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

SECOND SECTION

CASE OF BAARS v. THE NETHERLANDS

(Application no. 44320/98)

JUDGMENT

STRASBOURG

28 October 2003

FINAL

28/01/2004

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 Baars v. the Netherlands,

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

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 26 November 2002 and on 7 October 2003,

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

PROCEDURE

1. The case originated in an application (no. 44320/98) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Mr Jacobus Johannes Marie Baars ("the applicant"), on 10 September 1998.

2. The applicant was represented by Mr A.J.L.J. Pfeil, a lawyer practising in Maastricht. The Netherlands Government ("the Government") were initially represented by their Agent, Mrs J. Schukking of the Ministry for Foreign Affairs, and in the final stages of the proceedings by their Acting Agent, Ms H.L. Janssen of the same Ministry.

3. The applicant alleged a violation of Article 6 § 2 of the Convention in that, following an inconclusive trial, a judicial decision in subsequent proceedings nonetheless contained a clear statement, based on findings resulting from the conviction of another person, that he was guilty.

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

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

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

7. By a decision of 26 November 2002, the Court declared the application admissible.

8. Neither party filed observations on the merits. The applicant filed claims under Article 41 of the Convention (Rule 60 § 1), to which the Government responded in writing. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1928 and lives in Maaseik (Belgium).

10. On 15 February 1993 the applicant was arrested and taken into police custody (*verzekering*) on suspicion of forgery and of being an accessory to bribery of a public official. The public official concerned was a Mr B. The applicant was released from police custody on 19 February 1993. On 7 June 1995 the applicant was informed that the preliminary judicial investigation (*gerechtelijk vooronderzoek*) into the case had been closed.

11. By summons of 24 August 1995, the applicant was ordered to appear on 7 September 1995 before the Maastricht Regional Court (*arrondissementsrechtbank*) on charges of forgery committed together with others between 5 October 1991 and 5 November 1992.

12. Criminal proceedings had already been brought before the Maastricht Regional Court against Mr B. in relation to the same facts. Although both sets of criminal proceedings concerned the same facts, the criminal proceedings brought against Mr B. and the applicant were conducted separately.

13. In its judgment of 11 October 1995 in the applicant's case, the Maastricht Regional Court declared the prosecution inadmissible. It held that the judicial authorities had failed to deal with the applicant's case with the required diligence and that therefore the applicant's right to a trial within a reasonable time under Article 6 § 1 of the Convention had been violated. The public prosecutor lodged an appeal with the 's-Hertogenbosch Court of Appeal (g*erechtshof*), but informed the applicant on 17 August 1996, before the appeal proceedings had commenced, that this appeal had been withdrawn.

14. On 20 January 1997, in the course of the criminal proceedings on appeal in the case of Mr B., the applicant was heard as a witness before the

's-Hertogenbosch Court of Appeal. In its judgment of 3 February 1997, the 's-Hertogenbosch Court of Appeal convicted Mr B. of, *inter alia*, participating in forgery. It was found established that a receipt dated 9 October 1991 in relation to an alleged payment of NLG 7,414 by Mr B. to the applicant had been fraudulently written out in co-operation with Mr B.

15. In the meantime, on 18 November 1996, the applicant had lodged a request under Article 591a of the Code of Criminal Procedure (*Wetboek van Strafvordering*) for the reimbursement of costs and expenses incurred in the course of the criminal proceedings against him. His total claim amounted to NLG 104,708.80. On the same day he had lodged a request under Article 89 of the Code of Criminal Procedure for compensation for pecuniary and non-pecuniary damage caused by his having been kept in police custody. This claim amounted to NLG 205,000.

16. In its decision of 2 April 1997 in respect of the applicant's claim for costs and expenses incurred, the Maastricht Regional Court awarded the applicant an amount of NLG 114.60 for travel expenses and rejected his claims for the remainder. In a separate decision of the same date, the Maastricht Regional Court rejected the applicant's claim for compensation for the time spent in pre-trial detention. The applicant lodged appeals against both decisions with the 's-Hertogenbosch Court of Appeal.

