CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

## THIRD SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 19581/04
by Harry VAN OFFEREN
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 5 July 2005 as a Chamber composed of:

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

Having regard to the above application lodged on 1 June 2004,

Having deliberated, decides as follows:

## THE FACTS

The applicant, Mr Harry van Offeren, is a Netherlands national who was born in 1965 and lives in 's-Hertogenbosch. He is represented before the Court by Mr W. Bos, a lawyer practising in Eindhoven.

### A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In its judgment of 13 September 1999, following criminal proceedings on appeal, the Court of Appeal (*gerechtshof*) of 's-Hertogenbosch quashed the impugned judgment of the Regional Court (*arrondissementsrechtbank*) of 's-Hertogenbosch of 21 January 1999, convicted the applicant of having transported between 1 June 1998 and 8 October 1998 one or more quantities of cocaine, of having held on 9 October 1998 about 640 grams of cocaine, of having held on 9 October 1998 – in preparation of drug offences – about 535 grams of a substance [mannitol] destined to dilute cocaine, of having unlawfully held on 9 October 1998 firearms and ammunition, and of social security fraud. It acquitted the applicant of the remaining charges, including trafficking cocaine. It sentenced the applicant to four years and six months imprisonment less the time spent in pre-trial detention. This judgment became final after an initially lodged appeal in cassation to the Supreme Court (*Hoge Raad*) was withdrawn on 24 September 1999.

In the meantime, on 21 December 1998, the public prosecutor had summoned the applicant to appear before the Regional Court of 's-Hertogenbosch in order to be heard on the prosecutor's request for an order for the confiscation of illegally obtained advantage (*vordering tot ontneming van wederrechtelijk verkregen voordeel*) within the meaning of Article 36e of the Criminal Code (*Wetboek van Strafrecht*), which had been assessed by the public prosecutor, on the basis of a criminal financial investigation (*strafrechtelijk financieel onderzoek*) carried out and closed on 18 December 1998, at a total amount of 357,059 Netherlands guilders (NLG; corresponding to EUR 162,026.31).

At the hearing held on 13 September 1999 before the Regional Court on the prosecution's application for a confiscation order, the applicant argued that, although he had been convicted of four offences for which a fifth-category fine could be imposed, namely three offences under the Opium Act (*Opiumwet*) and one offence under the Weapons and Ammunition Act (*Wet Wapens en Munitie*), he had not obtained any benefits by or through these offences. He had only traded in cars and gold, not in drugs. In so far as the request for a confiscation order was based on illegally obtained advantage by or through trafficking cocaine, the applicant argued that it could not be held that he had committed this offence as the Court of Appeal had acquitted him of that charge and that, therefore, the imposition of a confiscation order on that basis would be in violation of his right to be presumed innocent under Article 6 § 2 of the Convention.

In its ruling of 25 October 1999, the Regional Court rejected the applicant's arguments and issued a confiscation order in the amount of NLG 357,059 to be replaced, in case of lack of payment or impossibility of recovery, by thirty months detention.

The applicant filed an appeal against this ruling with the Court of Appeal of 's-Hertogenbosch.

Hearings were held before the Court of Appeal on 7 March 2002 and 8 July 2002, in the course of which it noted the contents a number of documents, including two financial reports drawn up on 17 December 1998 and a further financial report drawn up on 2 July 1999 by the Financial Criminal Investigation Unit of the North Brabant Regional Police, according to which the applicant had had considerable revenues from an untraceable/unknown source, in any event not from a traceable legal source. The applicant maintained that he had only traded in cars and gold, but not in cocaine. The Court of Appeal further heard seven witnesses – including Mr F. whom the prosecution suspected of perjury (*meineed*) and in respect of whom the procedure concerning a suspicion of perjury by a witness as set out in Article 295 of the Code of Criminal Procedure (*Wetboek van Strafvordering*) was applied – on the applicant's business activities.

