



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

FORMER THIRD SECTION

CASE OF HAMMERN v. NORWAY

(Application no. 30287/96)

JUDGMENT

STRASBOURG

11 February 2003

FINAL

11/05/2003

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 Hammern v. Norway,

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

Mr J.-P. COSTA, *President*,

Mr W. FUHRMAN,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Mrs H.S. GREVE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 17 September and 21 January 2003,

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

PROCEDURE

1. The case originated in an application (no. 30287/96) against the Kingdom of Norway 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 Norwegian national, Mr Ulf Arne Hammern (“the applicant”), on 14 December 1995.

2. The applicant was represented by Mr C. Wiig, a lawyer practising in Trondheim. The Norwegian Government (“the Government”) were represented by Mr F. Elgesem, who acted as Agent until he left the Attorney-General's Office (Civil Matters) in June 2002. Thereafter, they were represented by Mr H. Harborg of that office.

3. The applicant alleged a violation of Article 6 § 2 of the Convention on account of the reasoning relied on by the Norwegian courts in refusing his compensation claim with respect to damage sustained in criminal proceedings in which he had been acquitted.

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 former Third 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.

6. On 11 September 2001 the Chamber decided that, in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the case of *O v. Norway*,

Ringvold v. Norway and *Y v. Norway* (applications nos. 29327/95, 34964/97 and 56568/00 – Rule 43 § 2).

7. By a decision of the aforementioned date the Court declared the application admissible.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). However, this case was retained by the former Third Section.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 September 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr H. HARBORG, Attorney-General's Office, (Civil matters)	<i>Agent,</i>
Mr F. ELGESEM, <i>Advokat</i> ,	<i>Counsel/Adviser</i>
Mr K. KALLERUD, Senior Public Prosecutor, Office of the Director of Public Prosecutors,	
Ms E. HOLMEDAL, Attorney, Attorney-General's Office (Civil matters),	
Ms T. STEEN, Attorney, Attorney-General's Office,	<i>Advisers;</i>

(b) *for the applicant*

Mr C. WIIG, <i>Advokat</i> ,	<i>Counsel,</i>
Mr U. HAMMERN,	<i>Applicant.</i>

The Court heard addresses by Mr Krokeide (counsel for Mr O, who pleaded the common issues relevant to both his case and that of Mr Hammern), Mr Wiig and Mr Elgesem.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1949 and lives in Bjugn.

11. On 10 March 1992 the head of the social services in the municipality of Bjugn contacted the local police after having received reports from Botngård kindergarten indicating that the applicant, who was an assistant at the kindergarten at the time, had sexually abused one or more of the

children there. Subsequently, a criminal investigation was carried out. On 13 March 1992 the applicant was interrogated. He denied the accusations. On the same date he was suspended from his post.

12. On 1 September 1992 the applicant was formally indicted with respect to various offences under Articles 195, 198 and 228 of the Penal Code (*straffeloven*) concerning the sexual abuse of minors, allegedly committed against two children at the kindergarten, and under Article 192 of the Penal Code with respect to one of them. On 12 October 1992 the indictment was extended to 14 children at the kindergarten and, on 21 October 1992, a new indictment was issued involving 15 children. On 9 January 1993 the indictment was again extended to offences of sexual abuse of 36 named children and an unknown number of children at the kindergarten.

13. On the latter date, 6 further persons were indicted for sexual offences in relation to the same matter: the applicant's wife, two employees at the kindergarten and the local sheriff.

14. As a result of the above, the applicant spent three periods in pre-trial detention – respectively 7, 7 and 32 days – a total of 46 days. In the course of the investigations, three searches were carried out at the applicant's home.

15. On 22 September 1993 the applicant was formally indicted under Articles 195, 198 and 213 of the Penal Code for having allegedly committed various offences of sexual abuse against 10 kindergarten children.

16. On the same date the charges against the six other accused persons were dropped. They later claimed compensation under Articles 444 to 446 of the Code of Criminal Procedure (*straffeprosessloven*). The local sheriff obtained a settlement of NOK 200,000 in compensation for non-pecuniary damage; the five others obtained a court order requiring the State to pay NOK 200,000 to each of them. The applicant's wife obtained, in addition, NOK 140,000 in compensation for pecuniary damage.

17. The applicant's trial took place before the Frostating High Court (*lagmannsrett*), sitting with three judges and a jury, over a period of 43 days, between 15 November 1993 and 31 January 1994. After the jury had answered all of the 25 questions relating to the indictment in the negative, the applicant was acquitted by a judgment of 31 January 1994.

18. The applicant subsequently filed a petition with the High Court, claiming compensation under Articles 444 to 446 of the Code of Criminal Procedure.

The High Court, sitting with two of the judges who had taken part in the trial and a new judge (replacing the judge who had presided at the trial, disqualified from sitting in the compensation case), held an oral hearing between 13 and 15 February 1995.

