



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

GRAND CHAMBER

**CASE OF HERMI v. ITALY**

*(Application no. 18114/02)*

JUDGMENT

STRASBOURG

18 October 2006

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

**In the case of Hermi v. Italy,**

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

Mr. L. WILDHABER, *président*,  
Mr C.L. ROZAKIS,  
Mr J.-P. COSTA,  
Mr B.M. ZUPANČIČ,  
Mr R. TÜRMEŒ,  
Mr C. BÎRSAN,  
Mr J. HEDIGAN,  
Mr A.B. BAKA,  
Mr V. ZAGREBELSKY,  
Mr J. BORREGO BORREGO,  
Mrs A. GYULUMYAN,  
Mr. D. SPIELMANN,  
Mr E. MYJER,  
Mr DAVID THÓR BJÖRGVINSSON,  
Mrs D. JOČIENĚ,  
Mr D. POPOVIĆ,  
Mrs I. ZIEMELE, *juges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 3 May 2006 and on 6 September 2006,  
Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 18114/02) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Tunisian national, Mr Fausi Hermi (“the applicant”), on 31 March 2002.

2. The applicant was represented by Mr M. Marini and Mrs D. Puccinelli, lawyers practising in Guidonia (Rome). The Italian Government (“the Government”) were represented by their Agent, Mr I.M. Braguglia, and their co-Agent, Mr F. Crisafulli.

3. The applicant alleged, in particular, that he had been unable to participate in a hearing before the Rome Court of Appeal held in the context of criminal proceedings for drug trafficking.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 23 September 2004 it was declared partly admissible by a Chamber of that Section, composed of

Mr C.L. Rozakis, Mr P. Lorenzen, Mr G. Bonello, Mr A. Kovler, Mr V. Zagrebelsky, Mrs E. Steiner and Mr K. Hajiyeu, judges, and also of Mr S. Nielsen, Section Registrar.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

6. On 28 June 2005 a Chamber of the Fourth Section, composed of Sir Nicolas Bratza, Mr J. Casadevall, Mr G. Bonello, Mr R. Maruste, Mr V. Zagrebelsky, Mr S. Pavlovschi and Mr L. Garlicki, judges, and of Mr M. O'Boyle, Section Registrar, delivered a judgment in which it held, by four votes to three, that there had been a violation of Article 6 of the Convention. It also awarded the applicant a thousand euros for non-pecuniary damage.

7. On 23 September 2005 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73. On 30 November 2005 a panel of the Grand Chamber granted the request.

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

9. The applicant and the Government each filed a memorial.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 May 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. CRISAFULLI, judge, Ministry of Foreign Affairs, *co-Agent*,

(b) *for the applicant*

Mrs D. PUCCINELLI, lawyer, *Counsel*.

The Court heard addresses by them.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1969 and is currently serving a sentence in Viterbo Prison.

### **A. The applicant's arrest and conviction at first instance**

12. On 28 November 1999 the applicant was discovered in possession of a package containing 485 grams of heroin and was arrested by the Rome *carabinieri*. Proceedings were instituted against him for drug trafficking. On 23 December 1999 the applicant appointed two lawyers of his own choosing, Mr M. Marini and Mrs D. Puccinelli.

13. A hearing was held in private before the Rome preliminary hearings judge (*giudice dell'udienza preliminare*) on 25 February 2000, attended by the applicant and his two lawyers. The record of the hearing shows that there was no interpreter present. The applicant stated that he had understood the content of the charge and the evidence against him and could speak Italian. He subsequently requested adoption of the summary procedure (*giudizio abbreviato*) provided for in Articles 438 to 443 of the Code of Criminal Procedure ("the CCP"). His lawyers requested that their client's detention pending trial be replaced by house arrest (*arresti domiciliari*). The preliminary hearings judge, taking the view that the charges against the applicant could be determined on the basis of the steps in the proceedings taken at the preliminary investigation stage (*allo stato degli atti*), ordered that the summary procedure be adopted and adjourned the proceedings.

14. A further hearing was held in private on 24 March 2000, at which the applicant and his two lawyers were present. The record of the hearing states that the applicant "speaks Italian" (*si da atto che parla la lingua italiana*). One of the applicant's lawyers requested that his client be released on the ground that the drugs in his possession had been intended for his personal use. In the alternative, he requested that his client's detention pending trial be replaced by a less stringent security measure. The requests were rejected by the preliminary hearings judge.

15. In a judgment of 24 March 2000 the Rome preliminary hearings judge sentenced the applicant to six years' imprisonment and a fine of 40,000,000 lire (approximately 20,658 euros). He observed that the quantity of drugs permitted for personal use must not exceed what was required to meet immediate needs. At the time of his arrest, the applicant had just purchased a quantity corresponding to more than 8,000 average daily doses.

### **B. The proceedings before the Court of Appeal and the Court of Cassation**

16. The applicant appealed against the judgment, reiterating the arguments adduced at first instance. He contended that interpreting the law on drugs in a way that penalised drug users was in breach of the Constitution.

17. On 1 September 2000 Mr Marini was informed that the hearing had been set down for 3 November 2000. The applicant, who was in Rome

Prison, was notified on the same day. He received a letter entitled “Notice to appear in appeal proceedings before the court sitting in private” (*decreto di citazione per il giudizio di appello davanti la Corte in camera di consiglio*), the relevant parts of which read:

“The President ... of the Court of Appeal ... in view of the notice of appeal lodged by (1) Basilaran Pacilyanathan, born [in] Sri Lanka on 1 November 1964, who is [in] Vasto Prison and (2) Fauzi [sic] Hermi, born [in] Tunisia on 27 January 1969, who is [in] Regina Coeli Prison ... against the judgment of the Rome preliminary hearings judge of 24 March 2000 convicting them as [set out] in the official record[;] whereas in the appeal proceedings the court must sit in private as the circumstances are those provided for in Articles 443 § 4 [and] 599 § 1 of the CCP ... ; having regard to Article 601 of the aforementioned Code of Criminal Procedure; gives notice to the above-mentioned [persons] to appear at the hearing which the Court of Appeal ... is to hold in private on 3 November 2000, at 9 a.m., to rule on the above appeal. The appellants may, up to five days before the hearing and through the intermediary of [their] lawyers, examine at the registry the records and documents and ... make a copy of and consult them...”

18. Between 1 September 2000 and the day of the hearing, the applicant had no contact with his lawyers.

19. On 23 October 2000 the applicant's lawyers filed pleadings with the registry of the Rome Court of Appeal. They submitted that there was no proof that the drugs in the applicant's possession had been intended for sale; the judges should therefore have accepted the applicant's assertion that they had been for his own personal use. Moreover, the expert chemical analysis of the drugs had been performed by the police without the defendant's lawyer being present, and was therefore null and void. The first-instance judge had also omitted to rule on the objection of unconstitutionality raised by the defence. In the alternative, the lawyers requested a reduction of the applicant's sentence.

20. At the hearing on 3 November 2000 Mr Marini requested an adjournment of the hearing on the ground that Mrs Puccinelli, the applicant's other lawyer, was ill. The Court of Appeal dismissed the request. Mr Marini then objected to the continuation of the proceedings in the absence of his client and requested that the latter be brought from the prison to the hearing room. The Rome Court of Appeal dismissed his request, observing that the applicant had not informed the authorities in advance that he wished to participate in the appeal proceedings.

21. In a judgment of 3 November 2000 the Court of Appeal upheld the judgment at first instance.

22. The applicant appealed on points of law. He alleged, *inter alia*, that the appeal judges had not allowed him to attend his trial and that the notice to appear at the appeal hearing had not been translated into Arabic.

