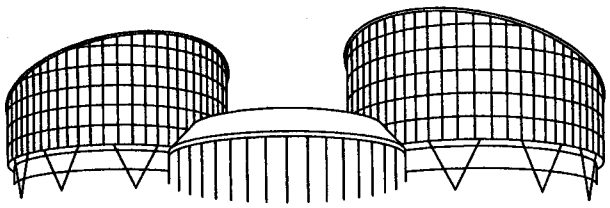

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HÜMMER v. GERMANY

(Application no. 26171/07)

JUDGMENT

STRASBOURG

19 July 2012

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 Hümmer v. Germany,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 26 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 26171/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Lars Hümmer ("the applicant"), on 3 May 2007.

2. The applicant, who had been granted legal aid, was represented by Mr T. Guber, a lawyer practising in Munich. The German Government ("the Government") were represented by their Deputy Agent, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

3. The applicant alleged that he had not been able at any stage of the criminal proceedings instituted against him to question the main witnesses on whose testimonies the domestic court had based its order to place him in a psychiatric hospital, in breach of his right to a fair trial pursuant to Article 6 §§ 1 as well as 3 (d) of the Convention.

4. The applicant and the Government each filed observations on the admissibility and merits of the application.

5. By a decision of 8 June 2010, the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1978 and lives in Bayreuth. At the time of the events in issue in September 2003 he was living in Bingen, Rhineland-Palatinate, where he was studying mechanical engineering.

7. On 26 November 2003 the applicant's mother, his brother and his sister ("the witnesses") informed the police about an incident that had occurred during the night of 2-3 September 2003 at the applicant's parents' house in Wilhemsthal, Bavaria. The witnesses testified that the applicant, who cannot remember the incident, had strangled his sister and had attacked his brother with an axe before being overpowered by his parents. The applicant's father did not press criminal charges and did not testify against the applicant.

8. The Coburg Public Prosecutor opened a criminal investigation against the applicant for attempted murder. On 8 December 2003 the witnesses repeated their statements before the investigating judge (*Ermittlungsrichter*) of the Kronach District Court in the presence of a police officer. The applicant was not informed of the hearing before the investigating judge. No counsel was appointed for him.

9. On 16 December 2003 the Kronach District Court issued a warrant for the applicant's arrest. The applicant was arrested on 19 December 2003 and remanded in custody. By a decision of the Coburg Regional Court of 6 October 2004 the applicant was transferred to a psychiatric hospital pending trial.

10. On 28 February 2005 the Coburg Regional Court ordered that the applicant be placed in a psychiatric hospital pursuant to section 63 of the Criminal Code (see "Relevant domestic law and practice" below).

The Regional Court found it established that on the evening of 2 September 2003 the applicant travelled from Bingen to his parents' house in Wilhelmsthal. He entered the house with his own key without notifying his parents or his brother and sister of his arrival. During the night he went to his sister's bedroom, strangled her and then attacked his brother with an axe causing him injuries on his head, hands, arms and legs. Once the applicant had been overpowered by his parents, the entire family gathered in the kitchen. The sister then drove the applicant's heavily bleeding brother to hospital where two of his wounds were sutured. The applicant stayed with his family in his parent's house until end of September 2003. During his stay he was provided with medical care by a local doctor who diagnosed him with having suffered an epileptic seizure. The applicant then returned to Bingen but made another unannounced visit to his parent's house on 21 November 2003. Following this visit the applicant's mother, brother and

sister who feared a further attack by the applicant decided to inform the police about the incident in the night of 2-3 September 2003 and pressed criminal charges against the applicant on 26 November 2003 (see above § 7).

11. The Regional Court qualified the acts as two counts of assault occasioning grievous bodily harm (*gefährliche Körperverletzung*). It further held on the basis of expert opinions that the applicant had acted either in a state of diminished awareness of his actions due to epilepsy (*epileptischer Dämmerzustand*) or during a bout of paranoid schizophrenia and could therefore not be held responsible for the acts, pursuant to section 20 of the Criminal Code (see "Relevant domestic law and practice" below).

