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

FORMER THIRD SECTION

CASE OF O. v. NORWAY

(Application no. 29327/95)

JUDGMENT

STRASBOURG

11 February 2003

FINAL

11/05/2003

In the case of O. v. Norway,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Mrs H.S. GREVE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 17 September 2002 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. 29327/95) 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 O. ("the applicant"), on 11 October 1995. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr A.B. Krokeide, a lawyer practising in Gjøvik. 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 in respect of damage sustained in criminal proceedings in which he had been acquitted.

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

5. By a decision of 14 December 1999 the Chamber declared the application partly admissible.

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 *Hammern v. Norway*, *Ringvold v. Norway* and *Y. v. Norway* (applications nos. 30287/96, 34964/97 and 56568/00 – Rule 43 § 2).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Third Section.

8. 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), *Agent*,
Mr F. ELGESEM, *Advokat*, *Counsel/Adviser*,
Mr K. KALLERUD, Senior Public Prosecutor,
Office of the Director of Public Prosecutions,
Ms E. HOLMEDAL, Attorney-General's Office
(Civil Matters),
Ms T. STEEN, Attorney-General's Office, *Advisers*;

(b) *for the applicant*
Mr A.B. KROKEIDE, *Advokat*, *Counsel*.

The Court heard addresses by Mr Krokeide and Mr Elgesem.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1955 and lives in Norway.

10. By an indictment of 23 June 1993, the applicant and his father were charged under Articles 195 § 1 (sexual relations with a minor) and 207 (sexual relations with a close relative) of the Criminal Code (*straffeloven*) with having committed sexual offences during the periods from 1985 to 1989 and 1988 to 1991 respectively against the applicant's daughter, L., who was born on 18 October 1981.

11. By a judgment of 1 June 1994, the Eidsivating High Court (*lagmannsrett*), sitting with three judges and a jury, noted that the jury had answered the questions on the charges in the negative and therefore acquitted the applicant and his father. No appeal was lodged against the judgment, which consequently gained legal force.

12. Subsequently, on 29 August 1994, the applicant and his father filed a petition with the High Court requesting compensation under Articles 444 and 446 of the 1981 Code of Criminal Procedure (*straffeprosessloven*) for pecuniary and non-pecuniary damage caused by the criminal proceedings against them. The father sought, in the alternative, compensation under Articles 445 and 446.

13. In the compensation proceedings, the High Court, sitting with the same judges as in the trial, received written pleadings but did not hold an oral hearing. By a decision (*kjennelse*) of 25 January 1995, it rejected the applicant's claim but awarded his father 30,000 Norwegian kroner in compensation under Articles 444 and 446.

In the introduction to its decision, the High Court reiterated certain information derived from the criminal proceedings, notably the specific contents of the charges of sexual abuse, the jury's verdict and the acquittal by the High Court.

As regards the applicant's claim, the High Court stated, *inter alia*:

> "The High Court notes that, pursuant to Articles 444 or 446 ... of the Code of Criminal Procedure, it is a condition for obtaining compensation that it must be shown to be probable that the accused did not carry out the act which formed the basis of the charge. Accordingly, in order to award compensation it must be shown on the balance of probabilities that the accused did not commit the acts in respect of which he has been acquitted.
>
> The High Court finds it probable that the victim [L.], born on 18 October 1981, has been subjected to sexual abuse in the form of sexual intercourse. Reference is made to the medical examination carried out ... on 21 November 1991 ...
>
> [L.'s] father and mother separated in 1989 when the mother moved to Oslo together with [L.] ... As a witness, the mother made statements about [L.'s behaviour] before as well as after the separation. This could indicate that she has been subjected to sexual abuse. The child's behaviour resulted in the mother contacting the ... institute in the summer of 1991 where [L.] underwent individual and family therapy, as did her mother and her cohabitant.
>
> As a witness during the trial, Ms Anne Okstad, a psychologist, ... explained [L.'s] behaviour. In the light of this and of talks and symbolic games with [L.], Ms Okstad concluded that there was no doubt that [L.] had been subjected to sexual abuse.
>
> The question is therefore now whether on the balance of probabilities other persons than the defendants are behind the abuses. In this respect the judicial examinations of [L.] are of central importance and the witness evidence as to what [L.] has stated is significant. From the outset there had been no concrete information in this case about other offenders. [L.] has been subjected to judicial examinations three times ... In

connection with the first examination the judge recorded that no information had been submitted which could justify a concrete suspicion of sexual abuse having been committed against [L.]. During the second examination [the applicant] was mentioned in connection with a description of immoral sexual relations and during the third examination even the grandfather was mentioned. During the examinations the information was submitted, without spontaneity, in part under pressure from the examining judge, and in part through writing down names and events on pieces of paper.

