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

THIRD SECTION

CASE OF BAYBAŞIN v. THE NETHERLANDS

(Application no. 13600/02)

JUDGMENT

STRASBOURG

6 July 2006

FINAL

06/10/2006

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 Baybaşın v. the Netherlands,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mr E. MYJER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 15 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 13600/02) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Hüseyin Baybaşın ("the applicant"), on 28 February 2002.

2. The applicant was represented by Ms J. Serrarens, a lawyer practising in Maastricht. The Netherlands Government ("the Government") were represented by their Agent, Ms J. Schukking, of the Netherlands Ministry of Foreign Affairs.

3. On 6 October 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the applicant's complaint that the weekly routine strip-searches to which he had been subjected between 16 July 2001 and 21 November 2002 in the course of his stay in the maximum security institution (*Extra Beveiligde Inrichting* – "EBI") breached his rights under Articles 3 and 8 of the Convention. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of this part of the application at the same time as its admissibility. It rejected the remainder of the applicant's complaints.

4. In accordance with Article 36 § 1 of the Convention and Rule 44 of the Rules of Court, the Registrar informed the Turkish Government of their right to submit written comments. They did not avail themselves of this right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and is serving a sentence of life imprisonment in the Netherlands.

A. The circumstances of the applicant's detention

6. On an unspecified date in 1996 the applicant was detained in the Netherlands in connection with a request for his extradition to Turkey, where he was suspected of murder. During his detention, there were serious indications that the applicant's life was at risk from foreign State or non-State agents.

7. Shortly before his release in December 1996 – after a Netherlands court had ruled that the applicant's extradition to Turkey was not permissible – the prison authorities received indications that the applicant and three co-detainees harboured escape plans. On 25 February 1998, the applicant filed a criminal complaint with the police, alleging that the Turkish authorities planned to kill him.

1. The criminal proceedings against the applicant

8. On 27 March 1998 the applicant was arrested and placed in pre-trial detention (*voorlopige hechtenis*) on suspicion of having committed serious crimes within a violent criminal organisation in which he played a leading role. Criminal proceedings were brought against the applicant, who was sentenced in first-instance proceedings to twenty years' imprisonment. On 30 July 2002, following proceedings on appeal, the Court of Appeal (*gerechtshof*) of 's-Hertogenbosch quashed the first-instance judgment, convicted the applicant of several offences and sentenced him to life imprisonment. His subsequent appeal on points of law to the Supreme Court (*Hoge Raad*) was dismissed on 21 October 2003.

2. The applicant's detention during and after the criminal proceedings

9. The applicant was initially detained in an ordinary remand centre (*huis van bewaring*). Shortly after he was apprehended, and on the basis of information indicating a risk that he would seek ways to escape and also reports that he was in danger of being "liquidated", he was transferred to the National Segregation Unit (*Landelijke Afzonderingsafdeling*) in a Rotterdam detention facility.

10. On 26 June 1998, on the advice of the special selection board of the maximum security institution (*Extra Beveiligde Inrichting* – "EBI"), the

Minister of Justice decided to place the applicant in the pre-trial detention unit of the EBI, which is part of the Nieuw Vosseveld Penitentiary Complex in Vught. His detention in the EBI prison was reviewed and extended by the Minister every six months. The applicant unsuccessfully challenged each decision to extend before the Appeals Board (*beroepscommissie*) of the Central Council for the Administration of Criminal Justice (*Centrale Raad voor Strafrechtstoepassing*). On 1 April 2001 the Central Council was replaced by the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*).

3. The decision of 16 July 2001 extending the applicant's stay in the EBI

11. By letter of 16 July 2001 the applicant was informed that the Minister of Justice had decided to extend his detention in the EBI once again. According to information contained in the proposal of 25 June 2001 to extend the applicant's stay in the EBI, he had not had any contact with social workers during the previous six months and apparently did not feel the need to have such contact. The proposal, which describes in detail the applicant's attitude, behaviour and activities in the EBI, does not mention any psychological problems encountered by the applicant caused by his detention in the EBI.

12. The letter of 16 July 2001, in its relevant part, reads as follows:

> "From the information available about you, it appears that you must be regarded as likely to try to escape (*vluchtgevaarlijk*). On this subject, I would inform you as follows.
>
> Official reports (*ambtsberichten*) that have been received point out that – quite apart from your membership of a criminal organisation – you are suspected of having committed serious crimes. You are suspected of leadership of an international criminal organisation that must be regarded as very violent. You are suspected of having personally instigated very serious and very violent crimes that have seriously undermined law and order. You have since been sentenced at first instance to twenty years' imprisonment, after a sentence of life imprisonment was sought [by the prosecution]. You have lodged an appeal.
>
> When you were being transferred to the Breda Regional Court (*arrondissementsrechtbank*) and the National Segregation Unit in Rotterdam on 8 April 1998 and 10 April 1998 respectively, "suspect" cars were observed [whose registered owners] may have been connected to persons with a criminal background. You have indicated that you(r family) are wealthy. It is therefore also reasonable to conclude that you are capable of providing financial backing for escape plans, in this instance for the organisation of an escape (attempt) via the hiring of third parties.
>
> Also during a previous detention, in the ... detention facility, there were indications, on 29 November 1996, that you had plans to mount an escape together with others, in an operation involving a firearm. On 9 December 1996, in the same detention facility,

information (was found) that could be connected to the indications referred to above. Your previous detention was a consequence of the fact that Turkey (unsuccessfully, as it later transpired) had requested your extradition in connection with serious crimes.

As during your previous detention, you have indicated that you are being threatened with "liquidation", even whilst in detention. You also lodged a criminal complaint to that effect with the Rotterdam police on 25 February 1998. Accordingly, as during your previous detention, you were transferred – in view of the seriousness of the information, which became apparent after the investigation – [to the National Segregation Unit on 10 April 1998] in order to secure not only your safety but also the order, peace and security of the prison where you were detained. The fears which you expressed were confirmed once more in May 1998 by official reports.

On 13 September 1999 you and your sister, who was visiting you, acted in breach of the rules governing the regime in the EBI. Your sister allowed you to read uncensored reports which she then destroyed. Disciplinary action was taken against you as a result.

With reference to the contents of the third paragraph, I would inform you that in January 2001 the presence of another "suspicious" car was noted near the EBI around the time of your transfer to the Rotterdam Regional Court. Three persons who had been travelling in the car were present in the courtroom on 25 January 2001. They turned out to have criminal records.

On 30 October 2000 you and a co-detainee had a conversation about one of the latter's escape attempts elsewhere in the Netherlands. In this context the co-detainee concerned told you that he had paid 25,000 Netherlands guilder for this. It was noted that your co-detainee added that 'that would never succeed here because the staff and the Governor work closely together'.

In the meantime, after life imprisonment was sought [by the prosecution], you have been sentenced at first instance to twenty years' imprisonment. You have lodged an appeal.

An escape on your part would be unacceptable to society and would seriously undermine law and order, having regard to the serious crimes of which you are suspected and, in this case, of which you have been convicted at first instance. If plans to "liquidate" you were to materialise, this would give rise to offences creating social unrest and seriously undermining law and order.

In view of the above, the [EBI] selection board, having heard evidence from the selection officer (with whom you refused to speak), has advised me to continue your detention in the EBI. I have taken a decision to that effect.

To give you as full a picture as possible, I would further inform you that the rules governing the EBI regime offer added guarantees for preventing the implementation of (possible) plans to "liquidate" you. In this connection it must be mentioned, with reference to what has been stated above, that (at the beginning of 2000) "liquidation plans" concerning you came to light within the EBI, in this case death threats by third persons. You indicated that you took these threats very seriously; you appeared frightened and it was clear that they had made an impression on you."