12. As regards the finding of facts, the Regional Court noted that the applicant did not have any recollection of the events in the night of 2-3 September 2003 and that the only available direct witnesses, namely the applicant's mother, brother and sister, had availed themselves of their right not to testify against the applicant in court pursuant to section 52 of the Code of Criminal Procedure (see "Relevant domestic law and practice" below). The applicant's father had refrained from pressing criminal charges and had not participated in the proceedings (see above § 7). The facts could nevertheless be established on the basis of the testimony of the investigating judge, who had heard the witnesses on 8 December 2003 and had given an account of their pre-trial statements in court. The Regional Court held that it was not prevented from hearing the investigating judge as a witness and taking his testimony about the witnesses' pre-trial statements into account.

13. The Regional Court noted that the Public Prosecutor had failed to request the appointment of counsel for the applicant prior to the hearing of the witnesses by the investigating judge in accordance with section 140 (1) no. 2 read in conjunction with section 141 (3) of the Code of Criminal Procedure as construed by the Federal Court of Justice in the light of the requirements of Article 6 § 3 (d) of the Convention. Furthermore, the unrepresented applicant had not been informed about the hearing before the investigating judge pursuant to section 168(c) (3) and (5) of the Code of Criminal Procedure and there would have been no grounds to exclude a potential counsel from the hearing (see "Relevant domestic law and practice" below).

14. The Regional Court reiterated that under the Federal Court of Justice's case-law the failure to appoint counsel did not compel the exclusion of the investigating judge's testimony. However, the Regional Court was bound to proceed to a particularly critical assessment of the investigating judge's testimony in view of the fact that neither the accused nor counsel had been able to directly examine the witnesses. The finding of facts could only be based on the investigating judge's testimony if the latter was corroborated by other significant considerations.

15. The Regional Court took several items of evidence as corroborating the investigating judge's testimony into account. Firstly, it emphasised that for its establishment of facts it not only disposed of the testimony by the investigating judge but also of three consistent witness statements that gave a coherent account of the events in issue. According to the testimony given by the investigating judge, there was nothing to establish that the witnesses had not told the truth or wanted to incriminate the applicant; the witnesses had testified because they had been concerned about the applicant's health and had feared another attack by him. Furthermore, the police superintendent who had registered the witnesses' criminal charge on 26 November 2011 had testified that on this occasion he had been spontaneously told by the witnesses - prior to their subsequent questioning - that the applicant had attacked members of his family with an axe. The Regional Court pointed out that as opposed to the witnesses' subsequent testimonies to the police, these spontaneous statements did not have to be excluded from the trial pursuant to section 252 of the Code of Criminal Procedure but constituted admissible evidence. In addition, another policeman had testified that the applicant's mother had called him spontaneously on 3 December 2003 and had asked what further action would be taken as a result of the criminal complaint with a view to preventing a renewed unannounced visit and attack by the applicant. In the Regional Court's view these spontaneous statements supported the witnesses' description of the events in the night of 2-3 September 2003.

Moreover, the doctor who had treated the applicant's brother's cuts in hospital on 3 September 2003 had testified that he had been suspicious of the latter's explanation for his injuries at that time, namely that he had fallen through a glass pane. The Regional Court further noted that the applicant's brother had later handed over an axe to the police on his own initiative, and that the police officer who had received the implement had testified that the brother had confirmed that the axe was the *corpus delicti*. Finally, the applicant himself had testified that he could remember seeing his brother covered in blood on the morning of 3 September 2003 when the family had gathered in the kitchen and that his family members had told him that he had attacked his brother and sister during the night. According to the applicant, he himself had proposed that same morning to contact the police but his family had refused to do so. He further remembered that his sister had taken his brother to hospital.

16. The applicant lodged an appeal on points of law in which he complained that the investigating judge's testimony ought to have been excluded from the trial.

17. The Coburg Public Prosecutor lodged an appeal on points of law in which he argued that the attack on the witnesses should have been classified as two counts of attempted manslaughter as well as assault occasioning grievous bodily harm.

18. On 25 May 2005 the Federal Public Prosecutor moved that the applicant's appeal on points of law be dismissed on the grounds that the Regional Court had, in line with the reasoning in the related Federal Court of Justice's leading judgment, established that the investigating judge's testimony had been corroborated by other important considerations and that the Regional Court's holding was free of error.

19. On 24 August 2005 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. On 31 August 2005 the Federal Court of Justice ordered the State to pay the costs of the Public Prosecutor's Appeal on points of law which had been withdrawn. These decisions were served on the applicant on 9 and 16 September 2005 respectively.