23. In his final submissions, the public prosecutor requested that the impugned decision be set aside.

24. In a judgment of 24 January 2002 the Court of Cassation dismissed the applicant's appeal. It observed that neither the Convention nor the CCP required procedural documents to be translated into the language of a non-national defendant in Italy. However, the latter had the right to be assisted free of charge by an interpreter in order to be able to understand the charges against him and follow the progress of the proceedings. As to the other complaints, the Court of Cassation observed that the presence of the defendant was not required under the summary procedure, the adoption of which had been requested by the applicant himself of his own volition. Furthermore, the applicant had not made clear his wish to participate in the appeal hearing.

### **C. The enforcement proceedings and the applicant's background**

25. On 4 July 2003 the Rome court responsible for the execution of sentences granted the applicant leave to serve the remainder of his sentence under house arrest. On 10 July 2003 the applicant left Frosinone Prison. On that occasion he signed a report setting out the terms of his house arrest and elected to reside in a property (*tenuta*) belonging to one of his lawyers. He subsequently returned to Viterbo Prison

26. The documents produced by the Government before the Grand Chamber show that the applicant was first identified by the Rome police authorities (*Questura*) on 15 September 1990 in connection with an investigation into drug trafficking. His fingerprints were taken by the authorities on at least seven subsequent occasions: on 18 January and 27 February 1991, 5 May and 7 September 1992, 15 January 1993 and 31 January and 26 April 1999. On the last occasion the applicant was arrested driving a stolen vehicle, which he told the *carabinieri* he had taken a week previously. During the subsequent criminal proceedings against him for theft and driving without a licence, the applicant declared his address and reserved the right to appoint a lawyer. The applicant later sent two handwritten letters to the Viterbo court responsible for the execution of sentences. The letters, dated 20 July and 25 November 2005, were written in Italian and signed by the applicant. In the first, which was two pages long, the applicant complained of the refusal to grant his application for leave of absence. In the second, consisting of a single page, he requested an alternative measure to detention (*semilibertà*). The applicant had also sent a handwritten letter to the Court of Cassation in March 2004, and on 29 June 2003 had written a short note in Italian to his lawyer.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The summary procedure

27. The summary procedure is governed by Articles 438 and 441 to 443 of the CCP. It is based on the assumption that the case can be decided at the preliminary hearing on the basis of the case file as it stands (*allo stato degli atti*). When the summary procedure is adopted, the hearing takes place in private and is devoted to hearing the arguments of the parties. As a rule, with the exception of cases in which the defendant requests the admission of fresh evidence (*integrazione probatoria*), the parties must base their arguments on the documents contained in the file held by the Public Prosecutor's Office. If the judge decides to convict the defendant, the sentence is reduced by one-third. The judgment is delivered in private.

28. The relevant parts of the provisions of the CCP governing the summary procedure, as amended by Law no. 479 of 16 December 1999, read as follows:

#### Article 438

“1. The defendant may request that the case be decided at the preliminary hearing on the basis of the case file as it stands...

2. The request may be made, orally or in writing, until such time as the final submissions have been made under Articles 421 and 422.

3. The wishes of the defendant shall be expressed in person or through the intermediary of a specially instructed representative (*per mezzo di procuratore speciale*). The signature on the instruction shall be authenticated by means of the formalities detailed in Article 583 § 3 [by a notary, another authorised person or counsel for the defence].

4. The judge shall give a decision on the request in the order adopting the summary procedure.

5. The defendant ... may make his request subject to the admission of new evidence necessary for the court to reach a decision. The judge shall adopt the summary procedure if the admission of such evidence is necessary for a decision to be reached and is compatible with the aim of economy inherent in the procedure, taking into account the documents already before the court which can be used. In such cases the prosecution may request the admission of rebutting evidence. ...

...”

#### Article 441

“1. The summary procedure shall follow the provisions laid down concerning preliminary hearings, in so far as they can be applied, with the exception of Articles 422 and 423 [provisions governing the power of the judge to order of his own motion the production of crucial evidence and the possibility for the prosecution to amend the charge].

...

3. The summary proceedings shall be conducted in private. The judge shall order the proceedings to be conducted at a public hearing if all the defendants so request.

...

5. Where the judge considers that the case cannot be determined as it stands he shall acquire (*assume*) of his own motion the evidence necessary for a decision to be reached. In such cases, Article 423 shall apply.

6. For the purposes of the production of the evidence [referred to] in paragraph 5 of the present Article and in Article 438 § 5, the arrangements adopted shall be those set forth in Article 422 §§ 2, 3 and 4 [these paragraphs permit the parties to put questions to the witnesses and expert witnesses through the intermediary of the judge and give the defendant the right to request that he be questioned].”

#### Article 442

“1. Once the arguments have been heard, the judge shall take a decision under the terms of Articles 529 et seq. [these provisions concern discharge, acquittal and conviction].

1a. The judge's deliberations shall be based on the documents contained in the file [referred to] in Article 416 § 2 [the file held by the Public Prosecutor's Office on the steps taken in the preliminary investigation], the documents [indicated] in Article 419 § 3 [relating to the steps in the investigation taken after the defendant was committed for trial] and the evidence adduced at the hearing.

2. If the defendant is convicted, the sentence imposed by the judge in the light of all the circumstances shall be reduced by one-third. Life imprisonment shall be replaced by thirty years' imprisonment. Life imprisonment with solitary confinement ... shall be replaced by life imprisonment.

3. The judgment shall be served on the defendant if he or she was not present.

...”

#### Article 443

“1. The defendant and the prosecution may not appeal against an acquittal if the object of the appeal is to secure a different form [of acquittal].

...

3. The prosecution may not lodge an appeal against a conviction unless the judgment alters the legal characterisation of the offence (*il titolo del reato*).

4. The appeal proceedings shall be conducted in accordance with the provisions of Article 599.”

### **B. Powers of the appellate court and arrangements for private hearings**

29. Article 597 § 1 of the CCP states:

“The appeal judge shall be empowered to rule (*la cognizione del procedimento*) solely (*limitatamente*) on those aspects of the decision referred to in the grounds of appeal.”



30. The relevant parts of Article 603 §§ 1 and 2 of the CCP read as follows:

“1. Where one of the parties, in the grounds of appeal, ... has requested the admission of evidence already produced at first instance or of new evidence the judge, if he considers that he is unable to determine the case as it stands (*se ritiene di non essere in grado di decidere allo stato degli atti*), shall order the investigation to be reopened.

2. If fresh evidence has come to light or [has been] discovered since the proceedings at first instance, the judge shall order the investigation to be reopened within the limits laid down by Article 495 § 1 [exclusion of evidence which is prohibited by law, manifestly superfluous or of no relevance to the proceedings].”

31. As indicated in the reference contained in Article 443 § 4 of the CCP (see paragraph 29 above *in fine*), when an appeal is lodged under the summary procedure, the second-instance proceedings are conducted in accordance with the provisions of Article 599 of the CCP. The relevant parts of Article 599 read as follows:

“1. When an appeal relates solely to the type or severity of the sentence, ... the court shall sit in private in accordance with the arrangements set forth in Article 127.

2. The hearing shall be adjourned if a defendant who has expressed a wish to appear has a legitimate reason for not attending.

3. In cases where the investigation is reopened after the appeal proceedings have begun, the judge shall take the evidence in private, in accordance with Article 603. The prosecution and defence counsel must be present. If the latter is not present when the reopening of the investigation is ordered, the judge shall set down a further hearing and shall order a copy of his decision to be forwarded to the prosecuting authorities and served on counsel for the defence.

...”

