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

FIRST SECTION

CASE OF TIERCE AND OTHERS v. SAN MARINO

(Applications nos. 24954/94, 24971/94 and 24972/94)

JUDGMENT

STRASBOURG

25 July 2000

In the case of Tierce and Others v. San Marino,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr R. TÜRMEN,
Mr J. CASADEVALL,
Mr T. PANȚÎRU,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 7 December 1999 and 4 July 2000,

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

PROCEDURE

1. The case originated in three applications (nos. 24954/94, 24971/94 and 24972/94) against the Republic of San Marino. The first application was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by the European Commission of Human Rights ("the Commission") and by the San Marinese Government ("the Government") on 2 and 27 November 1998 respectively (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention). The joined second and third applications were referred to the Court by the Commission and by the Government on 8 and 9 March 1999 respectively.

2. The applications were lodged with the Commission under former Article 25 of the Convention by a French national, Mr Jean-Marc Tierce ("the first applicant"), on 17 May 1994 and by two Italian nationals, Mr Roberto Marra ("the second applicant") and Ms Paola Gabrielli ("the third applicant"), on 9 February 1994.

The first applicant alleged a violation of Article 6 of the Convention in that judgment had been given against him in appeal proceedings without his having been heard in person by the judge. He also complained under Article 6 that he had not been tried by an impartial tribunal, as the judge who had prepared the file for the appeal hearing had also conducted the judicial investigation and tried the case at first instance.

The second and third applicants alleged a violation of Article 6 § 1 in that they had not been heard in person by the appellate judge.

3. The Commission declared the first application partly admissible on 18 October 1996. In its report of 23 April 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 6 § 1 in that the applicant had not been tried by an impartial tribunal (unanimously), and a violation of Article 6 § 1 in that the applicant had not been heard in person by the appellate judge (twenty-nine votes to one)[1].

The Commission joined the second and third applications and declared them partly admissible on 1 July 1998. In its report of 30 November 1998, it expressed the opinion that there had been a violation of Article 6 § 1 in that the applicants had not been heard in person by the appellate judge (twenty-eight votes to one).

4. A panel of the Grand Chamber decided that the three applications should be examined by one of the Sections of the Court (Rule 100 § 1 of the Rules of Court). The President of the Court assigned them to the First Section (Rule 52 § 1).

5. The applicants and the Government each filed a memorial.

6. On 14 September 1999 the Court decided to join the three applications.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 December 1999.

There appeared before the Court:

(a) *for the Government*
Mr L.L. DANIELE, *Agent*,
Mr G. CECCOLI, *Co-Agent*;

(b) *for the applicant*
Mr A. SELVA, of the San Marino Bar, *Counsel*.

8. The President of the Court gave the Agent of the Government and the applicants' lawyer leave to use the Italian language (Rule 34 § 3).

9. The Court heard addresses by Mr Selva, Mr Daniele and Mr Ceccoli.

THE FACTS

1. *Note by the Registry*. The report is obtainable from the Registry.

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

10. On 29 November 1990 the first applicant's business associate, Mr C.B., lodged a criminal complaint with the Civil and Criminal Court (*tribunale commissariale civile e penale*) of the Republic of San Marino, accusing the first applicant of irregularities in the management of their business affairs. On 4 December 1990 Mr C.B. lodged a second complaint together with supporting documents, seeking, in particular, to have the first applicant's bank accounts frozen.

11. By a summons issued by the *Commissario della Legge* (judge) of the Civil and Criminal Court, Mr L.E., on 6 December 1990 and served on 10 December 1990, the first applicant was required to appear before that court on 17 December 1990; at the first applicant's request, the hearing was postponed until 22 February 1991.

12. On 30 January 1991 Mr C.B. filed further documents.

13. On 22 February 1991 Mr C.B. and the first applicant were questioned by the *Commissario della Legge*, Mr L.E.

14. On 4 March 1991 the first applicant filed pleadings.

15. On 16 May 1991 the *Commissario della Legge*, Mr L.E., ordered an expert to draw up a report with a view to ascertaining the nature of the business relationship between the first applicant and his associate and verifying the propriety of the first applicant's management of the company.

16. On 28 November 1991 the expert submitted his report, concluding that, on account of irregularities attributable to the first applicant, the latter owed his associate the sum of 93,188,334 Italian lire. On 30 December 1991 the *Commissario della Legge*, Mr L.E., allowed a further application by Mr C.B., dated 18 December 1991, for the attachment of the first applicant's assets in order to prevent him disposing of them.

17. On 8 May 1992 the *Commissario della Legge*, Mr L.E., questioned the expert, who reaffirmed his findings. The first applicant's lawyer asked for time to submit various documents.

18. On 14 May and 4 June 1992 the first applicant's lawyer filed his observations and various documents; Mr C.B.'s lawyer did likewise on 15 May and 11 June 1992.

