



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

THIRD SECTION

CASE OF BOK v. THE NETHERLANDS

(Application no. 45482/06)

JUDGMENT

STRASBOURG

18 January 2011

FINAL

18/04/2011

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

In the case of Bok v. the Netherlands,

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

Josep Casadevall, *President*,

Elisabet Fura,

Corneliu Bîrsan,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 30 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 45482/06) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Netherlands national, Mr Johan Bok (“the applicant”), on 1 November 2006.

2. The applicant was represented initially by Mr L.C. van Walree and later by Ms I.N. Weski, both at relevant times lawyers practising in Rotterdam. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker of the Ministry for Foreign Affairs.

3. The applicant alleged in particular that he had been a victim of a violation of Article 6 § 2 of the Convention in that, in civil proceedings which he had brought as plaintiff, he had been required to prove his innocence of a crime of which he had been previously acquitted.

4. On 9 September 2008 the Chamber decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (former Article 29 § 3 of the Convention).

5. The Government filed written observations (Rule 54 § 2 (b) of the Rules of Court, as in force at the time) on the admissibility and merits. No observations were received from the applicant within the time-limit set for that purpose (Rule 38 § 1, as in force at the time). However, the applicant requested the Court to continue the proceedings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The criminal proceedings and subsequent compensation procedure

6. In 1994 – in the context of a much wider criminal investigation involving many suspects – a preliminary judicial investigation (*gerechtelijk vooronderzoek*) was opened against the applicant, who was suspected of participation in a criminal organisation. On 6 March 1995 the investigating judge (*rechter-commissaris*) of the Middelburg Regional Court (*rechtbank*) authorised the Middelburg public prosecutor to issue a garnishee order (*conservatoir beslag*) against the applicant in the context of this investigation, the scope of which had been extended to offences under the Opium Act (*Opiumwet*). Also in this context, a house in Rotterdam owned by the applicant's daughter was searched on 21 March 1995, during which the front door, the alarm installation and bedroom furniture were damaged. This search took place under the direction of the Rotterdam investigating judge and on the basis of an authorisation issued by the Middelburg Regional Court. A number of objects found during this search were seized under the garnishee order, including two cars: a Jeep and a Mercedes. The Jeep was returned to the lease company that owned it on 28 June 1995. The applicant was charged with various offences under the Opium Act and the Arms and Ammunition Act (*Wet Wapens en Munitie*).

7. By judgment of 5 June 1997, the Middelburg Regional Court convicted the applicant of various charges brought against him and sentenced him to eighteen months' imprisonment and payment of a fine of 100,000 Netherlands guilders (“NLG”). The applicant lodged an appeal.

8. The Mercedes car seized on 21 March 1995 was sold at a public auction on 11 July 1997.

9. On 9 February 1998, the Court of Appeal (*gerechtshof*) of The Hague accepted the appeal filed by the applicant, quashed the judgment of 5 June 1997 and acquitted the applicant of all charges, finding that they had not been lawfully and convincingly proven (*niet wettig en overtuigend bewezen*).

10. On an unspecified date, the applicant lodged a claim with the Court of Appeal of The Hague under Article 591a of the Code of Criminal Procedure (*Wetboek van Strafvordering*), seeking the reimbursement of an amount of more than NLG 200,000 for costs and expenses incurred by him in the course of the criminal proceedings.

11. On 29 June 1998 the Court of Appeal of The Hague awarded the applicant NLG 100,000 for costs and expenses incurred, and rejected his claim under Article 591a for the remainder. No further appeal lay against this decision.

12. On 3 March 1999, the proceeds of the sale of the Mercedes car plus accrued statutory interest were paid to the applicant.

B. The civil proceedings

13. On 13 July 1999, considering that the criminal proceedings taken against him had not only entailed the incurring of legal costs and expenses but had also caused him and his daughter pecuniary and non-pecuniary damage, the applicant and his daughter brought civil proceedings against the Netherlands State before the Regional Court of The Hague. Alleging a wrongful act (*onrechtmatige daad*) within the meaning of Article 6:162 of the Civil Code (*Burgerlijk Wetboek*), the applicant and his daughter claimed that a body for whose acts the State was liable had acted in a wrongful manner towards them by having brought criminal proceedings against the applicant, and by using criminal investigation tools (search and seizure) on the basis of a suspicion that had been unfounded from the outset.

14. The applicant claimed compensation in the amount of NLG 1,500,000 for non-pecuniary damage and NLG 475,055.30 for pecuniary damage (loss of profits, extra accountants' and financing costs, costs incurred in relation to the two cars seized). The applicant's daughter claimed compensation of NLG 2,000 for non-pecuniary damage and NLG 7,760 for pecuniary damage caused to her house and furniture in the course of the search of 21 March 1995.

