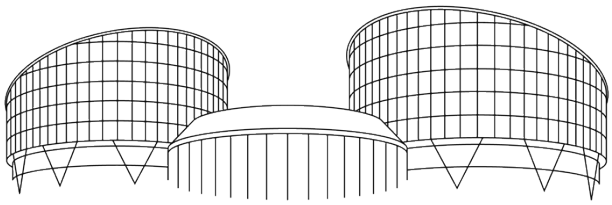

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF LALMAHOMED v. THE NETHERLANDS

(Application no. 26036/08)

JUDGMENT

STRASBOURG

22 February 2011

FINAL

22/05/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lalmahomed v. the Netherlands**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Boštjan M. Zupančič,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Ann Power, *judges,*

and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 25 January 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 26036/08) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Mr Goelzeer Lalmahomed ("the applicant"), on 2 June 2008.

2. The applicant was represented by Mr A.R. Kellermann, a lawyer practising in The Hague. The Netherlands Government ("the Government") were represented by their Deputy Agent, Ms L. Egmond of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that the refusal of leave to appeal against conviction and sentence offended against Article 6 of the Convention.

4. On 26 May 2010 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3, as in force at the time).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in Delft.

6. On 7 June 2006 a person was stopped for questioning in connection with an offence against the General Municipality Bye-laws (*Algemene*

Plaatselijke Verordening) of The Hague. He had no proof of his identity on his person.

7. The police officer identified the person as the applicant from a police photograph. The applicant was fined 50 euros (EUR) for not being able to show proof of identity. The fine was not paid, and the applicant was summoned to appear before the District Court judge (*kantonrechter*) of The Hague to answer a charge of failing to present an official identity document (see paragraph 16 below).

8. On 15 January 2007 the applicant appeared before the District Court judge. He claimed to be innocent, suggesting that the culprit might have been his brother. He stated that he had been acquitted of similar charges several times before. The District Court judge then adjourned the hearing in order to enable the reporting police officer and the applicant to check an identity photograph together. The applicant gave a mobile telephone number so that an appointment could be made.

9. On 9 May 2007 instructions were sent on the public prosecutor's behalf to the police for the applicant to be shown the police identity photograph, a new official record to be made and a photograph of the applicant and if possible his brother also to be attached thereto.

10. On 27 June 2007 a police officer drew up an official record of his various attempts to contact the applicant by telephone; he had been met with a recording of the voice of a man asking callers not to leave any messages because he had insufficient prepaid credit to listen to them and call back. The Government state that the police officer who had first identified the applicant (paragraph 7 above) wished to persist in his statement that he had recognised the accused as the applicant from the photograph in the possession of the police. Clear police photographs of the applicant and his brother, which the Government state show that there was little resemblance between them, were dispatched in addition.

11. The hearing was resumed on 11 October 2007 at 12 noon. The applicant had been summoned in writing but failed to turn up in time to take part. The District Court judge then tried him *in absentia*, convicted him and sentenced him to a fine of EUR 60 or one day's detention in lieu. Judgment was given orally. The official record of delivery reads as follows:

> "OFFICIAL RECORD OF DELIVERY OF ORAL JUDGMENT (*AANTEKENING MONDELING VONNIS*)
>
> Judgment given by District Court judge C. on 11 October 2007 in the case against the accused
>
> | | |
> |---|---|
> | Name: | Lalmahomed |
> | First names: | Goelzeer |
> | Born on: | 30 October 1962 in District Suriname (Suriname) |

Address: [etc.]

Place of residence: Delft

Defended case, [accused] failed to turn up after adjournment

QUALIFICATION:

Minor offence defined in Article 447e of the Criminal Code (*Wetboek van Strafrecht*), section 2 of the Compulsory Identification Act (*Wet op de identificatieplicht*)

COMMITTED:

on 7 June 2006

DECISION:

Fine of EUR 60,00 or 1 day's detention in lieu

The judge states that for lodging an appeal this case is subject to a special procedure, the so-called leave-to-appeal system.