20. On 1 April 2006 the applicant lodged his first application with this Court (no. 14678/06) which was declared inadmissible for non-exhaustion of domestic remedies by a Committee of three judges on 5 September 2006.

21. On 16 October 2006 the applicant applied for the reinstatement of the proceedings in regard to his compliance with the one-month period to lodge a constitutional complaint and submitted his constitutional complaint to the Federal Constitutional Court.

22. On 20 March 2007 the Federal Constitutional Court refused to admit the applicant's constitutional complaint for examination and noted that there was no need to decide the applicant's application for the reinstatement of the proceedings (no. 2 BvR 225/07).

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. The Regional Court may order an accused to be placed in a psychiatric hospital if he has committed an unlawful act in a state that excludes a finding of guilt, and if his act reveals that as a result of his condition, future serious unlawful acts can be expected of him and that he therefore presents a danger to the general public (section 63 of the Criminal Code). An accused acts without guilt if he is incapable of appreciating the wrongfulness of his act or of acting in accordance with such appreciation due to a pathological emotional disorder, profound consciousness disorder, mental defect or any other serious emotional abnormality (section 20 of the Criminal Code).

24. Pursuant to section 168(c) (2) of the Code of Criminal Procedure, the prosecutor, the accused and defence counsel shall be permitted to be present during the judicial examination of a witness or expert prior to the opening of the main proceedings. The judge may exclude an accused from being present at the hearing if his presence would endanger the purpose of the investigation, in particular if it is to be feared that a witness will not tell the truth in the presence of the accused (section 168(c) (3) of the Code of Criminal Procedure). The persons entitled to be present shall be given prior

notice of the dates set down for the hearings. The notification shall be dispensed with if it would endanger the success of the investigation (section 168(c) (5) of the Code of Criminal Procedure).

25. Defence counsel may be appointed during preliminary proceedings; the public prosecution office shall request such an appointment if in its opinion the assistance of defence counsel in the main proceedings will be mandatory (section 141 (3) of the Code of Criminal Procedure). The assistance of defence counsel is mandatory if, *inter alia*, the main hearing is held at first instance before the Regional Court, the accused is charged with a serious criminal offence, or the proceedings are conducted with a view to placement in a psychiatric hospital (section 140 (1) nos. 1, 2 and 7 of the Code of Criminal Procedure). Counsel is to be appointed when an indicted accused without defence counsel has been requested to reply to the bill of indictment (section 141 (1) of the Code of Criminal Procedure).

26. In a leading judgment of 25 July 2000 (published in the official reports, *BGHSt*, volume 46, p. 96 et seq.) the Federal Court of Justice held that section 141 (3) of the Code of Criminal Procedure required, in view of Article 6 § 3 (d) of the Convention, the appointment of counsel for an unrepresented accused if the key witness for the prosecution was to testify before an investigating judge and the accused was excluded from this hearing. The failure to appoint counsel prior to the hearing before the investigating judge did not exclude the latter's testimony about the witnesses' statements as long as the proceedings, seen as a whole, remained fair. To this end the investigating judge's testimony had to be carefully assessed. A conviction could only be based on the investigating judge's testimony if this testimony was corroborated by other important considerations.

27. Parents, brothers and sisters need not testify against their accused son or daughter, brother or sister (section 52 (1) no. 3 of the Code of Criminal Procedure); if such a witness makes use of his or her right not to testify at the main hearing, prior witness statements shall not be read out (section 252 of the Code of Criminal Procedure). According to the Federal Court of Justice's case-law, section 252 of the Code of Criminal Procedure is an exclusionary rule that applies to all statements made prior to a main hearing by witnesses who avail themselves of their right not to testify at the main hearing, with the exceptions of spontaneous statements made by the witness before or outside his or her formal testimony as well as testimonies before a judge after the witness has been advised of his or her right not to testify.

THE LAW

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

28. The applicant complained that neither he nor counsel were able to examine the main witnesses against him at any stage of the proceedings. He alleged that therefore his right to mount an effective defence had been unduly restricted. His right to a fair trial further had been breached by the trial court's admission of the investigating judge's account of the statements made by the witnesses at the pre-trial stage.

He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, as far as relevant, read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. The parties' submissions

1. The Government

29. The Government conceded that neither the applicant nor counsel had been able at any stage of the proceedings to question or to have questioned the applicant's family members who were the only direct witnesses of the events at issue.

