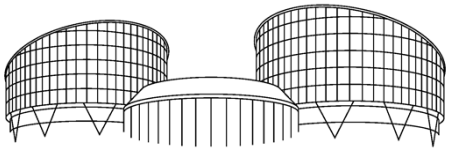

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF DIJKHUIZEN v. THE NETHERLANDS

(Application no. 61591/16)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 • Fair hearing • Impossibility to secure physical presence of applicant, detained in Peru, at his appeal hearing • Court of Appeal entitled to substitute hearing by videoconference in the circumstances • Applicant's repeated and unambiguous refusal to participate by videoconference constituted waiver of right to take part in hearing

STRASBOURG

8 June 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Dijkhuizen v. the Netherlands,

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

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Ilse Freiwirth, *DeputySection Registrar,*

Having regard to:

the application (no. 61591/16) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Mr Ment Floor Dijkhuizen ("the applicant"), on 17 October 2016;

the decision to give notice to the Netherlands Government ("the Government") of the complaint concerning the refusal to grant the applicant, who was detained abroad, a trial by video link and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 18 May 2021,

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

INTRODUCTION

1. The case concerns the applicant's complaint under Article 6 of the Convention that he was prevented from attending the appeal hearing in his criminal case, whether in person or by videoconference, and thereby from exercising the rights of the defence.

THE FACTS

2. The applicant is a Netherlands national born in 1966. He is currently detained in Peru. The applicant was represented by Mr B.Th. Nooitgedagt, a lawyer practising in Amsterdam.

3. The Government were represented by their Agent, Ms B. Koopman, of the Netherlands Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant's business prior to the events complained of was importing tinned vegetables from Peru into the Netherlands.

6. On 12 November 2005 the applicant was arrested and taken into detention on remand. On 30 August 2006 he was summoned to appear before the Rotterdam Regional Court (*rechtbank*) on charges of having, among other things, imported on several occasions – together and in collaboration with others (*tezamen en in vereniging met anderen*) – into the Netherlands sizeable quantities of cocaine hidden in vegetable tins. These charges, which involved individuals from various countries, were part of a substantial and complex case featuring a large number of defendants. The applicant, who was tried in parallel with six other accused, took part in the trial hearing.

7. On 13 March 2008 the Rotterdam Regional Court, sitting in Dordrecht, convicted the applicant of having participated in the importation of 1,623 kilogrammes of a substance containing cocaine and acquitted him of other charges. It sentenced him to nine years' imprisonment. Both the prosecution and the applicant appealed. Six co-accused also appealed against their convictions.

8. On 20 October 2008 a preparatory hearing (*regiezitting*) took place before the Court of Appeal (*gerechtshof*) of The Hague. At that time, the seven defendants who were being tried simultaneously were all resident in different countries. The applicant – then still detained on remand – was present in person. The applicant's counsel requested the lifting or, in the alternative, the suspension of the applicant's detention on remand, arguing that the applicant was unlikely to abscond.

9. On 10 November 2008 the Court of Appeal gave a decision suspending the applicant's detention on remand. The suspension was conditional: specifically, the applicant was to surrender his passport and remain in the Netherlands throughout the period of suspension and he was to present himself before the police or the courts whenever summoned to do so.

10. On 7 April 2009 the applicant's counsel requested permission for the applicant to travel within the European Union to pursue his business activities. The Court of Appeal granted this request on 16 April 2009.

11. On 4 December 2009 the applicant's counsel requested the lifting of the requirement that he remain in the European Union. On 18 December 2009 the Court of Appeal granted this request; the requirement that he present himself before the police or the courts when summoned to do so was however maintained. On 21 December 2009 the applicant's passport was returned to him. The applicant travelled to Peru.

12. In 2011, 2012 and 2013 a number of further preparatory hearings - not attended by the applicant – took place; the hearing on the merits in the applicant's case – and in the cases tried in parallel – was scheduled for 25 November to 6 December 2013.