19. On 19 June 1992 another *Commissario della Legge* authorised a second preventive attachment of the first applicant's property, including a number of cars, bank accounts and any other items of value. In an order of 24 June 1992 the second *Commissario della Legge* specified the items that were to be attached and appointed the first applicant as their legal guardian (*custode giudiziale*).

20. On 25 and 26 June 1992 the bailiffs (*cursori*) drew up a record of the attachment, noting that two cars had disappeared and that the first applicant,

who was responsible for them in his capacity as legal guardian, was unable to indicate their whereabouts. Mr C.B.'s lawyer consequently lodged a further complaint against the first applicant, accusing him of the offence of fraudulent conversion of property under attachment (*frode nel pignoramento o nel sequestro*).

21. On 26 June 1992 the missing cars were located; on the same day the first applicant was questioned by the *Commissario della Legge*, Mr L.E.

22. On 2 July 1992 a defence witness was questioned by the *Commissario della Legge*, Mr L.E.

23. On 19 and 23 November 1992 Mr C.B.'s lawyer lodged a third application for preventive attachment of the first applicant's property. On 14 December 1992 the *Commissario della Legge*, Mr L.E., allowed the application and authorised the attachment of certain cars belonging to the first applicant, and also of his share in another company. On the same day the first applicant was committed for trial on charges of fraud and fraudulent conversion of property under attachment.

24. On 2 February 1993 the first applicant was issued with a summons to appear in court.

25. Since the shortened form of procedure (*procedura sommaria*) was applicable, the trial was held before the same *Commissario della Legge*, Mr L.E., who had already dealt with the case as the investigating judge. Evidence was heard from the parties and from various defence witnesses.

26. In a judgment delivered by the *Commissario della Legge*, Mr L.E., on 7 May 1993 and deposited at the registry on 16 July 1993 the first applicant was found guilty on both charges (fraud and fraudulent conversion of property under attachment), and was given a one-year suspended prison sentence and ordered to pay a fine.

27. On an unspecified date the first applicant appealed against that judgment. He argued, firstly, that he could not be held criminally liable and that the only issue that could be raised was that of his civil liability, basing his submission, in particular, on the content of agreements he had concluded with Mr C.B. He also complained that he had not been given permission to consult certain accounting documents which could have established that his actions had at the very most amounted to misappropriation (*appropriazione indebita*) rather than to fraud. As regards the charge of fraudulent conversion of property under attachment, he added that he had never intended to break the law but had quite simply misunderstood the content of a Criminal Court decision of 3 July 1993 and had, accordingly, believed that the attachment order had been lifted; on realising his error, he had immediately informed the judge of the cars' whereabouts. Lastly, he maintained that the charge of fraud had become time-barred on 26 July 1993.

28. The complainant likewise appealed, arguing that the first applicant's criminal liability was beyond dispute because he had misrepresented their

firm's financial position in order to make him accept a sum well below the value of his share. He further submitted that the charges were not time-barred and that the *Commissario della Legge* had not taken into account certain aggravating circumstances, the continuation of the offence in question or the commission of other offences, such as issuing bad cheques, fraudulent conversion of property under attachment and misappropriation. The complainant also claimed damages and sought to have the orders for the attachment of the first applicant's property upheld.

29. State Counsel (*Procuratore del Fisco*) sought to have the judgment at first instance upheld in its entirety.

30. In the meantime, the *Commissario della Legge* had ordered the lifting of the attachment of certain of the first applicant's assets.

31. Without holding a hearing, and on the basis of the documents relating to the investigation at first instance (*alla stregua delle risultanze processuali*), which the *Commissario della Legge*, Mr L.E., had added to the file for the appeal, the criminal appeals judge (*Giudice delle appellazioni per le cause penali*) held, in a judgment of 22 October 1993 which was deposited at the registry on the same day and became final on 26 November 1993, firstly that the applicant's objection that he had been unable to consult the accounting documents was manifestly ill-founded and in any event of no consequence, since he had never been denied access to the documents.

The appellate judge further held that the file on the investigation at first instance showed that the first applicant had concealed his activities from his associate Mr C.B., and had falsely represented their firm's financial position to him for the purpose of deception; his conduct consequently amounted to fraud. As regards misappropriation, that offence – which had, moreover, become subject to limitation – did not preclude fraud, but should rather be added to it as a preliminary step towards it. The judge accordingly upheld the first applicant's conviction.

As regards the offence of fraudulent conversion of property under attachment, the judge considered that the first applicant's explanation was legally irrelevant, since it referred to a decision delivered after the perpetration of the offences for which he had been tried. The judge also dismissed the objection that the charge of fraud was time-barred, pointing out that time had ceased to run while the expert report was being drawn up and that the limitation period had consequently not expired until 2 November 1993.

