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

COURT (CHAMBER)

CASE OF PAKELLI v. GERMANY

(Application no. 8398/78)

JUDGMENT

STRASBOURG

25 April 1983

In the Pakelli case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. L. LIESCH,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Mr. R. BERNHARDT,
Mr. J. GERSING,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 November 1982 and on 23 March 1983,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Federal Republic of Germany ("the Government"). The case originated in an application (no. 8398/78) against that State lodged with the Commission on 5 October 1978 under Article 25 (art. 25) of the Convention by a Turkish national, Mr. Lütfü Pakelli.

2. The Commission's request and the Government's application were lodged with the registry of the Court within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 14 May and the latter on 24 May 1982. The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); its purpose was to obtain a decision as to whether or not there had been a breach by the respondent State of its obligations under Article 6 para. 3 (c) (art. 6-3-c). The application invited the Court to hold that there had been no such breach.

* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules of Court entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 (art. 43) of the Convention), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 28 May 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. M. Zekia, Mr. L. Liesch, Mr. E. García de Enterría and Mr. B. Walsh (Article 43 (art. 43) in fine of the Convention and Rule 21 para. 4). Subsequently, Mr. L.-E. Pettiti and Mr. J. Gersing, substitute judges, took the place of Mr. Zekia and Mr. García de Enterría, who were prevented from taking part in the consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 para. 5), ascertained, through the Registrar, the views of the Agent of the Government and the Delegate of the Commission regarding the procedure to be followed. On 9 June 1982, having particular regard to their concurring statements, he concluded that there was no need for memorials to be filed. After consulting, through the Deputy Registrar, the Agent of the Government and the Delegate of the Commission, the President directed on 4 October that the oral proceedings should open on 25 November 1982.

On 2 November, the Registrar, on the President's instructions, requested the Commission and the Government to produce several documents; these were received on 5, 22 and 23 November.

5. The hearings were held in public at the Human Rights Building, Strasbourg, on 25 November. Immediately before they opened, the Chamber had held a preparatory meeting; it had authorised the Agent and the advocates of the Government and the person assisting the Delegate of the Commission to use the German language (Rule 27 paras. 2 and 3).

There appeared before the Court:

- for the Government:

Mrs. I. MAIER, Ministerialdirigentin
at the Federal Ministry of Justice, *Agent*,
Mr. P. RIESS, Ministerialrat
at the Federal Ministry of Justice,
Mr. W. STILLER, Regierungsdirektor
at the Federal Ministry of Justice, *Advisers*;

- for the Commission:

Mr. J.A. FROWEIN, *Delegate*,
Mr. N. WINGERTER, the applicant's lawyer
before the Commission, assisting the Delegate (Rule 29 para. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mrs. Maier and Mr. Riess for the Government and by Mr. Frowein and Mr. Wingerter for the Commission, as well as their replies to its questions. On 26 November, in response to a

request which he had made on the instructions of the President, the Registrar received certain documents from the Commission.

6. On 20 December, the Commission transmitted to the Court the applicant's claims under Article 50 (art. 50) of the Convention.

In accordance with the Orders and directions of the President, the registry received the following documents on this issue:

- on 20 January 1983, the comments of the Government;

- on 9 and 10 February 1983, the observations of the Delegate of the Commission and, through him, the observations of the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr. Pakelli, a Turkish national born in 1937, is currently living in Turkey; he was resident in the Federal Republic of Germany from 1964 to 1976.

8. The applicant arrived in the Federal Republic in February 1964 and was engaged by the firm of Audi-NSU at Neckarsulm. He stayed there for two and a half years. Subsequently, he had a succession of different occupations: mechanic in another firm at Neckarsulm, manager of a restaurant, independent insurance and building-loans broker. The last-mentioned activity, which consisted of negotiating and concluding, for example, life-insurance and savings contracts with Turkish workers, provided him, as he himself stated, with a very good monthly income.

9. On 31 May 1972, the Heilbronn District Court (Amtsgericht) imposed on him a suspended sentence of ten months' imprisonment for an offence against the Narcotics Act (Betaeubungsmittelgesetz). The Heilbronn Regional Court (Landgericht) dismissed the applicant's appeal on 12 March 1973.

These proceedings are not here in issue.

10. The criminal proceedings to which the present case relates began in 1974.

Mr. Pakelli was arrested on 7 May on suspicion of having committed a further offence against the Narcotics Act; on 4 September, he was granted the assistance of an officially appointed lawyer, namely Mr. Wingerter, of Heilbronn.

