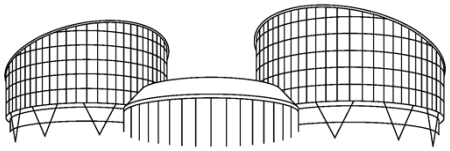

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF X v. THE NETHERLANDS

(Application no. 72631/17)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Insufficient interests cited by domestic court to outweigh applicant's right to attend appeal hearing in person through a second adjournment • Relative brevity of pending proceedings and no need for requested adjournment to be of a long duration • Reasoning provided by applicant as to importance of her attendance, considering consequences of outcome for her employment and wish to explain causes and prevention of reoffending

STRASBOURG

27 July 2021

FINAL

03/11/2021

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

In the case of X 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 Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 72631/17) 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, Ms X ("the applicant"), on 2 October 2017;

the decision to give notice to the Netherlands Government ("the Government") of the complaint concerning Article 6 §§ 1 and 3 (c) of the Convention;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 18 May and 6 July 2021,

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

INTRODUCTION

1. The case concerns a complaint under Article 6 §§ 1 and 3 (c) of the Convention regarding the refusal of the appellate jurisdiction to adjourn the hearing of the applicant's criminal case in order for her to attend the hearing in person.

THE FACTS

2. The applicant was born in 1974 and lives in Utrecht. The applicant was represented by Mr M. Berndsen, a lawyer practising in Amsterdam.

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

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

5. The applicant has a history of shoplifting stated to be compulsive in nature and related to mental illness. The present case arises from a prosecution on two counts of theft. The applicant had declared to the police

that she had put the items at issue in her bag and had left the premises without paying for them.

6. After the postponement at the request of the defence of a hearing scheduled for 3 March 2014, on 30 January 2015 the single-judge chamber of the criminal division (*politierechter*) of the Central Netherlands Regional Court (*rechtbank Midden-Nederland*) tried the applicant for theft. The defence was conducted by counsel, who had been authorised (*gemachtigd*) by the applicant to do so in her absence. The single-judge chamber convicted the applicant of thefts committed on 18 December 2013 and on 25 October 2014 (an added case; *gevoegde zaak*), sentenced her to two months' imprisonment suspended for two years, with the special condition that she was to seek treatment during that period and comply with the indications given to her by, or on behalf of, the institution or person providing that treatment. It further ordered the execution of two earlier suspended sentences for theft, the first a four-week prison sentence imposed in 2012 and the second a fine of 5,000 euros (EUR) imposed in 2013.

7. The applicant lodged an appeal with the Arnhem-Leeuwarden Court of Appeal (*gerechtshof*).

8. The applicant was summoned to the hearing of the Court of Appeal to be held on 4 June 2015.

9. By letter of 21 May 2015 the applicant's counsel, Mr S., informed the Court of Appeal that the applicant would be out of the country on that date in the service of her employer, a multinational company. The applicant's counsel submitted email correspondence from within that company, received from the applicant the previous day, setting out the applicant's travel schedule and reflecting the impossibility of adjusting it to the date of the Court of Appeal's hearing.

10. On 4 June 2015 the Court of Appeal adjourned the hearing *sine die*.

11. The Court of Appeal informed Mr S. that the hearing would be resumed on 20 July 2015. This date was chosen in consultations between Mr S. and the registry of the Court of Appeal.

12. On 18 June Mr S. sent the president of the Court of Appeal a fax message that included the following:

> "In consultation with a Court of Appeal staff member a new hearing has been agreed with me for 20 July next at 9.30 a.m.
>
> I have informed Ms X of this by email. She has informed me by return of email that she will be abroad on 20 July 2015 in connection with her work ... It is apparent from her messages that she will be in the Netherlands from 27 July 2015 until the end of August 2015.
>
> On her behalf, I request you to deviate from what has been agreed with your staff member and to set a hearing date during the period in which she will be in the Netherlands, of course with my apologies for the inconvenience.

> For the record I attach, by way of further explanation, the email correspondence between my client and myself. This includes her working schedule until the end of the year."

The attached email correspondence included, as well as the applicant's travel schedule, an email from the applicant stating that she would be abroad for work on a range of dates including 20 July 2015.