The appellate judge also upheld the order for the attachment of the first applicant's property and referred the case to the civil courts for quantification of the damages to be paid to the complainant.

Lastly, the judge forwarded the procedural documents to the *Commissario della Legge*, instructing him to ascertain whether the first

applicant could be held liable for the fraudulent conversion on 24 June 1992 of a further car under attachment.

32. In the San Marinese judicial system there is no provision for an appeal on points of law.

B. The second and third applicants

33. On 30 January 1993 the second and third applicants were found in possession of drugs and arrested by the San Marinese police. Their arrest was confirmed later that day by the *Commissario della Legge*, Ms R.V.

34. On 1 February 1993 the second applicant was questioned by the *Commissario della Legge*. He stated, among other things, that he had come to San Marino to buy drugs for personal use and that he had asked the third applicant to join him, although she had not been aware of his intentions.

35. On 4 February 1993 the third applicant was questioned by the *Commissario della Legge*. She stated, in particular, that she had not known about the second applicant's activities.

36. On 4 February 1993 the *Commissario della Legge* refused an application for release (*difesa a piede libero*) which the third applicant had lodged earlier that day. On 15 February 1993 the appellate judge, Mr M.N., dismissed an appeal lodged by the third applicant on 8 February 1993.

37. On 25 February 1993 the third applicant again applied to the *Commissario della Legge* to be released. The *Commissario della Legge*, Ms R.V, instructed a "marshal" to question the third applicant, who reaffirmed her earlier statements but said that she did not wish to add anything. The *Commissario della Legge* allowed her application for release on 26 February 1993.

38. On 9 March 1993 the *Commissario della Legge*, Ms R.V., dismissed an application for release lodged by the second applicant on 5 March 1993.

39. On the same day the *Commissario della Legge*, Ms R.V., charged the second and third applicants with unlawful possession of and trafficking in drugs, and also charged the second applicant with unlawful possession of a firearm. She summoned them to stand trial on 26 April 1993.

40. At their trial the second and third applicants reaffirmed the statements they had made during the investigation.

41. In a judgment of 26 April 1993 another *Commissario della Legge*, Mr S.S., sentenced the second applicant to seven months' imprisonment for unlawful possession of drugs (without intent to supply) and acquitted him of the offence of unlawful possession of a firearm. He acquitted the third applicant with the benefit of the doubt.

42. On the same day the second applicant appealed against that judgment to the criminal appeals judge.

43. A second application for release lodged by the second applicant on 5 May 1993 was refused by the *Commissario della Legge*, Mr S.S., on

6 May 1993. On 10 May 1993 the second applicant appealed against that decision, but the appellate judge, Mr P.G., dismissed the appeal in a decision of 13 May 1993, on the grounds of the serious nature of the alleged offence and the second applicant's extensive criminal record.

44. On 17 May 1993 State Counsel appealed against the judgment of 26 April 1993, seeking the conviction of the second applicant – for possession of drugs with intent to supply, rather than merely for possession of drugs – and the third applicant. He argued, in particular, that the *Commissario della Legge* had failed to take into account a number of factors: as regards the second applicant, the strong evidence of his dealing in heroin, the serious nature of the offence, and his extensive criminal record, among other things, and, as regards the third applicant, her contribution to and physical participation in the offence, her knowledge of crime, and the fact that she had knowingly and willingly committed the offence with which she had been charged.

45. On 21 May 1993 the third applicant likewise appealed against the judgment of 26 April 1993, seeking acquittal on the ground that she had not committed the offence.

46. On 23 June 1993 the second and third applicants applied to the Council of the XII, challenging Mr M.N. and Mr P.G. as appellate judges, on the ground that they had dealt with the case at an earlier stage, having already dismissed their applications for release on appeal.

47. On 30 July 1993 the Council of the XII dismissed their application.

48. On 2 August 1993 the second applicant asked the appellate judge to request a ruling from the General Grand Council (*Consiglio Grande e Generale*) as to whether the absence of a public hearing on appeal during which the accused could give evidence in person to the appellate judge was in conformity with the San Marinese Constitution and with Article 6 § 1 of the Convention. On 13 August 1993 State Counsel submitted that the request should be declared manifestly ill-founded.

49. On 3 August 1993 Mr P.G. was appointed as the judge in the appeal proceedings.

50. On 20 August 1993 the third applicant requested a ruling as to whether, firstly, Article 54 of the Code of Criminal Procedure, pursuant to which all foreign nationals not resident within the territory of San Marino who were charged with a criminal offence had to be detained, and, secondly, the absence of an independent tribunal to decide on preventive measures in individual cases, were in conformity with the Constitution and with Article 5 and Article 6 § 2 of the Convention.

