



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

FOURTH SECTION

CASE OF HERMI v. ITALY

(Application no. 18114/02)

JUDGMENT

STRASBOURG

28 June 2005

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
18 October 2006**

*This judgment will become final in the circumstances set out in Article 44
§ 2 of the Convention. It may be subject to editorial revision.*

In the case of Hermi v. Italy,

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

Sir Nicolas BRATZA, President,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. MARUSTE,

Mr V. ZAGREBELSKY,

Mr S. PAVLOVSKI,

Mr L. GARLICKI, judges,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 7 June 2005,

Delivers the following judgment, which was adopted on that 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, a lawyer practising in Guidonia. The Italian Government ("the Government") were represented by their Agent, Mr I.M. Braguglia and their co-Agent, Mr F. Crisafulli.

3. The applicant complained, 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). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 23 September 2004, the Court declared the application partly admissible.

6. 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).

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1969 and is currently in Frosinone Prison.

9. 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 a lawyer of his own choosing, Mr M., who represented him throughout the proceedings.

10. The applicant subsequently requested, through the intermediary of his lawyer, adoption of the summary procedure (*giudizio abbreviato*) provided for in Articles 438 to 443 of the Code of Criminal Procedure ("the CCP"). The representative of the Public Prosecutor's Office gave a favourable opinion. The Rome 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.

11. At the private hearing held on 24 March 2000 in the presence of the applicant, the latter, through the intermediary of his lawyer, pleaded not guilty on the ground that the drugs had been intended for his personal use and not for sale.

12. 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.

13. 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.

14. On 1 September 2000 Mr M. was informed that the hearing had been set down for 3 November 2000. On that day Mr M. 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.

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

16. The applicant appealed on points of law. He alleged that the appeal judges had not allowed him to attend his trial and that the summons to appear at the appeal hearing had not been translated into Arabic.

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

18. 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 the steps in the proceedings 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 free will. Furthermore, the applicant had not made clear his wish to participate in the appeal hearing.

II. RELEVANT DOMESTIC LAW

19. The summary procedure is governed by Articles 438 to 443 of the CCP.

20. Under the terms of these provisions as they applied at the time when the applicant was arrested, the defendant could request, subject to a favourable opinion from the representative of the Public Prosecutor's Office, that the case be decided at the preliminary hearing. If the judge deemed that the charges could be determined on the basis of the steps performed at the preliminary investigation stage and recorded in the file held by the Public Prosecutor's Office (*fascicolo del pubblico ministero*), he ordered the summary procedure to be adopted. The summary procedure was subsequently amended by Law no. 479 of 16 December 1999. Under the new rules, a favourable opinion from the representative of the Public Prosecutor's Office is no longer required, and the judge cannot reject the request for the summary procedure to be adopted if the defendant does not request that any evidence be produced (*integrazione probatoria*).

21. Where the summary procedure is adopted, the hearing takes place in private and is devoted to hearing the arguments of the parties, which must be based 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 (Article 442 § 2). The judgment is delivered in private.

22. Under the terms of Article 597 § 1 of the CCP:

“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.”

THE LAW

I. COMPLAINT DECLARED ADMISSIBLE AND SCOPE OF THE CASE

23. In its decision of 23 September 2004, which, in accordance with its case-law, defines the scope of the case before it (see *Lamanna v. Austria*, no. 28923/95, § 23, 10 July 2001, and *Craxi v. Italy (no. 1)*, no. 34896/97, § 55, 5 December 2002), the Court declared admissible only the applicant's complaint concerning his inability to participate in the appeal hearing. Accordingly, the Court cannot take into consideration the allegations made by the applicant after the admissibility decision which do not relate to that complaint. In particular, it cannot examine the applicant's complaint concerning his inability to participate in the hearing before the Court of Cassation. That complaint was, moreover, declared inadmissible in the partial decision of 6 November 2003.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

24. 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, the relevant parts of which provide:

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

A. The arguments of the parties

1. The applicant

25. The applicant submitted that any proceedings (whether ordinary or summary and whether at first, second or third instance) should be conducted in the presence of the defendant. He also contended that he had not been duly informed, in a language which he understood, of the procedure to be followed in order to exercise his right to participate in the appeal hearing. He argued that it was for the State to provide him with accurate and comprehensive information on the subject, and that the authorities' failure to do that could not be made good by the acts of third parties (such as a

fellow detainee or the defence counsel). Furthermore, it was inconceivable that a defendant whose native language was Arabic should be familiar with the details of the Italian Code of Criminal Procedure. Having been brought to the first-instance hearing as a matter of course, the applicant had expected the same thing to happen at the appeal stage.