13. The applicant planned to return from Peru to the Netherlands by boarding a flight to Amsterdam from the airport at Guayaquil, in

neighbouring Ecuador, on 23 November 2013. However, he was arrested by the Peruvian authorities while attempting to cross the border. He was placed in detention on remand on charges of money laundering related to the trade in illegal narcotic substances.

14. When the hearing of the Court of Appeal resumed on 25 November 2013, the applicant's counsel informed the Court of Appeal that the applicant was unable to attend, having been arrested and detained in Peru. He asked the Court of Appeal to grant an adjournment and seek the applicant's extradition to the Netherlands despite the absence of any extradition treaty with Peru. He added the following:

> "My client does not wish to be heard by videoconference or under letters rogatory. He prefers to be heard at the hearing itself. It follows that the existence or not of an extradition treaty needs to be investigated. The fact is [*Immers*], my client will not say a single word as long as he is detained in Peru. The protection which my client enjoys in the Netherlands should have its effect in Peru also."

The Court of Appeal adjourned the hearing *sine die*.

15. On 6 December 2013 the Court of Appeal ordered the applicant to be heard as a defence witness in the case of another accused which was being tried in parallel with his.

16. On 24 January 2014 the applicant's counsel informed the prosecuting Advocate General that he had been in touch with his client by telephone and that the applicant had expressed the wish to appear before the Court of Appeal of The Hague in person, both as a witness and as an accused. He asked the Advocate General to cause a formal extradition request to be made to the Peruvian authorities, stating that the applicant would not oppose it.

17. By letter of 7 March 2014 the Advocate General informed the applicant's counsel that Peruvian law prevented the transfer abroad, even temporarily, of detainees who were suspects in Peruvian criminal proceedings.

18. By letter of 18 March 2014 the prosecuting Advocate General informed the applicant's counsel that the appeal hearing on the merits would resume on 20 October of that year.

19. By fax of 21 March 2014 the applicant's counsel asked the prosecuting Advocate General to cause a formal extradition request to be made to the Peruvian authorities. This fax included the following:

> "Since Mr Dijkhuizen is in detention on remand in Peru, my communication with him is subject to some delays.
>
> I have in the meantime received a (provisional) reply to your letter of 7 March [2014], the gist of which is that he will not lend his cooperation to any kind of video hearing and will not authorise me without reservation to conduct the defence on his behalf for the purpose of the hearing on the merits of his criminal case in his absence."

20. By letter of 24 March 2014 the Advocate General informed the applicant's counsel that no such formal request would be made. The reason was that Peruvian law did not permit a detainee held as a suspect in Peruvian criminal proceedings to be extradited or transferred abroad. This information had been obtained by the Netherlands liaison officer in Lima from a Peruvian public prosecutor.

21. On 16 October 2014 the applicant's counsel informed the prosecuting Advocate General and the Court of Appeal by fax that the applicant was prepared to be heard as a witness by videoconference. In particular, he stated the following:

> "Mr Dijkhuizen has expressed his willingness to be heard as a witness by video link (*videoverbinding*). It is my understanding that the necessary facilities exist in the Castro Castro prison in Lima where he is being held. I therefore request that you ensure that it is made possible for him to fulfil his role as a witness at the hearing in this way."

22. The hearing on the merits that had been adjourned on 25 November 2013 (see paragraph 14 above) resumed on 20 October 2014. The applicant did not attend, being still detained in Peru. There was no hearing by videoconference.

23. The applicant's counsel exercised the rights of the defence on the applicant's behalf.

24. In his opening address, held on 20 October 2014, the applicant's counsel requested the Court of Appeal to adjourn the proceedings in order to enable the applicant to participate in the hearing in person.

25. In his closing address, held on 29 October 2016, the applicant's counsel asked that the prosecution be declared inadmissible on the ground that the rights of the defence had been grossly violated; in the alternative, that the hearing be reopened in order for the applicant to be extradited or temporarily surrendered so that he could attend in person; in the further alternative, that the hearing be reopened so that the applicant could take part by videoconference.