On 23 August 1993 the third applicant likewise requested a ruling as to whether the absence of a public hearing on appeal during which the accused could be heard in person by the appellate judge was constitutional.

51. In a judgment delivered on 24 August 1993 and made public on 27 August 1993 the appellate judge sentenced the second applicant to one

year and two months' imprisonment for possession of drugs with intent to supply, and the third applicant to ten months' imprisonment. The judge referred to the statements made by the second and third applicants during the proceedings at first instance. He held, in particular, that the second applicant was guilty of a serious offence and had also attempted to conceal the third applicant's guilt, and that the third applicant was guilty on account of the strong evidence against her; she had been aware of the second applicant's criminal intentions and had made a conscious decision to participate in the offence.

52. The judge further held that the second and third applicants' requests for rulings as to constitutionality were manifestly ill-founded. As regards, in particular, the absence of a public hearing on appeal, the judge concurred with the applicants' arguments, which were based on the principles of international law, but held that the objection had been raised with a view to revising the Code of Criminal Procedure, a process that could not be initiated by means of a declaration of unconstitutionality.

II. RELEVANT DOMESTIC LAW

53. Criminal procedure is governed in San Marinese law by the 1878 Code of Criminal Procedure, as amended by Law no. 43 of 18 October 1963 and Law no. 86 of 11 December 1974.

54. The shortened form of procedure is governed by Articles 174 to 185 of the Code of Criminal Procedure. It is applicable to offences carrying either a prison sentence of up to three years or a fine. Proceedings are conducted before the *Commissario della Legge*, who must set the case down for trial within thirty days and may in the meantime carry out summary investigations (*indagini sommarie*) and take emergency measures. The *Commissario della Legge* summons the accused and any witnesses to appear before him at the hearing. The summons is also served on State Counsel (Article 175), who is required to take part in the proceedings as prosecutor (*magistrato requirente*).

55. At the hearing, the *Commissario della Legge* examines the witnesses and then the defendant. Next, State Counsel gives his address and counsel for the defence makes his submissions. Finally, the defendant may put forward any arguments he considers necessary for his defence (*esporre cio' che crede in sua discolpa*) (Articles 176-79).

56. The *Commissario della Legge* deliberates in private, draws up the operative provisions and, on returning to the courtroom, makes them public by reading them out. The text of the judgment must be deposited at the registry within thirty days of delivery (Article 181). The *Commissario della Legge* may also adjourn the case if he considers that further information is required (Article 182).

57. Under the ordinary procedure, preliminary investigations are conducted by the *Commissario della Legge* and hearings are held before the first-instance judge (*magistrato*).

58. In addition, section 24 of the Judicature Act (Law no. 83 of 28 October 1992) provides that, pending the entry into force of a new Code of Criminal Procedure, only the provisions governing the shortened form of procedure are to be applied to offences committed from the day after the publication of that Act in the Official Gazette (*Bollettino Ufficiale*). The functions of investigating and trial judge are, however, to be discharged by two different *Commissari della Legge*.

59. Under Articles 186 et seq. of the Code of Criminal Procedure, appeals against a judgment at first instance may be lodged by the accused, State Counsel or the complainant (but only in relation to the latter's civil interests).

60. Article 196 of the Code of Criminal Procedure provides that the appellate judge has jurisdiction to deal with all aspects of a case (*piena cognizione del giudizio*). If an appeal is lodged solely by the accused, the judge may neither impose a harsher penalty nor withdraw any advantages granted.

61. Appeal proceedings are conducted without any further investigative measures being taken; the parties make their submissions in the same order as at first instance. The accused is not entitled to be heard in person by the appellate judge.

62. An investigative hearing may nonetheless be held at the appeal stage if the judge considers it necessary to repeat investigative measures that have been declared void or to carry out new ones (Article 197). The hearing is held before the *Commissario della Legge*.

63. Article 198 of the Code of Criminal Procedure provides that judgments are to be delivered at a public hearing in the presence of the Captains-Regent (*Capitani Reggenti*), the accused, his counsel and the other parties; the registrar reads out the judgment.

64. Under Article 197 of the San Marinese Criminal Code, anyone who unlawfully appropriates another's property of which he is in possession in any capacity whatsoever is guilty of the offence of misappropriation (*appropriazione indebita*).

65. Under Article 204 of the Criminal Code, anyone who secures an unfair material advantage by misleading another through deception or misrepresentation is guilty of the offence of fraud (*truffa*).

THE LAW

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

A. Impartiality of the tribunal

66. The first applicant complained that in the proceedings against him the same *Commissario della Legge* had conducted both the judicial investigation and the trial at first instance, and had subsequently conducted a further investigation at the appeal stage. On that account, he alleged an infringement of his right to be tried by an impartial tribunal as required by Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ..."