32. The overall arrangements for conducting hearings in private are set out in Article 127 of the CCP, which reads as follows:

“When proceedings must be held in private, the judge or the president of the chamber shall set down the hearing and serve notice of it on the parties, other interested persons and counsel for the defence. The notice shall be forwarded or served at least ten days before the date chosen. If the defendant has no counsel, the notice shall be sent to the officially appointed defence lawyer.

2. Memorials may be filed with the registry up to five days before the hearing.

3. Evidence shall be heard from the prosecution, the other recipients of the notice and the defence counsel if they appear at the hearing. If the person concerned is detained or imprisoned in a place outside the jurisdiction of the court and so requests, evidence must be taken from him before the date of the hearing by the judge responsible for the execution of sentences in that place.

4. The hearing shall be adjourned if a defendant or convicted person who has requested leave to give evidence in person and who is not detained or imprisoned in a place outside the court's jurisdiction has a legitimate reason for not attending.

5. Failure to comply with the provisions of paragraphs 1, 3 and 4 shall render the proceedings null and void.

6. The hearing shall be conducted in camera.

7. The judge shall rule by means of an order to be served on or forwarded to the persons indicated in paragraph 1 as soon as possible. The persons concerned may lodge an appeal on points of law.

8. Enforcement of the order shall not be stayed pending the appeal, unless the judge who issued the order decides otherwise by means of a reasoned decision (*con decreto motivato*).

9. A decision to declare the notice of appeal inadmissible shall be issued by the judge in the form of an order and without the need for procedural formalities, unless otherwise provided. The provisions of paragraphs 7 and 8 shall apply.

10. The record of the hearing shall be drafted, as a general rule, in the form of a summary in accordance with Article 140 § 2.”

33. The Court of Cassation has ruled that this provision applies to appeal hearings under the summary procedure. In particular, in its judgment of 24 April 1995 (no. 6665) in the *Visciano* case, it articulated the following legal principle: “A defendant who is in prison or under house arrest must also be given a hearing ... in appeal proceedings against a judgment given [following] summary proceedings in accordance with Article 442 of the CCP, but only if he or she so requests within the time-limit laid down by Article 127 (2) of the CCP (that is, at least five days before the hearing), in accordance with the reference in the last paragraph of Article 443 of the CCP to Article 590, the first paragraph of which refers, in turn, to the ‘formalities provided for in Article 127’ for proceedings conducted in private.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained that he had been unable to participate in the hearing of 3 November 2000 before the Rome Court of Appeal. He relied on Article 6 of the Convention which, in its relevant parts, reads:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (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;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

### **A. Chamber judgment**

35. The Chamber found that there had been a violation of Article 6 of the Convention. It considered that the applicant had had the right to appear and defend himself before the Rome Court of Appeal, as the latter had been called upon to examine questions both of fact and of law. It had not only had to rule on objections of unconstitutionality or issues concerning the interpretation of domestic law raised by the defendant's lawyer, but also to assess whether the evidence produced at first instance was sufficient to justify a guilty verdict.

36. The Chamber also considered that there were serious doubts as to whether the applicant had understood the content of the notice informing him of the date for the hearing. It observed that the notice had not been translated into either of the two languages (Arabic and French) which the applicant claimed to speak. It had not been established, either, whether and to what extent the applicant understood Italian and was capable of grasping the meaning of a legal document of some complexity.

37. Lastly, in the Chamber's view, it had not been established in the instant case that the applicant had unequivocally waived his right to appear. The applicant, who had been brought to the first-instance hearing as a matter of course, could reasonably have expected that the same thing would happen in the appeal proceedings. Furthermore, on 3 November 2000, the applicant's lawyer, having observed that his client was absent, had requested that Mr Hermi be brought from the prison to the hearing room. In so doing he had expressed clearly the wish of the defendant to participate in the appeal hearing.

### **B. The parties' submissions**

#### *1. The applicant*

38. The applicant submitted that any proceedings (whether ordinary or summary and whether at first, second or third instance) should be conducted in public and in the presence of the defendant. In the instant case, the Court

of Appeal had ruled on questions of fact and of law. The appeal had related also to the question whether the heroin in the applicant's possession had been for his own personal use and to the repetition of the expert chemical analysis. On appeal, the defendant had the right to request that he or she be heard, and the appeal court could, of its own motion, reopen the investigation, take new evidence, examine new witnesses and order expert reports in order to establish the truth.

39. To argue, as the Government had, that adoption of the summary procedure made the presence of the defendant superfluous, was contrary to the spirit of the law. Moreover, as it was impossible to predict what would happen at the appeal stage, the participation of the defendant could not be ruled out in advance. In the present case the hearing had taken place in private, without members of the public or the defendant being present, in flagrant breach of Article 6 of the Convention. Moreover, Article 6 gave every defendant the right to defend himself in person, to examine witnesses or have them examined and to have the assistance of an interpreter, none of which was possible in his absence. The defendant should always have the opportunity of defending himself in person and of making in person factual and legal submissions on his own behalf.

40. The applicant pointed out that the notice of the date of the hearing had been written in Italian, a language which he did not understand. At the time of his trial, he had had a passive, scant and superficial command of spoken Italian and had been quite unable to read the language. He would therefore have been incapable of understanding a technically complex legal document written in Italian. In that connection, the applicant challenged the authenticity of the letters produced by the Government which, in any case, had been written well after his trial had ended. Moreover, at the trial stage, the applicant had been able to understand the charges and the evidence against him only because they had been translated into French by Mr Marini, who had also proposed the adoption of the summary procedure to him.

41. Accordingly, it had been for the authorities to provide a translation of the notice in one of the two languages spoken by the applicant, namely Arabic and French. Assistance by a third party (a fellow prisoner or the defence lawyer) was not a valid substitute. It was unrealistic in an Italian prison setting to expect that a prisoner might be able to obtain a translation of the procedural documents in his case. Interpreters had to be paid for their services and could be engaged only at the request of the prosecution. Furthermore, it was inconceivable that a defendant whose native language was Arabic would be conversant with the finer points of Italian procedure, unless his rights and their limits had been spelled out for him.

42. The applicant admitted that he had not requested leave to appear, but considered that he had not waived that right either. Waiver of that right had to be explicit and could not be presumed. Having been brought to the

hearings before the preliminary hearings judge as a matter of course, he had expected the same thing to happen in the appeal proceedings. Mr Marini, on realising that his client was not present at the hearing on 3 November 2000, had requested at the outset of the proceedings that he be brought to the hearing room. Moreover, the Chief Prosecutor at the Court of Cassation had requested that the appeal proceedings be declared null and void, arguing that the applicant had the right to appear and that the notice of the date of the hearing, which had not been translated into Arabic, had not set out the rights of the defendant or the steps to be taken in order to assert those rights in a manner comprehensible to the applicant.

43. Whereas the Government maintained that the applicant should have submitted a written request in Italian to be brought before the appellate court, at least five days before the hearing, such a requirement was itself in breach of the Convention. A defendant could not be made to complete a series of oral and written formalities in order to assert his right to participate in the appeal hearing. The summary procedure, under which the presence of the defendant was not required, was contrary to the Convention and the Italian Constitution and should be abolished.

44. The applicant considered that the authorities should have set out all his rights, without exception, in the notice informing him of the date of the hearing. They should also have given details of the formalities to be completed in order to take part in the appeal proceedings. However, one had only to read the impugned notice to see that no mention was made of those formalities. It could not be left to lawyers to fill in the gaps left by the authorities.