13. On 25 July 2001 the applicant, as in the case of the previous decisions to extend, again challenged the extension of his stay in the EBI by lodging an appeal with the Appeals Board of the Council for the Administration of Criminal Justice and Protection of Juveniles. In his appeal against the decision of 16 July 2001 the applicant challenged the necessity of his continued detention in the EBI. He also stated that he was suffering both physically and mentally as a result of the EBI detention regime without, however, substantiating that claim. Relying on the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") in respect of its visit to the EBI in 1997 and on the Court's decision on admissibility of 28 August 2001 in the case of *Van der Ven v. the Netherlands* (no. 50901/99), he argued that his (continued) detention in the EBI infringed his rights under Articles 3 and 8 of the Convention on account of the EBI detention regime.

14. On 27 February 2002 the Appeals Board dismissed the appeal. It held, on the basis of the different elements set out in the impugned decision, that the applicant was extremely likely to try to escape and, in view of the offences of which he was suspected, that he posed an unacceptable risk in terms of the danger of his committing further serious violent crimes. Noting that the applicant was suspected of offences in respect of which a twenty-year prison sentence had been imposed at first instance and which were a source of grave concern to society and public opinion, the Appeals Board was of the opinion that the applicant, in the event of an escape, would pose an unacceptable risk to society. It also took into account the fact that specific threats to kill the applicant or to have him killed had repeatedly come to light. It therefore concluded that the applicant's stay in the EBI corresponded to both situations provided for in Article 6 (a) and (b) of the Regulation on the selection, placement and transfer of detainees (*Regeling selectie, plaatsing en overplaatsing van gedetineerden*) of 15 August 2000. As regards the applicant's reliance on the Convention, it held that the proceedings on the extension of the applicant's stay in the EBI fell outside the scope of Article 6 of the Convention and that the interference with the rights guaranteed by Article 8 § 1 of the Convention was permissible to the extent that such interference was in accordance with the law and necessary in a democratic society in the interests of, *inter alia*, the prevention of disorder or crime. Lastly, it held that the decision to extend the applicant's stay in the EBI was lawful and that, weighing up all the interests involved, it could not be considered as unreasonable or unjust. It did not deal with the applicant's argument that the extension of his stay in the EBI was contrary to Article 3 of the Convention.

4. Subsequent decisions extending the applicant's stay in the EBI

15. In the meantime, on 21 December 2001, the applicant's detention in the EBI had been extended again. His appeal to the Appeals Board was

dismissed on 30 May 2002 on the same grounds as those given in the Appeal Board's decision of 27 February 2002.

16. On 21 May 2002 the applicant's detention in the EBI was extended once more. The applicant lodged an appeal with the Appeals Board against this decision on 30 May 2002. No further information has been submitted about these appeal proceedings.

17. On 24 December 2003 the applicant was transferred from the EBI to another prison with a different regime.

18. On 23 March 2004 Dr R.J.P. Rijnders – a psychiatrist attached to the Centre 1945 Foundation (*Stichting Centrum '45*), a national centre for the medical-psychological treatment of members of the Resistance in the Second World War, victims of war and organised violence, and asylum seekers suffering from post-traumatic stress disorder related to experiences in their country of origin – drew up a report on the applicant's state of mental health. According to the report the applicant had developed various mental problems (chronic post-traumatic stress disorder, depression and a strong tendency towards somatisation) during his detention in the EBI. The post-traumatic stress phenomena were mainly linked to his experiences in the EBI and only some of his complaints and symptoms were connected with his experiences in Turkey.

B. The applicant's civil action in tort against the Netherlands State

19. On 10 August 2004 the applicant brought a civil action in tort (*onrechtmatige daad*) against the Netherlands State before the Hague Regional Court. One of the grounds on which he claimed payment of compensation in respect of non-pecuniary damage for unlawful acts for which he considered the Netherlands State to be liable was that, from his arrest in March 1998 until the end of December 2003, he had been subjected to inhuman and degrading treatment on account of the conditions of his detention, including "(continuous) sensory deprivation and insufficient social contact (extensive social isolation), humiliating and unnecessary strip-searches, frisking, [and] being prohibited (*inter alia*) from communicating in Kurdish with, for instance, his mother and children". The applicant based this part of his claim on the Court's findings in its judgments of 4 February 2003 in the cases of *Van der Ven v. the Netherlands* (no. 50901/99, ECHR 2003-II) and *Lorsé and Others v. the Netherlands* (no. 52750/99), the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as set out in two reports (see paragraphs 46-47 below), a report drawn up on 10 October 2003 by academic researchers on the psychological impact of the EBI regime on the mental well-being of (former) inmates (see paragraph 23 below), and the report drawn up on 23 March 2004 by the

psychiatrist R.J.P. Rijnders (see paragraph 18 above). These civil proceedings are currently pending before the Regional Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Weekly routine strip-searches in the EBI

20. An overview of the relevant domestic law and practice is given in the Court's judgment of 4 February 2003 in the case of *Van der Ven v. the Netherlands* (no. 50901/99, §§ 26-35, ECHR 2003-II) and in *Baybaşın v. the Netherlands* ((dec.), no. 13600/02, 6 October 2005).

21. On 1 March 2003, in view of the Court's findings in its judgments of 4 February 2003 in the cases of *Van der Ven* (cited above) and *Lorsé and Others* (cited above), the EBI house rules (*huisregels*) were amended, with the result that the practice of weekly routine strip-searches accompanying the weekly cell inspections was abandoned. Under the amended Article 6(4) of the EBI house rules, strip-searches could be carried out at random during or directly after a weekly cell inspection.

22. As from 10 July 2003, pursuant to a ruling given on 7 July 2003 by the judge responsible for provisional measures (*voorzieningenrechter*) of the Hague Regional Court in summary injunction proceedings brought against the Netherlands State in June 2003 by thirteen EBI detainees, the random strip-searches were no longer linked to cell inspections and the EBI authorities from then on determined in the case of each individual detainee to what extent random strip-searches were called for. The situation of each individual detainee is now discussed at the monthly EBI staff meeting on detainees.

23. On 10 October 2003 researchers from the Free University of Amsterdam presented a report on a study, commissioned in January 2001 by the Minister of Justice, about the psychological impact of the EBI regime on the mental well-being of (former) inmates (see paragraphs 47-48 below). It concluded that the EBI regime affected the cognitive functioning of detainees in a negative manner, with particular reference to the speed of processing information and response inhibition. This was probably a result of the lack of stimuli in the detention situation. The report further concluded that the EBI regime caused more depression than a restricted community regime and that strip-searches were perceived as humiliating, constituting an extra burden for persons detained in the EBI. On the other hand, the EBI regime provided a better balance between rest and activity than a restricted community regime, as a result of which EBI detainees maintained a healthier life rhythm. In addition it had not been demonstrated that EBI detainees displayed more physical symptoms of persistent mental stress.

B. Civil actions for compensation in tort brought against the Netherlands State

1. Judicial review by the civil courts of acts by public authorities

24. Under Netherlands law the civil courts have traditionally had jurisdiction to grant relief against the authorities, if and in so far as no other relief is available. Where a person bases a claim against the authorities on an allegation that the latter have committed a tort within the meaning of Article 6:162 of the Dutch Civil Code (*Burgerlijk Wetboek*) against him or her, the civil courts have jurisdiction in principle. Where the civil courts have jurisdiction, they can also act in summary injunction proceedings (*kort geding*) in which a plaintiff can, *inter alia*, request the civil court to issue an order against the authorities. An act by the authorities is unlawful and constitutes a tort when it violates a right of the plaintiff or is contrary to a rule of international or domestic law which seeks to protect the plaintiff's interests, or to general principles of proper administration (*algemene beginselen van behoorlijk bestuur*). An action in tort is subject to a limitation period of five years under Article 3:310 (1) of the Civil Code.