17. In two separate decisions of 19 March 1998, the Court of Appeal rejected the applicant's appeals against the two decisions of 2 April 1997 in relation to his claim for costs and expenses and his claim for the time spent in pre-trial detention. Its reasoning in both decisions included the following:

> “It appears from the case against the co-accused B., in which the Court of Appeal delivered its final judgment on 3 February 1997 convicting B. of, amongst other things, 'participating in forgery', that the document referred to under a. above is a receipt.
>
> The Court of Appeal takes the view that this receipt was forged by the applicant together with B. who was then an alderman of Maastricht. Given the following circumstances:
>
> a. It is stated on this receipt that it was drawn up on 9 October 1991, whereas B. has stated that he was not in the Netherlands on that date and the applicant, heard as a witness at the appeal hearing on 20 January 1997 in the criminal case against B., has stated that the receipt was drawn up and signed after the journey to Egypt, i.e. after 27 or 28 November 1991;
>
> b. B. initially stated that he had received the sum allegedly paid to him by the applicant from his son, which his son confirmed;
>
> c. B. stated, after he and his son had withdrawn these statements, that he had received that money from his mother-in-law;
>
> d. B.'s mother-in-law stated unambiguously on 12 February 1993 that she had never given her son-in-law any money, nor given any into his safe-keeping;

e. all the expenses for the journey to Egypt billed by the ... travel agency were debited to the account of 'travel, accommodation and representation expenses' of Baars Contractors and Road Builders Ltd. (*Aannemings- en wegenbouwmaatschappij Baars B.V.*) – that is, as business expenses – and were only debited to the private current account of the applicant, on the applicant's instructions, on 21 January 1992,

the Court of Appeal finds in its judgment of 3 February 1997 that B. did not at any time, and in particular, did not on 9 October 1991 pay the sum of NLG 7,414 to the applicant.

Based on these circumstances, from which it follows that the applicant – if the prosecution department had not forfeited the right to prosecute by exceeding a reasonable time and [the prosecution] had not been declared inadmissible by the Regional Court for that reason – would in all likelihood (*met grote mate van waarschijnlijkheid*) have been convicted, the Court of Appeal finds no reasons in equity for awarding compensation, and it will therefore dismiss the appeal."

II. RELEVANT DOMESTIC LAW

18. At the time of the events complained of, the relevant provisions of the Code of Criminal Procedure provided as follows:

Article 89

"1. If a case ends without the imposition of a punishment or measure, or when such punishment or measure is imposed but on the basis of a fact for which detention on remand is not allowed, the court may, at the request of the former suspect, grant him compensation at the expense of the State for the damage which he has suffered as a result of police custody, clinical observation or detention on remand (*voorlopige hechtenis*). Such damage may include non-pecuniary damage. ..."

Article 90

"1. Compensation shall be awarded in each case if and to the extent that the court, taking all circumstances into account, is of the opinion that there are reasons in equity to do so.

2. In the determination of the amount, the personal circumstances (*levensomstandigheden*) of the former suspect shall also be taken into account. ..."

Article 591

"1. Compensation shall be paid to the former suspect or his heirs out of State funds for costs borne by the former suspect under or pursuant to the provisions of the Act on Fees in Criminal Cases (*Wet tarieven in strafzaken*), in so far as the appropriation of these costs has served the investigation or has become devoid of purpose by the withdrawal of summonses or legal remedies by the public prosecution service (*openbaar ministerie*).

2. The amount of compensation shall be determined at the request of the former suspect or his heirs. This request must be submitted within three months following the termination of the case. The determination shall be made in the court with jurisdiction as to both facts and law before which, at the time of its termination, the case was or

would have been prosecuted or else was last prosecuted, by the District Court judge or by the presiding judge as the case may be. The presiding judge may appoint one of the judges of the Court of Appeal or the Regional Court who have dealt with the case to do so. The District Court judge or the [Regional Court or Court of Appeal] judge shall issue an order of payment (*bevelschrift van tenuitvoerlegging*) for the amount of the compensation. ...”

Article 591a

“1. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs shall be granted compensation out of State funds for his travel and subsistence expenses incurred for the investigation and the examination of his case, calculated on the basis of the Act on Fees in Criminal Cases.