45. Lastly, the Court of Cassation had quashed a conviction on account of the fact that the notice of the date of the hearing had not been translated into the defendants' mother tongue (the applicant cited judgment no. 293, Sixth Section, 14 January 1994, in the *Chief Mbolu* case). On that occasion it had reiterated that Article 143 § 1 of the CCP, which stipulated that every non-national defendant had the right to be assisted by an interpreter, applied to all the oral and written procedural decisions which were served on the defendant, and in particular to the notice of the date of the hearing, which was a crucial procedural document. Italian case-law, therefore, was not unanimous in that regard.

## 2. *The Government*

46. The Government pointed out at the outset that the appeal proceedings had been conducted under the summary procedure, a simplified procedure which the applicant himself had requested and which entailed certain advantages for the defendant. Under that procedure, in which the decision was taken on the basis of the file held by the Public Prosecutor's Office and the production of fresh evidence was ruled out in principle, the importance of the defendant's presence was reduced. The appeal was

discussed in private and evidence was heard from the parties only if they appeared.

47. Under Italian law, where the rights of the defence could not be exercised jointly by the defendant and his representative, the technical defence put forward by the lawyer was considered to be of greater importance. That was particularly true in cases such as the present one where, since the accused had been arrested in flagrante delicto, the arguments adduced by the defence had been of an essentially legal nature and the input from the applicant himself had been negligible. The applicant had never attempted to deny the offence and had not made his request for adoption of the summary procedure subject to the admission of new evidence, as permitted by Article 438 § 5 of the CCP.

48. The Court of Appeal's jurisdiction had been limited to examining the issues raised in the grounds of appeal (the legal concepts of "trafficking", "personal use" of drugs and a "considerable quantity" of heroin, whether an expert report was null and void, and the interpretation and application of section 73 of the Narcotics Act and its constitutionality), all issues of an essentially legal nature. True, the question of the guilt or innocence of the defendant had been at issue, but from a legal rather than a factual standpoint. Nor had the Court of Appeal been called upon to assess the character and personality of the defendant or to determine whether he was a drug addict. While it could re-examine the evidence already contained in the file, that process simply amounted to ascertaining the existence of evidence that had already been obtained.

49. Furthermore, the Court of Appeal had no power to increase the sentence. The Government further pointed out that reopening of the investigation at the appeal stage was an exceptional measure which could be taken only if the judge deemed it necessary. It was even less common under the summary procedure. In addition, during the proceedings at first instance the applicant had attended two hearings before the preliminary hearings judge. Although a lawyer was required to be present, he had been free to intervene in person in his own defence.

50. In view of the circumstances outlined above, and on the basis of the Court's case-law in *Kamasinski v. Austria* (judgment of 19 December 1989, Series A no. 168) and, conversely, in *Kremzow v. Austria* (judgment of 21 September 1993, Series A no. 268-B), the Government concluded that the presence of the defendant at the appeal hearing was not required under the Convention. In any event, even assuming that an irregularity had occurred as a result of the applicant's absence from the appeal hearing, the proceedings taken overall had been fair.

51. In that connection the Government pointed out that Article 6 of the Convention required only those written documents which were crucial to an exact understanding of the charges against the accused, and hence to the effective exercise of his defence rights, to be translated. In the instant case

the document concerned had been a simple notification which had no bearing on the merits of the case or the charges against the defendant. The State had therefore been under no obligation to provide a translation. In any event, if he had not fully understood the notice of the date of the hearing, the applicant could have asked to be assisted free of charge by an interpreter; alternatively he could have asked a fellow prisoner to translate it or sought clarification from the lawyer he had appointed, who was supposed to be proficient in Italian and able to grasp the meaning of a perfectly straightforward legal document.

52. It was true that the impugned notice had not indicated the procedure to be followed in order to participate in the hearing. However, the State could not be required to explain to individuals the procedural subtleties of each oral or written step in the proceedings. Establishing such a principle, particularly in the case of straightforward formalities, was liable to undermine the effectiveness of the judicial system. The lawyers appointed by the applicant, on the other hand, could have got in touch with their client to explain that, if he wished to take part in the appeal hearing, he should ask to be brought to the courtroom. The lawyers could also have requested his transfer when they filed pleadings with the registry of the Rome Court of Appeal on 23 October 2000 (see paragraph 19 above).

53. In addition, the record of the hearing of 25 February 2000 showed that the applicant had made the request for adoption of the summary procedure himself. He therefore knew the language of the proceedings and would have been able to understand his lawyer's explanations concerning the summary procedure. This was borne out by the fact that, at the hearings on 25 February and 24 March 2000, the applicant had said that he could speak Italian and that he had understood the charges against him. The applicant had lived in Italy since at least 1990 and, when he had been arrested on 26 April 1999, had displayed sufficient mastery of Italian to admit to theft and to provide details as to the circumstances of the offence (see paragraph 26 above). The applicant had also handed over to the authorities in the prison where he was detained a statement to the effect that he was dismissing his previous lawyers and appointing two new counsels to represent him, and had written two long letters by hand. All those documents had been written in Italian. Even assuming that the applicant had exaggerated his command of Italian, his statements had given the authorities legitimate grounds for presuming that he was capable of understanding the notification of the appeal hearing.

54. The Government submitted that, by omitting to inform the authorities of his wish to be brought before the Court of Appeal, the applicant had, tacitly but unequivocally, waived his right to participate in the hearing of 3 November 2000. The request to be brought to the hearing room had to be made at least five days before the hearing (Article 127 § 2 of the CCP, which the Court of Cassation, in its judgment no. 6665 of 1995,

had found to be applicable to such situations – see paragraph 33 above). Having received the notice on 1 September 2000, the applicant had had almost two months to make his request.

55. It was strange and regrettable, in the Government's view, that neither of the applicant's two lawyers had felt the need to talk to their client, or to telephone him or write to him ahead of the appeal hearing. As the lawyers had been appointed by the applicant, the authorities could not be held responsible for that omission, since any shortcomings on the part of the lawyers in question had not been manifest and had not been brought to the attention of the courts in good time.

56. The applicant in the instant case had been, or should have been, perfectly aware of the proceedings, the appeal, the date of the hearing and the need to make a request to the prison authorities to be taken to the hearing room. To find in those circumstances that the absence of the accused from the appeal hearing had not been fully informed and intentional would represent a clear departure from the Court's settled case-law and would alter the balance which had to be struck between the requirements of justice and the rights of the defence. The Government referred in that connection to *Medenica v. Switzerland* (no. 20491/92, ECHR 2001-VI) and, conversely, to the Grand Chamber judgment in *Sejdovic v. Italy*, (no. 56581/00, 1 March 2006).

57. Lastly, the request made by Mr Marini at the hearing could not carry decisive weight. In Italy, the presence of the defendant at the hearing was optional rather than compulsory. The contradiction between the attitude of the accused and his lawyer's statements could not therefore be resolved by giving greater weight to the latter. The lawyer's task was to represent and defend his client; he could not take the place of his client in performing actions falling within the private sphere relating to freedom of decision and action.

## **C. The Court's assessment**

### *1. General principles*

#### **(a) Right to participate in the hearing**

58. In the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Lala v. the Netherlands*, judgment of 22 September 1994, Series A no. 297-A, p. 13, § 33; *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, p. 15, § 35; and *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004), and the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005).



59. Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person “charged with a criminal offence” is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to “everyone charged with a criminal offence” the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”, and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 27, and *Sejdovic*, cited above, § 81).

60. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing (see *Kamasinski*, cited above, p. 44, § 106). The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, p. 13, § 27, and *Monnell and Morris v. the United Kingdom*, judgment of 2 March 1987, Series A no. 115, p. 22, § 56).

61. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that a public hearing was held at first instance (see, among other authorities, *Monnell and Morris*, cited above, p. 22, § 58, as regards the issue of leave to appeal, and *Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, p. 13, § 30, as regards the court of cassation). However, in the latter case, the underlying reason was that the courts concerned did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see *Ekbatani*, cited above, p. 14, § 31).