(signed) the District Court judge"

12. The applicant lodged an appeal the same day by filling in a form at the registry. He stated his reasons for wishing to appeal as follows:

"I did not attend the hearing because:

I was mistaken about the time. I thought it was at 1 p.m. ...

I would have wished to put forward the following:

I am not the person who committed the offences. I have been acquitted 8 or 9 times already because someone else is misusing my identity."

13. On 3 December 2007 a single-judge chamber of the Court of Appeal (*gerechtshof*) of The Hague sitting as President gave a decision refusing the applicant leave to appeal. It contains the following reasoning:

"In view of the case file, which includes an extract from the criminal register (*justitiële documentatie*), the President does not consider plausible the applicant's statement that his identity details are systematically misused by someone else and that he has been acquitted by the courts several times already because of that.

The President is not aware of any other reasons for which the interests of the proper administration of justice require the case to be heard in appeal."

The judgment of the District Court judge thus became final.

14. The extract from the criminal register as contained in the case file of the single-judge chamber of the Court of Appeal shows that the applicant has been convicted of crimes from his early adulthood until recently. He has

also submitted authentic copies of official records of oral delivery of recent summary judgments of the District Court of The Hague. These are dated 19 January 2006, 2 May 2006, 19 June 2006, 8 March 2007 and 8 January 2008. They give no details of the cases other than that they ended in acquittals.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Domestic law

*1. The Code of Criminal Procedure (*Wetboek van Strafvordering*)*

15. In its relevant part, Article 410a of the Code of Criminal Procedure provides as follows:

> "1. If an appeal is possible and has been lodged against a judgment concerning only one or more minor offences (*overtredingen*) or indictable offences (*misdrijven*) which, according to the statutory description, carry a sentence of imprisonment not exceeding four years, and no other sentence or measure has been imposed than a fine not exceeding – or, if two or more fines have been imposed in a single judgment, not exceeding a combined maximum – of EUR 500, the appeal lodged shall only be heard and considered if, in the considered opinion of the President, such is required in the interests of the proper administration of justice. ..."

This provision entered into force on 1 July 2007.

2. Failure to present an identity document

16. Section 2 of the Compulsory Identification Act (*Wet op de identificatieplicht*) requires every person aged fourteen or over to present an official identity document to a police officer upon first demand. Article 447e of the Criminal Code (*Wetboek van Strafrecht*) makes failure to do so a minor offence punishable by a second-category fine (i.e. not exceeding, at the relevant time, EUR 3,350).

*3. The Criminal Records (Information) Ordinance (*Besluit Justitiële Gegevens*)*

17. Section 3 of the Criminal Records (Information) Ordinance provides as follows:

> "In relation to minor offences, the following shall be information for the record:
>
> a. the information mentioned in sections 6 and 7(1) of cases in which the public prosecution service has taken a decision to settle the case, with the exception of a decision to hand out a penal order (*strafbeschikking*) in which only a fine is imposed to an amount of less than EUR 100 and a decision not to pursue the prosecution, unless the latter decision is made subject to conditions;

b. the information mentioned in sections 6 and 7(1) of cases in which a court has given a decision, whether final or not, in so far as a penal community service order (*taakstraf*) or a custodial sentence other than in lieu of a sentence of another kind (*vrijheidsstraf anders dan vervangende*) has been imposed, or a fine of at least EUR 100, and in those cases in which an additional penal measure (*bijkomende straf*) has been imposed."

Section 6 of the ordinance sets out the information identifying the convicted person that is to be recorded; section 7(1) sets out the information required to record the criminal act concerned, the decision of the public prosecution service or the court as the case may be and the execution of the sentence or other penal measure.

