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

COURT (CHAMBER)

CASE OF PIERSACK v. BELGIUM

(Application no. 8692/79)

JUDGMENT

STRASBOURG

1 October 1982

In the Piersack case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. J. PINHEIRO FARINHA,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 and 26 March and on 21 September 1982,

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

PROCEDURE

1. The Piersack case was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in an application (no. 8692/79) against the Kingdom of Belgium lodged with the Commission on 15 March 1979 under Article 25 (art. 25) of the Convention by a Belgian national, Mr. Christian Piersack.

2. The Commission's request was lodged with the registry of the Court on 14 October 1981, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request is to obtain a decision as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 22 October 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. L. Liesch, Mr. J. Pinheiro Farinha and Mr. R.

Bernhardt (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). On 25 November, the President exempted Mrs. Bindschedler-Robert from sitting; thereafter she was replaced by Mr. F. Gölcüklü, the first substitute judge (Rules 22 § 1 and 24 § 4).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Registrar, the views of the Agent of the Government and the Delegate of the Commission regarding the procedure to be followed. On 1 December 1981, having particular regard to their concurring statements, the President decided that it was not necessary for memorials to be filed; in addition, he directed that the oral proceedings should open on 25 March 1982.

On 29 January and 8 March 1982, acting on the President's instructions, the Registrar invited the Commission and the Government to supply several documents and also particulars on a factual aspect of the case; these were received on 3 February, 16 February, 2 March and 9 March.

5. The hearings were held in public at the Human Rights Building, Strasbourg, on 25 March. Immediately before their opening, the Chamber had held a preparatory meeting.

There appeared before the Court:

- for the Government:

Mr. J. NISET, Legal Adviser
at the Ministry of Justice, *Agent*,
Miss Anne de BLUTS, avocet, *Counsel*;

- for the Commission:

Mr. G. TENEKIDES, *Delegate*,
Mr. M. LANCASTER, the applicant's lawyer
before the Commission, assisting the Delegate (Rule 29 § 1, second sentence, of the Rules of Court).

The Court heard their arguments and observations as well as their replies to questions put by the Court and one of its members. A supplementary written reply from the Agent of the Government was received by the Registrar on 1 June 1982.

6. At the deliberations on 21 September 1982, Mr. G. Lagergren, the second substitute judge, took the place of Mr. Thór Vilhjálmsson, who was prevented from taking part in the consideration of the case (Rules 22 § 1 and 24 § 1).

AS TO THE FACTS

I. THE PARTICULAR FACTS OF THE CASE

7. The applicant, a Belgian national born in 1948, is a gunsmith. He is in the process of serving in Mons prison a sentence of eighteen years' hard labour imposed on him on 10 November 1978 by the Brabant Assize Court for murder.

8. During the night of 22-23 April 1976, two Frenchmen, Mr. Gilles Gros and Mr. Michel Dulon, were killed by revolver shots in Brussels whilst they were in a motor-car with Mr. Piersack, Mr. Constantinos Kavadias (against whom proceedings were subsequently discontinued) and a Portuguese national, Mr. Joao Tadeo Santos de Sousa Gravo.

A. From the opening of proceedings until reference of the case to the Court of Cassation

9. On 9 July 1976, Mr. Preuveneers, an investigating judge at the Brussels Court of First Instance, issued a warrant for the arrest of the applicant, who was suspected of having caused both deaths. He was in France at the time, but was arrested by the French authorities who, after agreeing to grant his extradition, handed him over to the Belgian police (gendarmerie) on 13 January 1977. The Courtrai procureur du Roi (public prosecutor) so informed his colleague in Brussels by a letter of the same date. Mr. Pierre Van de Walle, a senior deputy procureur, initialled the letter and forwarded it to the official in the public prosecutor's department (parquet) who was dealing with the case, one Mrs. del Carril. She transmitted it to Mr. Preuveneers with a covering note (apostille) dated 17 January.

