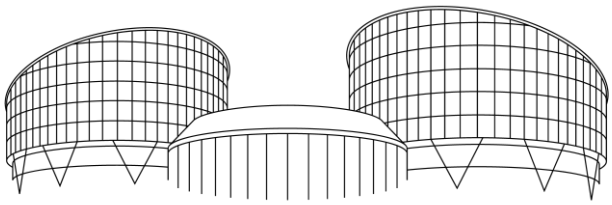

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF NEZIRAJ v. GERMANY

(Application no. 30804/07)

JUDGMENT

STRASBOURG

8 November 2012

FINAL

08/02/2013

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

In the case of Neziraj v. Germany,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
Paul Lemmens, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 30804/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Nerim Neziraj ("the applicant"), on 13 July 2007.

2. The applicant was represented by Mr U. Sommer, a lawyer practising in Cologne. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, *Ministerialrat,* of the Federal Ministry of Justice.

3. The applicant alleged that his right of access to court, his right to be heard and his right to defend himself through legal assistance of his own choosing under Article 6 § 3 (c) of the Convention had been violated in the criminal proceedings against him. He complained that the court of appeal had dismissed his appeal without an examination of the merits because he had not attended the hearing, even though his counsel had been present and ready to defend him.

4. On 3 March 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The Government of Serbia, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), indicated that they did not wish to exercise that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1979 and is currently detained in Remscheid Prison.

A. The proceedings before the criminal courts

7. On 3 February 2003 the Cologne District Court, having held a hearing at which the applicant and his lawyer had been present and witnesses had been heard, convicted the applicant of bodily injury and sentenced him to a fine amounting to 100 daily payments of fifteen euros (EUR). The applicant had pleaded for his acquittal.

8. The applicant, represented by counsel, lodged an appeal against that judgment.

9. On 11 June 2003 the Cologne Regional Court held a hearing at which the applicant's counsel was present whereas the applicant failed to attend in person. Several witnesses had equally been summoned. The applicant's counsel explained that an arrest warrant had been issued against the applicant in respect of different charges. The applicant had therefore chosen not to attend the hearing in person but wished to be represented by his counsel. He claimed that, having regard to Article 6 § 3 (c) of the Convention, a defendant was entitled to be represented by a lawyer in appeal proceedings.

10. By a judgment of the same day, the Regional Court, granting the request made by the Public Prosecutor's Office, dismissed the applicant's appeal. It found that the applicant had lodged his appeal within the prescribed time-limit. However, he had failed to attend the hearing before the Regional Court, to which he had been summoned, without sufficient excuse. He also had not been entitled to be represented by counsel. Therefore, his appeal had to be dismissed pursuant to Article 329 § 1, first sentence, of the Code of Criminal Procedure (see paragraph 25 below).

11. On 26 September 2003 the Cologne Court of Appeal dismissed the applicant's appeal on points of law, in which he had referred to his defence rights under Article 6 of the Convention, as ill-founded, as the judgment of the Regional Court did not disclose an error of law.

B. The proceedings before the Federal Constitutional Court

12. On 22 October 2003 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that the decision of the Regional Court, as confirmed by the Court of Appeal, not to deal with his

appeal on the merits due to his failure to appear at the hearing had violated his right of access to court, his right to be heard in court and his right to defend himself through a lawyer as guaranteed by the Basic Law.

13. On 27 December 2006 the Federal Constitutional Court declined to consider the applicant's constitutional complaint as it was ill-founded (file no. 2 BvR 1872/03). The decision was served on the applicant's counsel on 23 January 2007.

14. The Federal Constitutional Court found that the applicant's right to an effective defence, which was inherent in his right to a fair trial under the Basic Law, had not been breached. In coming to this conclusion, it also had regard to the case-law of the European Court of Human Rights on Article 6 §§ 1 and 3 (c) of the Convention. It stressed that the Court, in its case-law, had never found that an application of Article 329 § 1 of the German Criminal Code failed to comply with Article 6 of the Convention.

1. The right to defend oneself through counsel under the Basic Law

15. The Federal Constitutional Court stressed that the applicant's right to an effective defence had to be interpreted in the context of the system of appeals of the Code of Criminal Procedure and of further fundamental rights, such as the right to be heard and the principle of immediacy (*Unmittelbarkeitsgrundsatz*). Following an appeal (*Berufung*), the appellate court conducted fresh proceedings in respect of questions of both fact and law and took its own decision after having taken evidence. The principles of oral and public proceedings and of immediacy applied also to proceedings before the appellate courts. Under the provisions of the Code of Criminal Procedure, criminal proceedings as a rule could not be conducted in the defendant's absence, even before an appellate court. Therefore, in cases covered by Article 329 § 1, first sentence, of the Code of Criminal Procedure, there was no hearing on the merits, but the judgment delivered by the court of first instance in the defendant's presence was upheld.