15. In its judgment of 11 July 2001, the Regional Court rejected the applicant's claims. It considered that, according to the relevant case-law under Article 6:162 of the Civil Code, the institution of criminal proceedings or use of criminal investigation tools could only be regarded as wrongful when such proceedings had been brought or such tools used in breach of the law or with disregard of fundamental requirements (*in strijd met de wet dan wel met verontachtzaming van fundamentele vereisten*), or where it appeared retrospectively from the criminal investigation – either from the final decision or otherwise – that the suspicion on the basis of which the criminal proceedings had been brought or the criminal investigation tool used had been unjustified (*dat de verdenking ten onrechte heeft bestaan*). It held that the first situation did not arise in the applicant's case as, during the preliminary judicial investigation against the applicant, the investigating judges of Middelburg and Rotterdam and the Middelburg Regional Court had given an affirmative answer to the question whether there was a reasonable suspicion against the applicant and that consequently it had to be assumed that a reasonable suspicion had existed at the time.

Furthermore, in its judgment of 9 February 1998, the Court of Appeal had found that the criminal investigation methods used in the applicant's case had not been illicit. The Regional Court found that the second situation did not arise in the applicant's case either, as it did not follow from the applicant's acquittal or from the contents of the criminal case-file as made available to the court that the applicant had not carried out the acts of which he had been suspected. Consequently, and absent an automatic right to compensation for lawful acts on the part of the State in the context of the criminal investigation against him, the only possibility for the applicant to obtain compensation in connection with the criminal proceedings brought against him and the use of criminal investigation methods in this investigation was to avail himself of the possibilities provided under Articles 89, 90, 591 and 591a of the Code of Criminal Procedure.

16. As regards the applicant's daughter, the Regional Court found no indication that there had ever been any suspicion of her involvement in the facts on which the charges brought against the applicant were based. Consequently, it found that the damage suffered by her – caused by criminal investigation methods directed against her father – should not be borne by her. On the basis of the elements before it, the Regional Court assessed this damage at NLG 3,000 and ordered the Netherlands State to pay this amount to the applicant's daughter. It rejected the remainder of both plaintiffs' claims.

17. On 30 August 2001, the applicant and his daughter lodged an appeal with the Court of Appeal of The Hague. The Netherlands State lodged a cross-appeal (*incidenteel beroep*).

18. In its judgment of 11 November 2004, the Court of Appeal quashed the ruling of 11 July 2001 but only in respect of the compensation award to the applicant's daughter, which it reduced to 750 euros, rejecting the remainder of her claim for lack of substantiation. It upheld the impugned ruling for the remainder. Referring to the constant case-law of the Supreme Court (*Hoge Raad*), the Court of Appeal held, in so far as relevant, as follows:

“2.2. ... The Regional Court has rightly declined to consider the acquittal by the criminal court to be of decisive importance but instead considered whether the criminal investigation – the final judgment or otherwise – demonstrated that [the applicant] had not committed the crimes with which he had been charged. According to the consistent case-law of the Supreme Court this does not contravene the presumption of innocence of Article 6 § 2 of the Convention. The Convention case-law cited by [the plaintiffs], which does not substantially differ from the Convention case-law taken into account by the Supreme Court in its consistent case-law, does not shed any different light on the case. Nor can allegation that the criminal case file is inaccessible, if correct, cannot lead to the conclusion that the cited criterion is applicable.

2.3. To the extent that [the plaintiffs] also wish to argue that [the applicant] has been prosecuted without justification because, as they state, no reasonable suspicion

of guilt of a criminal offence in his respect existed, the Court of Appeal notes the following. For the search and the garnishee order permission was granted by the Middelburg Regional Court and the investigating judge, respectively. In the present proceedings it cannot be successfully argued that these judicial authorities in so doing took an incorrect decision. That would, after all, imply that it was for the civil court to examine whether the criminal court had taken a correct decision and this is incompatible with the closed system of legal remedies (*gesloten systeem van rechtsmiddelen*) [in the Netherlands legal order]. It has not been argued, nor is it apparent, that there are special circumstances which might justify making an exception to this principle.

2.4. The argument that [the applicant] has been prosecuted without justification because a reasonable suspicion of guilt was lacking has hardly at all been substantiated by [the applicant], whereas in the case at hand the onus of proof lies with [the applicant] and not the State. [The applicant] has only submitted that the suspicion in this case rested solely on the fact that [the applicant] knew the co-suspect F. and on some meaningless taps. This is however insufficient, given the contents of the [items of evidence set out in the judgment of 7 June 1997 by the Middelburg Regional Court as submitted by the defendant in response to the plaintiffs' summons in the present proceedings] which could give rise to the suspicion that H. and F. were involved in trafficking hashish ... and that [the applicant] had regular – business – contacts with F. and H.

2.5. The Court of Appeal agrees with the Regional Court that the criminal investigation – the final judgment or otherwise – does not show that [the applicant] was innocent (*onschuldig*) of the crimes charged. The Court of Appeal notes that such a conclusion can only be drawn if the suspect's innocence is reasonably obvious (*de onschuld van de verdachte met enige evidentie naar voren komt*). This is not the case here given – on the one hand – the items of evidence [as set out in the judgment of 7 June 1997] and – on the other – the absence from the criminal case file, in so far as made available [in the present proceedings], of convincing disculpatory material (*overtuigend ontlastend materiaal*). There is no need to consider, as the Regional Court did, whether the evidence relied on points in a different direction [i.e. to the applicant's guilt].”