1. Submissions of those appearing before the Court

67. The first applicant did not dispute the personal good faith, competence or honesty of the judge in question (and accordingly submitted that a challenge on grounds of bias could not have constituted an effective remedy), but considered that the fact that the same *Commissario della Legge* had taken preventive measures, had convicted and sentenced him at first instance and had subsequently prepared the file for the appeal hearing in itself constituted objective justification for his doubts as to the judge's impartiality. He further argued that the fact that in 1992 the San Marinese legislature had seen fit to amend the shortened form of procedure applicable at the time of his conviction by providing that one *Commissario della Legge* should prepare the file and another should try the case implied *per se* that the previous system had not satisfied the requirements of Article 6 of the Convention.

68. The first applicant argued, in particular, that the presence of State Counsel – who, moreover, was not a judicial officer – was not a guarantee of impartiality, since he had been appointed not by Parliament, as provided by domestic legislation, but by the *Commissario della Legge*. In any event, State Counsel was not empowered to take any measures of his own motion; under the Code of Criminal Procedure, his powers were limited to endorsing or challenging measures initiated by the judge.

69. The Government submitted, firstly, that the mere fact that Law no. 83 of 18 October 1992 had amended the San Marinese judicial system could not be taken to mean that the previous system, to which the first applicant's complaint related, had breached Article 6 § 1 of the Convention. Furthermore, only the shortened form of procedure entailed the discharging of a combination of functions by the same person; in cases dealt with under the ordinary procedure, the *Commissario della Legge* conducted investigations and the first-instance judge (and, on appeal, the appellate judge) ruled on the merits.

70. In any event, the *Commissario della Legge*'s impartiality was guaranteed by the manner in which proceedings were conducted – in particular, by the powers enjoyed by the police during the investigation –

and by the courses of action available to the accused and to any civil parties to the proceedings, who could bring complaints before the appellate judge and could request to have witnesses examined again at a public hearing. In addition, the investigative measures taken by the *Commissario della Legge* were subject to scrutiny by State Counsel, who was required to take part in all criminal proceedings as a representative of the State in order to ensure the formal propriety of all steps taken, the correct application of the law and the fair administration of justice. A further guarantee of the *Commissario della Legge*'s impartiality was provided by the fact that at the public hearing before him State Counsel gave an address, experts could be called to give evidence again and all the parties could submit further requests to have witnesses examined or investigative measures repeated.

71. In the present case the first applicant's conviction at first instance had been based on reports drawn up by experts appointed by the *Commissario della Legge* and by the experts designated by the parties, on the documents obtained in the course of the proceedings and on the first applicant's statements, in which he had admitted carrying out the acts of which he was accused, while at the same time arguing that he should not be punished. Furthermore, the first applicant had had the opportunity to challenge the *Commissario della Legge* on grounds of bias.

72. With regard to the appeal proceedings in particular, the Government argued that no relevant new evidence had been adduced to cast doubt on the investigation and the judgment at first instance; accordingly, the *Commissario della Legge*'s only intervention in his capacity as an appellate judge had been to order the lifting of the attachment of certain items and documents.

73. The Government referred to the Court's judgments in the cases of Fey v. Austria (24 February 1993, Series A no. 255-A), Padovani v. Italy (26 February 1993, Series A no. 257-B) and Sainte-Marie v. France (16 December 1992, Series A no. 253-A), in which the Court, finding in all three cases that there had been no violation of Article 6 of the Convention, had stated that the mere fact that a judge had also made pre-trial decisions could not in itself be taken as justifying doubts as to his impartiality, and that only special circumstances might warrant a different conclusion; there were no such circumstances, the Government argued, in the instant case.

74. The Commission considered that the scope of the *Commissario della Legge*'s powers in the proceedings at first instance was sufficient to justify the first applicant's misgivings as to his impartiality.

2. Principles established by the Court's case-law

75. The Court reiterates that, for the purposes of Article 6 § 1, the impartiality of a tribunal must be assessed by means of a subjective test, which consists in seeking to determine the personal conviction of a particular judge in a given case, and by means of an objective test, which

consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see the Padovani judgment cited above, p. 20, § 25).

76. The instant case is solely concerned with objective impartiality, as the first applicant did not dispute the *Commissario della Legge*'s subjective impartiality, a fact that may explain why he did not challenge him. It must therefore be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see the Padovani judgment cited above, p. 20, § 27). What is decisive is not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (see the Fey judgment cited above, p. 12, § 30, and the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, § 33).

3. Application of the above principles in the instant case

77. Mr Tierce's concerns stemmed from the fact that the *Commissario della Legge* had discharged a combination of functions on two counts, acting as both investigating and trial judge at first instance and subsequently also preparing the file for the appeal hearing.

The Court will begin by examining the first combination of functions. To that end, it will consider the scope and nature of the measures taken by the *Commissario della Legge* before the trial.