26. The applicant admitted that he had not requested leave to appear, but stressed that he had not waived that right either. He also pointed out that his lawyer, on discovering that he was not present at the hearing of 3 November 2000, had immediately requested that his client be brought to the hearing room. However, the Court of Appeal had dismissed the request.

2. The Government

27. The Government first pointed out 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 case file as it stood and the production of fresh evidence was ruled out in principle, the presence of the defendant was of minor importance.

28. The Government submitted that the participation of the defendant at the hearing did not have the same importance at the appeal stage as at first instance. They pointed out that the complexity of criminal law and the structure of criminal trials in Italy tended, in cases where the rights of the defence could not be exercised jointly by the defendant and his representative, to lend greater weight to the technical defence put forward by the lawyer. This 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 contribution of the defendant himself had been negligible. The applicant, indeed, had never attempted to deny the offence, and the defence conducted by his lawyer had been particularly vigorous and effective.

29. Furthermore, since the Court had dismissed all the applicant's other complaints under Article 6 of the Convention, the proceedings as a whole should be regarded as fair, even assuming that an irregularity had occurred as a result of the defendant's absence from the appeal hearing.

30. The Government asserted that requiring the defendant to express a positive intention to appear was not in breach of the Convention. In that connection they pointed out that, under Italian law, the participation of the defendant in the hearing was a right rather than an obligation. In the instant case, the applicant had received a notice informing him of the date of the hearing and of the existence of that right, and stating that it was for the defendant to request the prison authorities to arrange his transfer from the prison to the place of the hearing. True, the applicant alleged that the notice had not been translated into Arabic or French. However, Article 6 of the

Convention did not go so far as to require that all steps in the proceedings should be translated; if he had not fully understood the notice, the defendant could have asked to be assisted free of charge by an interpreter or asked a fellow detainee to translate it.

31. The Government contended further that the applicant understood and spoke Italian, as he himself had stated during the hearing at first instance. He had thus been able to understand the charges against him and the explanations of his lawyer concerning the summary procedure. Hence, the applicant would have been perfectly capable of understanding the content of a simple summons. In any event, he could have requested clarification on the subject from his lawyer. Moreover, the latter, who had also received notice of the date of the hearing, could have contacted his client to explain that, if he wished to participate in the appeal hearing, he must request that he be brought to the court. Admittedly, it was sometimes difficult for a defendant to understand all the legal implications of a judicial act. However, the role of the lawyer was precisely to inform his client as to the procedures to follow in order to safeguard his rights.

32. In view of the above, and taking into account the particular circumstances of the case, the Government considered 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.

B. The Court's assessment

33. The Court reiterates that, 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; *T. v. Italy*, judgment of 12 October 1992, Series A no. 245-C, p. 41, § 26, and *F.C.B. v. Italy*, judgment of 28 August 1991, Series A no. 208-B, p. 21, § 33; see also *Belziuk v. Poland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 570, § 37, and *Sejdovic v. Italy*, no. 56581/00, § 29, 10 November 2004).

34. At first instance, the concept of a fair trial means that a person charged with a criminal offence should be entitled to attend the hearing (*Tierce and Others v. San Marino*, nos. 24954/94, 24971/94 and 24972/94,

§ 94, ECHR 2000-IX, and *Forcellini v. San Marino*, no. 34657/97, § 35, 15 July 2003).

35. However, the manner in which Article 6 § 1 of the Convention is applied to appellate courts depends on the specific features of the proceedings in question. Thus, proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even if the appellant has not been given the opportunity of being heard in person by the appellate court. On the other hand, 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. The principle that hearings should be held in public entails the right for the accused to give evidence in person to an appellate court (see *Forcellini v. San Marino*, cited above, *ibid.*, and *Dondarini v. San Marino*, no. 50545/99, § 27, 6 July 2004).

36. The Court reiterates that the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 of the Convention restrictively (see, *mutatis mutandis*, *Moreira de Azevedo v. Portugal*, judgment of 23 October 1990, Series A no. 189, pp. 16-17, § 66). Moreover, a hearing may be held to be in breach of Article 6 even in the absence of actual prejudice (see *A.B. v. Slovakia*, no. 41784/98, § 56, 4 March 2003). The existence of prejudice is relevant only in the context of Article 41 (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 18, § 35 *in fine*).

37. In the instant case, the Rome Court of Appeal was called upon to examine questions both of fact and of law and to uphold or quash the applicant's conviction. It had not only 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 establish the defendant's guilt. In that connection, it should be reiterated that the mere absence of new facts or the adoption of a simplified procedure are not sufficient to warrant departing from the principle that appeal hearings should be held in public in the presence of the accused (see, *mutatis mutandis*, *Forcellini v. San Marino*, cited above, § 36).

