



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

THIRD SECTION

CASE OF BÖHMER v. GERMANY

(Application no. 37568/97)

JUDGMENT

STRASBOURG

3 October 2002

FINAL

21/05/2003

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 Böhmer v. Germany,

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

Mr I. CABRAL BARRETO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr R. TÜRMEK,

Mr B. ZUPANČIČ,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 15 November 2001 and on 12 September 2002,

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

PROCEDURE

1. The case originated in an application (no. 37568/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Gino Böhmer (“the applicant”) on 8 April 1997.

2. The applicant complained under Article 6 §§ 1 and 2 of the Convention that German court decisions revoking the suspension of his sentence violated the presumption of innocence.

3. The applicant was represented by Mr Frank Klingbeil, a lawyer practising in Siegburg. The German Government (“the Government”) were represented by their Agent, Mr Klaus Stoltenberg, *Ministerialdirigent*.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

7. By a decision of 15 November 2001, the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant's conviction by the Hamburg Regional Court

8. On 14 June 1991 the Hamburg Regional Court convicted the applicant, a German national born in 1966, on charges of receiving stolen goods and theft and sentenced him to two years' imprisonment. The execution of the sentence was suspended on probation for a period of four years.

2. The applicant's conviction by the Ahrensburg Regional Court

9. On 18 March 1993 the Ahrensburg District Court convicted the applicant on charges of negligent drunken driving and negligent driving without licence and imposed a fine. Thereupon, the Hamburg Regional Court decided to prolong by two years the applicant's probationary period.

3. The criminal proceedings before the Hamburg District Court

10. On 15 September 1995 the Hamburg Prosecutor's Office charged the applicant and two co-accused with several counts of fraud, committed between March 1993 and April 1994.

11. Moreover, on 28 September 1995 the applicant was issued with a penal order (*Strafbefehl*) by the Hamburg District Court in the framework of a summary procedure. He was sentenced to a fine of 30 German marks (DEM - approximately 15 Euro) per day for thirty days for an offence of fraud, committed in February 1994 to the detriment of Mr H. Upon the applicant's objection, lodged with the assistance of Mr Klingbeil, main proceedings were instituted before the District Court. On 24 November 1995 these proceedings and the proceedings concerning the charges of September 1995, were joined.

12. In May 2000 the Hamburg District Court convicted the applicant of fraud and sentenced him to ten months' imprisonment. The proceedings concerning the charge of fraud to the detriment of Mr H. were provisionally stayed pursuant to section 154 (2) of the Code of Criminal Procedure as it appeared unnecessary to sanction the offence in question separately, the applicant having been sentenced to ten months' imprisonment in respect of the other fraud offences.

4. The criminal proceedings before the Kiel District Court

13. On 21 December 1995 the Kiel District Court issued a penal order against the applicant, convicting him of fraud, committed in August 1994. He was sentenced to a fine of DEM 20 per day for fifty days.

14. When the postman found nobody at the applicant's home, the order was served in accordance with the relevant legal provisions, by way of a notification in his letter-box on 10 January 1996 to collect the said decision deposited at the local post office in his absence. Since the applicant did not lodge an objection in time, the penal order acquired legal force as the final judgment in the matter on 25 January 1995. On 11 October 1996 the Rendsburg District Court granted the applicant's request for retrial.

5. The proceedings before the Hamburg courts concerning the revocation of the suspension

15. On 2 April 1996 the Hamburg Regional Court informed the applicant of its intention to revoke the suspension of his sentence of 1991 and invited him to comment within a period of one week after service of the letter. Due to the applicant's absence from home, the letter was served by way of a notification in his letter-box on 6 April 1996 to collect the said letter at the local post office.

16. On 18 April 1996 the Hamburg Regional Court revoked the suspension of the applicant's sentence to two years' imprisonment, imposed on 14 June 1991.

17. In the reasons given for its decision, the Regional Court, referring to section 56f (1)(1) of the Penal Code, found that the applicant had committed criminal offences during the period of probation and had thereby shown that he did not fulfil the expectations upon which the suspension of the sentence was based.