2. If the case ends without imposition of a punishment or measure ..., the former suspect or his heirs may be granted compensation out of State funds for the damage which he has actually suffered through loss of time as a result to the preliminary investigation and the examination of his case at the trial, as well as the costs of counsel. This will include compensation for the costs of counsel during police custody and detention on remand. Compensation for such costs may furthermore be granted when a case ends with the imposition of a punishment or measure on the basis of a fact for which detention on remand is not allowed. ...

4. Articles 90 and 591, paragraphs 2 to 5, shall apply by analogy. ...”

THE LAW

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

19. The applicant complained under Article 6 § 2 of the Convention that the reasoning of the decisions of 19 March 1998 ran counter to the principle of the presumption of innocence enshrined in Article 6 § 2 of the Convention, which provides as follows:

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

The Government disputed this.

20. The applicant argued that the decisions at issue did not merely describe a state of continued suspicion but clearly reflected a finding that he was guilty. This finding was reached on the basis of proceedings against another person, to which he – the applicant – had not been party and in which he had not been able to exercise the rights of the defence. In his view, in the determination of requests under Articles 89 and 591a of the Code of Criminal Procedure, domestic courts ought only to have regard to the contents of the case-file of the person concerned.

21. The Government did not dispute the applicability of Article 6 § 2 to the proceedings in question. They submitted, however, that no violation of that provision could be found. Referring to the Court's case-law, in particular its judgments in the cases of *Lutz v. Germany*, *Englert v. Germany* and *Nölkenbockhoff v. Germany* (judgments of 25 August 1987, Series A no. 123), they argued that the Court of Appeal had merely taken into account the suspicion that still weighed against the applicant. It had concluded, as it was fully entitled to in light of the European Court's *Leutscher v. the Netherlands* judgment (26 March 1996, *Reports of Judgments and Decisions* 1996-II), that there were no reasons in equity to order the payment of compensation to the applicant.

22. The considerations on which the Court of Appeal had based the decisions complained about could not be interpreted otherwise than as a description of the suspicions against the applicant. They were in any case similar to those in other cases decided by the Convention organs, which had resulted in decisions of inadmissibility (*Kandel v. the Netherlands* [dec.], no. 25513/94, 18 May 1995, and *Hibbert v. the Netherlands* [dec.], no. 38087/97, 26 January 1999).

23. The Government further noted that, unlike in other cases such as that of *Sekanina v. Austria* (judgment of 25 August 1993, Series A no. 266), the applicant in the present case had never been formally acquitted.

24. While it was true that the Court of Appeal had had regard to the case against B., who had in fact been found guilty, it had to be remembered that B.'s conviction related to the same forgery as that which had given rise to the prosecution of the applicant. The facts and evidence in the two cases were therefore necessarily similar.

25. The Court notes that it is not part of its duties to rule on the scope of the examination by the Netherlands domestic courts of requests under Articles 89 and 591a of the Code of Criminal Procedure. Its task in the present case is solely to decide whether the facts complained of disclose a violation of Article 6 § 2 of the Convention.

26. In the *Minelli v. Switzerland* judgment of 25 March 1983 (Series A no. 62, p. 18, § 37), the applicable principle was stated as follows:

> “In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.”

27. In the *Lutz* judgment (*Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 25, §§ 59-60, references omitted), the Court added:

> “The Court points out, first of all, like the Commission and the Government, that neither Article 6 § 2 nor any other provision of the Convention gives a person 'charged

> with a criminal offence' a right to reimbursement of his costs where proceedings taken against him are discontinued. The refusal to reimburse Mr. Lutz for his necessary costs and expenses accordingly does not in itself offend the presumption of innocence (...). Nevertheless, a decision refusing reimbursement of an accused's necessary costs and expenses following termination of proceedings may raise an issue under Article 6 § 2 if supporting reasoning which cannot be dissociated from the operative provisions amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence".

28. The similarity of the present case with the *Lutz* case is that the criminal proceedings in both cases ended without any decision on the merits because the prosecution was time-barred. In the subsequent proceedings in the *Lutz* case concerning reimbursement of costs and expenses, the German first-instance court noted (*loc. cit.*, § 62):

> "that 'as the file [stood], the defendant would most probably have been convicted' (...). When dismissing the applicant's appeal, the Regional Court held, among other things, that had the prosecution not been statute-barred, the defendant 'would almost certainly have been found guilty of an offence'(...)".