(a) Combination of the functions of investigating and trial judge at first instance

78. The Court reiterates that "in order that the courts may inspire in the public the confidence which is indispensable, account must ... be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality" (see the Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30).

79. In the instant case the Court notes that for more than two years the *Commissario della Legge* conducted very thorough investigations in respect of the first applicant; the measures taken included questioning the accused, the complainant and certain witnesses on several occasions, ordering expert reports, questioning the expert and making two orders for preventive attachment of the first applicant's property. The *Commissario della Legge* therefore made very extensive use of his powers as an investigating judge.

He subsequently committed the first applicant for trial and, after examining the parties on one occasion during a trial that lasted approximately three months, convicted him.

80. Accordingly, the Court considers that the applicant's misgivings as to the *Commissario della Legge*'s impartiality may be regarded as justified from an objective standpoint. In addition, the Court fails to see how the participation of State Counsel – irrespective of whether he was appointed lawfully – or the aspects of the trial to which the Government referred might be sufficient to dispel any suspicion of bias on the part of the *Commissario della Legge*.

81. The Court would also point out, as the Commission did, that the instant case differs from the Padovani case cited by the Government in that the proceedings brought against Mr Tierce were not concerned with an offence discovered while it was being committed and were not based on statements made by the accused himself; his conviction, which occurred after two criminal complaints had been lodged against him, was based on the findings of the investigations conducted by the *Commissario della Legge*, who refused to accept the first applicant's defence.

(b) Investigative functions during the appeal proceedings

82. In the light of the above conclusion, the Court does not consider it necessary to examine whether there was also any objective justification for Mr Tierce's concerns about the fact that the same *Commissario della Legge* subsequently dealt with the preparation of the file for the judge dealing with the appeal.

4. Conclusion

83. Having regard to the *Commissario della Legge*'s dual role as the investigating and trial judge in the impugned proceedings and, in particular, to the extent of his powers in preparing the case file, the Court concludes that the first applicant's misgivings as to the *Commissario della Legge*'s impartiality may be regarded as objectively justified.

There has therefore been a violation of Article 6 § 1 of the Convention.

B. Absence of a public hearing on appeal at which the applicants could argue their case

84. The three applicants complained that they had not had the opportunity to give evidence in person to the appellate judge, whereas Article 6 § 1 of the Convention provides:

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

1. Submissions of those appearing before the Court

85. In the applicants' submission, the mere fact that the judgment had been made public was not sufficient to meet the respondent State's obligations under Article 6 of the Convention. The Convention institutions had consistently interpreted that provision to mean that at a public hearing the judge had to recapitulate the findings of the investigation and assess the accused's character before giving judgment; that was only possible by means of oral examination. In the instant case, if the applicants had given evidence to the appellate judge, they would have been able to set their arguments against those of the other parties and to cross-examine any witnesses called; the judge would also have been given an opportunity to assess their character.

86. The applicants further pointed out that the hearings that were possible under Article 197 of the Code of Criminal Procedure did not take place before the appellate judge but before the *Commissario della Legge*, even if it was the appellate judge who requested them.

87. The Government relied in the first place on the Jan-Åke Andersson and Fejde v. Sweden judgments (29 October 1991, Series A nos. 212-B and 212-C), in which the Court had ruled that there was no need to hold a public hearing on appeal because the new facts were not significant, and also on the following judgments: K.D.B. v. the Netherlands (27 March 1998, *Reports of Judgments and Decisions* 1998-II); Vermeulen v. Belgium (20 February 1996, *Reports* 1996-I); Brualla Gómez de la Torre v. Spain (19 December 1997, *Reports* 1997-VIII); and Van Orshoven v. Belgium (25 June 1997, *Reports* 1997-III).

88. Secondly, they challenged the applicants' interpretation of the concept of "publicity". The public nature of court proceedings guaranteed in Article 6 was intended to protect litigants from the risk of justice being administered in secret without public scrutiny; it was also a means of fostering public confidence in the courts, since it made the administration of justice more transparent and contributed to a fair trial, a feature of any democratic society (see the Axen v. Germany judgment of 8 December 1983, Series A no. 72, and the Sutter v. Switzerland judgment of 22 February 1984, Series A no. 74). In San Marino, judgments delivered by the appellate judge were made public at a public hearing in the presence of the Captains-Regent, and that undoubtedly ensured that public scrutiny was possible and that justice was administered in a transparent manner.