In its decision of 28 February 1995, the High Court ordered the State to award him the entirety of his claim of NOK 45,000 in compensation for pecuniary damage under Article 445, according to which provision such

“compensation for special or disproportionate damage as a consequence of the criminal prosecution” could be awarded as was “reasonable in the circumstances”. Moreover, under Article 446, cf. 445, the High Court awarded him NOK 125,000 in compensation for non-pecuniary damage suffered as a result of the prosecution. However, on the basis of an assessment, the relevant parts of which are quoted in the Supreme Court's (*Høyesterett*) decision cited below (paragraph 23), the High Court rejected his claim for supplementary compensation under Article 444, it not having been shown probable that he did not commit the act which was the basis of the charge. The High Court referred to the evidence presented during the trial hearing between November 1993 and January 1994 and during the oral hearing in the compensation case in February 1995.

19. The applicant appealed against the High Court's decision of 28 February 1995 to the Appeals Selection Committee of the Supreme Court (*Høyesteretts kjæremålsutvalg*). He complained that the High Court's decision contained assumptions of criminal liability and that, consequently, it violated Article 6 § 2 of the Convention. He requested the Supreme Court to quash the High Court's decision.

20. By a decision of 8 June 1995, notified to the applicant by mail on 20 July 1995, the Appeals Selection Committee, considering that the applicant's appeal concerned the High Court's application of Article 444 of the Code of Criminal Procedure, rejected the appeal.

21. In its reasoning, the Appeals Selection Committee first recalled that in its decision reported in *Norsk Retstidende* 1994, p. 721, the Supreme Court had stated (at p. 725):

“It is the accused who carries the burden of proof that he did not carry out the act. It is sufficient that it is more probable than not. I do not agree with counsel for the defence that the accused has discharged the burden of proof where both alternatives, on the basis of the available evidence, appear to be equally likely. In this assessment the ordinary standards of evidence shall apply and the requirements in respect of the strength of the evidence must then to some extent be adapted to the possibilities for the accused to show that he did not carry out the act. Given the manner in which the provision has been formulated the situation may easily arise that an acquittal is not sufficient to justify a compensation claim when the accused is unable to discharge this burden of proof. I should like to stress that the refusal of a compensation claim does not entail that the previous acquittal is undermined or that the acquittal is open to doubt. The compensation case must be determined on an independent basis and the rules on evidence applying in such compensation cases do not differ from those which apply to ordinary compensation claims. The legislator has as a starting point opted for a solution whereby the financial burden caused by the institution of criminal proceedings, which are discontinued or which end with an acquittal, must be borne by the accused unless he is able to show that it is probable that he did not commit the act.”

22. The Appeals Selection Committee further recalled that in the above case the Supreme Court considered the relationship between the conditions for compensation under Article 444 of the Code of Criminal Procedure and

the case-law of the European Court of Human Rights, in particular the *Sekanina v. Austria* judgment of 25 August 1993 (Series A no. 266-A). The Supreme Court concluded that the rules in Article 444 of the Code of Criminal Procedure were not, as such, contrary to Article 6 § 2 of the Convention. The Appeals Selection Committee affirmed that it would base itself on this view in its assessment of the present case. It further recalled that, in the 1994 decision, the Supreme Court had expressed the following view on the *Sekanina* judgment:

“[In this case] decisive importance was attached to the reasoning in the particular case for rejecting the compensation claim. If in the reasoning for refusing compensation doubt is voiced as to whether the acquittal was correct or if the reasoning contains assumptions about criminal liability, then the relationship to Article 6 § 2 of the Convention would be problematic.”

23. Then the Appeals Selection Committee went on to state:

“As pointed out by the prosecution in its reply to the appeal, the High Court had to justify why it considered that the conditions for making an award for compensation under Article 444 of the Code of Criminal Procedure had not been fulfilled. The Appeals Selection Committee must determine whether the reasoning of the High Court conflicted with the requirements of Article 6 § 2 of the Convention.

The Committee refers to the fact that the reasoning must be formulated in the light of the conditions for compensation as mentioned above. It is further clear that the High Court ... was aware of the rules in Article 6 § 2 of the Convention, the European Court's *Sekanina* judgment and the 1994 decision of the Supreme Court. In its decision concerning compensation under Article 444, the High Court, after having quoted the provision, specifies the subject-matter of the case as follows.

'Following the High Court's acquittal, Mr Hammern is not guilty under the criminal law. This question has not been submitted to the High Court which will not deal with it. The present case is a compensation claim brought by Mr Hammern. The question is whether he, in view of the rules of evidence under the law of compensation, is able to show that he did not carry out the acts which were referred to in the indictment.'

