CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

AFFAIRE VAN MECHELEN ET AUTRES c. PAYS-BAS (ARTICLE 50)

CASE OF VAN MECHELEN AND OTHERS v. THE NETHERLANDS (ARTICLE 50)

(55/1996/674/861-864)

ARRÊT/JUDGMENT

STRASBOURG

30 octobre/October 1997

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SUMMARY[1]

Judgment delivered by a Chamber

The Netherlands – claims for just satisfaction by applicants held by the Court to have been victims of a violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention

ARTICLE 50 OF THE CONVENTION

Costs and expenses, domestic proceedings: claims submitted after delivery of the principal judgment, which contained an award in this respect. There is no call for the Court to reconsider that award.

Damage: Court cannot speculate that the outcome of the proceedings would have been different had the violation of the Convention not taken place – on the other hand, the fact remains that the criminal proceedings were not conducted in conformity with the Convention – under Netherlands law it is not possible to obtain a retrial – award made in respect of non-pecuniary damage.

Costs and expenses, Article 50 proceedings: award made on an equitable basis.

Conclusion: respondent State to pay specified sums in respect of non-pecuniary damage (eight votes to one) and Article 50 proceedings (unanimously).

COURT'S CASE-LAW REFERRED TO

23.4.1997, Van Mechelen and Others v. the Netherlands

1. This summary by the registry does not bind the Court.

In the case of Van Mechelen and Others v. the Netherlands[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. MATSCHER,
Mr C. RUSSO,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Mr B. REPIK,
Mr K. JUNGWIERT,
Mr E. LEVITS,
Mr P. VAN DIJK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 30 August and 22 October 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 17 April 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in four applications (nos. 21363/93, 21364/93, 21427/93 and 22056/93) against the Kingdom of the Netherlands lodged with the Commission under Article 25 by Mr Hendrik van Mechelen and Mr Willem Venerius on 27 November 1992, by Mr Johan Venerius on 8 December 1992 and by Mr Antonius Amandus Pruijmboom on 24 November 1992. All four applicants are Netherlands nationals.

Notes by the Registrar

1. The case is numbered 55/1996/674/861–864. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In a judgment of 23 April 1997 ("the principal judgment", *Reports of Judgments and Decisions* 1997-III), the Court held that there had been a violation of Article 6 § 1 of the Convention taken together with Article 6 § 3 (d) in that the conviction of the applicants had been based to a decisive extent on the evidence of police officers of whose identity the defence had been unaware and whose demeanour under direct questioning they had been prevented from observing (ibid., pp. 712–14, §§ 56–65, and point 1 of the operative provisions). It also awarded the applicants specified sums for costs and expenses (ibid., p. 715, § 73, and points 2 and 3 of the operative provisions).

3. As the question of the application of Article 50 was not ready for decision in respect of damage, the Court reserved it and invited the Government and the applicants to submit, within three months, their observations on the matter and, in particular, to notify the Court of any agreement they might reach (ibid., p. 714, § 69, and point 4 of the operative provisions).

4. The written observations of Mr Pruijmboom were received at the registry on 21 July 1997, those of Mr van Mechelen, Mr Johan Venerius, Mr Willem Venerius and the Government on 23 July.

The Delegate of the Commission declined to comment.

AS TO THE FACTS

A. Particular circumstances

5. The applicants were sentenced to fourteen years' imprisonment (see paragraph 26 of the principal judgment). Pursuant to Article 15 § 2 of the Criminal Code (*Wetboek van Strafrecht* – see paragraph 9 below) they were due for provisional release no later than June 1998.

6. After the Court delivered its judgment on 23 April 1997 the applicants brought summary proceedings to obtain an order for their release.

Without awaiting the outcome of these proceedings the Minister of Justice decided to suspend the execution of the applicants' prison sentences for a period of three months. The applicants were released on 25 April at 5.15 p.m.

7. By letter of 22 July 1997 the Minister of Justice informed the applicants that they would not be required to serve the remainder of their sentences.

8. The Court's file contains a report dated 16 October 1996 drawn up by a psychologist connected to the Penitentiary Selection Centre (*Penitentiair selectiecentrum*). It appears from this document that Mr van Mechelen required psychiatric treatment for depression and suicidal tendencies resulting from the length of his detention and the prolonged uncertainty as to the outcome of the domestic and Strasbourg proceedings.

B. Relevant domestic law and practice

9. Article 15 § 2 of the Criminal Code provides that a person sentenced to a term of imprisonment of at least one year shall be granted provisional release after serving two-thirds of his sentence. Time spent in detention on remand is counted against the total sentence.