According to the mother's and her partner's statements, [L.] had referred to both [the applicant] and the grandfather. It appeared as if the child had been under pressure to speak in order to enable the family to calm down. Ms Okstad stated that [L.], in the course of a realistic conversation, had referred to 'intrusions, pawing, threats and aggression by [the applicant]' and that she had spontaneously confirmed that abuse had taken place several times. She also appeared to have been agitated both during and after these conversations.

Considering the case as a whole, the High Court does not find it shown on the balance of probabilities that [the applicant] did not engage in sexual intercourse with his daughter. ...

[The applicant's] claim for compensation is thus dismissed. In the light of this conclusion, there is no reason to order the reimbursement of his costs."

14. The applicant appealed against that decision to the Supreme Court (*Høyesterett*). On 20 April 1995 the Appeals Leave Committee of the Supreme Court (*Høyesteretts kjæremålsutvalg*) upheld the High Court's decision, stating, *inter alia*:

"The High Court has correctly taken as its starting-point the view that under Articles 444 and 446 ... of the Code of Criminal Procedure it is a condition that it must be shown to be probable that the accused did not carry out the act which formed the basis for the charge against him and that this implies that on the balance of probabilities [*sannsynlighetsovervekt*] the accused did not commit the acts in respect of which he was acquitted. In this connection the Committee refers to [its decision reported in] *Norsk Retstidende* 1994, p. 721, where the first voting judge stated, with the approval of the other judges, *inter alia*:

'Compensation pursuant to Article 444, first sentence, must – when the accused is acquitted or the case against him is discontinued – cover the financial losses he has suffered if "it has been shown to be probable [*gjort sannsynlig*]" that he has not carried out the act which formed the basis for the charges. 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 in 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 must apply and the requirements in respect of the strength of the evidence must then to some extent be adapted to the ability of 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 where the accused is unable to discharge the burden of proof. I should like to stress that the refusal of a compensation claim does not imply that the previous acquittal is undermined or that the acquittal is open to doubt. The

compensation claim must be determined on an independent basis and the rules of 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.'

The High Court has found it probable that [the applicant's] daughter was subjected to sexual abuse ... Considering the case as a whole, the High Court has further concluded that it has not been shown that on the balance of probabilities [the applicant] did not engage in sexual intercourse with his daughter. The Appeals Leave Committee finds no reason to depart from the High Court's assessment of the evidence, which is based on the judges' participation at the trial hearing in this case, where it must be deemed vital that the court had the opportunity to hear directly the accused and the witnesses – something which the Committee is not empowered to do ...

The Appeals Leave Committee accordingly finds that the evidence is not such as to fulfil the conditions for compensation under Article 444 of the Code of Criminal Procedure; nor, as a consequence, are the conditions for awarding damages under Article 446 satisfied."

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. 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. Only two conclusions are possible 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, such as that formerly known in some other European countries, where a criminal charge could result in the finding that there was not sufficient evidence to establish guilt.

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

Article 444

"If a person charged is acquitted or the proceedings against him are discontinued, he may claim compensation from the State for any damage that he has sustained as a result of 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 where 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 proceedings 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."

17. 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 settles the case. The provisions of Article 318, first paragraph, shall apply correspondingly.

If the case has been concluded without any judicial examination 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 is to 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. When examining 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 judgment is given in the case."

18. Compensation after acquittal or discontinuation of the proceedings is not automatic and is not awarded unless the conditions in the above-cited Articles are met.

19. When compensation is awarded to persons who are considered innocent as they have been acquitted or the proceedings against them have been discontinued, Articles 445 and 446 are the general provisions and, *de facto,* the main provisions providing for compensation.

20. In the present case the applicant, unlike his father, did not seek compensation under Articles 445 and 446. Instead, the applicant claimed compensation under the special provision in Article 444, together with Article 446. Under this provision, 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 with which he or she was charged. In the assessment of that probability, none of the other constitutive elements of a criminal offence, such as criminal intent, is in issue.