11. The trial opened before the Heilbronn Regional Court on 7 April 1976 and continued on 8, 14, 23 and 3O April. The applicant was defended by Mr. Wingerter and, at certain moments, by Mr. Rauschenbusch, a member of the same firm.

On 3O April, the court sentenced Mr. Pakelli to two years' and three months' imprisonment for an offence against the Narcotics Act and for tax evasion (Steuerhinterziehung): it was found to be proved that in the spring of 1972 the accused had illegally imported into Germany sixteen kilograms of cannabis resin of Turkish origin, hidden in his car.

12. On 3 May 1976, Mr. Wingerter filed an appeal on points of law (Revision). In his memorial of 5 August, setting out the grounds of appeal, he relied, inter alia, on Article 146 of the Code of Criminal Procedure, which provides that several accused persons may not be defended by one and the same lawyer (see paragraph 26 below). Mr. Wingerter explained that he had previously represented another person who on the occasion in question had, according to the Regional Court's findings, been Mr. Pakelli's accomplice.

Mr. Pakelli was released on 10 August 1976 and returned to Turkey.

On 22 October, the Federal public prosecutor (Generalbundesanwalt) moved that the appeal be held inadmissible on the ground that it had been filed by a defence counsel who, on his own admission, was not entitled to represent the applicant.

On 19 November, Mr. Rauschenbusch applied for leave to proceed out of time (Wiedereinsetzung in den vorigen Stand) in order to lodge a fresh appeal, which appeal he in fact filed at the same moment. On 21 December 1976, the Federal Court (Bundesgerichtshof) allowed the application; it had first sought the opinion of the public prosecutor who, without giving reasons, had indicated that he was in favour of such a course.

On 13 January 1977, the Regional Court granted Mr. Rauschenbusch's request of 19 November 1976 to be appointed official defence counsel to file the memorial setting out the grounds of appeal; two weeks later it relieved Mr. Wingerter of his duties.

13. In his memorial of 26 January 1977, which was thirty-four pages in length, Mr. Rauschenbusch complained solely of procedural errors (Verfahrensrugen). He listed nineteen, most of which concerned decisions of the Heilbronn Regional Court refusing to appoint an expert or to summon, question or have questions put to witnesses. The last of the alleged errors related to Article 146 of the Code of Criminal Procedure: recalling that Mr. Wingerter had previously defended another person whom the Regional Court had convicted, on 21 June 1974, as an accomplice of Mr. Pakelli, Mr. Rauschenbusch maintained that this recourse to a common defence counsel had been contrary to the interests of both accused (see paragraph 26 below).

14. In its observations in reply (Gegenerklärung) of 14 March 1977, the public prosecutor's office attached to the Regional Court submitted that the appeal was inadmissible. It considered that Article 146 prevented Mr. Rauschenbusch, just as it did Mr. Wingerter, from acting in the case as officially appointed lawyer. Mr. Rauschenbusch replied on 23 March. He

pointed out, amongst other things, that since he had never defended Mr. Pakelli's accomplice, Article 146 did not apply to him.

On 20 April, the Federal public prosecutor invited the above-mentioned office to comment on the complaints that had been made; in his view, it was at least doubtful whether the appeal was inadmissible de plano.

On 12 August, the Heilbronn public prosecutor's office filed its supplementary observations (weitere Gegenerklaerung), dated 1 August; it sent a copy to Mr. Rauschenbusch. In accordance with the practice in such matters (Instruction no. 162 of the Instructions on Criminal Procedure and Administrative Fines Procedure - Richtlinien für das Strafverfahren und das Bussgeldverfahren), the observations reproduced for each complaint the relevant documents in the case-file, in particular the requests made by the applicant's lawyer during the trial and the decisions taken by the Regional Court thereon. As regards Article 146 of the Code of Criminal Procedure, the public prosecutor's office referred to its earlier observations, including those of 14 March.

15. On application by the Federal public prosecutor's office, the Federal Court decided on 13 October 1977 to hold a hearing (Hauptverhandlung) on 29 November. Mr. Rauschenbusch and his client, who had returned to Turkey, were notified of this on 17 October.

16. On 24 October, Mr. Rauschenbusch applied to be officially appointed as the applicant's lawyer for the hearing of 29 November.