25. However, as to the jurisdiction of the civil courts in cases where an administrative appeal lies, it is an established principle under Netherlands law that – given the closed system of legal remedies (*gesloten system van rechtsmiddelen*) in the Netherlands legal system – the civil court should refrain from examining the lawfulness of an administrative decision, provided that the administrative appeal offers sufficient guarantees as to a fair procedure. On this topic, extensive case-law has been developed by the Netherlands Supreme Court (*Hoge Raad*) over the last decades, supported by several authorities, to the effect that where an administrative appeal does not offer sufficient guarantees of a fair procedure, the civil courts have full jurisdiction to review the lawfulness of the administrative decision. On the other hand, a civil action should be declared inadmissible when another specific remedy exists which offers sufficient guarantees of fair proceedings (see Supreme Court, 12 December 1986, *Nederlandse Jurisprudentie* (Netherlands Law Reports – "NJ") 1987, no. 381; see also *Oerlemans v. the Netherlands*, judgment of 27 November 1991, Series A no. 219, §§ 21-35 and §§ 53-56).

26. In a case in which it gave judgment on 3 December 1971, the Supreme Court examined the question whether a party which considers that it has been injured by a judicial ruling against it can bring a subsequent civil action in tort against the State arguing that the judge failed to act with due care in giving that ruling. The Supreme Court found that this was not possible, holding that it was solely for the legislature to decide in what cases a remedy was to be provided. It would be incompatible with this principle if an unsuccessful party were to have the possibility, via a civil action, of

making the correctness of a [final] judicial ruling the subject matter of new proceedings, and thus to obtain a renewed examination in another manner than that provided for by statute. It added that only if the proceedings leading to a judicial decision had breached such fundamental legal principles (*fundamentele rechtsbeginselen*) that the case could no longer be said to have been determined in a fair and impartial manner, and if there was no possibility of appeal nor had there ever been such a possibility, could the State be held liable for the effects of such a ruling in a civil action in tort (NJ 1972, no. 137; see also Supreme Court, 29 April 1994, NJ 1995, no. 727; Court of Appeal of The Hague, 16 July 1998 and 12 November 1998, NJ 1999, nos. 256 and 127; and Court of Appeal of The Hague, 7 April 2000 and 18 May 2000, Administrative Law Reports (*Jurisprudentie Bestuursrecht*) 2000, nos. 147 and 142).

27. In a judgment given on 3 April 1987 concerning civil proceedings taken against the Netherlands State by an association of detainees who wished to challenge a special restricted-detention regime in a specific wing of the prison in The Hague, the Supreme Court held that, as individual detainees had available to them a specific remedy to challenge a transfer to the wing concerned (that is to say, the individual complaint procedure provided for in Article 51 *et seq.* of the Prison Act 1953 (*Beginselenwet Gevangeniswezen*) as in force at that time) and it was not in dispute that that remedy offered sufficient procedural safeguards, the plaintiff's case had been correctly declared inadmissible, as the association had acted solely "in the context of promoting the interests of its members", which were already safeguarded by the individual complaint procedure under Article 51 *et seq.* of the Prisons Act 1953 (NJ 1987, no. 744).

28. In a judgment given on 1 February 1991 (NJ 1991, no. 413) in a civil action against the Netherlands State brought by a co-accused of a successful applicant in Strasbourg (*Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A no. 166), the Supreme Court held:

> "It is embedded in the [Netherlands] legal system that a criminal court conviction against which an ordinary appeal can no longer be lodged not only should, but must, be executed. It is further incompatible with the closed system of legal remedies in criminal cases that a convicted person should have the opportunity, via a claim [for damage arising from tort] against the State, to bring a fresh set of legal proceedings challenging the decision of the criminal court or the acceptability of the [criminal] proceedings leading to the decision and to have [the subject matter of those proceedings] reviewed by the civil courts.
>
> Considering the obligations flowing from Articles 1, 5 and 13 [of the Convention] to secure the rights set out in Article 6 [of the Convention] and to provide an effective remedy in the event of a violation of those rights, an exception must be made to the above-mentioned rules should a ruling of the European Court [of Human Rights], which the criminal court judge could not take into account in his decision, prompt the conclusion that the decision had come about in such a manner that it could no longer

be said that there had been a fair hearing of the case within the meaning of Article 6 § 1 [of the Convention].

When such an exceptional case occurs, immediate execution of the decision can no longer be regarded as permitted under the legal system, and the person convicted can institute interim injunction proceedings [before the civil court judge] seeking – depending on the circumstances – to have execution prohibited, suspended or limited. The nature of interim injunction proceedings and the reticence to be observed by the judge in interim injunction proceedings when examining the manner in which an irrevocable decision of the criminal court judge has come about, mean that there is scope for granting such a claim only when it is beyond reasonable doubt that the ruling of the European Court [of Human Rights] indeed requires that the above-mentioned conclusion be reached."

In this case, the Supreme Court accepted the Court of Appeal's finding against the plaintiff in view of the fact that, when the impugned ruling was given on 22 December 1988, the Court had not yet delivered its judgment in the *Kostovski* case.

2. Civil actions brought by persons detained in the EBI

29. A number of persons detained in the EBI have in the past sought to bring interim injunction proceedings before the civil courts in order to have the regime, or certain aspects of it, relaxed (for further details, see *Lorsé and Others*, cited above, §§ 40-42).

3. Revision of final criminal convictions

30. On 1 January 2003 an amendment to Article 457 of the Code of Criminal Procedure (*Wetboek van Strafvordering* – "the CCP") entered into force, governing possible means of obtaining revision (*herziening*) of final judgments. This amendment extended the existing grounds on which a revision of a final conviction could be sought by including as a ground for revision a ruling by the European Court of Human Rights that the criminal proceedings leading to that conviction had been in violation of the Convention. The relevant part of the amended text of Article 457 of the CCP reads:

"1. An application for revision of a final ruling (*eindbeslissing*) entailing a conviction which has obtained the force of *res iudicata* can be lodged:

...

3°. on the ground of a ruling of the European Court of Human Rights in which it has been established that [the Convention or one of its Protocols] has been violated in the proceedings leading to the conviction ... if revision is necessary in order to secure reparation within the meaning of Article 41 of [the Convention]."

A request for revision can be lodged with the Supreme Court by the Procurator-General, the convicted person or the latter's lawyer within a period of three months after the convicted person has become aware of the

Court's ruling referred to in Article 457 (1), subparagraph 3 (Article 458 of the CCP).

31. If the Supreme Court accepts a request for revision based on Article 457 (1), subparagraph 3, it can either itself determine the criminal charges after reopening of the criminal proceedings, or order the suspension of execution of the original judgment and remit the case for a fresh determination to a Court of Appeal different from the one that gave the original judgment (Article 567 (2) of the CCP).

4. Domestic proceedings brought by applicants after proceedings under the Convention in which the Court found a violation of the Convention and in which it examined and determined claims by the applicants for just satisfaction under Article 41 of the Convention

32. In its judgment of 23 April 1997 in the case of *Van Mechelen and Others v. the Netherlands* (*Reports* 1997-III), the Court found a violation of the Convention in that the criminal proceedings against the four applicants had not been conducted in compliance with the requirements of Article 6 §§ 1 and 3 (d) of the Convention. In its judgment it awarded each of the applicants an amount for costs and expenses and adjourned its examination of the applicants' claim for non-pecuniary damage, considering that that part of the applicants' claim for just satisfaction was not ready for decision.

33. On 23 April 1997 the applicants in that case lodged a request for their immediate release from detention, failing which they would bring summary injunction proceedings against the State. On 25 April 1997 the Minister of Justice decided to grant them temporary release (*strafonderbreking*) and they were released from prison on the same day.