The Committee points to the fact that here the High Court clearly specifies that Mr Hammern is not liable under the criminal law. Furthermore it is specified that the compensation claim must be determined on the basis of the rules of evidence applying under the law on compensation. The High Court then concludes, against the background of the evidence adduced, that considering the case as a whole, Mr Hammern 'has not shown it to be probable that he did not carry out the acts which grounded the charge.'

Moreover, in the concluding remarks, it is stated:

'When the High Court, considering the case as a whole, reached the conclusion that Mr Hammern had not discharged his burden of proof, account was also taken of the fact that the requirements as to the strength of the evidence must to a certain extent be adapted to the possibility which he has for showing that he [Mr Hammern] did not commit the acts.... Nevertheless, in the assessment, it is the usual rules on evidence which should apply....'

In support of his submission that the High Court's reasoning contains assumptions about criminal liability, he points to certain intermediate passages in which the High Court states:

'Medical experts have in the light of their investigations reached conclusions which in practice imply a very high degree of probability that the 10 children referred to in the indictment have been exposed to sexual abuse. The medical experts have discounted the possibility of self-inflicted injuries, that the injuries are caused by pathological conditions or conditions at variance from the norm. As pointed out by the prosecution, the children themselves gave statements to their parents, during the judicial examinations and to a psychologist, about abuse by Mr Hammern. Through the video recording of the judicial examinations of the children, the Court has been able to see how the children expressed themselves.

The Court has been able to apprise itself of how the children during the examinations changed their behaviour when presented with questions of sexual abuse.

Nor does the following fact make it less likely that he carried out the acts for which he was charged: the children markedly changed their behaviour, *inter alia*, in the form of bedwetting, refusing or expressing fear about going to the kindergarten, several children had a sore crotch, sore abdomen and, on one or several occasions, blood on their underwear, circumstances which essentially occurred after Mr Hammern started to work at the kindergarten and which diminished after his departure.

The High Court further finds it established that at the kindergarten it was possible to perpetrate such abuse without it being revealed either from a technical or practical point of view.

In the aftermath, several of the employees at the kindergarten have pointed to a few surprising situations: for instance the governor's eyewitness evidence, her perception of the situation, when she came over to Mr Hammern while he was washing a child in the crotch under peculiar circumstances.

The High Court does not find any reason to go further into the discussion about the possibility of paedophilia. It is not only the so-called real paedophiles who commit abuse against children. Nor can a diagnosis which excludes paedophilia be deemed accurate, or notional paedophilia be defined precisely.'

Having regard to the fact that the High Court clearly specified that its assessment was confined to the compensation case which was to be determined on the basis of the rules of evidence applying in such cases, the Appeals Selection Committee finds that the High Court's reasoning does not go further than is necessary to carry out a careful examination of the compensation claim and that it does not entail any infringement of the presumption of innocence laid down in the Convention. The Committee once more emphasises that a refusal to award compensation under Article 444 does not imply that the previous acquittal is being undermined.

In the light of the foregoing, the appeal must be rejected."

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. Under the Norwegian jury system, when an accused is acquitted the jury is not entitled to disclose whether any of its members held a different opinion, and no records are kept which could disclose that a negative answer as to the applicant's guilt was not unanimous. The criminal system knows only two conclusions in a criminal case – guilt or acquittal (see Articles 365, 366, 372 and 373 of the Code of Criminal Procedure). There is no third alternative, which was known in some other European countries, where a criminal charge could result in the finding that there was not sufficient evidence for establishing guilt.

25. Articles 444 to 446 of the Code of Criminal Procedure provide for compensation where a person has been acquitted, or the prosecution discontinued. The provisions read as follows:

“Article 444: If a person charged is acquitted or the prosecution against him is discontinued, he may claim compensation from the State for any damage that he has suffered through the prosecution if it is shown to be probable that he did not carry out the act that formed the basis for the charge. If a sentence of imprisonment or other custodial sanction has already been served, any damage resulting from this shall be compensated without regard to what has been shown to be probable.

Compensation shall not be awarded when the person charged, by making a confession or otherwise, has wilfully instigated the prosecution or the conviction.

If he has otherwise contributed to the damage by negligence, the compensation may be reduced or dispensed with entirely.

Article 445: Even if the conditions prescribed in Article 444 are not fulfilled, the court may award the person charged compensation for special or disproportionate damage as a consequence of the criminal prosecution whenever this appears to be reasonable in the circumstances.

Article 446: If the conditions relating to compensation prescribed in Articles 444 or 445 are fulfilled, the court may, when special reasons so indicate, award the person charged a suitable amount as redress for the indignity or other damage of a non-economic nature that he has suffered as a result of the prosecution.”

26. In addition, there are certain formal conditions set out in Article 447 for the submission and examination of a compensation claim made under Articles 444 to 446:

“Any claim for compensation or redress must be submitted not later than three months after the person charged has been informed of the decision that finally concludes the case. The provisions of Article 318, first paragraph, shall apply correspondingly.

