



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

FIRST SECTION

CASE OF ORR v. NORWAY

(Application no. 31283/04)

JUDGMENT

STRASBOURG

15 May 2008

FINAL

01/12/2008

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 Orr v. Norway,

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

Christos Rozakis, *President*,

Nina Vajić,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 1 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 31283/04) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr Marcus Orr (“the applicant”), on 16 August 2004.

2. The applicant was represented by Ms S. Zanker, a lawyer practising in London. The Norwegian Government (“the Government”) were represented by their Agent, Mrs F. Platou Amble, Attorney, Attorney General’s Office (Civil Matters).

3. The applicant alleged a violation of Article 6 § 2 of the Convention on account of the national court’s decision, despite his acquittal on criminal charges, to order him to pay compensation to the victim.

4. On 19 October 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 7 August 2001, the applicant co-piloted a British Airways flight from Newcastle to Gardermoen Airport outside Oslo. There were three other crew members on board, including Ms C. (1st Cabin Crew). All four

crew members were to stay overnight at an airport hotel before flying back to the United Kingdom the next day.

6. On 1 November 2002 the Eidsvoll District Court (*tingrett*) convicted the applicant of having raped C and sentenced him to 2 years' and 6 months' imprisonment and ordered him to pay her NOK 75,000 for non-pecuniary damage and NOK 160,000 for pecuniary damage.

7. On an appeal by the applicant, the Eidsivating High Court (*lagmannsrett*), sitting with a jury, held a fresh hearing in the case. The jury answered the questions relating to the charges in the negative (no reasons are given by a jury). The professional judges decided to pass judgment on the basis of the jury's verdict and acquitted the applicant by a judgment of 20 March 2003.

8. Ms C. maintained the claim that the applicant was civilly liable to pay compensation under the Damage Compensation Act 1969. The High Court, consisting of the professional judges, considered the claim the next day. By two votes to one the High Court concluded, in the same judgment, that the applicant was liable and ordered him to pay NOK 74,000 in compensation for pecuniary damage and NOK 25,000 for non-pecuniary damage.

9. The High Court's judgment included the following account and reasoning:

"The High Court jury was asked one main question, which concerned forcible coitus. The jury answered the question in the negative. Thereafter the jury was asked one main question as to whether the accused was guilty of obtaining, by gross negligence, sexual relation by violence or threatening behaviour. There was additionally put a supplementary question as to whether the sexual relation mentioned in the main question constituted coitus. The jury answered the main question in the negative. The court bases the judgment on the jury's verdict.

[The applicant] is therefore acquitted of the indictment raised against him.

The victim's assistant counsel stated, after the jury's verdict had been made known, that the compensation claim for pecuniary and non-pecuniary damage would be maintained. The victim has claimed an amount up to NOK 74,000 in compensation for pecuniary damage and up to 75,000 NOK for non-pecuniary damage. The accused has pleaded that he should be released from the claim.

Despite the fact that [the applicant] has been acquitted of having, with intent or gross negligence, raped [Ms C.], under Norwegian law, she has thereby lost her possibility to claim compensation under the civil law on tort for the harmful act that she claims has taken place. Because other and weaker requirements of proof apply for establishing that an act has occurred under the civil law on tort than when there is question of imposing criminal liability for the same act, an award of compensation for pecuniary/non-pecuniary damage would not in itself amount to setting aside the acquittal.

The compensation issue shall be determined under the Damage Compensation Act 1969.

If the victim has been exposed to an infringement or misconduct as described *inter alia* in Article 192 of the Penal Code, compensation for pecuniary damage resulting from the infringement or misconduct may be awarded under sections 3-1 and 3-3 of the Damage Compensation Act. In section 3-5 it is further stipulated that a person who with intent or gross negligence has "... committed infringement or an act of misconduct as mentioned in section 3-3" may be ordered to pay to the victim such a lump sum as the court deems would constitute reasonable compensation for the pain and suffering and other non-pecuniary caused thereby.

Because [Ms C.] alleges that the applicant has been guilty of an aggravated act against her in respect of which he has been acquitted of criminal liability, it is required in the assessment of the evidence that on the balance of probabilities it is clearly probable [*klar sannsynlighetsovervekt*] that the act has taken place. This means that considerably more than ordinary probability is required, albeit not the same strength of evidence being required as for establishing that the perpetrator is guilty in a criminal case.

[The applicant] and [Ms C.] spent the night from 7 to 8 August 2001 at SAS Radisson Hotel at Gardermoen. [...]

On the basis of [Ms C.]'s evidence and the requirement of clear of probability on the balance of probabilities in order to fulfil the requirement of proof, the High Court finds it established for its decision on compensation that the applicant called her at her hotel room during the night with the pretext that he needed to borrow or to get some drinks as he himself had 'gone dry'. [Ms C] was lying asleep when the telephone rang and was irritated about the disturbance, but she replied that he could come and get something from her mini-bar. Immediately thereafter he knocked on the door. [Ms C.] who was not wearing night clothes did not have the time to get dressed, but covered herself with her quilt, opened the door and let the applicant into the room. She could see that he was intoxicated. He went to the mini-bar and fetched something to drink, but instead of leaving he sat down on her bed and started talking. After a short time he began pulling her quilt in order to remove it. She asked him to leave, but he did not follow her suggestion. At a certain point in time he managed to get the quilt off her, but she managed to get up and put it around her again.

[The applicant] continued to pull the quilt and drew her towards himself and also got himself undressed. In the end they were both in the bed.

The High Court unanimously finds that on the balance of probabilities it is clearly probable that [the applicant] during this night had sexual intercourse with [Ms C.] and that this intercourse was not consensual on her part.

As to the question whether the remaining conditions for making an award of compensation have been fulfilled, the High Court is divided in a majority and a minority.

The majority [...] finds on the evidence that on the balance of probabilities it was clearly probable that [the applicant] understood that [Ms C.] did not want sexual relations with him, but nonetheless forced coitus upon her by exercising such a level of violence [*vold*] that the act could be accomplished. There was no question of serious use of violence [*alvorlig voldsbruk*], only of overpowering by holding [Ms C.]'s arms. Even though the victim had different alternatives for escaping the situation, which she for different reasons did not find that she could use, this does not

alter the basic character of the act which was wilful violation by the use of violence [*vold*].

Against the background of the majority's finding that it has been established that on the balance of probabilities it was clearly probable that [the applicant], by the use of violence [*vold*] has gained [*tiltvunget seg*] sexual intercourse with [Ms C.], the conditions for making an award of compensation have been fulfilled. [...]

The minority, ..., has found that the conditions for ordering the accused to pay compensation have not been fulfilled.

