the Third Republic, the National Legal Service Commission (*Conseil supérieur de la magistrature* – "CSM") denoted the formation of the Court of Cassation when it sat as the disciplinary authority for judges. The Constitutions of 1946 and 1958 made the CSM a separate organ under a specific Article. The Constitutional Laws of 27 July 1993 and 23 July 2008 altered its composition and remit.

19. Before the above-mentioned Constitutional Law of 23 July 2008 and Institutional Law no. 2010-830 of 22 July 2010 by which it was implemented (due to come into force at the end of January 2011), and since 1958, the President of the Republic had been the chair of the CSM. Thus Mr Sarkozy was its chairman from 2006 to January 2011. The Minister of Justice was then its vice-chair. The explanatory memorandum in respect of the draft Constitutional Law stated that the reform of the CSM required, in particular, the abolition of its chairmanship by the Head of State: "The evolution in the role played by the judicial authority in a modern democracy requires that it should cease to be chaired by the President of the Republic". Also prior to the 2008 reform, the CSM section for judges comprised, in addition to the President of the Republic and the Minister of Justice, five judges and a prosecutor, a *conseiller d'État*, appointed by the *Conseil d'État*, and three prominent citizens, not being members of parliament or of the ordinary courts, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate. In addition to its power to appoint judges (see paragraphs 22 et seq. below), this section operated as a disciplinary board and was then chaired by the President of the Court of Cassation.

20. The current composition of the CSM, as a result of the constitutional reform of 2008, is described in Article 65 of the Constitution cited in paragraph 17 above.

3. Appointment and promotion of judges and prosecutors

21. Admission to the national legal service (*la magistrature*) traditionally depends on passing a competitive examination. The successful candidates are appointed as legal service trainees (*auditeurs de justice*) and

receive professional training in the national training college for judicial office (*École nationale de la magistrature*). Recruitment by direct integration is also provided for and strictly governed by Ordinance no. 58-1270 of 22 December 1958 pertaining to the Institutional Law on the status of members of the national legal service ("the 1958 Ordinance").

22. Articles 4, 6 and 28 of the 1958 Ordinance read as follows:

Article 4

"Judges shall have security of tenure.

Consequently, judges may not receive, without their consent, a new assignment, even by way of advancement."

Article 26

"The President of the Republic shall appoint legal service trainees to posts of the second level of the judicial hierarchy on the proposal of the Ministry of Justice.

Depending on their ranking, with the exception of the duties covered by the examiners' reservations provided for in Article 21, and depending on the list proposed to them, the legal service trainees will inform the Minister of Justice of the post to which they wish to be appointed.

...

Having regard to these choices, the Minister of Justice, shall refer the decision for the approval of the competent section of the Commission. ..."

Article 28

"Instruments of appointment to the duties of president of a *tribunal de grande instance* or a *tribunal de première instance* or of a *conseiller référendaire* at the Court of Cassation shall be made by the President of the Republic on the proposal of the competent section of the National Legal Service Commission.

Instruments pertaining to an advancement to a higher grade or to an appointment to duties as judge or prosecutor other than those mentioned in the previous paragraph, shall be made by the President of the Republic on the proposal of the Ministry of Justice, subject to the binding approval of the competent section of National Legal Service Commission as regards judges and of the competent section of the said Commission as regards prosecutors. The rules governing the appointment of prosecutors shall apply to the officers assigned to the central administration of the Ministry of Justice."

23. The hierarchy of the judiciary consists of two grades (Article 2 of the 1958 Ordinance). The advancement of judges is discretionary, on the basis of merit. However, conditions are laid down for advancement from the second to the first grade. In addition to having served for seven years, the judges who so request and who are worthy of advancement will be listed on an advancement table drawn up by the promotions board, comprising a majority of elected judges or prosecutors. The board will take its decision based on an individual examination of the judge's file, after assessment by his line manager in an adversarial process. The table will then be notified to

each of the judges concerned and displayed with full transparency in each court, such as to allow those who have not been proposed to send the board an application for listing (Articles 15, 18, 21, and 22-27 of Decree no. 93-21 of 7 January 1993 made for the application of the 1958 Ordinance).

24. Moreover, the access of judges to certain duties depends on their inclusion on an aptitude and selection list drawn up by the promotions board. The proposed appointment is then notified to the CSM and to the heads of the Court of Cassation and the Courts of Appeal, who ensure its dissemination (Article 27-1 of the 1958 Ordinance).