16. The Federal Constitutional Court further reasoned that the right to an effective defence could not be asserted irrespective of further rights and principles laid down in the Basic Law and the Code of Criminal Procedure. Article 329 § 1, first sentence, of the Code of Criminal Procedure did not only aim at preventing a defendant from delaying proceedings against him by his absence, but also at securing his presence at the hearing, which was both a right and a duty. It was based on the understanding that a court only complied with its duty to establish the truth and to fix a fair penalty if it had seen the defendant in person and had heard his defence. Both under Article 14 § 3 of the International Covenant on Civil and Political Rights and under the European Convention on Human Rights the right to defend oneself entailed the right to be present. That right secured an unrestrained defence, but was at the same time a duty aimed at establishing the truth, for which the defendant's conduct and his submissions or even his silence could

be helpful. There were only very limited exceptions to the rule that no trial should be conducted in the defendant's absence (Articles 231 § 2, 231a, 231b, 231c, 232, 233, 247, 329 § 2, 350 § 2, 387 § 1, 411 of the Code of Criminal Procedure; see paragraphs 25-30 below).

17. The right and duty to be present related to the principles of immediacy and of oral proceedings which aimed at establishing a sound basis for the court's decision and reflected the defendant's right to be heard. As the defendant's presence did not exclusively serve to secure his rights, he was not free to waive his right to be present or to delegate it to his defence counsel.

18. The legislator had decided not to authorise a criminal trial in the defendant's absence. Therefore, Article 329 § 1, first sentence, of the Code of Criminal Procedure proportionately restricted the defendant's right to decide on the way in which he wanted to exercise his right to be heard and his right to defend himself through counsel. Having regard to the principles lying at the heart of the German criminal trial, the right to a fair trial did not oblige the legislator or the courts to authorise a defendant who failed to attend his trial to be represented by his defence counsel.

2. The right to defend oneself through counsel under Article 6 §§ 1 and 3 (c) of the Convention

19. The Federal Constitutional Court further observed that the German courts, in interpreting the law, were obliged to have regard to the provisions of the Convention and to the decisions taken by the European Court of Human Rights within the limits of a methodically arguable interpretation of the applicable German law. There was no judgment of the European Court of Human Rights finding a violation of the Convention in respect of Article 329 § 1 of the Code of Criminal Procedure, under which the defendant was not authorised to be absent and to have himself represented by his defence counsel at his trial. However, the European Court of Human Rights had given judgments in respect of other Contracting States to the Convention which concerned the defendant's absence and his counsel's presence in order to defend him at trial (see *Poitrimol v. France*, 23 November 1993, Series A no. 277-A; *Lala v. the Netherlands*, 22 September 1994, Series A no. 297-A; *Pelladoah v. the Netherlands*, 22 September 1994, Series A no. 297-B; *Van Geyseghem v. Belgium* [GC], no. 26103/95, ECHR 1999-I; and *Krombach v. France*, no. 29731/96, ECHR 2001-II). That court had found that the fact that the defendant, in spite of having been properly summoned, did not appear, could not justify depriving him of his right under Article 6 § 3 (c) of the Convention to be defended by counsel.

20. According to the Federal Constitutional Court, it could be left open whether the principles established in these cases, having regard to the differences of fact and in the national law which they had concerned,

applied without restrictions to the case at issue. In particular, in some of the cases decided by the European Court of Human Rights the defendant had not been heard with legal arguments which, in a German criminal trial, as a rule, had to be examined by the courts *ex officio*. In any event, Article 329 § 1, first sentence, of the Code of Criminal Procedure complied with Article 6 of the Convention. It only concerned the defendant's absence at his trial before the appellate court. The fact that his case was not dealt with anew on the merits was a result of his own decision not to attend the hearing without sufficient excuse and did not breach his rights under Article 6 § 3 (c) if, as was the rule, a trial at first instance had been held in his presence. If an arrest warrant had been issued against him for different charges, it was up to the defendant to resolve the conflict this entailed for him as he deemed best. It was not imperative to resolve this conflict for him by authorising him to be represented by his defence counsel at the trial on his appeal. Furthermore, the fact that defence counsel could not claim a hearing in such a case did not breach the principle of "equality of arms". This principle applied to a hearing on the merits, which was not held in cases covered by Article 329 § 1 of the Code of Criminal Procedure. The said provision also did not deprive the defendant of legal assistance within the meaning of Article 6 § 3 (c). Counsel could claim in court that the requirements of Article 329 of the Code of Criminal Procedure were not met. Otherwise, trials *in absentia* would in fact be authorised.