B. Communication No. 1797/2008 of the Human Rights Committee of the United Nations

18. Article 14 of the International Covenant on Civil and Political Rights of 1966, in its relevant part, provides as follows:

"5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

19. On 27 July 2010 the Human Rights Committee of the United Nations adopted Views under Article 5 § 4 of the Optional Protocol to the International Covenant on Civil and Political Rights on Communication No. 1797/2008 (Thomas Wilhelmus Henricus Mennen v. The Netherlands). These Views included the following (footnote references omitted):

"Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

8.2 As to the author's claim that he has not been able to exercise his right to appeal under article 14, paragraph 5, in an effective and meaningful way, since he did not have access to a duly reasoned, written judgment of the trial court and to other documents such as trial transcripts, the Committee notes that the State party confirmed that in the present case no such document had been produced. The Committee notes the State party's submission that the author's counsel was provided with a number of official police reports on the case prior to his application for leave to appeal, without specifying their content and relevance to the verdict. The Committee, however, observes that these reports could not have provided guidance as to the motivation of the first instance court in convicting the author of a criminal offence, nor indication on what particular evidence the court had relied. The Committee recalls its established practice that in appellate proceedings guarantees of a fair trial are to be observed, including the right to have adequate facilities for the preparation of his defence. In the circumstances of the instant case, the Committee does not consider that the reports provided, in the absence of a motivated judgment, a trial transcript or even a list of the evidence used, constituted adequate facilities for the preparation of the author's defence.

8.3 The Committee further notes that, according to the State party, the President of the Court of Appeal denied leave to appeal with the motivation that a hearing of the appeal was not in the interests of the proper administration of justice and that counsel's contentions were not supported in law. The Committee considers this motivation inadequate and insufficient in order to satisfy the conditions of article 14, paragraph 5, of the Covenant, which require a review by a higher tribunal of the conviction and the sentence. Such review, in the frame of a decision regarding a leave to appeal, must be examined on its merits, taking into consideration on the one hand the evidence presented before the first instance judge, and on the other hand the conduct of the trial on the basis of the legal provisions applicable to the case in question.

8.4 Accordingly, in these specific circumstances, the Committee finds that the right to appeal of the author under article 14, paragraph 5, of the Covenant has been violated, due to failure of the State party to provide adequate facilities for the preparation of his defence and conditions for a genuine review of his case by a higher tribunal.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violation of article 14, paragraph 5, of the Covenant."

THE LAW

I. ADMISSIBILITY

A. The Government's preliminary objection

20. The Government argued by way of preliminary objection that the applicant could have submitted a ground of appeal to the effect that refusal of leave to appeal would constitute a violation of the Convention.

21. The applicant replied that he had been unaware of the existence of the leave-to-appeal system, which had only come into being some three months before he lodged his appeal. Moreover, at that stage he had not received the judgment of the District Court judge in writing.

22. The Court observes that for a single-judge chamber of the Court of Appeal sitting as President to accept any argument to the effect that the Convention required the applicant to be heard in person would be to negate the entire leave-to-appeal system as enshrined in domestic law. That being the case, the Court is not persuaded that it would have made any difference in the present case had the applicant so argued. Nor indeed have the Government demonstrated that such an argument has ever been successfully

used. It follows that the Government's preliminary objection must be dismissed.

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

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

24. The applicant complained that he was denied access to the appellate jurisdiction. He relies on Article 6 §§ 1 and 3 (c) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (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; ..."

25. The Government denied that there had been any such violation.

A. Argument before the Court

1. The applicant

26. The applicant alleged a violation of the right to defend himself in person, as guaranteed by Article 6 §§ 1 and 3 (c) of the Convention, as he had not been offered any opportunity to appear in person before the Court of Appeal. This violation was, in his submission, aggravated by the absence to lodge any further appeal on points of law to the Supreme Court. It was his position that the domestic legislation which made such a state of affairs possible in itself violated the Convention provisions mentioned.

27. The applicant stated that the form which he had returned to the authorities did not state that leave to appeal could be denied without a hearing. Moreover, prospective appellants usually did not receive any documents from the first-instance case file at the leave-to-appeal stage.

28. He also pointed, "for the sake of completeness", to the Views of the United Nations Human Rights Committee on Communication

No. 1797/2008, the facts of which were, in his submission, very similar to his own case.