13. On 30 June 2015 Mr S. sent the president of the Court of Appeal a fax message in the following terms:

> "Re my last letter to you in this case, that of 18 June 2015, I have spoken to one of your staff members, Ms R. She told me that you were not in favour of a further adjournment, because the case was already in process for some time. I was asked whether I could not speak on behalf of Ms X at the hearing.
>
> [I] have forwarded this proposal to my client in an email. She has replied to me today. I attach a copy of her email.
>
> On her behalf, I urge you to address her arguments. I have already sent you a schedule of her business abroad. This schedule also indicates clearly when my client will be able to attend a hearing."

The attached email from the applicant included the following:

> "I have indicated the dates on which I will be abroad for work in good time. Has this information been forwarded to the [Court of Appeal]?
>
> The (unjustified) impression is now being given that I am trying to shift the hearing date all the time, which is not conducive to creating a positive image.
>
> In addition, I would like the hearing to be over so that I can close this episode and move on.
>
> I would like to attend the hearing myself because I am best placed to explain the causes of my reoffending and also my willingness to prevent reoccurrence. I can also explain the aspects that have had a positive effect on preventing reoffending in the period since I was last arrested. In addition, I wish to address any questions the judges may have for me in person.
>
> I therefore ask you to inform the [Court of Appeal] that:
>
> - I will be abroad in the period [including 20 July 2015] and have so indicated well in advance;
> - My stay abroad is consequent on my professional activities and concerns [a project] in several countries that cannot be rescheduled;
> - I wish to be present at the hearing and explain my case in person.
>
> My urgent request to the [Court of Appeal] is therefore to move the hearing of 20 July 2015 to a different date.
>
> I again attach an overview of the periods during which I will be abroad in connection with my work: ..."

14. The Court of Appeal resumed the hearing on 20 July 2015. The applicant was not present. Mr S. stated that he had not been authorised

(*gemachtigd*) to conduct the defence. He made a further statement, which was recorded as follows:

> "I request an adjournment. I have made a professional mistake by not finding out from my client whether she would be in the Netherlands on the day of the hearing. I thought she would be absent abroad only once. I have not had sufficient insight into her work. She works for the Y company ... I did not realise that she would need to spend time abroad throughout the year. I should have consulted with her before. She wants to attend the hearing no matter what. I have discussed with her by email whether she could authorise me [to conduct the defence in her absence], but she has indicated that she absolutely intends to attend the hearing in person. ..."

In addition, Mr S. submitted an email which he had received that day from the applicant's husband. This email states that it had been drawn up in agreement with the applicant and it set out why she was unable to be present at the hearing that day and why it was important for her to attend the hearing in person. It contains, *inter alia*, the following:

> "The erroneous impression appears to be emerging that [the applicant] wishes to evade the hearing and/or the penalty. ...
>
> [The applicant] places a high value on her work. Work is important and she would not like to put it on the line. Work provides her with an anchor. ... The sentence imposed by the Regional Court, however, removes that anchor."

15. The prosecuting Advocate General (*Advocaat-Generaal*) made the following statement during the hearing:

> "I am opposed to an adjournment. This is a suspect with a criminal record. The case has been adjourned before. According to the probation and social rehabilitation service (*reclassering*) the suspect has a worrying history of evading care (*zorgwekkende zorgmijder*). There can be no further adjournment. I see no documents relating to the suspect's job."

16. The Court of Appeal refused to order a second adjournment. It declared the applicant to be in default of appearance (*verstek*) and proceeded with the hearing in the applicant's absence. Its refusal is recorded in the following terms:

> "The request for an adjournment is refused. The suspect has appealed. In view of the job she states to have, which apparently means that she has to spend much time abroad, it would have been proper for the suspect to inform her counsel in advance of the dates on which she knew that she would be available or not as the case might be. It would moreover have been proper for counsel to check with the suspect whether she would be abroad on the planned hearing date. In addition, the Court of Appeal has weighed the interest of society in an effective and expeditious trial and the interest of a proper organisation of judicial proceedings. In this connection it is significant that the case has been adjourned once already because the applicant was abroad."

17. The prosecuting Advocate General asked for the judgment of the Regional Court (see paragraph 6 above) to be confirmed, noting that this court had taken into account the applicant's personal circumstances.