21. The Federal Constitutional Court further set out that under Article 329 § 4 of the Code of Criminal Procedure (see paragraph 25 below), the court could also order the defendant's arrest in order to secure his presence at his trial instead of dismissing his appeal without a hearing on the merits. However, such an order was not appropriate to enforce the defendant's own interest, in particular if there were no indications that he was ready to attend the hearing.

22. The Federal Constitutional Court further found that for the said reasons the defendant's right of access to court had not been violated, even assuming that the defendant had substantiated sufficiently this complaint.

II. RELEVANT DOMESTIC LAW

A. Rule: No trial hearing in the defendant's absence

23. The German Code of Criminal Procedure provides that, as a rule, no hearing may be held in respect of a defendant who fails to attend (Article 230 § 1 of the Code of Criminal Procedure).

24. As to the consequences of a defendant's failure to be present at his trial at first instance, Article 230 § 2 of the said Code stipulates that if no adequate reason has been given for the defendant's failure to attend, an

order shall be made to produce him before the court or a warrant of arrest shall be issued.

25. As regards the defendant's failure to attend his trial hearing before the appellate court (*Berufungsgericht*), Article 329 of the Code of Criminal Procedure provides:

> "(1) If, at the beginning of a main hearing neither the defendant nor, in cases in which this is permitted, a representative of the defendant appears, and if no adequate reason has been given for the failure to appear, the court dismisses an appeal lodged by the defendant without hearing the merits of the case. ...
>
> (2) Under the conditions set out in paragraph 1, first sentence, a hearing may be held in the defendant's absence following an appeal lodged by the prosecution. ...
>
> (3) The defendant may request restoration to the status quo ante within one week after service of the judgment under the conditions specified in Articles 44 and 45.
>
> (4) If the procedure under paragraphs 1 or 2 is not applied, an order shall be made for the defendant to be brought before the court or to be arrested. Such orders shall be dispensed with if it is to be expected that he will attend the new main hearing without coercive measures having been taken."

B. Exceptions to the rule

26. The Code of Criminal Procedure provides for some exceptions to the above rule. A trial hearing may be held in the defendant's absence (and a judgment on the merits be given), in particular, if the defendant absented himself in the course of a hearing and had already been heard on the charges (Article 231 § 2), if he rendered himself intentionally unfit to stand trial (Article 231a) or if he was removed from the courtroom for disorderly conduct (Article 231b), unless the court considers the defendant's presence necessary. In proceedings against several defendants the court may also authorise a defendant to absent himself during parts of the hearing which do not concern him (Article 231c).

27. Furthermore, a hearing may be held in the defendant's absence if only a fine of up to 180 times the daily pay rate is to be expected and if the defendant was properly summoned and was warned in the summons that a hearing could be conducted in his absence (Article 232). The defendant may also be released from his duty to attend the main hearing upon his request if only a prison sentence of up to six months or a fine of up to 180 times the daily pay rate is to be expected (Article 233).

28. In cases in which the main hearing, under the said provisions, may be held in the defendant's absence, he is entitled to be represented by defence counsel provided with a written power of attorney (Article 234).

29. The criminal courts may further order the defendant to leave the courtroom during the examination of a co-defendant or a witness in the interest of establishing the truth or in order to protect the health of the person testifying or of the defendant (Article 247).

30. Moreover, a defendant may choose not to attend and to have himself represented by counsel in a hearing on an appeal on points of law (Article 350 § 2), in a hearing on charges brought by way of private prosecution (Article 387 § 1) or in a hearing following his objection against a sentence order (Article 411 § 2).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

31. The applicant complained under Article 6 § 3 (c) of the Convention that, in the criminal proceedings against him, the appellate court had failed to deal with his appeal on the merits because he had not attended the hearing, despite the fact that his counsel had been present and ready to defend him. He claimed that his right of access to court, his right to be heard in court and his right to defend himself through a lawyer had been violated thereby. Article 6 of the Convention, in so far as relevant, reads as follows:

> "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 ..."

32. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

34. In the applicant's view, Article 6 § 3 (c) of the Convention had been breached in the proceedings before the Regional Court. He had been deprived of his right to defend himself through counsel of his own choosing before that court. It had been his aim, by requesting the hearing of witnesses and lodging motions to take further evidence, to prove that the judgment of the court of first instance was wrong and to obtain his acquittal. However,

the five witnesses who had been summoned to the hearing on appeal had not been heard by the Regional Court.