The President of the 1st Criminal Chamber (Strafsenat) of the Federal Court refused the application on the following day. In his view, an accused (Angeklagter) who was at liberty was not entitled to such an appointment for hearings in an appeal on a point of law; there was no legal requirement at that stage for him either to appear in person or to be represented by a lawyer (Article 350 paras. 2 and 3 of the Code of Criminal Procedure; see paragraph 22 below). As regards compliance with procedural rules (verfahrensrechtlich), an appeal court (Revisionsgericht) would examine the impugned decision on the basis of the written grounds of appeal; as regards any substantive complaints (bei sachlichrechtlicher Beanstandung), it would affect of its own motion a review that was not subject to any limitations. Furthermore, on this occasion neither the facts of the case nor the legal issues it raised justified the appointment requested.

In the objections (Gegenvorstellungen) he raised on 7 November 1977, Mr. Rauschenbusch cited a judgment of 19 October 1977 of the Federal Constitutional Court (see paragraph 22 below), holding that, in addition to the cases provided for by law, legal aid had to be granted for hearings in appeals on a point of law in "serious" ("schwerwiegend") cases if the person concerned was unable to pay a lawyer of his own choosing. And, he submitted, Mr. Pakelli was in such a situation, for a final conviction would lead to his expulsion. Mr. Rauschenbusch asked the Federal Court to indicate whether he should supply particulars of the applicant's assets in

order to substantiate (glaubhaft machen) the latter's lack of means. According to Mr. Rauschenbusch, Mr. Pakelli was obviously (offensichtlich) not in a position to pay a lawyer. He had come to the Federal Republic as a migrant worker and had returned to Turkey after spending a long (laengeren) period in Heilbronn prison. It was evident that he had no savings.

Mr. Rauschenbusch requested that, if need be, the matter be referred to the Chamber for decision.

On 10 November, the President of the 1st Criminal Chamber of the Federal Court confirmed his decision of 25 October refusing the application; he took the view that the above-mentioned judgment of 19 October 1977 did not concern a case that was comparable to the applicant's.

17. The hearing was held on 29 November 1977, in the absence of the applicant and of Mr. Rauschenbusch. According to the minutes, the Federal Court heard the judge acting as rapporteur and then the submissions (Ausfuhrungen) of an official of the Federal public prosecutor's office (Bundesanwaltschaft) in favour of rejecting the appeal. After deliberating in private, the court gave on the same day judgment dismissing the appeal.

The judgment held firstly that the appeal was admissible: Article 146 of the Code of Criminal Procedure did not prevent Mr. Rauschenbusch from representing Mr. Pakelli before the Federal Court. On the other hand, that Article had not been complied with at first instance since Mr. Wingerter had previously defended the applicant's accomplice. However, the Federal Court, referring to a judgment of its 3rd Criminal Chamber (see paragraph 26 below), added that an appeal on a point of law based on that Article could succeed only if the representation of several accused by one and the same lawyer proved to be really incompatible, in the circumstances of the case, with the duties of the defence. And on this occasion it had not been established that there was any conflict of interests.

The Federal Court then rejected the remainder of the complaints: some were examined in detail and held to be without foundation and the others were considered more briefly and held to be manifestly ill-founded.

The judgment, which was ten pages in length, was served on Mr. Rauschenbusch on 21 December 1977.

18. In January 1978, Mr. Wingerter lodged an appeal with the Federal Constitutional Court. Alleging a violation of Articles 1, 2, 3, 6, 20 and 103 para. 1 of the Basic Law, he repeated the submissions made by his colleague Mr. Rauschenbusch before the Federal Court on 7 November 1977 (see paragraph 16 above). He argued that it was only through a defence counsel that Mr. Pakelli could have availed himself of his right to be heard: he lived in Turkey, lacked financial resources and had an insufficient command of German. In addition, the legal issues involved were particularly complex, as was shown by the length of the memorial setting out the grounds of appeal (see paragraph 13 above) and the Federal Court's decision to hold a hearing.

Mr. Pakelli should therefore have been given the opportunity of stating his views on the submissions of the Federal public prosecutor's office. Again, the consequences of an unfavourable judgment would have been such as to make the official appointment of a lawyer essential: for the applicant, dismissal of the appeal meant his undoing in Germany and the breakdown of his marriage and family life.

Mr. Wingerter, who requested that legal aid be granted to the applicant, asked the Constitutional Court to indicate whether he should supply particulars of his client's assets in order to substantiate (glaubhaft machen) the latter's lack of means.

In a ruling given on 10 May 1978 by a panel of three judges, the Constitutional Court decided not to hear the appeal on the ground that it did not offer sufficient prospects of success. The Constitutional Court found nothing arbitrary in the decision of the President of the 1st Criminal Chamber of the Federal Court. Moreover, the case was not "serious", within the meaning of the above-mentioned judgment of 19 October 1977 (see paragraphs 16 above and 22 below). Finally, Mr. Pakelli could have remained in the Federal Republic of Germany and attended the hearing before the Federal Court, if need be with the assistance of an interpreter.