18. The Court of Appeal gave judgment on 3 August 2015. It quashed the Regional Court's judgment, re-examined the case, found the applicant

guilty as charged and sentenced her to an unconditional sentence of two weeks' imprisonment. It also ordered the execution of the two earlier suspended sentences, as the Regional Court had done. As regards sentencing, the Court of Appeal considered that:

> "The sentence set out below is in accordance with the nature and seriousness of the acts found proven and the circumstances under which they have been committed, having regard also to the person of the suspect, such as these have become apparent during the examination at the hearing.
>
> In its determination of the sentence, the Court of Appeal has in particular taken into account – and finds therein the reasons leading to the choice for an unsuspended term of imprisonment of the duration as set out below – that:
>
> The suspect has been found guilty of two counts of shoplifting. Shoplifting causes considerable nuisance to shopkeepers. Moreover, it causes considerable financial loss to tradespeople each year. In addition, the suspect has been convicted of shoplifting on previous occasions and she was in the probationary periods of two earlier shoplifting convictions at the time when she committed this one [*sic*]. It is apparent from the advisory opinion of the probation and social rehabilitation service (*reclasseringsadvies*) that the suspect does not want to lend her cooperation to treatment within the framework of probation and social rehabilitation."

19. The applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*). Relying on Article 6 of the Convention, she complained, *inter alia*, that the Court of Appeal had failed to weigh her right to attend the hearing in person in the balance. The error had been made by the applicant's counsel and should not be imputed to the applicant herself. It was moreover not the case that the applicant had failed to inform her counsel of her travel plans: she actually had done so and a copy of the relevant correspondence had been submitted to the Court of Appeal. In that regard that court's judgment was incomprehensible.

20. She further submitted that she still wished to be tried in proceedings taking place in her presence. It was in her interest to be able to explain at a hearing what had led her to commit the offences; her personal input might cast the case in a different light such as to lead to a different view on the type of sanction to be imposed and on the question whether previously imposed suspended sentences should be executed or not. She claimed that the execution of the judgment of the Court of Appeal, which had, *inter alia*, amounted to a six-week prison sentence, would in all likelihood lead to the loss of her job.

21. The Procurator-General (*Procureur-Generaal*) to the Supreme Court, in her advisory opinion (*conclusie*) of 14 March 2017 (ECLI:NL:PHR:2017:312), expressed the view, *inter alia*, that

> "[i]n the light of the importance of the suspect's right of attendance, guaranteed by Article 6 of the Convention, on which she has expressly and repeatedly relied, the circumstance that the applicant's counsel has failed to check whether the suspect could be able to attend the hearing on 20 July 2015 does not constitute sufficient ground to reject the request for an adjournment.

...

Considering that the facts charged date from December 2013 and October 2014 [respectively] and the single-judge chamber of the Regional Court gave judgment on 30 January 2015, it cannot be seen without further reasoning, which is lacking, why already on 20 July 2015 the interests mentioned by the Court of Appeal should weigh more heavily in the balance than the suspect's interest in being tried in her presence. I take into account that the present case concerns two charges of shoplifting. It seems to me an exaggeration that the interests of the supermarkets – which incidentally the Court of Appeal did not specify – imperatively require the request for an adjournment to be rejected. The present case is of an entirely different order from cases involving victims of, for example, crimes of violence or of a sexual nature, who have a justified interest not to be left too long in uncertainty about the outcome of the criminal case."

22. The Supreme Court gave judgment dismissing the applicant's appeal on points of law on 9 May 2017 (ECLI:HR:2017:826). Its reasoning included the following:

"2.4. The Court of Appeal refused the request for an adjournment, holding that it would have been proper for the suspect to inform her counsel in advance of the dates on which she would not be able to attend the hearing, that it would moreover have been proper for counsel to check with the suspect whether or not she would be prevented from attending the hearing on the planned date, and that society has an interest in an effective and expeditious trial and a proper organisation of judicial proceedings, in which connection the Court of Appeal considered it significant that the case had been adjourned once already because the applicant was abroad. It is therefore implicit that the Court of Appeal has weighed in the balance on the one hand the interest of the requested adjournment of the hearing and the basic interest of the suspect in being able to exercise her right to attend the hearing and on the other hand the interests of an effective and expeditious trial and a proper organisation of judicial proceedings. In so far as the ground of appeal complains that the Court of Appeal failed to make such an assessment, it [is unfounded].

2.5. In so far as the ground of appeal complains that the Court of Appeal's assessment is incomprehensible, it fails. Considering, among other things, the grounds on which after the first adjournment of the hearing the renewed request for an adjournment was based, the reasoning given by the Court of Appeal constitutes sufficient justification for its rejection."