The minority does not find it has been made sufficiently probable that [the applicant] understood that the sexual intercourse was not consensual on [Ms C.]'s part or displayed gross negligence in this respect."

10. On 12 May 2004, on the basis of the High Court's judgment, the applicant's appeal within the company against his dismissal from his job as a pilot for British Airways was refused.

11. The applicant appealed to the Supreme Court against the High Court's procedure, assessment of evidence and application of the law. The appeal on the latter point was on the ground that, contrary to Article 6 § 2 of the Convention, the High Court had failed in its judgment to make it sufficiently clear that the order to pay compensation did not affect his acquittal of the charges. By a decision of 9 October 2003 the Appeals Selection Committee of the Supreme Court granted leave to appeal with respect to this ground of appeal, while refusing such leave for the remainder.

12. In support of his appeal against the High Court's application of the law, the applicant argued, *inter alia* the following. For a judgment awarding compensation to be rendered after an acquittal, there was a requirement under the European Court's case law relating to Article 6 § 2 of the Convention that the reasoning stated in the judgement be worded in such a way as not to cast doubt on the correctness of the acquittal. This entailed firstly that the judgment must make a clear distinction between the acquittal on the criminal charge and the decision on compensation. It ought to be made clear that the subject-matter for the two issues, respectively criminal and civil liability, are different and that the award of compensation did not weaken the acquittal. In this case, the High Court had failed to create the necessary distance between the two issues, since the reasoning in the judgment went on immediately thereafter to deal with the subject of compensation. Moreover, no express reservation had been stated with regard to the acquittal.

Furthermore, the applicant argued, it was necessary to avoid the use of formulations that might serve to raise doubts about the acquittal. In several places, the High Court had used such formulations, including the expressions "guilty", "the use of force" and "sexual intercourse by force". This came so close to establishing that the conditions for criminal sexual

assault had been fulfilled that the presumption of innocence must be deemed to have been violated. Extra care ought to be exercised when formulating the reasoning in a judgment where the questions of criminal liability and civil liability to pay compensation are decided in the same case. In this connection the applicant relied on the Court's judgment of 11 February 2003 in *Y. v. Norway* (no. 56568/00, ECHR 2003-II).

The applicant, again referring to the aforementioned *Y v. Norway* judgment and also to Article 13 of the Convention, submitted that, if the Supreme Court were to find a breach of the Convention in the present case, it would have to quash the lower court's judgment. Where a decision suffered from such defects, due process required that there be an entirely fresh assessment of the evidence. If there was no basis for setting the impugned judgment aside, then at the very least a declaratory judgment ought to be rendered, stating a violation of the Convention.

13. On 24 February 2004 the Supreme Court unanimously rejected the applicant's appeal against the High Court's judgment on compensation, finding no breach of Article 6 § 2 of the Convention.

The first voting judge, Ms Justice Stabel, gave the following reasons:

(23) I have concluded that the reasons given by the High Court do not contravene the presumption of innocence in Article 6 § 2 of the Convention [...] and accordingly that the appeal will not succeed.

[...]

(25) With regard to the details of the provision applied in our case, it is in my view appropriate to base our assessment on the judgment rendered by the Supreme Court on 27 November 2003 in Case No. 2003/227. This judgment was rendered after the guiding judgments by the European Court of 11 February 2003 in *Y. v. Norway* [cited above] and *Ringvold v. Norway* [no. 34964/97, ECHR 2003-II]. Reference is made to the thorough discussion of the decisions – and past case-law of the European Court – contained therein. Therein it is stated that Article 6 § 2 protects any person suspected of a criminal offence against any affirmations being made in court decisions on other statements by public authorities that he is guilty of a criminal offence, without his having been convicted in a criminal case.

(26) It is accordingly clear – and undisputed – that it is not contrary to the presumption of innocence for a person who has been acquitted of a criminal charge to be ordered to pay compensation in a civil case, even if in terms of content the material facts upon which the claim for compensation is based correspond to the conditions for criminal liability. However, where a person who has been acquitted of a criminal charge is ordered to pay compensation, it is a requirement that the grounds on which the compensation order is based must not be formulated in such a way as to cast doubts over the correctness of the acquittal. Moreover, provided that the compensation order is not formulated in this way, Article 6 § 2 of the Convention [...] does not constitute an obstacle to the person acquitted of the criminal charge being ordered to pay compensation in the same case for the act to which the indictment related.

(27) According to Article 3 of the Code of Criminal Procedure, ... a legal claim that the victim or other injured parties have against the accused may be adjudicated in the criminal case, provided that the claim derives from the same act as the criminal case. The possibility to review the claim for compensation in the criminal case has clear advantages from the point of view of procedural economy and saves the victim from the financial and emotional burden of undergoing two trials. The evidentiary requirements in civil actions are less stringent than those that apply in criminal cases. An unavoidable consequence of this is that a person who has been acquitted of a criminal charge may be ordered to pay compensation in the same case, based on the finding that he committed the act in respect of which s/he had been acquitted. In order to enable this without creating doubts about the acquittal, strict requirements should apply to the reasoning contained in the judgment awarding compensation.

(28) The ground for the appeal is that the reasons given in the High Court's judgment on this point violated the presumption of innocence. In its judgment of 27 November 2003, the Supreme Court found that an appeal lodged on this basis must be regarded as an appeal on the ground of procedural error. This too is my finding.

(29) Under Article 144(4) of the Code of Civil Procedure, the reasoning in a judgment in a civil case must 'state precisely and exhaustively the facts on which the Court bases its decision ...'. In our case the basis for compensation for pecuniary and non-pecuniary damage is sections 3-3 and 3-5(1)(b) of the Damage Compensation Act 1969. It is a condition in both of these provisions that the tortfeasor has inflicted on the victim a violation of the type provided for in Article 192 of the Criminal Code. The court must therefore make it clear that it has found proven a fact which from an objective point of view constitutes a breach of this provision. The subjective conditions for liability also coincide to some extent, namely that compensation for pecuniary and non-pecuniary damage requires intent or gross negligence and that Article 192 (4) of the Criminal Code also makes sexual assault by gross negligence a criminal offence.

(30) Given the manner the conditions for compensation have been formulated, it is not possible to avoid coming close to a criminal-law assessment. In order to do this, without casting doubt on the acquittal, the court must in my view take as a starting point what *inter alia* distinguishes the legal consequences, i.e. the requirement of proof that the conditions have been fulfilled. The finding that, in objective terms, a breach of Article 192 has occurred cannot be avoided. The same applies to the subjective conditions for compensation. What must be avoided is casting doubt over the correctness of the acquittal, in view of the strict evidentiary requirements that apply in criminal cases.