10. On 4 February 1977, the investigating judge wrote to the Brussels procureur du Roi to enquire whether, as regards the co-accused Santos de Sousa, the public prosecutor's department intended to report the facts to the Portuguese authorities, those authorities apparently being no longer willing to grant his extradition. On his covering note, the judge added in manuscript, between brackets, the words "for the attention of Mr. P. Van de Walle". Mrs. del Carril replied to Mr. Preuveneers on 9 February 1977.

11. On 20 June, the procureur général (State prosecutor) attached to the Brussels Court of Appeal sent to the procureur du Roi the results of letters rogatory executed in Portugal concerning Mr. Santos de Sousa. After initialling the covering note, Mr. Van de Walle forwarded it to Mr. De Nauw, the deputy who had taken over from Mrs. del Carril in dealing with the case; Mr. De Nauw transmitted the note to the investigating judge on 22 June.

12. On 13 December 1977, Mr. Van de Walle took his oath as a judge on the Brussels Court of Appeal, to which office he had been appointed on 18 November. Most of the investigations had been completed by that time, although some further formal steps were taken at a later date.

13. On 12 May 1978, the deputy, Mr. De Nauw, signed an application for an arrest warrant (réquisitoire de prise de corps); prior to that, in a report of forty-five pages, he had referred the matter to the procureur général attached to the Court of Appeal, who had replied on 11 May. By judgment of 16 June, the Indictments Chamber (Chambre des mises en accusation) of the Brussels Court of Appeal remitted the applicant for trial before the Brabant Assize Court on charges of voluntary and premeditated manslaughter of Mr. Gros and Mr. Dulon. The procureur général drew up the formal indictment on 27 June.

14. The trial took place from 6 to 10 November 1978 before the Assize Court which was presided over by Mr. Van de Walle. After the court had heard, amongst others, numerous prosecution and defence witnesses, the twelve members of the jury withdrew to consider their verdict. Mr. Piersack had maintained throughout that he was innocent. On the third question put to them, concerning the "principal count", they arrived at a verdict of guilty, but only by seven votes to five. After deliberating on that question in private, the President and the two other judges (assesseurs) declared that they agreed with the majority.

In the final event, the Assize Court convicted the applicant of the murder of Mr. Dulon and acquitted him as regards the other charges; it accepted that there were mitigating circumstances and sentenced him on 10 November 1978 to eighteen years' hard labour. It also recorded that on account of his nationality it had not been possible to obtain the extradition to Belgium of Mr. Santos de Sousa, who had been arrested in Portugal.

15. The applicant then appealed on points of law to the Court of Cassation. His sixth ground of appeal, the only ground that is relevant in the present case, was that there had been a violation of Article 127 of the Judicial Code, which provides that "proceedings before an assize court shall be null and void if they have been presided over by a judicial officer who has acted in the case as public prosecutor (ministère public) ...". He contended that the words "for the attention of Mr. P. Van de Walle" appearing in manuscript on the covering note of 4 February 1977 (see paragraph 10 above) showed that Mr. Van de Walle, and not some other judicial officer in the public prosecutor's department, had been dealing with the matter at the relevant time and had, accordingly, taken some part or other in the investigation of the case. Mr. Piersack made no mention of the letter of 13 January and the note of 20 June 1977 (see paragraphs 9 and 11 above), since at that stage neither he nor his lawyer had identified the author of the initials marked thereon; the Government on their own initiative

supplied this information to the Commission in their written observations of March 1980 on the admissibility of the application.