35. The applicant argued that the Regional Court's failure, in compliance with the applicable provisions of the Code of Criminal Procedure, not to hear his case on the merits did not comply with the Court's well-established case-law. Neither the Federal Constitutional Court nor the Government had shown that the facts at issue in the present application differed from those at issue in the Court's case-law as established, *inter alia*, in the applications of *Poitrimol v. France* (23 November 1993, Series A no. 277-A), *Lala v. the Netherlands* (22 September 1994, Series A no. 297-A), *Van Geyseghem v. Belgium* ([GC], no. 26103/95, ECHR 1999-I), *Krombach v. France* (no. 29731/96, ECHR 2001-II) and *Kari-Pekka Pietiläinen v. Finland* (no. 13566/06, 22 September 2009), in which the Court had found a breach of Article 6 §§ 1 and 3 (c) of the Convention.

36. In the case of *Van Geyseghem* (cited above), for instance, the applicant had been convicted at first instance but failed to attend the hearing on appeal. His defence counsel was present and ready to defend him before the court of appeal, but the court did not allow him to do so. The Court, in finding a breach of Article 6 § 3 (c), found that the right of everyone charged with a criminal offence to be effectively defended by a lawyer was one of the basic features of a fair trial. It stated that an accused did not lose this right merely on account of not attending a court hearing. The same considerations applied to the present case.

37. Moreover, the applicant stressed that the rights laid down in Article 6 § 3 (c) were not restricted in appeal proceedings. Admittedly, there was no right under German law to a second instance in all criminal proceedings. However, as the law prescribed a second instance and a fresh examination of the relevant evidence in the circumstances of his case, the courts had to comply with the rights guaranteed by the Convention also at that instance. Given that the German criminal courts, in a hearing on appeal, had to establish the relevant facts anew, in the same way as the court of first instance, there were no convincing grounds for authorising restrictions on the rights of the defence in the appeal proceedings which were not permitted at first instance. The courts' duty to verify on their own motion whether the formal requirements for conducting criminal proceedings were met and whether there were bars to such proceedings applied to proceedings at first instance and on appeal in the same way. The rights of the defence, including the right to apply for evidence to be taken and witnesses to be examined through one's defence counsel and not in person, had to be respected irrespective of, and in addition to, the courts' said duty.

(b) The Government

38. The Government took the view that Article 6 § 3 (c) had been complied with. They stressed, first, that the applicable provisions of the Code of Criminal Procedure did not permit the applicant to be represented by counsel in the appeal proceedings before the Cologne Regional Court, to which the applicant had been properly summoned. Under Article 329 § 1, first sentence, of the Code of Criminal Procedure, the Regional Court had been obliged to dismiss the applicant's appeal without hearing the merits of his case. The conditions for an exception to that rule had not been met. In particular, the applicant had not received a summons in accordance with Article 232 of the Code of Criminal Procedure (see paragraph 27 above) warning him that a hearing could be held in his absence. On the contrary, he had been warned in his summons that his appeal would be dismissed without a hearing on the merits if he failed to appear without a sufficient excuse.

39. In the Government's submission, the applicant's right to defend himself through legal assistance of his own choosing was only marginally affected by the rule laid down in Article 329 § 1 of the Code of Criminal Procedure. It had to be noted that in the appeal proceedings, counsel for the defence had had the right to claim that the conditions for an application of that rule were not met, that necessary conditions to conduct the criminal proceedings were not met or that there was a bar to the conduct of those proceedings.

40. The Government further referred to the reasons given by the Federal Constitutional Court for finding that the applicant's defence rights under Article 6 § 3 (c) had not been breached. It stressed that in criminal proceedings in Germany, following an appeal (*Berufung*), the court of appeal was called upon to take evidence itself in a new public and oral hearing with the parties and not only to detect possible mistakes made by the court of first instance. The applicant's presence at that hearing was not only a right, but also a duty. The court of appeal could not fulfil its task of establishing the truth without having obtained a personal impression of the applicant. The fact that the applicant feared that he would be arrested on the basis of a warrant issued in different proceedings did not alter that conclusion. It was for the applicant to resolve this conflict as he considered it most appropriate.

41. Moreover, the Government argued that the circumstances underlying the Court's judgments in several applications lodged against other Contracting Parties to the Convention concerning the compliance with Article 6 of the refusal to hear a case on the merits in the defendant's absence despite his counsel's presence differed from the facts at issue in the present case. Those cases therefore had to be distinguished from the present application.