18. The Regional Court noted that, subsequent to the said suspension, the applicant had been convicted of further criminal offences and that these convictions had become final. Thus he had been convicted of traffic offences by the Ahrensburg District Court on 18 March 1993 and of fraud by the Kiel District Court on 21 December 1995. The court considered that in particular the applicant's conviction of another offence relating to property had shown that he did not fulfil the expectations upon which the suspension of his sentence was based. Taking into account that the period of suspension had already once been prolonged, other, more lenient measures than revoking the suspension were not possible.

19. Due to the applicant's absence, the order was also served by way of a notification in his letter-box on 23 April 1996 to collect the decision of 18 April 1996 deposited at the local post.

20. On 17 May 1996 the applicant, assisted by Mr Klingbeil, submitted an application for the reinstatement of the proceedings against the decision of 18 April 1996 and lodged an appeal against the said decision.

21. By letter of 15 August 1996 the Hamburg Court of Appeal informed the applicant's counsel that, considering the Public Prosecutor's decision to stay the execution of the sentence (*Vollstreckungsaufschub*) until 4 August 1996, it would await the outcome of the proceedings before the Kiel District Court regarding his request for reinstatement.

22. On 22 August 1996 the Court of Appeal decided to grant the applicant's request for reinstatement and adjourned the appeal proceedings to await the final outcome of the Kiel proceedings relating to his request for reinstatement. The Court of Appeal considered that the question whether or not the applicant had committed a further offence of fraud was decisive for its decision on revoking his suspension. It noted that this request had been unsuccessful at first instance, but appeal proceedings were pending. The Court of Appeal dismissed the applicant's request to await the outcome of the proceedings relating to his request for retrial.

23. On 24 September 1996 the Court of Appeal informed the applicant that, following deliberations, the case remained adjourned to await the outcome of the Kiel proceedings for reinstatement.

24. On 14 October 1996 a hearing took place before the Court of Appeal, which heard the statements made by Mr H. and the further witness, police officer B., in the presence of the applicant's counsel. The applicant, waiting outside the court building, did not attend the hearing in order not to be seen in case of a confrontation with Mr H., as suggested by his counsel.

25. Following the hearing, the Court of Appeal dismissed the applicant's appeal against the decision of 21 December 1995 on the ground that the reasons given in that decision were correct in their conclusion.

26. According to the Court of Appeal, the applicant "had not fulfilled the expectations upon which the suspension of his sentence ... was based, as he committed new offences during the period of suspension" (*"hat die Erwartungen, die der ... Strafaussetzung zugrunde lagen, nicht erfüllt, weil er in der Bewährungszeit neue Straftaten begangen hat"*).

27. In its reasoning, the Court of Appeal noted the applicant's final conviction by the Ahrensburg District Court on 18 March 1993.

28. As regards the penal order issued by the Kiel District Court on 21 December 1995, it considered that the applicant's pending request for retrial might result in the hearing of numerous witnesses. As the prolonged period of suspension had already expired four months ago, the Court of Appeal found that it could not await the outcome of these proceedings.

29. The Court of Appeal turned next to the proceedings pending before the Hamburg District Court. It noted that, following the applicant's successful appeal against the penal order of 28 September 1995, the District Court had joined these and further criminal proceedings involving the applicant and two other accused and relating to several charges of fraud. In the latter proceedings, trial proceedings had not yet been opened on account of difficult investigations. The Court of Appeal stated that it would not await the outcome of these proceedings either. Rather, it opted for a procedure under section 308 of the Code of Criminal Procedure to examine the question whether or not, in addition to the conviction by the Ahrensburg District Court of 1993, the applicant's criminal offence to the detriment of Mr. H. could constitute a reason for revoking the suspension of his sentence.

30. The Court of Appeal considered that, having questioned Mr. H. and a further witness, the police officer B., in presence of the applicant's defence

counsel, “it had been able to obtain certainty that the applicant was guilty of fraud to the detriment of witness ... [H.] (section 263 of the Penal Code)” (*“hat dem Senat ... die Gewissheit verschafft, dass sich der Beschwerdeführer gegenüber dem Zeugen ... [H.] des Betruges schuldig gemacht hat (§ 263 StGB)”*).