26. The Court of Appeal gave judgment on 21 November 2014. As relevant to the case before the Court, its reasoning included the following:

> "As to the interest of Ment Dijkhuizen as an accused to make a statement via videoconference from detention in Peru, the Court of Appeal takes the following view.
>
> Starting on 24 March 2014 the defence could and should have realised that, based on the situation in the Netherlands, the hearing on the merits would take place in October 2014, whereas Dijkhuizen was still in detention in Peru. Likewise, the defence ought to have realised that hearing Dijkhuizen as an accused by means of a videoconference was a possibility, but that that would require a request for international legal assistance and technical arrangements (...). However, as long as the defence does not signal the willingness of Ment Dijkhuizen to make a statement in this way, everyone will – justifiably – choose as their starting point the statement made by counsel at the hearing of 25 November 2013 that Ment Dijkhuizen does not

wish to be heard by videoconference or under letters rogatory and will make no statement as long as he is detained.

The first signal that Ment Dijkhuizen's procedural attitude had changed having been made only on 16 October 2014, it was made impossible for the authorities to send out a request for international legal assistance for a videoconference to take place in the period around 20 October 2014 in time. The question therefore now arises whether the case needs to be adjourned again, and at this late stage, for the purpose of hearing Ment Dijkhuizen as an accused by videoconference. Weighing in the balance on the one hand Dijkhuizen's weighty interest to be able to make his statement as an accused and proffer whatever he considers useful, and on the other hand the circumstance that the hearing on the merits was not continued in November 2013 at the request of Dijkhuizen's counsel because of [Dijkhuizen's] detention, as well as the interest of society in an effective and speedy trial and the interests of the co-accused, the Court of Appeal is of the view that the interest that this case from 2005 should now be tried should prevail."

The Court of Appeal considered nine years' imprisonment appropriate in principle but found it necessary to reduce that amount by 15% in compensation for the excessive length of the proceedings. It imposed on the applicant a sentence of seven years and six months.

27. The applicant lodged an appeal on points of law, complaining, *inter alia*, of the failure to seek his transfer or extradition and the failure to entertain his request to be heard by videoconference.

28. On 19 April 2016 the Supreme Court (*Hoge Raad*) gave judgment dismissing the applicant's appeal on points of law on summary reasoning.

29. According to the Government, the applicant has been sentenced to twenty-five years' imprisonment in Peru and has submitted a request to serve the remainder of his sentence in the Netherlands.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

30. The Code of Criminal Procedure (*Wetboek van Strafvordering*, hereinafter "the CCP"), in its relevant part, provides as follows:

Article 131a

"1. Where in this Code the power is given to hear, interrogate or question persons, that power shall also include, except in cases to be determined in delegated legislation, hearing, interrogating or questioning by a videoconference in which a direct image and sound link shall be established between the persons concerned.

2. The president of the judicial formation, the judge, the investigating judge or the civil servant who is charged with leading the hearing shall decide whether a videoconference shall be made use of, taking into account the interest of the investigation. Before deciding the person to be heard or his counsel and where appropriate the public prosecutor shall be given the opportunity to make their views known about the use of a videoconference. Further rules on this point may be set by delegated legislation.

3. There shall be no separate legal remedy against the decision to make use of a videoconference.

..."

Article 278

"...

3. If the suspect [having failed to appear] has indicated that he wishes to conduct his defence in person and requests an adjournment of the hearing of his case, the [trial court] shall decide on the request for an adjournment. The [trial court] shall grant or refuse the request for an adjournment, after which, in the latter case, it shall continue with the hearing with due regard to Article 280 § 1. ..."

Article 279

"1. The suspect who has not appeared at the hearing may have the defence conducted at the hearing by a lawyer (*advocaat*) who states that he has been expressly authorised to do so. The [trial court] shall agree to this ...