89. Moreover, while it was true that an accused was not entitled to give evidence in person to the appellate judge, that state of affairs was justified by the specific aspects of procedure in San Marino. In that connection, the Government referred, in particular, to the Court's case-law, according to which "[w]hilst the member States of the Council of Europe all subscribe to [the] principle of publicity [of proceedings], their legislative systems and judicial practice reveal some diversity as to its scope and manner of

implementation, as regards both the holding of hearings and the 'pronouncement' of judgments" (see the Sutter judgment cited above, pp. 12-13, § 27, and the Pretto and Others v. Italy judgment of 8 December 1983, Series A no. 71, pp. 11-12, § 22).

In the Le Compte, Van Leuven and De Meyere v. Belgium judgment (23 June 1981, Series A no. 43), the Court had also held that Article 6 afforded the accused the possibility of waiving the right to a public hearing. In the instant case the applicants had not asked for an investigative hearing to be held.

90. In conclusion, the Government considered that, since no new evidence had been adduced during the appeal proceedings, it had not been necessary to hold a hearing in the instant case.

91. The Commission expressed the view that the appellate judge had been required to deal with both the factual and the legal aspects of the three applicants' cases and to make a full assessment of the issue of their guilt; in those circumstances, the applicants should have been heard in person by him.

2. Principles established by the Court's case-law

92. The Court reiterates that the accused's right to a public hearing is not only an additional guarantee that an endeavour will be made to establish the truth but also helps to ensure that he is satisfied that his case is being determined by a tribunal whose independence and impartiality he may verify. The public character of proceedings before judicial bodies protects litigants against the administration of justice in secret without public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the following judgments: Axen cited above, p. 12, § 25; Fejde cited above, pp. 67-68, § 28; and Sutter cited above, p. 12, § 26).

93. The principle of the public nature of court proceedings entails two aspects: the holding of public hearings and the public delivery of judgments (see the Sutter judgment cited above, p. 12, § 27, and the Axen judgment cited above, p. 12, §§ 28 et seq.). Only the first aspect is in issue in the case before the Court.

94. The Court notes in this connection that, at first instance, the concept of a fair trial means that a person charged with a criminal offence should be entitled to attend the hearing (see the Colozza v. Italy judgment of 12 February 1985, Series A no. 89, pp. 14-15, §§ 27-29).

95. The absence of public hearings on appeal may be justified by the special features of the proceedings in issue, provided that there has been a public hearing at first instance. Thus, 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 if the appellant has not been given the opportunity of being heard in person by the appellate court (see the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 14, § 31).

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. The principle that hearings should be held in public entails the right for the accused to give evidence in person to an appellate court. From that perspective, the principle of publicity pursues the aim of guaranteeing the accused's defence rights.

3. Application of the above principles in the instant case

96. The Court must examine whether, in the instant case, the special features of appeal proceedings in San Marino warranted departing from the principle of a public hearing at which the accused may put forward his case.

97. The Court observes that, contrary to the Government's submissions regarding the Fejde and Jan-Åke Andersson cases, from the case-law cited above it is clear that the mere absence of new facts is not sufficient to warrant departing from the principle that appeal hearings should be held in public in the presence of the accused; the most significant factor is the nature of the questions which the appellate court is to address.

98. The Court notes that in San Marino appellate judges have jurisdiction to deal with points of fact and law (see paragraph 60 above). No public hearings take place before them; however, under Article 197 of the Code of Criminal Procedure, an investigative hearing may be held in the course of appeal proceedings if the appellate judge considers that certain investigative measures need to be repeated, but the hearing takes place before the *Commissario della Legge*, who is responsible for conducting investigations at the appeal stage (see paragraph 61 above).

No investigative hearings took place at the appeal stage either in the proceedings against Mr Tierce or in those against Mr Marra and Ms Gabrielli. The Court considers it irrelevant that the applicants did not request such a hearing, since it would not in any event have taken place before the appellate judge and they would consequently not have had the opportunity to put their case to him.

(a) The proceedings against Mr Tierce

99. In the proceedings against Mr Tierce, the appellate judge had to consider points of both fact and law.

The first applicant maintained that he could not be held criminally liable. It was therefore the appellate judge's task to make a full assessment of the

issue of his guilt or innocence. Admittedly, the judge could not increase the penalty imposed at first instance, but the main question for him to examine was whether the first applicant was guilty or innocent. He considered the legal classification of the first applicant's conduct and, without directly assessing evidence adduced by the first applicant in person, confirmed that the applicant's conduct had amounted to fraud and not merely to misappropriation, even though the difference between the two offences lay chiefly in the subjective element (that of intention to deceive). Furthermore, at the complainant's request, the judge even considered a further offence allegedly committed by the first applicant and subsequently referred the matter to the *Commissario della Legge*. The issue of the preventive attachment of the first applicant's property was also well to the fore in the appeal proceedings.

100. Accordingly, the applicant should have been heard in person by the appellate judge.

(b) The proceedings against Mr Marra and Ms Gabrielli

101. In the proceedings against the second and third applicants, the appellate judge had to consider points of both fact and law. In particular, he had to make a full assessment of their guilt, as they denied all responsibility for the alleged offences. The judge was required to assess the evidence given by the second and third applicants to the *Commissario della Legge*, without examining them directly.