RELEVANT LEGAL FRAMEWORK

I. THE CRIMINAL CODE

23. Article 310 of the Criminal Code (*Wetboek van Strafrecht*) provides as follows:

"Any person who takes any property belonging in whole or in part to another person with the intention of unlawfully appropriating it, shall be guilty of theft and shall be liable to a term of imprisonment not exceeding four years or a fine of the fourth category."

II. THE CODE OF CRIMINAL PROCEDURE

24. As relevant to the case before the Court, the Code of Criminal Procedure (*Wetboek van Strafvordering*, hereinafter "the CCP") provides as follows:

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 Regional Court shall decide on the request for an adjournment. The Regional Court shall grant or refuse the request for an adjournment, after which, in the latter event, 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 [but remains empowered to order the personal appearance of the suspect before it: see Article 278 § 2].

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 Regional 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. ..."

Article 350

"... the Regional Court shall, on the basis of the indictment and the examination at trial, deliberate on the question of whether it has been proved that the accused committed the offence, and, if so, which criminal offence as defined by law has been proved; if it is concluded that the offence has been proved and constitutes a criminal offence, the court shall deliberate on the criminal liability of the accused and on the imposition of the punishment or measure as laid down by law."

25. By virtue of Article 415 § 1 of the CCP the provisions cited above apply equally to appeal proceedings. Accordingly, the Court of Appeal must carry out its own independent determination of the issues set out in Article 350 of the CCP. In doing so, the Court of Appeal focuses its hearing on "the objections which have been submitted by the defendant and the Public Prosecution Service to the judgment rendered by the court of first

instance, and on that which is otherwise necessary" (Article 415 § 2 of the CCP).

26. Thus, even if the Court of Appeal finds the same acts proven as the first-instance court, it is not bound by the sentence imposed by that court; it is competent to impose a more lenient or a heavier sentence, or a different type of penalty.

III. THE 2011 COUNTRY-WIDE ADJOURNMENT PROTOCOL

27. A Country-wide Adjournment Protocol (*Landelijk aanhoudingenprotocol*) was adopted in 2011 by the Country-wide Consultation Structure of Presidents of Criminal Divisions (*Landelijk overleg van Voorzitters van de Strafsectoren*). As relevant to the case before the Court, it reads as follows:

> **"Starting point**
>
> This Adjournment Protocol gives a – non-exhaustive – enumeration of points of attention and recommendations (hereafter recommendations) relative to the treatment of requests for adjournments. These points of attention and recommendations are intended to promote (formal) legal unity, the expeditious pursuit of proceedings and an optimal use of the capacity available for hearings.
>
> The protocol applies in particular to requests for adjournments made before the hearing. For other such requests, made during the hearing, the protocol should be applied by analogy as far as possible.
>
> **Adjournment policy**
> **General points of attention**
>
> Before a request for an adjournment is considered, the file number (*parketnummer*), the name of the suspect, the hearing date and the reason(s) for any adjournment must be known.
>
> A general point of attention is to seek the position of the Public Prosecution Service (*Openbaar Ministerie*) on the request for an adjournment before the request for an adjournment is decided on.
>
> If a request for an adjournment is honoured, then in principle the case concerned will be adjourned – in consultation with the Public Prosecution Service – for a set period.
>
> Any rejection of a request for an adjournment must be reasoned, a mere reference to this adjournment protocol not being sufficient.
>
> **Points of attention in case of absence of the suspect**
>
> In the case of a request for an adjournment by a suspect it needs to be considered whether the reason given by the suspect for his or her absence is sufficiently urgent and credible and whether the suspect's interest in any adjournment should take precedence over the interest of the proper administration of criminal justice.

Credibility does not flow from the statement by itself: in general, some sort of proof will be required (unless the absence can already be accepted based on the information contained in the file). As a rule, therefore, the suspect can be expected to provide the information in support of the request which is considered desirable with a view to the decision to be taken. If a request is insufficiently supported by evidence, or if a request for additional information is not or not sufficiently complied with, then consequences may be attached to that.

The urgency must always be considered. If the absence could have been made known at an earlier time, then that can be understood to indicate a lack of urgency and/or credibility.

..."