31. In this respect, the Court of Appeal took note of both witnesses' indications as to the circumstances of the offence in question as well as to the criminal information laid by the victim H. and the subsequent investigations. Thus, the Court of Appeal found that the applicant had offered H. a mobile phone and a video camera at a low price. When the transaction was to be carried out some time later at a parking place on the motorway, the applicant had taken H.'s money and disappeared without handing over the promised goods. While H. had not identified the applicant on police photographs shown to him at the police department the day after the offence, he did recognise him in a collection of police photographs which had been presented to him by the police officer B. The Court of Appeal considered that both witnesses' statements were true. The court argued that H. had openly talked about his bad conscience regarding the low price of the two objects and he had also admitted that, because he was ashamed, he had not told the truth as to the circumstances of the applicant's disappearance on the occasion of his questioning by the police. Moreover, police officer B. had remembered many details and had also explained an amendment to the minutes of H.'s questioning.

32. Furthermore, the Court of Appeal indicated that it had inspected the files of the proceedings pending before the Hamburg District Court inasmuch as the collection of police photographs was concerned. The Court of Appeal noted that, when the scene of identifying the applicant had been re-enacted, the witness H., following an initial hesitation as to a photograph showing another person, had clearly recognised the photograph showing the applicant. In these circumstances, the Court of Appeal considered not necessary to re-enact the consultation of police photographs, which had been taken place at the police department one day after the offence.

33. The Court of Appeal did not take up the suggestion of the applicant's counsel for an open confrontation between the witness H. and several persons, including the applicant. It considered that so much time had elapsed since the offence that the applicant's appearance could have considerably changed. Furthermore, it had not been sure whether the applicant would have participated in such a confrontation. In this situation, it rather relied on the memory of the witness H.

34. The Court of Appeal concluded that the strict conditions were met for considering an offence, prior to final conviction, as a reason for revoking a suspension. In cases as the present one, awaiting the final conviction would, on account of the considerable possibilities of delay, lead to the unbearable result that criminal offenders could commit further offences during the probationary period without any risk of suffering disadvantages.

35. According to the Court of Appeal, the applicant's conviction by the Ahrensburg District Court and his criminal offence against H. had shown that, contrary to the initial prognosis, the applicant was not able to live a law-abiding life. While the conviction by the Ahrensburg District Court merely disclosed a general lack of reliability and could not, taken alone, justify revoking the suspension, the applicant had proceeded in the case H. in a way similar to that followed for the offence underlying his 1991 conviction. Accordingly, the suspended prison sentences had had no impact on the applicant. More lenient measures could not therefore be envisaged.

36. The decision was served on the applicant's counsel on 18 October 1996.

37. On 22 January 1997 the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

38. Subsequently, the Pardon Division at the Hamburg Court of Appeal suspended the execution of the sentence pending the proceedings before the Court.

II. RELEVANT DOMESTIC LAW

1. The Penal Code

39. Sections 56 to 58 of the Penal Code govern the suspended execution of sentences. Section 56 concerns the conditions for suspension and reads as follows:

“1. Upon a sentence of imprisonment of no more than one year, the court shall suspend the execution of the punishment and grant probation if it can be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence. Particularly to be considered are the personality of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his living conditions and the effects which can be expected as a result of the suspension.

(2) The court may also suspend the execution of a longer term of imprisonment which does not exceed two years under the provisions of subsection (1) and grant probation if a comprehensive evaluation of the offence and personality of the convicted person reveals the existence of special circumstances. In making the decision the efforts of the convicted person to make restitution for the harm caused by the offence should particularly be considered.”

40. According to section 56a, the competent court determines the period of probation of between two and five years. It may subsequently be reduced to the minimum or prolonged to the maximum before its expiration. The court may impose conditions on the convicted person (section 56b), and may issue instructions to the convicted person for the duration of his period of probation (section 56c) or place the convicted person under the supervision of a probationary officer (section 56d). According to section 56e, such decisions may be taken or amended at a later stage.

41. As regards the revocation of a suspension, section 56f of the Penal Code provides *inter alia* that

“1. The court shall revoke the suspension of a sentence if the convicted person commits a criminal offence during the period of probation and, thereby, shows that he did not fulfil the expectations upon which the suspension of the sentence was based

...

2. The court shall, however, refrain from revocation when it suffices:

(1.) to impose further conditions or instructions, in particular to place the convicted person under the supervision of a probation officer; or

(2) to prolong the period of probation ...”