In its decision of 25 September 2002, the Court of Appeal quashed the ruling of 25 October 1999 and imposed a confiscation order in the amount of EUR 162,026.31, to be replaced – in case of lack of payment or impossibility of recovery – by eighteen months' detention. In so far as relevant, this decision reads as follows:

> "It has been argued on behalf of [the applicant] that there exist insufficient indications that [he] would have committed (in brief) cocaine trafficking.
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> The court rejects this defence. In its judgment of 13 September 1997 having become final, this court has convicted [the applicant] of, *inter alia*, transport of cocaine in the period between June and October 1998, possession of about 640 grams of cocaine, and possession of the diluent mannitol. Cocaine trafficking must be regarded as an offence similar to the offences under the Opium Act found proved.
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> The court is of the opinion, noting the quantity of cocaine held by [the applicant], the proved transport of cocaine ..., the possession of a diluent, and the CID (*Criminele Inlichtingen Dienst*; Criminal Intelligence Service) information in the case-file, that there exist sufficient indications that [the applicant] has committed the offence of cocaine trafficking.
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> The court considers wholly incredible the [applicant's] explanation for his frequent visits to the attic he had rented ... (where the cocaine had been concealed) that every time he would exchange there a 9 mm. Walther pistol for an easier to handle Beretta calibre 6.35.
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> In addition it appears from the property analysis (*vermogensvergelijking*) prepared by the police (first and second financial reports of [17 December 1998 of] the Financial Criminal Investigation Unit of the North Brabant Regional Police) that [the applicant], in the period between 1 January 1997 and 31 May 1998, held a considerable capital consisting, *inter alia*, of jewellery and cars where [the applicant], during that period, was in receipt of welfare benefits.
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> [The applicant] and his counsel have stated before the court in the [present] proceedings on appeal that the different cars, which according to the prosecution belonged to [the applicant], would have been financed by the witness F. and would in

fact belong to the latter, which statement was confirmed in full by the witness F. in the [present] proceedings on appeal.

However, the court is of the opinion that it has appeared from the [present] appeal proceedings and, in particular, from the different statements from the perjury procedure in respect of F. that the ... [latter's] statement must be regarded as wholly incredible. [The applicant's] version has, in the opinion of the court, not been established. Noting this, the Court considers that no other conclusion can be reached than that [the applicant] has purchased these cars with own capital.

[The applicant] has tried during the [present] appeal proceedings to demonstrate that, to the extent that there would be any capital, this [capital] would have been obtained from the (illegal) trade in gold and cars.

However, in the court's opinion, it has not been demonstrated in the examination in court that [the applicant] would actually have been engaged in that trade and that it would have generated such profits that thereby [the applicant's] abovementioned capital could be explained. In this, the court takes into account that [the applicant's] allegation that there would be great differences in the price of gold in the Netherlands and Belgium has, as appears from information provided by the police, turned out to be untrue. [The applicant's] statement will be put aside by the Court as incredible.

On grounds of the above, the court finds that it cannot be concluded otherwise than that there are sufficient indications that [the applicant] has been engaged, during the period from 1 January 1997 to 31 May 1998, in violating the prohibition set out in Article 2 .... of the Opium Act and that [the applicant] has derived benefit from this trafficking in cocaine to an amount to be determined below."

The applicant filed an appeal in cassation with the Supreme Court (*Hoge Raad*), complaining that the imposition of the confiscation order on the basis of an offence of which he had been acquitted violated his right to be presumed innocent as guaranteed by Article 6 § 2 of the Convention.

In his advisory opinion, the Procurator General to the Supreme Court considered, referring to the Supreme Court's case-law on this point, that the imposition of the confiscation order did not infringe the applicant's rights under Article 6 § 2 of the Convention.

On 9 December 2003, the Supreme Court dismissed the applicant's complaint in cassation, holding:

"The complaint does not provide grounds for overturning the ruling of the Court of Appeal (*kan niet tot cassatie leiden*). Having regard to Article 81 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), no further reasoning is called for, since the complaint does not give rise to a need for a determination of legal issues in the interest of legal unity or legal development."