25. As is the case for the appointment of new judges (Article 26 of the 1958 Ordinance, paragraph 22 above), any promotion or appointment to a new post takes the form of an instrument issued by the President of the Republic on the proposal of the Minister of Justice, based on a proposal by the CSM or on the binding approval of the latter in accordance with Article 65 of the Constitution (see paragraph 17 above). That instrument may be appealed against, by way of judicial review, before the *Conseil d'État*. The formation examining such an appeal has a limited scrutiny, verifying that the choice is not vitiated by any manifest error in the assessment of the needs of the service or of the respective aptitude of the judges concerned. The formation further ensures that the appointment is not vitiated by any mistake of law or any improper exercise of authority (see, for example, *Conseil d'État*, no. 259294, 10 August 2005; *Conseil d'État*, no. 325268, 10 January 2011). The *Conseil d'État* stated that the principle of equal treatment implied that the CSM should carry out an in-depth assessment of the value of each of the candidates. While the CSM was free, on an indicative basis, to set selection criteria such as geographical mobility or a better matching of profiles to posts, it would always be required to engage in an individual examination of the specific particulars of each file (*Conseil d'État*, no. 273176, 14 December 2005; *Conseil d'État*, no. 272232, 10 March 2006).

4. Disciplinary measures concerning judges

26. Pursuant to Article 43 of the 1958 Ordinance, "any failure by a member of the national legal service to discharge his official duties, or to act in accordance with the requisite honour, scrupulousness or dignity, shall constitute misconduct for disciplinary purposes". Under Article 65, paragraph 2, of the Constitution, disciplinary actions are brought before the CSM section responsible for judges, sitting in its capacity as a disciplinary board, and chaired by the President of the Court of Cassation. Such actions are referred to the CSM by the Minister of Justice, who is entitled to request an investigation, prior to any proceedings, by the General Inspectorate of the Justice System (at the material time known as the General Inspectorate of Judicial Services) which comes under the Ministry of Justice. Actions may also be brought to the CSM by the President of the Court of Appeal

under which the disciplined judge is serving, and since 2010 by any citizen in connection with judicial proceedings concerning the conduct of a judge in the exercise of his duties (Article 50-1 to 50-3 of the 1958 Ordinance). In the latter case, a filtering panel first examines the admissibility of the complaint.

27. During the disciplinary proceedings, the chair of the disciplinary board appoints a rapporteur. The judge is summoned and his file is disclosed to him. At the hearing, after evidence has been taken from the director of judicial services and the report has been read, the disciplined judge, who may be represented by a lawyer, is asked to submit his explanations and any pleas in his defence. The hearing is public. However, if the protection of public order or private life so require, or if there are any special circumstances that may undermine the interests of the justice system, the hearing room may be closed to the public, for all or part of the hearing, by the disciplinary board, if necessary of its own motion. The CSM's decision must give reasons and is delivered in open court (Articles 51 to 58 of the 1958 Ordinance). It may be appealed against before the *Conseil d'État*.

5. Relevant provisions concerning prosecutors

28. As to the relevant provisions concerning prosecutors, the Court would refer to *Moulin v. France* (no. 37104/06, §§ 22 to 29, 23 November 2010). It should be observed that, unlike judges, they are bound by a hierarchical relationship with the Ministry of Justice.

29. On 26 April 2016, a plan for the reform of the CSM was adopted at second reading by the National Assembly. It provided in particular that the CSM section responsible for prosecutors would have the power to decide on proposed appointments by giving its binding approval, and no longer by a non-binding opinion. That constitutional reform, which was supposed to have been approved by the two chambers of Parliament sitting together as the *Congrès*, was ultimately unsuccessful. Moreover, Institutional Law no. 2016-1090 of 8 August 2016 abolished the appointment of Principal Public Prosecutors by the Cabinet.

B. Relevant provisions of the Code of Criminal Procedure

30. Under Article 31 of the Code of Criminal Procedure, as in force at the material time, "[t]he public prosecutor shall bring criminal proceedings and formally request the application of the law". The Law of 25 July 2013 on the powers of the Minister of Justice and public prosecutors in matters of criminal policy and the conducting of prosecutions complemented that provision by adding "in full compliance with the principle of impartiality by which he shall be bound". That law also abrogated the possibility for the

Minister of Justice to give general instructions to the public prosecutor in respect of individual cases.

31. Under Article 2 of the Code of Criminal Procedure, civil action is open to all those who have personally suffered damage directly caused by the offence. While victims who join criminal proceedings as a civil party now face certain constraints, because they can no longer give testimony and may incur sanctions if their claims are unsuccessful or improper, they nevertheless benefit from the status of party to the criminal proceedings and are kept informed of any developments; they may also submit requests for investigative acts, use any remedies and above all obtain reparation from the criminal court for the damage they have suffered. Any improper use of a civil party intervention may give rise to criminal sanctions for malicious or fanciful accusations (Articles 226-10 and 434-26 of the Criminal Code). At the civil level, the actions provided for by Articles 91, 472 and 516 of the Code of Criminal Procedure enable a defendant after an acquittal, or where there is no case to answer, to seek damages from the person who improperly used the civil party intervention. Such actions can be brought only against a civil party which itself initiated the prosecution.

