



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

1959 · 50 · 2009

THIRD SECTION

CASE OF MARCELLO VIOLA v. ITALY

(Application no. 45106/04)

JUDGMENT
[Extracts]

STRASBOURG

5 October 2006

FINAL

05/01/2007

In the case of Marcello Viola v. Italy,

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

Boštjan M. Zupančič, *President*,

John Hedigan,

Corneliu Bîrsan,

Vladimiro Zagrebelsky,

Alvina Gyulumyan,

Dauid Thór Björgvinsson,

Ineta Ziemele, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 14 September 2006,

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

PROCEDURE

1. The case originated in an application (no. 45106/04) 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 an Italian national, Mr Marcello Viola (“the applicant”), on 30 November 2004.

2. The applicant was represented by Mr A. Romeo, a lawyer practising in Taurianova. The Italian Government (“the Government”) were represented by their Agent, Mr I.M. Braguglia, and by their Deputy co-Agent, Mr N. Lettieri.

3. On 13 December 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints based on the applicant's participation by videoconference in the appeal hearings during the second set of criminal proceedings and on Article 4 of Protocol No. 7 to the Convention. In accordance with Article 29 § 3 of the Convention, it was decided that the admissibility and the merits of the case would be examined at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1959 and is currently detained in L'Aquila Prison.

A. The first set of criminal proceedings

5. On 16 March 1992 the applicant was arrested and remanded in custody on charges of murder and belonging to a mafia-type organisation. He was also charged with a number of counts of illegally carrying weapons. In particular, he had allegedly aided and abetted the carrying in a public place of a weapon used to commit a number of murders, including that of one M.L.

6. In a judgment of 16 October 1995, the Palmi Assize Court sentenced the applicant to fifteen years' imprisonment for membership of a mafia-type criminal organisation. He was acquitted of the other charges.

7. The applicant appealed.

8. In a judgment of 10 February 1999, the Reggio di Calabria Assize Court of Appeal reduced the applicant's prison sentence to twelve years.

9. The applicant appealed on points of law. In a judgment of 8 February 2000, the text of which was deposited at the registry on 25 February 2000, the Court of Cassation dismissed the applicant's appeal.

B. The second set of criminal proceedings

1. The preliminary investigations and the trial at first instance

10. In the meantime, on 19 June 1996, the Reggio di Calabria investigating judge had made a fresh order for the applicant's detention pending trial. On 15 October 1996 he had committed the applicant to stand trial in the Palmi Assize Court. The applicant was charged with several counts of murder and attempted murder, membership of a mafia-type criminal organisation and illegally carrying a weapon. The applicant was accused, in particular, of having given orders to murder M.L. He was also accused of being an accomplice to carrying the weapon used to commit the crime. The applicant had alleged that this weapon had been one of the ones that he had been accused of carrying in the first set of criminal proceedings.

11. During the proceedings a number of witnesses, including *pentiti* (former mafiosi who have decided to cooperate with the authorities), were examined.

12. In a judgment of 22 September 1999, the Palmi Assize Court imposed five life sentences on the applicant and ordered him to serve three years of his sentence in solitary confinement. It imposed an additional sentence of a total of seventy years' imprisonment on him. The decision was based on statements by the *pentiti*, which were considered to be accurate and credible and were corroborated by other evidence.

2. *The appeal proceedings*

13. The applicant appealed.

14. From 2000 the applicant was subject to a restricted prison regime, provided for by section 41 *bis* of Law no. 354 of 26 July 1975 (known as “the Prison Organisation Act”), which, among other things, limited his contact with the outside world. Accordingly, the applicant was no longer brought to the hearing room from prison. He was, however, able to participate in the hearings of 21 February and 15 June 2001 and 5 March 2002 by means of an audiovisual link with the hearing room.

15. By a judgment of 5 March 2002, the Reggio di Calabria Assize Court of Appeal acquitted the applicant of one of the charges of murder. It found that the offences committed by the applicant were part of a single criminal design (*unico disegno criminoso*) and reduced his sentence to one life sentence and solitary confinement for two years.