However, on the basis of an *ex officio* examination of the impugned ruling, the Supreme Court decided to quash the impugned ruling in part, i.e. in so far as the Court of Appeal had imposed alternative detention. It rejected the remainder of the appeal in cassation.

## B. Relevant domestic law and practice

Article 36e of the Criminal Code (*Wetboek van Strafrecht*) provides:

1. Upon the application of the Public Prosecutions Department any person who has been convicted of a criminal offence may be ordered in a separate judicial decision to pay a sum of money to the state in order to deprive him of illegally obtained advantage.

2. Such an order may be imposed on a person as referred to in paragraph 1 who has obtained advantage by means of or from the proceeds of the said criminal offence or similar offence or offences for which a fifth-category fine[1] may be imposed, in connection with which there exist sufficient indications that they were committed by him.

3. Upon the application of the Public Prosecutions Department any person who has been found guilty of an indictable offence for which a fifth-category fine may be imposed and against whom, in connection with his being suspected of that offence, a criminal financial investigation[2] has been instituted, may be ordered in a separate judicial decision to pay a sum of money to the state in order to deprive him of illegally obtained advantage if, having regard to that investigation, it is likely that other indictable offences led in any other way to the convicted person obtaining illegal advantage.

4. The judge shall determine the amount which the illegally obtained advantage is estimated to represent. Advantage shall be taken to include cost savings. The value of goods which the court deems to form part of the illegally obtained advantage may be estimated to be its market value at the time the decision is taken or may be estimated by reference to the yield to be obtained through public auction if the amount must be recovered. The court may order that the amount to be paid shall be less than the estimated advantage.

5. Goods shall be taken to mean all objects and property rights.

6. In determining the amount which the illegally obtained advantage is estimated to represent, legal claims from disadvantaged third parties awarded by a court shall be deducted.

7. In imposing the order account shall be taken of orders to pay a sum of money by way of deprivation of illegally obtained advantage imposed under previous decisions."

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[1] At the material time, an amount of NLG 100,000 [equivalent to EUR 45,378] and, currently, EUR 45,000.

[2] According to Article 126 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), a criminal financial investigation can be opened in case of suspicion of an offence for which a fifth-category fine can be imposed and which offence has generated proceeds – valuable in money – of some importance, and in order to determine the pecuniary value of illegally obtained proceeds for the purposes of a confiscation order. It can be opened in addition to a principal criminal judicial preliminary investigation (*gerechtelijk vooronderzoek*).

The possibility to deprive a person of proceeds of crime was introduced in 1983 by the Financial Penalties Act (*Wet Vermogenssancties*). On 1 March 1993, the Act of 10 December 1992 on the extension of the possibilities to apply the measure of illegally obtained advantage and other financial penalties (*Wet tot verruiming van de mogelijkheden tot toepassing van de maatregel van ontneming van wederrechtelijk verkregen voordeel en andere vermogenssancties*) entered into force. One of the changes brought about by this Act was that the proceedings on the measure of deprivation of illegally obtained advantage were disconnected from the principal criminal proceedings, *inter alia*, in order to prevent situations in which issues concerning illegally obtained advantage would overshadow and affect the duration of the principal criminal proceedings.

It established a specific procedure – separate from the criminal proceedings taken against a suspect – for imposing a confiscation order under Article 36e of the Criminal Code. This specific procedure is set out in Articles 511b - 511i of the Code of Criminal Procedure (*Wetboek van Strafvordering*). The legislator's choice for this setting was to express that it concerned a continuation of the criminal prosecution of the convicted person, the purpose being to determine the sanction to be imposed (*Kamerstukken* (Parliamentary Documents) II, 1989/90 session, 21,504 no. 3, p. 14). The confiscation order procedure is neither designed nor intended for the determination of a criminal charge, but for the detection of illegally obtained proceeds, to determine the pecuniary value thereof and, by way of a judicial confiscation order, to deprive the beneficiary of these proceeds. The aim pursued by the possibility of imposing confiscation orders is twofold; in the first place to remedy an unlawful situation and, secondly, to bring about a general crime-preventive effect by rendering crime unattractive on account of an increased risk that proceeds of crime will be confiscated.