32. In the course of the pre-trial proceedings, the parties may ask the investigating judge to take testimony from them or from a witness, to hold a confrontation or an on-site visit, to order one of them to adduce in evidence any material that may be useful for the investigation, or to perform any other task that they consider necessary for the discovery of the truth (Article 82-1 of the Code of Criminal Procedure).

33. Before the court, the public prosecutor and the parties' lawyers may put questions directly to the defendant, the civil party, the witnesses or anyone else called to testify, by asking the presiding judge for leave to speak. The defendant and the civil party may equally put questions through the intermediary of the presiding judge (Article 442-1 of the Code of Criminal Procedure).

C. Commissions reviewing the President's status before the courts

34. Following the guidance of the "Avril" Commission set up in 2002, the current status of the President of the Republic before the courts, as provided in Articles 67 and 68 of the Constitution (paragraph 17 above), consists in:

(a) immunity in respect of any acts performed in the course of his presidential duties (subject to proceedings before the International Criminal Court or impeachment proceedings by Parliament sitting as a High Court in the case of a breach of his duties that is manifestly incompatible with his office);

(b) immunity before the courts during his term of office in respect of any acts performed by him that are unconnected with his presidential office.

35. By a decree of 16 July 2012 the President of the Republic decided to set up a Commission for modernisation and ethics in public life, chaired by the former Prime Minister Lionel Jospin. This Commission was asked to propose reforms that might be given effect in an amendment to the Constitution, but also in an institutional law or an ordinary statute, and particularly concerning the question of the President's status before the courts. In a report published on 7 November 2012, the Commission looked for the first time at the President's position in terms of "intervention", in other words the possibility for him to intervene as a civil party. It found that it was "necessary to call into question, in both criminal and civil proceedings, the immunity of the President of the Republic in respect of acts that [had] not been performed in his capacity as Head of State". In civil matters, the Commission found "that the extension of the immunity to civil actions [was] questionable as a matter of principle, disproportionate to the aim pursued and shocking in terms of its consequences". It took the view in particular that "the rule of the Head of State's immunity in civil matters, since there [was] no concurrent prohibition on the bringing of proceedings by the President himself during his term of office, as a private individual, for the defence of his civil interests, [had] led to a highly regrettable asymmetry".

III. INTERNATIONAL AND COUNCIL OF EUROPE TEXTS ON JUDICIAL INDEPENDENCE AND SECURITY OF TENURE

36. The Court refers to its judgment in *Baka v. Hungary* ([GC], no. 20261/12, ECHR 2016), and in particular paragraphs 77 to 83. It also refers to *Tsanova-Gecheva v. Bulgaria* (no. 43800/12, § 63, 15 September 2015) in which mention is made of Opinion no. 10 (2007) of the Consultative Council of European Judges (CCJE), in the part concerning the selection, appointment and promotion of judges.

37. The relevant passages from the European Charter on the statute for judges (8-10 July 1998)[1] read as follows:

> "1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

[1] Adopted at a meeting held under the auspices of the Council of Europe in Strasbourg on 8-10 July 1998 involving various participants from European States and two international associations, then endorsed by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14 October 1998, and again by judges and Ministry of Justice representatives from 25 European States meeting in Lisbon on 8-10 April 1999.

38. The compilation of Venice Commission opinions and reports concerning courts and judges (CDL-PI (2015)001), under "Appointment of judges" reads as follows:

> "2.2.3.1 Multitude of systems
>
> ...
>
> In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.
>
> ...
>
> Notwithstanding their particularities appointment rules can be grouped under two main categories.
>
> In elective systems, judges are directly elected by the people (this is an extremely rare example and occurs at the Swiss cantonal level) or by the Parliament ...
>
> Appointments of ordinary judges [in contrast to constitutional judges] are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded.
>
> ...
>
> In the direct appointment system the appointment body can be the Head of State ...
>
> In assessing this traditional method, a distinction needs to be made between parliamentary systems where the president (or monarch) has more formal powers and (semi-) presidential systems. In the former system the President is more likely to be withdrawn from party politics and therefore his or her influence constitutes less of a danger for judicial independence. What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the President would not be allowed to appoint a candidate not included on the list submitted by it. As long as the President is bound by a proposal made by an independent judicial council ... the appointment by the President does not appear to be problematic.
>
> In some countries judges are appointed by the government ... There may be a mixture of appointment by the Head of State and appointment by the Government. ... As pointed out above, this method may function in a system of settled judicial traditions but its introduction in new democracies would clearly raise a concern. ..."

