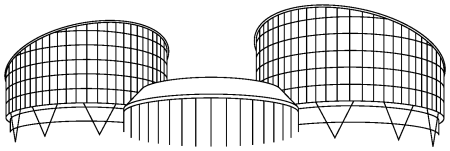

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF CLEVE v. GERMANY

(Application no. 48144/09)

JUDGMENT

STRASBOURG

15 January 2015

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 Cleve v. Germany,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 48144/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Ludger Cleve ("the applicant"), on 7 September 2009.

2. The applicant was represented by Mr D. Röttgering, a lawyer practising in Gescher. The German Government ("the Government") were represented by two of their Agents, Mr H.-J. Behrens and Mrs K. Behr, of the Federal Ministry of Justice.

3. The applicant alleged that statements made by the Regional Court in the reasoning of its judgment acquitting him amounted to a finding of guilt, in breach of the presumption of innocence laid down in Article 6 § 2 of the Convention.

4. On 14 October 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963 and lives in Xanten.

A. Background to the case

6. The applicant's daughter A. was born on 9 March 1994. Since their separation in September 1994, the applicant and A.'s mother, Ms J., have been quarrelling over the custody of and contacts with A. The child was initially living with her mother. In 2004, A. was placed in a home.

7. On 9 November 2006 Ms J. laid an information against the applicant with the police, accusing him of having raped their daughter since 1998. As A. had persistently declared not to be ready to make a statement before the police, the proceedings were initially discontinued. Following a visit of A. to her mother, the latter informed the police that A. was now ready to testify. A. was heard by the police twice in May 2007. On 5 November 2007 psychological expert K., having examined A., submitted a report on the credibility of A.'s submissions.

8. On 18 January 2008 the Münster Public Prosecutor's Office charged the applicant with fifteen counts of serious sexual abuse of children (Article 176a of the Criminal Code, see paragraph 19 below) and of sexual abuse of a person entrusted to him for upbringing (Article 174 of the Criminal Code, see paragraph 20 below), his daughter A., committed between the beginning of 2002 and summer 2004 mostly in or in the vicinity of Senden. The applicant was accused of having raped A. in his car on thirteen occasions and in a holiday apartment on two occasions when he met her on weekends and during vacations following her parents' separation.

9. The applicant was in detention on remand between 14 February 2008 and 26 February 2008, when the execution of the detention order was suspended.

B. The proceedings before the domestic courts

1. The proceedings before the Regional Court

10. On 17 September 2008 the Münster Regional Court, having held five hearings, acquitted the applicant of the charges on account of insufficiency of proof. It further ordered the Treasury to bear the costs of the proceedings and the applicant's necessary expenses and to pay the applicant compensation for his detention on remand from 14 to 26 February 2008.

11. The Regional Court, having regard to the testimonies of several witnesses and the (diverging) reports of two psychological experts, K. and B., on the credibility of A.'s submissions, found that the offences the applicant had been charged with had not been proven with the certainty necessary for a criminal conviction. It noted that the applicant had contested the charges. He was only incriminated by A.'s statements. The Regional Court stated that it has not been convinced by A.'s testimony in the hearing

that the charges were completely correct, in particular, in terms of a clear definition of the criminal acts and their time frame.

12. The Regional Court, having regard to the witness statements of two educators who had noted signs of sexual abuse in A.'s conduct, two psychologists who had treated A. and a friend of A., was not persuaded that A. had been influenced by third persons, including her mother, so as to incriminate her father.

13. The Regional Court then stated in its judgment:

> "... To sum up, the Chamber does not discern any signs of suggestive influence.
>
> Therefore, the Chamber assumes, in sum, that the core events described by the witness have a factual basis, that is, that the accused actually carried out sexual assaults on his daughter in his car. Nevertheless, the acts could not be substantiated, in terms of either their intensity or their time frame, in a manner that would suffice to secure a conviction. The inconsistencies in the witness's testimony were so marked that it was impossible to establish precise facts."
>
> [*"... Zusammengefasst sind Anhaltspunkte einer Suggestion für die Kammer nicht ersichtlich.*
>
> *So geht die Kammer im Ergebnis davon aus, dass das von der Zeugin geschilderte Kerngeschehen einen realen Hintergrund hat, nämlich dass es tatsächlich zu sexuellen Übergriffen des Angeklagten zu Lasten seiner Tochter in seinem Auto gekommen ist. Die Taten ließen sich aber dennoch weder ihrer Intensität noch ihrer zeitlichen Einordnung nach in einer für eine Verurteilung hinreichenden Art und Weise konkretisieren. Die Inkonstanzen in den Aussagen der Zeugin waren so gravierend, dass konkrete Feststellungen nicht getroffen werden konnten."*]