Pursuant to Article 511b § 1 of the Code of Criminal Procedure, a request for a confiscation order under Article 36e of the Criminal Code must be filed by the public prosecutor with the Regional Court as soon as possible and not later than a maximum of two years after a convicting judgment handed down in the substantive criminal proceedings by the first instance trial court. It is not required that, when filing such a request, the conviction must have obtained the force of *res iudicata*.

Article 311 § 1 of the Code of Criminal Procedure obliges the public prosecutor to indicate – in case this has not yet been done – when delivering the closing speech (*requisitoir*) before the first instance trial court in the substantive criminal proceedings whether the prosecution intends to seek a confiscation order in case of a conviction. The purpose of this obligation is to prevent a situation that a convicted person is confronted, at the latest two years after his conviction by a first instance court, with a request for a confiscation order, and to express that a confiscation order procedure does

not constitute a fresh, second prosecution based on the same facts but is to be understood as a separate part of the earlier substantive criminal proceedings and that the prosecution does not stop after the end of the substantive criminal proceedings but is pursued in the confiscation order procedure.

The notion of "similar offence or offences" under Article 36e § 2 of the Criminal Code relates to offences of a similar nature as those having formed the object of the criminal proceedings against the accused, such as for instance drug offences, property offences and offences involving forgery and fraud.

The rules of evidence that apply in criminal proceedings, as set out in Articles 338-344a of the Code of Criminal Procedure, are not applicable to a confiscation order procedure. In that procedure it is for the public prosecutor to establish a prima facie case that there are sufficient indications that the person concerned has committed one or more similar offences within the meaning of Article 36e § 2 of the Criminal Code having generated illegally obtained advantage. It is for the person concerned to rebut the prosecutor's case. The judge will decide the case on the basis of a balancing of probabilities, comparable to the standard of proof applicable to civil proceedings.

The fact that the rules of evidence applicable to criminal proceedings do not apply to the confiscation order procedure entails that – if in criminal proceedings an accused has been partly convicted and partly acquitted of the charges brought against him – in a subsequent confiscation order procedure the judge may impose a confiscation order against the person concerned which is not only based on the offence(s) of which he has been convicted, but also on the similar offence(s) of which he has been acquitted but in respect of which the judge is satisfied, on a balance of probabilities, that there exist sufficient indications that he has committed them.

Pursuant to Article 511f of the Code of Criminal Procedure, the judge can derive the assessment of the actual amount of illegally obtained advantage under Article 36e of the Criminal Code only from the contents of "legal means of evidence" (*wettige bewijsmiddelen*). Article 339 of the Code of Criminal Procedure defines "legal means of evidence" as the personal observations of the judge, statements of the accused, statements of a witness, statements of an expert, and written materials (such as, for instance, judicial decisions, and formal minutes and records). However, unlike the requirement in criminal proceedings that a conviction can only be based on evidence that is corroborated by other evidence, the assessment of the amount of illegally obtained advantage in a confiscation order procedure can be based on only one evidentiary item, such as for instance a formal record containing the statement of the person concerned.