39. Opinion no. 10 (2007) on "Council for the Judiciary in the service of society" issued by the Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe, to the Council of Europe's Committee of Ministers, reads as follows on the presidency of a "council for the judiciary":

> "III. C. 3. Selection of the Chair
>
> 33. It is necessary to ensure that the Chair of the Council for the Judiciary is held by an impartial person who is not close to political parties. Therefore, in parliamentary systems where the President / Head of State only has formal powers, there is no objection to appointing the Head of State as the chair of the Council for the Judiciary,

whereas in other systems the chair should be elected by the Council itself and should be a judge."

40. In its above-cited compilation (see paragraph 38 above), under "Council of Justice", the Venice Commission emphasises that while the participation of such councils in judicial appointments is crucial, they need not take over the whole administration of the justice system, which can be left to the Ministry of Justice (4.1). Point 4.2 deals with the composition of judicial councils and reads as follows:

"4.2.1 General approach

There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions."

...

4.2.6. Chair of the Council; structure and working bodies of the Council

It is necessary to ensure that the chair of the judicial council is exercised by an impartial person who is not close to party politics. Therefore, in parliamentary systems where the president / head of state has more formal powers there is no objection to attributing the chair of the judicial council to the head of state, whereas in (semi-) presidential systems, the chair of the council could be elected by the Council itself from among the non-judicial members of the council. Such a solution could bring about a balance between the necessary independence of the chair and the need to avoid possible corporatist tendencies within the council.

CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 35

...

In addition, the Commission considers that [the proposed measure], providing that the President chairs the Council of Justice, could prove rather problematic. Having the President as the Chair is not necessarily the best solution (although provided for in a number of European Constitutions) and his or her role as the Chair should be purely formal. In this regard, the Commission wishes to recall the European Charter on the Statute for Judges, which stresses the importance of the absolute independence of this body from both the executive and the legislative powers

CDL-AD (2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia, § 58

..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

41. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicant alleged that the civil-party intervention by the President of France had breached the equality of arms principle and his right to an independent and impartial tribunal. Those provisions read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal established by law.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. Admissibility

42. The Court finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The complaint concerning the equality of arms

43. The applicant argued that respect for the equality of arms principle meant formally examining whether the parties to the criminal trial were on an equal footing, and that this had not been the case. He took the view that the Government could not reproach him for failing to seek the questioning of the President when he knew that this was precluded by Article 67 of the Constitution. Moreover, the status of Head of State, which prohibited any action or counter-claim against him, necessarily entailed a breach of the equality of arms principle.

44. The applicant emphasised that equality of arms could not be reduced merely to the adversarial principle. It also meant that there should be no special relations between the parties and that a balance of powers should necessarily be afforded to the parties.

45. The Government, after emphasising that there was no provision of domestic law which would prevent the President of the Republic from joining criminal proceedings as a civil party, in the course of his term of office, pointed out that, in accordance with the Court's case-law (*Perna v. Italy* [GC], no. 48898/99, ECHR 2003-V), it would not be useful to hold an adversarial examination of witnesses for each side if the conviction was not based on witness statements. The Government observed that in the present case, it could not be seen from the decisions of the domestic courts that the arguments developed by Mr Sarkozy, particularly in his criminal complaint, had been used in evidence against the applicant. His conviction had been based on other findings, in particular the statements of another defendant and his own confessions. Moreover, he had never asked for testimony to be taken from the President.

46. As to the applicant's allegation that he had been precluded from bringing any proceedings against the President on grounds of unjustified accusations, in the event of the discontinuance of the proceedings or of his acquittal, the Government pointed out that such proceedings were possible only when the civil party had itself initiated the prosecution. In the present case, by contrast, it was the public prosecutor who had taken the decision to prosecute and there had been no discontinuance or acquittal. The fact that the criminal investigation had been conducted expeditiously demonstrated the proper functioning of the justice system (members of Mr Sarkozy's family had also been targeted, suggesting that a large-scale fraud was likely) and the applicant had not established how this fact had deprived him of a fair trial. Lastly, the Government submitted that the applicant did not have any legal standing to bring proceedings against the President on account of malicious or fanciful accusations because no such offences were made out. They concluded that the applicant could not argue that his inability to bring such actions was capable of placing him in a situation of clear disadvantage in relation to the other party.

(b) The complaint concerning the independence and impartiality of the tribunal

47. The applicant argued that the participation of the President of the Republic in the appointment of judges had rendered the judgment against him unfair, without it being necessary to adduce evidence of any pressure on the judges. The future career of those judges fell within that power of appointment, which could be regarded as a means of pressure, at least in appearance. In any event, the possibility for the President to ask judges whose career was dependent on him to pass judgment on his private interests raised an issue with regard to the right to a fair trial.