42. In particular, in the cases of *Poitrimol* (cited above), *Krombach* (cited above) and *Lala* (cited above) the applicants had been convicted in their absence by the court of first instance before their appeal had been dismissed without an examination of the merits of their cases. Conversely, the applicant in the present case had been present at his hearing before the first-instance District Court and able to defend himself in person. Furthermore, in the case of *Poitrimol* (cited above, § 38) the Court had considered that declaring an appeal inadmissible on grounds related to the applicant's absconding was a disproportionate sanction. Conversely, the rule laid down in Article 329 § 1 of the Code of Criminal Procedure was unconnected to a defendant's absconding. Moreover, the Code of Criminal Procedure allowed a defendant to have the reasons for his absence examined by asking for a reinstatement of the proceedings under Article 329 § 3 of the Code of Criminal Procedure (see paragraph 25 above) or by lodging an appeal on points of law.

43. The Government further stressed that the present case differed from the cases of *Van Geyseghem* (cited above) and *Krombach* (cited above) in that under German law, requirements for and bars to the criminal proceedings had to be taken into account *ex officio*, that is, without necessitating a lawyer's motion or pleadings to that effect. A defendant could lodge an appeal on points of law against a decision dismissing his appeal under Article 329 § 1 of the Code of Criminal Procedure if that had not been the case.

44. Finally, the case of *Kari-Pekka Pietiläinen* (cited above) equally differed from the present case. In the former case, the Court based its finding of a violation of Article 6 § 3 (c) on the particular circumstances of that case. The Court noted, in particular, the fact that the applicant had not been informed that his absence on only one day of his hearing, on which, moreover, his presence did not appear necessary, would be equated with an absence during the trial as a whole. Only in these circumstances had the Court considered that failing to deal with the applicant's case on the merits despite his counsel's presence was a disproportionate sanction. Conversely, in the present case, only a one-day hearing including the taking of all witness evidence had been scheduled and the applicant had been informed in his summons on the consequences of his absence at that hearing.

2. The Court's assessment

(a) Recapitulation of the relevant principles

45. The Court reiterates that 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. It therefore examines complaints relating to these rights under both provisions taken together (see, *inter alia*, *Poitrimol v. France*,

23 November 1993, § 29, Series A no. 277-A; and *Krombach v. France*, no. 29731/96, § 82, ECHR 2001-II).

46. The Court repeatedly had to deal with the question whether an accused who had been properly summoned and who deliberately avoided appearing in person without having provided an excuse acknowledged as valid for not attending the hearing remained entitled to defend himself through "legal assistance of his own choosing" within the meaning of Article 6 § 3 (c).

47. In its case-law, the Court pointed out that, in the interests of a fair criminal process, 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 (see, *inter alia*, *Poitrimol*, cited above, § 35; and *Krombach*, cited above, § 86). As a general rule, this was equally true for an appeal by way of a rehearing (see, *inter alia*, *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A; and *Pelladoah v. the Netherlands*, 22 September 1994, § 40, Series A no. 297-B). The legislature accordingly had to be able to discourage unjustified absences (see, *inter alia*, *Poitrimol*, cited above, § 35; *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 33, ECHR 1999-I; and *Van Pelt v. France*, no. 31070/96, § 66, 23 May 2000).

48. However, the Court stressed 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 (see, amongst others, *Lala*, cited above, § 33; *Pelladoah*, cited above, § 40; *Van Pelt*, cited above, § 66; and *Kari-Pekka Pietiläinen v. Finland*, no. 13566/06, § 31, 22 September 2009).

49. The Court consistently found that the latter interest prevailed and that, consequently, the fact that a defendant, in spite of having been properly summoned, did not appear, could not – 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 (see *Lala*, cited above, § 33; *Pelladoah*, cited above, § 40; *Van Geyseghem*, cited above, § 33; *Van Pelt*, cited above, § 66; *Harizi v. France*, no. 59480/00, § 49, 29 March 2005; and *Kari-Pekka Pietiläinen*, cited above, § 31).

50. The Court stressed in this context that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, was one of the fundamental features of a fair trial. A person charged with a criminal offence did not lose the benefit of this right merely on account of not being present at the trial (see *Poitrimol*, cited above, § 34; *Van Geyseghem*, cited above, § 34; *Stroek v. Belgium*, nos. 36449/97 and 36467/97, § 23, 20 March 2001; *Goedhart v. Belgium*, no. 34989/97, § 26, 20 March 2001; and *Kari-Pekka Pietiläinen*, cited above, § 32).