10. Revision (*herziening*) of a judgment in a criminal case that has become final is possible on the ground, *inter alia*, that circumstances have come to light which, if the trial court had been aware of them, would presumably have led to the accused's acquittal or conviction on a lesser charge, or to a finding that the prosecution was inadmissible (Article 457 § 1 of the Code of Criminal Procedure – *Wetboek van Strafvordering*).

An application for revision on one of these grounds must be lodged with the Supreme Court (*Hoge Raad* – Article 458 of the Code of Criminal Procedure).

Such an application cannot be based on errors of law, even if these are established by international tribunals (see the judgment of the Supreme Court of 13 January 1976, *Nederlandse Jurisprudentie* – Netherlands Law Reports – 1976, no. 339, regarding a judgment of the Court of Justice of the European Communities).

AS TO THE LAW

A. The applicants' claims in respect of costs and expenses incurred in the domestic proceedings

11. The applicants submitted claims in respect of costs and expenses incurred in the domestic proceedings. They did not provide any particulars.

12. These claims were submitted after the delivery of the principal judgment, which contained an award in respect of costs and expenses. There is no call for the Court to reconsider that award.

B. Damage

13. The applicants observed that it was not possible under Netherlands law to reopen the proceedings (see paragraph 10 above). It followed that they could not obtain a rehearing under conditions satisfying the requirements of Article 6 §§ 1 and 3 (d) of the Convention and that accordingly there was no possibility of redress approaching *restitutio in integrum*. In their submission, the absence of such a possibility ought not to be counted against them.

They maintained that they were innocent of the crimes charged and would have had a realistic chance of being acquitted if the criminal proceedings had met Convention standards. In view of the unfavourable conditions in which the anonymous police officers were supposed to have seen the perpetrators of the crimes – it had been dark, the getaway car had had tinted windows, and very high speeds had been reached during the pursuit – it was very doubtful whether the officers' statements would have been considered credible and reliable by the 's-Hertogenbosch Court of Appeal had they been capable of challenge in open court. Accordingly, for the assessment of the damage suffered the starting-point should be that the statements of the anonymous police officers should not have been admitted as evidence. It followed that their convictions were unsafe and that their detention had been illegal.

14. The applicants each claimed 250 Netherlands guilders (NLG) for each day spent in detention. Their claims under this head amounted to NLG 752,500 for Mr van Mechelen, to NLG 746,250 for Mr Johan Venerius and to NLG 746,000 for Mr Willem Venerius and Mr Pruijmboom.

15. These sums were, in their view, justified by the extreme length of the detention, approximately half of which they had spent in detention on remand under a regime more restrictive than that applicable to convicted prisoners serving their sentence. During all of this time they had been separated from their families. It appeared from an official psychological report of the Penitentiary Selection Centre that Mr van Mechelen, in particular, had suffered psychological harm. Furthermore, the applicants' sense of justice had been outraged.

16. They submitted that although they had been released ahead of time, this was to be seen only as an act by which the State limited its liability for damages *vis-à-vis* them.

For that matter, their release had not put an end to their suffering. During their detention they had had no opportunity to ensure normal living conditions for themselves and their families. In addition, the case had received widespread press coverage; they were still generally believed to be guilty – even the Minister of Justice herself had so indicated – and their honour and reputation remained tarnished. Furthermore their conviction had not been deleted from the criminal records.

17. The Government considered the applicants' claims disproportionate. In their view, the Court's principal judgment constituted in itself a measure of just satisfaction, all the more so since it had been widely reported in the media. Moreover, it was by no means established that the evidence given by the anonymous police officers would have been much different had they been questioned in circumstances in conformity with the Convention; accordingly the Court could not speculate as to the outcome of the proceedings had such violation not taken place.

They also pointed out that the applicants had been released and the execution of their sentences discontinued. In addition, they had offered, in the settlement negotiations following the delivery of the principal judgment, to mention in the criminal records the reasons why the sentences were not executed in their entirety.

They considered it reasonable for the Court to award the applicants NLG 25,000 each. Mr van Mechelen might be awarded an additional sum of NLG 5,000 on account of his especially difficult personal circumstances.

18. The Court cannot speculate as to whether the outcome of the proceedings would have been different had the violation of the Convention not taken place. On the other hand, the fact remains that the criminal proceedings were not conducted in conformity with the Convention. Moreover, as stated by the applicants and not disputed by the Government, under Netherlands law it is not possible for the applicants to obtain a retrial.