48. The applicant also complained that the public prosecutor lacked impartiality. The fact that the proceedings had been brought by the public prosecutor rather than by the President did not guarantee the appearance of

an independent and impartial tribunal. Having regard to the relationship of dependence between a public prosecutor who was subordinate to the executive, and a civil party who was the head of the executive, the defendant could not be sure to have a fair trial. In the present case, the use of unusual investigative means, the rapidity of the judicial pre-trial investigation, and the manifestly zealous attitude of the public prosecutor in making submissions at the court hearing in support of the admissibility of the President's civil-party intervention, could only be attributed to the identity of the victim.

49. The applicant took the view that his ability to submit his arguments to the court had no bearing on the question whether that court presented an appearance of independence and impartiality.

50. Lastly, as to the Government's allegation that the President would be deprived of his right of access to a court, the applicant replied that the inadmissibility of the President's civil-party intervention was a necessary appendage to his immunity, in order to permit an effective separation of powers.

51. The Government first emphasised that an independent and impartial tribunal within the meaning of Article 6 of the Convention referred to judges and not to prosecutors, who for their part were responsible for the criminal charge, within the meaning of that provision.

52. The Government acknowledged that the appointment of judges by the President of the Republic might appear to give the latter an advantage when he was a party to proceedings. However, Article 64 of the Constitution guaranteed the independence of judges, who had security of tenure, were not subordinate to the Minister of Justice, were protected from any form of outside interference and whose decisions were collegial. The Government added that judges were appointed with the assistance of the CSM, a constitutional body with equal representation through which the independence of the judiciary could be ensured.

53. The Government further emphasised that the presence in the proceedings of the President of the Republic as a civil party had not had any negative impact on the tribunal's appearance of independence and impartiality: the decision to prosecute had been taken by the public prosecutor, the applicant had been able to submit his arguments and comment on those submitted against him throughout the pre-trial investigation and the proceedings in the domestic courts, he had acknowledged his involvement in the offence and other material in the file had established his participation in the fraud.

54. Lastly, the Government observed that in the present case there had been no link between the purely private dispute and the institutional or political activity of the President. Thus, a decision finding his civil-party intervention inadmissible would have impaired the very essence of his right of access to a court, a right enjoyed by any citizen. In addition, to restrict the

President's civil action during his term of office would entail a risk of impunity for those seeking to undermine the presidential office, and this would be at odds with the right of all citizens to respect for their freedoms and with the principle of the proper administration of justice.

2. The Court's assessment

(a) General principles

55. The Court observes that, under its case-law, the principle of equality of arms – one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, Reports of Judgments and Decisions 1997-I), including in connection with the use of remedies (see *Ben Naceur v. France*, no. 63879/00, 3 October 2006).

56. The Court further reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision and it will examine the applicant's complaint under those two provisions taken together (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §100, ECHR 2015, and the case-law cited therein).

57. When it examines a complaint under Article 6 § 1, the Court's primary concern must be to evaluate the overall fairness of the criminal proceedings (see *Correia de Matos v. Portugal* [GC], no. 56402/12, § 126, 4 April 2018). When making this assessment, the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, to the rights of witnesses (see *Schatschaschwili,* cited above, § 101).

58. In addition, Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him normally has to be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle can only be accepted on the condition that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him – either when that witness is making his statements or at a later stage of the proceedings (ibid., §§ 103-105).

59. Moreover, the Court points out that in determining in previous cases whether a body could be considered as "independent" – that is, mainly, of the executive or of the parties to the case – it has had regard to such factors as the manner of appointment of its members, the duration of their term of

office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. The security of tenure of judges during their term of office must in general be regarded as a corollary of their independence and therefore as one of the requirements of Article 6 § 1 (see *Campbell and Fell v. United Kingdom*, 28 June 1984, § 78, Series A no. 80, *Maktouf and Damjanović v. Bosnia-Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts) and *Haarde v. Iceland*, no. 66847/12, § 103, 23 November 2017). The fact that judges are appointed by the executive is admissible if, once appointed, they receive no pressure or instructions in the performance of their judicial duties (see *Sacilor-Lormines v. France*, no. 65411/01, § 67 ECHR 2006-XIII, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 49, 30 November 2010).

60. Lastly, the Court would refer, as regards the general principles governing the question of the impartiality of a tribunal, to its judgment in *Morice v. France* ([GC], no. 29369/10, §§ 73-78, ECHR 2015). The concepts of independence and objective impartiality are closely linked and the Court may, depending on the circumstances, consider both issues together (see *Sacilor-Lormines*, cited above, § 62).