51. Even if the legislature had to be able to discourage unjustified absences, it could not penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings could be satisfied by means other than deprivation of the right to be defended (see *Van Geyseghem*, cited above, § 34; *Van Pelt*, cited above, § 67; and *Kari-Pekka Pietiläinen*, cited above, § 32). It was for the courts to ensure that a trial was fair and, accordingly, that counsel who attended the trial for the apparent purpose of defending the accused in his absence was given the opportunity to do so (see, *inter alia*, *Van Geyseghem*, cited above, § 33; and *Kari-Pekka Pietiläinen*, cited above, § 31).

(b) Application of these principles to the present case

52. The Court notes that the applicant in the present case complained that his right of access to court, his right to be heard and his right to defend himself through legal assistance had been breached in that, at his criminal appeal hearing, his lawyer had not been allowed to conduct the defence in his absence and his appeal had been rejected without an examination on the merits. It considers that the application essentially raises an issue in relation to the applicant's right to defend himself through a lawyer. As a consequence of the domestic courts' refusal to allow the applicant's counsel to defend the applicant in his absence, the case further raises an issue in relation to the applicant's access to court and the fairness of his trial. The Court shall therefore examine the complaints under Article 6 §§ 1 and 3 (c) taken together (see also paragraph 45 above).

53. The Court further observes that the present case concerns a defendant's criminal appeal by way of a rehearing of the case. That hearing on appeal was the last instance where, under domestic law, the case could be fully examined as to questions of fact and law. However, counsel for the applicant had not been authorised to represent the applicant in the latter's absence without an excuse acknowledged as valid. The situation at issue is therefore comparable to that examined in the cases of *Poitrimol* (cited above, §§ 28, 32), *Lala* (cited above, § 31), *Pelladoah* (cited above, § 38), *Van Geyseghem* (cited above, § 29), *Van Pelt* (cited above, §§ 62, 65), *Goedhart* (cited above, § 24), *Stroek* (cited above, § 21), *Harizi* (cited above, § 51) and *Kari-Pekka Pietiläinen* (cited above, § 25) in these respects. Moreover, in the case of *Krombach*, the applicant had not been allowed to be represented by counsel in his absence at his trial hearing at first instance. The Court nevertheless considered the case comparable in relation to the issue raised by the cases cited above as the applicant equally failed to appear at a hearing to which he had been properly summoned (ibid., §§ 83, 86).

54. In these cases, which concerned four different Contracting Parties to the Convention, the Court found that the respective applicant's defence rights prevailed over the public and the victim's interest in discouraging the

applicant's absence at his trial. The legitimate requirement that a defendant must attend his court hearing therefore had to be satisfied by other means than a deprivation of the right to be defended by counsel (see, in particular, §§ 49 and 51 above). The Court concluded, accordingly, that there had been a breach of Article 6 §§ 1 and 3 (c) in all of the said cases.

55. The Court takes note, in this connection, of the Government's and the Federal Constitutional Court's argument that in the German criminal procedure, the defendant did not only have a right, but also a duty to be present, and that he could not therefore waive his right to presence at the hearing. The applicant's presence and conduct, even if he availed himself of the right to remain silent, was important for the criminal courts in order to comply with their duty to establish the truth and to fix a fair penalty.

56. The Court observes that it has previously dealt with similar arguments put forward by defendant States. In the case of *Van Geyseghem*, for instance, it was argued by the respondent Government that the accused's attendance facilitated the proper administration of justice and allowed sentences to be adapted to the individual offender (ibid., § 31). The Court had agreed with that reasoning, stressing the importance that a defendant should appear for a fair administration of justice. It considered, however, that the legitimate requirement that defendants had to attend their trial had to be met by other means than a deprivation of the defence rights of the person concerned (ibid., §§ 33, 34).

57. The Court further notes that in the Government's submission, the cases cited above had to be distinguished from the present case as the factual or legal situation in those cases had differed from that at issue in the instant case.

58. The Government submitted, firstly, that the facts at issue in the cases of *Poitrimol*, *Krombach* and *Lala* (all cited above) differed from those in the present case. The applicants in the former cases had been convicted in their absence already by the court of first instance. Conversely, the applicant in the present case had been present at the hearing before the first-instance District Court before his appeal had been dismissed by the Regional Court on appeal without a further examination of the merits.