2. The trial of a case against a suspect who has specifically authorised counsel to conduct the defence shall be considered to be a defended action (*procedure op tegenspraak*)."

Article 280

"1. If the suspect does not appear at the hearing and the [trial court] does not have occasion to

a. declare the summons null and void ...

b. order the suspect to be brought before it ...

it shall give an order declaring the suspect in default of appearance and the hearing in the case shall be continued in his absence, unless it has agreed to the defence being conducted in accordance with Article 279 § 2. ..."

31. By virtue of Article 415 of the CCP these provisions apply equally to appeal proceedings.

32. The delegated legislation referred to in Article 131a § 2 of the CCP is constituted by the Videoconference Rules (*Besluit videoconferentie*), which, at the relevant time, in their relevant part provided as follows:

Section 2

"2. In the following cases videoconferences will not be used, except with the approval of the accused or his counsel:

...

b. with regard to the accused, at a hearing on the merits of the case before the full-bench chamber (*meervoudige kamer*)."

33. In its judgment of 14 May 2019 (ECLI:NL:HR:2019:709), the Supreme Court held as follows:

"2.3.2. The right to be tried in one's presence has found its expression in Article 14 § 3 of the International Covenant on Civil and Political Rights, introductory sentence and under d, while in addition it follows from the purpose and purport of Article 6 of the Convention that the right referred to must be considered to be encompassed in that treaty provision also. Taking into account, also, the case-law of the European Court of Human Rights as set out in the advisory opinion of the Advocate General [i.e. essentially *Hokkeling v. the Netherlands*, no. 30749/12, 14 February 2017], the main rule is that the examination of the case in a public hearing at first instance or on appeal must be suspended if it is apparent from the case file or from what is stated at the hearing that the accused is detained abroad but does not appear to have validly waived his right to be tried in his presence.

2.3.3. Only in exceptional cases can the rule set out under 2.3.2. be deviated from. For that to be the case, it is required that:

(i) it is established on the basis of sufficiently meticulous reporting (*voldoende nauwkeurige verslaglegging*) by the Public Prosecution Service (*Openbaar Ministerie*) that the Netherlands authorities have made enough of an effort to allow the accused to make it known whether he wishes to be present at the hearing of his case and, if that is the case, to exercise his right to be present, and

(ii) nevertheless it is not to be expected that the accused can be enabled to exercise his right to be present within an acceptable time, and

(iii) the interest of proper criminal procedure (*behoorlijke strafvordering*) - including the interest not only of the accused but also of society itself in an effective and speedy trial – would be seriously impaired if the hearing cannot commence or be continued, and this interest must, in the given circumstances, be afforded greater weight than the interest of the accused in being able to exercise his right to be present in person.

2.3.4. In connection with the requirements set out in 2.3.3. relevant considerations may include the following:

- whether an adjournment has been requested and what arguments have been proffered by or on behalf of the accused for adjourning the hearing, whether the accused is willing to cooperate in his transfer to the Netherlands in order to be present at the hearing of his criminal case, and whether the absence of the accused from the trial can be compensated for by making use, for the hearing, of a videoconference as referred to in Article 131a of the Code of Criminal Procedure;

- what interests, taking into account also the seriousness of the crime charged, are at stake for the accused;

- the danger that the right to prosecute may lapse through passage of time.

2.3.5. The main rule is, however, that if it appears from the case file or what emerges at the hearing that the accused is detained abroad and that it does not appear that he has validly waived his right to be tried in his presence, the hearing should not proceed. For that reason, a decision not to adjourn for exceptional reasons as set out in 2.3.3. requires further reasoning.

2.3.6. It should be noted that ultimately in the assessment of the reasonableness of the time taken up by the proceedings an adjournment on the ground that the accused is detained abroad will in principle be imputed to the accused himself."