34. The Court determined the applicants' claims for non-pecuniary damage in its judgment of 30 October 1997 (*Van Mechelen and Others v. the Netherlands* (Article 50), *Reports of Judgments and Decisions* 1997-VII), in which it noted that under domestic law it was not possible for the applicants to obtain a retrial[1]. The applicants had claimed 250 Netherlands guilders (NLG) for each day spent in detention, resulting in total claims of between NLG 746,000 and NLG 752,500. After having examined the respondent Government's comments on those claims, the Court awarded one applicant NLG 30,000 (13,613.41 euros (EUR)) and each of the three other applicants NLG 25,000 (EUR 11,344.51) for non-pecuniary damage, and rejected the remainder of the applicants' claims for non-pecuniary damage.

[1] Since 1 January 2003, it has been possible to obtain a retrial in criminal cases. (See paragraph 28 above; see also *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 57, 10 November 2005.)

35. On 19 February 1999 the Committee of Ministers of the Council of Europe, exercising its supervisory powers under the Convention as regards the execution of the Court's judgments of 23 April 1997 and 30 October 1997, adopted a final resolution (Res DH(99)124) in the case. Having noted the measures taken by the Netherlands on the basis of the Court's judgments, the Committee of Ministers concluded that the manner in which the Netherlands had executed both judgments was in compliance with their obligations under the Convention.

36. On 29 April 1999 three of the four applicants brought a civil action in tort against the Netherlands State before the Hague Regional Court. They sought a declaratory ruling that the Netherlands State was liable for pecuniary and non-pecuniary damage arising out of unlawful administration of justice in violation of their rights under Article 6 §§ 1 and 3 (d). They sought payment of compensation corresponding to NLG 250 for each day spent in detention, less the compensation amount awarded by the Court. They based their claims on the argument that, given the Court's findings in its judgment of 23 April 1997, it had been established that in the domestic criminal proceedings against them the Netherlands judge had breached fundamental legal principles and that the resulting judgment and their detention had been unlawful.

37. In its judgment of 5 July 2003, following appeal proceedings taken by the Netherlands State, the Hague Court of Appeal quashed the impugned judgment given on 17 January 2001 by the Regional Court, and for the time spent in detention (pre-trial and following conviction) awarded compensation for non-pecuniary damage to the first plaintiff in the amount of EUR 190,240, less EUR 13,613.41 already awarded by the Court. It awarded the second plaintiff EUR 127,120, less EUR 11,344.51 awarded by the Court, and the third plaintiff EUR 127,140, less EUR 11,344.51 awarded by the Court. The Court of Appeal held, *inter alia*, that:

> "The finding of the European Court [of Human Rights] that full redress (*volledige genoegdoening*) by means of a 'retrial' in the Netherlands is not possible, means that the European Court may award compensation on grounds of equity (*vergoeding naar billijkheid*), but not that in subsequent civil proceedings the domestic judge can no longer award full compensation for damage (*volledige schadevergoeding*). The State's argument, that [the three plaintiffs] requested compensation for damage for the first time before the European Court and not previously before the domestic judge, and that the European Court would have taken into account in its judgment the same claims for damages (*schadeposten*) as those now in issue in the present procedure, fails because no rule exists prohibiting the bringing of a claim before the Netherlands judge seeking compensation for damage, a part of which – namely an award in equity – has already been awarded in separate proceedings before the European Court."

38. In its judgment of 18 March 2005 on the appeal on points of law brought by the Netherlands State against the ruling of 5 July 2003, the Supreme Court held that the State had been correct in not challenging this part of the reasoning in the impugned judgment.

39. On 4 February 2003 the Court delivered its judgment in the case of *Lorsé and Others* (cited above), finding a violation of Article 3 of the Convention in respect of the applicant Lorsé in that, during his stay in the EBI of more than six years, the applicant – who was already subjected to a great number of control measures – had been subjected to weekly routine strip-searches without convincing security reasons. It found no violation in respect of the other grievances raised by Mr Lorsé and the other applicants (his spouse and his children) under Articles 3, 8 and 13 of the Convention. As regards damages, the applicants requested the Court to award them a symbolic amount of NLG 1,000 (EUR 453.78), stating that no amount of money would be capable of compensating for the harm suffered by them. Taking the view that Mr Lorsé had sustained some non-material damage on account of the treatment which had been found contrary to Article 3, the Court awarded him for non-pecuniary damage EUR 453.78, that is to say, the full amount claimed under that head.

40. On 6 February 2003 Mr Lorsé brought summary injunction proceedings against the Netherlands State before the judge responsible for provisional measures in the Civil Law Division of the Hague Regional Court, seeking an order against the State to cease with immediate effect the execution of the fifteen-year prison sentence that had been imposed on him, to release him immediately from prison and not to seek payment of the fine of NLG 1,000,000 (EUR 453,780.22) that had also been imposed.

41. On 12 February 2003 the judge responsible for provisional measures ruled on the applicant's request. This decision, in its relevant part, reads:

> "3.1. The plaintiff has an urgent interest in his claim. The civil court judge – in this case the judge responsible for provisional measures in summary injunction proceedings – is empowered to take cognisance [of the case], as the plaintiff claims that the State has acted unlawfully toward him by, *inter alia,* continuing his detention.
>
> 3.2. For the determination of the claim, it is a fact that the State has violated the applicant's rights under Article 3....
>
> 3.3. Under Article 41 of [the Convention] the applicant is entitled to reparation (*rechtsherstel*) in respect of this irreparable violation of the Convention. If need be, he can assert that right before the courts. The State is deemed to be acting unlawfully towards him if no suitable form of redress is provided.
>
> 3.4. The parties provide different answers to the question as to whether the measures requested by the plaintiff ... constitute a form of redress compatible with our legal system and, if so, whether those measures are suitable and appropriate in this case.
>
> 3.5. [The judge responsible for provisional measures rejects] the argument of the State that the closed system of legal remedies in criminal proceedings and the corresponding obligation of the State to execute rulings of the criminal courts, militate against this form of redress. In this system, no provision has been made to date for (a suitable response to) a violation of the kind at issue in the instant case. There have been no prior similar cases, and the possible occurrence of such cases has apparently

not been taken into consideration in legislation or in existing case-law. In principle, early release or non-execution of a fine imposed may constitute a suitable form of redress for a violation of Article 3 of the Convention of the kind in issue. This exception to the closed system of legal remedies in criminal cases is, to that extent, consistent with the Supreme Court's approach in its judgment of 1 February 1991 (NJ 1991, 413).

3.6. The State has referred to the financial compensation awarded by the [European Court of Human Rights] and to the just satisfaction which, in the case of the applicant, lies in the fact that his complaint was declared well-founded [by the European Court of Human Rights]. However, these two elements do not form a suitable, and certainly not a sufficient, form of redress for the plaintiff. Consequently, they do not stand in the way of the claims being allowed. The plaintiff can request the domestic judge to order that additional measures be taken.

3.7. In reply to a question, the State stated that it was possible, in this respect, to consider measures such as the plaintiff's serving the remainder of his prison sentence under a less strict regime or the granting of a pardon in accordance with existing procedure. ... Again, these options do not form an obstacle to allowing the claims. The first option does not constitute sufficient redress in this case, while the option of a pardon corresponds to (a request for) a concession rather than the granting of a right, which is what is at issue here.

3.8. In these circumstances, the State should release the plaintiff earlier than June 2004 [when the plaintiff becomes eligible for early release] and waive the execution of the sentence in its entirety. Having regard to the nature of the violation of the Convention which is an established fact, a form of redress (*genoegdoening*) which relates to the applicant's liberty is more suitable, and in any event warrants greater priority than waiving payment of the part of the fine still outstanding.

3.9. No fixed standard exists for 'offsetting' the remaining part of the plaintiff's prison sentence. There are no pertinent reference points on the subject in the existing legislation. This means that the amount of the compensation must be determined on an equitable basis (*naar billijkheid*). The seriousness of the violation [of the Convention] justifies reduction of the sentence by a period equal to 10% of the number of days for which the applicant was subjected to the regime in the EBI... This amounts to a reduction of 230 days (round figure)...