19. After his arrest on 7 May 1974, Mr. Pakelli had remained in custody until 10 August 1976, partly in detention on remand and partly to serve sentences that had been imposed on him.

II. RELEVANT LEGISLATION

1. Officially appointed lawyers

20. If the accused has not chosen a defence counsel, the trial court will appoint one in the following cases (listed in Article 140 para. 1 of the Code of Criminal Procedure):

- the trial at first instance is before the Court of Appeal (Oberlandesgericht) or the Regional Court;
- the accused is charged with an indictable offence (Verbrechen);
- the proceedings may result in the accused's being prohibited from exercising a profession;
- the accused is deaf or dumb;
- the accused has been interned for at least three months by order or with the approval of a court and has not been released at least two weeks before the opening of the trial;
- the question arises whether the accused should be detained for mental examination;
- the case concerns preventive detention proceedings (Sicherungsverfahren);

- a decision has been taken prohibiting the previous defence counsel from taking part in the proceedings.

An appointment will also be made in other cases, either by the court of its own motion or at the accused's request, if such a step appears necessary on account of the seriousness of the act in question, the factual or legal complexity of the case, or if it is obvious that the accused cannot conduct his own defence (Article 140 para. 2).

21. The official appointment of a lawyer by the trial court covers not only the proceedings before that court but also the written stage of any appeal on a point of law. If necessary, the trial court will make a special appointment for the latter stage.

22. An accused (Angeklagter) who is in custody does not have an enforceable right to attend hearings in an appeal on a point of law - whether before the appeal court or the Federal Court (Articles 121 and 135 of the Judicial Code - Gerichtsverfassungsgesetz) -, but he may be represented thereat by a lawyer (Article 350 para. 2). If he has not chosen a lawyer and is not brought to the hearing, the President of the court having jurisdiction will appoint one for him if he so requests (Article 350 para. 3).

An accused who is at liberty may appear in person or be represented by a lawyer at the appeal hearing (Article 350 para. 2). According to the case-law of the Federal Court, defence counsel can be assigned to him only under Article 140 para. 2 (see paragraph 20 above), since Article 140 para. 1 does not apply to hearings in an appeal on a point of law (Entscheidungen des Bundesgerichtshofes in Strafsachen, vol. 19, pp. 258-263).

Furthermore, the Federal Constitutional Court has held that defence counsel is to be appointed by the court of its own motion and at the expense of the State in serious cases (schwerwiegende Fälle) if the accused cannot pay for a lawyer of his own choosing (Entscheidungen des Bundesverfassungsgerichts, vol. 46, pp. 202-213).

2. Hearings in appeals on points of law

23. The court concerned may dispose of an appeal on a point of law without hearings in the following cases only:

- where it finds the appeal inadmissible (Article 349 para. 1 of the Code of Criminal Procedure);
- where, on a reasoned application by the public prosecutor's office, the court considers unanimously that the appeal is manifestly ill-founded (Article 349 para. 2); and
- where the court finds unanimously that an appeal filed in the interests of the accused is well-founded (Article 349 para. 4).

In all other cases the court has to hold a hearing before taking its decision (Article 349 para. 5); before the Federal Court, there are hearings in only ten per cent of the appeals on points of law lodged in criminal cases.

When the public prosecutor's office applies for an appeal to be rejected as manifestly ill-founded, it has to communicate its submissions and the reasons to the appellant; the latter may file a reply within two weeks (Article 349 para. 3).

24. Article 350 para. 1 requires that the accused and his lawyer be informed of the date and place of the hearing; if it is not possible to contact the former, notification to the latter is sufficient.

25. Appeal hearings open with the rapporteur's address; this is followed by the statements and submissions of the public prosecutor's office, the accused and his defence counsel. The appellant is heard first and the last address to the court is always made by the accused (Article 351).

3. "Common defence counsel" (gemeinschaftliche Verteidigung)

26. According to the former version of Article 146 of the Code of Criminal Procedure, which was in force until 31 December 1974, several accused could be represented by a single counsel if this was not contrary to the interests of the defence. As it was often difficult for courts to detect or establish such conflicts of interests, Article 146 was modified in 1974: the new text, which has been applicable since 1 January 1975, does not allow several accused to be defended by a common defence counsel.