(b) Application to the present case

61. The Court would observe, at the outset, that the domestic courts had some hesitation, on account of the ambivalence of the position of the President of the Republic when he acts as a claimant in proceedings, in deciding that the civil action that he brought for the defence of his civil interests was consonant with the principles of equality of arms and an independent and impartial tribunal (see paragraphs 10 and 11 above; see also the submissions of the Advocate-General at the Court of Cassation, paragraph 14 above). The Court of Cassation, sitting as a plenary court, its most solemn formation, nevertheless took the view that Article 2 of the Criminal Code did not rule out a civil-party intervention by the President and decided that there was no need to refer a priority question of constitutionality to the Constitutional Council as to the compatibility of that provision with the principle of the separation of powers and the safeguards of a fair trial (see paragraphs 13 and 15 above). The Court notes that at the time when the Court of Cassation delivered its judgment in the present case, new Article 65 of the Constitution had entered into force (see paragraph 17 above) and the Head of State no longer chaired the CSM. On that date also, the question of the status before the courts of the President of the Republic, who is protected from any judicial action but not prohibited from acting in proceedings in the form of a civil-party intervention, with regard to the principle of equality before the law, was not yet a matter of debate at national level (see paragraph 35 above).

62. The Court reiterates that it is in the first place for the domestic authorities, notably the courts, to interpret and apply the domestic law and to decide on issues of constitutionality (see *Henryk Urban and Ryszard Urban*, cited above, § 51). The Court further points out that it is not a matter of imposing on States a given constitutional model governing, in one way or another, the relations and interaction between the various State powers (*Savino and Others v. Italy*, nos. 17214/05 and 2 others, § 92, 28 April 2009). The choice of the French legislature in allowing the President to act in judicial proceedings during his term of office cannot therefore constitute in itself a subject of dispute before the Court. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of interaction between the powers. The question is always whether, in a given case, the requirements of the Convention have been met (see *Henryk Urban and Ryszard Urban*, cited above, § 46, and *Haarde*, cited above, § 84).

(i) Equality of arms

63. In so far as the applicant complained of the imbalance created in relation to the President of the Republic, because the latter was protected by Article 67 of the Constitution from any action available to sanction improper use of his civil-party intervention, the Court notes that the Court of Cassation took the view that the conditions for bringing such actions were not satisfied in point of fact, as the applicant had not been granted any discontinuance or acquittal and Mr Sarkozy had not himself initiated the prosecution (see paragraph 15 above). In those conditions, the Court sees no reason to consider that the President's intervention in the proceedings deprived the applicant of equal treatment as to the possibility of exercising the above-mentioned actions. Moreover, if the applicant had not been found guilty, and if Mr Sarkozy had brought the prosecution, the applicant could have brought such proceedings within one month from the end of the President's term of office in accordance with Article 67 paragraph 3 of the Constitution (paragraph 17 above). The Court finds that the same applies to the other criminal actions mentioned by the applicant, namely proceedings for malicious or fanciful accusations, that he clearly had no interest in bringing, as the President had only taken the initiative of complaining to his bank about fraudulent debits from his bank account, acts for which the public prosecutor considered that a judicial investigation should be opened.

64. The applicant further alleged that, for the sake of a fair trial, a confrontation should have been held between him and the President in the presence of the investigating judge or during the court proceedings. The Court notes that the President is precluded from an obligation to testify by

virtue of his protective status defined in the second paragraph of Article 67 of the Constitution. His absence from the trial is thus based on a serious legal ground, provided for by the Constitution, and on objective considerations of protection which pertain to the office of a Head of State, and does not as such breach Article 6 of the Convention (see, *mutatis mutandis*, *Urechean and Pavlicenco v. Republic of Moldova*, nos. 27756/05 and 41219/07, § 47, 2 December 2014).

65. At all events, the Court finds that, in convicting the applicant, the domestic courts did not refer to any decisive incriminating evidence that the civil party, whose criminal complaint and intervention followed the complaint of the bank's director and the bringing of a prosecution by the public prosecutor, may have adduced and whose credibility and reliability would have required examination during questioning or a court hearing. The Court observes in this connection that the Court of Cassation found that the Court of Appeal had rightly taken the view that the applicant had been "found guilty on the basis of both his own confessions and the statements of other defendants, together with the evidence gathered during searches". Accordingly, the nature of the case, the evidence available, and the consistent versions of the defendant (the applicant) and the civil party, did not require the taking of testimony from the latter in any event.

66. In so far as the applicant also complained about a breach of the equality of arms principle on account of the public prosecutor's support for the civil party, the Court notes that there is no material in the file to indicate that Mr Sarkozy's intervention during the proceedings might have encouraged the public prosecutor to take action with the aim or effect of unduly influencing the criminal court or of preventing the applicant from defending himself effectively. The Court does not therefore disagree with the Court of Appeal's conclusion that the action of the "public prosecutor's office ... could not ... have undermined the legitimate interests and fundamental rights of those concerned" (see paragraph 11 above). It does not deny, in this connection, that the offence in question might have warranted the expeditious nature of the investigation, since such acts could cause harm to many people, as shown by the facts of the case (see paragraphs 7 and 8 above).