3.10. On the basis of this solution, the plaintiff's claim should be rejected. Indeed, the plaintiff has no urgent interest in a provisional measure which will only take effect after about nine months [when the applicant has served his mitigated sentence]... It is assumed that the State (the Minister of Justice) will execute this ruling and release the plaintiff at a time that can be determined precisely on the basis of the standard set out here. If need be, the plaintiff can apply again in due course to the judge responsible for provisional measures.

3.11. Each of the parties can in fact be deemed to have been ruled against."

42. Both parties agreed to lodge a direct "leapfrog" appeal on points of law (*sprongcassatie*) with the Supreme Court, which dismissed both appeals on 31 October 2003. Although it agreed with the Netherlands State that the judge responsible for provisional measures had incorrectly assumed that

Article 41 of the Convention gave Mr Lorsé an (independent) right to redress which, if need be, could be asserted before the domestic judge, it held that this could not lead to the setting-aside of the judgment as, pursuant to the Convention, the State was obliged to provide redress. However, relying on the Court's reasoning in the cases of *Papamichalopoulos and Others v. Greece* ((Article 50), judgment of 31 October 1995, Series A no. 330-B) and *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII), the Supreme Court considered that, although the State was in principle free to determine the manner in which redress was to be provided, that freedom did not mean that the domestic judge was unable to take a decision on that point, but simply that a suitable form of redress was to be sought within the domestic legal order. As the Netherlands State had acted unlawfully towards Mr Lorsé in so far as his rights under Article 3 had been violated, as found by the Court, Mr Lorsé was entitled to claim compensation from the State, which would be acting unlawfully if it failed to provide a suitable form of redress. The Supreme Court accepted that such compensation could be granted in a manner other than the payment of a sum of money. In cases such as the present one, where the violation found concerned the manner of execution of a custodial sentence, it could take the form of cessation of the execution of the sentence. The Supreme Court found that the order of the judge responsible for provisional measures to cease execution of the prison sentence should be regarded as a suitable form of compensation in kind in the case of Mr Lorsé. As regards the argument raised by the State that the closed system of legal remedies and the corresponding obligation for the State to execute rulings of the criminal courts precluded the form of redress claimed by Mr Lorsé, the Supreme Court – while acknowledging that there was a difference between a situation in which the violation found concerned a domestic criminal conviction itself or the proceedings having led to that conviction [as in the case of *Van Mechelen and Others*] and a situation in which the violation found was unrelated to such a conviction or proceedings [as in the case of Mr Lorsé] – held that this difference did not mean that the judge responsible for provisional measures had based point 3.5 of the impugned ruling on an incorrect interpretation of the law. Given the particular circumstances of the case, the violation of Article 3 found by the Court and the fact that there was no specific statutory remedy for determining redress for such a violation, the Supreme Court concluded that in that case an exception to the closed system of legal remedies could be accepted. It further found that the judge responsible for provisional measures had given sufficient reasons as to the determination of the compensation awarded to Mr Lorsé.

43. In its judgment of 8 April 2003 in the case of *M.M. v. the Netherlands* (no. 39339/98), in which the applicant complained that his telephone conversations with a Mrs S. had been recorded by the latter with equipment provided by the police with a view to their use as

prosecution evidence against him, the Court found a violation of Article 8 of the Convention on the ground that the conversations in question had not been recorded "in accordance with the law". As the applicant had declined to submit any claims for compensation in respect of pecuniary or non-pecuniary damage, stating that he intended instead to pursue such claims before the domestic courts, the Court made no award for just satisfaction under those headings. In so far as the applicant claimed compensation for legal costs and expenses incurred by him in the domestic proceedings, the Court rejected the applicant's argument that the criminal proceedings against him had resulted entirely from the violation it had found in his case, taking the view that those proceedings had in fact been occasioned by a reasonable suspicion of wrongdoing on the applicant's part, and recalling that it had already at the admissibility stage rejected the applicant's complaints touching on the use made of the evidence obtained as a result of the violation found.

44. On an unspecified date and on the basis of the Court's findings in its judgment of 8 April 2003, the applicant M.M. filed a request with the Supreme Court for revision of the final domestic judgment of 16 June 1995, in which the Court of Appeal – without the recorded telephone conversations having been relied on in evidence – had convicted him of having sexually assaulted Mrs S. and another woman and had sentenced him to a suspended term of four months' imprisonment and payment of a fine of NLG 10,000 (EUR 4,537.80), to be replaced by 100 days' detention in the event of non-payment.

45. On 27 September 2005 the Supreme Court accepted the request for revision and, in accordance with Article 467 (2) of the CCP, determined the matter itself. It held:

> "4.4. ... the State has the obligation to provide redress if the European Court of Human Rights has found a violation of a Convention provision. Such redress can be provided entirely or in part within the framework of the revision procedure, amended for this purpose.
>
> 4.5. Having regard to the violation of Article 8 found by the European Court of Human Rights, the Supreme Court is of the opinion that revision is necessary for the purposes of redress. To that extent, the request is well-founded. ... The request is aimed primarily at having the Supreme Court declare the prosecution inadmissible, while quashing the judgment in respect of which revision is sought.
>
> 4.6. The Supreme Court cannot accede to this request since it is only in exceptional cases that a prosecution may be declared inadmissible, and the instant case cannot be considered as such. In this respect the petitioner relies mistakenly on [the Supreme Court's judgment of 19 December 1995; NL 1996, no. 249]. In that case the Supreme Court held that, in certain circumstances, a serious breach of the principles of proper proceedings may lead to the prosecution being declared inadmissible if, as a result of that breach, deliberately or owing to gross negligence of the defendant's interests, the defendant's right to a fair hearing has been violated. As the European Court of Human Rights, in its decision on admissibility [*M.M.. v. the Netherlands* (dec.), no. 39339/98]

of 21 May 2002, preceding its judgment of 8 April 2003, declared inadmissible the [applicant's] complaint under Article 6 of the Convention as being manifestly ill-founded, it cannot be said that there has been a serious breach of the principles of proper proceedings as a result of which, deliberately or owing to gross negligence of the [applicant's] interests, his right to a fair hearing has been violated.

4.7. Taking into account that, in the proceedings leading to the judgment of which revision is sought, there was no breach of Article 6 and that the contents of the recorded telephone conversations were not used in evidence, there is no ground for referring the case to another Court of Appeal under Article 461 of the CCP for the purposes of obtaining redress, as requested by the petitioner in the alternative.

4.8. In the light of the importance of the provision violation and the nature and seriousness of the irreparable defects in the preliminary criminal investigation, as found by the European Court of Human Rights, the Supreme Court will, after accepting the [revision] request, determine the matter itself, in accordance with Article 467 (2) of the CCP, and reduce the fine imposed by the Court of Appeal in the following manner."

The Supreme Court quashed the original judgment of the Court of Appeal in part, that is, in respect only of the amount of the fine imposed and the duration of the alternative detention period, reducing the fine by 10% to EUR 4,000 and the duration of the alternative detention to 90 days.

III. RELEVANT INTERNATIONAL TEXTS

46. The findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as regards the EBI, as set out in its Report on the visit to the Netherlands from 17 to 27 November 1997, together with the Netherlands Government's response to these findings, are set out in the Court's judgment of 4 February 2003 in the case of *Van der Ven* (cited above, §§ 32-35).

47. The CPT visited the Netherlands again from 17 to 26 February 2002 and, in the course of this visit, carried out a follow-up visit to the EBI. Its findings were the following (Report to the Authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe and to the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in February 2002, CPT/Inf (2002) 30, excerpts):

"33. At the time of the February 2002 visit, the Extra Security Institution (EBI) at the Nieuw Vosseveld Prison Complex was being renovated, and the inmates allocated to it were being held in the Temporary Extra Security Institution ((T)/EBI) building nearby (cf. paragraph 58 of CPT/Inf (98) 15).