30. They maintained that the fact that the applicant had not been notified of the hearing of the witnesses by the investigating judge in the course of the preliminary proceedings did, as such, not raise a problem. They nevertheless acknowledged that pursuant to section 141 (3) of the Code of Criminal Procedure, as construed by the case-law of the Federal Court of Justice, counsel should have been appointed for the applicant at the pre-trial stage and be granted the opportunity to assist the hearing by the investigating judge and to question the witnesses. Since the witnesses had

availed themselves of their statutory right not to testify on the occasion of the ensuing trial in accordance with section 52 of the Code of Criminal Procedure, the applicant had been definitely deprived of an opportunity to examine them. The procedural error of not having appointed counsel already at the investigative stage had therefore also affected the fairness of the main proceedings.

31. In the Government's view the Coburg Regional Court had, however, sufficiently compensated the resulting restrictions for the defence in the course of the trial. In line with the related principles developed in the Federal Court of Justice's case-law referring to Article 6 § 3 (d) of the Convention, the Regional Court had pointed out that the evidentiary value of the investigating judge's testimony was reduced because of the applicant's inability to question the main witnesses. Consequently, it had not based its findings of fact solely on the witnesses' testimonies as introduced by the investigating judge but had taken other significant evidence into account. For instance, the court had made reference to the applicant's account of the events following the assault on the morning of 3 September 2003 and the witnesses' spontaneous statements made vis-à-vis the police officer who had recorded the criminal charges brought against the applicant on 26 November 2003 as well as the applicant's mother's enquiry of 3 December 2003 regarding the further steps taken by the police as a result of the criminal complaint. The Regional Court further had had regard to the injuries sustained by the applicant's brother, the submissions of the doctor who had treated the applicant's brother's wounds in hospital and the *corpus delicti* handed over to the police by the latter. The Government also pointed out that the applicant as well as counsel had been in a position to observe the demeanour of the investigating judge as well as the aforementioned police officers and doctor when they were testifying in court and had the opportunity to question these witnesses. Thus, the defence had had the possibility to form their own impression of the latters' credibility.

32. The Government contended that the Regional Court had thoroughly and critically assessed these additional items of evidence which not only had their own independent evidentiary value and could therefore serve as a basis for the Regional Court's decision but which also corroborated the investigating judge's testimony. They therefore constituted a strong indication that the statements made by the witnesses in the course of the preliminary proceedings had been accurate. The applicant's placement in a psychiatric hospital had therefore not been based solely or decisively on the statements of witnesses whom the applicant had been unable to question or have been questioned.

33. Having regard to these considerations, the Government concluded that the criminal proceedings against the applicant as a whole had been fair

and there had thus been no violation of Article 6 § 1 and 3 (d) of the Convention.

2. The applicant

34. The applicant submitted that the Government had actually acknowledged that the applicant's rights to examine witnesses against him had been infringed. The Government's view that the resulting restrictions for the defence had been compensated by the Regional Court's finding that the investigating judge's testimony was of reduced evidentiary value and that the applicant's conviction therefore had to be based on further significant evidence had no mooring in the text of the Convention or the Court's case-law. In particular, the present case was not comparable to applications previously examined by the Court which related to situations where the identity or the whereabouts of a witness were unknown, thus making it impossible for the national authorities to arrange for an examination of the latter by defence counsel.

35. The applicant further maintained that, contrary to the Government's submissions, his placement in a psychiatric hospital had, in fact, been based solely on the statements of the key witnesses whom he had not had an opportunity to question. The corroborating evidence adduced by the Regional Court did not provide a sufficient basis for the court's related order and a conviction based solely on corroborating evidence would not have been safe.

36. For these reasons, the applicant concluded that the rights of the defence had been restricted to an extent which was irreconcilable with the guarantees contained in Article 6 §§ 1 and 3 (d) of the Convention.

B. The Court's assessment

37. The Court recalls that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, as a recent authority, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, §118, ECHR 2011, with further references therein). In making this assessment the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010-....) and, where necessary, to the rights of witnesses (see, amongst many authorities, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II).

38. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II and *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X).