B. Submissions of the public prosecutor's department attached to the Court of Cassation

16. In his submissions, Mr. Velu, an avocat général, retraced developments in the relevant Belgian legislation and judicial decisions, distinguishing between three periods:

(a) Before 1955, although there were no written rules on the subject, the Court of Cassation had delivered eight judgments in which it had been held that a judicial officer who had acted as public prosecutor in criminal proceedings could not thereafter sit in the case as a judge and, in particular, on the assize court bench. The Court of Cassation founded this prohibition on a general and absolute principle that was said to derive from the very nature of the functions. The avocat général summarised the judgments as follows:

> "It is of little moment - that the judicial officer in the public prosecutor's department intervened in the case only occasionally or by chance...;
>
> - that his intervention did not implicate one or more of the accused by name;
>
> - that his intervention did not involve a formal step in the process of investigation.
>
> It suffices that the judicial officer in the public prosecutor's department personally played some part in the conduct of the prosecution in the case in question.
>
> There is incompatibility as soon as the judicial officer, during the course of the prosecution, has personally intervened in the case in the capacity of member of the public prosecutor's department."

(b) The second period (1955-1968), during which the Court of Cassation apparently did not have occasion to rule on the problem of incompatibility between the functions of public prosecutor and the functions of judge, was marked by two new factors: the incorporation of the Convention into the Belgian domestic legal system and the developments in domestic case-law with regard to the general principle of law whereby cases must be impartially examined by the court.

The litigant's right to "an impartial tribunal", within the meaning of Article 6 § 1 (art. 6-1) of the Convention, could imply either that a judge was simply obliged to withdraw if he were at all biased as regards the case or, alternatively, that he was under the more extensive duty of withdrawing whenever there was a legitimate reason to doubt whether he offered the requisite guarantees of impartiality. The avocat général rejected the first interpretation, which he described as "restrictive", in favour of the second, the "extensive", interpretation; he relied notably on Article 31 of the Vienna

Convention on the Law of Treaties (account to be taken of the object and purpose) and on the Delcourt judgment of 17 January 1970 (Series A no. 11, pp. 14-15, § 25 in fine). As regards the general principle of law whereby cases must be impartially examined by the court, he also referred to judgments of the Belgian Court of Cassation and the Belgian Conseil d'État. In addition, he cited the following passage from an inaugural address of 1 September 1970 to the Court of Cassation: "any judge whose impartiality may legitimately give rise to doubts must refrain from taking part in the decision".

(c) The third period saw the entry into force of Articles 127 and 292 of the Judicial Code (see paragraph 22 below) and the application by the Court of Cassation of the second of these Articles to cases where a decision had been given by a judge who had previously acted as a member of the public prosecutor's department. According to the avocat général, the five judgments that he listed followed the same approach as those delivered in the first period and established that:

(i) notwithstanding Article 292 of the Judicial Code, the general principle of law whereby cases must be impartially examined by the court had retained its full force;

(ii) for the purposes of that Article, the expression "dealing with a case in the exercise of the functions of public prosecutor" signified intervening therein in the capacity of prosecuting party;

(iii) there could not be said to have been such an intervention if, in the case concerned, a judicial officer in the public prosecutor's department had simply

- appeared at a hearing at which the court did no more than adopt a purely procedural measure; or

- taken some step which was manifestly without effect on the conduct of the prosecution.

In the light of the foregoing, the avocat général concluded that the Court of Cassation should "set aside the judgment under appeal ... whether on the sixth ground adduced by the appellant or on the ground, to be taken into consideration by the Court of its own motion, of violation either of Article 6 § 1 (art. 6-1) of the Convention ... or of the general principle of law whereby cases must be impartially examined by the court".

The avocat général stressed that the covering note of 4 February 1977 emanated from the investigating judge, the person who quite naturally was best informed not only as to the background to the case but also as to the identity of the judicial officer or officers in the public prosecutor's department who were dealing with the prosecution. And Mr. Preuveneers had added to the covering note, in manuscript, the words "for the attention of Mr. P. Van de Walle", thereby indicating the specific addressee for whom the note was personally intended:

"If the investigating judge marked this covering note as being for Mr. P. Van de Walle's attention, it is logical to suppose that he knew that that judicial officer had personally played some part or other in the conduct of the prosecution.

What other reasonable explanation can be given for such a course of action ... which surely would not have been taken unless the two officers had been in contact regarding the investigation of the case?

