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

CASE OF VAN GEYSEGHEM v. BELGIUM

(Application no. 26103/95)

JUDGMENT

STRASBOURG

21 January 1999

In the case of Van Geyseghem v. Belgium,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr B. CONFORTI,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mr C. BÎRSAN,
Mr M. FISCHBACH,
Mrs H.S. GREVE,
Mr R. MARUSTE,
Mrs S. BOTOUCHAROVA,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 25 November 1998 and 14 January 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the Belgian Government ("the Government") on 9 April 1998 and by Mrs Nicole Van Geyseghem, a Belgian national ("the applicant"), on 10 April 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 26103/95) against the Kingdom of Belgium

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

lodged by Mrs Van Geyseghem with the European Commission of Human Rights ("the Commission") under former Article 25 on 25 October 1994.

The Government's application referred to former Articles 44 and 48, and that of the applicant to former Article 48, as amended by Protocol No. 9[1], which Belgium had ratified. The object of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 §§ 1 and 3 (c) of the Convention.

2. On 28 April 1998 the applicant designated the lawyer who would represent her (Rule 31 of former Rules of Court B[2]).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 7 July 1998 and the Government's memorial on 8 July 1998. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mrs F. Tulkens, the judge elected in respect of Belgium (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm and Mr C.L. Rozakis, the Vice-Presidents of the Court, and Sir Nicolas Bratza and Mr M. Pellonpää, Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr B. Conforti, Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mr R. Türmen, Mr C. Bîrsan, Mr M. Fischbach, Mrs H.S. Greve, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

5. On 12 November 1998 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

Notes by the Registry

1. Protocol No. 9 came into force on 1 October 1994 and was repealed by Protocol No. 11.
2. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

6. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr E. Bieliūnas, to take part in the proceedings before the Grand Chamber.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 25 November 1998.

There appeared before the Court:

(a) *for the Government*
Mr J. LATHOUWERS, Deputy Legal Adviser,
Head of Division, Ministry of Justice, *Agent*,
Ms B. VANLERBERGHE, of the Brussels Bar, *Counsel*;

(b) *for the applicant*
Mr R. VERSTRAETEN, of the Brussels Bar, *Counsel*;

(c) *for the Commission*
Mr E. BIELIŪNAS, *Delegate*.

The Court heard addresses by Mr Bieliūnas, Mr R. Verstraeten and Ms Vanlerberghe.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Nicole Van Geyseghem, a nursery nurse born in 1942, is a Belgian citizen. At the time of lodging her application, she was living in Hoeilaart (Belgium).

9. The applicant and four others were prosecuted for importing drugs from Brazil on three occasions between 22 June 1986 and 21 March 1987, including 2.33 kilograms of cocaine on 20 March 1987, the date on which the applicant was arrested.

A. Proceedings in the Brussels Criminal Court

10. On 10 December 1992 the Brussels Criminal Court convicted the applicant *in absentia* (she had failed to appear even though she had been properly served with a summons) and sentenced her to four years'

imprisonment and a fine of 180,000 Belgian francs (BEF). The court also ordered her immediate arrest on the ground that there was reason to believe that she would attempt to evade enforcement of her sentence.

11. On 26 April 1993 Mrs Van Geyseghem applied to the same court to set aside its judgment.

12. She attended the hearing of her application. On 7 May 1993 the Brussels Criminal Court, after adversarial proceedings, sentenced her to three years' imprisonment and a fine of BEF 60,000. The court held that there was no need to order the applicant's immediate arrest as there was no cause to fear that she would attempt to evade enforcement of her sentence.

13. On 21 May 1993 both the applicant and the prosecution appealed.

B. Proceedings in the Brussels Court of Appeal

14. Although the summons to appear had been served on her in accordance with the proper procedure, Mrs Van Geyseghem did not attend the appeal hearing and neither did a lawyer on her behalf. On 14 June 1993 the Brussels Court of Appeal, ruling in the applicant's absence, upheld the judgment of 7 May 1993 in its entirety. It also ordered the applicant's immediate arrest on the ground that there was reason to believe that she would attempt to evade enforcement of her sentence in view of its length and of the fact that she had failed to appear both at the appeal hearing and at the original trial.