62. However, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see *Fejde v. Sweden*, judgment of 29 October 1991, Series A no. 212-C, p. 68, § 31). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (see *Helmets v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, p. 15, §§ 31-32) and of their importance to the appellant (see *Kremzow*, cited above, p. 43, § 59; *Kamasinski*, cited above, pp. 44-45, § 106 *in fine*; and *Ekbatani*, cited above, p. 13, §§ 27-28).

63. Moreover, a detained appellant in the nature of things lacks the ability that an appellant at liberty or a civil party in criminal proceedings has to attend an appeal hearing. Special technical arrangements, including security measures, have to be made if such an appellant is to be brought before an appeal court (see *Kamasinski*, cited above, p. 45, § 107).

64. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004).

65. Applying these principles in the *Ekbatani* case (cited above, p. 14, § 32), the Court took the view that the presence of the defendant at the appeal hearing was required, as the case could not be properly determined without a direct assessment of the evidence given in person by the applicant and by the complainant, since the defendant's guilt or innocence was the main issue for determination before the appellate court. That finding was not altered by the fact that the appeal court could not increase the sentence imposed at first instance (see, *mutatis mutandis*, *Dondarini*, cited above, § 28, and *De Biagi v. San Marino*, no. 36451/97, § 23, 15 July 2003).

66. However, in *Kamasinski* (cited above, p. 45, §§ 107-108), the Court found that the decision of the Supreme Court refusing Mr Kamasinski leave to be brought to the hearing was not in breach of Article 6 of the Convention, given that under Austrian law hearings on appeal did not involve a fresh examination of the evidence or a reassessment of the defendant's guilt or innocence. Furthermore, the grounds of appeal lodged by Mr Kamasinski did not raise issues going to his personality and character, and the Supreme Court had no power to impose a more severe sentence than that passed at first instance.

67. The Court reached similar conclusions in the *Kremzow* case (cited above, p. 44, § 63), in which the applicant complained of the fact that he had not been present at the proceedings before the Supreme Court, which had been called upon to determine whether a motion to take evidence had been properly refused by the trial court and whether the excluded facts might have influenced the jury's verdict. In the same case, however, (p. 45, § 67), the Court found that it was essential to the fairness of the proceedings that the applicant be present during the hearing of the appeals. Those proceedings were of crucial importance for him as they involved an assessment not only of his character but also of his motive, which might have important implications for the severity of his sentence.

**(b) Right of the person charged with a criminal offence to be informed of the accusation against him**

68. Under paragraph 3 (a) of Article 6 of the Convention, any person charged with a criminal offence has the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. Whilst this provision does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, it does point to the need for special attention to be paid to the notification of the “accusation” to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him. A defendant not familiar with the language used by the court may be at a practical disadvantage if the indictment is not translated into a language which he understands (see *Sejdovic*, cited above, § 89; *Kamasinski*, cited above, pp. 36-37, § 79; *Tabaï v. France* (dec.), no. 73805/01, 17 February 2004; and *Vakili Rad v. France*, Commission decision of 10 September 1997, no. 31222/96).

69. In addition, paragraph 3 (e) of Article 6 states that every defendant has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see *Luedicke, Belkacem and Koç v. Germany*, judgment of 28 November 1978, Series A no. 29, p. 20, § 48).

70. However, paragraph 3 (e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an “interpreter”, not a “translator”. This suggests that oral linguistic assistance may satisfy the requirements of the Convention (see *Husain v. Italy* (dec.), no. 18913/03, 24 February 2005). The fact remains, however, that the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events (see *Güngör v. Germany* (dec.), no. 31540/96, 17 May 2001). In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided (see *Kamasinski*, cited above, p. 35, § 74).

71. The Court has held that, in the context of application of paragraph 3 (e), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court (see, *mutatis mutandis*, *Güngör*, cited above).

72. Lastly, while it is true that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed (see *Kamasinski*, cited above, pp. 32-33, § 65, and *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, p. 11, § 28), the ultimate guardians of the fairness of the proceedings – encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant – are the domestic courts (see *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002).

**(c) Waiver of the right to appear**

73. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Poitrimol*, cited above, pp. 13-14, § 31). In addition, it must not run counter to any important public interest (see *Sejdovic*, cited above, § 86, and *Håkansson and Stureson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66).

74. The Court has held that where a person charged with a criminal offence has not been notified in person, it cannot be inferred merely from the fact that he has been declared *latitante* (that is to say, wilfully evading the execution of a warrant issued by a court), relying on a presumption with an insufficient factual basis, that he has waived his right to appear at the trial and defend himself (see *Colozza*, cited above, pp. 14-15, § 28). It has also had occasion to point out that before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

75. Furthermore, a person “charged with a criminal offence” must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure (see *Colozza*, cited above, p. 16, § 30). At the same time, it is open to the national authorities to assess whether the accused has shown good cause for his absence or whether there

is anything in the case file to warrant finding that he was absent for reasons beyond his control (see *Medenica*, cited above, § 57; see also *Sejdovic*, cited above, §§ 87-88).

76. In view of the prominent place held in a democratic society by the right to a fair trial (see, among many other authorities, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 14-15, § 25 *in fine*), Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the date of the hearing and the steps to be taken in order to take part where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 72, ECHR 2004-IV). This applies equally in the context of simplified procedures such as the summary procedure, where the accused has waived a number of his or her rights.

## *2. Application of these principles to the instant case*

77. The Court notes first of all that the applicant was present at the first-instance hearings on 25 February and 24 March 2000 before the Rome preliminary hearings judge. It is true that, as pointed out by the applicant, these two hearings were not public but were conducted in private.

78. However, the Court observes that the fact that the hearings were not held in public was the result of the adoption of the summary procedure, a simplified procedure which the applicant himself had requested of his own volition. The summary procedure entails undoubted advantages for the defendant: if convicted, he receives a substantially reduced sentence, and the prosecution cannot lodge an appeal against a decision to convict which does not alter the legal characterisation of the offence (see Articles 442 § 2 and 443 § 3 of the CCP – paragraph 28 above). On the other hand, the summary procedure entails a reduction of the procedural guarantees provided by domestic law, in particular with reference to the public nature of the hearings and the possibility of requesting the admission of evidence not contained in the file held by the Public Prosecutor's Office.

79. The Court considers that the applicant, who was assisted by two lawyers of his own choosing, was undoubtedly capable of realising the consequences of his request for adoption of the summary procedure. Furthermore, it does not appear that the dispute raised any questions of public interest preventing the aforementioned procedural guarantees from being waived (see *Kwiatkowska*, cited above).

80. In that connection the Court reiterates that it has accepted that other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts' case-load, must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance (see, for example, *Helmers*, cited above, p. 16, § 36; *Jan Åke Andersson v. Sweden*, judgment

of 29 October 1991, Series A no. 212-B, p. 45, § 27; *Fejde*, cited above, pp. 68-69, § 31; and *Hoppe v. Germany*, no. 28422/95, § 63, 5 December 2002). Introduction of the summary procedure by the Italian legislature seems to have been expressly aimed at simplifying and thus expediting criminal proceedings (see, *mutatis mutandis*, *Rippe v. Germany* (dec.), no. 5398/03, 2 February 2006).

81. In the light of the above considerations, the fact that the hearings at first and second instance were conducted in private, and hence without members of the public being present, cannot be regarded as being in breach of the Convention. It remains to be determined whether the applicant's absence from the hearing of 3 November 2000 before the Rome Court of Appeal infringed his right to a fair trial.