However, the Federal Court (3rd Criminal Chamber) held on 27 February and 13 October 1976 that an appeal on a point of law based on a violation of Article 146 could succeed only if recourse to a common defence counsel was in fact contrary to the interests of the defence (Entscheidungen des Bundesgerichtshofes in Strafsachen, vol. 26, pp. 291-298; vol. 27, pp. 22-24). The 1st Criminal Chamber followed these precedents in its judgment of 29 November 1977 in the present case (see paragraph 17 above). The Government stated that this interpretation has since been accepted by all the Criminal Chambers of the Federal Court.

PROCEEDINGS BEFORE THE COMMISSION

27. In his application lodged with the Commission on 5 October 1978 (no. 8398/78), Mr. Pakelli claimed to be the victim of a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, 6-3-c) of the Convention. He alleged that he had lacked the means to pay for defence counsel of his own choosing and that the interests of justice required that a lawyer should have been appointed to represent him at the hearing before the Federal Court. He also asserted that he had not been able to return to the Federal Republic of Germany to present his own case, since he had neither a residence permit nor the necessary money to pay an interpreter.

On 16 May 1980, the Commission granted Mr. Pakelli free legal aid on the basis of a declaration of means dated 9 September 1979 and confirmed by certificates from the competent authorities.

On 7 May 1981, the Commission declared the application admissible in so far as it related to the rejection of the applicant's request that a lawyer be officially appointed for the hearing before the Federal Court; it declared the other complaints inadmissible on the ground of non-exhaustion of domestic remedies (Articles 26 and 27 para. 3 (art. 26, art. 27-3) of the Convention).

In its report of 12 December 1981 (Article 31), the Commission expressed the unanimous opinion that the applicant had been the victim of a violation of Article 6 para. 3 (c) (art. 6-3-c) and, by eleven votes to one, that it was not required to determine whether there had also been breach of the right to a fair trial, within the meaning of Article 6 para. 1 (art. 6-1).

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

28. At the close of the hearings of 25 November 1982, the Government invited the Court "to hold that there has not been a violation of Article 6 paras. 3 (c) and 1 (art. 6-3-c, art. 6-1) of the Convention in the applicant's case".

AS TO THE LAW

29. The applicant complained of the refusal of the Federal Court, in proceedings concerning an appeal on points of law (Revision), to appoint Mr. Rauschenbusch as official defence counsel for the hearings of 29 November 1977 before that court; he alleged that this constituted a violation of paragraph 3 (c) (art. 6-3-c), and also of paragraph 1, of Article 6 (art. 6-1) of the Convention.

It was not disputed that these provisions were applicable in the present case and the Court takes this point as established (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, pp. 13-15, paras. 25 and 26, and the Artico judgment of 13 May 1980, Series A no. 37, pp. 15-18, paras. 31-38). However, as the Government rightly pointed out, the manner in which those paragraphs are to be applied depends on the special features of the proceedings involved (see the above-mentioned Delcourt judgment, ibid.).

I. THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (c) (art. 6-3-c)

30. Article 6 para. 3 (c) (art. 6-3-c) reads as follows:

> "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;
>
> ..."

Before the Commission, the Government argued that Article 6 para. 3 (c) (art. 6-3-c) did not require the grant of free legal assistance in the present case since Mr. Pakelli could have appeared in person at the Federal Court's hearing. Although they did not dwell on this point before the Court, they repeated that the applicant could have presented his own case to the Federal Court.

31. Article 6 para. 3 (c) (art. 6-3-c) guarantees three rights to a person charged with a criminal offence: to defend himself in person, to defend himself through legal assistance of his own choosing and, on certain conditions, to be given legal assistance free. To link the corresponding phrases together, the English text employs on each occasion the disjunctive "or"; the French text, on the other hand, utilises the equivalent - "ou" - only between the phrases enouncing the first and the second right; thereafter, it uses the conjunctive "et". The "travaux préparatoires" contain hardly any explanation of this linguistic difference. They reveal solely that in the course of a final examination of the draft Convention, on the eve of its signature, a Committee of Experts made "a certain number of formal corrections and corrections of translation", including the replacement of "and" by "or" in the English version of Article 6 para. 3 (c) (art. 6-3-c) (Collected Edition of the "Travaux préparatoires", vol. IV, p. 1010). Having regard to the object and purpose of this paragraph, which is designed to ensure effective protection of the rights of the defence (see the above-mentioned Artico judgment, Series A no. 37, p. 16, para. 33; see also, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, para. 30, and the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, para. 48), the French text here provides more reliable guidance; the Court concurs with the Commission on this point. Accordingly, a "person charged with a criminal offence" who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require.