15. On 26 August 1993 the applicant applied to set aside the Court of Appeal's judgment. Her application was served on the prosecution by means of a bailiff's writ, in which the hearing was set down for 13 September 1993.

16. The applicant did not attend the hearing in person. Her counsel, Mr Verstraeten, appeared and, relying on Article 185 § 2 of the Code of Criminal Procedure (see paragraph 20 below), stated that he was representing his client and would be making submissions to the effect that the prosecution had become time-barred between the delivery of the Court of Appeal's judgment *in absentia* and the date on which the application to set it aside was to be heard by the Court of Appeal. The court refused Mrs Van Geyseghem's counsel leave to address it and make submissions on his client's behalf. At counsel's request, the following was entered in the record of the hearing of 13 September 1993:

> "The Court refuses Mr Rafael Verstraeten, of the Brussels Bar, leave to represent the appellant and to make submissions on her behalf to the effect that the prosecution is time-barred."

17. In a judgment of 4 October 1993 the Court of Appeal declared the application void on the following grounds:

"Although the application has been filed in the proper form and within the statutory time, the appellant has failed to attend the hearing on the date set by her and has not adduced any evidence of *force majeure* preventing her from attending in person."

C. Proceedings in the Court of Cassation

18. The applicant lodged an appeal on points of law against the judgment of 4 October 1993. In her pleading she argued that the Court of Appeal's refusal to grant her counsel leave to make submissions on her behalf had infringed her defence rights and Article 185 § 2 of the Code of Criminal Procedure, which provides that the accused may appear by counsel "where the hearing concerns only an objection [or] a matter unconnected with the merits of the case …". In written submissions of 16 March 1994 summarising his address, the applicant's counsel referred to the European Court's judgment in the Poitrimol v. France case (23 November 1993, Series A no. 277-A).

19. The Court of Cassation dismissed her appeal in a judgment of 4 May 1994 in the following terms:

"The appellant submits that her counsel attended the hearing and that the Court of Appeal, in refusing him leave to represent her and make submissions on her behalf to the effect that the prosecution was time-barred – that is, to raise 'an objection unconnected with the merits of the case' – infringed Articles 185, 188 and 211 of the Code of Criminal Procedure and the general principle of law which requires that the rights of the defence be respected;

Where a trial or appeal court is dealing with charges which may attract a custodial sentence as the principal sentence, paragraph 2 of the above-mentioned Article 185 allows an accused to appear by counsel only 'where the hearing concerns an objection, a matter unconnected with the merits of the case or the civil interests';

Within the meaning of that provision, a claim that an action is time-barred is neither an objection nor a matter unconnected with the merits;

The ground of appeal has no basis in law."

II. RELEVANT DOMESTIC LAW

20. The relevant Articles of the Code of Criminal Procedure read as follows:

Article 185

"1. The party claiming civil damages and the party liable to pay such damages shall attend the hearing or appear by counsel.

2. The accused shall attend the hearing. However, the accused may appear by counsel in the case of minor offences which do not attract a custodial sentence or where the hearing concerns an objection, a matter unconnected with the merits of the case or the civil interests.

The Criminal Court may still grant leave for the accused to appear by counsel where he provides evidence that he is unable to attend.

3. In any event, the Criminal Court may order the accused to attend. No appeal shall lie against such a decision.

The judgment in which the accused is ordered to attend shall be served on the party concerned on an application by the prosecution, together with a summons to attend on the date determined by the Criminal Court. Where the accused fails to attend, the court shall determine the matter in his absence."

Article 186

"If the accused fails to attend the hearing, he shall be tried in his absence."

Article 187

"An accused who is convicted in his absence may lodge an application to set aside the judgment within fifteen days of the date on which it was served on him."

Article 188

"An application to set aside shall automatically be effective as a summons to attend the first hearing following the expiry of fifteen days, or three days where the party lodging the application is in custody.