14. In coming to that conclusion, the Regional Court took into account that witness A. had made the impression of being authentic. It was true that her statements had been short and she had appeared being relatively uninvolved. However, seven witnesses who knew A. partly for a longer period of time had confirmed that she generally spoke and acted in that manner and did not discuss problems in detail.

15. The Regional Court observed, however, that even having regard to these elements, the inconsistencies in witness A.'s statements prevailed to an extent that it was not in a position to establish concrete offences. There were inconsistencies in the witness's statements on the number of the acts described by her (between 25 and 50), the place of these acts (notably concerning acts in a holiday apartment which the witness mentioned only at a later stage) and the time frame in which they took place (starting when the witness was between four and eight and ending either on the witness's placement in the home or continuing also after that placement). Moreover, A. had been uncertain in the hearing about the exact manner in which the acts described by her were committed in the car and did not recall any details on several points. A. had, for instance, been very uncertain in the hearing whether the applicant had moved within the car onto the front passenger seat where she had sat or whether he had left the car and walked

around it to come on her seat. Moreover, A. had declared several times in the hearing not to have any precise recollection of the events any more.

16. The judgment was served on the applicant's counsel on 11 November 2008 and subsequently became final.

2. The proceedings before the Federal Constitutional Court

17. On 9 December 2008 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He claimed that the Regional Court's statements "that the core events described by the witness have a factual basis, that is, that the accused actually carried out sexual assaults on his daughter in his car" had breached his constitutional right to a fair trial, his personality rights and human dignity.

18. On 10 March 2009 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 2499/08). The decision was served on the applicant's counsel on 19 March 2009.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions of the Criminal Code

19. Article 176a of the Criminal Code provides for the offence of serious sexual abuse of children (*schwerer sexueller Mißbrauch von Kindern*), that is persons aged under fourteen years of age. In the version in force prior to 1 April 2004 it provided, in particular, that sexual abuse of children shall be punishable by imprisonment of not less than a year if a person over eighteen years of age completes an act of sexual intercourse or similar sexual acts which entail a penetration of the body with the child. Since 1 April 2004, the same offence is punishable by imprisonment of not less than two years.

20. Article 174 of the Criminal Code concerns sexual abuse of persons entrusted for upbringing (*sexueller Mißbrauch von Schutzbefohlenen*). In the version in force prior to 1 April 2004 it provided, in particular, that whoever commits sexual acts on his biological or adopted child under eighteen years of age shall be punishable by imprisonment of up to five years or a fine. Since 1 April 2004, the same offence is punishable by imprisonment of not less than three months and up to five years.

B. Provisions of the Code of Criminal Procedure

21. Article 203 of the Code of Criminal Procedure provides that the court decides to open the main proceedings if, in the light of the results of the preparatory (investigation) proceedings, there appear to be sufficient grounds to suspect that the indicted accused committed a criminal offence.

22. Article 244 § 2 of the Code of Criminal Procedure provides that in order to establish the truth, the court shall extend *ex officio* the taking of evidence to all facts and evidence which are relevant to the decision.

23. Pursuant to Article 261 of the Code of Criminal Procedure, the court shall evaluate the evidence taken in accordance with its free conviction gained from the hearing as a whole. Conviction in that sense means a sufficient degree of certainty, having regard to life experience, leaving no reasonable doubts on a question relevant to the finding of guilt (see Federal Court of Justice, file no. 2 StR 551/87, judgment of 8 January 1988, § 4).