II. RELEVANT INTERNATIONAL LAW

34. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 January 1988) in its relevant part provides as follows:

Article 3
Offences and sanctions

"1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

a) i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention [including *inter alia* cocaine];

..."

Article 6
Extradition

"...

2. Each of the offences to which this article applies [see Article 3 § 1, quoted in its relevant part above] shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

4. The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

...

7. The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

..."

Article 7
Mutual legal assistance

"1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

a) Taking evidence or statements from persons;

b) Effecting service of judicial documents;

c) Executing searches and seizures;

d) Examining objects and sites;

e) Providing information and evidentiary items;

f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;

g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters.

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

...

12. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

...

15. Mutual legal assistance may be refused:

a) If the request is not made in conformity with the provisions of this article;

b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction;

d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

16. Reasons shall be given for any refusal of mutual legal assistance.

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

..."

35. There is a treaty between the Kingdom of the Netherlands and the Republic of Peru providing for the transfer of sentenced persons to their home country to serve their sentences there (Treaty on the transfer of sentenced persons between the Kingdom of the Netherlands and the Republic of Peru, signed in The Hague on 12 January 2011 and in force since 1 March 2014), but none providing for the extradition of suspects.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

36. The applicant complained under Article 6 of the Convention that he had been prevented from defending himself and taking an active part in the hearing of witnesses at the appeal hearing, whether by attending in person or by videoconference. He also complained that he had thus been denied adequate facilities for the preparation of his defence.

In its relevant parts, Article 6 of the Convention reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...

...

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

...

(b) to have adequate time and facilities for the preparation of his defence;

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

(d) to examine ... witnesses against him ..."

A. Admissibility

37. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

38. The applicant submitted that he had been denied a fair hearing by the Court of Appeal inasmuch as he had not been enabled to attend the hearing in person alongside his counsel in order to dispute evidence, present an alternative version of the facts, make requests for further investigations and cross-examine witnesses directly.

39. He referred in the first place to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see paragraph 34 above), in particular Articles 6 § 7 and 7 §§ 1, 4, 5, 6, 7, 8 and 17 thereof, which – in his submission – required the Netherlands authorities to enter into formal negotiations with the Government of Peru to secure his transfer to the Netherlands for the hearing. In the absence of such formal negotiations, it could not be said that the Netherlands authorities had made enough of an effort to allow the applicant to attend in person.

40. If a formal title for the applicant's detention were needed in order to request the applicant's extradition from Peru, then it would have been a simple matter for the Court of Appeal to rescind the suspension of his detention on remand.

41. In so far as the interests of the applicant's co-accused, whose cases were being tried in parallel with his own, might be argued to justify proceeding without the applicant himself, the applicant submitted that at least one co-accused had in fact sought to have him heard as a witness in his or her own case.

42. The applicant's own conduct could not justify denying him the right to attend the hearing. The applicant had been entirely within his rights to travel to Peru; he had been admitted into Peruvian territory; there had been nothing to suggest that he was in danger of arrest; and in fact, he had only been arrested while trying to return to the Netherlands in order to attend the hearing scheduled two days later.

43. As regards the possibility of allowing the applicant to participate in the hearing by videoconference, the applicant's initial refusal had been inspired by the fear that any statements which he might make and which might incriminate others might come to the notice of the other persons thus incriminated. He had changed his position only after attempts to secure his

release from Peruvian detention had failed. At all events, no attempt had ever been made to organise a videoconference.

(b) The Government

44. The Government submitted that the Netherlands Public Prosecution Service had looked into the possibility of obtaining the applicant's extradition or temporary surrender but, since it appeared from information given by a Peruvian public prosecutor that such a course was prevented by Peruvian law as long as the applicant remained a criminal suspect in Peru (see paragraphs 17 and 20 above), had abandoned efforts in this direction as likely to fail and cause further delay.

45. The Court of Appeal could not have been expected to stay the proceedings until the applicant's presence in person could be secured, given the entitlement of the applicant's co-accused and the applicant himself to a fair trial within a reasonable time.

46. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see paragraph 34 above) did not confer on the applicant a right to be extradited to the Netherlands. In particular, in its Article 6 § 5 that treaty granted the requested State the right to refuse extradition based on its own domestic law.

47. Since – in the Government's allegation – the applicant had been fully aware that he was under investigation for money laundering in Peru, he had in any case brought the impossibility to attend the hearing in person upon himself by travelling to Peru of his own free will, thus accepting the considerable risk that he would not be able to return.

48. The applicant had waived the right to take part in the hearing by videoconference instead of attending in person. The statement of his counsel made at the hearing of 25 November 2013 (see paragraph 14 above) had been construed by the Court of Appeal as an unambiguous refusal to make a statement by such means; this refusal had been restated by fax on 21 March 2014 (see paragraph 19 above).

49. On 16 October 2014 – a few days before the hearing was to reopen - had the applicant made it known to the Advocate General and the Court of Appeal that he had changed his position (see paragraph 21 above). Even then, as reflected in the fax message sent by his counsel, he had only been willing to be heard by videoconference as a witness in the cases against his co-accused. Only in his closing address of 29 October 2014 (see paragraph 25 above) had the applicant's counsel expanded the request to include questioning the applicant as the accused in his own case. In these circumstances, the decision of the Court of Appeal to refuse a further stay of the proceedings had been a reasonable one, considering also the interests of the applicant's co-accused who were being tried in parallel.

2. The Court's assessment

50. It is the Court's established case-law that, although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see, among many others, *Sejdovic v. Italy* [GC], no. 56581/00, § 81, ECHR 2006 II; see also *Colozza v. Italy*, 12 February 1985, § 27, Series A no. 89, and *Hokkeling v. the Netherlands*, no. 30749/12, § 57, 14 February 2017). Indeed, and as the Court has also held, it is of capital importance in the interests of a fair and just criminal process that the accused should appear at his trial, and the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Hermi v. Italy* [GC], no. 18114/02, § 58, 18 October 2006).

51. The Court has, however, also held that the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing. The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein. 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, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that a public hearing was held at first instance. However, in the latter case, the underlying reason was that the courts concerned did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved. Nonetheless, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person. In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant (see *Hermi*, cited above, §§ 60-62, with further references).

52. The Convention leaves the Contracting States wide discretion as regards the choice of the means put in place to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's

task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Medenica v. Switzerland*, no. 20491/92, § 55, ECHR 2001-VI, and *Somogyi v. Italy*, no. 67972/01, § 67, ECHR 2004-IV).

53. The Court has further held that although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on it to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention (see *Marcello Viola v. Italy*, no. 45106/04, § 67, 5 October 2006, and *Bivolaru v. Romania (no. 2)*, no. 66580/12, § 138, 2 October 2018).

54. Turning to the facts of the present case and taking into account the particular circumstances, the Court accepts without question that the applicant, who was detained as a criminal suspect in Peru, was unable to return to the Netherlands to physically attend the hearing of the Court of Appeal as he might have wished.

55. The Court observes in this respect that the Government state that Peruvian law prevented the extradition or temporary surrender to foreign powers of persons who were detained as criminal suspects in Peru itself (see paragraph 44 above). They base their statement on information obtained by a liaison officer in Peru from a Peruvian public prosecutor (see paragraph 20 above). The applicant relies heavily on the Advocate General's failure to seek a formal decision on extradition or mutual legal assistance (see paragraph 39 above) but does not attempt to deny that this information is correct. Accordingly, although a formal decision by the competent Peruvian authority would have dispelled all possible doubt, the Court is satisfied that for reasons of Peruvian law it was not possible at the relevant time to obtain the cooperation of the Peruvian authorities with a view to securing the applicant's physical presence, from which it follows that a formal request would have been pointless. It should be noted in this regard that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, referred to by the applicant, in its Articles 6 § 5 and 7 § 15 d) permits the requested state to refuse extradition or mutual legal assistance, respectively, for reasons based on its own domestic law (see paragraph 34 above). Consequently, it cannot be said that the Netherlands authorities did not display due diligence in pursuing the possibilities of international legal assistance (compare and contrast, *mutatis mutandis*, *Ben Moumen v. Italy*, no. 3977/13, §§ 50-51, 23 June 2016, in which the Italian authorities failed to seek the attendance of a witness believed to be resident on Moroccan territory for cross-examination but the