If the case has been concluded without any judicial trial of the evidence relating to the issue of guilt, the claim shall be submitted to a court of summary jurisdiction.

Otherwise the claim shall be submitted to the court that shall conduct or has last conducted any such trial. If the claim is submitted to the District Court or the City Court, but has not been decided when an appeal against the assessment of evidence in relation to the issue of guilt proceeds to an appeal hearing, the Court of Appeal shall also decide the question of compensation. On the hearing of the claim the court shall as far as possible sit with the same judges who decided the criminal case. In the Court of Appeal lay judges or the selected jurors who join the court pursuant to Article 376 e shall not take part unless the decision is made at the same court sitting as that at which judgement is pronounced in the case.”

27. Compensation after acquittal or a discontinued prosecution is not automatic and is not granted unless the conditions in the above-cited Articles are met.

28. When compensation is granted to persons considered innocent as they have been acquitted or the prosecution against them has been discontinued, Articles 445 and 446 are the general provisions and, *de facto*, the main provisions providing for compensation. In the present case the applicant was awarded compensation both under Articles 445 and 446.

In addition the applicant requested compensation under the special provisions of Article 444, under which the State may be liable to pay compensation even in the absence of any proof of negligence or fault on the part of the authorities. The liability of the State to pay compensation is strict where it has been shown to be probable that the claimant did not carry out the act of which he or she was charged. In the assessment of the latter, none of the other constitutive elements of a criminal offence, such as criminal intent, is in issue.

29. According to the case-law of the Norwegian Supreme Court, the evidentiary standard applying with respect to liability to pay compensation under Article 444 differs from that applying to criminal liability. Whereas in criminal proceedings it is for the prosecution to prove beyond reasonable doubt that the defendant committed the incriminated act, in compensation proceedings it is for the claimant to show that, on the balance of probabilities, it was more than 50% probable that he or she did not carry out the act grounding the charge. The requirement of proof in compensation cases may nevertheless be adjusted (i.e. to less than 50%) in the light of the claimant's ability to adduce evidence, especially where a long time has elapsed since the alleged criminal act. The competent court has to make a new assessment, independently of the acquittal, of all the evidence available in order to establish whether it is probable that the claimant did not carry out the act which formed the basis of the charge.

30. It is not a requirement for obtaining compensation that the acquitted claimant adduce new evidence. The compensation claim may thus be made with reference to the evidence made available in the criminal proceedings or obtained by the court of its own motion.

31. In 1996 the Norwegian Council on Criminal Law (*Straffelovrådet*) made a recommendation to the Ministry of Justice that Articles 444 to 446

of the Code of Criminal Procedure be amended in a number of respects, including the abolition of the condition whereby the claimant must prove that on the balance of probabilities he or she did not carry out the act giving rise to the charge. Nevertheless, the Council was of the view that the provisions in force are not inconsistent with Norway's obligations under Article 6 § 2 of the Convention, as interpreted by the Court in its case-law (see *Norges Offentlige Utredninger* (Official Norwegian Report), *Erstatning i anledning straffeforfølgning* (Compensation in connection with Criminal Proceedings), 1996: 18, pp. 20-22, 36, 5 2). On 15 May 2002 a Government Bill was presented to Parliament (*Ot.prp.nr.77, 2001-2002*), proposing *inter alia* the repeal of this condition.

THE LAW

32. The applicant complains that, in breach of his right under Article 6 § 2 of the Convention to be presumed innocent until proven guilty of the commission of an offence, the national courts rejected his compensation claim under Article 444 of the Code of Criminal Procedure, on reasoning which contained assumptions of criminal guilt.

33. Article 6 § 2 of the Convention provides as follows:

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

34. The Government contested this allegation and requested the Court to hold that this provision was not applicable and had not been violated in the instant case.

A. Submissions of those appearing before the Court

1. The applicant

35. The applicant submitted that, while not being formally charged with a criminal offence in the compensation proceedings, he was nevertheless in effect subjected to an assumption of guilt by the courts in their consideration of his compensation claim. In this respect the facts of his case could not be distinguished from those at issue in the *Sekanina v. Austria* judgment of 25 August 1993 (Series A no. 266-A) and the *Asan Rushiti v. Austria* judgment (no. 28389/95, 21.3.2000).

36. The applicant maintained that in proceedings regarding a compensation claim made under Article 444 of the Code of Criminal Procedure, the same judges who sat in the criminal proceedings would normally also sit in the compensation case. Moreover, unless new evidence

was adduced in the compensation case, their decision would inevitably be based on the evidence in the criminal proceedings and, were they to reject the claim, they would necessarily have to rely on evidence to the defendant's disadvantage. Thus, the applicant submitted, the manner in which the compensation proceedings were conducted under Article 444 was, as such, incompatible with Article 6 § 2 of the Convention.