(31) The High Court opens the section of the judgment in which the compensation issue is decided by stating that notwithstanding the acquittal of [the applicant], under Norwegian law [Ms C.] has not forfeited her right to claim compensation for pecuniary and non-pecuniary damage under the rules on civil compensation for the tortuous act which she says has taken place. The Court continues:

'Because other and weaker requirements of proof apply for establishing that an act has occurred under the civil law on tort than when there is question of imposing criminal liability for the same act, an award of compensation for pecuniary/non-pecuniary damage would not in itself amount to setting aside the acquittal.'

(32) The defence has argued that the interjection ‘in itself’ constitutes a reservation that opens the way for the conclusion that doubt is cast on the judgment. I do not agree with this, nor that the High Court, when providing in a subsequent paragraph a further description of the evidentiary requirements, refers to [Ms C.]’s claim that [the applicant] was ‘guilty’ of an aggravated act towards her for which he has been acquitted in terms of criminal law. The expression ‘guilty’, which in fact was a quote from [Ms C.]’s submissions, must be viewed with reference to the evidentiary requirements applicable in compensation cases of this nature and to the other conditions.

(33) After having outlined the chain of events that it has found established, the High Court concluded that ‘it is clear on the balance of probabilities that on this night [the applicant] had sexual intercourse with [Ms C.] and that this intercourse was not voluntary on her part’. This cannot in my view be regarded as an attack on the acquittal. Nor does it go any further than what is necessary in order to establish that the conditions for compensation are present. The same applies when the majority of the High Court states that on the balance of probabilities it was clearly probable that [the applicant] realised that [Ms C.] did not want sexual intercourse with him and that ‘[the applicant] by the use of violence has gained sexual intercourse with [Ms C.]’.

(34) To sum up, I note that the High Court provided a clear account of the differences between the evidentiary requirements for punishment and those applicable to compensation. Moreover, the assessment of the conditions for compensation took place on an independent basis without any reference to the indictment or the written list of questions put to the jury. Furthermore, as I have already noted, I do not find that expressions of a typically criminal- law character were used. Factors of this nature were found to be decisive when the Supreme Court ruled on 27 November 2003 that the presumption of innocence had been violated in that case, see paragraphs 36 and 38 of the decision. In our case, I am accordingly of the view that the High Court marked the necessary distance to the criminal case and that it did not cast doubt on the acquittal in other ways.

(35) I have concluded on this basis that the appeal must be rejected.”

The four other judges agreed with the first voting judge “in the main and the conclusion”.

14. The applicant has submitted a letter of 20 October 2004 from the Compensation Office for Victims of Violent Crime (*Kontoret for voldsoffererstatning*). It states that by a decision of 24 May 2004 the Office had granted Ms C. NOK 182,313 in compensation, “having found it shown on the balance of probabilities it was clearly probable that she had been inflicted personal injury as a result of a criminal act.” It further notified the applicant that the Office might seek restitution of NOK 124,000 from him.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. In so far as relevant, Article 192(1) and (2) of the Penal Code read:

“Any person who

a) engages in sexual activity by means of violence or threats, [...]

shall be guilty of rape and liable to imprisonment for a term not exceeding 10 years. In deciding whether the offender made use of violence or threats or whether the aggrieved person was incapable of resisting the act, importance shall be attached to whether the aggrieved person was under 14 years of age.

A penalty of imprisonment for not less than two years shall be imposed if

a) the said activity was sexual intercourse, or [...]

A person who, due to gross negligence, is guilty of rape according to the first paragraph above shall be punished with minimum five years' imprisonment. ...”

16. Under Norwegian criminal law there are four basic conditions that must be met in order to establish criminal liability:

- (1) the accused has committed the proscribed act or omission (*actus reus*) which is contrary to a provision of the Penal Code or to a special statutory penal provision in force at the time when the act was committed;
- (2) there are no exonerating circumstances (e.g. self-defence);
- (3) the accused has acted with intent (*mens rea*), unless otherwise expressly stated in the relevant penal provision; and
- (4) the accused was of sound mind at the time of the commission of the offence.

As a general rule, the prosecution has to prove these four elements beyond reasonable doubt. Any reasonable doubt shall benefit the accused (*in dubio pro reo*).

17. In so far as is relevant, Article 376A of the Code of Criminal Procedure reads:

“If the jury's verdict is that the person is not guilty, but the court finds that he is undoubtedly guilty, the court may unanimously decide that the case shall be retried before other judges. At the new trial the High Court shall be constituted as a composite court (*meddomsrett*)...”

18. Article 376 of the same Code provides:

“If the jury's verdict is that the accused is not guilty and if the court does not take a decision pursuant to Article 376A, it shall render a judgement of acquittal.”

No reasons are given for an acquittal.

19. Under the Code of Criminal Procedure 1981, a civil claim may be pursued in connection with a criminal trial, provided that the claim arises from the same set of facts. The claim is decided by the three professional

judges who have taken part in the criminal case, without the participation of the jury.

Article 3 reads:

“Any legal claim that the aggrieved person or any other injured person has against the person charged may, in accordance with the provisions of Chapter 29, be pursued in connection with such cases as are mentioned in Article 1 or Article 2, provided that the said claim arises from the same act that the case is concerned with...

The claims specified in the first and second paragraphs are deemed to be civil claims and shall be dealt with in accordance with the provisions of Chapter 29...”.

20. The court will determine the claim on the basis of the evidence adduced during the trial. However, it may receive further evidence. Article 144 of the Code of Civil Procedure, then in force, (*tvistemålsloven*-Law of 13 August 1915 no. 6; replaced with effect from 1 January 2008 by a new Code) required that the professional judges, precisely and exhaustively, state the facts on which they base their decision on the alleged victim’s civil claim.

21. Other provisions concerning civil compensation claims may be found in Chapter 29 of the Code of Criminal Procedure, notably the following:

Article 427

“In a public prosecution, the prosecuting authority may on application pursue such civil legal claims as are specified in Article 3. ...

When civil claims are pursued against a person other than the person charged, the person concerned assumes the position of a party to the case in so far as this issue is concerned. ...”

Article 428

“Any person who has any such civil claim as is specified in Article 3 may himself pursue it in connection with a public prosecution if a main hearing is held. ...”

Article 435

“A separate appeal against a decision of civil claims shall be brought in accordance with the provisions of the Code of Civil Procedure. The same shall apply to a reopening of the case.”

22. Under the Damage Compensation Act 1969, the alleged victim may, regardless of the outcome of the criminal proceedings, claim compensation for pecuniary and non-pecuniary damage.