Following those proceedings, Mr Marra was convicted of possessing drugs with intent to supply, even though the judge at first instance had ruled out the element of intent. Ms Gabrielli was convicted on the ground that she had been aware of the second applicant's criminal activities and had knowingly and willingly taken part in them, although the subjective element had been ruled out at first instance and she had, consequently, been acquitted.

Accordingly, the appellate judge's review of the guilty verdict challenged by Mr Marra and Ms Gabrielli should have entailed hearing what they had to say directly.

4. Conclusion

102. Having examined San Marinese procedure as a whole, the role of the appellate judge and the nature of the questions before him in the instant case, the Court finds that there were no special features such as to justify denying the applicants a public hearing on appeal which they could attend and at which they could give evidence in person.

There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. 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

1. The first applicant

104. Mr Tierce claimed 750,000 euros (EUR) for the non-pecuniary damage he had suffered. He also maintained that he had suffered substantial pecuniary damage.

105. The Government pointed out that in his memorial the first applicant had not made any claim in respect of pecuniary damage. As regards non-pecuniary damage, he had not produced the slightest evidence of the alleged damage; in any event, a finding of a violation would constitute sufficient just satisfaction.

106. The Court cannot speculate as to what conclusions the San Marinese criminal courts would have reached if the violations found had not occurred. The first applicant's claims in respect of pecuniary damage should therefore be dismissed. However, the Court considers that Mr Tierce undoubtedly sustained non-pecuniary damage. Making its assessment on an equitable basis as required by Article 41 of the Convention, the Court decides to award him the sum of 12,000,000 Italian lire (ITL).

2. The second and third applicants

107. The second and third applicants each claimed EUR 20,000 in respect of non-pecuniary damage. They also claimed EUR 10,500 and EUR 1,000 respectively for the pecuniary damage they had sustained on account of their wrongful detention pending trial.

108. The Government argued, firstly, that the sums claimed were excessive and that no supporting documents or vouchers had been produced. In particular, there was no causal link between the pecuniary damage sustained and the alleged violation. A finding of a violation would constitute sufficient just satisfaction for any non-pecuniary damage.

109. The Court cannot speculate as to what conclusions the San Marinese courts would have reached if the violation found had not occurred, and consequently dismisses the second and third applicants' claims in respect of pecuniary damage.

The Court considers, however, that an award should be made to Mr Marra and Ms Gabrielli for non-pecuniary damage. Making its assessment on an equitable basis as required by Article 41, the Court decides to award them ITL 10,000,000 each.

B. Costs and expenses

110. Mr Tierce also sought reimbursement (in the amount of ITL 34,446,000) of the fees paid to his lawyer in connection with the proceedings before the Court.

111. The Government left the matter to the Court's discretion, but argued that the sums claimed were excessive and unjustified and that there was no causal link between the costs incurred in the domestic proceedings and the alleged violations. They considered that it would be reasonable to award the first applicant 10% of the sums claimed under this head.

112. Mr Marra and Ms Gabrielli likewise sought reimbursement of the fees paid to their lawyer in the domestic proceedings (EUR 20,000) and in the proceedings before the Commission and the Court (EUR 10,000 each).

113. The Government argued that the second and third applicants had not produced an itemised bill of the costs incurred in the proceedings before the Court, and considered that in any event the sums claimed were excessive. Nor was there any causal link between the costs incurred in the domestic proceedings and the alleged violation.

114. The Court reiterates that under Article 41 of the Convention it will order reimbursement only of the costs and expenses that are shown to have been actually and necessarily incurred and are reasonable as to quantum (see, among other authorities, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 79, ECHR 1999-V).

115. In the instant case, having regard to the evidence before it, the criteria set out above and the fact that the three applicants were represented by the same lawyer, the Court considers it reasonable to make an overall award of ITL 15,000,000 for costs and expenses.

C. Default interest

116. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 2.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of impartiality of the tribunal that tried the first applicant;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the fact that the three applicants were unable to give evidence in person to the appellate judge;

3. *Holds*
(a) that the respondent State is to pay the first applicant, within three months, ITL 12,000,000 (twelve million Italian lire) in respect of non-pecuniary damage;
(b) that the respondent State is to pay the second and third applicants, within three months, ITL 10,000,000 (ten million Italian lire) each in respect of non-pecuniary damage;
(c) that the respondent State is to pay the three applicants, within three months, the overall sum of ITL 15,000,000 (fifteen million Italian lire) for costs and expenses, together with any value-added tax that may be chargeable;
(d) that simple interest at an annual rate of 2.5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in French, and notified in writing on 25 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President