59. The Court observes that in the cases referred to by the Government the applicants were indeed tried, for different reasons, in their absence by the respective courts of first instance. However, in other cases cited above, the applicants were tried and convicted by the courts of first instance in their presence (see, in particular, *Pelladoah*, cited above, §§ 10-11; *Van Geyseghem*, cited above, § 12; *Van Pelt*, cited above, §§ 14-18; and *Kari-Pekka Pietiläinen*, cited above, § 6). That factual difference was not, therefore, decisive for the Court's conclusion in the above cases.

60. The Court further takes note of the Government's argument that the present case differed from the cases of *Van Geyseghem* and *Krombach* (cited above) as under German law, requirements for and bars to the

criminal proceedings had to be taken into account by the courts on their own motion, that is, without necessitating a lawyer's motion or pleadings to that effect.

61. The Court, however, refers to its findings in the case of *Van Geyseghem* that the court of appeal in that case had to examine on its own motion, for instance, the issue of statutory limitation (ibid., §§ 31 and 35) – a possible bar to the proceedings. It stressed in this respect that, nevertheless, the fact remained that counsel's assistance was indispensable for resolving conflicts and his role was necessary in order for the rights of the defence to be exercised (ibid., § 35). Similarly, the Court considered in the case of *Krombach* that the domestic court should have given the applicant's lawyers an opportunity to put forward their arguments relating to a point of law (an estoppel *per rem judicatam* and the *non bis in idem* rule – further bars to criminal proceedings) which it had had jurisdiction to examine (ibid., § 90). It follows, therefore, that according to its case-law it has been decisive that the applicants' lawyers had been unable to put forward their arguments in the applicants' defence, including legal reasoning relating, for instance, to bars to the proceedings, irrespective of the question whether the domestic courts had to examine them already on their own motion.

62. The Government also argued that, contrary to other legal systems, under German law a defendant could, by asking for a reinstatement of the proceedings or by lodging an appeal on points of law, have re-examined the validity of the reasons for his absence or the courts' failure to take into account, on their own motion, conditions or bars to the criminal proceedings.

63. The Court observes that there appear to be certain differences in these respects in the legal systems of the defendant States in the above cases. However, at least in some of these States, the law provided for a right to reopening if the defendant had a valid excuse for not attending the hearing which he had been unable to announce in time (see, for instance, *Kari-Pekka Pietiläinen*, cited above, § 11) or for an appeal on points of law in certain circumstances (see, for instance, *Lala*, cited above, §§ 12-13; and *Van Geyseghem*, cited above, §§ 18-20). The Court therefore considers that certain differences in these respects equally have not played a decisive role for its finding of a breach of Article 6 §§ 1 and 3 (c) in its previous case-law.

64. The Court is further not convinced by the Government's argument that it only found a breach of Article 6 §§ 1 and 3 (c) of the Convention in the case of *Kari-Pekka Pietiläinen* in the particular circumstances of that case. It found in that case that the principles established in its above-mentioned case-law applied to that case and that the domestic court of appeal had had the duty to allow the applicant's counsel to defend him, even in his absence. Further reasons given by it why this was "particularly

true" in that case did no more than confirm and reinforce the Convention violation found (ibid., § 34).

65. Finally, the Court would add that its conclusions in the above case-law on the subject-matter did not depend on the question whether the inadmissibility of the applicant's appeal under domestic law was to be considered as a sanction imposed on the defendant for having absconded. It notes, however, that in a number of applications examined by it – as in the present case – , an arrest warrant had been issued against the applicants prior to the hearing they failed to attend (see, for instance, *Poitrimol*, cited above, § 20; *Lala*, cited above, § 10; and *Goedhart*, cited above, § 10). This fact had not been decisive in the Court's reasoning either. It would also reiterate in this connection that an accused was not obliged to surrender to custody in order to secure the right to be (re)tried in conditions that comply with Article 6 of the Convention (see *Krombach*, cited above, § 87).

66. It follows that the principles established in the Court's above case-law (see paragraphs 45-51) apply to the present case, which cannot be distinguished, on the basis of the factual situations or of differences in domestic criminal law, from the circumstances at issue in the said previous cases.

67. There has accordingly 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

68. 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

69. The applicant claimed 1,500 euros (EUR) in respect of pecuniary damage. He submitted that he had to pay that sum, comprising the fine imposed on him on appeal and the court costs, as a result of his conviction on appeal. He further claimed EUR 2,000 in respect of non-pecuniary damage. He argued that the fact that he had not had a chance to have the judgment of the first-instance court rectified had put a burden on him.

70. The Government considered that the applicant could not claim any compensation in view of the fact that there had not been a breach of his Convention rights.