19. The applicant and his daughter lodged an appeal on points of law (*cassatie*) – limited to points of law and procedural conformity – with the Supreme Court. On 16 June 2006, referring to Article 81 of the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*) and without stating any further reasons, the Supreme Court rejected this appeal in cassation as not prompting a determination of legal issues in the interest of legal unity and legal development.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

20. Article 27 of the Code of Criminal Procedure defines the notion of a suspect in criminal proceedings. It reads in its relevant part:

“1. Before the start of the prosecution, the person referred to as the suspect shall be the person in respect of whom a reasonable suspicion of guilt of a criminal act flows from facts or circumstances.

2. [After the prosecution has started], the suspect is the person against whom the prosecution is directed. ...”

21. If at the end of the preliminary criminal investigation the public prosecutor decides to bring the case to trial, the prosecutor will issue a summons which must be served on the accused. This summons contains the charges against the accused, which are set out in a very formal and detailed manner, in conformity with the requirements of Article 261 of the Code of Criminal Procedure. Pursuant to Articles 348 and 350 of the Code of Criminal Procedure, the trial court is strictly bound by the wording of the summons and the trial may not be conducted beyond the facts detailed in the charge(s). Only the public prosecutor may amend the charge, and then only in certain circumstances and subject to approval by the trial court (Article 313 of the Code of Criminal Procedure). In reaching its verdict, the trial court must answer the questions set out in Articles 348 and 350 of the Code of Criminal Procedure and, as to Article 350, must follow strictly the sequence of these questions as set out in that provision. In so far as relevant, these Articles read as follows:

Article 348

“The court shall examine – on the basis of the summons and what has emerged from the trial hearings – the validity of the summons, its competence to examine the charge and the admissibility of the prosecution and whether there are reasons to suspend the prosecution.”

Article 350

“If the examination referred to in Article 348 does not lead to [a ruling declaring the nullity of the summons, the incompetence of the trial court to deal with the case, the inadmissibility of the prosecution or the suspension of the prosecution], the court shall deliberate – on the basis of the summons and what has emerged from the trial hearings – on the question whether it has been proven that the accused has committed the fact [as described in the summons] and, if so, what offence this fact constitutes according to the law. If found that the fact is proven and [constituting a] punishable [offence], the court shall deliberate on the criminal liability (*strafbaarheid*) and on the imposition of a punishment or measure.”

22. Pursuant to Article 338 of the Code of Criminal Procedure, a finding that it has been lawfully and convincingly proven (*wettig en overtuigend bewezen*) – which is the standard of proof in Netherlands criminal law – that the accused has committed the fact(s) as described in the formal charge can only be made by the court when the latter reached that conviction on the basis of “legal means of evidence” (*wettige bewijsmiddelen*). “Legal means of evidence” are personal observations of the judge, statements of the

accused, statements of witnesses, statements of experts, authentic minutes and records in proper form and other written documents (Article 339 § 1 and Articles 340-344a of the Code of Criminal Procedure). Pursuant to Article 359 §§ 1 and 3 of the Code of Criminal Procedure, a judgment must enumerate the means of evidence as well as the pertinent facts and circumstances on which a conviction is based.

23. If the court finds that it has not been legally and convincingly proven that the accused has committed the fact(s) as set out in the charges, the judge must pronounce an acquittal (Article 352 § 1 of the Code of Criminal Procedure). If the court finds such fact(s) proven but not constitutive of a punishable offence, or if it finds that the accused cannot be held criminally liable, it shall discharge the accused from further prosecution (“*ontslag van rechtsvervolging*”) (Article 352 of the Code of Criminal Procedure). Unlike a judgment in which an accused is convicted, no further reason than “it has not been lawfully and convincingly proven” is given for an acquittal.

24. Articles 89, 90, 591 and 591a of the Code of Criminal Procedure provide a former suspect with the possibility – albeit on limited grounds – to obtain damages for lawful acts undertaken by the authorities in the context of criminal proceedings against him or her after a judicial decision to acquit or to discontinue the criminal proceedings. In so far as relevant, these Articles read as follows:

Article 89

“1. If a case ends without the imposition of a punishment or measure, or when such punishment or measure is imposed but on the basis of a fact for which detention on remand is not allowed, the court may, at the request of the former suspect, grant him compensation at the expense of the State for the damage which he has suffered as a result of police custody, clinical observation or detention on remand (*voorlopige hechtenis*). Such damage may include non-pecuniary damage. ...”

Article 90

“1. Compensation shall be awarded in each case if and to the extent that the court, taking all circumstances into account, is of the opinion that there are reasons in equity to do so.

2. In the determination of the amount, the personal circumstances (*levensomstandigheden*) of the former suspect shall also be taken into account. ...”

Article 591

“1. Compensation shall be paid to the former suspect or his heirs out of State funds for costs borne by the former suspect under or pursuant to the provisions of the Act on Fees in Criminal Cases (*Wet tarieven in strafzaken*), in so far as the appropriation of these costs has served the investigation or has become devoid of purpose by the

withdrawal of summonses or legal remedies by the public prosecution service (*openbaar ministerie*).