39. The statement of a witness does not always have to be made in court and in public if it is to be admitted as evidence; in particular, this may prove impossible in certain cases (see *Asch v. Austria*, 26 April 1991, § 27, Series A no. 203). In any event, paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *D. v. Finland*, no. 30542/04, § 41, 7 July 2009 and *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 67, ECHR 2001-VIII).

40. The Court further reiterates in this context that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly and in particular whether the defendant's rights have not been unacceptably restricted and that he or she remains able to participate effectively in the proceedings (see *T. v. the United Kingdom* [GC], no. 24724/94, § 83, 16 December 1999 and *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A).

41. The Court notes at the outset that, as also pointed out by the applicant, the present application does not concern witnesses whose identity or whereabouts are unknown to the accused. In the instant case the only available eye witnesses of the events in issue were the applicant's mother, brother and sister (the applicant's father having refrained from participating in the proceedings, see above §§ 7 and 12) who all refused to give evidence at the trial, as they were entitled to in their capacity as family members of the accused pursuant to section 52 of the German Code of Criminal Procedure. They could thus neither be heard by the trial court nor were the prosecution or the defence able to examine them during trial. The Court recalls in this context that provisions granting family members of the accused the right not to testify as witnesses in court with a view to avoiding

their being put in a moral dilemma can be found in the domestic law of several member States of the Council of Europe and are, as such, not incompatible with Article 6 §§ 1 and 3 (d) of the Convention (see *Unterpertinger v. Austria*, 24 November 1986, § 30, Series A no. 110).

42. Furthermore, as concerns the fact that the Regional Court heard the investigating judge who gave an account of the witnesses' pre-trial statements of 8 December 2003, the Court reiterates that the use in evidence of statements obtained at the investigative stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the defendant has been given an adequate opportunity to challenge the statements, either when made or at a later stage (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, § 34, Series A no. 194-A; *Lucà*, cited above, § 40 and *Gossa v. Poland*, no. 47986/99, § 54, 9 January 2007). This implies that the use made of evidence admitted by the trial court must comply with the rights of the defence, in particular, where the accused has not had an opportunity at any stage in the earlier proceedings to question the persons whose statements are introduced into the trial (see, *mutatis mutandis*, *Unterpertinger*, cited above, § 31) and where they form the sole or decisive evidence for a conviction or related decision by the trial court (see *Al-Khawaja and Tahery*, cited above, § 119). The Court has held in this context that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule"; ibid.).

43. The Court notes that it is not disputed between the parties that the applicant did not have the opportunity to question his mother, brother and sister at trial. It is further not contested by the Government that the Public Prosecutor had failed to request the appointment of counsel prior to the witnesses' hearing before the investigating judge in accordance with domestic law as construed by the Federal Court of Justice and that it thus had been imputable to the national authorities that defence counsel did not have an opportunity to examine the witnesses at the pre-trial stage.

44. As regards the significance of the untested evidence for the trial, the Court accepts the Government's submissions that the witnesses' pre-trial statements of 8 December 2003, as introduced to the proceedings by the investigating judge's testimony, were not the only evidence before the Regional Court. The court also referred, *inter alia*, to the witnesses' statements made prior to their formal testimonies vis-à-vis the police officer who had recorded the criminal charges brought against the applicant on 26 November 2003 as well as the applicant's mother's enquiry of 3 December 2003 regarding the further steps taken by the police as a result of the criminal complaint. It further had regard to the injuries sustained by

the applicant's brother, the submissions of the doctor who had treated the applicant's brother's wounds and the *corpus delicti* handed over to the police by the latter. The Court notes, however, that such corroborating evidence was either hearsay itself or circumstantial and appears to have even increased the Regional Court's reliance on the statements of the witnesses whom the applicant could not examine. As regards the applicant's recollection of the events following the assault, the Court notes that this could at best provide indirect support for the claim that the applicant had attacked his sister and brother.

It follows that the only evidence conclusively demonstrating that the applicant had committed the assault was the witnesses' pre-trial statements. In its judgment of 28 February 2005, the Regional Court in fact emphasised that its establishment of facts was not only based on the testimony by the investigating judge but also on three consistent witness statements that gave a coherent account of the events in issue and were credible. It thus appears that the Regional Court's finding relied, at least to a significant extent, on the hearsay testimony of the only direct witnesses of the events in issue and whom neither the defence nor the trial court had an opportunity to examine. It was obviously evidence of great weight and the Court therefore concludes that the witness statements made by the applicant's mother, brother and sister at the pre-trial stage were decisive for the trial court's decision-making (see *Al-Khawaja and Tahery*, cited above, § 131).