67. Lastly, the Court notes that it cannot be seen from the file that the applicant did not have the benefit of adversarial proceedings.

68. Having regard to the foregoing, the Court takes the view that Mr Sarkozy's intervention in the proceedings as a third party did not have the concrete effect of creating an imbalance in the rights of the parties and in the conducting of the proceedings. Accordingly, there has been no violation of Article 6 § 1 as regards the equality of arms principle.

(ii) The independence and impartiality of the tribunal

69. Like the domestic courts, the Court will draw a distinction, in examining the allegation of a lack of independence and impartiality, between the application of this principle to prosecutors on the one hand and to judges on the other.

(α) As to the alleged lack of independence and impartiality of the public prosecutor's office

70. As regards public prosecutors, the Court observes that while it found them to be lacking in independence in the *Moulin* judgment, cited above, its conclusion only engaged Article 5 § 3 of the Convention in a case concerning judicial review of deprivation of liberty, and therefore fell within the meaning of that specific provision and the autonomous concepts developed by its case-law in that area. It would observe, moreover, that the status of prosecutors still appears to be under discussion in France, but it reiterates that it is not for the Court to take a stance in this debate, which is a matter for the national authorities (see paragraph 29 above; and *Moulin*, cited above, § 57).

71. In any event, in the present case, the public prosecutor, as a party to the proceedings, was not responsible, in that capacity, for the "determination" of any "criminal charge" within the meaning of Article 6 § 1 of the Convention. The Court reiterates in that connection that the public prosecutor's office cannot be bound by the obligations of independence and impartiality that Article 6 imposes on a "tribunal", which is a judicial organ "called upon to determine, on the basis of legal norms and following organised proceedings, any question within its jurisdiction" (see *Thoma v. Luxembourg* (dec.), no. 38432/97, 25 May 2000; *Agnelet v. France* (dec.), no. 61198/08, 27 September 2011; *Nastase v. Romania* (dec.), no. 80563/12, 18 November 2014; and *Ryan James Clements v. Greece* (dec.), no. 76629/14 , 19 April 2016).

(β) As to the alleged lack of independence and impartiality of the "tribunal" hearing the applicant's case

72. As to the applicant's allegation that the judges lacked impartiality, the Court reiterates that his guilt was established by evidence which was independent of the civil action of the President of the Republic. In addition, it is noteworthy that the applicant has not alleged that the trial judges or the Court of Cassation acted on the President's instruction or otherwise demonstrated bias. The Court therefore finds that the applicant's trial does not reveal anything which could have undermined its impartiality.

73. As regards the applicant's allegation that the "tribunal" lacked independence, the Court notes that the Court of Cassation did not take the view that the appointment of judges by the President rendered them subordinate to the latter. It emphasised in particular that judges were

protected by their security of tenure and that they were independent, not being subjected to any pressure or instructions from the appointing authority. The Court observes that, in so finding, the Court of Cassation assessed the independence of the "tribunal" in purely objective terms, in relation to the statutory situation of judges, without looking into whether there was an appearance of independence.

74. The Court reiterates that in order to determine whether a tribunal can be considered to be independent as required by Article 6 § 1 of the Convention, appearances may also be of importance (see *Sramek v. Austria*, 22 October 1984, § 42, Series A no. 84). As regards the appearance of independence, the standpoint of a party is important but not decisive. What is decisive is whether the fear of the party concerned can be held "objectively justified" (see *Sacilor-Lormines*, cited above, § 63). The Court will thus proceed to examine the applicant's complaint in terms of appearances.

75. The Court finds that the applicant focuses his argument on the President's power to appoint judges. In the applicant's view, being associated with his status as civil party, the exercise of this power was, at least in terms of appearances, capable of casting doubt on the independence of the "tribunal" dealing with the case. The Court will therefore mainly examine the terms of the judges' appointment, in order to ascertain whether this "tribunal" could be regarded as independent, after first noting that the other criteria for the assessment of independence, namely the term of office of judges and the existence of protection against external pressure, were such as to guarantee their functional independence and to protect them from any pressure, particularly on the part of the executive.

76. In this connection, and as the Government have pointed out, the Court finds that the statutory situation of judges protects them from any attempt to undermine their independence.

77. The Court thus finds that their security of tenure is guaranteed by the Constitution (see paragraph 17 above; see also paragraph 22 above). It reiterates that security of judicial tenure is a fundamental guarantee of the independence of members of a court against any arbitrary acts of the executive (see *Baka*, cited above, and *Sacilor-Lormines*, cited above, § 67).