Indeed, the national courts' reasoning in dismissing his compensation claim was based on a reassessment of the evidence in the criminal case. It could hardly be argued, as proposed by the Government, that the national courts' reasoning remained strictly within the bounds of the particular burden of proof applying to compensation claims under Article 444. On the contrary, in rejecting the applicant's claim, the national courts, in a manner inconsistent with the Court's ruling in the above-mentioned *Sekanina v. Austria* judgment, relied on grounds of suspicion against the applicant which had previously been adjudicated in the criminal case, and in respect of which he had been acquitted. Apart from the fact that the judgment was based on evidence adduced in the criminal trial, it contained passages which left no doubt whatsoever that it was the court's opinion that the applicant had committed acts for which he had previously been charged, tried and acquitted. The Government's argument that the national courts at no point in their reasoning discussed the applicant's acquittal in the criminal proceedings, suggested that an individual's right to protection under Article 6 § 2 was solely a matter of form, not substance.

2. The Government

37. The Government submitted that the applicant's compensation claim under Article 444 of the Code of Criminal Procedure was civil in character. They stressed that, as a general rule, Article 6 § 2 was applicable only in cases which involved a criminal charge or proceedings dealing with allegations voiced by a competent, public authority that the defendant had committed a criminal offence. Limited exceptions had been made to this rule, under the test set out in the *Sekanina* line of case-law, where the decision on the right to compensation was linked to the decision on criminal responsibility to such a degree that the former could be regarded as a consequence and – to some extent – a concomitant of the latter. However, that could not be said about the applicant's compensation case, which had been determined on an independent basis.

38. The Government argued that there were crucial differences between the Norwegian and the Austrian systems. Firstly, under the latter, the jury's verdict at the trial was an essential issue because decisive weight was attached to the jury's vote and reasoning in the subsequent determination of the acquitted person's compensation claim. This was not possible under the Norwegian system, according to which no records were kept of the jury's deliberations; no reasons were given by the jury for its verdict; no

information was disclosed as to the voting, beyond a simple 'yes' or 'no' from the jury. Thus, without any insight into the voting or the reasons for the acquittal, the court was effectively barred from drawing any conclusions from the jury's deliberations or reasoning when deciding on compensation.

Secondly, it followed from the *Sekanina* judgment that the pivotal question was whether the reasoning employed by the national courts in determining the compensation claim amounted to a "voicing of suspicion regarding the [claimant's] innocence". The provisions at issue in the Austrian case made it a condition that the suspicion against the acquitted person had been dispelled, which invited the national court to reassess the acquittal.

In contrast, those applied by the Norwegian courts in the instant case did not require any affirmation of the claimant's criminal liability in order to reject the compensation claim or invite any discussion as to the correctness of his acquittal. The competent courts could not voice any suspicion regarding the innocence of the acquitted person. The test was solely whether, in view of the particular rule of evidence applying in such cases, it was more likely than not that the claimant had committed the act which had grounded the charge. The subject matter touched upon only one of the four conditions for establishing criminal liability, namely the objective breach of a penal provision, and thus could not reasonably be interpreted as a supposition of criminal guilt. In the applicant's case the national courts kept their reasoning strictly within these bounds. This fact was underlined by the Supreme Court's reference to the 1994 precedent, according to which a refusal of a compensation claim did not undermine or question an acquittal, but must be based on a separate assessment using the evidentiary standard applicable to ordinary compensation claims made independently of the criminal matter. At no point in their reasoning did the national courts discuss the applicant's acquittal in the criminal proceedings.

39. In the Government's view a fine – but absolutely essential – line had to be drawn between criminal and civil responsibility. It would be unacceptable if an acquittal in a criminal case should be binding upon any authority that subsequently was called upon to decide civil law matters arising from the same set of facts. An acquittal could not have as a consequence a requirement that subsequent decisions in civil matters must presume that the acquitted person did not perpetrate the act, if it is shown on the balance of probabilities that he or she nevertheless was the perpetrator. For example, it must be possible for a domestic court deciding on compensation for unlawful detention, for the purposes of Article 5 § 5 of the Convention, to have regard to whether the detention was warranted by a reasonable suspicion.

40. In the light of the above, the Government requested the Court to hold that Article 6 § 2 was inapplicable to the proceedings of which complaint was made. Should the Court nevertheless find this provision applicable,

they invited it to hold that there had been no failure to comply with it in the applicant's case.