The Court concluded that the German courts thereby meant to indicate, as they were required to do for the purposes of the decision, that there were still strong suspicions concerning the applicant. It added that, even if the terms used might appear ambiguous and unsatisfactory, the national courts had confined themselves in substance to noting the existence of "reasonable suspicion" that the defendant had "committed an offence". On the basis of the evidence, in particular Mr Lutz's earlier statements, the decisions described a "state of suspicion" and did not contain any finding of guilt. In this respect the Court found that there was a contrast with the more substantial, detailed decisions which the Court had considered in the aforementioned *Minelli* case.

29. In the present case, however, the Court of Appeal based its decision not to make any award to the applicant, who had been charged with forgery, on its view that "[the] receipt [had been] forged by the applicant" and enumerated in detail the elements from which this followed.

30. In these circumstances, it cannot be said that the Court of Appeal merely indicated that there were still strong suspicions concerning the applicant.

31. The reasoning of the Court of Appeal amounts in substance to a determination of the applicant's guilt without the applicant having been "found guilty according to law". It was based on findings in proceedings against another person, Mr B. The applicant participated in these other proceedings only as a witness, without the protection that Article 6 affords the defence.

32. The Court therefore finds that there has been a violation of Article 6 § 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

34. The applicant claimed 2,540,066 Netherlands guilders plus 815,807 euros (EUR) which he stated he had been forced to inject into his company to save it from ruin after the publicity given to his case had caused orders to dwindle.

35. The Government argued that no causal link existed between any violation of Article 6 § 2 that might be found and the pecuniary damage alleged.

36. The Court agrees with the Government that the pecuniary damage alleged is not referable to the violation found. No award will therefore be made under this head.

2. Non-pecuniary damage

37. The applicant claimed EUR 500 in respect of his police custody plus EUR 60,000 in respect of other non-pecuniary damage.

The Government argued that the applicant's police custody was not a result of the decisions of 19 March 1998. In addition, they considered the claims in respect of other non-pecuniary damage excessive.

38. In agreement with the Government, the Court points out that the applicant's detention in police custody did not result from the violation found. For the remainder, the Court is of the opinion that the finding of a violation of Article 6 § 2 provides sufficient just satisfaction for any resulting non-pecuniary damage and that no reasons are apparent which would justify a cash award.

B. Costs and expenses

1. Domestic proceedings

39. The applicant claimed EUR 6,411.10 in respect of accountants' expenses incurred in the course of the criminal proceedings as well as EUR 41,849.10 not including value-added tax in respect of legal costs. Of the latter sum, EUR 35,319.85 related to the criminal proceedings.

40. The Government were prepared to reimburse costs related to the compensation proceedings under Articles 89 and 591a of the Code of Criminal Procedure to an amount calculated on the basis of domestic legal aid scales.

41. The Court has found a violation of Article 6 § 2 only as regards the decisions of 19 March 1998 which brought the compensation proceedings to a close. The expenses incurred in the criminal proceedings are unrelated to it.

42. As to the expenses incurred in the compensation proceedings, the Court finds that these were aimed at obtaining the repayment of certain sums, not at preventing the inclusion of the offending finding of guilt in the decisions. In these circumstances the Court does not consider that the applicant's financial outlay in these proceedings should be reimbursed by the Government.

43. It follows that the applicant's claims for reimbursement of the costs and expenses of the domestic proceedings must be dismissed in their entirety.

2. Convention proceedings

44. In his submissions dated 30 May 2003, the applicant claimed a total of EUR 8,836.51 in respect of the proceedings before the Commission and the Court.

45. The Court notes, firstly, that the applicant did not lodge any observations on the merits after the case was declared admissible and, secondly, that legal costs incurred after 1 April 2003 – not yet invoiced, but estimated provisionally at EUR 2,500 – seem to relate essentially to the formulation and submission of the applicant's claims under Article 41. In the circumstances the Court considers the sums claimed excessive.

46. Making its own estimate, the Court awards the applicant EUR 2,500, plus any tax that may be chargeable, to cover the cost of the Convention proceedings.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

3. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 28 October 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P COSTA
President