29. Finally, he complained, under Article 6 § 2, that his statement that he had been acquitted on grounds of mistaken identity had been dismissed as implausible before without further examination. He had claimed to have been acquitted on the ground that someone else had misused his identity, but acquittals of minor offences were excluded from the criminal record by virtue of section 3 of the Criminal Records (Information) Ordinance (paragraph 17 above).

2. The Government

30. The Government submitted that Article 6 of the Convention did not include a right of access to an appellate jurisdiction, unlike Article 2 of Protocol No. 7 which was not in force for the Kingdom of the Netherlands.

31. They also noted that the Netherlands leave-to-appeal system was far from unique; such systems were found in many countries. They served to prevent large numbers of relatively insignificant cases from clogging up the criminal justice system. Moreover, exceptions to the right of appeal in criminal matters in regard to offences of a minor character were recognised even in Article 2 of Protocol No. 7.

32. In the alternative, they argued that the applicant had in fact had the benefit of review of his case by a higher tribunal, albeit not in the form of a full re-hearing. The single-judge chamber of the Court of Appeal sitting as President had been presented with the complete case file, including the investigation documents. The applicant had not been prevented from making what legal points he wished, including references to the Convention if he saw fit, and the assessment by the single-judge Chamber had not been subject to any statutory restrictions.

33. For the remainder, they stated that the applicant was himself to blame for not turning up at the hearing after the proceedings had been adjourned by the District Court judge. The mere fact that the applicant had not attended the second hearing did not suffice to make the conviction unfair.

3. The Court's assessment

34. The Court notes at the outset that Article 6 does not compel Contracting Parties to provide appeals in civil or criminal cases (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11). A right to seek review of conviction and sentence is enshrined in Article 2 § 1 of Protocol No. 7 in terms similar to those of Article 14 § 5 of the International Covenant on Civil and Political Rights.

35. It is also correct that the Kingdom of the Netherlands has not ratified Protocol No. 7. Consequently the Convention did not impose on the

respondent Party the obligation to provide the applicant with the opportunity to appeal.

36. Even so, a Contracting Party which provides for the possibility of an appeal is required to ensure that persons amenable to the law shall enjoy before the appellate court the fundamental guarantees contained in Article 6 (see the above-cited *Delcourt* judgment, *loc. cit.*, and *De Cubber v. Belgium*, 26 October 1984, § 32, Series A no. 86; as more recent examples, *Khalfaoui v. France*, no. 34791/97, § 37, ECHR 1999-IX; and *Kudła v. Poland* [GC], no. 30210/96, § 122, ECHR 2000-XI). The right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (see *Delcourt*, *loc. cit.*; more recently, *Ryakib Biryukov v. Russia*, no. 14810/02, § 37, ECHR 2008-...; and *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 53, ECHR 2008-...).

37. However, it is quite possible that leave-to-appeal proceedings may comply with the requirements of Article 6, even though the appellant be not given an opportunity to be heard in person by the appeal court, provided that he or she had at least the opportunity to be heard by a first-instance court (see, in particular, *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 58, Series A no. 115; more recently, *Sibgatullin v. Russia*, no. 32165/02, § 35, 23 April 2009). Moreover, as long as the resulting decision is based on a full and thorough evaluation of the relevant factors (*Monnell and Morris*, § 69), it will escape the scrutiny of the Court; in this connection, the Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; and *Cornelis v. the Netherlands* (dec.), no. 994/03, ECHR 2004-V (extracts)), as it is not a court of appeal – or, as is sometimes said, a "fourth instance" – from these courts (see, among many other authorities, *Kemmache v. France (no. 3)*, 24 November 1994, § 44, Series A no. 296-C; and *Melnychuk v. Ukraine* (dec), no. 28743/03, ECHR 2005-IX).