78. In addition, and as the Court of Cassation pointed out, judges are not in a position of subordination in relation to the Ministry of Justice and are not subjected to any pressure or instructions in the exercise of their judicial duties.

79. Lastly, security of judicial tenure, as a guarantee of independence, is accompanied under French law by precise rules on the advancement and discipline of judges. Decisions affecting the appointment of judges, or their career path, transfer and promotion, are taken after the intervention of the CSM and adversarial proceedings, or are even based solely on its proposal for the most important positions (see paragraphs 23 to 25 above). In

disciplinary matters, the CSM rules as a disciplinary board and directly imposes the sanction, such that its decisions in such matters are judicial in nature (see paragraphs 17, 26 and 27 above).

80. It remains for the Court to address the question of the independence of the "tribunal" having regard to the power of appointment of the President of the Republic. The Court reiterates that the mere appointment of judges by the executive does not entail a relationship of subordination if, once appointed, they are free from influence or pressure when carrying out their adjudicatory role (see *Henryk Urban and Ryszard Urban*, cited above, § 49).

81. In France, the power to appoint judges exercised by the President of the Republic takes the form of an instrument issued by the President on the proposal of the Minister of Justice, based on the "binding approval" of the CSM in accordance with Article 65 of the Constitution, which means in practical terms that the executive could not appoint a judge in disregard of the CSM's decision. Moreover, the competent formation of the CSM makes "proposals" for the appointment of judges of the Court of Cassation, together with the presidents of Courts of Appeal and *tribunaux de grande instance*, and thus, by itself, considers and chooses candidates as it sees fit. The applicant's appeal was thus examined by the Court of Cassation, a superior court of the judicial order, whose judges are appointed on the proposal of the CSM itself. Lastly, the instrument of appointment of a judge is not an act of unfettered discretion and may thus be appealed against before the *Conseil d'État* (see paragraph 25 above).

82. The Court infers from the prerogatives of the CSM, whose role it is, together with the President, to guarantee the independence of the judiciary, that the signing by the President of instruments for the appointment of new judges or for promotion or assignment to a new post (see paragraphs 22 and 25 above) is the formal culmination of the relevant decision-making process and does not, *per se*, undermine the independence of the judges concerned. In addition, the collegial exercise of the CSM's power of "proposal" and "binding approval" constitutes, in the Court's opinion, an essential safeguard against the risk of pressure on judges by the executive. This is, moreover, the position of the Venice Commission, which highlights the crucial role of judicial councils or commissions – as independent bodies – in the process of judicial appointment (see paragraphs 38 and 40 above), this being essential to the balance of a democratic society.

83. Nevertheless, and even though the CSM's powers are capable of addressing the fears expressed about the functional independence of judges, the Court finds that, in the circumstances of the case, Mr Sarkozy, as a party to the dispute, remained the Chairman of the CSM when the judges of the Nanterre Criminal Court and the Versailles Court of Appeal adjudicated on the applicant's case (see paragraphs 10 and 11 above). Thus, at the relevant time, Mr Sarkozy was both Chairman of the CSM and civil party in the

case. The President's intervention in the proceedings thus gave the applicant cause for concern about his influence on the future career of the judges to whose appointment he had contributed and who were dealing with a claim about his private interests. The Court takes the view, however, that such an impression does not suffice for a lack of independence to be established.

84. The applicant, who was ordered to pay Mr Sarkozy just one euro in damages, together with court costs, has not provided any concrete evidence to show that he could have had an objectively justified fear that the judges of the Nanterre Criminal Court and the Versailles Court of Appeal were under the President's influence. The Court observes in this connection that the case before the judges did not bear any relation to the political duties of Mr Sarkozy, who had neither brought the prosecution nor provided any evidence to establish the applicant's guilt. In addition, the Court notes that it was on 15 June 2012 that the Court of Cassation delivered its judgment, in which it examined the applicant's complaints about the equality of arms and about the independence and impartiality of the tribunal, at a date when Mr Sarkozy no longer chaired the CSM. The Court points out that, after the judgment of the Versailles Court of Appeal of 8 January 2010, the reform of the French Constitution (brought about by the Law of 23 July 2008) came into force. The chairmanship of the CSM was thereby transferred from the President of the Republic to the President of the Court of Cassation, in order to secure the independence of the judicial system.

85. The Court finds it necessary to reiterate that, where a high-ranking figure with an institutional role in the career path of judges acts as claimant in a dispute, such situation is capable of casting legitimate doubt on the independence and impartiality of the bench. However, in the present case, having regard to the foregoing and taking account of the subject-matter of the dispute, the Court does not see any reason to find that the judges called upon to adjudicate on the applicant's case were not independent within the meaning of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in French, and notified in writing on 18 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Angelika Nußberger
Registrar	President