C. Case-law of the Federal Constitutional Court

24. The Federal Constitutional Court, in its well-established case-law, reiterates that the presumption of innocence is a particular aspect of the principle of the rule of law and thus has the rank of constitutional law. By virtue of Article 6 § 2 of the Convention, it is also part of the positive law of the Federal Republic of Germany with the rank of federal law. It protects the defendant against disadvantages which are equivalent to a guilty verdict or a penalty but have not been preceded by proceedings in compliance with the rule of law for the determination of the defendant's guilt (see, *inter alia*, Federal Constitutional Court, file nos. 2 BvR 254/88 and 2 BvR 1343/88, decision of 29 May 1990, § 33 with further references; file no. 2 BvR 1590/89, decision of 16 December 1991, § 24; file no. 2 BvR 878/05, decision of 17 November 2005, § 18; and file no. 2 BvR 1975/06, decision of 14 January 2008, § 9).

25. The Federal Constitutional Court further found that findings of guilt in the reasoning of a decision discontinuing the proceedings taken prior to the termination of the main hearing might entail a breach of the presumption of innocence. As a rule, the person concerned could only suffer prejudice by the operative part of a decision which alone determined the legal consequences in a binding manner. Statements contained in the reasoning of a decision could, however, breach the presumption of innocence if they amounted to a finding of criminal guilt despite the fact that the proceedings were discontinued prior to the termination of the main hearing. In contrast, statements in the reasoning of a decision could not breach the presumption of innocence if the main proceedings had been completed and the case was therefore ready for the court's decision on the defendant's guilt (see, *inter alia*, Federal Constitutional Court, file nos. 2 BvR 254/88 and 2 BvR 1343/88, cited above, §§ 39-40; file no. 2 BvR 2588/93, decision of 6 February 1995, § 9).

26. Under the Federal Constitutional Court's case-law, the presumption of innocence does not prohibit a finding of remaining suspicions that the defendant committed the offence in question in a decision which terminates criminal proceedings without a formal guilty verdict. However, in such a

situation the reasoning has to show clearly that the court did not make a finding of guilt, but only described a state of suspicion. The question whether the court complied with that standard has to be determined having regard to the context of the court's reasoning as a whole (see, *inter alia*, Federal Constitutional Court, file nos. 2 BvR 254/88 and 2 BvR 1343/88, cited above, §§ 41-42 and file no. 2 BvR 878/05, cited above, § 20) (both in the context of a complaint about criminal proceedings discontinued for insignificance, if at all, of the defendant's guilt); and file no. 2 BvR 1590/89, cited above, § 25 (in the context of a complaint about criminal proceedings discontinued because of a procedural bar to pursuing the proceedings).

THE LAW

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

27. The applicant complained that statements made by the Regional Court in its judgment acquitting him amounted to a finding of guilt and had breached his right to a fair trial and the presumption of innocence as provided in Article 6 §§ 1 and 2 of the Convention.

28. The Court shall examine the applicant's complaint under Article 6 § 2 alone in view of the fact that the presumption of innocence enshrined in Article 6 § 2 is one of the elements of a fair criminal trial as required by Article 6 § 1 (see, *inter alia*, *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308; *Vassilios Stavropoulos v. Greece*, no. 35522/04, § 35, 27 September 2007; and *Virabyan v. Armenia*, no. 40094/05, § 185, 2 October 2012) specifically addressed in the former provision. Article 6 § 2 reads as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

29. The Government contested the applicant's argument.

A. Admissibility

1. The parties' submissions

(a) The Government

30. The Government took the view that the presumption of innocence under Article 6 § 2 of the Convention did not apply to the reasons given by a trial court in its judgment. Referring also to the case-law of the Federal Constitutional Court (in particular, to that court's decision of 29 May 1990,

see paragraphs 24-26 above), the Government argued that the presumption of innocence under Article 6 § 2 was of a purely formal nature. If, after a fair main hearing in which the accused had been able to exercise his defence rights, the suspicions against the accused had not been dispelled, but could also not be proven in accordance with the law, he had a right to an acquittal in the operative provisions of the judgment. In contrast, the accused did not have any further rights in respect of the reasons given by the domestic court for its judgment. An acquittal for lack of evidence, such as in the present case, could be pronounced despite the fact that substantial suspicions remained against the accused. Such an acquittal was therefore of a procedural nature, in the sense that the procedural requirements for a finding of guilt had not been met. Contrary to an acquittal after proof that the accused was not guilty, it did not morally rehabilitate the accused, who did not have a right to be cleared of all suspicions under Article 6 § 2.