71. The Court considers that it cannot speculate what the outcome of the proceedings before the Regional Court would have been if the latter had

allowed the applicant to be represented by counsel. It therefore rejects the applicant's claim in respect of pecuniary damage.

72. The Court further accepts that the domestic courts' failure to comply with the requirements of Article 6 in the present case cannot be made good by a mere finding of a violation. Having regard to its case-law and making its assessment on an equitable basis, it therefore awards the applicant EUR 1,000, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

73. The applicant also claimed a total of EUR 4,500, plus value-added tax (VAT) of 19 per cent, for the costs and expenses incurred in the proceedings before the domestic courts. This sum comprised EUR 2,000 for the lawyer's fees incurred in the proceedings before the District Court, EUR 1,000 for the lawyer's fees incurred in the proceedings before the Regional Court and EUR 1,500 for the lawyer's fees incurred in the proceedings before the Federal Court of Justice and the Federal Constitutional Court. The VAT was to be added to these amounts. He further claimed EUR 2,000, plus VAT, for the costs and expenses incurred before the Court.

74. The Government did not comment on these claims.

75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 3,500, plus any tax that may be chargeable to him, covering costs under all heads.

C. Default interest

76. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Power-Forde and Nußberger is annexed to this judgment.

D.S.
C.W.

JOINT CONCURRING OPINION OF JUDGES POWER-FORDE AND NUSSBERGER

We have voted with the majority in finding a violation, but nonetheless we think that it is worth reconsidering the Court's frequently criticised and controversial case-law on Article 6 § 3 (c) of the Convention,[1] which, in our view, obliges States to initiate reforms of criminal procedure that are neither necessary nor helpful.

Article 6 § 3 (c) of the Convention defines as a minimum standard in criminal procedure that everyone who is charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing".

Whereas the right to "legal assistance" is clearly intended to secure to an accused person the support of a lawyer, the Court has interpreted this provision as a right for the accused to be absent from trial and to be replaced by a lawyer. While this might be acceptable in respect of legal systems where the law on criminal procedure allows trials *in absentia* and thus does not secure the accused person's right to be heard, this approach cannot be transferred to legal systems which do not allow trials *in absentia*, but which link certain consequences or sanctions to a defendant's unexcused absence from second-instance proceedings, after the case has already been fully heard by the court of first instance.

Admittedly, it is one of the most essential features of the guarantees under Article 6 of the Convention that the accused be heard. The other side of the coin, however, is that the accused must listen, not only to the questions put to him, but also to the charges, the witnesses' and experts' statements and – in particular – to the victim's report of his or her suffering. A personal confrontation with and awareness of the public discussion on the defendant's crime and guilt must be seen as a precondition for effective rehabilitation and reintegration into society, which is the basic aim of punishment. Although the lawyer is able to advance arguments in defence of the accused at the trial, he cannot replace his client. If the accused does not attend the trial, where all the questions of fact and law are discussed, the trial loses its main purpose.

[1] See the dissenting opinions of Judges Ryssdal, Freeland and Lopes Rocha and Judge Pettiti in *Poitrimol v. France*; Judge Matscher in *Lala v. The Netherlands*; Judge Pellonpää in *Van Geysegheim v. Belgium*; and the concurring opinions of Judges Wildhaber, Palm, Rozakis, Türmen and Bîrsan in *Van Geysegheim v. Belgium*, all of which criticise the Court's interpretation of Article 6 § 3 (c) of the Convention.

For this reason, the Court has always emphasised "that it is 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 need to be protected, and of the witnesses. The legislature must accordingly be able to discourage unjustified absences" (see *Poitrimol v. France*, 23 November 1993, § 35, Series A no. 277-A).

In our opinion, however, it is not correct to balance this duty on the part of the legislature to discourage unjustified absences against the accused person's right to be adequately defended. This would mean failing to distinguish the right to legal assistance from the right to be absent from trial. It is undisputed that, had the accused been present at his trial, he would have had the right to defend himself "through legal assistance". Thus, we do not share the Court's view that the accused would lose his right to be defended by a lawyer as guaranteed by Article 6 § 3 (c) of the Convention. He is merely denied the right to be replaced by a lawyer, a right which is not guaranteed by the Convention.

The Court's case-law is perplexing: on the basis of the accused person's wish for a retrial, everybody must be present and witnesses can even be obliged to attend the hearing; meanwhile, the accused himself is permitted to be absent. It is difficult to imagine how the repetition of a full examination of the facts and law of a case at second instance, without the presence of the accused, could better serve the purpose of establishing the truth and fixing a fair penalty than the same examination at first instance, in the presence of the accused.