3. *The appeal on points of law*

16. The applicant appealed on points of law. He complained, *inter alia*, of a failure on the part of the Assize Court of Appeal to give reasons for its finding that, despite a number of gaps in their evidence, the prosecution witnesses were credible. With regard to the murder of M.L., the applicant observed that part of the evidence adduced by the prosecution was that the police had found a P38 Walther pistol inside a car parked near land belonging to him. In the first set of criminal proceedings, however, the applicant had been acquitted of the charge of carrying that pistol. Moreover, that circumstantial evidence did not in any way establish that he had given orders to murder M.L.

17. The applicant did not allege that there had been a violation of the right to a fair trial on account of the nature of his participation in the appeal hearings.

18. In a judgment of 26 February 2004, the text of which was deposited at the registry on 3 June 2004, the Court of Cassation dismissed the applicant's appeal. It held that the Assize Court of Appeal had given logical and proper reasons for its decision on all the disputed issues.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Law no. 11 of 7 January 1998 introduced, among the implementing provisions of the Code of Criminal Procedure (CCP), a new Article 146 *bis* which, in its relevant parts and after the amendments introduced by Law no. 4 of 19 January 2001, is now worded as follows:

“1. In proceedings concerning one of the offences provided for in Article 51, paragraph 3 *bis*, and Article 407, paragraph 2, sub-paragraph (a), no. 4 of the Code [that is, mainly Mafia-related and other serious offences], a person who, in any capacity, is detained in a prison shall participate in the hearings at a distance [*a distanza*] in the following cases:

(a) where there are serious requirements of public safety or order;

(b) where the proceedings are particularly complex and participation at a distance is deemed necessary in order to avoid delays. In considering the requirement of avoiding delays in the proceedings, regard shall also be had to the fact, where applicable, that other proceedings are pending at the same time against the same defendant before different courts.

1 *bis*. Besides the cases provided for in paragraph 1, participation at a distance shall also be arranged in proceedings brought against a detainee who has been the subject of the measures provided for in section 41 *bis*, paragraph 2, of Law no. 354 of 26 July 1975 ...

2. The decision to order participation at a distance shall be taken, if necessary of their own motion, by the president of the trial court or of the Assize Court ... during the preliminary measures stage, or by the judge ... during the proceedings. The order shall be communicated to the parties and defence counsel at least ten days prior to the hearing.

3. Where an order is made for participation at a distance, an audiovisual link shall be activated between the hearing room and the place of detention so that the persons present in both places can see each other clearly and simultaneously and hear what is being said. If the measure is ordered in respect of several defendants who are being detained, in any capacity, in different places, each [of them] shall, by means of the same arrangement, be able to see and hear the others.

4. Defence counsel or his or her replacement must always be able to be present where the accused is situated. Defence counsel, or his or her replacement present in the hearing room, and the accused shall be able to confer confidentially, by means of appropriate technical equipment.

5. The place from which the accused is connected by audiovisual link to the hearing room shall be regarded as an extension of the hearing room [*è equiparato all'aula d'udienza*].

6. An officer of the court qualified to assist the judge ... shall be present at the place where the accused is situated and shall certify the latter's identity and officially note that there is no impediment to or restriction on the exercise of his or her rights and entitlements. He or she shall also certify that the provisions of paragraph 3 and the

second sentence of paragraph 4 have been complied with, and, if the examination takes place, that the precautions have been taken to ensure the lawfulness thereof ... To that end he shall consult, if necessary, the accused and his counsel. ...

7. If it becomes necessary during the proceedings to arrange a confrontation between witnesses or identification of the accused or another measure requiring him to be observed in person, the judge shall, if he considers it necessary, after hearing the parties, order that the accused be present in the hearing room for the time necessary to comply with that measure.”

20. According to the Constitutional Court (order no. 483 of 26 November 2002), participation at a distance seeks to achieve the following aims: (a) protect public order in the event of possible acts of intimidation by the accused against other parties in the trial; (b) prevent the transfer of the accused from prison to the hearing room from becoming an opportunity to renew contact with the criminal organisations to which they belong; and (c) expedite the conduct of particularly complex and long trials, which often take place in different courts. The Constitutional Court has also stated that the system introduced by Law no. 11 of 7 January 1998 guarantees the right of persons accused of exceptionally serious offences to participate in their trial, while weighing that right against the duty to protect the public and ensure the proper conduct of the trial (*ordinato svolgimento dei processi*).