(b) The applicant

31. In the applicant's submission, the right to be presumed innocent under Article 6 § 2 of the Convention applied to the criminal courts' reasoning. It protected the accused from statements by a criminal court which went beyond the mere description of remaining doubts and relativized the acquittal, thus inviting other authorities and the public to consider the accused guilty of the offences he had been charged with.

2. The Court's assessment

(a) Recapitulation of the relevant principles

32. The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 will be violated if a judicial decision 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, *inter alia*, *Allenet de Ribemont*, cited above, § 35; *Rushiti v. Austria*, no. 28389/95, § 31, 21 March 2000; *Vassilios Stavropoulos*, cited above, § 35; and *Tendam v. Spain*, no. 25720/05, § 35, 13 July 2010).

33. As to the period of time during which the presumption of innocence applies, the Court recalls that Article 6 § 2 applies to everyone "charged with a criminal offence". Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof, legal presumptions of fact and law, the privilege against self-incrimination, pre-trial publicity and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013, with many references).

34. In cases in which a criminal court rejected an indictment and acquitted the accused or discontinued the proceedings against him, both the

Court and the Commission stressed that the reasoning in the domestic court's decision forms a whole with, and cannot be dissociated from, the operative provisions. Therefore, the Convention organs had to examine the reasoning of the domestic court's decision in the light of the presumption of innocence despite the fact that the indictment was rejected (see *Adolf v. Austria*, 26 March 1982, §§ 38-39, Series A no. 49, in respect of the reasons given for a decision to close criminal proceedings for insignificance of the accused's fault; and *T.H. v. Sweden*, no. 15260/89, Commission decision of 29 June 1992, in respect of reasons given in a judgment acquitting the accused).

35. Moreover, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence does not only apply in the context of pending criminal proceedings. It also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged (see *Allen*, cited above, § 94). What is also at stake once the criminal proceedings have been concluded is the person's reputation and the way in which that person is perceived by the public. To a certain extent, the protection afforded under Article 6 § 2 in this respect may overlap with the protection afforded by Article 8 (see *Allen*, cited above, § 94 with further references).

36. The Court, thus, considers that once an acquittal has become final – be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6 § 2 – the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence (see *Rushiti*, cited above, § 31; *Vostic v. Austria*, no. 38549/97, § 19, 17 October 2002; *Vassilios Stavropoulos*, cited above, § 38; and *Tendam*, cited above, §§ 36, 39). The operative provisions of a judgment acquitting the accused must be respected by every authority which refers, directly or indirectly, to the criminal responsibility of the person concerned (see *Vassilios Stavropoulos*, cited above, § 39; and *Tendam*, cited above, § 37).

37. The protection afforded by the presumption of innocence ceases once an accused has properly been proved guilty of the offence charged with (see *Phillips v. the United Kingdom*, no. 41087/98, § 35, ECHR 2001-VII; and *Allen*, cited above, § 106). Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" (see *Phillips*, ibid.).

(b) Application of these principles to the present case

38. The Court notes that the present case concerns a complaint that the reasoning of the domestic criminal court in its judgment acquitting the applicant for want of evidence, following the conclusion of the accused applicant's trial for sexual offences, breached the presumption of innocence under Article 6 § 2.

39. The Court observes at the outset that the applicant was "charged with a criminal offence", namely with serious sexual abuse and sexual abuse of a person entrusted to him for upbringing, his daughter A., as required for Article 6 § 2 to apply, at the time the trial court delivered its judgment. This is uncontested between the parties.

40. The Court further takes note of the Government's argument that the presumption of innocence under Article 6 § 2 of the Convention did not apply to the reasons given by a trial court in its judgment acquitting an accused. It acknowledges that the large majority of applications raising an issue under Article 6 § 2 before it concerned either the scope of the presumption of innocence prior to the trial court's judgment on the accused's guilt or the protection afforded by that provision after the final acquittal or discontinuance of the proceedings (see paragraphs 33 and 35-36 above).