45. The Court has emphasised in its recent case-law that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission at trial will not automatically result in a breach of Article 6 § 1. At the same time the Court found that where a conviction is based solely or decisively on the evidence of absent witnesses, it must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (see *Al-Khawaja and Tahery*, cited above, § 147). The Court observes that similar considerations are reflected in the Regional Court's judgment of 28 February 2005 stating, with reference to the Federal Court of Justice's related case-law, that since neither the accused nor counsel had been able to examine the witnesses against the accused, the trial court was requested to assess the investigating judge's testimony particularly critically and could only base its decision on such testimony if the latter was corroborated by other significant factors.

46. The Court is therefore called upon to examine whether the Regional Court had put sufficient counterbalancing factors in place and had proceeded to a fair and proper assessment of the reliability of the available evidence. The Court observes that the counterbalancing factors relied on by

the Government mainly include the fact that the trial court had taken the aforementioned corroborating evidence (see above § 44) into account in its decision-making. The Government further pointed out that the applicant as well as counsel had been in a position to observe the demeanour of the investigative judge as well as the aforementioned police officers and doctor when they had testified in court and had the opportunity to question these witnesses. In the Government's view they had thus had the possibility to form their own impression of the latter's credibility. Furthermore, according to the investigating judge's testimony, there had been nothing to establish that the witnesses when questioned in the course of the investigation proceedings had not told the truth or wanted to incriminate the applicant.

47. Having regard to these arguments and acknowledging that the trial court had been aware of the fact that the evidentiary value of the investigating judge's testimony had to be carefully scrutinised, the Court will examine whether the factors adduced by the Government, taken alone or in combination, constituted a sufficient counterbalance to the handicap under which the defence laboured following the admission as evidence of the investigating judge's account of the witnesses' statements made at the pre-trial stage.

48. The Court recalls in this context that counsel for the applicant had not been appointed prior to the witnesses' hearing by the investigating judge in the preliminary proceedings, in breach of domestic law. The applicant had thus been deprived of a procedural safeguard afforded by national law as construed by the domestic courts with a view to granting the defence an opportunity to examine key witness for the prosecution at the pre-trial stage. The Court shares the Government's view that this procedural error at the investigative stage has also affected the fairness of the main proceedings. It is, by contrast, not convinced by the Government's argument that the Coburg Regional Court has sufficiently compensated the resulting restrictions for the defence in the course of the trial.

49. As regards the evidence corroborating the witness statements as adduced by the Regional Court and as referred to by the Government, the Court reiterates its finding that such evidence did at best provide indirect support for the claim that the applicant had attacked his sister and brother and that the statements of the applicant's family members provided the only conclusive evidence in this regard.

50. The Court further observes that the statements of these witnesses and the circumstances under which they have been made were to some extent contradictory or at least incoherent. It notes, for instance, that the applicant's brother, mother and sister pressed criminal charges against the applicant on 26 November 2003, almost three months after the incident had occurred. It is therefore questionable whether any statements made on that date or thereafter vis-à-vis the police officer can still be considered as being made spontaneously as assumed by the trial court. It is further not surprising

that after such a considerable period of time the witnesses, having had ample opportunity to compare their recollection of the events, gave similar and coherent accounts of the alleged assault during their examination by the investigating judge. As regards the injuries sustained by the applicant's brother, the Court notes that the latter himself had adduced vis-à-vis the doctor who had treated him in hospital on 2 September 2003 and who had subsequently testified at the applicant's trial, that he had fallen through a glass pane. While this doctor, when examined at trial, expressed doubts as to the explanation given for the injuries, there is nothing in his testimony to establish that the injuries could in principle not have been caused by such an accident or that they had actually been caused by the axe that constituted the alleged *corpus delicti*. The Court further cannot but take note of the fact that even though the sister had undisputedly accompanied her brother to the hospital, she had not been examined by a doctor and no circumstantial evidence exists for any injuries, such as strangulation marks, sustained by her.