In addition to paying a brief visit to the facilities undergoing renovation, the CPT's delegation examined the regime currently being applied, and devoted attention to the procedures governing placement and extension of placement in EBI. In the course of the visit, interviews were held with all 14 inmates, the establishment's management and staff, as well as representatives of the EBI Selection Board.

...

c. regime

37. Following its first visit to the EBI, the CPT expressed considerable concern about the regime applied within the institution. It recommended that the regime be revised, in particular as regards certain of its features: the group system (if not discarded, to at least be relaxed and inmates to be allowed more out-of-cell time and a broader range of activities); searching policies (to be reviewed in order to ensure that they are strictly necessary from a security standpoint); and visiting arrangements (to be reviewed, the objective being to have visits take place under more open conditions) (cf. paragraphs 61 to 70 of CPT/Inf (98) 15).

However, in their response (dated 1 March 1999) to the CPT's visit report, the Dutch authorities defended point by point the different aspects of the regime being applied in the EBI (cf. paragraph 29 of CPT/Inf (99) 5).

38. In the course of the February 2002 visit, the Director of the Nieuw Vosseveld Prison Complex and the Acting Director of the EBI informed the CPT's delegation that a limited number of modifications to the regime and its implementation had taken place. For instance, steps were being taken to increase staff/inmate communication through a training programme known as "Safety at the door", as well as by the previously-mentioned adaptations of the exercise yards. Further, a slight expansion of the types of activities offered had made it possible for inmates to practice playing musical instruments in their cells. Another positive development was that the special "handcuffs regime" (cf. paragraph 8 of CPT/Inf (98) 15) had not been applied in respect of any inmate since 1999.

However, despite these welcome developments, the regime in the unit was essentially the same as in 1997, and the prison's management acknowledged that there had been "no change in most of the rules". Although the official allowance for activities was generous (50 or more hours per week), in practice, most inmates' out-of-cell time did not appear to have increased (averaging 2 to 4 hours per day). The stringing of plastic curtain hooks on short rods, which was performed individually in the cells, continued to be the only work offered. It remained the case that body searches - including anal inspections - were performed on each prisoner at least once a week [13], a process which was invariably perceived as humiliating. Conditions under which visits and sessions with non-custodial staff took place also continued to be very restrictive. Inmates' remarks to the delegation (e.g. "losing positivity", lacking "future feelings", "beginning to hate people from the heart", and/or having to cope by being "mentally separate") frequently echoed those made in November 1997.

To sum up, inmates held in the EBI remained subject to a very impoverished regime.

39. In an environment which is potentially hazardous to the mental health of prisoners, it is of critical importance to provide a varied programme of appropriate stimulating activities (including education, sport, work of vocational value, etc.). *The CPT calls upon the Dutch authorities to make further efforts with a view to increasing out-of-cell time, allowing for more human contact, expanding the range of activities (work and education), and alleviating searching measures for prisoners held in the EBI. Less constrained contact should be encouraged with all staff.*

Following a recommendation made by the CPT in its previous periodic visit report (cf. paragraph 70 of CPT/Inf (98) 15), the Dutch authorities commissioned the University of Nijmegen to carry out an independent study of the psychological state of current and former inmates of the EBI. A preliminary study completed on 17 April 2000 concluded that "an empirical examination of the possible effects of a maximum security regime on the mental conditions of prisoners is feasible." The Dutch authorities have indicated that such an empirical examination has in fact commenced and would be completed by Summer 2003. *The CPT trusts that it will receive the results of the study in due course.*

One point raised by the preliminary study may be noted, i.e that the lack of influence of detainees on the severity of the regime being applied to them constitutes a "contradiction in the policy" of the EBI. *The Committee would like to receive the views of the Dutch authorities on this statement.*

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13. Each prisoner was also subjected to such a search before and after being interviewed by members of the CPT's delegation."

48. The Netherlands Government responded to these findings in the following terms (CPT/Inf (2003) 39, excerpts):

"The "Extra Security Institution" at the Nieuw Vosseveld Prison Complex

recommendations ...

- the Dutch authorities to make further efforts with a view to increasing out-of-cell time, allowing for more human contact, expanding the range of activities (work and education), and alleviating searching measures for prisoners held in the EBI. Less constrained contact should be encouraged with all staff (paragraph 39)

Response: Prisoners in the EBI spend a total of about 52 hours a week on out-of-cell activities, and these activities are no less varied than in other prisons. They include exercise, visits, sport, work, education and recreation. Not all prisoners take part in all activities. What they do depends partly on interest and ability. The work in the EBI is simple. However, it is difficult to provide work that is more varied and yet meets security requirements. In principle, work in the EBI is done jointly. The Government refutes the claim that, on average, prisoners participate in activities for no more than between two and four hours a day. In fact they spend an average of four to five hours a day in out-of-cell activities.

The Government agrees that prisoners and staff should have more contact. Fenced-off walkways for staff have now been erected in the exercise yards. They provide more opportunities for informal contact and interaction between prisoners and staff.

The number of searches has been sharply reduced since the opening of the EBI. Besides a weekly search during cell checks, searches are carried out after visits to areas containing potentially dangerous objects, such as the hairdresser's or the doctor's or dentist's surgery, and after contact with the outside world, such as visits. Searches are still necessary from the point of view of security. The Government would point out that searches are also conducted in ordinary prisons.

On 4 February 2003, in two separate cases against the Netherlands, the European Court of Human Rights ruled that: "the combination of routine strip-searching with the other stringent security measures in the EBI amounted to inhuman or degrading treatment in violation of article 3 of the Convention. There has thus been a breach of this provision." (Van der Ven v. the Netherlands, Application no. 50901/99, ECtHR 4 February 2002, § 63; see also Lorsé et al v. the Netherlands, Application no. 52750/99, ECtHR 4 February 2002, § 74). These judgments and other considerations have prompted the Government to stop routine weekly searches in the EBI over a long period of time. The EBI's regulations will be amended.

...

requests for information

- the results of the "empirical examination of the possible effects of a maximum security regime on the mental conditions of prisoners", being conducted by the University of Nijmegen (paragraph 39)

Response: The study is expected to be completed by autumn 2003 as indicated. As soon as the findings are available, the Government will forward them to the Committee.

- the views of the Dutch authorities on the statement, made in the preliminary study carried out by University of Nijmegen, to the effect that the lack of influence of detainees on the severity of the regime being applied to them constitutes a "contradiction in the policy" of the EBI (paragraph 39)

Response: The Government understands the point made in the preliminary study concerning the lack of influence that prisoners have on the regime. However, opportunities to exercise influence are necessarily more restricted in the EBI than in other prisons because of the nature of the system. The facility is exclusively for prisoners who are highly likely to abscond or who pose a serious threat to society. Placement in the EBI is mainly determined by considerations of safety and security. In this sense the EBI differs from other prisons. The emphasis on safety and security means that placement in the EBI does not depend on a prisoner's behaviour but on the risk he represents."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

49. The applicant complained that the weekly routine strip-searches to which he had been subjected between 16 July 2001 and 21 November 2002 in the course of his detention in the EBI were incompatible with his rights under Article 3 and Article 8 of the Convention.

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The parties' submissions

50. The Government submitted that domestic remedies had not been exhausted, as the applicant had brought a civil action in tort against the Netherlands State claiming, *inter alia*, compensation for non-pecuniary damage suffered on account of having been subjected to allegedly humiliating and unnecessary strip-searches in the EBI. Furthermore, if the applicant were to be awarded any compensation in those proceedings, he could no longer be regarded as a victim for the purposes of Article 34 of the Convention. The Government were therefore of the opinion that the application should be declared inadmissible.