In a judgment handed down on 1 April 2003 and published in the Netherlands Law Reports (*Nederlandse Jurisprudentie*; "NJ"), the Supreme Court held, in so far as relevant:

> "3.3. In its ruling of 22 May 2001, NJ 2001, no. 575, the Supreme Court considered the following:
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> - The provisions of Article 36e of the Criminal Code and [Articles 551b – 511i] of the Code of Criminal Procedure concern the imposition of a measure on the person convicted of a punishable offence, namely the obligation to pay a sum of money to the State for the purposes of confiscating illegally obtained advantage. This does not constitute a penalty, but a measure aimed at the deprivation of illegally obtained advantage. The fact that the imposition of that measure has been given a place in a criminal procedure does not alter its special character.
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> - That special character is also expressed in the requirements set for imposing it. These requirements are less strict than those that must be met for imposing a [criminal law] penalty. The regulations on evidence that apply to criminal proceedings do not apply in their full extent. This entails that offences included in a criminal charge having resulted in an acquittal can still form the basis for the imposition of a (confiscation) measure. Also in such a case, the judge must determine either that there exist sufficient indications that a similar offence or similar offences, referred to in Article 36e § 2 of the Criminal Code for which a fine of the fifth category may be imposed, has/have been committed by the person concerned, or that it is plausible that the other similar offences, referred to in Article 36e § 3 of the Criminal Code, have in any way resulted in the illegal obtaining of advantage by the person concerned. Such a determination is preceded by the procedure regulated in Articles 511b *et seq.* of the Code of Criminal Procedure. This serves as a guarantee that the judge, who must determine a request for a confiscation order filed by the prosecution department, will only do so after he has examined whether, and has found that, the statutory conditions, *inter alia* whether there are indications within the meaning of the second paragraph [of Article 36e] or plausibility within the meaning of the third paragraph [of Article 36e], have been met.
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> - The above entails that the circumstance that the suspect has been acquitted of specific offences does not automatically constitute an obstacle for considering those offences, in the framework of the confiscation procedure, as "similar offences" or "offences for which a fifth-category fine may be imposed" as referred to in Article 36e § 2 of the Criminal Code.
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> 3.4. The Supreme Court adds that this is not incompatible with Article 6 § 2 of the Convention as, in the procedure regulated by Article 511b *et seq.* of the Code of Criminal Procedure, the person concerned is provided with the opportunity to defend himself, including the possibility to argue that and why there exist insufficient indications that the similar offence or similar offences for which a fifth-category fine may be imposed, as meant in Article 36e § 2 of the Criminal Code, has/have been committed by [him], or that it is not plausible that the other punishable offences, within the meaning of Article 36e § 3 of the Criminal Code, have resulted in the illegal obtaining of advantage by [him]. The fact that the procedure on a ... [request for a confiscation order] must be regarded as a separate part or a continuation of a same [set of] criminal prosecution [proceedings] that can lead to conviction and

sentence (see *Hoge Raad*, 5 December 1995; NJ 1996; no. 411) does not prompt a different finding.

3.5. Considering that it has neither been argued nor appeared that the opportunity, referred to in [the above paragraph] 3.4., has not been provided in the instant case, the decision of the Court of Appeal does not disclose an incorrect interpretation of the law."

## COMPLAINT

The applicant complains that the confiscation order imposed on him infringed his right to be presumed innocent under Article 6 § 2 of the Convention since it was based on a judicial finding that he had committed an offence of which he had been acquitted in the criminal proceedings that had been brought against him.

## THE LAW

The applicant complained that the confiscation order imposed on him was based on an offence of which he had been acquitted, thus violating his right to the presumption of innocence under Article 6 § 2 of the Convention, which reads as follows:

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

The Court reiterates that the presumption of innocence, guaranteed by this provision, will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law (see *Deweer v Belgium*, judgment of 27 February 1980, Series A no. 35, § 56; and *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, § 37). Furthermore, the scope of Article 6 § 2 is not limited to criminal proceedings that are pending (see *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, § 35).

In certain instances, the Court has also found this provision applicable to judicial decisions taken following an acquittal (see *Sekanina v. Austria*, judgment of 25 August 1993, Series A no. 266-A, § 22; *Asan Rushiti v. Austria*, no. 28389/95, § 27, 21 March 2000; and *Lamanna v. Austria*, no. 28923/95, 10 July 2001).). The latter judgments concerned proceedings relating to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his necessary costs, or compensation for detention on remand, and which were found to constitute

a consequence and the concomitant of the substantive criminal proceedings. In the *Asan Rushiti* judgment (cited above, § 31), the Court emphasised that Article 6 § 2 embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.