82. Under Italian law, the applicant had an indisputable right to attend the appeal hearing, on condition that he made a request to be brought to the hearing room. That is not contested by the Government and, moreover, is made clear by the domestic provisions concerning private hearings. In particular, Article 127 § 3 of the CCP stipulates that "evidence shall be heard from ... the other recipients of the notice [of the date of the hearing]" – a category which included the defendant – "if they appear at the hearing" (see paragraph 32 above). Article 599 § 2 of the CCP states that the proceedings are to be adjourned if "a defendant who has expressed a wish to appear" has a legitimate reason for not attending (see paragraph 31 above). It is hard to see how this would be possible if the legislation did not confer on the defendant the right to take part in the appeal hearing.

83. That does not necessarily imply, however, that the presence of the applicant at the appeal hearing is required by Article 6 § 1 of the Convention, as the requirements of that provision are autonomous in relation to those of national legislation.

84. In the instant case, the Court deems it appropriate to proceed on the basis of the following facts. The Rome Court of Appeal, as is readily understandable, was empowered to rule solely on those aspects of the decision referred to in the grounds of appeal (see Article 597 § 1 of the CCP – paragraph 29 above). In the grounds of appeal, the applicant confined himself to reiterating the arguments adduced in his defence before the preliminary hearings judge, namely that the drugs in his possession had been for his own personal use. He also alleged that the way in which the legislation on drugs had been interpreted was unconstitutional (see paragraphs 14 and 16 above). In addition, in the pleadings which they filed on 23 October 2000, the applicant's lawyers argued that the expert chemical analysis of the drugs was null and void owing to procedural defects (see paragraph 19 above).

85. In the Court's view these grounds related essentially to the legal characterisation of the offence and to the interpretation of the domestic legislation on drugs and the validity of expert reports. On the other hand, the

fact that the applicant had been in possession of the drugs was not disputed at the appeal stage (see, *mutatis mutandis*, *Fejde*, cited above, p. 69, § 33). The applicant had been arrested in flagrante delicto (see paragraph 12 above) and at no stage in the proceedings attempted to deny the factual basis of the charges against him. In particular, insofar as the applicant continued to maintain at the appeal stage, despite all appearances to the contrary, that the drugs found in his possession had been intended for his own personal use and not for sale, even though the quantity concerned, according to the preliminary hearings judge, was equivalent to more than twenty years' average consumption (see paragraph 15 above), the Court fails to see how in the present case the physical presence of the applicant at the appeal hearing could in any way have influenced the characterisation of the offence of drug trafficking which had formed the basis for his conviction.

86. The Court also notes that, as the prosecution could not appeal against a decision to convict which did not alter the characterisation of the offence, the Rome Court of Appeal had no power to increase the applicant's sentence. The court could uphold the sentence imposed at first instance, reduce it or acquit the applicant. In that respect the present case differs from that of *Kremzow*, cited above.

87. Lastly, the Court notes that, under the summary procedure, which was requested by the applicant, the production of fresh evidence is ruled out in principle, as the decision must be taken on the basis of the documents contained in the file held by the Public Prosecutor's Office (see, in particular, Articles 438 § 1 and 442 § 1a of the CCP – paragraph 28 above). It is true that, under the terms of paragraph 5 of Article 438, cited above, the defendant may make his request for adoption of the summary procedure subject to the admission of fresh evidence necessary for the court to reach a decision. However, that did not occur in this case, as the applicant had consented to a decision being given on the sole basis of the evidence obtained by the authorities during the preliminary investigation. Accordingly, he knew or should have known through his lawyers that the appeal hearing would be confined in principle to hearing the arguments of the parties, without any evidence being produced or witnesses examined.

88. In the light of the above, and having taken into account all the specific circumstances of the present case, the Court considers that, regard being had to the fact that the applicant participated in the first-instance hearings and that those proceedings were of an adversarial nature, the requirements of a fair trial, as defined by the Convention, did not necessitate the presence of the applicant at the appeal hearing.

89. That finding is sufficient basis for concluding that there has not been a violation of Article 6 § 1 of the Convention. In any event, the Court observes that, even assuming that the applicant had a right under the Convention to appear at the hearing of 3 November 2000, he was duly informed of the date of that hearing and waived his right to appear.

90. With regard to the last point, and unlike the Chamber, the Grand Chamber considers that it is clear from the case file that the applicant had sufficient command of Italian to grasp the meaning of the notice informing him of the date of the appeal court hearing. It observes that, at the first-instance hearings on 25 February and 24 March 2000, the applicant himself stated that he could speak Italian and that he had understood the content of the charge and the evidence against him (see paragraphs 13 and 14 above). The truth of that assertion and the fact that it had been made spontaneously were not disputed by the applicant or his lawyers during the domestic judicial proceedings. Moreover, as the Government rightly pointed out, at the time of the appeal proceedings the applicant had been living in Italy for at least ten years, and when he was arrested in 1999 had been able to provide the *carabinieri* with details about the factual basis of the allegations against him (see paragraph 26 above).

91. In the Court's view, these elements gave the domestic judicial authorities sufficient reason to believe that the applicant was capable of grasping the significance of the notice informing him of the date of the hearing, and that it was not necessary to provide any translation or interpretation. The Court also notes that the applicant does not appear to have informed the prison authorities of any difficulties in understanding the document in question.

92. It is regrettable that the notice did not indicate that it was for the applicant to request, at least five days before the date of the hearing, that he be brought to the hearing room (see paragraph 17 above). However, the State cannot be made responsible for spelling out in detail, at each step in the procedure, the defendant's rights and entitlements. It is for the legal counsel of the accused to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights.

93. In the instant case, the applicant was informed of the date of the appeal hearing on 1 September 2000, that is, more than two months in advance of the hearing. The same was true of the lawyer appointed by the applicant (see paragraph 17 above). During that time, the applicant's lawyers did not deem it necessary to get in touch with their client (see paragraph 18 above). There is nothing in the case file to indicate that the applicant attempted to make contact with them.

94. The Court cannot but regret the lack of communication between the applicant and his lawyers. Precise explanations concerning the request to be brought to the hearing, and the time-limit and arrangements for making such a request, could have dispelled any doubts the applicant might have had in that regard. In that connection, the Court points out that it is clear from the wording of Article 599 § 2 of the CCP (see paragraph 31 above) and the case-law of the Court of Cassation (see judgment no. 6665 of 1995 – paragraph 33 above) that a prisoner wishing to attend the appeal hearing in



the context of a summary procedure must make known his wish to be brought to the hearing at least five days in advance. That would have been known to the lawyers appointed by the applicant.

95. The Court reiterates that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance ...”, it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A no. 205, p. 16, § 30). In that connection it must be borne in mind that the Convention is intended to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 38, and *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

96. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or appointed by the accused. The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see *Daud v. Portugal*, judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, pp. 749-750, § 38, and *Sannino v. Italy*, no. 30961/03, § 49, 27 April 2006).

97. In the present case, the applicant at no point alerted the authorities to any difficulties encountered in preparing his defence. Furthermore, in the Court's view, the shortcomings of the applicant's counsel were not manifest. The domestic authorities were therefore not obliged to intervene or take steps to ensure that the defendant was adequately represented and defended (see, conversely, *Sannino*, cited above, § 51).

98. In addition, the Court notes that the Rome Court of Appeal interpreted, in substance, the applicant's omission to request his transfer to the hearing room as an unequivocal, albeit implicit, waiver on his part of the right to participate in the appeal hearing (see paragraph 20 above). In the particular circumstances of the present case, the Court considers that that was a reasonable and non-arbitrary conclusion.