Thus Mr. Pakelli, although authorised by German law to appear in person before the Federal Court, could claim such assistance to the extent that the conditions laid down by Article 6 para. 3 (c) (art. 6-3-c) were satisfied.

A. Absence of sufficient means to pay for legal assistance

32. The Government argued as follows. There was nothing to substantiate the applicant's assertion that he did not have sufficient means to pay for legal assistance of his own choosing; on the contrary, he had himself stated before the Regional Court that he earned a very good income in the Federal Republic of Germany; according to the findings contained in the judgment of 30 April 1976 (see paragraph 11 above), he also made money from his drug traffic activities; in addition, he had opened a business shortly after returning to Turkey.

The Commission considered that the Government were not entitled at this stage to challenge the applicant's assertions. It pointed out firstly that under German law the grant of free legal assistance was not conditional on the indigence of the litigant in question; secondly, Mr. Rauschenbusch had offered before the hearings to supply a certificate of indigence (see paragraph 16 above), but the Federal Court did not accept this offer.

33. The Court is unable to agree with the Commission on this point. The question of Mr. Pakelli's means played no part in the decision complained of: the refusal of the request for the appointment of Mr. Rauschenbusch was based solely on the fact that, in the opinion of the President of the 1st Criminal Chamber of the Federal Court, the case did not fall within the category of cases for which German law prescribed the assistance of a defence counsel (see paragraph 16 above). Accordingly, the Government cannot be held to have lost their entitlement to contest before the Convention institutions, in the context of Article 6 para. 3 (c) (art. 6-3-c), the applicant's claim that he was indigent.

34. It has nevertheless to be recognised, as was done by the Commission's Delegate, that it is in practice impossible to prove today that in 1977 Mr. Pakelli did not have the means to pay his lawyer. However, there are some indications that this was so. Thus, there is no reason to suppose that Mr. Rauschenbusch would have been unable to obtain the above-mentioned certificate; in this connection, it has to be noted that his client had spent two years in custody in the Federal Republic of Germany before returning to Turkey in 1976 (see paragraphs 15 and 19 above). In addition, Mr. Pakelli supplied to the Commission in 1979 a statement of means and certificates from the competent Turkish authorities, the latter being based on the declaration of assets and income which he had made for tax purposes the previous year; it appeared from these documents that he was engaged in business on a small scale and that his financial situation was modest. These data - which, moreover, were not disputed by the

Government - led the Commission to grant him free legal aid (see paragraph 27 above).

Admittedly, these particulars are not sufficient to prove beyond all doubt that the applicant was indigent at the relevant time; however, having regard to his offer to the Federal Court to prove his lack of means and in the absence of clear indications to the contrary, they lead the Court to regard the first of the two conditions contained in Article 6 para. 3 (c) (art. 6-3-c) as satisfied.

B. The interests of justice

35. According to the applicant and the Commission, the interests of justice required that Mr. Rauschenbusch be officially appointed as the applicant's lawyer for the hearings of 29 November 1977 before the Federal Court.

In contesting this view, the Government made the following points. Mr. Pakelli had had a defence counsel during the written stage of the proceedings; as for the hearings, their object was circumscribed by the grounds of his appeal on points of law: since he was challenging the judgment of 30 April 1976 solely on account of alleged procedural errors, he could neither raise new complaints nor supplement his memorial setting out the grounds of appeal by referring to other questions of fact. Only legal arguments and submissions could have been put to the court at the hearings. The issues involved were not complicated and it could not be said that their determination would entail serious consequences, for the proceedings could not have led to any aggravation of the decision complained of. Moreover, Mr. Pakelli could have appeared in person. Finally, the Commission had misunderstood the role of the Federal public prosecutor's office in appeals on a point of law. That role consisted of examining the grounds of appeal from a completely independent standpoint and, in particular, of ensuring that the law was uniformly applied and that case-law remained consistent; it was thus very similar to the role of the Procureur g{n{ral attached to the Belgian Court of Cassation (see the above-mentioned Delcourt judgment).

36. The Court notes firstly, as did the Commission, that this was one of the rare cases in which the Federal Court held a hearing: this occurs in only ten per cent of the appeals on a point of law in criminal cases (see paragraph 23 above). In fact, on the present occasion the Federal Court was obliged to arrange for oral proceedings since the appeal proved to be admissible and the public prosecutor's office had not applied for it to be rejected as manifestly ill-founded (Article 349 of the Code of Criminal Procedure; see paragraph 23 above). This shows that the hearing could have been of importance for the decision to be given. It therefore became necessary, in order to ensure a fair trial, to comply with the rule that oral proceedings shall take place with the participation of both parties (débat contradictoire).