The application shall be void if the party who lodged it fails to attend the hearing. Save as hereinafter provided, no appeal by the party who lodged the application to set aside shall lie against the Criminal Court's ruling.

Where appropriate, the court may make an interim award. Such an award shall be enforceable notwithstanding an appeal."

Article 208

"A judgment on appeal delivered *in absentia* may be challenged by means of an application to set aside made under the same procedure and within the same time-limits as a judgment delivered *in absentia* by the Criminal Court.

The application shall automatically be effective as a summons to attend the first hearing following the expiry of fifteen days, or three days where the party lodging the application is in custody.

The application to set aside shall be void if the party who lodged it fails to attend the hearing. No appeal by the party who lodged the application shall lie against the Court of Appeal's ruling other than an appeal on points of law to the Court of Cassation."

Article 211

"The provisions of the preceding Articles which relate to the formalities of judicial investigations, the nature of evidence, the form, authenticity and signature of final judgments delivered at first instance, orders to pay costs and the penalties applicable under those Articles shall also apply to judgments delivered on appeal."

21. Where an application to set aside has been declared void on the ground that the applicant failed to attend the hearing, the judgment which records the fact will itself be a judgment given *in absentia*. If the applicant again fails to attend the hearing, a second application by him to set aside will be inadmissible, in accordance with the maxim "*opposition sur opposition ne vaut*" (an application to set aside a judgment delivered *in absentia* on an application to set aside an earlier judgment delivered *in absentia* is ineffective). Were the convicted person able to lodge a further application to set aside the decision of the court which refused *in absentia* his application to set aside an initial decision also delivered *in absentia*, he could, by failing to attend and lodging one application after another, indefinitely hinder the enforcement of any conviction and thus paralyse the administration of justice.

PROCEEDINGS BEFORE THE COMMISSION

22. Mrs Van Geyseghem applied to the Commission on 25 October 1994. She complained that she had been denied a fair hearing and that her defence rights had been infringed in that, because of her failure to appear, she had been unable to be represented by counsel in the Brussels Court of Appeal when it had heard her application to set aside her conviction *in absentia* of 14 June 1993. She relied on Article 6 §§ 1 and 3 (c) of the Convention.

23. The Commission (Second Chamber) declared the application (no. 26103/95) admissible on 9 April 1997. In its report of 3 December 1997 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 6 (fourteen votes to one). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

24. In their memorial the Government asked the Court to hold that, in view of the special features of Belgian law, Article 6 of the Convention had not been violated.

25. Counsel for the applicant asked the Court to

"(a) hold that Article 6 §§ 1 and 3 (c) of the Convention had been violated; and

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

(b) afford the applicant just satisfaction in accordance with Article [41] of the Convention".

THE LAW

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

26. Mrs Van Geyseghem complained that the Brussels Court of Appeal had refused to grant her counsel leave, in her absence, to defend her at the hearing of her application to set aside a judgment it had given earlier. She alleged a breach of paragraphs 1 and 3 (c) of Article 6 of the Convention, which provide:

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

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

…

(c) to defend himself in person or through legal assistance of his own choosing …

…"

The Government contested that submission; the Commission accepted it.

27. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see, among other authorities, the Poitrimol v. France judgment of 23 November 1993, Series A no. 277-A, p. 13, § 29).

28. The Court notes at the outset that the issue in the present case is not whether a trial in the accused's absence is compatible with Article 6 §§ 1 and 3 (c); the applicant's complaint was not that the appeal hearing of 13 September 1993 (see paragraphs 15-16 above) was held in her absence – she had not wished to avail herself of her right to attend – but that the Brussels Court of Appeal had decided the case without allowing her counsel to defend her and, in particular, make submissions on her behalf to the effect that the prosecution was time-barred. Mr Verstraeten, the lawyer whom she had instructed to defend her, had attended the hearing with the intention of putting her case. He had been prevented from doing so.