Section 3-5, as in force at the relevant time, read as follows:

“Anyone who, with intent or gross negligence has

a. Caused personal injury or

b. Committed an infringement or an act of misconduct as mentioned in section 3-3, may ... be obliged to pay the victim such a lump sum as the court deems would constitute reasonable compensation (*oppreisning*) for the pain and suffering and other non-pecuniary damage caused thereby. ...

A person who with intent or gross negligence has caused the death of another person, may be ordered to pay such compensation to the deceased’s ... parents.”

23. Section 3-3, referred to in the above provision, expressly applies to misconduct mentioned in, amongst others, Article 192 of the Penal Code.

24. A claim for compensation for non-pecuniary damage submitted by a victim under section 3-5 of the Act is subject to his or her showing that the alleged perpetrator, with intent or gross negligence, committed the wrongful act. The test is normally the balance of probabilities and the burden of proof lies with the claimant. However, in a landmark ruling of 1996 concerning civil liability for forced sexual intercourse (*Norsk Retstidende* 1996, p. 864, at p. 876; *Ringvold v. Norway*, no. 34964/97, §§ 16-19, ECHR 2003-II) the Norwegian Supreme Court held that the requirement as to the strength of the evidence had to be stricter than that which applied to the test of the balance of probabilities, bearing in mind the burden which an allegation of reprehensible conduct might have for the defendant and the serious consequences it might have for his or her reputation. In a case of the kind under consideration, the test had to be whether on the balance of probabilities it was clearly probable that the alleged abuse had been committed (“*klar sannsynlighetsovervekt*”). This burden was heavier where liability may have serious consequences for the respondent’s reputation, though it was less than for criminal liability.

25. The objective constitutive elements of acts which may give rise to both criminal liability and civil liability to pay compensation are not always the same. The subjective constitutive elements in principle differ: normally criminal liability requires intent whereas liability to pay compensation requires gross or simple negligence. There may be exonerating circumstances – such as self-defence, necessity, provocation or ignorance – which exclude criminal liability but which do not exclude liability to pay compensation (see *Norges Offentlige Utredninger* (Official Norwegian Report) 2000:33 “*Erstatning til ofrene hvor tiltalte frifinnes for straff*” (Compensation to Victims in Cases where the Accused has been Acquitted of the Criminal Charge), study by Mr J. T. Johnsen, Professor of Law, Chapter 1, sub-chapter 1.3.2).

26. The purposes of the criminal law and the law on compensation are not identical. While deterrence and restoration are important considerations in both areas of law, the former places emphasis on retribution and the latter

on the spreading of financial loss. The two systems also supplement one another in important respects. While criminal law sanctions are particularly designed to deter the actual and potential offenders from committing offences, those of the law of compensation are particularly designed to meet the aggrieved person's need for economic redress (*ibid.*, Chapter 1, sub-chapter 1.2.1).

27. The above-mentioned study identified several justifications for maintaining the possibility to award compensation in connection with criminal proceedings even after an acquittal. It may serve the interests of economy of procedure and also psychological stress may be saved by treating criminal charges and compensation claims in joint proceedings. In comparison with civil proceedings, such joint proceedings were cheap both for the accused and for the victim who would be able to benefit from free legal aid for the handling of the civil claims. If the compensation proceedings had to await a final outcome in the criminal case (at three levels of jurisdiction), it could take years before they could start. For the victim, and also for the acquitted, this could involve a considerable extra psychological burden. Moreover, in joint proceedings, the demands for thoroughness that were inherent in the criminal process would contribute to increasing the quality of the examination of the civil claim. Furthermore, the exonerating effect of an acquittal was not likely to be greater in split proceedings than in joint ones. On the contrary, in view of the problems related to examining the criminal evidence twice, the effect would tend to be more consistent under the latter. Finally, in criminal cases giving rise to more than one civil claim, deciding them all at the same time in connection with the criminal process would ensure a greater degree of "procedural equality" and coherence (*ibidem*, Chapter 6, sub-chapter 6.3.1 and 6.3.2).

THE LAW

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

28. The applicant complained that the High Court's judgment awarding Ms C. compensation entailed a violation of his right under Article 6 § 2 of the Convention to be presumed innocent until proven guilty of the commission of an offence. This provision reads:

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

29. The Government invited the Court to declare the application inadmissible and, in any event, to find that Article 6 § 2 was inapplicable and not violated in the instant case.

A. Admissibility

30. In connection with his above-mentioned complaint, the applicant submitted that the letter of 20 October 2004 from the Compensation Office for Victims of Violent Crime (see paragraph 14 above) should be seen as an inseparable part of the compensation proceedings or could be seen as part of the enforcement of the High Court's judgment.

31. The Government argued that this part of the application was flawed in substance as this was a separate compensation scheme based on an independent assessment by the Office under the Compensation for Victims of Violent Crime Act 2001. A decision by the Office could be appealed to the Compensation Board for Victims of Violent Crime and a decision by the latter could be challenged before the courts according to Article 435 § 1 of the Code of Civil Procedure. This arrangement should not to be confused with criminal proceedings in the present case. The Government requested the Court to declare this part of the application inadmissible for failure to exhaust domestic remedies.

32. As to the remainder of the application, the Government invited the Court to declare it inadmissible as being manifestly ill-founded.

33. The Court considers that, in so far as the applicant complains about the notice of 20 October 2004 from the Compensation Office for Victims of Violent Crime, this appears to constitute a separate matter in respect of which he has not exhausted domestic remedies.

34. As regards the remainder of the application the Court considers that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. This part of the application must therefore be declared admissible.

B. Merits

1. The parties' submissions

(i) The applicant

35. The applicant submitted there were clear links between the criminal case and the compensation claim. He argued that it is relevant to the applicability of Article 6 § 2 that criminal and victim compensation proceedings were joined. The links created between the criminal case and the compensation claim led to the conclusion that Article 6 § 2 applied to the compensation claim as well.

36. In Norway, the constitutive elements of non-pecuniary compensation for rape were identical to the preconditions for criminal liability for rape. By virtue of section 3-5 of the Damage Compensation Act 1969, a person was entitled to non-pecuniary compensation if he or she could prove the

commission of a criminal offence under Article 192 of the Penal Code by wilful or grossly negligent conduct. Equally criminal liability for the offence under section 192 required proof of wilful or grossly negligent conduct.

37. In the applicant's opinion, the High Court did expressly and in substance state that all the conditions for criminal liability had been fulfilled on a clear preponderance of probabilities. Even the Supreme Court had made it clear that the objective and subjective constituent elements for criminal and pecuniary and non-pecuniary civil liability for rape were co-extensive in the applicant's case. In this connection he referred to paragraphs 29 to 30 of the Supreme Court's judgment quoted above.