2. *The Code of Criminal Procedure*

42. Section 154 of the Code of Criminal Procedure provides for the provisional stay of the prosecution in the following terms:

“1. The public prosecutor may decide not to prosecute

(1) where the penalty or the corrective or preventive measure to be expected if a conviction is secured is almost negligible in comparison with a penalty or corrective or preventive measure imposed on the defendant - or which he must expect to be imposed - for another offence

2. Once proceedings have been instituted, the court may provisionally stay them at any stage on an application by the public prosecutor.”

43. Court decisions other than conviction and sentence may be challenged in proceedings instituted under section 304 of the Code of Criminal Procedure. In such proceedings, the appellate court may order investigations or proceed to own investigations (section 308 (2)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

44. The applicant complained that German court decisions revoking the suspension of a prison sentence imposed upon him in 1991 violated the presumption of innocence. He relied on Article 6 §§ 1 and 2 of the Convention which, in so far as relevant, provides:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a]... tribunal established by law. ...

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

A. The submissions of the parties

1. The Government

45. In the Government's submission, the presumption of innocence, as guaranteed by Article 6 § 2, had not been violated in the present case.

46. Referring to the case-law of the Convention organs, they stated that this principle did not prevent the Contracting States from considering a person's conduct when deciding whether or not to revoke the suspension of a prison sentence. It did not require a final conviction in each case before the underlying facts could be used in order to decide whether the suspension was to be revoked. Decisive was whether or not the person concerned had been able to exercise his or her defence rights.

47. In the case-law of the Federal Constitutional Court, the principle of being presumed innocent until proved guilty according to law derived from the principle of the rule of law, and regard should be had to the Convention and to the case-law of the European Court of Human Rights in interpreting the principles and fundamental rights enshrined in the Basic Law (*Grundgesetz*). Accordingly, no measures amounting in effect to a finding of guilt or a penalty could be taken against a defendant without his guilt having been established beforehand at a proper trial. However, punishable conduct could be ascertained in other than criminal proceedings, and it was not against the presumption of innocence to draw specific conclusions for the purpose of such court proceedings even before a final conviction by the competent court. It was therefore not objectionable from a constitutional point of view that the decision to revoke a suspension on account of a new criminal offence could be taken prior to the person's conviction. It was sufficient that the court was, on the basis of its own assessment, convinced that the person had committed the offence. As far as the suspension was concerned, the initial criminal judgment had made a prognosis of the convicted person's future conduct which could have been negative in the event of "a high probability of another offence committed in the meantime" (*"eine hohe Wahrscheinlichkeit einer zwischenzeitlich begangenen weiteren Tat"*). The decision to revoke the suspension did no more than correct the initial prognosis, which had turned out to be incorrect (Federal Constitutional Court, decisions of 1 and 4 December 1986, *Neue Juristische Wochenschrift* 1988, p. 1715 et seqq.).

48. However, considering the risk of a possibly unjustified deprivation of liberty, decisions to revoke a suspension required an adequate investigation of the facts and a sufficient factual basis had to exist. The Hamburg Court of Appeal had investigated the facts underlying the fraud to the detriment of the witness Mr H. in a comprehensive and detailed manner and had given the applicant an opportunity to comment. The Court of Appeal had critically assessed the statements made by this witness. A confrontation had not been necessary. The Court of Appeal had proceeded at the hearing in the same manner as the trial court in the main proceedings

would have done. Accordingly, the applicant had been afforded proceedings in accordance with the rule of law.

49. Moreover, in the Government's view, the Court of Appeal's statement that "it had been able to obtain certainty that the applicant was guilty of fraud to the detriment of witness ... [H.] (section 263 of the Penal Code)" had to be considered in the context of section 56f of the Penal Code. The Court of Appeal had thereby examined whether the conditions for revoking the suspension were met. This decision did not relate to the sanctioning of the new criminal offence.

50. Finally, the fact that in the main proceedings, the competent court eventually stayed the proceedings in respect of this offence was irrelevant. It was only in view of the sanction imposed for other offences, that the court saw no need to sentence the applicant for the fraud to the detriment of Mr H.