29. The Court also notes that since the incident occurred during the hearing of her application to set aside an appellate court's judgment, Mrs Van Geyseghem had no further opportunity of having arguments of law and fact presented at second instance in respect of the charge against her. At the time of the hearing in the Brussels Court of Appeal on 13 September 1993 the applicant was therefore in a situation comparable to the one considered by the Court in the Poitrimol v. France case (see the judgment cited above, p. 15, § 35) and the Lala and Pelladoah v. the Netherlands cases (see the judgments of 22 September 1994, Series A no. 297-A and B, p. 13, § 31, and p. 34, § 38, respectively).

30. The applicant pointed out, firstly, that in its judgments in the Lala and Pelladoah cases the Court had held that the accused's right to be defended by counsel was of crucial importance for the fairness of the criminal justice system and that this interest should at all events prevail. The fact that under Belgian law a person convicted *in absentia* could apply to have a conviction set aside could not justify reaching a different decision from the one given by the Court in the above cases. The Court's finding that no such remedy existed at the appeal stage in Netherlands law had not been decisive. In any event, even if the possibility of applying to set aside a conviction were to be regarded as essential for determining whether an accused enjoyed the right to be defended, it would not – in the applicant's view – be decisive in the instant case, since it was precisely in proceedings to set aside that the Brussels Court of Appeal had refused to allow Mr Verstraeten to represent her.

Secondly, the applicant continued, the mere fact that an accused did not appear at trial and exercised the right afforded by the Code of Criminal Procedure to apply to set aside a decision given *in absentia* did not amount to an abuse of process. Nor had the courts held in their decisions in her own case that her conduct amounted to such an abuse. The functioning of the courts was protected from any such attempts at obstruction because Belgian law did not permit a second application to set aside (see paragraph 21 above).

Lastly, contrary to the Government's assertions, the Court of Appeal, which had ruled that the application to set aside was void, could not have considered whether the prosecution was time-barred. According to Belgian case-law and legal theory, once an application to set aside had been ruled invalid, such an issue could not be considered.

31. The Government submitted that the differences between Netherlands and Belgian law justified reaching a different decision from the one given by the Court in the Lala and Pelladoah cases cited above. Unlike Netherlands law, which did not generally make it compulsory for an accused to attend his trial and limited the possibilities of applying to set aside decisions delivered *in absentia*, Belgian law allowed an application to be made to set aside any conviction *in absentia* and required the accused's personal attendance, save in cases in which the law allowed representation by counsel. The accused's attendance facilitated the proper administration of justice, was necessary to protect the interests of victims and witnesses, allowed sentences to be adapted to the individual offender and was essential if the sentence was to have a deterrent effect. Giving an accused a right to evade justice would seriously undermine the authority of the courts.

In both the aforementioned cases, the Government continued, the Court had weighed the importance of an accused's personal attendance against that of his being adequately defended and represented by a lawyer. The Belgian system struck a proper balance between the various interests requiring protection. Mrs Van Geyseghem had had four opportunities of submitting her defence. It had depended entirely on her whether she had the advantage of adversarial procedure on appeal; but she had repeatedly and deliberately obstructed the holding of adversarial proceedings and her conduct had amounted to an abuse of process. The right to be defended by a lawyer could not be absolute and therefore could not be relied upon if the defendant refused to appear on three occasions, as had happened in the instant case. In any event, a court giving judgment *in absentia* was under a duty to investigate the case and examine of its own motion all possible defences, including those relating to statutory limitation. That Mr Verstraeten had been unable to represent his client and make submissions to the effect that the prosecution was time-barred had had no effect on the outcome of the proceedings. In conclusion, there had therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

32. The Commission considered that the particular points put forward by the Government were not such as to justify reaching a different conclusion from the one adopted by the Court in the Poitrimol, Lala and Pelladoah judgments.