IV. RELEVANT DOMESTIC CASE-LAW

28. In its judgment of 13 October 2015 (ECLI:NL:HR:2015:3026), the Supreme Court held as follows in relation to a complaint on points of law about a court of appeal's refusal to adjourn a hearing:

"2.3. In deciding on a request for an adjournment of the hearing in the case, the trial court must weigh in the balance all the interests concerned, including the interest of the suspect in being able to exercise his right to attend the hearing – which includes the right to have the defence conducted in his absence by a lawyer expressly authorised to do so –, [and] the interest not only of the suspect but also of society in an effective and expeditious trial and the interest of a proper organisation of judicial proceedings (...)"

V. SUBSEQUENT DEVELOPMENTS IN DOMESTIC CASE-LAW

29. In its judgment of 16 October 2018 (ECLI:NL:2018:1934), which concerned a complaint on points of law of the alleged failure by a court of appeal to decide in an explicit and reasoned manner on a request for an adjournment of a hearing, the Supreme Court clarified its understanding of the suspect's right to an adjournment in order to attend the hearing (whether in person or represented by a lawyer duly authorised) as follows (case-law references omitted):

"2.4. As a rule the suspect or his or her counsel may be expected to submit (at a later date if need be) the information supporting the request considered necessary by the trial court in view of the decision to be taken. If the trial court does not consider the circumstances on which the request is grounded credible without further evidence, it may attach consequences to the circumstance that the request is insufficiently corroborated and/or its wish for supplementary information has not been (sufficiently) fulfilled.

However, in order to find that the circumstance on which the request is based is not credible it will not in all cases suffice to establish that that circumstance is insufficiently corroborated. It is, after all, also dependent on the nature of the reason given – in particular whether it concerns a circumstance that presents itself unexpectedly, connected for example to illness of the suspect – whether, before the request is decided on, an opportunity should be offered to add a further explanation to

the request and/or submit evidence at a later stage. It should however be noted that the trial court can refrain from offering such an opportunity and from taking a decision on the credibility of the reasons on which the request is grounded based on the finding that on a weighing of the interests as set out in 2.5 below the reasons adduced would - even if correct - not lead it to honour the request.

After the opportunity has been offered to submit a further explanation or evidence, as the case may be, the trial court may dismiss the request immediately – that is, without entering into the weighing of interests as set out in 2.5 below – on the ground that the circumstance on which the request is grounded is not credible (...).

2.5. If it is not the case that the circumstance on which the request is grounded has been judged not credible, the trial court needs to weigh in the balance all the interests involved in adjourning the hearing. These are the interest of the suspect in being able to exercise his right to be present, guaranteed by Article 6 § 3 (c) of the Convention - including the right to be represented by counsel specifically authorised for that purpose - and, in brief, the interest not only of the suspect but also of society itself in the effective and speedy treatment of the case (...). In case of dismissal of the request, the trial court must account in the reasoning of its decision for this weighing of interests, in which the reasons on which the request is grounded must be involved.

In the specific case that the suspect is prevented by illness from appearing at the hearing and has requested, or caused to have requested, an adjournment of the hearing in connection therewith, the trial court shall comply with this request in order to offer the suspect another opportunity to be present at the hearing when his or her case comes up. There may however be special circumstances that lead the trial court to come to the view that the interest of a proper conduct of criminal proceedings (*behoorlijke strafvordering*) – which includes the termination of the case within a reasonable time – would be seriously impaired if the hearing were to be suspended and this interest must in the given circumstances weigh more heavily in the balance than the interest of the suspect to attend the hearing (...).

Apart from this situation in which the suspect is prevented by illness it cannot be stated in advance as a general rule what the result of the above weighing of interests should be. The trial court must perform this weighing exercise in the concrete circumstances of the case and, in the event of a refusal of the request for an adjournment, must give reasons for the decision based thereon. In an appeal on points of law only the comprehensibility (*begrijpelijkheid*) of such reasoning can be assessed."