2. The applicant

51. The applicant submitted that the Court of Appeal's decision contained a finding of guilt in respect of a criminal charge which formed part of criminal proceedings pending before another court. Furthermore, he had not been proven guilty according to the law, as the Court of Appeal had proceeded under section 308 of the Code of Criminal Procedure, which did not require it to apply the strict rules of evidence or the other procedural guarantees of Article 6.

52. He also argued that there was a risk of diverging decisions on the question of guilt. Moreover, the Court of Appeal had taken its decision without a public hearing and after a taking of evidence which did not respect the rights of the defence. A final conviction should be the necessary requisite of any decision revoking the suspension of a sentence, which amounts in fact to a punishment.

B. The Court's assessment

53. The Court reiterates in the first place that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair trial that is required by paragraph 1 (see, among other authorities, the *Deweert v. Belgium* judgment of 27 February 1980, Series A no. 35, p. 30, § 56, the *Minelli v. Switzerland* judgment of 25 March 1983, Series A no. 62, p. 15, § 27, and the *Allenet de Ribemont v. France* judgment of 10 February 1995, Series A no. 308, p. 16, § 35). Consequently, the applicant's complaint will be examined under the two provisions taken together.

54. The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the

official regards the accused as guilty (see the above-mentioned Deweer judgment, § 56; the above-mentioned Minelli judgment, § 37; and also the *Allenet de Ribemont v. France* judgment of 10 February 1995, Series A no. 308, p. 16, § 35).

55. Once an accused has properly been proved guilty of a particular criminal offence, Article 6 § 2 can have no application in relation to allegations made about an accused's personality as part of the sentencing process, unless they are of such a nature and degree as to amount to the bringing of a new charge within the autonomous meaning of the Convention (see the *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, pp. 37-38, § 90, and the *Phillips v. the United Kingdom* judgment of 5 July 2001, § 35).

56. The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see the *Daktaras v. Lithuania* judgment of 10 October 2000, § 41).

57. In the present case, the Court observes at the outset that the sentence of imprisonment was lawfully imposed upon the applicant after his conviction in 1991. Following the revocation of its suspension, detention to serve this prison sentence would have to be regarded as lawful detention in accordance with Article 5 § 1 (a) of the Convention. The impugned decision therefore does not as such violate Article 6 § 2 of the Convention.

58. It remains to be examined whether the supporting reasoning in the Court of Appeal's decision amounts in substance to a determination of the applicant's guilt contrary to Article 6 § 2.

59. The Court notes that the Hamburg Court of Appeal confirmed the first-instance decision to revoke the suspension of a prison sentence imposed upon the applicant in previous criminal proceedings. According to the Court of Appeal, the applicant had not fulfilled the expectations upon which the suspension of his sentence was based, as he committed new offences during the period of suspension. In this respect, the court, having taken evidence, found that "it had been able to obtain certainty that the applicant was guilty of fraud to the detriment of witness ... [H.] (section 263 of the Penal Code)". The Court of Appeal concluded that, in these circumstances, the strict conditions were met for considering an offence, prior to final conviction, as a reason for revoking a suspension. In cases as the present one, awaiting the final conviction would, on account of the considerable possibilities of delay, lead to the unbearable result that criminal offenders could commit further offences during the probationary period without any risk of suffering disadvantages.

60. The Court finds that these statements must be read as a whole and in their proper context (see the *Adolf v. Austria* judgment of 26 March 1982, Series A no. 49, pp.18-19, § 40; the above-mentioned Minelli judgment, p. 19, § 40; and the above-mentioned *Daktaris* judgment, § 43).

61. The Court first notes that in accordance with section 56 of the Penal Code, the execution of a sentence to imprisonment will be suspended, if it

can be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence. In making this prognosis, the criminal court has to consider the personality of the convicted person, his previous history, the circumstances of his offence, his conduct after the offence, his living conditions and the effects which can be expected as a result of the suspension.

62. The Court is prepared to consider, as does the Government, that the decision to revoke a suspension, to the extent that it is based on an assessment, with the benefit of hindsight, that the convicted person showed that he or she did not fulfill the expectations upon which the suspension was based, may be no more than a correction of the initial prognosis.

63. Section 56f (1) of the Penal Code, however, requires a court to base this assessment on a finding that the person has committed a criminal offence during the period of probation.