33. The Court points out that in the first of those three cases it held that it was of capital importance that a defendant should appear, 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 needed to be protected – and of the witnesses. The legislature accordingly had to be able to discourage unjustified absences (see the Poitrimol judgment cited above, p. 15, § 35). In the other two cases, it stated however that it was also "of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal, the more so if, as is the case under Netherlands law, no objection may be filed against a default judgment given on appeal" (see the Lala and Pelladoah judgments cited above, p. 13, § 33, and pp. 34-35, § 40, respectively). The Court added that the latter interest prevailed and that consequently the fact that a defendant, in spite of having been properly summoned, does not appear, cannot – even in the absence of an excuse – justify depriving him of his right under Article 6 § 3 of the Convention to be defended by counsel (ibid.). It was for the courts to ensure that a trial was fair and, accordingly, that counsel who attended trial for the apparent purpose of defending the accused in his absence was given the opportunity to do so (ibid., p. 14, § 34, and p. 35, § 41).

34. The Court cannot accept the Belgian Government's argument that the finding that there was no possibility of applying to set aside a conviction *in absentia* was decisive in the reasoning of the Lala and Pelladoah judgments. The clause beginning with the adverbial phrase "the more so" (see paragraph 33 above) was added as a secondary consideration. On the contrary, the Court stated that the interest in being adequately defended prevailed. The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended. The Court notes that Article 185 § 3 of the Code of Criminal Procedure (see paragraph 20 above) provides that in any event the Criminal Court may order an accused to attend and that no appeal lies against such a decision.

35. The principle established in the Lala and Pelladoah cases applies in the instant case. Even if Mrs Van Geyseghem did have several opportunities of defending herself, it was the Brussels Court of Appeal's duty to allow her counsel – who attended the hearing – to defend her, even in her absence.

That was particularly true in this case since the defence which Mr Verstraeten intended to put forward concerned a point of law (see paragraph 16 above). Mr Verstraeten intended to plead statutory limitation, an issue which the Court has described as crucial (see the Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 17, § 34). Even if, as the Government maintained, the Court of Appeal must have examined of its own motion the issue of statutory limitation, the fact remains that counsel's assistance is indispensable for resolving conflicts and his role is necessary in order for the rights of the defence to be exercised. Furthermore, it does not appear from the judgment of 4 October 1993 (see paragraph 17 above) that any ruling was given on the issue.

36. In conclusion, there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. Article 41 of the Convention provides:

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

A. Damage

38. Mrs Van Geyseghem claimed 4,332,000 Belgian francs (BEF) in compensation for the pecuniary damage arising from the loss of her position as a nursery nurse and from having to live abroad in order to retain her freedom to come and go and thus avoid the consequences of the violation of the Convention. She also claimed BEF 2,000,000 for non-pecuniary damage arising from

(a) being unable to defend herself in the courts and justify herself in society's eyes;

(b) suffering social obloquy following her conviction;

(c) having to cease her social activities in Belgium;

(d) being unable to lead a regular family and private life, given the geographical distance separating her from her family and friends; and

(e) being in permanent fear of arrest and extradition to Belgium.

39. The Government submitted that there was no causal link between the alleged violation and the pecuniary damage allegedly sustained. In any event, the expenses incurred as a result of the applicant's absconding should not be taken into account. The Convention did not confer a right to evade justice.

40. Like the Delegate of the Commission, the Court considers that it cannot speculate as to the conclusion the Court of Appeal would have reached if it had granted the applicant leave to appear by counsel. Furthermore, no causal link has been established between the violation of the Convention found in this case and the various heads of the alleged pecuniary damage (due, in part, to the applicant's absconding). The claims under this head must therefore be dismissed.

As regards the alleged non-pecuniary damage, the Court considers that it has been sufficiently compensated by the finding of a violation of Article 6.

B. Additional claim

41. The applicant requested an undertaking from the Belgian State not to enforce the sentence passed on her by the Brussels Court of Appeal. A pardon could discharge the sentence, while maintaining the conviction.

42. The Court points out that the Convention does not give it jurisdiction to require any such undertaking from the Belgian State.