99. It observes in that regard that the obligation on the applicant to make clear his wish to be brought to the hearing did not entail the completion of any particularly complex formalities. Moreover, the transfer of a prisoner calls for security measures and needs to be arranged in advance. A strict deadline for submitting the request for transfer is therefore justified.

100. It should also be pointed out that there were further indications lending weight to the conclusion that the applicant did not wish to take part

in the appeal hearing. Firstly, there is nothing in the case file to indicate that, on the day of the hearing, when he realised that he was not going to be taken to the hearing room, the applicant protested to the prison authorities. Secondly, in their pleadings of 23 October 2000, filed with the registry of the Court of Appeal a mere eleven days before the date of the hearing, the applicant's lawyers did not request that Mr Hermi be brought to the hearing room.

101. It is true that, at the appeal hearing, Mr Marini objected to the proceedings being continued in his client's absence (see paragraph 20 above). However, in the Court's view, that objection, made at a late stage and unsupported by any statement from the defendant himself, could not outweigh the attitude adopted by the applicant.

102. In the light of the above, and taking account in particular of the conduct of the applicant's lawyers, the Court considers that the Italian judicial authorities were entitled to conclude that the applicant had waived, tacitly but unequivocally, his right to appear at the hearing of 3 November 2000 before the Rome Court of Appeal. Moreover, the applicant could have asserted that right without the need for excessive formalities.

103. It follows that there has been no violation of Article 6 of the Convention.

## FOR THESE REASONS, THE COURT

*Holds*, by twelve votes to five, that there has been no violation of Article 6 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 October 2006.

T.L. EARLY  
Section Registrar

Luzius WILDHABER  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Rozakis, Spielmann, Myjer and Ziemele and the dissenting opinion of Judge Zupančič are annexed to this judgment.

L.W.

T.L.E.

JOINT DISSENTING OPINION OF JUDGES ROZAKIS,  
SPIELMANN, MYJER AND ZIEMELE

*(Translation)*

1. Notwithstanding the fact that we agree with the majority's reiteration of the general principles which apply regarding the right of the defendant to take part in the hearing and to be informed of the charges against him, and the waiver of the right to appear (see paragraphs 58 to 76 of the judgment), we cannot subscribe to the manner in which the judgment applies these principles to the instant case.

2. Let us recall the facts.

First of all, the applicant was informed that the appeal hearing had been set down for 3 November 2000. However, at no point was he informed of any requirement to state his intention of taking part in the hearing. The letter entitled "Notice to appear in appeal proceedings before the court sitting in private" simply stated that "appellants may, up to five days before the hearing and through the intermediary of [their] lawyers, examine at the registry the records and documents and ... make a copy of and consult them...".

3. The rule requiring the defendant to expressly request that evidence be heard from him in person actually results from an interpretation of Italian case-law. In its judgment no. 6665 of 24 April 1995 (*Visciano*), the Court of Cassation articulated the following legal principle: "A defendant who is in prison or under house arrest must also be given a hearing ... in appeal

proceedings against a judgment given [following] summary proceedings in accordance with Article 442 of the CCP, but only if he or she so requests within the time-limit laid down by Article 127 (2) of the CCP (that is, at least five days before the hearing), in accordance with the reference in the last paragraph of Article 443 of the CCP to Article 590, the first paragraph of which refers, in turn, to the 'formalities provided for in Article 127' for proceedings conducted in private." (paragraph 33 of the judgment).

4. We would point out that, at the hearing of 3 November 2000, one of the lawyers objected to the proceedings being continued in his client's absence and requested that the latter be brought from the prison to the hearing room.

5. Next, it should be stressed that the hearing before the Court of Appeal was devoted to establishing whether the drugs found in the applicant's possession had been intended for his own personal use and whether the first-instance court had interpreted the relevant legislation in a manner which penalised drug users not involved in trafficking. The appeal court had full jurisdiction and was free to examine the case as to the facts and the law.

6. Finally, the applicant was a foreign national with only a limited knowledge of the Italian legal system. His command of Italian was probably not sufficient to enable him to familiarise himself with the finer points of Italian criminal procedure. In any event, we consider it largely irrelevant whether the applicant had the necessary language skills to grasp the meaning of the notice informing him of the date of the appeal court hearing, since the notice made no mention of the steps to be taken in order to attend the hearing.

7. Granted, the conduct of the applicant's lawyers was not above reproach. We can readily subscribe to the reasoning of the majority in criticising the lawyers' lack of diligence. If communication between the lawyers and the applicant had been better and the lawyers had taken steps to ensure that the applicant attended the appeal hearing, no issue would have arisen under the Convention.

8. However, the conduct and shortcomings of the lawyers do not absolve the authorities of their responsibilities.

While the "summary procedure" which was applied in the instant case has certain exceptional features, it has to be said that it does not expressly restrict participation in any stage of the proceedings. It is sometimes said in jest, rightly or wrongly, that prisoners know their rights and the rules of criminal procedure better than many lawyers. However, that does not exempt the authorities from the obligation to inform prisoners of their basic rights.

9. Our Court's case-law is clear.

As paragraph 58 of the judgment rightly points out: "In the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Lala v. the Netherlands*, judgment of 22 September 1994, Series A no. 297-A, p. 13, § 33; *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, p. 15, § 35; and *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004), and the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005)."

These principles accord with the text of Article 6 of the Convention. As the Court recalls in paragraph 59 of the judgment: "Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present (see *Colozza*

v. *Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 27, and *Sejdovic*, cited above, § 81).”

10. In paragraphs 64 and 65 of the judgment, the Court reiterates: “Where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004).” The judgment continues: “Applying these principles in the *Ekbatani* case ([judgment of 26 May 1988, Series A no. 134], p. 14, § 32), the Court took the view that the presence of the defendant at the appeal hearing was required, as the case could not be properly determined without a direct assessment of the evidence given in person by the applicant and by the complainant, since the defendant's guilt or innocence was the main issue for determination before the appellate court. That finding was not altered by the fact that the appeal court could not increase the sentence imposed at first instance (see, *mutatis mutandis*, *Dondarini*, cited above, § 28, and *De Biagi v. San Marino*, no. 36451/97, § 23, 15 July 2003).”

11. In the present case the appellate court was called upon precisely to examine the case as to the facts and the law and to make a full assessment of the applicant's guilt or innocence. In addition – as our colleague Judge Zupančič points out in his dissenting opinion – it is not easy to separate the “law” from the “facts”.

12. As regards the waiver of the right to appear, the Court has always required any such waiver to be “unequivocal”. Moreover, it reiterates this principle in paragraph 76, as follows:

“In view of the prominent place held in a democratic society by the right to a fair trial (see, among many other authorities, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 14-15, § 25 *in fine*), Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the date of the hearing *and the steps to be taken in order to take part where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit* (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 72, ECHR 2004-IV). *This applies equally in the context of simplified procedures such as the summary procedure, where the accused has waived a number of his or her rights.*”<sup>1</sup>

13. We are therefore of the opinion that the applicant had the right to take part in the proceedings before the court of appeal. That right, which existed in Italian law, is guaranteed, moreover, by Article 6 of the Convention. The general principles of our case-law should have been

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<sup>1</sup> Our italics.

applied in full, it being clear that this case bears closer resemblance to *Dondarini v. San Marino* than to *Kamasinski v. Austria*.

14. The applicant had not waived his right to appear in an unequivocal manner. While the Rome Court of Appeal observed that the applicant had not informed the authorities in advance that he wished to take part in the appeal proceedings, and the Court of Cassation simply reiterated that the defendant had not expressed a wish to attend the hearing, neither of these courts made any reference to a *waiver* on the part of the applicant of his right to appear. For an explicit waiver to exist, the authorities would at least have had to inform the applicant officially that if he did not contact them within a certain period he would be deemed to have explicitly waived his right to appear.