64. In this legal situation, the reasoning contained in the Court of Appeal's decision was not limited to assessing the applicant's personality or to describing a "state of suspicion" that the applicant had committed a criminal offence during his period of probation.

65. In the Court's opinion, the Court of Appeal, sitting as court supervising the execution of sentences, had assumed the role of the Hamburg District Court, the competent trial court, and had unequivocally declared that the applicant was guilty of a criminal offence. That is evidenced by the clear phrasing that it had obtained "certainty" that the applicant had committed fraud to the detriment of the witness Mr H. This conclusion is further supported by facts that the Court of Appeal opted for the taking of evidence under section 308 of the Code of Criminal Procedure and proceeded to a substantial and detailed evaluation of the probative value of the statements made by the witnesses in its decision. Indeed, the Government argue that the Court of Appeal proceeded in the same manner as the trial court in the main proceedings would have done.

The present case therefore differs from the facts underlying the Commission's decisions relied upon by the Government, declaring complaints about decisions to revoke sentences inadmissible (no. 17664/91, 9 October 1991, and no. 23091/93, 30 November 1994; both unreported). In the first of these cases, the trial court had revoked a suspension after having convicted the accused in the new trial proceedings; in the second, the reasoning had been limited to noting a state of suspicion on the basis of the results of preliminary investigations, respectively. Furthermore, there is no similarity with some cases where the Commission noted that the decision to revoke the suspension had been based on the person's admission of guilt (see decisions no. 12380/86, 5 October 1988; no. 12669/87, 11 October 1988; and no. 15871/89, 9 October 1991; all unreported).

The only case concerning a decision to revoke a suspension, in which the Commission declared the complaint under Article 6 § 2 admissible (no. 12748/87, 14 March 1989, unreported), resulted in a friendly settlement

(Commission's report of 11 October 1989, Decisions and Reports 63, p. 137). The settlement was reached following a declaration by the German Federal Government that it would, *inter alia*, draw the attention of the *Länder* judicial authorities to the need to respect the presumption of innocence, as guaranteed by Article 6 § 2 of the Convention, when applying section 56f (1)(1) of the Penal Code and that it would consider, in co-operation with the *Länder*, whether section 56f (1) should be amended in order to ensure that the revocation of a suspended sentence in such circumstances does not conflict with Article 6 § 2 of the Convention.

No legislative changes intervened.

66. As regards the Government's additional argument that the Court of Appeal's decision under section 56f of the Penal Code did not relate to the sanctioning of the new criminal offence, the Court notes that the relevant facts were determined and taken into account as decisive factor for the deprivation of the applicant's liberty. With its decision to revoke the suspension of the applicant's prison sentence under the initial conviction, the Court of Appeal drew penal consequences from the new criminal offence and imposed a disadvantage upon the applicant that, in the Court's view, equates with a penalty.

67. Nor does the Court subscribe to the Government's claim that the applicant was, before the Court of Appeal, afforded proceedings in accordance with the rules of law. The presumption of innocence, considered in the light of the general obligation of a fair criminal trial under Article 6 § 1, excludes a finding of guilt outside the criminal proceedings before the competent trial court, irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general considerations of expediency (see above § 38).

68. In this context, the Court notes that in the main proceedings before the Hamburg District Court, prosecution in respect of the charge of fraud in question was eventually stayed on account of the more important sanctions imposed on the applicant for other criminal offences. The Court, notwithstanding the fact that it arrives at a different conclusion on the merits of the application, agrees with the Government that this outcome of the main proceedings has no bearing on the issues before it.

69. In these circumstances, the Court finds that the Hamburg Court of Appeal's reasoning, in its decision of 14 October 1996, offended the presumption of innocence, which is a specific aspect of the requirements of a fair trial.

70. There has been accordingly a breach of Article 6 §§ 1 and 2.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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.”

72. The applicant did not file any claims for just satisfaction under Article 41. The Court, for its part, sees no ground for examining this question of its own motion (see, *mutatis mutandis*, the Nasri v. France judgment of 13 July 1995, Series A no. 320-B, p. 26, § 49).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been a violation of Article 6 §§ 1 and 2 of the Convention.

Done in English, and notified in writing on 3 October 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President