C. Costs and expenses

43. Mrs Van Geyseghem claimed the following amounts in respect of costs and expenses:

(a) BEF 312,781 for the proceedings in the Court of Appeal to set aside its earlier judgment, the proceedings in the Court of Cassation and the proceedings before the Commission; and

(b) BEF 100,000 for her legal assistance before the Court.

44. The Government did not express a view. The Delegate of the Commission wished to leave the matter to the Court's discretion.

45. If the Court finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before the Strasbourg institutions, but also those incurred in the national courts for the prevention or redress of the violation (see, among other authorities, the Hertel v. Switzerland judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2334, § 63). In the instant case the Court finds that the applicant did not incur such costs and expenses in the Court of Appeal. That part of her claim must therefore be dismissed. However, Mrs Van Geyseghem is entitled to seek payment of the costs and expenses of the proceedings in the Court of Cassation in addition to those of the proceedings before the Commission and the Court. Under those heads the Court, making its assessment on an equitable basis in the light of the information before it, awards Mrs Van Geyseghem BEF 300,000.

D. Default interest

46. According to the information available to the Court, the statutory rate of interest applicable in Belgium at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention;

2. *Holds* unanimously that the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered;

3. *Holds* unanimously that the respondent State is to pay the applicant, within three months, 300,000 (three hundred thousand) Belgian francs for costs and expenses, on which sum simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 1999.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mr Wildhaber, Mrs Palm, Mr Rozakis, Mr Türmen and Mr Bîrsan;

(b) concurring opinion of Mr Bonello;

(c) dissenting opinion of Mr Pellonpää.

L.W.
M. de S.

JOINT CONCURRING OPINION OF JUDGES WILDHABER, PALM, ROZAKIS, TÜRMEN AND BÎRSAN

We voted in favour of a violation of Article 6 § 1 combined with Article 6 § 3 (c) of the Convention in this case because we believe that the Brussels Court of Appeal did not allow the applicant to be represented by a lawyer before that court on a matter where a point of law was at issue and where the presence of a lawyer was more indispensable than the presence of the accused person herself.

To our minds, that was the only issue in this case that raised a problem of conformity of the national proceedings with the requirements of Article 6 and we are not therefore prepared to accept the more general approach which transpires from paragraph 34 of the Court's judgment, where it is implied that Article 6 may allow an accused person to be absent if he or she is duly represented by a lawyer during criminal proceedings.

We think that such a conclusion is unwarranted for all those cases where the presence of an accused person is necessary for the good administration of criminal justice.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority for a finding of violation of Article 6, but reached that conclusion via a more radical approach.

The point of departure of this opinion is that the presence of a defendant during his trial is basically his right, not his obligation[1]. In this case, as in its previous case-law, the Court has presided over a cheerless metamorphosis of a fundamental right into a crushing duty[2]. What the Convention sets forth as the accused's privilege has been alchemised into a debt due by the defendant to the State. With the baneful consequence that an accused may be denuded of his defence if he chooses to exercise his privilege not to attend his trial or appeal.

Article 6 § 3 (c) heralds the fundamental right of the accused "to defend himself in person or through legal assistance of his own choosing". The Convention offers a choice to the person accused: to secure his defence either in person or through legal support. The Belgian system has erased this choice. On appeal, the defendant must defend himself in tandem with his lawyer, or not defend himself at all. That system has hijacked from the defendant the options which the Convention devolves exclusively on him. The State acts as the prosecutor of the defendant, and also believes itself to be the sole arbiter of his choice of defence.

Article 6 § 3 (c) is meant to bestow on the defendant an alternative between two possible courses, both tending to maximise his best defence (and the promotion of the accused's "best defence" is an imperative constituent of the right to a fair hearing). He may opt to exercise that right either by appearing in court or by not appearing; in the first alternative, he may elect to conduct his own defence, or engage the services of a professional lawyer. In the second, the Convention allows his defence to be undertaken by a lawyer of his choice.

The Belgian Court of Appeal, in a pleading meant essentially to scrutinise a technical dispute (time-bar of the criminal action), refused the guiding hand of a professional lawyer, for the sole reason that the applicant had not attended the hearing. It rejected the profitable and the constructive, because of the absence of the unhelpful and the superfluous.