It is of little moment that other judicial officers in the public prosecutor's department intervened in the case, for example to follow up the investigating judge's covering note, or that Mr. Van de Walle intervened only by chance or occasionally, or that such intervention has not been shown to have implicated the appellant or a co-accused by name or ... to have involved a formal step in the process of investigation.

Finally, there would be no reasonable explanation for the handwritten words ... if Mr. Van de Walle's intervention in the case had until then been limited to steps that were purely routine or ... were manifestly without effect on the conduct of the prosecution."

Even if the Court of Cassation were not to allow the appeal on the sixth ground, which was based on Article 127 of the Judicial Code, the circumstances described above were, in the opinion of the avocat général, Mr. Velu, sufficient to give rise to legitimate doubts as to whether the President of the Assize Court had offered the guarantees of impartiality required both by Article 6 § 1 (art. 6-1) of the Convention and by the general principle whereby cases must be impartially examined by the court.

C. Judgment of the Court of Cassation

17. The Court of Cassation dismissed the appeal on 21 February 1979.

As regards the sixth ground of appeal, the Court of Cassation observed firstly that the mere despatch of the covering note of 4 February 1977 did not necessarily show that Mr. Van de Walle had "acted in the case as public prosecutor", within the meaning of Article 127 of the Judicial Code.

The Court of Cassation also took into consideration of its own motion Article 6 § 1 (art. 6-1) of the Convention and the general principle of law establishing the right to the impartiality of the court. It was true that both of these norms obliged a judge to refrain from taking part in the decision if there were a legitimate reason to doubt whether he offered the guarantees of impartiality to which every accused person was entitled. However, the Court held that the documents which it could take into account did not reveal that after the public prosecutor's department had received the covering note mentioned in the ground of appeal, Mr. Van de Walle, who was then a senior deputy to the Brussels procureur du Roi, had taken any decision or intervened in any manner whatsoever in the conduct of the prosecution relating to the facts in question. Admittedly, for a judge's impartiality to be regarded as compromised on account of his previous intervention in the

capacity of judicial officer in the public prosecutor's department, it was not essential that such intervention should have consisted of adopting a personal standpoint in the matter or taking a specific step in the process of prosecution or investigation. Nevertheless, it could not be assumed that a judicial officer in the public prosecutor's department had intervened in a case in or on the occasion of the exercise of his functions as such an officer merely because there was a covering note which had been addressed to him personally by the investigating judge but which had not been shown by any evidence to have been received by the officer or to have caused him to take even an indirect interest in the case. In this connection, the Court of Cassation noted finally that it was not the senior deputy Van de Walle who had replied to the covering note.

II. THE RELEVANT LEGISLATION AND PRACTICE

A. The public prosecutor's department (ministère public)

18. In criminal matters, the public prosecutor's department "conducts prosecutions in the manner specified by law" (Article 138, first paragraph, of the Judicial Code). In that capacity, it investigates, and institutes proceedings in respect of, offences and then, if appropriate, appears at the trial in order to argue the case for the prosecution.

All the judicial officers in the public prosecutor's department form a hierarchical body which is generally recognised as being characterised by unity, indivisibility and independence.

In addition to the departments of the procureur général at the Court of Cassation and of the procureurs généraux at the Courts of Appeal, there is a procureur du Roi for each district; subject to the supervision and directions of the procureur général attached to the Court of Appeal, a procureur du Roi acts as public prosecutor before the District Courts, the Courts of First Instance, the Commercial Courts and the District Police Courts (Article 150 of the Judicial Code). He is aided by one or more deputies who are subject to his personal supervision and directions, including one or more senior deputies appointed by Royal Decree who assist him in the management of the public prosecutor's department (Article 151 of the Judicial Code).

19. In the Brussels public prosecutor's department, there are several dozen judicial officers all of whom are answerable to the procureur du Roi. The department is divided into sections, with a senior deputy at the head of each section. As a strict matter of law, the individual deputies come under the sole authority of the procureur du Roi who himself comes under the authority of the procureur général attached to the Court of Appeal, but in practice a senior deputy exercises certain administrative powers over the deputies. In particular, he revises their written submissions to the courts,

discusses with them the approach to be adopted in a specific case and, if the occasion arises, gives them advice on points of law.