51. These inconsistencies, which are not addressed in the Regional Court's judgment of 28 February 2005, could neither be explored by the applicant nor by the trial court in cross-examination of the witnesses. Furthermore, neither the trial court nor the prosecution, the accused or counsel were in a position to observe the direct witnesses' demeanour under questioning and to form their own impression of their probity and credibility. While the Court accepts the Government's submissions that the applicant as well as counsel had been in a position to observe the demeanour of the investigative judge as well as the aforementioned police officers and doctor when testifying in court, it nevertheless is of the opinion that such possibility does not compensate for the lack of opportunity to test the truthfulness and reliability of the decisive evidence in the case at hand, namely the witnesses' statements at the pre-trial stage.

The Court is further of the opinion that the investigating judge's assessment that the witnesses' statements made at the pre-trial stage had been credible and that there was no indication for collusion on their part can scarcely be considered a proper substitute for the possibility of the defence or the trial court to question the witnesses in their presence and make their own judgment as to their demeanour and reliability (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 62, *Reports of Judgments and Decisions* 1997-III and *Kostovski v. the Netherlands*, 20 November 1989, § 43, Series A no. 166).

52. Having regard to the above considerations, the Court therefore finds that no adequate procedures were introduced by the authorities to counterbalance the difficulties faced by the defence and that there is nothing to establish that the applicant was given an adequate and proper opportunity to challenge and question the only direct witnesses against him. This appears even more evident when taking into account that the applicant

himself, due to the epileptic seizure he had been suffering from, did undisputedly not have any recollection of the events in issue and was thus not even in a position of giving evidence denying the charge. The Court recalls in this respect that a defendant must not be placed in a position where he is effectively deprived of a real chance of defending himself by being unable to challenge the case against him (see *T. v. the United Kingdom* [GC], cited above, § 83 and *Stanford v. the United Kingdom*, cited above, § 26)."

53. The Court therefore considers that the decisive nature of the witnesses' statements as introduced by the investigating judges' testimony in the absence of any strong corroborative evidence meant that the trial court in the instant case was unable to conduct a fair and proper assessment of the reliability of such evidence. Examining the fairness of the proceedings as a whole, the Court concludes that there were no sufficient counterbalancing factors to compensate for the difficulties to the defence resulting from the admission of the investigating judge's testimony.

The Court therefore finds that there has been a violation of Article 6 § 1 read in conjunction with § 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant did not claim any award for pecuniary damage. He submitted that the objective of his application was to obtain a retrial before the domestic courts, should the Court hold that the admission of the investigating judge's testimony in the trial before the Coburg Regional Court constituted a violation of the Convention. The Government did not comment on this issue.

56. The Court accordingly does not make an award in respect of pecuniary damage. As to the specific measure requested by the applicant in compensation, the Court considers that where, as in the instant case, an individual has been the victim of proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if he or she so requests, represents in principle an appropriate way of redressing the violation (see *Cudak v. Lithuania* [GC], no. 15869/02,

§ 79, ECHR 2010 and *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-II).

57. The applicant claimed EUR 10,000 in respect of non-pecuniary damage. The Government left the matter to the Court's discretion.

58. The Court accepts that being deprived of the guarantees provided by Article 6 of the Convention has caused the applicant non-pecuniary damage which is not remedied by the mere finding of a violation. Ruling on an equitable basis, it awards him EUR 10,000 under that head.

B. Costs and expenses

59. The applicant, who had been granted legal aid, claimed an estimated total of EUR 6,000 in costs and expenses for legal fees incurred in the proceedings before the Court. He further claimed an estimated total of EUR 15,000 for costs and expenses incurred before the domestic courts. He claimed an additional amount in the range of EUR 30 to EUR 40 for copying costs and postal charges without specifying which part of this sum had been incurred before the domestic courts or the Court.

60. The Government argued that any costs and expenses in relation to the proceedings before the Coburg Regional Court had not been incurred in order to prevent or redress a violation of the applicant's Convention rights. Furthermore, the costs and expenses claimed by the applicant with respect to the proceedings before the domestic courts were based on an estimate and had not been substantiated by the applicant. As regards the lawyers' fees claimed by the applicant for the proceedings before the Court, the Government left it to the Court's discretion to decide on their reasonableness.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 in respect of costs and expenses for the proceedings before the Court, less EUR 850 received by way of legal aid from the Council of Europe, making a total of EUR 4,150, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

62. 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. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,150 (four thousand one 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President