B. The Court's assessment

1. Applicability of Article 6 § 2

41. The Court reiterates that the concept of a “criminal charge” in Article 6 is an autonomous one. According to its established case-law, there are three criteria to be taken into account when deciding whether a person was “charged with a criminal offence” for the purposes of Article 6, namely the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring (see *Phillips v. the United Kingdom*, no. 41087/98, § 31, 5 July 2001; *A.P., M.P. and T.P. v. Switzerland*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, § 39). Moreover, the scope of Article 6 § 2 is not limited to criminal proceedings that are pending (see *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p.16, § 35). In certain instances, the Court has also found the provision applicable to judicial decisions taken after the discontinuation of such proceedings (see in particular the following judgments: *Minelli v. Switzerland*, 25 March 1983, Series A no. 62, and *Lutz, Englert and Nölkenbockhoff v. Germany*, 25 August 1987, Series A no. 123), or following an acquittal (see *Sekanina and Rushiti* cited above and *Lamanna v. Austria*, no. 28923/95, 10 July 2001). The latter decisions concerned proceedings relating to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his (or his heirs') necessary costs, or compensation for detention on remand, and which were found to constitute a consequence and the concomitant of the criminal proceedings.

42. The Court considers that the compensation proceedings in the present case did not give rise to a “criminal charge” against the applicant, and sees no need to deal with the Government's argument that they were civil in character. The issue is whether the compensation case nevertheless was linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2. The Court reiterates that the impugned national decisions on compensation were taken with specific reference to the terms of Article 444 of the Code of Criminal Procedure, under which a person who had been charged could seek compensation with respect to matters which were directly linked to the criminal proceedings against him or her.

43. In this respect, the Court notes from the outset that any compensation claim made under Article 444 had to be lodged, pursuant to Article 447 of the Code, within three months from the close of the criminal

proceedings, with the same court and, as far as possible, in the same formation which had conducted the trial.

44. Moreover, according to Article 444, compensation could be sought from the State for damage which the claimant had suffered as a result of the prosecution; in other words damage engaging the responsibility of the State, not a private party. This is a weighty consideration in determining the applicability of Article 6 § 2, which provision is not limited to a trial court's conduct of criminal proceedings (see the aforementioned judgments in *Sekanina*, § 22, and *Allenet de Ribemont*, p. 16, § 36, and, *a contrario*, cf. the *Ringvold* judgment delivered on the same date as the present judgment).

45. In view of the responsibility of the State referred to above, the grounds on which compensation could be granted or refused must be of significance to the scope of the application of Article 6 § 2.

Under the relevant provision of Article 444, the outcome of the criminal proceedings was a decisive factor, it being a prerequisite that the person charged had been acquitted or that the proceedings had been discontinued.

Moreover, unlike in criminal proceedings – where it was for the prosecution to prove beyond reasonable doubt that the defendant had committed the incriminated act - in a compensation case of the present kind it was for the acquitted person to show that, on the balance of probabilities, it was more than 50% probable that he or she did not carry out the act grounding the charge. Leaving aside this difference in evidentiary standards, the latter issue overlapped to a very large extent with that decided in the applicant's criminal trial. It was determined on the basis of evidence from that trial by the same court, sitting largely in the same formation, in accordance with the requirements of Article 447 of the Code.

46. Thus, the compensation claim not only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject-matter. Its object was, put simply, to establish whether the State should have a financial obligation to compensate the burden it had created for the acquitted person by the prosecution it had engaged against him. Although the applicant was not “charged with a criminal offence”, the Court considers that, in the circumstances, the conditions for obtaining compensation were linked to the issue of criminal responsibility in such a manner as to bring the proceedings within the scope of Article 6 § 2, which accordingly is applicable.

2. Compliance with Article 6 § 2

47. As to the further question, whether Article 6 § 2 was complied with in the compensation case, the Court reiterates that this provision embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible (see *Rushiti*, cited above, § 31). It observes that in its decision of 25 February 1995, the relevant parts of which were quoted by the Appeals Selection Committee of

the Supreme Court, the High Court reiterated the conclusions of the medical experts, “*imply[ing] a very high degree of probability that the 10 children referred to in the indictment have been exposed to sexual abuse*” and summarised at length the different types of evidence pointing to Mr Hammern as the perpetrator of the acts described in the indictment (paragraph 23 above). On the basis of the evidence presented both during the criminal trial hearing and the compensation hearing, the High Court reached the conclusion that the applicant had failed to show that it was probable that he had not perpetrated the acts which formed the basis of the charges, and rejected his compensation claim under Article 444 of the Code of Criminal Procedure. In the view of the Court, the High Court's reasoning clearly amounted to the voicing of suspicion against the applicant with respect to the charges of sexual abuse for which he had been acquitted.