Once an accused has properly been proved guilty of a particular criminal offence, Article 6 § 2 has no application in relation to allegations made about an accused's personality as part of the sentencing process, unless they are of such a nature and degree as to amount to the bringing of a new charge within the autonomous meaning of the Convention (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, § 90, and *Phillips v. the United Kingdom*, no. 41087/98, § 34-36, ECHR 2001-VII).

The Court observes that the applicant does not dispute that, during the prosecution which led to his criminal conviction, he was "charged with a criminal offence" and was therefore entitled to – and received – the protection of Article 6 § 2. The applicant further does not dispute that he was lawfully convicted of drug offences, i.e. of having transported cocaine, of possession of about 640 grams of cocaine and of possession of a substance destined to dilute cocaine. There can thus be no doubt that the Court of Appeal was entitled to determine a sentence to be imposed on him, which it did by imposing a prison sentence of four years and six months.

In order to determine whether in the course of the subsequent confiscation order proceedings the applicant was "charged with a criminal offence" within the meaning of Article 6 § 2, the Court must have regard to three criteria, namely, the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring (see *Phillips*, cited above, § 31 with further references).

As regards the classification of the proceedings under domestic law, the Court notes that, as from 1 March 1993, the proceedings on deprivation of illegally obtained advantage were disconnected from the principal criminal proceedings – *inter alia*, in order to prevent situations in which issues concerning illegally obtained advantage would overshadow and affect the duration of the principal criminal proceedings – by providing for a separate procedure set out in the Code of Criminal Procedure. However, it is clear from the statutory framework that this separate procedure remains directly linked to the substantive criminal proceedings in that only a criminal conviction can trigger off a confiscation order procedure. In these circumstances, the Court considers that the confiscation order procedure must be regarded as forming a part of the sentencing process under domestic law.

Turning to the second and third relevant criteria – the nature of the proceedings and the type and severity of the penalty at stake – the Court notes that, in a confiscation order procedure, the prosecution must establish

a prima facie case that the convicted person has benefited from crime, i.e. from the offence(s) of which he has been found guilty and/or other offences of a similar nature. It is then for the convicted person to rebut the prosecution's case by proving, on the balance of probabilities, that the benefits in question were not obtained through such offences but have another origin not related to the offence(s) of which he was convicted or to any offence of a similar nature.

In the instant case, the Court of Appeal noted that a property analysis disclosed that, at the material time, the applicant had demonstrably held a considerable capital from an untraceable/unknown source, in any event not from a traceable legal source. It subsequently examined and rejected as not credible the applicant's explanation that this capital stemmed from his having traded in cars and gold, and – finding that this allowed no other conclusion than that this capital stemmed from drug trafficking – imposed a confiscation order in the amount of EUR 162,026.31. If the applicant failed to pay this amount he was to serve an extra eighteen months' imprisonment, consecutive to the four years and six months' term already imposed on him on 13 September 1999.

However, the purpose of this procedure was not the conviction or acquittal of the applicant for any other offences, but to assess whether assets demonstrably held by him were obtained by or through drug-related offences and, if so, to assess the amount at which the confiscation order should properly be fixed. In these circumstances, the Court if of the opinion that the confiscation order procedure must therefore be regarded as analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a person properly convicted of one or more drug offences and did not involve the bringing of any new "charge" within the meaning of Article 6 § 2 of the Convention (see, *mutatis mutandis*, *Phillips v. the United Kingdom*, cited above, §§ 32-35.

Consequently, the Court finds that, in the particular circumstances of the present case, the facts of the case do not disclose a violation of the applicant's rights under Article 6 § 2 of the Convention.

It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President