38. The applicant was of the view that there were clear links between the criminal acquittal and the reasons in the compensation proceedings, in terms of the same issues, evidence, judges, parties and judgment, in terms of statutory and judicial reference to the positive fulfilment of the conditions for criminal liability, and in terms of time, so as to justify the application of Article 6 § 2 to the latter proceedings. In the circumstances, the High Court had faced the impossible task of seeking to reconcile its compensation reasoning with the criminal acquittal that immediately preceded it, without substantially casting doubt on that criminal acquittal. In the applicant's opinion, the High Court should not have sought to determine civil liability in the face of the criminal acquittal but should have left that issue to be determined by a separate civil court, at which Article 6 § 2 would not necessarily have applied.

39. The High Court had determined criminal and civil liability in the same judgment and appeared to have come to contradictory conclusions on the objective constituent elements and on the subjective constituent element of guilt, thereby giving rise to an issue under Article 6 § 2. The particular aspect of the High Court's reasoning that had given rise to an issue under the Convention was the majority's finding that "on the evidence there was a clear preponderance of probability that [the applicant] understood that [Ms C.] did not want sexual relations with him, but nonetheless forced coitus upon her by exercising such a level of force/ violence that the act could be accomplished ... the basic nature of the act was wilful violation by the application of violence". Such a finding of intention and bad faith, on the basis of the same evidence and co-extensive objective constituent elements, clearly cast doubt on the acquittal declared by the same court.

40. The applicant submitted that there was no real difference between the standard of proof applied in the criminal case and that applied in the compensation claim. Proof beyond reasonable doubt, in whatever form of words expressed, was one standard. Proof on a preponderance of probability was another, lower standard. If there was a third standard of a "clear preponderance of probabilities", it was necessary to identify what the standard was and when it applied. The reality was that the standard of proof

applied in the compensation claim appeared to be proof to the criminal standard.

41. Even if the standard applied was lower than the criminal standard, such a heightened civil standard of proof was incapable of sufficiently distinguishing between criminal and civil liability so as to avoid casting doubt on the acquittal, because the proceedings were joined and the objective and subjective constituent elements of liability were identical for criminal and civil liability.

(ii) *The Government*

42. Initially, the Government pointed out that, in its judgments in *Y v. Norway* and *Ringvold v. Norway* (both cited above), the Court had formulated the test to be applied in this type of cases under Article 6 § 2. In the Government's opinion, the High Court and also the Supreme Court had correctly applied that test in the applicant's case. In their view, the present case could not be distinguished from other comparable cases in which the Court had found no violation or had declared the application inadmissible as being manifestly ill-founded. In its judgment, when read as a whole, the High Court had left no doubt as to the meaning of the judges' reasoning on the compensation issue and thus complied with the requirements set forth in the Court's case law.

43. The Government pointed out that while an acquittal from criminal liability ought to be maintained in ensuing civil proceedings, it did not preclude the establishment of civil liability, based on a less strict burden of proof. Furthermore, no issue had arisen under Article 6 § 2 because civil liability had been established in joint proceedings with a criminal case that had resulted in an acquittal. The same system as in Norway had been established in several other states.

44. The Government underlined that although the objective and subjective conditions for criminal liability and civil liability to a certain degree could overlap, there were nevertheless important differences between the basic conditions for establishing criminal liability and civil liability. Moreover, the purposes of the criminal law and the law on compensation were unlike. Also, the burden of proof required in civil cases, such as the present, was less strong than the burden of proof required in criminal cases, albeit it was somewhat stronger than the ordinary balance of probabilities that applied in civil cases, in order to safeguard the defendant's reputation. The Court had accepted this burden of proof in previous cases against Norway.

45. The High Court in the present case had acted under its obligation to give precise and exhaustive reasons in civil judgments. It had refrained from imputing criminal liability to the applicant with regard to the charges of rape in the ensuing compensation proceedings. In the view of the Government,

the High Court distinguished sufficiently clearly between criminal and civil liability, so as not to create a link between the cases.

46. Thus, the Government could not agree with the applicant's submission that the High Court appeared to have come to contradictory conclusions on the matter of criminal liability and civil liability.

2. The Court's assessment

47. The Court will examine the applicant's complaint in the light of the principles enunciated in its case-law (see *Ringvold v. Norway*, no. 34964/97, § 36, ECHR 2003-II; and *Y. v. Norway*, no. 56568/00, § 39 ECHR 2003-II (extracts) and its application of those principles in those cases (see respectively at paragraphs 37-42 and 40-47 of the said judgments). These principles were reiterated in *Pamela Kay Reeves v. Norway* (dec.) no. 4248/02, 08.07.2004; and *Tommy Lundkvist v. Sweden* (dec.) 48518/99, 13.11.2003. Accordingly, it will examine whether the compensation proceedings in this case gave rise to a "criminal charge" against the applicant and, in the event that this was not the case, whether the compensation case nevertheless was linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2.

48. Turning to the first of the criteria for establishing whether there was a "criminal charge", namely the classification of the proceedings under national law, the Court notes that the High Court's decision to award compensation had its legal basis in Chapter 3 of the Damage Compensation Act 1969, which sets out the general principles of the national law on torts applicable to personal injuries. It is clear from both the wording of Article 3-5 and Norwegian case-law that criminal liability is not a prerequisite for liability to pay compensation. Even where, as here, the victim had opted for joining the compensation claim to the criminal trial, pursuant to Article 3 of the Code of Criminal Procedure, the claim would still be considered a "civil" one. Thus the Court finds that the compensation claim was not viewed as a "criminal charge" under the relevant national law (see *Y.*, cited above, § 40).

49. As regards the second and third criteria, the nature of the proceedings and the type and severity of the "penalty", the Court considers that the following considerations relied on in its *Ringvold* judgment (§ 38, see also the *Y.* judgment at § 41 and *Reeves* and *Lundkvist*, all cited above) are relevant to the compensation decision in the instant case:

"...[T]he Court observes that, while the conditions for civil liability could in certain respects overlap, depending on the circumstances, with those for criminal liability, the civil claim was nevertheless to be determined on the basis of the principles that were proper to the civil law of tort. The outcome of the criminal proceedings was not decisive for the compensation case. The victim had a right to claim compensation regardless of whether the defendant was convicted or, as here, acquitted, and the compensation issue was to be the subject of a separate legal assessment based on

criteria and evidentiary standards which in several important respects differed from those that applied to criminal liability.