One of the above-mentioned sections - section B - deals with indictable and non-indictable offences (crimes et délits) against the person. Mr. P. Van de Walle was the head of this section during the period in question, until his appointment to the Brussels Court of Appeal (see paragraph 12 above). According to the Government, the procureur du Roi regarded himself at that time as personally responsible for cases - like Mr. Piersack's - involving an indictable offence, the number whereof was actually fairly small; he worked on those cases directly with the deputy in charge of the file - on this occasion, Mrs. del Carril and then Mr. De Nauw -, rather than through the intermediary of the senior deputy whose principal role was to countersign documents, if not to act as a "letter-box". The applicant contested this version of the facts, maintaining that the Government were giving an exaggerated view of the "autonomy" enjoyed by the deputies vis-à-vis the senior deputies.

B. Assize courts

20. Under Article 98 of the Belgian Constitution, a jury has to be constituted in all cases involving an indictable offence. Assizes are held, as a rule at the chief town in each province, in order to try accused persons remitted for trial there by the Court of Appeal (Articles 114 to 116 of the Judicial Code and Article 231 of the Code of Criminal Procedure).

Each assize court is composed of a President and two other judges (assesseurs); for criminal matters, it sits with a jury of twelve members (Articles 119 to 124 of the Judicial Code).

The President's duties include directing the jurors in the exercise of their functions, summing-up the case on which they have to deliberate, presiding over the whole of the procedure and determining the order in which those wishing to do so shall address the court; he also keeps order in court (Article 267 of the Code of Criminal Procedure). He is entitled by law to take, at his discretion and on his own initiative, any steps which he may consider expedient for the purpose of establishing the truth, and he is bound in honour and conscience to make every effort to that end, for example by ordering of his own motion the attendance of witnesses or the production of documents (Articles 268 and 269).

21. After closing the hearings (Article 335, last paragraph, of the Code of Criminal Procedure), the President puts to the jury the questions arising from the indictment and hands the text of those questions to the foreman of the jury (Articles 337 to 342). The jurors then retire to their room to deliberate together, in the absence of the President and the other judges; they may return only when they have arrived at their verdict (Articles 342 and 343).

To be valid, the jury's verdict must be adopted by a majority for or against the accused; if the voting is equal, he is acquitted (Article 347). However, if he is found guilty on the principal count by no more than the simple majority of seven votes to five - as was the case for Mr. Piersack (see paragraph 14 above) -, the President and the two other judges deliberate together on the same question; if a majority of them does not agree with the majority of the jury, the accused is acquitted (Article 351). If there is a finding of guilt, the judges retire with the jurors to the jury-room and they deliberate as a single body, under the chairmanship of the President of the Court, on the sentence to be imposed in accordance with the criminal law; the decision is taken by an absolute majority (Article 364).

C. Incompatibilities

22. Article 292 of the 1967 Judicial Code prohibits the concurrent exercise of different judicial functions, except where otherwise provided by law; it lays down that "any decision given by a judge who has previously dealt with the case in the exercise of some other judicial function" shall be null and void. Article 127 specifies that "proceedings before an assize court shall be null and void if they have been presided over by a judicial officer who has acted in the case as ... public prosecutor (ministère public) or has delivered rulings on the conduct of the investigations".

PROCEEDINGS BEFORE THE COMMISSION

23. In his application of 15 March 1979 to the Commission (no. 8692/79), Mr. Piersack claimed to have been the victim of a violation of Article 6 § 1 (art. 6-1) of the Convention; he contended that he had not received a hearing by "an independent and impartial tribunal established by law", since Mr. Van de Walle, the President of the Assize Court which convicted him, had allegedly dealt with the case at an earlier stage in the capacity of a senior deputy to the procureur du Roi.