21. In its judgment no. 342 of 22 July 1999, the Constitutional Court held that participation at a distance was compatible with the “right to a defence”, as guaranteed by Article 24 § 2 of the Constitution. It stated that it could not accept the idea that only the physical presence of the accused in the hearing room would ensure the effectiveness of this right, since the Constitution required only the personal and conscious (*consapevole*) participation of the defendant in the proceedings. Article 146 *bis* of the implementing provisions of the CCP was not limited to indicating the technical means necessary to installing a link between the hearing room and the place of detention, but required that certain “results” be attained and, in particular, the “effective” participation of the accused in the proceedings with a view to ensuring the proper exercise of his right to a defence. There were also legislative provisions guaranteeing contact between the accused, the right of defence counsel to be present where the defendant was situated and the ability of the accused and his counsel to communicate with each other. The judge had the power and the duty to ensure that the technical means installed were appropriate to the aims sought to be achieved and could, if necessary, order the accused to be present in the hearing room. In the opinion of the Constitutional Court, the fact that the new provisions departed from “tradition” did not upset the balance and dynamics of a trial that, on the contrary, remained substantively unchanged.

22. For the same reasons, the Constitutional Court found that the system introduced by Law no. 11 of 7 January 1998 could not be deemed to be

contrary to Article 6 of the Convention, a provision which required, among other things, compliance with the “reasonable time” requirement, in particular for accused persons in detention.

III. RELEVANT INTERNATIONAL LAW

23. Articles 9 and 10 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters provide:

Article 9 – Hearing by videoconference

“1. If a person is in one Party's territory and has to be heard as a witness or expert by the judicial authorities of another Party, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 7.

[...]”

Article 10 – Hearing by telephone conference

“1. If a person is in one Party's territory and has to be heard as a witness or expert by judicial authorities of another Party, the latter may, where its national law so provides, request the assistance of the former Party to enable the hearing to take place by telephone conference, as provided for in paragraphs 2 to 6.

[...]”

24. Articles 10 and 11 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000, provide:

Article 10 – Hearing by videoconference

“1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.

[...]”

Article 11 – Hearing of witnesses and experts by telephone conference

“1. If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where its national law so provides, request assistance of the former Member State to enable the hearing to take place by telephone conference, as provided for in paragraphs 2 to 5.

[...]”

25. In its Resolution of 23 November 1995 on the protection of witnesses in the fight against international organised crime, the European Council called on Member States to guarantee proper protection of witnesses. To that end it indicated, among other things, that “one of the forms of protection to be envisaged is the possibility of giving evidence in a place other than that in which the person being prosecuted is situated through the use, if necessary, of audiovisual methods, subject to observance of the adversary principle as interpreted in the case-law of the European Court of Human Rights”. The European Council went on to state that:

“... In order to facilitate the use of audiovisual methods, the following points, in particular, should be taken into consideration:

1. In principle, it should be envisaged that the hearing may be conducted under the legal and practical conditions of the requesting State only.
2. If the legislation of either State allows for the witness to be assisted by an adviser during the hearing, it should be possible for such assistance to be arranged in the territory of the State in which the witness is situated;
3. Translation costs and the cost of using audiovisual methods should be borne by the requesting State, unless otherwise arranged with the State to which the request is addressed.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

26. The applicant complained that he had been forced to participate by videoconference in the appeal hearings during the second set of proceedings. He relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which read as follows:

“In the determination of his civil rights and obligations ..., 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.”

27. The Government contested the applicant's submissions on this point.

...

B. The merits

1. The parties' submissions

(a) The Government

35. The Government observed at the outset that hearings by videoconference were provided for and recommended by a number of international treaties and conventions, such as the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, the Resolution of the European Council of 23 November 1995, the Act of the European Council of 29 May 2000, the Convention of the European Union of 29 May 2000, the agreement between Italy and Switzerland of 10 September 1998 and the agreement between the European Union and the United States on Mutual Legal Assistance of 25 June 2003. This showed that videoconferencing was considered as a technical means compatible with the Convention, be it by the Council of Europe or other international organisations, such as the European Union. According to the Government, it should therefore be presumed that a State did not depart from Convention requirements by introducing videoconferencing into its legal system.