21. According to the case-law of the Norwegian Supreme Court, the evidentiary standard applying in respect of 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 impugned 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 that formed the basis of 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.

22. It is not a requirement for obtaining compensation that the claimant should 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.

23. 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 had to prove that on the balance of probabilities he or she had not carried out the act giving rise to the charge. Nevertheless, the Council was of the view that the provisions in force were 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* (Norwegian Official Reports), "*Erstatning i anledning straffeforfølgning*" ("Compensation in connection with criminal proceedings"), 1996:18, pp. 20-22, 36, 52). On 15 May 2002 a government bill was presented to Parliament (*Ot.prp.nr.77, 2001-2002*), proposing, *inter alia*, the repeal of that condition.

THE LAW

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

24. The applicant complained that, in breach of his right under Article 6 § 2 of the Convention to be presumed innocent until proved guilty of the commission of an offence, the national courts had rejected his compensation claim under Article 444 of the Code of Criminal Procedure on reasoning which could be interpreted as an establishment of criminal guilt, in spite of his previous acquittal on 1 June 1994.

25. Article 6 § 2 of the Convention provides:

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

26. The Government contested this allegation and requested the Court to hold that there had been no violation of the Convention in the instant case.

A. Submissions of those appearing before the Court

1. The applicant

27. The applicant submitted that, while not being formally charged with a criminal offence in the compensation proceedings, he had nevertheless in effect been 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 in issue in *Sekanina v. Austria* (judgment of 25 August 1993, Series A no. 266-A) and *Rushiti v. Austria* (no. 28389/95, 21 March 2000).

28. 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 incompatible with Article 6 § 2 of the Convention.

Indeed, the national courts' reasoning in dismissing his compensation claim had been explicitly based on a reassessment of the evidence in the criminal proceedings. It could hardly be argued, as proposed by the Government, that the national courts' reasoning had 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 *Sekanina* (cited above), relied on grounds of suspicion against the applicant which had previously been examined in the criminal proceedings, and in respect of which he had been acquitted. Apart from the fact that the judgment had been based on evidence adduced in the criminal trial, it had contained passages which left no doubt whatsoever that it was the court's opinion that the applicant had committed acts in respect of which he had previously been charged, tried and acquitted. The Government's argument that the national courts had not at any 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. The fact that the father but not the applicant had been awarded compensation meant that the High Court had "graded" the acquittals in the criminal proceedings.

2. The Government

29. 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 claim, which had been determined on an independent basis.

30. 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, in which no records were kept of the jury's deliberations, no reasons were given by the jury for its verdict and 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 *Sekanina* 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 in issue in the Austrian case made

it a condition that the suspicion against the acquitted person should have been dispelled, which invited the national court to reassess the acquittal.

In contrast, the provisions applied by the Norwegian courts in the instant case did not require any affirmation of the claimant's criminal liability in order to refuse the compensation claim and did not 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 formed the basis of the charge. The subject matter touched upon only one of the four conditions for establishing criminal liability, namely the objective breach of a provision of criminal law, and thus could not reasonably be interpreted as a supposition of criminal guilt. In the applicant's case the national courts had 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 had to be based on a separate assessment using the evidentiary standard applicable to ordinary compensation claims made independently of the criminal proceedings. At no point in their reasoning had the national courts discussed the applicant's acquittal in the criminal proceedings.

31. 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 were binding on any authority that was subsequently 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 should presume that the acquitted person had not perpetrated the act, if it was shown on the balance of probabilities that he or she nevertheless was the perpetrator. For example, it had to 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 had been warranted by a reasonable suspicion.

32. In the light of the above, the Government requested the Court to hold that Article 6 § 2 was inapplicable to the proceedings complained of. 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

33. 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, ECHR 2001-VII, and *A.P., M.P. and T.P. v. Switzerland*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1488, § 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, matters which were found to constitute a consequence and the concomitant of the criminal proceedings.

34. The Court considers that the compensation proceedings in the present case did not give rise to a "criminal charge" against the applicant, and it sees no need to deal with the Government's argument that they were civil in character. The issue is whether the compensation proceedings were nevertheless 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 in respect of matters which were directly linked to the criminal proceedings against him or her.