48. The Court is mindful of the fact that, in upholding the High Court's decision, the Appeals Selection Committee of the Supreme Court, had regard to and quoted its previous interpretation of Article 444 in a 1994 decision, according to which the refusal of a compensation claim did not undermine or cast doubt on the prior acquittal. Moreover, the Committee repeatedly emphasised this point in relation to the applicant's Article 444 claim (paragraphs 21 to 23 above). The Court appreciates that a deliberate effort was made to avoid any conflict with Article 6 § 2 in the interpretation of the statutory provision concerned. However, it is not convinced that, even if presented together with such a cautionary statement, the impugned affirmations were not capable of calling into doubt the correctness of the applicant's acquittal, in a manner incompatible with the presumption of innocence.

49. Against this background, the Court does not find any grounds for distinguishing the present case from those of *Sekanina* and *Rushiti* referred to above. Accordingly, there has been a violation of Article 6 § 2 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 6 § 2 of the Convention was applicable in this case;
2. *Holds* that there has been a violation of Article 6 § 2.

Done in English and notified in writing on 11 February 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs Greve is annexed to this judgment.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE GREVE

Introductory remarks

Whereas I agree with the reasoning and the conclusions reached in the judgment, I nonetheless find it important to focus in more detail on the problems raised by the wording of the relevant Norwegian compensation provisions. This is so even though the Norwegian provision in issue is in the process of being changed and thus will soon be of only historical interest.

The applicant in the case alleged a violation of Article 6 § 2 of the Convention on account of *the reasoning relied on by the Norwegian courts* in refusing his compensation claim under Articles 444 and 446 of the Norwegian Code of Criminal Procedure in respect of damage sustained in criminal proceedings in which he had been acquitted. The Court has found in the applicant's favour.

The Court based its decision on the finding that, in contradistinction to compensation claims by third parties against a person acquitted or against whom a prosecution has been discontinued, compensation claims from the person originally accused are a consequence and concomitant of the criminal proceedings as such and thus bring the presumption of innocence as enshrined in Article 6 § 2 into play.

Compensation requirements in the Convention

Article 5 § 5 of the Convention provides:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

In other words, compensation is to be granted to a person who has been arrested or detained in contravention of the provisions of Article 5, concerning the “right to liberty and security”. The issue is whether or not a High Contracting Party has acted in disregard of any of these provisions as such. The issue is *not* whether a person arrested or detained was guilty of an alleged crime on which the arrest or detention was based. A person later found guilty in a criminal trial could well be entitled to compensation under Article 5 § 5. Conversely, a person later acquitted or against whom proceedings were discontinued may not be eligible for compensation under Article 5 § 5.

Furthermore, Article 3 of Protocol No. 7, concerning “Compensation for wrongful conviction”, provides:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such

conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

Beyond this the Convention does not require a High Contracting Party to compensate anyone who has been the subject of a criminal investigation and/or a criminal trial. This is so even where the person is acquitted of all criminal charges.

The approach enshrined in the Convention and its Protocols is fully in line with, and follows up on, the core of the European human rights protection system whereby it is incumbent on the High Contracting Parties themselves to provide and enforce the rights and freedoms set out in the Convention and its Protocols. It is for the States to secure the rights and freedoms to everyone within their jurisdiction (see Article 1 of the Convention). This entails a dual obligation:

- (i) the State itself must meticulously and scrupulously respect those rights and freedoms; and
- (ii) the State must uphold law and order in its territory by ensuring that every other legal entity or natural person that violates the rights and freedoms of others is held to account for such violations.

National systems of criminal justice are thus indispensable instruments for securing the human rights and freedoms of the peoples of Europe.

In these circumstances, it would be counterproductive to provide an automatic right to compensation where there is an acquittal or the proceedings are discontinued. The question is how to strike a reasonable balance between crime prevention and the rights of the individual. A restrictive answer – as seen from the point of view of anyone who has undergone a criminal investigation and/or a criminal trial – is found in the aforementioned compensation provisions of the Convention and Protocols.

Compensation requirements in the Norwegian system

The Norwegian system has moved beyond the minimum of compensatory rules as provided for in the Convention. Article 53 of the Convention provides:

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

As regards compensation for persons considered innocent either because they have been acquitted or because the proceedings against them have been discontinued, compensation is awarded in Norway provided that the conditions in the Code of Criminal Procedure are satisfied. Article 445 read in conjunction with Article 446 is the general provision and *de facto* the main provision for compensation. Article 444 read in conjunction with Article 446 is the special provision.

The terms of Articles 444 to 446 Code of Criminal Procedure are to be found in paragraph 16 above.

Whether compensation is awarded because the condition in the general provision of Article 445 is satisfied or because the one in the special provision of Article 444 is, the *ratio legis* for the compensation is that, with the benefit of hindsight, it was not appropriate in the circumstances to prosecute the person notwithstanding that the person was eventually acquitted and is not criminally responsible for the act on which the criminal charge was based.