36. Furthermore, it could be seen from *Rippe v. Germany* ((dec.), no. 5398/03, 2 February 2006) that it was advisable for States to adopt procedural mechanisms at second or third instance which, while weakening safeguards for defendants to an extent, were designed to ensure compliance with the “reasonable time” principle.

37. The Government added that in *Rippe*, cited above, it had been a question of removing a fairly important safeguard – namely, the hearing – but that this had not stopped the Court from finding that the measure complained of was proportionate to the aim pursued. In the present case, however, all the conditions of a fair trial had been satisfied, particularly by ensuring the accused's effective participation in the proceedings by

videoconference, which was a sophisticated technical device that allowed the detainee to remain in his place of detention and avoided substantial delays. Only a video link would have allowed the applicant – who was subject to a restricted prison regime at the time, detained far away from the hearing room and on trial before different courts at the same time – to participate in the proceedings without their length being affected.

38. The Government also pointed out that videoconferencing had been used only on appeal, when, in theory, evidence could not be adduced and procedural guarantees were less substantial.

39. Moreover, moving highly dangerous detainees from one place to another raised serious issues of public safety and order. In particular, it multiplied the risks of escape and increased the likelihood of reprisals against the accused themselves. Furthermore, the physical presence of detainees in the hearing room increased the risk of intimidation of witnesses and injured parties.

40. In the Government's opinion, there was no substantial difference between the accused's physical presence and his participation in the proceedings by videoconference. A video link allowed the accused to see and hear what was going on in the hearing room, and he himself could be seen and heard by the other parties, the judge and the witnesses. He was thus in a position to listen to the evidence given by the witnesses and grasp anything capable of invalidating their evidence, request leave to address the court and make any statement he considered necessary to his defence.

41. The accused could also confer privately with counsel, present in the hearing room, by means of a telephone line secured against any attempt at interception. Counsel for the defendant could also send a replacement to the videoconference room or, conversely, attend on his client personally and entrust the lawyer replacing him with his client's defence before the court.

42. Provision for an accused's participation in the proceedings by videoconference was in any event limited to specific cases and the relevant procedure laid down by statute.

43. In the light of the foregoing, the Government submitted that hearings by videoconference ensured effective and speedy justice without sacrificing the rights of the defence. The applicant had not, moreover, indicated how he would have altered his defence if he had been present during the proceedings or what obstacles he had encountered as a result of the videoconference. Nor had he alleged that it had been conducted in breach of the relevant domestic provisions.

(b) The applicant

44. The applicant contested the Government's arguments. He stated that from 2000 he had been subject to the restricted prison regime provided for in section 41 *bis* of the Prison Organisation Act and had not therefore been able to be present at the appeal hearings in the second set of criminal

proceedings, which he had followed by videoconference. Accordingly, there had been a violation of the rights of the defence and he had been discriminated against as compared with other detainees.

45. The applicant also submitted that his participation via a video link and his subjection to the restricted prison regime had “certainly influenced” the court, at least from the point of view of assessing whether he was a danger to society.

46. In the applicant's view, he could have been transferred to the hearing room without incurring any danger. He stated in that connection that very often the hearing rooms used to try Mafia-related offences were geographically close to prisons and could be reached without bringing the detainee outside. In the present case, he submitted, instead of following his trial by videoconference from L'Aquila Prison, he could have been imprisoned in Reggio di Calabria Prison.

47. The requirement of the accused's presence in the hearing room was even more important where, as in the present case, the appeal court ordered the reopening of the investigation and further evidence was adduced before it. The applicant pointed out in this connection that during the appeal hearings in the second set of criminal proceedings an informer had been present before the Reggio di Calabria Assize Court of Appeal.

48. Lastly, videoconferencing resulted in “foreseeable difficulties” due to defective links or poor voice transmission, which prevented speedy communication with defence counsel.