30. In its judgment of 18 February 2020 (ECLI:NL:HR:2020:266), the Supreme Court applied this case-law in the following terms to a complaint on points of law concerning the rejection by a court of appeal of a request for an adjournment of a hearing:

"2.5. Taking into account the explicit statement of counsel that the suspect wished to make use of his right to be present, the decision of the Court of Appeal that it understands the suspect's absence in the sense that he has waived that right is incomprehensible. Moreover, in finding that the suspect had the possibility to choose whether to work or not the Court of Appeal would appear to have expressed the view that the circumstance that the suspect has not appeared for reasons connected to his work, on which the request for an adjournment of the hearing is based, is credible. Such being the case, the Court of Appeal ought to have weighed all the interests involved in an adjournment of the hearing [in accordance with the Supreme Court's judgment of 16 October 2018 (ECLI:NL:2018:1934), see the previous paragraph]. As

it is, the Court of Appeal has not shown that it has performed such a weighing of interests. Accordingly, the Court of Appeal has not given sufficient reasons for its refusal of the request [for an adjournment of the hearing] submitted by the suspect's counsel."

VI. POSSIBILITY TO REOPEN CRIMINAL PROCEEDINGS

31. Article 457 of the CCP governs the possible means of obtaining revision (*herziening*) of final domestic judgments. In 2002 a new sub-paragraph was added, in order to create the possibility to reopen criminal proceedings in instances where the Court had found a violation of the Convention.

Article 457 provides as follows, in so far as relevant:

"1. Following an application by the Procurator General or by the former suspect in respect of whom a judgment or appeal judgment has become irrevocable, the Supreme Court may, for the benefit of the former suspect, review a judgment entailing a conviction rendered by the courts in the Netherlands:

...

b. on the grounds of a ruling (*uitspraak*) of the European Court of Human Rights in which it has been determined that the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol to this Convention has been violated in proceedings which led to a conviction or a conviction for the same offence, if review is necessary with a view to legal redress as referred to in Article 41 of that Convention;

..."

32. It appears from the drafting history of Article 457 § 1 (b) of the CPP that it was intended for cases where the Court had established that a violation of the Convention had taken place. Creating the possibility of a review of the final domestic judgments would enable reparation of the damage caused by that violation as far as possible (Explanatory Memorandum (*Memorie van Toelichting*), Parliamentary Documents, Lower House of Parliament 2000-2001, 27 726, no. 3, p. 1).

THE LAW

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

33. The applicant complained that she had been unable to attend the hearing of the Court of Appeal in person, in breach of Article 6 § 3 (c) of the Convention.

In so far as relevant, Article 6 reads as follows:

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

...

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

...

(c) to defend himself in person ..."

A. Admissibility

34. The Government argued, by way of preliminary objection, that the application was manifestly ill-founded. They argued that the respondent State could not be held liable for the error committed by the applicant's counsel.

35. The applicant admitted that the mistake at the bottom of the present case had been made by her counsel. Nevertheless, once this mistake had been brought to the attention of the Court of Appeal, the latter had been under an obligation to intervene and secure to the applicant the effective exercise of her rights under Article 6 of the Convention.

36. The Court understands the Government's preliminary objection to be *ratione personae*, in the sense that the violation complained of is imputable to a person other than the Kingdom of the Netherlands.

37. Agreeing on this point with the applicant, the Court considers that the question before it is not whether the professional mistake here in issue should be imputed to the applicant's counsel: it is not in dispute that such is the case. Rather, the question is whether, once this mistake had been made known to the Court of Appeal, that court was entitled to deny the applicant the adjournment that would have enabled her to attend the hearing in person. This concerns the interpretation and application of Article 6 of the Convention by the Court of Appeal: it concerns the actual merits of the case and cannot be decided as a preliminary issue. That being so the Government's preliminary objection must be dismissed.

38. The Court notes that the application 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. Arguments by the parties

(a) The applicant

39. The applicant submitted that she had been denied a "practical and effective" right to defend herself. She had stated the explicit wish to appear before the Court of Appeal in person in order to clarify her personal situation, which as she saw it was of crucial importance to the decision to be taken on sentence; the mistake had been that of her counsel. She herself had not waived her right to be present. Her personal interests – which included

her employment – ought not to have been subordinated to the expeditious handling of her case, the less so since it had not been part of any defence tactic to cause delays or evade trial. Moreover, at the time when the request for an adjournment was made, the length of the proceedings was not yet excessive. In addition, the Court of Appeal had proceeded on the misconceived assumption that the applicant herself was to blame for not having informed her counsel of her planned absence. Finally, the Court of Appeal had significantly increased the sentence by imposing an unconditional prison term in lieu of a wholly suspended one.