15. The present case concerned a serious matter, in terms of both the nature of the offence and the potential sentence. In such circumstances, domestic courts have a duty to be particularly vigilant in ensuring that all the procedural guarantees are complied with. This was all the more necessary in the instant case since the applicant, who was in detention pending trial, was dependent on the public service for his transport from the prison to the hearing room.

16. Furthermore, the request to postpone the hearing would not have presented any insurmountable problems in the instant case. In that regard, it should be borne in mind that the hearing room where the appeal was to be examined was situated in Rome, the same city in which the applicant was in prison. Postponing the hearing would have enabled the applicant to be brought from the prison to the hearing room without difficulty. Given that the two locations were close together, he could have been brought there at very short notice.

17. In conclusion, we believe that there has been a violation of Article 6 of the Convention.

## DISSENTING OPINION OF JUDGE ZUPANČIČ

I agree with the joint dissenting opinion of Judges Rozakis, Spielmann, Myjer and Ziemele. However, to the extent that the decision in this case hinges on the distinction between facts and law – that is, to the extent that the Rome Court of Appeal would have been justified in dispensing with the presence of the defendant on the assumption that only legal issues were to be decided – I would like to contribute my own opinion concerning the relative nature of the distinction between factual and legal issues.

Legal issues cannot easily be separated from factual considerations either *in abstracto* or *in concreto*.

The reason for this is very simple. *In abstracto* it may be said that the choice of the norm (*la qualification du cas*) in relation to which the fact pattern is to be considered – clearly *determines* which facts are going to be considered as legally relevant and which are not. A different choice of legal characterisation brings different facts to the fore, or at least a different interpretation of the same facts. Even an extreme Hobbesian position is tenable in this respect, that is, that there simply *are* no legally relevant facts unless there is a prior legal norm (of criminal law) under which these facts become legally relevant<sup>2</sup>. To cite one example, the killing of the pawnbroker woman described by Dostoyevsky in his novel *Crime and Punishment* can only be called “murder” because there was a pre-existing norm of substantive criminal law that described and punished such conduct as “murder”.

In Continental jurisdictions, under the formula *iura novit curia*, criminal courts are not usually bound by the legal characterisation of the facts put forward by the prosecutor. The prosecution advances its evidence of a certain fact pattern (a past event) and proposes the legal characterisation which in its opinion best describes it. The defence will normally attempt to have *that* legal characterisation rejected. The court will settle for one of the two – or find its own.

It is thus fair to say that this dialectic operates through the mutual conversion of the facts into normative choice and normative choice into the selection of the relevant facts. Thus, which norm will initially be selected depends on the primary perception of the facts. Thereafter and conversely, the perception of the relevant facts may in turn determine the choice of (a different) norm. This mental loop will often be repeated several times in order to arrive at the optimal characterisation of the fact pattern. This mental process is silent, that is to say, it is not usually reflected in the final reasoning (grounds) of the judgment. It is nevertheless real and decisive. A first tentative legal characterisation is put forward by the police; it is then corrected by the prosecution, reacted to by the defence and adopted, or rejected, by the trial and appellate courts according to the principle *iura novit curia*.

Thus, all three parties attempt to find the legal characterisation that most adequately describes the fact pattern at hand. This can even be generalised in so far as we can say that in all legal reasoning – no matter at what instance of judicial decision-making – the winner is the one who most persuasively advances the most concise and otherwise appropriate legal characterisation. Inasmuch as it can be said that the outcome of this mental exercise is objectively predetermined and not subject to arbitrary preferences on the part of the judges, it makes sense to speak of the rule of law (as opposed to the supremacy of the judges).

In any event, legal reasoning at the appellate level – just as much as in the first-instance court – deals with the subsuming of the ascertained facts into the chosen legal norm. A different legal

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<sup>2</sup> “From this relation of sin to the law, and of crime to the civil law, may be inferred, ... secondly, that the civil law ceasing, crimes cease: for there being no other law remaining but that of nature, there is no place for accusation; every man being his own judge, and accused only by his own conscience, and cleared by the uprightness of his own intention. ... Thirdly, that when the sovereign power ceaseth, crime also ceaseth: for where there is no such power, there is no protection to be had from the law; and therefore every one may protect himself by his own power” (Hobbes, LEVIATHAN, Ch.XXVII (3), Of Crimes, Excuses, and Extenuations).



characterisation at the appellate level, in other words, will mean that facts other than those which were hitherto decisive will become legally relevant.

True, at the appellate level these “facts” are more likely to be various procedural violations. Here at the European Court of Human Rights we continue to make the point that we are not a fourth-instance court and that we do not wish to deal with any facts which are subject to the guiding principle of immediacy in a trial. Nevertheless, a new major premise in legal terms will always call for new elements making up the minor premise, that is, some kind of facts.

This dialectical interaction between the choice of the major premise (the norm) and the perception of the minor premise, that is, the determination of certain facts as legally (ir)relevant, is an antinomy. The norms are created to govern conduct. They must therefore be different *and* separate from the facts. The antinomy stems from the fact that the choice of facts which are to become legally relevant depends on the choice of legal norm, and *vice versa*. In other words, because there simply are no independent facts out there waiting for the legal norm to be applied to them, the result is a merger of the facts and the law. In the end it cannot be said that the norms and the facts are different and separate. Out of the millions of “facts” which were necessary conditions for the occurrence of the event in question, only a few will come to the fore and be retained as legally relevant. However, they come to the fore and are retained only because we have chosen a particular legal norm into which we wish to subsume them.

An additional complication arises in this mental exercise. The chosen norm (characterisation of the case) is not simply one paragraph of one article in the criminal code. A combination of several norms is needed in order adequately to cover the fact pattern. Issues such as criminal culpability (from the *general* part of the criminal code) combine with the choice of the specific charges (in the *special* part of the criminal code) – to say nothing of the requisite absence of affirmative defences (insanity, necessity, errors of fact and so forth).

In other words, the major premise is always a *combination* of different provisions of the criminal code. This makes it all the more patent that the rigour of the principle of legality is *not*, as it is usually understood to be, a one-dimensional subsuming of an obvious fact pattern into an obvious, single and exclusive norm. The choice of the combination of norms that best describes the fact pattern is in itself a complex mental exercise in which, like in a chess game, different combinations are considered before a final choice is settled upon.

In this context it is simply untenable to maintain that the “facts” can easily be separated from the “law”.

The question, however, whether in this particular case the Court of Appeal could have decided the case without the defendant's input concerning the facts is somewhat superfluous. *In abstracto*, Italian law itself provides the possibility for the defendant to participate precisely because it is sensitive to the complexity spelled out above.

*In concreto*, the second criminal division of the Court of Appeal decided that it could dispense with the defendant's presence. I would dare to assume that, even in terms of domestic procedural norms, this decision – to dispense with the presence of the defendant despite the absence of an express and unequivocal waiver resulting from his informed consent – ran counter to the spirit of the applicable Article 599(2) of the Italian *Codice di procedura penale*. In my view, the fact that the notice did not provide either for an express waiver or for the automatic transfer of the defendant to the Court of Appeal was a simple clerical oversight caused by careless drafting of the printed form.

The consequence of that, however, is that we do not know whether the applicant's absence from the hearing before the Rome Court of Appeal was the result of his informed consent, his lawyers' omission or some other factor. Given both the spirit of Article 599(2) of the Italian *Codice di procedura penale* and our own case-law, I would hold that the onus was on the Italian Government to convince us that the waiver was express and unequivocal.

Since the Government did not succeed in so doing, I feel that I was justified in voting for, rather than against, a violation of Article 6 of the Convention.