In the view of the Court, the fact that an act that may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence cannot, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being ‘charged with a criminal offence’. Nor can the fact that evidence from the criminal trial is used to determine the civil-law consequences of the act warrant such a characterisation. Otherwise, as rightly pointed out by the Government, Article 6 § 2 would give a criminal acquittal the undesirable effect of pre-empting the victim’s possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under Article 6 § 1 of the Convention. This again could give a person who was acquitted of a criminal offence but would be considered liable according to the civil burden of proof the undue advantage of avoiding any responsibility for his or her actions. Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude the establishment of civil liability in relation to the same facts.

Thus, the Court considers that, while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof (see, *mutatis mutandis*, *X v. Austria*, no. 9295/81, Commission decision of 6 October 1982, Decisions and Reports (DR) 30, p. 227, and *C. v. the United Kingdom*, no. 11882/85, Commission decision of 7 October 1987, DR 54, p. 162). If the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention.”

C. Violation of Article 6 § 2

50. The fact that the High Court dealt with the compensation issue in the same judgment as the criminal charges was a natural consequence of the fact that the two matters had been pursued in the course of the same proceedings. This could not of itself bring the compensation issue within the ambit of Article 6 § 2 (see *Y.* and *Reeves*, both cited above).

51. However, the Court notes that, in its reasoning on compensation, the High Court majority based its finding that the applicant was liable to pay compensation to Ms C. on a description of the facts giving details of such matters as the nature of the sexual contact, the applicant’s awareness of the absence of consent by Ms C., the degree of “violence” (“*vold*”) used by him to accomplish the act and his intent in this respect. In other words, it covered practically all those constitutive elements, objective as well as subjective, that would normally amount to the criminal offence of rape under Article 192 of the Penal Code. It is true that, as stated in the case-law quoted above, an acquittal from criminal liability does not bar a national

court from finding, on the basis of a less strict burden of proof, civil liability to pay compensation in relation to the same facts. However, the Court considers that, although the concept of “violence” may not have been exclusively criminal in nature, the use made of it by the High Court in the particular context did confer criminal law features on its reasoning overstepping the bonds of the civil forum (see *Y.*, cited above, § 46).

52. The Court is mindful of the fact that in two clearly distinct parts of its judgment, the High Court dealt respectively with the criminal charges against the applicant, ending in a conclusion of acquittal (a non-guilty verdict by the jury approved by the professional judges), and with the compensation claim made by Ms C., in respect of which it ordered the applicant to pay her compensation. In several places in the compensation part the High Court highlighted that the standard for civil liability to pay compensation was less strict than that for criminal liability.

53. However, the Court is not convinced that, even if presented together with such cautionary statements, the impugned reasoning did not “set aside” the applicant’s acquittal or “cast doubt on the correctness of the acquittal” (see respectively *Ringvold*, § 38, and *Y.*, § 46, both cited above).

54. These shortcomings were not rectified on appeal to the Supreme Court, which upheld the High Court’s reasoning as being consistent with the presumption of innocence under Article 6 § 2 of the Convention (see *Y.*, cited above, § 45).

55. Accordingly, the Court finds that Article 6 § 2 was applicable to the proceedings relating to the compensation claim against the applicant and that this provision was violated in the present case (see *Y.*, cited above, § 47).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant sought (1) “the quashing of the decision of the Eidsivating High Court awarding compensation against the applicant”. He further requested (2) sums totalling 61,657.53 pounds sterling (GBP)(approximately 82,000 euros (EUR)) in compensation for pecuniary damage for financial loss which he, because of the High Court judgment, had suffered on the labour market from 14 May 2003, when he had been

dismissed from his job in British Airways, until 16 December 2004, when he had obtained a reasonably comparable job with another airline company. This amount included GBP 29,638.96 for loss of earnings in respect of 13 months pay (after deduction of his earnings during that period in other non-comparable jobs), GBP 803.36 in costs for flight simulator training and GBP 28,259.69 for the costs of retraining as a pilot.

58. The applicant in addition requested (3) EUR 30,000 Euros in compensation for non-pecuniary damage.

59. The Government did not offer any comments on the above claims.

60. As regards item (1) the Court is not empowered under the Convention to “quash” the High Court’s judgment. In any event, in so far as the applicant’s claim can be understood as a request for compensation of the award that he was ordered to pay Ms C., the Court does not discern any causal link between the violation found and the pecuniary damage alleged. It cannot speculate on what the outcome before the High Court would have been had its reasoning not violated Article 6 § 2 of the Convention. It therefore rejects this claim. For the same reasons, the Court rejects item (2). On the other hand, as regard item (3), it awards the applicant EUR 10,000 in respect of non-pecuniary damage, to be converted into GBP at the rate applicable on the date of settlement.

B. Costs and expenses

61. The applicant did not make any claim for the reimbursement of legal costs for his legal representation before the national courts and the European Court. On the other hand he claimed GBP 122.20 for translation costs incurred before latter.

62. The Government did not offer any comments on the above claim.

63. The Court awards the sum of EUR 160 under this head, to be converted into GBP at the rate applicable on the date of settlement.

C. Default interest

64. 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

1. *Declares* unanimously the complaint that the High Court’s judgment awarding Ms C. compensation entailed a violation of Article 6 § 2 of the

Convention admissible and the remainder of the application inadmissible;

2. *Holds* by 4 votes to 3 that there has been a violation of Article 6 § 2 of the Convention;
3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10, 000 (ten thousand Euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, and EUR 160 (one hundred and sixty Euros) for costs and expenses, to be converted into GBP at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) concurring opinion of Mr Malinverni;
- (b) dissenting opinion of Mr Jebens;
- (c) dissenting opinion of Mr Nicolaou joined by Mrs Vajić.

C.R.
A.W.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

I voted with the majority in finding a violation of Article 6 § 2 of the Convention and I agree with all the arguments in favour of that conclusion, as set out in paragraphs 51 to 55 of the judgment. I should like, however, to add the following considerations.

1. As a matter of general principle, I entirely agree with the High Court's statement to the effect that "an acquittal from criminal liability does not bar a national court from finding, on the basis of a less strict burden of proof, civil liability to pay compensation in relation to the same facts".

While this rule is valid in many situations, I am not persuaded that it can be applied in the present case. Admittedly, as the High Court majority affirmed, "other and weaker requirements of proof apply for establishing that an act has occurred under the civil law on tort than when there is question of imposing criminal liability for the same act" (see paragraph 9 of the judgment). However, whilst recognising this, can one and the same court reach such seemingly contradictory conclusions where it rules as a criminal court on the one hand, and as a civil court on the other? I am not convinced, given that the two conclusions reached by the High Court appear so mutually incompatible.