(b) The Government

40. The Government argued that the mistake at the root of the events complained of had been made by the applicant's counsel and that the respondent High Contracting Party could not be held responsible for it. What was more, counsel had been retained by the applicant herself, not appointed by any domestic authority, and the applicant herself was a lawyer by training and profession. Moreover, the case had not been of any particular complexity, since on her own admission she was guilty: her guilt was not in doubt, and so her presence at the hearing could reasonably be dispensed with. Finally, the sentence imposed on appeal, while not suspended in its entirety like that imposed by the first-instance court, had been of two weeks' imprisonment instead of two months; it was therefore not considerably harsher.

41. The Government added that communication between a criminal suspect and his or her counsel was not the responsibility of a High Contracting Party and that no document corroborating the applicant's inability to attend the hearing of 20 July 2015 was submitted to the Court of Appeal.

2. The Court's assessment

42. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see, amongst many other authorities, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

43. 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).

44. 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).

45. Where the appellate court is competent to modify, including to increase, the sentence imposed by the lower court and when the appeal proceedings are capable of raising issues involving an assessment of the accused's personality and character and his or her state of mind at the time of the offence, which make such proceedings of crucial importance for the accused, it is essential to the fairness of the proceedings that he or she be enabled to be present at the hearing and afforded the opportunity to participate in it (see *Zahirović v. Croatia*, no. 58590/11, §§ 57 with further references, 59 and 62, 25 April 2013; *Cani v. Albania*, no. 11006/06, §§ 61 and 63, 6 March 2012; and, by contrast, *Fejde v. Sweden*, no. 12631/87, §§ 29 and 33, 29 October 1991).

46. 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).

47. The Court has also stated that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal aid scheme or privately financed (see *Sejdovic*, cited above, § 95, with further references).

48. Turning to the present case, the Court notes at the outset that it is of no relevance whether or not documentary proof of the applicant's projected absence on 20 July 2015 was submitted to the Court of Appeal, since the Court of Appeal did not reject the applicant's counsel's request for an adjournment of the hearing on the ground that such proof had not been submitted (see paragraph 16 above).

49. The Court further notes that the applicant neither waived her right to attend the hearing of the Court of Appeal, nor attempted to evade justice; indeed, the opposite is true (see paragraphs 12-13 above), and the Government do not argue otherwise. It is also the case that the applicant's counsel, Mr S. at the time, made a professional mistake in agreeing to a hearing on a date on which the applicant would be unable to attend (see paragraph 14 above).

50. The Court of Appeal was called upon to consider, according to the policy laid down in the Country-wide Adjournment Protocol (see paragraph 27 above), whether the reason given by the applicant for her absence was sufficiently urgent and credible and whether her interest in the adjournment sought should take precedence over the interest of the proper administration of criminal justice. Apparently accepting as given the credibility of the reasons stated, the Court of Appeal weighed the applicant's interest against "the interest of society in an effective and expeditious trial and the interest of a proper organisation of judicial proceedings", finding it "significant" that the hearing had been adjourned once already for the same reasons (see paragraph 16 above).

51. The Court observes, however, that the Court of Appeal did not set out in its judgment for what reason(s) the interests to which it had regard outweighed the applicant's interest in being able to exercise her right to

attend the hearing of her appeal in person (compare, *mutatis mutandis*, *Hokkeling*, cited above, § 62). In this context the Court has taken note of the recent case-law of the Supreme Court according to which trial courts are to provide sufficient reasoning when they reject a request for an adjournment (see paragraphs 29-30 above).

52. Given the relative brevity of the length of time during which the appeal proceedings had been pending – the first-instance judgment had been pronounced on 30 January 2015, less than six months earlier (see paragraph 6 above) – and considering that there would have been no need for the requested adjournment to be of a long duration as it was known to the Court of Appeal that the applicant would be available to attend a hearing between 27 July and the end of August 2015 (see paragraph 12 above), it appears to the Court that the weight of the interests indicated by the Court of Appeal was relatively modest. By contrast, the applicant had reasoned her wish to attend the hearing by explaining why this was important to her, for which reason she had, moreover, declined to authorise her counsel to conduct the defence on her behalf (see paragraphs 13-14 above).