2. The amount of compensation shall be determined at the request of the former suspect or his heirs. This request must be submitted within three months following the termination of the case. The determination shall be made in the court with jurisdiction as to both facts and law before which, at the time of its termination, the case was or would have been prosecuted or else was last prosecuted, by the District Court judge or by the presiding judge as the case may be. The presiding judge may appoint one of the judges of the Court of Appeal or the Regional Court who have dealt with the case to do so. The District Court judge or the [Regional Court or Court of Appeal] judge shall issue an order of payment (*bevelschrift van tenuitvoerlegging*) for the amount of the compensation. ...”

Article 591a

“1. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs shall be granted compensation out of State funds for his travel and subsistence expenses incurred for the investigation and the examination of his case, calculated on the basis of the Act on Fees in Criminal Cases.

2. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs may be granted compensation out of State funds for the damage which he has actually suffered through loss of time as a result of the preliminary investigation and the examination of his case at the trial, as well as the costs of counsel. This will include compensation for the costs of counsel during police custody and detention on remand. Compensation for such costs may furthermore be granted when a case ends with the imposition of a punishment or measure on the basis of a fact for which detention on remand is not allowed. ...

4. Articles 90 and 591, paragraphs 2 to 5, shall apply by analogy. ...”

B. The Civil Code and the Code of Civil Procedure

25. Apart from the above possibility under the Code of Criminal Procedure to seek damages for lawful acts by the authorities in criminal proceedings which have ended in an acquittal or discontinuation, it is also possible for former suspects – as currently there is no other specific remedy under domestic law – to seek compensation for a wrongful act, or tort, on the part of public authority (“*onrechtmatige overheidsdaad*”) by taking civil proceedings against the State claiming compensation for damages based on the argument that the institution of criminal proceedings and/or the application of one or more coercive measures in the course of those criminal proceedings constituted a wrongful act within the meaning of Article 6:162 of the Civil Code. Article 6:162 of the Civil Code reads as follows:

“1. A person who commits a wrongful act (*onrechtmatige daad*) against another which is attributable to him, must repair the damage suffered by the other in consequence.

2. Except where there is a ground of justification, the following acts are deemed to be wrongful: the violation of a right, and an act or omission violating a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.

3. A wrongdoer is responsible for the commission of a wrongful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles (*de in het verkeer geldende opvatting*)."

26. Pursuant to Article 150 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), the plaintiff claiming damages under Article 6:162 bears the burden of proof, unless a specific rule or reasons of equity (*redelijkheid en billijkheid*) call for a shift of the burden of proof to the defendant.

27. Pursuant to Article 149 § 1 of the Code of Civil Procedure, the judge mainly plays a passive role in civil proceedings. Apart from facts and circumstances of common knowledge (Article 149 § 2), a civil court can solely base its ruling on those facts or rights of which it was informed or of which it acquired knowledge during the proceedings in a manner complying with the requirements of the Code of Civil Procedure. The court must accept as established facts or rights claimed by one party and which have not or have been insufficiently disputed by the adversary party, notwithstanding its competence to request evidence, in so far as acceptance of claims would lead to legal consequences which are not for the free determination of the parties.

28. This entails that, in proceedings in which a wrongful act is claimed, it is the plaintiff who must substantiate his or her claim with sufficient and demonstrable facts. It is not enough merely to state, for instance, that a criminal prosecution has been unjustly brought or that a coercive measure in criminal law was unjustly used by the criminal investigating authorities. Rather, it is up to the defendant to give a reasoned challenge of the materials adduced by the plaintiff in substantiation of his or her claim. A mere denial without any substantiation is insufficient.

29. Parties to civil proceedings may submit evidence in any form (Article 151 § 1 of the Code of Civil Procedure) and, although there is no hierarchy between oral or documentary evidence, certain categories of documentary evidence (such as authentic deeds and final convicting judgments delivered after adversarial criminal proceedings) are compelling evidence as to the veracity of statements set out in such documents (Articles 160-161 of the Code of Civil Procedure). The evaluation of all other evidence is left to the discretion of the court (Article 152 § 2 of the Code of Civil Procedure).

C. The Bill on compensation of damage caused by government action in criminal proceedings

30. A “Bill on compensation of damage caused by government action in criminal proceedings” (*Wetvoorstel Schadecompensatie Strafvorderlijk Overheidsoptreden*) is pending which is intended to improve the legal position of persons having suffered damages in consequence of lawful or wrongful government action in the context of criminal proceedings. This Bill proposes to introduce one specific and simple procedure for examining such compensation claims filed by different categories of claimants (not only former suspects but also non-suspect victims, for instance bystanders hit by a ricocheted bullet fired by a police officer). The pertaining Explanatory Memorandum explains the current situation under Netherlands civil law in respect of former suspects as follows:

“As the law currently stands, a former suspect can only claim compensation for damages for lawful government action in criminal proceedings when it concerns 'wrongfulness *ex post*'. This means that a former suspect is entitled to compensation when, in retrospect, the government action is wrongful on the basis of this suspect's demonstrated innocence (*gebleken onschuld*). However, there is only demonstrated innocence when 'it is demonstrated by the ruling of the criminal court or otherwise by the documents relating to the criminal procedure that has not ended with a finding that the charges have been proven (*bewezenverklaring*) that the suspect is innocent and that the suspicion on which the action of the police or justice authorities was based was unfounded' (Supreme Court, 13 October 2006, ... *Landelijk Jurisprudentienummer* [National case-law database number, 'LJN'] AV6956).