38. It is also worth noting for the sake of clarity that Protocol No. 7 adds to the guarantees contained in the Convention: it does not detract from them. For present purposes, this means that Article 2 of Protocol No. 7 cannot be construed *a contrario* as limiting the scope of Article 6 guarantees in appellate proceedings with respect to those Contracting Parties for which Protocol No. 7 is not in force (*Ekbatani v. Sweden*, 26 May 1988, § 26, Series A no. 134).

39. Nonetheless, the mere fact that Protocol No. 7 cannot be applied prevents the Court from subjecting the law governing the Netherlands leave-to-appeal system to scrutiny similar in nature and scope to that of the Human Rights Committee.

40. It remains to be decided whether the requirements of Article 6 of the Convention were met in the present case.

41. The Court can agree that it was entirely the applicant's responsibility to take all reasonable measures to attend the hearing of the first-instance court. It has not been explained how the applicant came to make the mistake he did.

42. The case before the Court does not end there even so. The Court cannot overlook the fact that the single-judge chamber of the Court of Appeal sitting as President refused the applicant leave to appeal on the ground that he "[did] not consider plausible the applicant's statement that his identity details [were] systematically misused by someone else and that he [had] been acquitted by the courts several times already because of that". The applicant complains about this under Article 6 § 2. The Court, for its part, considers it more appropriate to deal with the matter here.

43. The Court reiterates that for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the judgment or decision that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention (*Taxquet v. Belgium* [GC], no. 926/05, § 90, 16 November 2010, with further references). In addition, while courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed (*Taxquet*, § 91, with further references).

44. The Court accepts that the extract from the applicant's criminal record contained in the case file and placed before the single-judge chamber of the Court of Appeal showed a number of convictions. However, the various acquittals by the District Court of The Hague (paragraph 14 above), although not mentioned on the extract from the applicant's criminal record and therefore not before the single-judge chamber, span a period overlapping the time of the events complained of.

45. The applicant claimed that his identity had been misused and that he had been acquitted on that ground several times before. The single-judge chamber of the Court of Appeal dismissed this ground of appeal as implausible as the acquittals did not appear in the extract from the criminal register (paragraph 13 above).

46. In the Court's view, although the grounds for the acquittals are not stated, they suggest that the applicant's claim that his identity had been misused ought not to have been discounted without further examination.

47. The acquittals too being part of the official record, the Court considers that the single-judge chamber of the Court of Appeal ought to have been aware of them. As it was, the absence from the case file of this information meant that the denial of leave to appeal in the present case

could not be based on a full and thorough evaluation of the relevant factors (see paragraph 37 above).

48. There has, therefore, been a violation of Article 6 § 1 of the Convention taken together with Article 6 § 3 (c).

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

49. As mentioned above, the applicant complained of a violation of Article 6 § 2 of the Convention in that his statement that he had been acquitted on grounds of mistaken identity had been dismissed as implausible without further examination. Article 6 § 2 of the Convention reads as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

50. Having regard to the finding contained in paragraph 48 above and the reasoning on which it is based, the Court considers that it is not necessary to examine the case under Article 6 § 2 as well.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

51. The applicant further complained that Netherlands procedure, in barring him from lodging an appeal, denied him an effective remedy. He relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

52. Having regard to its decision concerning Article 6, the Court takes the view that it does not have to examine the case under Article 13 as its requirements are less strict than, and are here absorbed by, those of Article 6 (see, among many other authorities, *Philis v. Greece (no. 1)*, 27 August 1991, § 67, Series A no. 209; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 117, ECHR 2000-VII; more recently and *mutatis mutandis*, *Menesheva v. Russia*, no. 59261/00, § 105, ECHR 2006-III).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. The applicant did not submit any claim for just satisfaction.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention;

3. *Holds* that there is no need to examine the complaints under Articles 6 § 2 and 13 of the Convention.

Done in English, and notified in writing on 22 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada	Josep Casadevall
Section Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Ziemele is annexed to this judgment.