2. *The Court's assessment*

(a) **General principles**

49. The Court reiterates that the guarantees in Article 6 § 3 of the Convention are specific aspects of the right to a fair trial set forth in the first paragraph of this Article. Consequently, the applicant's various complaints will be examined under the two provisions taken together (see, among many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

50. 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*, 22 September 1994, § 33, Series A no. 297-A; *Poitrinol v. France*, 23 November 1993, § 35, Series A no. 277-A; and *De Lorenzo v. Italy* (dec.), no. 69264/01, 12 February 2004), both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses (see *Sejdovic v. Italy* [GC], no. 56581/00, § 92, ECHR 2006-II).

51. It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in

particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (see *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II, and *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 53, *Reports* 1997-III).

52. 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*, 12 February 1985, § 27, Series A no. 89, and *Sejdovic*, cited above, § 81).

53. Nor is it in dispute that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings (see *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A).

54. The personal appearance of the defendant does not take the same crucial significance for an appeal hearing as it does for the trial hearing (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168). The manner of application of Article 6 to proceedings before courts of appeal does, however, depend 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*, 26 May 1988, § 27, Series A no. 134, and *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 56, Series A no. 115).

55. 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 even though the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that there has been a public hearing at first instance (see, *inter alia*, *Monnell and Morris*, cited above, § 58 (leave to appeal), and *Sutter v. Switzerland*, 22 February 1984, § 30, Series A no. 74 (Court of Cassation)). However, in the latter case the underlying reason is that the courts

concerned do not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see *Ekbatani*, cited above, § 31).

56. Indeed, even where an appeal court has full jurisdiction to review the case on questions both of fact and of law, Article 6 does not always require a right to a public hearing and *a fortiori* a right to be present in person (see *Fejde v. Sweden*, 29 October 1991, § 31, Series A no. 212-C). Regard must be had in assessing this question to, *inter alia*, the special features of the proceedings involved and the manner in which the defence's interests were presented and protected before the appellate court, particularly in the light of the issues to be decided by it (see *Helmets v. Sweden*, 29 October 1991, §§ 31-32, Series A no. 212-A), and their importance for the appellant (see *Kremzow v. Austria*, 21 September 1993, § 59, Series A no. 268-B; *Kamasinski*, cited above, § 106 *in fine*; and *Ekbatani*, cited above, §§ 27-28).

57. 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 a convicted person is to be brought before an appeal court (see *Kamasinski*, cited above, § 107).

58. 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).

59. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol*, cited above, § 34). A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (see *Mariani v. France*, no. 43640/98, § 40, 31 March 2005). It is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala*, cited above, § 33, and *Pelladoah v. the Netherlands*, 22 September 1994, § 40, Series A no. 297-B).

60. While it confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance ...”, Article 6 § 3 (c) 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*, 24 May 1991, § 30, Series A no. 205). In this respect, it must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are

practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

61. Specifically, an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness (see *S. v. Switzerland*, 28 November 1991, § 48, Series A no. 220). The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments (see *Brennan v. the United Kingdom*, no. 39846/98, §§ 38-40, ECHR 2001-X). However, restrictions may be imposed on an accused's access to his lawyer if good cause exists. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (see *Öcalan v. Turkey* [GC], no. 46221/99, § 133, ECHR 2005-IV).

62. Lastly, it should be pointed out that, having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied (see *Van Mechelen and Others*, cited above, § 58).

(b) Application of these principles to the present case

63. The Court observes at the outset that the Reggio di Calabria Assize Court of Appeal had the task of examining the case as to the facts and the law and making a full assessment of the issue of the applicant's guilt or innocence. The applicant's participation in the appeal proceedings was therefore necessary under the terms of the Convention. Indeed, this has not been disputed by the Government.

64. The applicant did not claim that he had been denied the opportunity to follow the proceedings. He complained of the manner of his participation, which was organised by videoconference. He alleged that the use of this device created difficulties for the defence.

65. The Court notes that participation in the proceedings by videoconference is explicitly provided for in Italian law, namely, by Article 146 *bis* of the implementing provisions of the CCP (see paragraph 19 above). This provision specifies the cases in which videoconferencing can be used, the authority competent to order it and the technical arrangements for installing an audiovisual link. The Constitutional Court has held it to be compatible with the Constitution and the Convention

(see order no. 483 of 2002 and judgment no. 342 of 1999 – paragraphs 20-22 above).