41. In contrast, the present case concerns the alleged breach of the presumption of innocence by a domestic court at the time when, having closed the hearing, it was called upon to make, and give reasons for, its decision on the applicant's guilt or innocence by assessing all the evidence before it. It emerges from the Court's case-law (see paragraph 36 above) that, at that stage of the proceedings, the trial court is not precluded by the presumption of innocence to voice remaining suspicions against the accused when acquitting him of the charges on account of insufficiency of proof. This can be deducted from the prohibition on voicing any suspicions of guilt, *including those expressed in the reasons for the acquittal* (emphasis added), once an acquittal has become final (ibid.). However, under the Court's case-law, the protection afforded by the presumption of innocence ceases only once an accused has properly been proved guilty of the offence charged with (see paragraph 37 above), which is never the case if he is acquitted. Consequently, the presumption of innocence applies to the reasons given in a judgment acquitting the accused in its operative provisions, from which the reasoning cannot be dissociated (see, in particular, *T.H. v. Sweden*, cited above; and compare *Adolf*, cited above, §§ 38-39, both referred to in paragraph 34 above). It may be breached if the reasoning reflects an opinion that the accused is in fact guilty (see paragraph 32 above).

42. The Court therefore concludes that Article 6 § 2 of the Convention is applicable. The Government's objection in this respect must therefore be dismissed.

43. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

44. The applicant submitted that the reasoning in the Regional Court's judgment had violated the presumption of innocence under Article 6 § 2 of the Convention. He stressed that the Regional Court, in its written judgment, had expressed the opinion that "*the core events described by the witness have a factual basis, that is, that the accused actually carried out sexual assaults on his daughter in his car*". He considered that these statements amounted to a finding of guilt despite the fact that the Regional Court had acquitted him on account of insufficiency of proof.

45. The applicant accepted that the Regional Court could acquit him for want of evidence if the suspicions against him could not be completely dispelled. However, in his case, the domestic court's impugned statements showed that it was convinced of his guilt, which contradicted the operative provisions of the judgment acquitting him and thus convicted him morally in an arbitrary manner. Referring to the Court's case-law (*inter alia*, to *Rushiti*, cited above and *Vostic*, cited above), he argued that prognoses as to an accused's guilt which were paramount to a finding of guilt breached Article 6 § 2.

46. The applicant took the view that the Regional Court, contrary to its duties under Article 244 § 2 and Article 261 of the Code of Criminal Procedure (see paragraphs 22-23 above), had not laid down in its judgment all factors which had been relevant to its conclusions. The Regional Court had failed, in particular, to set out in its reasoning that psychological expert B., heard by the court on the applicant's initiative, had considered that A.'s statements did not have a factual basis, but were the result of suggestions by third persons. This had, moreover, been confirmed by another expert heard in civil proceedings for damages subsequently brought by him against expert K. The fact that the Regional Court, instead of dealing with the central question of suggestions, had made the impugned statements showed that it had disregarded the presumption of innocence.

47. The applicant stressed that the impugned statements of the Regional Court, which had been aware of his long struggle to be granted access to his only daughter A., had an outside effect – and were probably even aimed at having that effect – in that the family court, in subsequent proceedings, excluded any contacts with his daughter. Furthermore, the prosecution had

referred to the impugned statements in discontinuing criminal proceedings against Ms J. initiated by the applicant. The applicant considered that as a result of the impugned statements, he remained stigmatised permanently in the eyes of the public.

(b) The Government

48. The Government took the view that the applicant's right to be presumed innocent until proved guilty under Article 6 § 2 of the Convention had not been violated by the Regional Court's impugned statements. They argued that, quite the contrary, the Regional Court's reasoning proved that the latter had taken its duties flowing from the presumption of innocence seriously. Despite the fact that, based on their professional experience and having directly heard and observed the applicant and the witnesses in the hearing, the judges of the Regional Court had gained the conviction that the core events the applicant was accused of had a factual basis, they had given the applicant the benefit of the doubt and had evaluated the evidence without prejudging him. In view of the remaining doubts as to elements including the intensity, time and exact circumstances of the applicant's acts and having regard to the strict requirements for assessing evidence under the rules on criminal procedure, the Regional Court, applying the principle "*in dubio pro reo*" flowing from Article 6 § 2, had acquitted him. Contrary to the applicant's submission, it had not, therefore, expressed the view that it was convinced of the applicant's guilt.