I enquire if the interests of a fair hearing would have been better served by allowing the applicant's lawyer to plead his brief, or, as happened in this

1. See the opinion of the Commission in the case of Colozza and Rubinat v. Italy, appended to the judgments of 12 February 1985, Series A no. 89, p. 29, § 118, and the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 12, § 25.
2. Notably in the Poitrimol, Lala and Pelladoah judgments referred to by the Court.

case, by dismissing the appeal without any hearing at all. I have but little doubt that, discharging the appeal without any hearing was massively more destructive to the well-being of a fair trial than hearing pleadings in the absence of the accused. I am puzzled and disturbed by an appeal system that, in substance, endures convictions to stand *in absentia*, but proscribes defence or acquittals *in absentia*. The weighting against the defendant appears manifestly too overbearing. That system allows a lot to the defendant, except a defence.

It is not questioned that the presence of the accused at his trial can be advantageous to the administration of justice. The arguments favouring the defendant's presence have been skilfully expounded in the Government's memorial, and I am sensitive to most of them[1]. One decisive consideration which the Government's inventory however disregards is that, even if present, the defendant has an inalienable right to silence. For the purpose of generating those benefits to the administration of justice listed by the Government, a mute defendant is almost as productive as an absent defendant.

This does not minimise the utility of the accused's presence at his trial for the proper administration of justice, or challenge that it should be encouraged. What should be discouraged is the transfiguration of a privilege of the defendant into an onerous responsibility, which divests him of his right of defence should he choose not to exercise his fundamental right to attend.

I part with the majority where it advocates a case-by-case approach, in which a balancing of interests between the rights of the defendant and those of the administration of justice is called for, according to the particular circumstances of each case.

In my view, balancing the discordant interests of the individual and those of society is crucial in the application of various other provisions of the Convention, where the text itself explicitly demands such balancing[2]. In the fundamental right to be present at the trial, Article 6 § 3 (c) posits no such balancing, and any excursion into that equilibrating exercise would be both amiss and inadmissible. At best, balancing is subjective and therefore arbitrary. In this case it is also clearly *ultra vires*. I am generally unhappy with the doctrine of "implied limitations" of fundamental rights, and, in any case, I do not read any convincing "implied limitations" on the exercise of this particular right.

The right of the defendant to be absent from his trial corresponds quite closely to his right to silence. If, in the name of the acknowledged benefits to the administration of justice, the accused's presence at his trial were to be considered a prerequisite to any defence, substantially the same arguments

1. Paragraphs 21 to 25.
2. For example, Articles 8 § 2, 9 § 2, 10 § 2, 11 § 2.

could coerce him into renouncing his right to silence – in deference to those same interests of the administration of justice.

In practice, I cannot foresee any case where, in a search for equilibrium between society's interests and this particular fundamental right of the accused (even were any balancing legitimate), the latter should ever succumb to the former. And I see no utility in what are essentially specious distinctions between the accused's absence in cases at first instance, and on appeal; nor in distinguishing appeals on facts from appeals on law.

The Court, I believe, should have professed this forthrightly, pre-empting the possibility of future balancing exercises which may lead to findings in which the defendant's right to be present at his trial becomes his tombstone.

DISSENTING OPINION OF JUDGE PELLONPÄÄ

I voted against finding a violation of Article 6 in the present case.

I admit that the Brussels Court of Appeal's decision of 13 September 1993 to refuse the applicant's counsel leave to represent her may at first sight appear problematic from the point of view of Article 6 § 3 (c).

That decision, however, should not be looked at in isolation, without regard to the proceedings as a whole and the purpose and function of the guarantees enumerated in paragraph 3 of Article 6.