Where these documents do not demonstrate that the person concerned was innocent, then it must be assumed – according to consistent case-law – that the suspicion of the person concerned complied with the standard laid down in Article 27 [of the Code of Criminal Procedure], that criminal law measures [taken and] based on that suspicion were not unlawful and that – for obtaining compensation of damage – the suspect is to turn to the possibilities under Articles 89-93, 591 and 591a of the Code of Criminal Procedure (see, *inter alia*, Supreme Court 13 October 2006, ... LJN AV6956). This applies also for those cases in which the accused has been acquitted, because an acquittal does not always mean that an accused was innocent. In some cases it is no longer possible to find out during the criminal proceedings what exactly did happen. For instance because witnesses give conflicting evidence on essential points and the accused's denial is supported by other statements. Then it is possible to acquit an accused for lack of evidence while at the same time it remains unclear whether the accused has committed the fact [constituting the offence]....”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

31. The applicant complained under Article 6 § 2 of the Convention that the reasons stated by the Court of Appeal for rejecting his compensation claim under Article 6:162 of the Civil Code failed to respect the presumption of innocence through finding – despite his acquittal – that the original suspicion weighing against him had not been dispelled.

Article 6 § 2 of the Convention reads as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

A. Admissibility

1. The Government's preliminary objection

32. The Government asked the Court to declare the application inadmissible on the ground that the applicant could not claim to be a “victim” of any supposed violation of the Convention. They pointed to the applicant's acquittal and to the considerable sum of money which he had received in compensation for any damage which he might have suffered in the course of the proceedings. In the circumstances, a claim of victim status could not be based on the mere fact that the applicant had not subsequently been awarded further compensation by the civil courts.

33. As will be seen below, the applicant does not complain merely that he was denied further compensation as the Government suggest. Reduced to their essentials, his complaints are that the denial of further compensation was based on grounds incompatible with requirements of fairness and the presumption of innocence enshrined in Article 6 §§ 1 and 2. The Government's preliminary objection therefore lacks a basis in fact and must be dismissed.

2. Conclusion as to admissibility

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

B. Merits

35. The Government argued that the present case was distinguishable from earlier cases in which the Court had found a violation on the ground that a final and unappealable acquittal had been called into question. An acquittal did not establish innocence, as in the present case it had not. The failure retrospectively to declare the applicant innocent could not be equated with an implied or express suspicion of guilt.

36. In fact, the Court of Appeal had avoided expressing itself on the applicant's guilt or innocence. In stating that the applicant's innocence did not appear from the acquittal judgment, the Court of Appeal had not implied a lingering suspicion. It had found, as it properly could, that the suspicion which had caused the coercive measures to be ordered had, at the time, been reasonable and that the acquittal *per se* was insufficient to justify a different conclusion.

37. The Court has frequently held that neither Article 6 § 2 nor any other provision of the Convention gives a person “charged with a criminal offence” the right to the reimbursement of his costs or the right to compensation for lawful pre-trial detention where proceedings taken against him were discontinued or resulted in an acquittal (see, among many other authorities, *Sekanina v. Austria*, judgment of 25 August 1993, Series A no. 266-A, § 25, and *Hibbert v. the Netherlands* (dec.), no. 30087/97, 26 January 1999).

38. However, the Court has been led to find violations of Article 6 § 2 in that the reasons given for refusing monetary compensation following the termination of criminal proceedings reflected an opinion that the accused was guilty of a crime, notwithstanding the absence of any actual conviction (see, as examples concerning the same respondent Party, *Baars v. the Netherlands*, no. 44320/98, § 31, 28 October 2003, and *Del Latte v. the Netherlands*, no. 44760/98, § 33, 9 November 2004; as examples of similar findings against a different respondent Party, see *Hammern v. Norway*, no. 30287/96, § 47, 11 February 2003, and *O. v. Norway*, no. 29327/95, § 39, ECHR 2003-II).

39. The Court has also, on occasion, found Article 6 § 2 to have been violated in that a judgment by a civil court awarding damages against a former defendant in a criminal case contained reasoning incompatible with the latter's acquittal (*Y v. Norway*, no. 56568/00, § 46, ECHR 2003-II (extracts); *Orr v. Norway*, no. 31283/04, § 53, 15 May 2008).

40. In contrast, in *Ringvold v. Norway*, no. 34964/97, § 38, ECHR 2003-II, the Court accepted that “while exoneration from criminal liability ought to stand in ... compensation proceedings [brought by the victim of the acts at issue against the former accused], it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof”, although “[if] the national

decision on compensation were to contain a statement imputing criminal liability to the [former accused], this would raise an issue falling within the ambit of Article 6 § 2 of the Convention” (see also *Reeves v. Norway* (dec.), no. 4248/02, 8 July 2004).

41. The cases of *Puig Panella v. Spain*, no. 1483/02, 25 April 2006, and *Tendam v. Spain*, no. 25720/05, 13 July 2010, concerned proceedings in the administrative courts brought by applicants following criminal proceedings that had resulted in the overturning of a conviction (*Puig Panella*) and in an acquittal (*Tendam*), respectively. In both cases the Court found violations of Article 6 § 2 in that the domestic courts had based their rejection of the applicant's claims on the finding that the outcome of the criminal proceedings did not show that the facts charged did not exist, but merely the absence of sufficient proof to ground a conviction.