24. The Commission declared the application admissible on 15 July 198O. In its report of 13 May 1981 (Article 31 of the Convention) (art. 31), the Commission expressed the unanimous opinion that there had been a breach of one of the requirements of Article 6 § 1 (art. 6-1), namely that the tribunal be impartial.

The report contains one separate, concurring opinion.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

25. At the hearings, the Government requested the Court "to hold that there has been no violation of Article 6 § 1 (art. 6-1) of the Convention in the present case".

AS TO THE LAW

I. THE ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

26. Under Article 6 § 1 (art. 6-1) of the Convention,

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

1. "Independent tribunal"

27. According to the applicant, the court by which he was convicted on 10 November 1978 was not an "independent tribunal". This assertion, for which he adduced no supporting evidence, does not stand up to examination. Under the Constitution (Articles 99-100) and by statute, the three judges of whom Belgian assize courts are composed enjoy extensive guarantees designed to shield them from outside pressures, and the same purpose underlies certain of the strict rules governing the nomination of members of juries (Articles 217-253 of the Judicial Code).

2. "Impartial tribunal"

28. Mr. Van de Walle, the judge who presided over the Brabant Assize Court in the instant case, had previously served as a senior deputy to the Brussels procureur du Roi; until his appointment to the Court of Appeal, he was the head of section B of the Brussels public prosecutor's department, this being the section dealing with indictable and non-indictable offences against the person and, therefore, the very section to which Mr. Piersack's case was referred (see paragraphs 9-12, 14 and 19 above).

29. On the strength of this fact the applicant argued that his case had not been heard by an "impartial tribunal": in his view, "if one has dealt with a matter as public prosecutor for a year and a half, one cannot but be prejudiced".

According to the Government, at the relevant time it was the procureur du Roi himself, and not the senior deputy, Mr. Van de Walle, who handled cases involving an indictable offence; they maintained that each of the

deputies - on this occasion, Mrs. del Carril and then Mr. De Nauw - reported to the procureur on such cases directly and not through Mr. Van de Walle, the latter's role being principally an administrative one that was unconnected with the conduct of the prosecution and consisted, inter alia, of initialling numerous documents, such as the covering notes of 13 January and 20 June 1977 (see paragraphs 9, 11 and 19 above). As regards the covering note of 4 February 1977 (see paragraph 10 above), the investigating judge, Mr. Preuveneers, was said to have written thereon the words "for the attention of Mr. P. Van de Walle" solely because he knew that Mrs. del Carril was frequently on sick-leave. In addition, so the Government stated, there was no evidence to show that Mr. Van de Walle had received that note and, in any event, it was not he but Mrs. del Carril who had replied to Mr. Preuveneers.

30. Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, § 58).

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 (see paragraph 17 above), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.

(b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a

judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality; the Court concurs with the Government on this point.

(c) The Belgian Court of Cassation, which took Article 6 § 1 (art. 6-1) into consideration of its own motion, adopted in this case a criterion based on the functions exercised, namely whether the judge had previously intervened "in the case in or on the occasion of the exercise of ... functions as a judicial officer in the public prosecutor's department". It dismissed Mr. Piersack's appeal on points of law because the documents before it did not, in its view, show that there had been any such intervention on the part of Mr. Van de Walle in the capacity of senior deputy to the Brussels procureur du Roi, even in some form other than the adoption of a personal standpoint or the taking of a specific step in the process of prosecution or investigation (see paragraph 17 above).

(d) Even when clarified in the manner just mentioned, a criterion of this kind does not fully meet the requirements of Article 6 § 1 (art. 6-1). In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

31. This was what occurred in the present case. In November 1978, Mr. Van de Walle presided over the Brabant Assize Court before which the Indictments Chamber of the Brussels Court of Appeal had remitted the applicant for trial. In that capacity, he enjoyed during the hearings and the deliberations extensive powers to which, moreover, he was led to have recourse, for example the discretionary power conferred by Article 268 of the Judicial Code and the power of deciding, with the other judges, on the guilt of the accused should the jury arrive at a verdict of guilty by no more than a simple majority (see paragraphs 13-14 and 20-21 above).