In the circumstances the Court considers the sums suggested by the Government appropriate compensation for non-pecuniary damage. It accordingly awards to Mr Johan Venerius, Mr Willem Venerius and Mr Pruijmboom NLG 25,000 each. To Mr van Mechelen, who has suffered considerable personal distress, it awards NLG 30,000.

C. Costs and expenses incurred in the Article 50 proceedings

19. The applicants claimed reimbursement of the costs and expenses incurred in the proceedings for obtaining just satisfaction under Article 50 of the Convention.

Mr van Mechelen, Mr Johan Venerius and Mr Willem Venerius, who were represented in these proceedings by Ms Spronken, claimed NLG 6,086.50. Mr Pruijmboom, who was represented by Mr Knoops, claimed NLG 5,500.

20. The Government considered these sums excessive.

21. The Court, deciding on an equitable basis, awards Mr van Mechelen, Mr Johan Venerius and Mr Willem Venerius jointly NLG 2,000 plus any value-added tax that may be payable. To Mr Pruijmboom it awards an identical sum.

D. Default interest

22. According to the information available to the Court, the statutory rate of interest applicable in the Netherlands at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by eight votes to one that the respondent State is to pay, within three months, in respect of non-pecuniary damage,
   (a) to Mr van Mechelen, 30,000 (thirty thousand) Netherlands guilders;
   (b) to Mr Johan Venerius, 25,000 (twenty-five thousand) Netherlands guilders;
   (c) to Mr Willem Venerius, 25,000 (twenty-five thousand) Netherlands guilders;
   (d) to Mr Pruijmboom, 25,000 (twenty-five thousand) Netherlands guilders;

2. *Holds* unanimously that the respondent State is to pay, within three months, in respect of costs and expenses incurred in the proceedings for obtaining just satisfaction under Article 50,
   (a) to Mr van Mechelen, Mr Johan Venerius and Mr Willem Venerius jointly, 2,000 (two thousand) Netherlands guilders plus any value-added tax that may be payable;
   (b) to Mr Pruijmboom, 2,000 (two thousand) Netherlands guilders plus any value-added tax that may be payable;

3. *Holds* unanimously that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Rejects* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and notified in writing on 30 October 1997, pursuant to Rule 57 § 2, second sub-paragraph, of Rules of Court B.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the partly dissenting opinion of Mr Foighel is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE FOIGHEL

I cannot concur in the result arrived at by the majority. In my opinion the reasoning on which it is based is incomplete.

In its essentials, the present case is similar to that of Kostovski v. the Netherlands (judgment of 20 November 1989, Series A no. 166). In both cases the applicants were convicted on the evidence of witnesses who were heard under conditions not reconcilable with Article 6 §§ 1 and 3 (d) of the Convention.

Like Mr Kostovski, the applicants in the present case spent several years in prison as the direct consequence of the establishment of their guilt, which was effected in a manner that did not comply with the requirements of Article 6, particularly of Article 6 § 3 (d) (see the above-mentioned Kostovski judgment, p. 22, § 48).

It follows in my opinion that the applicants were denied a real opportunity to secure for themselves a more favourable outcome of their trial.

Admittedly it is not for our Court to speculate as to what the outcome of the proceedings might have been had it been otherwise. But that is not the point. The point is that Article 6, in so far as it relates to criminal proceedings, is dominated by the presumption of innocence enshrined in the second paragraph, which reads:

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

It provides the accused with certain procedural guarantees for a fair trial, which were not afforded the applicants in this case; accordingly, it is by no means established ("until proved guilty according to law") that the applicants would have received such heavy sentences, or even been convicted, had the proceedings against them met the standards of the Convention.

It is up to the Government to challenge this presumption, if possible. In the instant case the Government did not do so for reasons which it is not for the Court to adjudicate. Accordingly the applicants must continue to benefit from the presumption of innocence and their detention following their conviction by the 's-Hertogenbosch Court of Appeal on 4 February 1991 was illegal. And indeed even the respondent Government recognised this, by releasing them, by offering to state in the criminal records the reasons why their prison sentences were not executed in their entirety, and by stating that they were prepared to pay them a sum of money (albeit a relatively small one) in compensation.

I consider therefore that the applicants are entitled to financial compensation to be calculated according to the time spent in detention from the day of that court's judgment. I would consider NLG 150,000 an appropriate sum. This is the same amount the Government of the Netherlands paid Kostovski by way of non-pecuniary damage.