37. It is true that, since the applicant confined himself to alleging that there had been procedural errors (Articles 344 para. 2 and 352 para. 1 of the Code of Criminal Procedure), the Federal Court had solely to give a ruling on the grounds which he had invoked and later set out at length in his memorial (see paragraph 13 above). However, Mr. Pakelli would have been able, had his lawyer appeared before the court, to explain his complaints, to supply further particulars thereof if need be and to develop his written arguments. He would, for example, have been able to comment on the statement made by the judge acting as rapporteur (Article 351 of the Code of Criminal Procedure; see paragraph 25 above). Such possibilities of intervening in the course of the proceedings would have been all the more valuable because the appeal, itself a voluminous document, concerned nineteen different points.

Again, as the Commission rightly pointed out, one of the complaints made related to the application of the new version of Article 146 of the Code of Criminal Procedure. Admittedly, the 3rd Criminal Chamber of the Federal Court had already decided, in 1976, that an appeal on a point of law based on this Article could succeed only if recourse to a common defence counsel had in fact been contrary to the interests of the defence (see paragraph 26 above). Moreover, Mr. Rauschenbusch did not contest this interpretation. However, he endeavoured to demonstrate that there had been a conflict of interests in the present case. In addition, it could be predicted that the judgment that the Federal Court was going to deliver would not be without importance for the development of case-law. The Government themselves stated that the case-law on this point has remained constant since the judgment of 29 November 1977 dismissing the applicant's appeal; they recognised that oral argument on the interpretation of Article 146 would have been of some value.

38. In these circumstances, it goes without saying that the personal appearance of the appellant would not have compensated for the absence of his lawyer: without the services of a legal practitioner, Mr. Pakelli could not have made a useful contribution to the examination of the legal issues arising, and in particular the issue relating to Article 146 of the Code of Criminal Procedure. The Court concurs with the Commission on this point.

39. Finally and above all, the appeal proceedings in the present case were not conducted with the participation of both parties, in any event at the stage of the hearings. Even during the written phase, only the public prosecutor's office attached to the Heilbronn Regional Court replied to the appeal lodged by Mr. Pakelli, who was then still represented by Mr. Rauschenbusch, and it made no submissions on the merits of the grounds invoked (see paragraph 14 above). As regards the Federal public prosecutor's office - and irrespective of its precise role in appeal proceedings -, German law enabled the appellant to contest its submissions (Article 349 para. 3 of the Code of Criminal Procedure; see paragraph 23 above). Accordingly, if the Federal

Court had not decided to hold a hearing, the Federal public prosecutor's office would have filed its submissions in writing and communicated them to the applicant and the latter, as he rightly pointed out, would thus have had an opportunity of studying them and, if need be, of replying thereto.

This opportunity of refuting the public prosecutor's office's arguments should therefore have been made available to Mr. Pakelli at the hearings also. By refusing to provide him with a defence counsel, the Federal Court deprived him, during the oral stage of the proceedings, of the opportunity of influencing the outcome of the case, a possibility that he would have retained had the proceedings been conducted entirely in writing.

40. In these circumstances, the Court, like the Commission, considers that the interests of justice did require that the applicant be granted legal assistance for the hearings before the Federal Court.

C. Conclusion

41. Accordingly, there has been a violation of Article 6 para. 3 (c) (art. 6-3-c) of the Convention.

II. THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

42. The applicant also invoked, as regards the same facts, paragraph 1 of Article 6 (art. 6-1), which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Government did not put forward any separate arguments on this issue.

In company with the Commission, the Court would recall that the provisions of Article 6 para. 3 (c) (art. 6-3-c) represent specific applications of the general principle of a fair trial, stated in paragraph 1 (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 30, para. 56). Accordingly, the question whether paragraph 1 (art. 6-1) was observed has no real significance in the applicant's case; it is absorbed by the question whether paragraph 3 (c) (art. 6-3-c) was complied with. The finding of a breach of the requirements of paragraph 3 (c) (art. 6-3-c) dispenses the Court from also examining the case in the light of paragraph 1 (art. 6-1) (see, mutatis mutandis, the above-mentioned Deweer judgment, Series A no. 35, pp. 30-31, para. 56).