Court held their inability to provide the Moroccan authorities with that witness's address not to be an "insurmountable obstacle").

56. In the circumstances, and also taking into account that the proceedings at issue were part of a substantial and complex criminal trial in which seven suspects were involved who all resided in different countries at that time (see paragraphs 6 and 8 above), the Court therefore takes the view that the Court of Appeal was entitled to substitute a hearing in which the applicant participated by videoconference – as permitted by domestic law (see paragraph 32 above) and indeed, in principle, by Article 6 of the Convention (see *Marcello Viola*, cited above, § 67) – for a hearing at which the applicant could be physically present. It follows that there was a realistic option open to the applicant to take part in the hearing of his appeal (see also *Bivolaru*, cited above, §§ 138-39 and 144-45).

57. It is the position of the Government that the applicant validly waived his right to take part in the hearing by videoconference (see paragraph 48 above).

58. As the Court has held on many occasions, neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. A waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Furthermore, it must not run counter to any important public interest (see, among many other authorities, *Hermi*, cited above, § 73; *Sejdovic*, cited above, § 86; *Dvorski v. Croatia* [GC], no. 25703/11, § 100, 20 October 2015; and *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 117, 18 December 2018).

59. Turning to the facts of the present case, the Court cannot but have regard to the applicant's initial refusal – as stated by his counsel at the Court of Appeal's hearing of 25 November 2013 – to cooperate in any hearing by videoconference, whether as a witness or as an accused (see paragraph 14 above). The Court further notes that the applicant's consent to be heard by videoconference, communicated by his counsel on 16 October 2014, related only to his giving evidence as a witness in the proceedings against one of his co-accused; the applicant did not withdraw his refusal to participate by videoconference in his own case (see paragraph 21 above). Even as late as the opening of the appeal hearing on 20 October 2014 the applicant's counsel restated this refusal on the applicant's behalf (see paragraph 23 above). Only at the close of the hearing, on 29 October 2014, did the applicant's counsel announce that the applicant had changed his position

and was prepared to take part in the hearing by videoconference (see paragraph 25 above).

60. In the Court's opinion, the applicant's repeated and unambiguous refusal – which was maintained over a period of eleven months, until the closing address of the appeal hearing – cannot be construed otherwise than as a waiver of the right to take part in the hearing in his own case. Moreover, since the applicant's refusal was twice stated by his counsel in open court (see paragraphs 14 and 23 above), it cannot be found that this waiver was not attended by guarantees commensurate with the importance of the right thus waived. Finally, the applicant has not pointed to any public interest, let alone any important one, that would be affected by his waiver.

61. In the circumstances of the present case, therefore, the Court of Appeal was entitled to disregard the request made by the applicant's counsel in his closing speech to prolong the proceedings yet again so that the applicant could participate by videoconference.

62. This conclusion makes it unnecessary for the Court to address the parties' further arguments, notably the Government's argument that by travelling to Peru of his own free will, the applicant had contributed to creating the impossibility to attend the hearing in person (see paragraph 47 above; see also, for instance and *mutatis mutandis*, *Medenica*, cited above, § 58, where, in the specific circumstances of that case, the Court came to the conclusion that the applicant had largely contributed to bringing about a situation that prevented him from appearing before the domestic court).

63. There has accordingly been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

Done in English, and notified in writing on 8 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Yonko Grozev President