38. Hence, the applicant had the right to appear and to defend himself before the Rome Court of Appeal. It remains to be established whether he waived that right (see *Colozza v. Italy*, cited above, p. 15, § 29, and *Einhorn v. France* (dec.), no. 71555/01, § 33, ECHR 2001-XI).

39. The Court points out that 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; however, any such waiver must be made in an unequivocal manner and must not run counter to any important public interest (see *Sejdovic v. Italy*,

cited above, § 33, and *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66; see also *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000).

40. The Court notes that the Rome Court of Appeal and the Court of Cassation found, in substance, that the applicant had waived his right, since he had not expressed an intention to appear (see paragraphs 14 and 18 above). In that connection, the Government stated that the applicant had received a notice which explained that it was up to him to request the prison authorities to arrange his transfer from the prison to the place of the hearing (see paragraph 30 above). The applicant himself admitted that he had made no such request (see paragraph 26 above).

41. However, the Court observes that the notice was not translated into either of the two languages (Arabic and French) which the applicant claims to speak. It has 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. In that context, the financial, social and cultural situation of the person concerned, and the language difficulties likely to be encountered in a foreign country, are of relevance (see, *mutatis mutandis*, *Sejdovic v. Italy* (dec.), no. 56581/00, 11 September 2003). It should further be noted that the applicant stated that he had been brought to the first-instance hearing as a matter of course, a fact not contested by the Government. Hence, he could reasonably have expected that the same thing would happen in the appeal proceedings. In the view of the Court, these circumstances combined raise serious doubts as to whether the applicant understood the content of the notice informing him of the date for the hearing and the potential consequences of his failure to inform the authorities of his wish to participate in the hearing.

42. Be that as it may, the Court notes that on 3 November 2000 the applicant's lawyer, having observed that his client was absent, requested that Mr Hermi be brought from the prison to the hearing room (see paragraph 14 above). In so doing, the applicant's counsel expressed, in a clear and unequivocal manner, the wish of the defendant to take part in the appeal hearing (see, *mutatis mutandis* and conversely, *Zumtobel v. Austria*, judgment of 21 September 1993, Series A no. 268-A, p. 14, § 33-34).

43. In the circumstances, the Court cannot find that the applicant waived his right to appear at the hearing.

44. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

46. The applicant observed that, as a result of his conviction, he would be forced to pay a fine of 40,000,000 lire, or about 20,658 euros (EUR). In addition, he would be unable to carry on any occupation for six years, so that he would suffer a loss of earnings equivalent to approximately EUR 144,000, the amount which he could have earned from his work as a craftsman. Under the head of pecuniary damage, the applicant requested exemption from payment of the fine and claimed a minimum of EUR 140,000. He claimed EUR 100,000 in respect of non-pecuniary damage, citing the hardship and inconvenience of prison life.

47. The Government failed to see a causal link between the alleged violation of Article 6 of the Convention and the pecuniary damage alleged by the applicant. In that connection, they contended that the outcome of the criminal proceedings would have been no different had the applicant had the opportunity of taking part in the appeal hearing. His conviction had been based on proven and undisputed facts. The Government further pointed out that any custodial sentence made it impossible for the convicted person to carry on a lawful, gainful occupation outside prison. They noted that the applicant had not provided any evidence of the existence of his work as a craftsman or of income arising from it.

48. As to non-pecuniary damage, the Government argued that the finding of a violation would in itself constitute sufficient just satisfaction. The Court should in any event take account of the minor nature of the breach of the Convention.

49. The Court is unable to detect any direct causal link between the violation found in the present judgment and the pecuniary damage claimed by the applicant. It cannot speculate as to the possible outcome of the impugned proceedings had the violation of the Convention not occurred. However, the Court considers that the applicant sustained undeniable non-pecuniary damage. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, it decides to award him the sum of EUR 1,000.

B. Costs and expenses

50. The applicant claimed EUR 9,500 for costs and expenses incurred in the domestic courts, comprising EUR 3,500 for the proceedings before the Rome Court of Appeal and EUR 6,000 for the proceedings before the Court of Cassation. He claimed costs in the amount of EUR 8,000 in respect of the proceedings before the Court.

51. The Government argued that the costs incurred in the domestic proceedings had arisen out of the criminal proceedings themselves, and were unrelated to the violation of Article 6 of the Convention. With regard to those incurred in the Strasbourg proceedings, the Government left the matter to the Court's discretion.

52. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *Belziuk v. Poland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 573, § 49, and *Sardinas Albo v. Italy*, no. 56271/00, § 110, 17 February 2005).