51. The applicant disagreed. He submitted that he could only apply to the civil court for early release or payment of damages for the treatment to which he had been subjected in the EBI as, according to the Netherlands legal system, the civil courts did not in principle have jurisdiction to determine whether the treatment of detainees was in accordance with the Convention. Complaints about detention in the EBI and complaints about the EBI regime had to be brought before the penitentiary judge. Only if the latter refused to take a decision as to the merits could the civil judge act as a "last resort judge" within the closed system of legal remedies. However, the civil judge could not overrule the penitentiary judge's ruling on the merits.

2. The Court's assessment

52. The Court reiterates the relevant principles as to exhaustion of domestic remedies as set out in, *inter alia*, its judgment of 28 July 1999 in the case of *Selmouni v. France* ([GC], no. 25803/94, §§ 74-77, ECHR 1999-V). The purpose of Article 35 § 1 of the Convention is to afford the

Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The obligation to exhaust domestic remedies is, however, limited to making use of those remedies which are likely to be effective and available, meaning that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention.

53. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see, for instance, *Reilly v. the United Kingdom* (dec.), no. 53731/00, 26 June 2003).

54. In the present case, the ordinary remedy for challenging a decision to transfer to, or prolong detention in, the EBI was to appeal to the Appeals Board of the Central Council for the Administration of Criminal Justice or, after 1 April 2001, the Appeals Board of the Council for the Administration of Criminal Justice and Protection of Juveniles, a remedy of which the applicant in fact availed himself. The Court has further found no indication that a civil action against the State has ever been entertained by a domestic civil court on the basis of a finding that this specific remedy before the Appeals Board did not offer sufficient guarantees of fair proceedings or that in such appeal proceedings fundamental legal principles had been breached. Consequently, the Court has found no reason for concluding that, for the purposes of Article 35 § 1 of the Convention, the applicant should have turned to the civil courts after his appeals to the Appeals Board were rejected.

55. This finding is not altered by the fact that proceedings concerning the civil action in tort brought by the applicant are currently pending before the Regional Court, as these proceedings concern a claim for compensation in respect of non-pecuniary damage comparable to a claim under Article 41 of the Convention. The Court therefore finds it appropriate to examine this point under that provision.

56. In these circumstances, the Court finds that the application cannot be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. It further finds that the application is not inadmissible on any other grounds. Consequently, it must be declared admissible.

B. Merits

57. The applicant complained that the weekly routine strip-searches to which he had been subjected between 16 July 2001 and 21 November 2002 in the course of his detention in the EBI infringed his rights under Article 3 and Article 8 of the Convention.

58. The Government's submissions did not address the merits of the case.

59. The Court notes that the applicant was detained from 26 June 1998 until 24 December 2003 in the EBI where, until 1 March 2003, when this practice was abandoned, he was subjected to routine weekly strip-searches.

60. The Court recalls that, in its judgments of 4 February 2003 in the cases of *Van der Ven* and *Lorsé and Others*, cited above, it found that this practice amounted to treatment contrary to Article 3 of the Convention and that, in view of this conclusion, no separate examination under Article 8 was necessary. As regards the routine weekly strip-searches to which the applicant was subjected between 16 July 2001 and 21 November 2002, the Court sees no reason to distinguish the present case from the cases of *Van der Ven* and *Lorsé and Others*.

61. There has accordingly been a violation of Article 3 of the Convention.

62. Having regard to its above finding relating to Article 3, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

63. 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."

64. Article 46 of the Convention reads:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. Damage

1. The parties' submissions

65. The applicant, pointing out that he had been detained in the EBI for a period of about five and a half years, during which he had been subjected to weekly routine strip-searches on account of which he had suffered considerable psychological damage that could not be expressed in monetary terms, left determination of the award for compensation in respect of non-pecuniary damage to the discretion of the Court. In that connection the applicant submitted that, in the case of *Van der Ven*, who had been detained in the EBI for three and a half years, the Court had made an award of EUR 3,000 under that head. The applicant considered that compensation for non-pecuniary damage based on the standard used by the Court in the case of *Van der Ven* would not accurately reflect the extent of the psychological distress he had suffered in the EBI, where – according to the findings of a psychiatrist – he had developed chronic post-traumatic stress disorder and a depressive disorder as a result of his treatment. Consequently, the award for compensation in respect of non-pecuniary damage should be much higher than the award made in the case of *Van der Ven*.

66. The Government submitted that an award for compensation for non-pecuniary damage should be proportionate to the period of the applicant's detention in the EBI falling within the scope of the application. In the instant case, that period was sixteen months.

2. The Court's decision

67. Having found a violation of a substantive Convention provision, the Court must now consider how Articles 41 and 46 are to be applied. The unusual situation has arisen whereby an applicant has brought proceedings in a domestic court aimed at securing a monetary award in respect of non-pecuniary damage for a violation of the Convention even before the Court itself has given judgment, notwithstanding the fact that in the light of the Court's findings in the cases of *Van der Ven* and *Lorsé and Others*, cited above, the instant case can be qualified as a repetitive or "clone" case.

68. As regards claims for damage arising from a violation of a Convention provision, the Court cannot allow proceedings before it and proceedings in a domestic court aimed at precisely the same intended result to be actively pursued in parallel. It makes little difference in this respect whether such parallel domestic proceedings are already pending at the time when the application is lodged with the Court, in which case the application is inadmissible under Article 35 § 1 of the Convention, or whether the application is lodged with the Court first. The Court's decision, however, cannot be the same in both cases: the Convention does not contain any provision corresponding to Article 35 § 1 covering the latter eventuality.

69. For the sake of clarity it is worth noting that the rule that domestic remedies should be exhausted does not apply to just satisfaction claims submitted to the Court under Article 41 (formerly Article 50) of the Convention (see *De Wilde, Ooms and Versyp v. Belgium* (Article 50), judgment of 10 March 1972, Series A no. 14, pp. 7-9, §§ 15-16).

70. In deciding how to address the situation that the applicant has created, the Court must have regard to the object and purpose of the Convention. These are stated in the Preamble to the Convention, the most significant passage of which is the fifth paragraph, in which the signatory Governments declare that they are "resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration" of 10 December 1948 (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 16, § 34).

71. The Court must next consider its task as an institution created by the Convention. The Court's task, set it by Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. This it does by giving judgments and decisions interpreting the provisions of the Convention in specific cases on the basis of applications submitted under Articles 33 and 34 of the Convention by High Contracting Parties and persons, non-governmental organisations or groups of individuals claiming to be victims of violations of their rights, respectively, and by giving advisory opinions on questions within its competence at the request of the Committee of Ministers (Article 47 of the Convention; see also *Decision on the Competence of the Court to give an Advisory Opinion*, ECHR 2004-VI).

72. Under Article 41 of the Convention, the Court may afford just satisfaction to a party injured by a violation of the Convention or its Protocols if the internal law of the High Contracting Party concerned does not allow complete reparation to be made. However, the Court is enjoined to do so only "if necessary". Consequently, although the Court is sensitive to the effect which its awards under Article 41 may have and makes use of its powers under that Article accordingly (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 176, ECHR 2006-...), the awarding of sums of money to applicants by way of just satisfaction is not one of the Court's main duties but is incidental to its task of ensuring the observance by States of their obligations under the Convention.

73. Seen in this light, there can be no doubt of the greater importance of Article 46 of the Convention in comparison with Article 41. Under Article 46, the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties, the execution being supervised by the Committee of Ministers. One of the effects of this is that where the Court finds a violation, the respondent State has a legal obligation

not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scordino*, cited above, § 233). Furthermore, under the Convention, particularly Article 1, in ratifying the Convention, the Contracting States undertake to ensure that their domestic law is compatible with the Convention (see *Scordino*, cited above, § 234).

74. In relation to a party injured by a violation of a provision of the Convention or its Protocols, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Scordino*, cited above, § 246).

75. At the individual level as at the level of general measures, the Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, neither the Court nor for that matter the Committee of Ministers having the power or the practical possibility of doing so themselves. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Scordino*, cited above, § 247).