2. When a person who has been acquitted of a criminal charge is ordered to pay compensation, it is a requirement that the ground on which the compensation order is based must not be formulated in such a way as to cast doubt on the correctness of the acquittal. Strict criteria must apply to the reasoning contained in the judgment awarding compensation. This, however, was not the case in the judgment delivered by the majority of the High Court, which found that "on the balance of probabilities, it was clearly probable that the applicant understood that C. did not want sexual relations with him, but nonetheless forced coitus upon her by exercising such a level of violence that the act could be accomplished" (see paragraph 9 of the judgment). In my opinion, this wording amounts to setting aside the acquittal.

DISSENTING OPINION OF JUDGE JEBENS

I respectfully disagree with the majority's finding that Article 6 § 2 was applicable in this case. Consequently, I also disagree that the applicant's right to be presumed innocent has been violated. It follows from the Court's case law, especially *Ringvold* and *Y.* (both cited in paragraph 47 of the judgment), that the questions of applicability and compliance with Article 6 § 2 are closely intertwined in cases concerning criminal acquittal and subsequent civil liability for the same acts. In the following, I will discuss the relevant factors which have been developed in the Court's case law with respect to the scope of Article 6 § 2 in such situations and apply them to the present case.

In the instant case the impugned act in respect of which the applicant was found liable to pay civil compensation was covered essentially by the same objective constitutive elements as the criminal offence of rape set out in Article 192(1) and (2) of the Penal Code (see paragraph 15 of the judgment). There was also an overlap with regard to the subjective constitutive elements in that the establishment of either intent or gross negligence on the part of the perpetrator of the act was a prerequisite both for criminal liability and civil liability to pay compensation. However, there were important differences.

First of all, the standard of proof that applied in view of the particular seriousness of the act in question ("whether on the balance of probabilities it was clearly probable that the alleged abuse had been committed"), was less strict than the criminal standard of proof beyond reasonable doubt (see paragraph 24 of the judgment). As stated in the case-law quoted in paragraph 49 of the judgment, an acquittal from criminal liability does not bar a national court from finding, on the basis of a less strict burden of proof, civil liability to pay compensation in relation to the same facts. This is necessary in order to safeguard the interests of the victim, namely to avoid to place him or her in a worse position with regard to compensation than injured persons in non-criminal cases. It also follows from the victim's right of access to a court, which the Court has included in the "fair trial" guarantee in Article 6 § 1.

Secondly, but equally important, I discern no element in the High Court's description of the facts in respect of which it found the applicant liable to pay compensation, or in its assessment of those facts, that amounted to the establishment of criminal guilt on his part. The High Court was obliged to discuss factual questions which were relevant for whether or not to hold the applicant civilly responsible, and to describe its findings in the judgment, regardless of whether they coincided with the elements that constituted an offence according to the Criminal Code. As observed by the Supreme Court, no expressions of a typically criminal-law character had been used by the High Court, and there was also no reference to the indictment or the

questions to the jury in the criminal case (cf. *Y*, cited in paragraph 47 of the judgment, § 44). At no point did the High Court's description of the facts or its reasoning in my opinion go beyond what was necessary in order to present sufficient grounds for establishing civil liability, according to Article 144 of the Code of Civil Procedure, which was then applicable, and also Article 6 § 1 of the Convention.

The fact that the High Court dealt with the compensation issue in the same judgment as the criminal charges could, according to the Court's case-law, not of itself bring the compensation issue within the ambit of Article 6 § 2 (see *Reeves* and also *Y*, both cited in paragraph 47 of the judgment, where this factor did not lead the Court to find a violation). In this respect, reference is also made to the arguments that might be adduced in favour of maintaining such an arrangement of joint proceedings in Norwegian law (see paragraph 27 of the judgment). Furthermore, in two clearly distinct parts of its judgment, the High Court dealt respectively with the criminal charges against the applicant, ending in a conclusion of acquittal (a non-guilty verdict by the jury approved by the professional judges), and with the compensation claim made by Ms C., in respect of which it ordered the applicant to pay her compensation. In several places in the compensation part the High Court highlighted that civil liability to pay compensation was different from criminal liability.

Furthermore, it is significant that the purpose of establishing civil liability to pay compensation was quite different from that of establishing criminal liability, namely primarily to remedy the injury and suffering caused to the victim (see paragraph 26 above). Neither the purpose of the award nor its size – NOK 99,000 (NOK 74,000 and NOK 25,000 for respectively pecuniary and non-pecuniary damage), equivalent to EUR 12,500 - conferred on the measure the character of a penal sanction for the purposes of Article 6 § 2 (see *Ringvold*, § 39; see also *Reeves* and *Lundkvist*, all cited in paragraph 47 of the judgment).

Against this background, I do not agree with the applicant's various submissions that the High Court, in the compensation part, established criminal liability anew. The High Court neither stated nor implied that the applicant was criminally responsible for the offences of which he had been acquitted. It cannot be said that the decision and reasoning on compensation were incompatible with, and "set aside" or "cast doubt on the correctness of the acquittal" (see respectively *Ringvold* § 38, and *Y*. § 46 and also *Reeves* and *Lundkvist*, *Ibidem*).

As to the further question of whether there were links between the criminal case and the ensuing compensation case such as to justify extending the scope of the application of Article 6 § 2 to the latter, I reiterate that the outcome of the criminal proceedings was not decisive for the compensation issue. In the case at hand, the situation was reversed: despite the applicant's acquittal it was legally feasible to award

compensation. Regardless of the conclusion reached in the criminal trial against the applicant, the compensation case was therefore not a direct sequel to the former or a consequence and concomitant of it (see *Ringvold*, § 41; and *Lundkvist*; cf. *Reeves*, *Ibidem*).

Summing up, in my opinion, the High Court dealt with the question of “criminal acquittal and civil liability” in a manner which fully complied with the requirements in Article 6 § 2, and the Supreme Court loyally applied the criteria developed in the Court’s case law when deciding the appeal. As stated above, I see no reason why our court should arrive at different findings than those made by the national courts in this case.

DISSENTING OPINION OF JUDGE NICOLAOU
JOINED BY JUDGE VAJIĆ

My own view that there has been no violation of Article 6 § 2 of the Convention may perhaps be better explained, in this very simple case, by a short re-statement of the salient facts. The applicant was convicted on a charge of rape and sentenced to a term of imprisonment. Further, a civil claim based on the same facts and pursued by the complainant in connection with the criminal trial, according to Norwegian law, resulted in a compensation order against him.

On appeal by the applicant, a re-hearing took place before the High Court consisting of a panel of three judges sitting with a jury. A verdict of not guilty was brought in by the jury and accepted by the judges. The applicant was therefore acquitted. The civil claim remained and the High Court then proceeded, in the same judgment, to consider whether it had been proved.