53. With regard to the costs incurred in the domestic proceedings, the Court notes that the lawyer's fees claimed related to the entire course of the applicant's defence at second and third instance, and not exclusively to the issue of his inability to participate in the appeal hearing. Hence, the amounts claimed were not incurred solely in seeking redress for the violation of the Convention found in the instant case (see, *mutatis mutandis*, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). The fact remains that the applicant, before applying to the Convention institutions, exhausted the remedies available to him under Italian law. The Court consequently accepts that the applicant incurred expenses in order to redress the Convention violation in the domestic legal system (see, *mutatis mutandis*, *Rojas Morales v. Italy*, no. 39676/98, § 42, 16 November 2000). Having regard to the information in its possession and its relevant practice, the Court considers it reasonable to award EUR 1,500 under this head.

54. As to the costs incurred at European level, the Court considers the sums claimed to be excessive. Furthermore, it dismissed most of the applicant's complaints at the admissibility stage. It therefore considers that only a proportion of the expenses incurred by the applicant in the proceedings before it should be reimbursed (see, *mutatis mutandis*, *Sakkopoulos v. Greece*, no. 61828/00, § 59, 15 January 2004, and *Cianetti v. Italy*, no. 55634/00, § 56, 22 April 2004). Having regard to the information in its possession and its relevant practice, it considers it reasonable to award EUR 2,500 under this head (see, *mutatis mutandis*, *Vito Sante Santoro v. Italy*, no. 36681/97, § 68, ECHR 2004-...).

55. The total amount of costs and expenses to be awarded to the applicant is therefore EUR 4,000.

C. Default interest

56. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage and EUR 4,000 (four thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 28 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Maruste, Mr Zagrebelsky and Mr Garlicki is annexed to this judgment.

N.B.
M.O'B.

JOINT DISSENTING OPINION OF JUDGES MARUSTE,
ZAGREBELSKY AND GARLICKI

(Translation)

It is to our regret that we are unable to agree with the opinion of the majority in finding a violation of Article 6 §1 of the Convention on account of the fact that the Rome Court of Appeal held the hearing of 3 November 2000 in the applicant's absence.

Following the proceedings at first instance, the applicant was found guilty of possessing drugs (heroin) with the intention of selling them. The applicant participated in the hearing, assisted by a lawyer of his own choosing. The circumstances of the case were not disputed, as the applicant had been arrested in *flagrante delicto*. The applicant's argument was that he had bought the drugs for his personal use. On appeal, the applicant's lawyer submitted that the offence of which his client stood accused should be classified as possession of drugs for personal use, and that the quantity of drugs seized – 485 grams, or 8,465 doses, according to the appeal decision – did not suggest an intention to sell. The lawyer argued further that the law penalising the possession of drugs for personal use was in breach of constitutional freedoms.

Notice of the date for the appeal hearing was served on the applicant in prison. The fact that the notice stated that the accused could request leave to be present at the hearing is not disputed. The applicant made no such request. Not until the hearing itself did his lawyer request that the applicant be brought before the Court of Appeal. The latter, however, citing Article 127 of the Code of Criminal Procedure ("the CCP"), proceeded with the hearing in the absence of the defendant, since he had not requested leave to attend. The applicant's lawyer conducted the case on his client's behalf.

In our view, it is legitimate to require the defendant and/or his lawyer to make a formal request; there are therefore no grounds for finding a violation of Article 6 of the Convention. There was nothing to prevent the defendant from being present: the only formality to be completed was to request the prison authorities to bring him before the Court of Appeal. Under Italian law, the presence of the defendant at the hearing – even if he is in detention – is a right rather than an obligation.

The majority considered that the applicant might not have understood the instructions contained in the notice informing him of the date for the hearing, as the applicant maintained that he did not understand Italian. However, it is difficult to believe that the applicant, who had already been convicted and had served his sentence in Italy (see his application for release dated 24 February 2000) should not have been able to grasp the meaning of the notice or been able to request clarification, at least from his lawyer. In any event, the defendant was assisted throughout the proceedings

by a lawyer of his own choosing, who would normally be expected to have offered information and advice to his client. It is therefore reasonable to regard the applicant's conduct as a failure to act which rules out any breach of duty on the part of the authorities.

It might be added that at the appeal hearing, following a first-instance hearing covering both facts and law and in which the applicant had participated, no witnesses were to be examined and no new evidence was to be taken. The grounds of appeal concerned questions of law, and the powers of the appeal judge were defined by those grounds (see Article 597 of the CCP, quoted in paragraph 22 of the Court's judgment). Taking into account the nature of the appeal proceedings in the instant case, therefore, the defendant's presence was not required within the meaning of the Court's case-law (see, *mutatis mutandis*, *Kremzow v. Austria*, judgment of 21 September 1993, Series A no. 268-B, p. 44, §§ 60-63).