Yet previously and until November 1977, Mr. Van de Walle had been the head of section B of the Brussels public prosecutor's department, which was responsible for the prosecution instituted against Mr. Piersack. As the hierarchical superior of the deputies in charge of the file, Mrs. del Carril and then Mr. De Nauw, he had been entitled to revise any written submissions by them to the courts, to discuss with them the approach to be adopted in the case and to give them advice on points of law (see paragraph 19 above). Besides, the information obtained by the Commission and the Court (see paragraphs 9-11 above) tends to confirm that Mr. Van de Walle did in fact play a certain part in the proceedings.

Whether or not Mr. Piersack was, as the Government believe, unaware of all these facts at the relevant time is of little moment. Neither is it necessary

to endeavour to gauge the precise extent of the role played by Mr. Van de Walle, by undertaking further enquiries in order to ascertain, for example, whether or not he received the covering note of 4 February 1977 himself and whether or not he discussed this particular case with Mrs. del Carril and Mr. De Nauw. It is sufficient to find that the impartiality of the "tribunal" which had to determine the merits (in the French text: "bien-fondé") of the charge was capable of appearing open to doubt.

32. In this respect, the Court therefore concludes that there was a violation of Article 6 § 1 (art. 6-1).

3. "Tribunal established by law"

33. Initially, the applicant also claimed that the Brabant Assize Court was not a "tribunal established by law", arguing that Mr. Van de Walle's presence on the bench contravened, inter alia, Article 127 of the Judicial Code.

In order to resolve this issue, it would have to be determined whether the phrase "established by law" covers not only the legal basis for the very existence of the "tribunal" - as to which there can be no dispute on this occasion (Article 98 of the Belgian Constitution) - but also the composition of the bench in each case; if so, whether the European Court can review the manner in which national courts - such as the Belgian Court of Cassation in its judgment of 21 February 1979 (see paragraph 17 above) - interpret and apply on this point their domestic law; and, finally, whether that law should not itself be in conformity with the Convention and notably the requirement of impartiality that appears in Article 6 § 1 (art. 6-1) (cf., in the context of Article 5 (art. 5), the Winterwerp judgment of 24 October 1979, Series A no. 33, pp. 19-20, §§ 45-46, and the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, pp. 18-19, § 41).

In the particular circumstances, it does not prove to be necessary to examine this issue, for in the present case the complaint, although made in a different legal context, coincides in substance with the complaint which has been held in the preceding paragraph to be well-founded; besides, the applicant did not revert to the former complaint either in his written observations of April 1980 on admissibility or during the hearings of 10 December 1980 before the Commission and of 25 March 1982 before the Court.

II. THE APPLICATION OF ARTICLE 50 (art. 50)

34. At the hearings, Mr. Piersack's lawyer stated that his client was seeking under Article 50 (art. 50) of the Convention his immediate release, in accordance with "arrangements to be discussed", and also financial compensation to be used to meet the fees of his lawyers before the Belgian Court of Cassation (50,000 BF) and in Strasbourg (150,0000BF), subject to

deduction of the amount paid by the Council of Europe by way of legal aid (3,500 FF).

Counsel for the Government replied that, were the Court to find a violation, publication of the judgment would itself constitute adequate just satisfaction. She added that she was unaware of the authorities' present view on early release of the applicant.

35. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision. The Court must therefore reserve it and fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 6 § 1 (art. 6-1) of the Convention;

2. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Commission to submit to the Court, within two months from the delivery of the present judgment, the Commission's written observations on the said question and, in particular, to notify the Court of any friendly settlement at which the Government and the applicant may have arrived;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this first day of October, one thousand nine hundred and eighty-two.

Gérard WIARDA
President

Marc-André EISSEN
Registrar