35. In this connection, the Court notes at 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, the same bench which had conducted the trial.

36. Moreover, under Article 444, compensation could be sought from the State for damage which the claimant had sustained 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 *Sekanina*, cited above, p. 13, § 22, and *Allenet de Ribemont,* cited above, p. 16, § 36, and contrast the judgment in *Ringvold*, cited above, delivered on the same date as the present judgment).

37. In view of the responsibility of the State as referred to above, the grounds on which compensation may 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 is for the prosecution to prove beyond reasonable doubt that the defendant committed the impugned 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 that formed the basis of the charge. Leaving aside this difference in evidentiary standards, the latter issue overlapped to a very large extent with the one decided in the applicant's criminal trial. It was determined on the basis of evidence from that trial by the same court, sitting with the same judges, in accordance with the requirements of Article 447 of the Code.

38. 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 had a financial obligation to compensate the burden it had created for the acquitted person by the proceedings it had instituted 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

39. 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 January 1995, the High Court summarised the charges of sexual abuse brought against the applicant in the criminal trial, as well as reiterating the jury's verdict and his acquittal by the judges. Then it went on to examine whether the conditions for awarding compensation under Article 444 were fulfilled. Referring to evidence from the criminal case, the High Court found it probable that the

applicant's daughter had been subjected to sexual abuse and, "[c]onsidering the case as a whole, ... [did] not find it shown on the balance of probabilities that [he] did not engage in sexual intercourse with [her]" (see paragraph 13 above). In the view of the Court, the High Court's reasoning clearly amounted to the voicing of suspicion against the applicant regarding the charges of sexual abuse on which he had been acquitted.

40. The Court is mindful of the fact that, in upholding the High Court's decision, the Appeals Leave Committee of the Supreme Court had regard to and quoted its previous interpretation of Article 444 in a 1994 decision, in which it had been held that the refusal of a compensation claim did not undermine or cast doubt on the earlier acquittal (see paragraph 14 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.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

43. Under this provision the applicant sought, firstly, 23,191.50 Norwegian kroner (NOK) in compensation for legal costs that he had been required to pay in certain child-custody proceedings following the indictment in the criminal proceedings. Secondly, he claimed NOK 60,000, which he would have been awarded in the compensation proceedings had the national courts respected his rights under Article 6 § 2 of the Convention.

44. The Government disputed both claims.

45. The Court, finding no causal connection between the alleged pecuniary losses and the matter constituting a violation of the Convention, rejects both claims made under this head.

2. Non-pecuniary damage

46. The applicant further claimed NOK 100,000 (13,628.05 euros (EUR)) in compensation for non-pecuniary damage on the ground that the High Court's reasoning in refusing his compensation claim under Article 444 of the Code of Criminal Procedure had caused him considerable suffering and distress ever since.

47. The Government requested the Court to hold that the finding of a violation would in itself constitute adequate just satisfaction.

48. The Court accepts that the applicant sustained some non-pecuniary damage as a result of the infringement of the presumption of innocence in the compensation proceedings. Making an assessment on an equitable basis, the Court awards EUR 5,000 under this head.

B. Costs and expenses

49. The applicant claimed for costs and expenses incurred in the proceedings before the domestic courts and before the Convention institutions NOK 11,595 and NOK 20,000 respectively.

50. The Government raised no objections.

51. The Court, deciding on an equitable basis, awards the applicant EUR 2,900, less the EUR 2,848 already paid by the Council of Europe in legal aid in the present case.

B. Default interest

52. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 6 § 2 of the Convention is applicable in this case;

2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums:

(i) EUR 5,000 (five thousand euros) in compensation for non-pecuniary damage;

(ii) EUR 2,900 (two thousand nine hundred euros) in respect of costs and expenses, less EUR 2,848 (two thousand eight hundred and forty-eight euros) paid by the Council of Europe in legal aid in the present case;

(b) that these sums are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

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	J.-P. COSTA
Registrar	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 has been 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 [the] 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 of the judgment.

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 O. it is to be observed that *he opted not to claim compensation under the general provision* and not to seek the material and psychological solace that this could have given him. He nonetheless argued in Strasbourg that he suffered disproportionately because his father had received compensation under the general rule. According to O., this meant that the High Court which decided the compensation claims had, to his detriment, "graded" his and his father's acquittals on the criminal charges against them.

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.