42. The present case differs from all those mentioned above in that the applicant was awarded a sum of money towards his costs and expenses in dedicated proceedings which have not given rise to allegations that Article 6 § 2 has been violated, the applicant having chosen to bring additional civil proceedings in an attempt to obtain further sums.

43. The Court finds this latter distinction to be decisive. After all, in civil proceedings it is normally the plaintiff in a defended action who bears the burden of proof (*affirmanti non neganti incumbit probatio*, enshrined in domestic procedure as Articles 149 and 150 of the Code of Civil Procedure, see paragraphs 26 and 27 above).

44. The applicant based his claim on the premise that any suspicion against him had been groundless from the outset (see paragraph 13 above). For his claim to succeed, the applicant was required to prove his position by any of the means which domestic procedure placed at his disposal (see paragraphs 18 and 27-29 above).

45. The Court cannot find it unreasonable that the applicant was required to prove, on balance, the truth of his allegation that there had never been any reason to suspect him in circumstances where he was claiming damages in this regard. If the Court were to hold otherwise it would lead to the absurd consequence of obliging the domestic courts to take the applicant's assertions of wrongdoing on the part of the state at face value. The domestic courts were satisfied that there was *prima facie* evidence upon which the State was entitled to bring the criminal proceedings against the applicant. He enjoyed the presumption of innocence and was entitled to the benefit of the doubt in criminal proceedings. His acquittal was based on the fact that the evidence of the prosecution was not sufficient to find him guilty beyond reasonable doubt. His acquittal in criminal proceedings did not mean that he was dispensed from the obligation of having to prove his claim for damages brought in civil proceedings in accordance with the applicable domestic rules regarding burden of proof (see paragraphs 43-44 above).

46. It must be accepted as a consequence that the domestic civil courts were required, and therefore entitled, to decide whether the applicant had properly discharged his burden of proof.

47. The Court appreciates that in the present case the use of expressions stating the lack of any appearance of the applicant's "innocence" (*onschuld*) and the absence of "disculpatory material" (*ontlastend materiaal*) in paragraph 2.5 of the judgment of the Court of Appeal was unfortunate and, given the confusion which those expressions caused, inappropriate. The context is however set by the preceding paragraph of that judgment, paragraph 2.4, in which the Court of Appeal elaborated upon the scope of the burden of proof which the applicant was obliged to bear in making his claim. The impugned expressions, though unnecessary, were aimed at explaining what the applicant was obliged to prove and how he had failed so to do.

48. In conclusion, the Court cannot find that the ruling given by the Court of Appeal in finding against the applicant in the civil proceedings at issue offended the presumption of innocence guaranteed to him under Article 6 § 2 of the Convention. There has therefore not been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

49. The applicant also complained that it was incompatible with Article 6 § 1 of the Convention that, as the burden of proof lay with the plaintiff, he had to prove his innocence in the civil compensation proceedings. He lastly complained under Article 6 § 1 of the Convention that he was denied a fair trial in that the domestic courts incorrectly failed to appreciate that there had never existed a proper factual basis for instituting and pursuing criminal proceedings against him and for applying criminal investigation methods in these proceedings, which disproportionate measures have caused him damage.

Article 6 § 1 of the Convention, in its relevant part, reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

50. The Court will confine itself to referring to its conclusion in paragraph 48 above and the reasoning on which it is based. There is no separate issue to be considered under Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Declares* unanimously the application admissible;
3. *Holds* by six votes to one that there has been no violation of Article 6 § 2 of the Convention;
4. *Holds* by six votes to one that it is not necessary to consider the applicant's complaints under Article 6 § 1 of the Convention.

Done in English, and notified in writing on 18 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Section Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge López Guerra;
- (b) concurring opinion of Judge Power;
- (c) dissenting opinion of Judge Casadevall.

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE LÓPEZ GUERRA

I agree with the Chamber's conclusion concerning the non-violation of article 6 § 2 of the Convention. I consider, however, that the fact that the applicant had already been awarded a sum of money towards his costs and expenses is not the decisive factor (paragraph 43) in this case. In my opinion what really distinguishes this case from the *Puig Panella* and *Tendam* cases is that the Court of Appeal's determining reasoning in refusing the applicant's claims was undoubtedly based on his failure to prove that there had never been any probable cause for the charges against him. The Court of Appeal's reasoning stating that the applicant's final judgment and acquittal did not show that he was innocent is clearly of a lateral or secondary nature, being an *obiter dictum* in the judgment of that Court. Certainly, as our judgment states, that reasoning was inappropriate. But I concur with our judgment in that these unnecessary expressions do not represent a violation of the presumption of innocence.