It will be appreciated that, in line with the principle of presumption of innocence as enshrined in Article 6 § 2 of the Convention, the innocence of the person claiming compensation *cannot* be the issue in the compensation proceedings. Innocence in this context means either that the proceedings against the person in question have been discontinued or that the person has been acquitted, and that there are no special reasons to justify reopening the criminal proceedings.

Where the courts have to decide such compensation claims, the focus should be on whether or not the different procedural steps were warranted by a sufficient and reasonable suspicion – that is to say, whether or not there was a reasonable suspicion *at the material time*. The courts should look back at what was known when the procedural steps were taken, and ask if the procedural steps were justified under the circumstances. If the answer is no, the applicant may have a case for compensation. If the answer is yes, the procedural steps as such should not give rise to compensation.

The above implies that where a person is awarded compensation under the general rule in Article 445 read in conjunction with Article 446, the court is acknowledging that *there was not a sufficient and reasonable suspicion at the relevant time* which justified the procedural steps taken. The issue of innocence is not decided on or reopened in such cases. A compensation decision either acknowledges obvious defects in the criminal proceedings or else discredits a suspicion against the applicant that was previously perceived to be sufficient and reasonable. In the case of Hammern the decision to award him compensation under Article 445 read in conjunction with Article 446 can only be interpreted accordingly.

The special compensation provision in Article 444, read in conjunction with Article 446, was introduced by the Code of Criminal Procedure as a provision for special cases in which there had been a miscarriage of justice. The basic rationale for the provision is similar to that behind the provision in Article 3 of Protocol No. 7, namely that, where a miscarriage of justice has been established, the victim of it must be compensated even if compensation is not payable under other rules.

The rule in Article 3 of Protocol No. 7 is formulated in a manner indicating that it is only where a miscarriage of justice *has already been established* that there will be scope for mandatory compensation (an

exception from the mandatory compensation rule being made if it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the person otherwise entitled to compensation). The provision is only applicable where

- (i) a person has previously been convicted of a criminal offence;
- (ii) that conviction has been reversed, or the person has been pardoned; and
- (iii) a newly discovered fact shows conclusively that there has been a miscarriage of justice.

Such compensation decisions are taken by law-enforcement authorities. Although in their decision-making on compensation they revert to the issue of the guilt of the former accused, they do so only in a context in which the person was initially found guilty but the conviction was quashed or the person pardoned. The issue of guilt is not reopened in the compensation proceedings.

The special provision in Article 444 of the Norwegian Code of Criminal Procedure was intended to be even more favourable, that is to say to be of wider application. It gives a person who is tried but acquitted or against whom proceedings have been discontinued a right to compensation if it is shown on the balance of probabilities that the person did not carry out the act that formed the basis of the charge. The rationale is that there is the appearance of a miscarriage of justice, albeit of a lesser kind.

However, the provision in Article 444 is not formulated in a manner that limits its application to special cases in which, in particular, a newly discovered fact shows conclusively that there has been a miscarriage of justice. Conversely, the provision may be relied on also by applicants who are not primarily interested in compensation but want to reopen the legal assessment of the issue of guilt. At the same time, applicants in the latter group invoke the principle of presumption of innocence in an attempt to ensure that the courts trying their cases conclude that, on the balance of probabilities, they were not guilty. The result is that a well-meant provision – which has proved valuable in a significant number of the cases which it was intended to cover – turns out to be ill-advised and not compatible with the presumption of innocence. This is so even though Article 444 was never intended to result in the slightest question being raised about an acquittal or a discontinuation of proceedings. *The latter can readily be seen from the Norwegian courts' reasoning in the present case, in which the courts made every possible effort to emphasise that their finding in the compensation proceedings – the refusal of the compensation claim – did not mean that the earlier acquittal was undermined or laid open to doubt.*

Conclusion

The consequence of the Court's finding in this case is that a High Contracting Party cannot, without violating the Convention, offer

compensation after an acquittal or discontinuation of proceedings on the ground that on the balance of probabilities the person originally accused “did not carry out the act that formed the basis of the charge”. The reason is that compensation claims from that person are a consequence and concomitant of the criminal proceedings as such, and thus bring the presumption of innocence as enshrined in Article 6 § 2 into play. In contradistinction to cases in which compensation is sought by a third party, the question – in cases in which it is the person previously under investigation or charged with a crime and then acquitted who is seeking compensation – cannot be whether the person carried out the act that formed the basis of the charge because that is no longer in question: owing to the principle of presumption of innocence, there is invariably only one answer, and that is in the negative. The focus in these cases thus has to be limited to:

(i) the issues provided for in Article 5 § 5 of the Convention and in Article 3 of Protocol No. 7; and

(ii) whether the investigation and/or the criminal proceedings against the person *were warranted by a sufficient and reasonable suspicion at the time when the actual steps were taken*, that is to say *before* acquittal or discontinuation.