76. It should be observed at this point that the Court makes, under Article 41, such awards as in its view constitute "just satisfaction" for the violations which it has found. Once the Court's judgment has been executed in accordance with Article 46 – that is, once the necessary general and individual measures have been taken to put an end to the violation found and provide redress for its effects – any additional awards over and above those made by the Court are at the discretion of the competent domestic authorities. More specifically, once the Court has given judgment, found a violation of the Convention and awarded the applicant concerned compensation for damage under Article 41 for this violation, the Contracting State may – if it sees fit – grant the applicant concerned further

compensation, either in the form of extra money or in another form such as mitigation of a sentence imposed, in addition to the award for just satisfaction under Article 41 of the Convention already made by the Court. This occurred for instance in the cases of *Van Mechelen and Others* (cited above, §§ 32-38) and *Lorsé* (cited above, §§ 39-42). Such voluntary additional compensatory measures, however, do not have any basis in Article 41 or 46 of the Convention nor in any other provision of the Convention and its Protocols.

77. In the present case the Court considers that the nature of the violation found does not allow for *restitutio in integrum* in that – unlike a situation where criminal proceedings have been found to have infringed Article 6 of the Convention and a reopening of the criminal proceedings is possible under Netherlands law on the basis of that finding – the strip-searches complained of, which have not caused the applicant any pecuniary damage, simply cannot be undone. Consequently, only an award for non-pecuniary damage – to be determined on an equitable basis – can be envisaged.

78. Before examining the claim for compensation of non-pecuniary damage submitted by the applicant under Article 41, and having regard to the circumstances of the case, the domestic case-law as regards civil actions brought by a number of successful applicants in Strasbourg and the evolution of its workload, the Court proposes to examine what consequences may be drawn from Article 46 for the respondent State in the instant case.

79. It is not normally for the Court to determine what may be the appropriate measures of redress for a respondent State to adopt in accordance with its obligations under Article 46 of the Convention. However, having regard to the fact that the violation which the Court found in the judgments in the cases of *Van der Ven* and *Lorsé and Others*, cited above, concerned a practice to which all persons detained in the EBI until 1 March 2003 were subjected, the Court would observe that general measures at the national level were undoubtedly called for in the execution of those judgments and that those measures should take into consideration the entire group of individuals affected by the practice found to be in breach of Article 3. Furthermore, such measures should be such as to remedy the Court's finding of a violation in respect of a general practice, so that the system established by the Convention is not compromised by a large number of repetitive applications stemming from the same cause. Such measures must therefore include a mechanism for providing injured persons with compensation for the violation of the Convention established in the cases of *Van der Ven* and *Lorsé and Others*. In that connection the Court's concern is to facilitate the rapid and effective correction of a defect identified in the national system of human-rights protection. Once such a defect has been identified, the national authorities have the task, subject to

supervision by the Committee of Ministers, of taking – retrospectively if necessary – the necessary measures of redress in accordance with the principle of subsidiarity under the Convention, so that the Court does not have to reiterate its finding of a violation in a series of comparable cases.

80. As to the Netherlands authorities' response to the Court's judgments of 4 February 2003 in the cases of *Van der Ven* and *Lorsé and Others*, the Court notes that the practice of weekly routine strip-searches, which was found to be in breach of Article 3, was abolished on 1 March 2003 and that it has found the new practice as regards strip-searches in the EBI, as applied since 1 March 2003, to be compatible with Article 3 (see *Baybaşın* (dec.), cited above). The Court further understands that, under domestic law, it is possible for detainees who have been subjected to this particular practice found contrary to Article 3 in the cases of *Van der Ven* and *Lorsé and Others* to bring a civil action against the Netherlands State in order to obtain compensation for non-pecuniary damage sustained as a result of the practice of weekly routine strip-searches, which has now been abolished.

81. Although it is not for the Court, but for the Committee of Ministers, to determine whether such measures are sufficient for the purposes of Article 46, it considers that these measures are likely to prevent further admissible applications to the Court stemming from the same cause.

82. The Court further understands from the ruling of 12 February 2003 by the judge responsible for provisional measures and the subsequent judgment of 31 October 2003 of the Supreme Court (see paragraphs 41-42 above), and also from the judgment of 5 July 2003 of the Court of Appeal and the subsequent judgment of 18 March 2005 of the Supreme Court (see paragraphs 37-38 above), that proceedings before the Court concerning claims for just satisfaction filed by applicants under Article 41 do not form part of the closed system of legal remedies in the Netherlands domestic legal system, as in both these sets of civil proceedings – brought against the Netherlands State by successful applicants in Strasbourg in whose cases the Court had examined and determined claims for non-pecuniary damage under Article 41 – the domestic courts agreed to consider the applicants' claims for compensation for non-pecuniary damage arising out of the violation found by the Court, and in both cases made an award for compensation for non-pecuniary damage in addition to the award already made by the Court.

83. Having regard to the fact that the applicant in the instant case has already brought proceedings before the Hague Regional Court seeking compensation for non-pecuniary damage suffered on account of having been subjected to weekly routine strip-searches contrary to Article 3, the Court considers that in these circumstances this aspect of the case is not yet ready for decision. Without prejudging its determination of this part of the case, the Court considers that the medical report obtained by the applicant himself after his release from the EBI cannot, by itself, be regarded as

decisive for the question as to whether the psychological impact of the EBI detention regime and the practice of weekly routine strip-searches on the applicant's mental health was comparable to or worse than the impact they had on *Van der Ven* and *Lorsé*, warranting an award of the same or a higher amount for non-pecuniary damage. However, the proceedings on the applicant's request to the Hague Regional Court are still pending, and the Court wishes to take into account – in case it must determine the applicant's claim under Article 41 for compensation in respect of non-pecuniary damage – the compensation for non-pecuniary damage that the applicant may obtain under domestic law (see *Clooth v. Belgium*, judgment of 12 December 1991, Series A no. 225, p. 17, § 52).

84. Consequently, the question of the application of Article 41 is not yet ready for decision and should be reserved pending a final domestic decision on this matter, due regard being had to the possibility that on this point and during the domestic proceedings a friendly settlement may be reached between the respondent State and the applicant (Rule 75 § 1 of the Rules of Court).

B. Costs and expenses

85. The applicant claimed EUR 2,856, including 19% value-added tax (VAT), in respect of the costs and expenses incurred by him. According to the bill submitted, this amount corresponded to twelve hours' work by his lawyer at an hourly rate of EUR 200.

86. The Government submitted that the lawyer's fees claimed by the applicant merely corresponded to the number of hours worked by the applicant's representative, without specifying to which proceedings these activities related. The Government further submitted that, as the applicant had been granted legal aid under the Netherlands legal aid scheme for the domestic proceedings as well as the proceedings before the Court, the costs claimed – in so far as they related to those proceedings – did not qualify for compensation.

87. The Court recalls that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

88. According to Rule 60 § 2 of the Rules of Court, itemised particulars of all claims made are to be submitted, failing which the Chamber may reject the claim in whole or in part.

89. In the present case, the Court notes that the bill of fees submitted does not specify the nature of the work. The applicant has further not indicated whether, and if so, to what extent he was granted legal aid under

the Netherlands legal aid scheme for the domestic proceedings and the present proceedings before the Court.

90. Considering that, in these circumstances, this part of the applicant's Article 41 claim is also not ready for decision, the Court considers it appropriate to reserve its determination thereof, due regard being had to the possibility that on this point also a friendly settlement may be reached between the respondent State and the applicant (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible by a majority;

2. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

3. *Holds* unanimously that there is no need to examine the complaint under Article 8 of the Convention;

4. *Holds* unanimously that the question of the application of Article 41 of the Convention in respect of the applicant's claims under this provision is not ready for decision;
   accordingly,
   (a) *reserves* the said question;
   (b) *invites* the Government and the applicants to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 6 July 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President