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE ZIEMELE

I agree with the reasoning and conclusions of the Chamber as concerns the violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention. I do, however, have some observations to make as concerns the argument raised by the Government and the corresponding reasoning of the Court with respect to Article 2 of Protocol No. 7 (paragraphs 30, 35 and 39).

The case concerns the leave-to-appeal system for minor offences in the Netherlands. The appeal is available in a limited category of cases as defined by Article 410a of the Code of Criminal Procedure. The appeal is not automatic since the article says that: "[...] the appeal lodged shall only be heard and examined if, in the considered opinion of the President, this is required in the interests of the proper administration of justice..." On 27 July 2010 the Human Rights Committee, a treaty-monitoring body of the International Covenant on Civil and Political Rights (ICCPR), adopted Views on an individual complaint brought against the Netherlands in which among other things it stated: "The Committee further notes that, according to the State party, the President of the Court of Appeal denied the leave with the motivation that a hearing of the appeal was not in the interests of the proper administration of justice.... The Committee considers this motivation inadequate and insufficient to satisfy the conditions of Article 14 paragraph 5."

In the case before the Court leave to appeal was refused based on facts about which the single-judge chamber of the Court of Appeal did not have full information (paragraph 47). Refusal of leave to appeal under such circumstances was seen by the Court to be contrary to fair trial guarantees in the national legal system, which recognises a possibility of appeal, albeit limited. The inadequacy of the case file in the applicant's case gave the Chamber a chance to look at the leave to appeal from the angle of Article 6, even though Article 6 as such does not require the States Parties to provide for appeals in civil and criminal cases. This obligation only emerges in criminal cases under Article 2 of Protocol No. 7, although exceptions are permitted.

The Chamber states that it cannot examine the leave-to-appeal system from the point of view of Protocol No. 7 or subject it to the same scrutiny as the HRC precisely because the Netherlands has not ratified Protocol No. 7 (paragraph 35). I agree with the Chamber that there may be differences in obligations under different treaties the Netherlands has ratified and depending on whether the case is brought to the Human Rights Committee or the European Court of Human Rights (paragraph 39).

My problem goes back to another case in which the Grand Chamber, when asked to explain the rules of interpretation of the Convention in the light of other rules of international law, arrived at the following conclusions: "The Court, in defining the meaning of terms and notions in

the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. [...] In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law...” (*Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 85-86, 12 November 2008). It may well be that the *Demir and Baykara* case represents an example of unfortunate drafting and that nothing further beyond the scope of Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties should be read into it. However, if we were to follow the literal meaning of what the Grand Chamber said, it might suggest that in our case, even though the Netherlands has not ratified Protocol No. 7, since it does provide for a leave-to-appeal system of sorts the Chamber should have assessed whether the leave-to-appeal system as such complied with Article 6. After all, the applicant did complain that the domestic law governing this procedure was contrary to the Convention (paragraphs 26-27).

I believe that the outcome in this case, which differs on the facts from the case examined by the HRC, might not have been any different had we examined the same facts, as the Court's case-law has accepted that leave-to-appeal proceedings may comply with Article 6 requirements (paragraph 37), and the Chamber actually takes a somewhat more substantive look at the Netherlands system (paragraphs 36-37). The problem is really in the wording used by the Chamber in the instant case and the Grand Chamber in the *Demir and Baykara* case concerning the role of non-ratified treaties. I would like to think that what the Grand Chamber meant when it referred to non-ratified treaties was those treaties that some States may not have ratified but that could still indicate the emergence of a universal or regional customary norm. Where the customary rule turns out to be different from the Convention provision, at least in its original form and intent, that rule may indeed affect the subsequent reading of the Convention provision (see M. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff Publishers, 2009, p. 433). Should not the Chamber have tried to assess whether there might be a regional custom as concerns procedural guarantees for the leave to appeal in minor offences cases, and whether any effect might be discerned in relation to the scope of Article 6, especially since the Netherlands provides for the possibility of the leave to appeal and in that sense the difference between the obligations under Article 6 of the Convention and Article 14 of the ICCPR is reduced?