CONCURRING OPINION OF JUDGE POWER

1. The presumption of innocence when charged with a criminal offence is a sacrosanct principle of Convention law but the wording of Article 6 § 2, when taken alone, is open to different interpretations. What does “Everyone charged” actually mean? Does it mean “Everyone ever charged – no matter how long ago”? Or does it mean “Everyone when charged or likely to be charged with a criminal offence and for as long as such charges are pending”? Is the presumption of innocence “eternally live”, attaching to every person at all times regardless of whether one is actually facing a criminal charge or not? Or is the presumption something that is “triggered”, that only becomes legally meaningful when events occur through which a person is, in reality, facing or likely to be facing a criminal charge which has not, as yet, been determined? To my mind, these are not only neat philosophical questions; how they are answered is critical to the determination of this case.

2. The free-standing, post-acquittal “eternally live” model of interpretation of Article 6 § 2 is appealing and attractive and there is some support for this model in the case law to date – at least where a sufficient “link” exists between the post-acquittal observations of a court and the criminal responsibility of an accused¹. However, without advocating a rigid and unwavering adherence to the doctrine of “original intent”, common sense and the overall “fair trial” context within which the presumption of innocence is articulated within the Convention lead me to the view that the “events occurring” model of interpretation is the better one. Based on that interpretation, I voted with the majority in finding no violation of Article 6 § 2 of the Convention. The alternative would have established, in my view, an unreasonable and potentially unlimited extension of the scope of Article 6 § 2 to civil proceedings.

3. The Court confirmed in *Allenet de Ribemont v. France* that the presumption of innocence enshrined Article 6 § 2 is one of the elements of a fair criminal trial that is required by Article 6 § 1². The principle of presumption of innocence is, above all, a procedural safeguard in criminal proceedings and it imposes obligations on all state authorities to ensure that no suggestion is made that an accused charged with a criminal offence is guilty of that offence before he has been so found in accordance with law. However, the fact that every accused person enjoys the presumption of innocence when charged with a criminal offence does not invalidate the

¹ See, *inter alia*, *Sekanina v. Austria*, 25 August 1993, § 30, Series A no. 266-A; *Rushiti v. Austria*, no. 28389/95, § 31, 21 March; *Lamanna v. Austria*, no. 28923/95, § 38, 10 July 2001; and *Hammern v. Norway*, no. 30287/96, § 48, 11 February 2003; though these cases are distinguishable from the instant case on their facts and not least insofar as this case involved entirely separate civil proceedings instituted post-acquittal.

² *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308.

distinction in legal theory between criminal responsibility and civil liability arising out of the same events but involving different standards of proof.¹

4. The Court of Appeal, in acquitting the applicant, found that the charges against him had not been “convincingly proven”. Such evidence as was adduced at his criminal trial was insufficient to establish his guilt beyond reasonable doubt. In effect, that evidence failed to rebut the presumption of innocence which he enjoyed in respect of the specific charges and thus, that presumption remained undisturbed.

5. The applicant was entitled under domestic law to institute separate civil proceedings seeking damages against the State for alleged wrongful conduct on its part. Essentially, he claimed that the State had no reasonable grounds for suspecting him of the offences with which he had, previously, been charged. Once the decision was taken to put the reasonableness or otherwise of his prosecution in issue it was to be expected that, in contentious civil litigation, arguments would arise as to whether or not there had been evidence available for suspecting him of the offences in question. The civil courts found that evidence giving rise to reasonable suspicion had been available to the State and the applicant lost his case.

6. Where an allegation of wrongdoing is made in a contentious civil action for damages it is the right of every defendant thereto to challenge the allegations made. The Court could not countenance a situation where every acquitted person who subsequently litigates the reasonableness or otherwise of his arrest in separate civil proceedings would have to be awarded damages, failing which a violation of Article 6 § 2 would be found. In civil proceedings, the State, like every other defendant, is entitled to defend itself against claims made and, in this case, the State's defence succeeded.

7. When the events occurred through which the applicant found himself “charged with a criminal offence” the sacrosanct presumption of innocence was triggered. It remained “live” until the determination of the criminal proceedings when its *raison d'être* ceased to exist. To speak of a violation of the presumption of innocence when a person is not – or is no longer – facing a criminal charge is to divorce the principle from its purpose. That is the difficulty I have with the “eternally active” model of interpretation of Article 6 § 2.

8. At the time of the civil proceedings, the applicant was not a person “charged with a criminal offence”. There existed no reason for the presumption of innocence to “trigger” and thus it cannot have been disturbed by the findings of the civil court. I accept that some of the latter's observations might have been more elegantly articulated. I do not condone the remarks concerning the necessity for a suspect's innocence to be

¹ See, for example, *M.C. v. the United Kingdom*, no. 11882/85, Commission decision of 7 October 1987, D.R. 54, p. 162; and *Ringvold v. Norway*, no. 34964/97, § 38, ECHR 2003-II.

“reasonably obvious” nor the comments concerning the absence of “disculpatory material” within the criminal file. None of these observations were necessary for determining the civil action and it seems to me that the civil courts confused the concept of the “presumption of innocence” with the concept of “the existence of reasonable cause”. Unfortunate as this confusion was, and inelegant as the articulation might have been, I cannot conclude that these observations resulted in a “finding” of guilt that violates the presumption of innocence as protected under Article 6 § 2. The inelegantly articulated comments of the Court of Appeal did not in any way jeopardize the fairness of the applicant's criminal trial. The reality is that the applicant was not, at that point, a person charged with a criminal offence. The circumstances for which the procedural safeguard was incorporated into the Convention simply did not exist. It was for this reason that I found no violation of Article 6 § 2.

DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. I cannot agree with the majority's approach in this judgment, as it is my belief that there was a violation of the applicant's right to the presumption of innocence, for the reasons given below.

2. It has been the Court's well-established case-law, since the *Minelli* judgment¹, that the presumption of innocence will be violated if, without the accused having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty, even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. The scope of the presumption of innocence protected by Article 6 § 2 “is thus not confined to criminal proceedings which are pending but also encompasses judicial decisions pronounced after proceedings have been terminated”², be they decisions of civil courts or of administrative courts. The operative part of a judgment pronouncing an acquittal must be respected by any authority referring directly or indirectly to the criminal responsibility of the interested party³.

3. I agree with the judgment (paragraph 37) that neither Article 6 § 2 nor any other provision of the Convention gives a person “charged with a criminal offence” the right to the reimbursement of his costs or the right to compensation for lawful pre-trial detention, and that refusal by a domestic court to award an applicant such reimbursement or compensation does not in itself violate the presumption of innocence. Most European legislations which provide for the payment of such compensation subject it to certain conditions concerning the conduct of the interested party, either before or during the proceedings, or leave it to the discretion of the court, which, again, is not contrary to the provisions of the Convention. I also agree with the conclusion expressed in paragraph 38 of the judgment. The problem is therefore not the refusal, in itself, to award monetary compensation, but the reasoning behind the refusal or the language used in the arguments for the decision.

4. In *Sekanina v. Austria* the Linz Court of Appeal concluded: “The jury took the view that the suspicion was not sufficient to reach a guilty verdict; there was, however, no question of that suspicion's being dispelled.” The Court found that such affirmations – not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations – left open a doubt both as to the applicant's innocence and as to the correctness

¹ *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62.

² *Puig Panella v. Spain*, no. 1483/02, § 51, 25 April 2006.

³ *Vassilios Stavropoulos v. Greece*, no. 35522/04, § 39, 27 September 2007.

of the Assize Court's verdict, a doubt which was incompatible with the presumption of innocence, and it accordingly found a violation¹.

5. In *Puig Panella v. Spain*, the Ministry of Justice rejected the applicant's claim for damages, arguing that he "... had not really proved that he did not take part in the offences with which he was charged (...) and such compensation could be awarded only in the event of absolute certainty as regards the innocence of the person remanded in custody (...)". The Court held that that reasoning, subsequently upheld by the relevant domestic courts, was incompatible with the presumption of innocence, and found a violation².

6. More recently, in *Tendam v. Spain*, in rejecting the applicant's claims the Ministry of Justice again argued that he had been acquitted on appeal "not because of the objective or subjective inexistence of the offending act" but because of the lack of sufficient proof on which to base a conviction, and that "the applicant's involvement in the offence had not been sufficiently established". The Court reiterated that the domestic courts, in upholding that reasoning, had failed to remedy the problem. It accordingly found a violation³.

7. Even if the circumstances in each of these cases differ, they all have one thing in common which led to the finding of a violation: the wording used by the domestic authorities to defend their decisions not to award the applicants compensation.

8. In the present case the Court of Appeal (paragraph 18) states that it "agrees with the Regional Court that the criminal investigation – the final judgement or otherwise – does not show that (the applicant) was innocent (*onschuldig*) of the crimes charged. The Court of Appeal notes that such a conclusion can only be drawn if the suspect's innocence is reasonably obvious. This is not the case here (...)". I find it very difficult to see any distinction between these remarks and those referred to in the judgments mentioned above.

9. The majority distinguishes this case from the *Puig-Panella* and *Tendam* cases because the applicant, in previous proceedings, was awarded a sum of money towards his costs and expenses, adding that "The Court finds this latter distinction to be decisive", and further stating that in civil proceedings it is normally the plaintiff in a defended action who bears the burden of proof (paragraphs 42 and 43). Clearly I am not disputing that principle of civil law. But I find the distinction artificial. The fact of having received costs and expenses has nothing to do with a claim for compensation for alleged non-pecuniary damage. The problem is not the rejection of the applicant's claim for damages (the civil court might well

¹ *Sekanina v. Austria*, 25 August 1993, §§ 29 and 30, Series A no. 266-A.

² *Puig-Panella v. Spain*, §§ 30 and 57.

³ *Tendam v. Spain*, no. 25720/05, §§ 18 and 40, 13 July 2010.

have its reasons for that decision), but rather, as in the cases cited above, the reasoning given by the Court of Appeal.

10. The majority confines itself to acknowledging that “the use of expressions stating the lack of any appearance of the applicant's innocence and the absence of disculpatory material (...) was unfortunate and, given the confusion which those expressions caused, inappropriate”, but it did not draw what I consider were the necessary conclusions in this case. Furthermore, the phrase **“This applies also for those cases in which the accused has been acquitted, because an acquittal does not always mean that an accused was innocent”** in the Explanatory Memorandum to the “Bill on compensation” (paragraph 30) triggers certain misgivings about the future. This statement strikes me as being in flagrant contradiction with the letter and the spirit of Article 6 § 2 of the Convention.