III. THE APPLICATION OF ARTICLE 50 (art. 50)

43. Mr. Pakelli sought just satisfaction under Article 50 (art. 50). In the first place, he requested the Court to annul the Federal Court's judgment of 29 November 1977 and to direct the Government to issue an official disapproval of certain passages therein, which he regarded as racist or discriminatory and therefore unacceptable. In the second place, he asked for compensation of such amount as the Court considered fit for his alleged non-pecuniary loss. Finally, he claimed reimbursement of the costs and expenses entailed by the proceedings before the Federal Constitutional Court, which he quantified at DM 668.96.

44. The Government submitted that these various claims should be rejected. They maintained that the applicant had not been prejudiced in any way by the Federal Court's refusal to appoint a lawyer for him officially and that his criticisms of the reasons for that court's decision were unwarranted. As regards the costs and expenses of the proceedings before the Constitutional Court, the Government contended that it was not established that Mr. Pakelli had had to bear them; they also stated that the amount claimed did not exactly correspond to the scale applicable at the relevant time.

45. The Court considers that in the circumstances the question is ready for decision (Rule 50 para. 3, first sentence, of the Rules of Court).
The Court notes, as regards the first claim, that it is not empowered under the Convention either to annul the Federal Court's judgment or to direct the Government to disavow the passages complained of (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 25, para. 58, and the Dudgeon judgment of 24 February 1983, Series A no. 59, p. 8, para. 15). Without expressing any opinion on those passages, it adds that they cannot be regarded as the consequence of the breach of Article 6 para. 3 (c) (art. 6-3-c).

46. As the Government rightly pointed out, Mr. Wingerter has neither established the existence of the alleged non-pecuniary loss nor even indicated the nature thereof. There is nothing to show that the absence of a defence counsel left Mr. Pakelli with a distressing sensation of isolation, confusion and neglect (see the above-mentioned Artico judgment, Series A no. 37, p. 21, para. 47); in fact, this seems unlikely since he had returned to Turkey as early as the month of August 1976. In any event, the finding of a violation, contained in the present judgment, has already furnished sufficient redress for the alleged non-pecuniary loss (see, mutatis mutandis, the Le Compte, Van Leuven and De Meyere judgment of 18 October 1982, Series A no. 54, p. 8, para. 16).

47. The costs and expenses whose reimbursement was claimed were incurred in order to try to have the breach of the requirements of Article 6 para. 3 (c) (art. 6-3-c) rectified by the Federal Constitutional Court (see the

above-mentioned Dudgeon judgment, Series A no. 59, p. 9, para. 20). Moreover, this was not contested by the Government. However, they claimed that these items had been disbursed by the applicant's counsel and not by the applicant himself, since Mr. Wingerter had waived repayment and was moreover, on account of statutory limitation, no longer entitled to recover the debt due to him.

In fact, Mr. Pakelli has not so far paid his lawyer for representing him before the Federal Constitutional Court: Mr. Wingerter did not send him a note of his fees until 7 February 1982 and he stated that it would be in order to defer payment, having regard to the applicant's financial difficulties. In a memorial of 16 June 1980 filed with the Commission, Mr. Wingerter had pointed out that he had not yet received any fees for the proceedings in question and that he had not asked for any ("ein Honorar gar nicht erst gefordert") since he knew his client to be without means.

Nevertheless, neither these statements nor the other documents before the Court show sufficiently clearly that there has been any waiver. Indeed, as the Commission's Delegate rightly pointed out, it is not surprising that Mr. Wingerter, knowing his client's financial circumstances, decided not to send him a note of his fees at an earlier date (see the X v. the United Kingdom judgment of 18 October 1982, Series A no. 55, p. 18, para. 24). The Court would here point out, as did the Delegate, that in a human rights case a lawyer will be acting in the general interest if he agrees to represent or assist a litigant even if the latter is not in a position to pay him immediately.

As regards the argument based on the statutory limitation of Mr. Wingerter's right to recover the debt due to him, this is not a matter of public policy and could be relied on only by Mr. Pakelli himself.

Deciding on an equitable basis, the Court finds that the sum of DM 668.96 claimed for fees and expenses is reasonable.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraph 3 (c) of Article 6 of the Convention (art. 6-3-c);

2. Holds that it is not necessary also to examine the case under paragraph 1 of Article 6 (art. 6-1);

3. Holds that the respondent State is to pay to the applicant, in respect of legal costs and expenses, the sum of six hundred and sixty-eight German marks and ninety-six pfennigs (DM 668.96) and rejects the remainder of the claim for just satisfaction.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-fifth day of April, one thousand nine hundred and eighty-three.

Gérard WIARDA
President

Marc-André EISSEN
Registrar