53. While it is true that in the present case it was not in doubt that the applicant had committed a criminal offence (see also paragraph 5 above), the Court observes that, in accordance with Article 350 of the CCP, which provision equally applied in the appeal proceedings, the Court of Appeal was also called upon to deliberate on the criminal liability of the applicant and on the imposition of the punishment (see paragraphs 24-26 above). It was thus for the appellate court to establish her guilt and to determine the sentence to be imposed, which it could reduce or increase and which sentence could involve imprisonment (see paragraphs 23 and 25 above), a type of penalty which carries a significant degree of stigma (see *Talabér v. Hungary*, no. 37376/05, § 27, 29 September 2009). The applicant was clearly worried about the consequences for her employment which the imposition of an unsuspended, or the execution of a previously suspended, prison sentence would entail (see paragraphs 14 *in fine* and 20 above) and the outcome of the proceedings before the Court of Appeal was therefore of crucial importance to her.

54. The Court further observes that in its determination of the sentence the Court of Appeal attached relevance to an advisory opinion according to which the applicant did not want to cooperate with treatment within the framework of probation and social rehabilitation, and the Advocate General had stated at the hearing that the applicant had a history of evading care (see paragraphs 18 and 15 above). As the Court of Appeal had been informed, the applicant wished to address that court in person in order to explain the causes of her reoffending and also her willingness to prevent further occurrences of shoplifting and to elaborate on the aspects that had helped her not to reoffend since her last arrest (see paragraph 13, 14 *in fine* and 39

above). In the light of the case-law set out in paragraphs 43-46 above, the Court takes the view that she should have been enabled to do so.

55. While the interests cited by the Court of Appeal were undoubtedly relevant, the Court considers that in the circumstances of the present case they were not sufficient to outweigh the applicant's right to attend the hearing of her appeal in person.

56. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant stated that she had been made to serve the sentence imposed by the Court of Appeal on 3 August 2015 and the two suspended sentences ordered to be executed, the Public Prosecution Service having refused to await the outcome of the proceedings before the Court. For this she claimed 3,465 euros (EUR) in respect of pecuniary damage, based on a calculation according to domestic rates for unjustified detention. She also claimed EUR 2,500 in respect of non-pecuniary damage.

59. The Government asked the Court to dismiss the claim in respect of pecuniary damage as speculative and that in respect of non-pecuniary damage as unjustified.

60. The Court considers that the applicant has not shown the existence of a causal link between the violation found and the pecuniary damage alleged. It therefore rejects the applicant's claim under this head.

61. The Court further refers to its consistent case-law, according to which where, as in the instant case, a person is convicted in domestic proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a new trial or the reopening of the domestic proceedings at the request of the interested person would be the most appropriate way to redress the violation (see, among other authorities, *Sejdovic*, cited above, § 126; *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV; *Cabral v. the Netherlands*, no. 37617/10, §§ 42-43, 28 August 2018; and *Chernika v. Ukraine*, no. 53791/11, § 82, 12 March 2020). In this connection, it notes that Article 457 § 1 (b) of the Netherlands CCP (see paragraph 31 above) provides a basis for reopening proceedings if the Court finds a violation of the Convention.

62. The Court is led to conclude in the present case that reopening of the proceedings is the most appropriate form of redress for the established violation of the applicant's rights, should she request it, given that it is capable of providing *restitutio in integrum* as required under Article 41 of the Convention. That being so, the finding of a violation constitutes sufficient just satisfaction in the present case.

B. Costs and expenses

63. The applicant's claims under this head were the following:

(a) EUR 1,471.82 for the costs and expenses incurred before the Supreme Court;

(b) EUR 1,004.30 for the costs and expenses incurred in submitting a request for a postponement of the execution of the sentences and for a pardon (*gratie*);

(c) EUR 3,277.36 for the costs and expenses incurred before the Court.

64. The Government asked the Court to dismiss the applicant's claims under (b) but declined to comment on the claims under (a) and (c).

65. 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 were actually and necessarily incurred and are reasonable as to quantum. Furthermore, costs and expenses are only recoverable to the extent that they relate to the violation found (see, among many other authorities, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 290, 29 January 2019).

66. In the present case, regard being had to the documents in its possession and the above criteria, the Court dismisses the claim in paragraph 63 above under (b) but accepts the claims under (a) and (c) in full.

67. Under the head of costs and expenses, therefore, the Court awards the applicant EUR 4,750, plus any tax that may be chargeable to her.

C. Default interest

68. 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 and 3 (c) of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *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, EUR 4,750 (four thousand seven hundred and fifty 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 27 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Yonko Grozev
Registrar	President