As stated by the (former) Court in the Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 15, § 32, the various rights guaranteed in paragraph 3 are "specific applications of the general principle stated in paragraph 1 of the Article", with the consequence that "[w]hen compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots". Or, to quote the European Commission of Human Rights, the guarantees of Article 6 § 3 are "not an aim in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings" (Can v. Austria judgment of 30 September 1985, Series A no. 96, opinion of the Commission, p. 15). Sometimes a broad interpretation of paragraph 3 may be called for, if that is required in order to guarantee the fairness of the proceedings as a whole. Sometimes, however, it is not necessary to read into the specific provisions of paragraph 3 more than the words indicate, if a literal interpretation is sufficient from the point of view of the overall fairness of the proceedings.

In assessing this overall fairness, one should not lose sight of considerations concerning the general function of criminal law and proceedings and the role of the various participants, including the accused, in such proceedings. The respondent Government advanced a number of reasons (see paragraph 31 of the judgment) which justify a system in which a person accused of serious offences is obliged to appear personally before the court. That not all the reasons are present in a particular case is not necessarily decisive for the assessment of the case under Article 6. As a general rule, such a system and the application of it are acceptable as long as the Convention does not guarantee as a human right an accused's right to be absent from criminal proceedings against him or her. Correspondingly, as was stated in the Poitrimol case, "the legislature must ... be able to discourage unjustified absences" (see the Poitrimol v. France judgment of 23 November 1993, Series A no. 277-A, p. 15, § 35).

Where this legitimate policy of discouraging unjustified absences is pursued, the rights of the defence must of course be taken into account. Even so, the position of the accused cannot be a consideration that unconditionally overrides all the other interests involved. In my view, this should be taken into account also in the interpretation of the specific guarantees contained in Article 6 § 3.

If the proceedings against the applicant are assessed against this background, the first impression is that they were, as a whole, prima facie fair. After having been convicted *in absentia* on 10 December 1992, the applicant applied to set aside the conviction. This led to new first-instance proceedings conducted in the applicant's presence and to a reduction of her sentence in the judgment of 7 May 1993. As this remained the final judgment, her sentence to three years' imprisonment and fines resulted from fully adversarial first-instance proceedings. This is one – though not a decisive – difference between the present case and the Poitrimol case cited above and the cases of Lala v. the Netherlands and Pelladoah v. the Netherlands (judgments of 22 September 1994, Series A no. 297-A and B).

Furthermore, the applicant had the possibility of appealing and she did appeal. As the applicant did not appear before the Court of Appeal, the court, in her absence, upheld the judgment of 7 May 1993. Unlike the situation in the cases just mentioned, the applicant also had a remedy against this judgment *in absentia* in that she could ask for it to be set aside. This she did. Again she did not appear before the court, nor did she adduce any evidence of reasons preventing her from attending in person. The question is whether in these circumstances the refusal of the Court of Appeal to grant the applicant's counsel, who appeared before the court, leave to represent her amounts to a violation of Article 6 § 3 (c) read in conjunction with paragraph 1 of that Article.

In this respect it is of importance that even at the appeal level the applicant had two possibilities of presenting her case. By being present, as required by Belgian law, on one of the two occasions, she would have been able to enjoy the right to be assisted in accordance with Article 6 § 3 (c). She would also have had the possibility of being granted that right if she had adduced evidence of *force majeure* preventing her from attending in person. The applicant, however, is in effect claiming on the basis of the Convention not just a right to be assisted but rather a right to be absent from criminal proceedings and the corollary right to be defended in such proceedings by a representative. Although in specific circumstances fairness requires that such representation be allowed, as a general rule neither Article 6 § 3 (c) (which refers to "assistance") nor any other provision of the

Convention guarantees such a right. In view of this and of the fact that the Belgian system afforded the applicant ample opportunity to enjoy all the benefits of Article 6, I conclude that the system as applied in her case did not violate that Article.

I voted in favour of the conclusion that the judgment constitutes in itself just satisfaction for the claim based on alleged non-pecuniary damage. The reason for that vote was that, in accordance with my earlier conclusion, I do not consider that there has been any non-pecuniary damage. I also voted with the majority as regards the award for costs and expenses. Since the majority has found a violation, I consider it proper that the applicant should be compensated for her legal expenses.