Whereas criminal charges have to be proved beyond reasonable doubt, civil liability is established on the balance of probabilities depending on context. The same as in a number of other countries. Directing itself specifically on this matter, the High Court said that:

“Despite the fact that [the applicant] has been acquitted of having, with intent or gross negligence, raped [Ms C.], under Norwegian law, she has not thereby lost her possibility to claim compensation under the civil law on tort for the harmful act that she claims has taken place. Because other and weaker requirements of proof apply for establishing that an act has occurred under the civil law on tort than when there is question of imposing criminal liability for the same act, an award of compensation for pecuniary/non-pecuniary damage would not in itself amount to setting aside the acquittal... Because [Ms C.] alleges that the applicant has been guilty of an aggravated act against her in respect of which he has been acquitted of criminal liability, it is required in the assessment of the evidence that on the balance of probabilities it is clearly probable [*klar sannsynlighetsovervekt*] that the act has taken place. This means that considerably more than ordinary probability is required, albeit not the same strength of evidence being required as for establishing that the perpetrator is guilty in a criminal case.”

On that basis the High Court unanimously found that on the balance of probabilities it was clearly probable that sexual intercourse had taken place without the complainant’s consent. The unanimity extended no further. The majority went on to find, using the same standard of proof, that the applicant understood that the complainant had not consented and that he overcame her resistance by holding her arms. The crucial part of the judgment reads as follows:

“The majority finds on the evidence that, on the balance of probabilities, it was clearly probable that [the applicant] understood that [Ms C.] did not want sexual relations with him, but nonetheless forced coitus upon her by exercising such a level of violence [*vold*] that the act could be accomplished. There was no question of serious use of violence [*alvorlig voldsbruk*], only of overpowering by holding [Ms C.]’s arms....Against the background of the majority’s finding that it has been

established that on the balance of probabilities it was clearly probable that [the applicant], by the use of violence (*vold*) has gained [*tiltvunget seg*] sexual intercourse with [Ms C.], the conditions for making an award of compensation have been fulfilled..”

The applicant appealed to the Supreme Court on the ground that the judgment on compensation violated the presumption of innocence laid down in Article 6 § 2 of the Convention. On 24 February 2004 the Supreme Court unanimously dismissed the appeal. In its judgment it adverted to every aspect of the case, including the principles involved. It referred especially to the guiding, as it called them, judgments of this Court in *Y v. Norway*, (no. 56568/00, ECHR 2003-II (extracts)) and *Ringvold v. Norway*, (no. 34964/97, ECHR 2003-II), both decided a year earlier, in which it was held that both the procedural and the evidentiary parts of the Norwegian system were not incompatible with Article 6 § 2.

Indeed, this system of redress for a civil wrong, where on the same facts the defendant has been acquitted of a criminal charge, was comprehensively reviewed in the above cases which relied, among others, on *X v. Austria* (dec.) no 2995/81, 6 October 1982 and *M.C. v UK* (dec.) no 11882/85, 7 October 1987. Those were Commission decisions that stated in no uncertain terms that the difference in the respective standards of proof constitutes a sufficient distinction between a criminal charge on which there has been an acquittal and a civil claim ‘arising out of the same events.’ The same principles were, shortly after *Y* and *Ringvold* (cited above), applied in *Lundkvist v. Sweden* (dec.) no. 48518/99, ECHR, 13 November 2003 and *Reeves v. Norway* (dec.) no. 4248/02, 8 July 2004.

The majority in the present case has neither indicated a break, in some way, with past cases nor has it sought to qualify or develop any of the principles further. So the question is not now what view one takes of the system as such, for our case-law has confirmed that it is not tainted by any inherent systemic defect. The question is only whether the High Court was at fault in the language it used.

In fact all the Norwegian cases finally turned on what the Court thought of the way that the national courts had expressed themselves in their decisions, the Court repeatedly saying that if a decision contained a “statement imputing criminal liability” that would raise an issue under Article 6 § 2. The case of *Y v. Norway* (cited above) concerned a finding, on the matter of compensation, that it was clearly probable that the applicant “committed the offences”. Not surprisingly the Court found a violation. But not so in the other two cases even though in *Reeves v. Norway* (cited above) the impugned decision contained a finding directly connected with the indictment. The question being whether the fire of a house had been started deliberately or whether it was a mere accident, it was stated in the decision regarding civil liability that the defendant was “guilty of setting the fire as described in the indictment” when the defendant had already been acquitted

on a criminal charge of arson. And yet the Court held that those words, read in context, left no doubt that they were meant to refer only to the question of compensation. In contrast, the decision complained of in the present case does not seem to me to contain anything that might, even remotely, hint at criminal responsibility.

The Supreme Court in a meticulous judgment pointed out that since, under Norwegian law, a finding of civil liability had to be fully reasoned and since the act committed was one and the same, whether classified as criminal or as civil (reality being indivisible), civil liability could be differentiated from criminal only by reference to the respective standards of proof. That sounds of course familiar. It was what the Commission decisions had said in the cases I have already cited. The Supreme Court stressed in this regard the need for care, so that a judgment on civil liability should not in any way cast doubt on the acquittal. It concluded that:

“...the High Court provided a clear account of the differences between the evidentiary requirements for punishment and those applicable to compensation... marked the necessary distance to the criminal case and... did not cast doubt on the acquittal in other ways”.

I entirely agree. The views of the Supreme Court were, in my opinion, both pertinent and convincing and its conclusions were quite unavoidable. I regard its judgment as clearly right. I also can see no fault, either in substance or in form, in the way that the High Court had dealt with the matter. It is not without significance that the majority judgment in the present case does not contain details of any particular fault. It takes exception to the use by the High Court of the word ‘violence’ but it does not amplify on that in order to explain its view. In fact the High Court appears to have been alive to the risk of misunderstanding and so it circumscribed the use of the word by explaining that what it meant was that the applicant had forced the complainant to have sexual intercourse by holding her arms. I am quite unable to understand how that can be interpreted as signifying or imputing criminal liability. I do not know how the violence used could be described in milder terms even if it were necessary to avoid calling things by their proper names. The final general statement of the majority, in its judgment, that it is not convinced that “the impugned reasoning did not ‘set aside’ the applicant’s acquittal or ‘cast doubt on the correctness of the acquittal’” remains, as I read it, totally unexplained.

The High Court had, obviously, to perform a delicate task. Being well aware of the pitfalls it managed, with the necessary precision and clarity, to steer clear of any imputation of criminal liability while, at the same time, giving a judgment that was fully reasoned as required by Norwegian law. In my opinion there has been no violation of Article 6 § 2.