66. Provided that use of this method is not barred by domestic law and international instruments on the question, it is authorised for taking evidence from witnesses or experts, possibly with the participation of a person being prosecuted, by texts other than the Convention, namely the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (see paragraphs 23-24 above). In addition, in its Resolution of 23 November 1995 on the protection of witnesses in the fight against international organised crime, the European Council stated: “one of the forms of protection to be envisaged is the possibility of giving evidence in a place other than that in which the person being prosecuted is situated through the use, if necessary, of audiovisual methods” (see paragraph 25 above).

67. Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.

68. In this connection the Court observes that in the present case the videoconferencing measure was applied in accordance with paragraph 1 *bis* of Article 146 *bis* of the implementing provisions of the CCP, as the applicant was subject to the restricted prison regime. The applicant has not shown that other persons in a similar situation to his were treated differently.

69. In the Court's opinion, it is undeniable that the transfer of such a prisoner entails particularly stringent security measures and a risk of absconding or attacks. It may also provide the detainee with an opportunity to renew contact with the criminal organisations to which he is suspected of belonging.

70. The Court has accepted that other considerations, including the right to a 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 need for a public hearing at stages in the proceedings subsequent to the trial at first instance (see, for example, *Helmers*, cited above, § 36; *Jan-Åke Andersson v. Sweden*, 29 October 1991, § 27, Series A no. 212-B; *Fejde*, cited above, § 31; and *Hoppe v. Germany*, no. 28422/95, § 63, 5 December 2002). The videoconferencing measure provided for by the Italian legislature was aimed, among other things, at reducing the delays incurred in transferring detainees and thus simplifying and accelerating criminal proceedings (see, *mutatis mutandis*, *Rippe*, cited above).

71. At the same time it should be pointed out that the applicant was accused of serious crimes related to the Mafia's activities. The fight against that scourge may, in certain cases, require the adoption of measures intended to protect, in particular, public safety and order and to prevent other criminal offences (see *Pantano v. Italy*, no. 60851/00, § 69, 6 November 2003). With its rigid hierarchical structure and very strict rules and its substantial power of intimidation based on the rule of silence and the difficulty in identifying its followers, the Mafia represents a sort of criminal opposition force capable of influencing public life directly or indirectly and of infiltrating the institutions (see *Contrada v. Italy*, 24 August 1998, § 67, *Reports* 1998-V). It is not therefore unreasonable to consider that its members may, even by their mere presence in the courtroom, exercise undue pressure on other parties in the proceedings, especially the victims and *pentiti*.

72. In the light of the foregoing, the Court considers that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement in judicial proceedings. It remains to be considered whether the arrangements for the conduct of the proceedings respected the rights of the defence.

73. The Court observes that, in accordance with paragraph 3 of Article 146 *bis* of the implementing provisions of the CCP, the applicant was able to take advantage of an audiovisual link with the hearing room, which allowed him to see the persons present and hear what was being said. He could also be seen and heard by the other parties, the judge and the witnesses, and had an opportunity to make statements to the court from his place of detention.

74. Admittedly, it is possible that, on account of technical problems, the link between the hearing room and the place of detention will not be ideal, and thus result in difficulties in transmission of the voice or images. In the present case, however, at no time during the appeal proceedings did the applicant or his defence counsel seek to bring to the attention of the court difficulties in hearing or seeing (see, *mutatis mutandis*, *Stanford*, cited above, § 27).

75. The Court points out, lastly, that the applicant's defence counsel had the right to be present where his client was situated and to confer with him confidentially. This was also a statutory right of defence counsel present in the hearing room (see paragraph 4 of Article 146 *bis* of the implementing provisions of the CCP). There is nothing to suggest that in the present case the applicant's right to communicate with his lawyer out of the earshot of third parties was infringed.

76. That being so, the Court finds that the applicant's participation by videoconference in the appeal hearings during the second set of criminal proceedings did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had an opportunity to exercise the rights and entitlements inherent in the concept of a fair trial, as enshrined in Article 6.

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

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

...

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

...

Done in French, and notified in writing on 5 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Boštjan M. Zupančič
President