49. In the Government's submission, the Regional Court had also not prejudged the applicant contrary to the presumption of innocence. It had only made its assessment on the applicant's guilt in its judgment, after termination of the main hearing. At that point, the court was called upon to pronounce itself on the accused's guilt.

50. The Government stressed that under Article 244 § 2 and Article 261 of the Code of Criminal Procedure (see paragraphs 22-23 above), the criminal courts were obliged to state the considerations which had been relevant to their judgment in order to permit a review of the judgment in accordance with the rule of law. In case of an acquittal for want of evidence, these considerations had to include explanations why the charges against the accused had not been proven in the main hearing with the certainty required for a conviction, but also why the suspicions had not been dispelled either. Incriminating evidence had to be weighed against exonerating evidence.

51. The Government accepted that State authorities which had to take decisions concerning the applicant after, and on the basis of the Regional Court's impugned judgment could only refer to the operative part of that judgment acquitting the applicant. The presumption of innocence precluded them from referring to the Regional Court's statements on the applicant's guilt in its reasoning. In contrast, the sentencing Regional Court itself had not been precluded from making such findings in its reasoning (the

Government referred to *Tendam*, cited above, § 36 to support its view). In so far as the applicant complained that the family courts, in subsequent proceedings, had excluded contacts with his daughter by reference to the Regional Court's reasoning, he had, however, failed to appeal against that decision.

2. The Court's assessment

(a) Recapitulation of the relevant principles

52. The principle "*in dubio pro reo*" constitutes a specific expression of the presumption of innocence (see *Vassilios Stavropoulos*, cited above, § 39; and *Tendam*, cited above, § 37).

53. In cases in which a breach of the presumption of innocence by a judicial decision reflecting an opinion that an accused is guilty without him having been proved guilty according to law is at issue, the Court has held that a judicial decision may reflect that opinion even in the absence of any formal finding of guilt; it suffices that there is some reasoning suggesting that the court regards the accused as guilty (see *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62; *Baars v. the Netherlands*, no. 44320/98, § 26, 28 October 2003; *Petyo Petkov v. Bulgaria*, no. 32130/03, § 90, 7 January 2010; and *Tendam*, cited above, § 35). A finding of guilt in the absence of a final conviction must be distinguished, in that context, from the description of a "state of suspicion". Whereas the former infringes the presumption of innocence, the latter has been regarded as unobjectionable in various situations examined by the Court (compare *Lutz v. Germany*, 25 August 1987, § 62, Series A no. 123; *Englert v. Germany*, 25 August 1987, § 39, Series A no. 123; *Nölkenbockhoff v. Germany*, 25 August 1987, § 39, Series A no. 123; and *Virabyan*, cited above, § 186).

54. The Court further reiterates that in cases concerning the compliance with the presumption of innocence, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 (compare *Petyo Petkov*, cited above, § 90; and *Allen*, cited above, § 126).

55. Regard must be had, in this respect, to the nature and context of the particular proceedings in which the impugned statements were made. The Court must determine the true sense of the impugned statements, having regard to the particular circumstances in which they were made (compare *Petyo Petkov*, cited above, § 90). Depending on the circumstances, even the use of some unfortunate language may thus be found not to be in breach of Article 6 § 2 (compare *Lutz*, cited above, §§ 62 and 64; *Englert*, cited above, §§ 39 and 41; *Nölkenbockhoff*, cited above, §§ 39 and 41; and *Allen*, cited above, §§ 121 and 126).

(b) Application of these principles to the present case

56. The Court is called upon to decide, in the light of the above principles, whether the impugned statements made by the Regional Court in its judgment acquitting the applicant that "*the core events described by the witness have a factual basis, that is, that the accused actually carried out sexual assaults on his daughter in his car*" complied with the applicant's right to be presumed innocent until proved guilty according to law.

57. In determining whether the Regional Court's statements must be considered as amounting to a finding of guilt or only to the description of a state of suspicion, the latter being permitted in the reasons of an acquittal judgment (see paragraphs 36 and 41 above), the Court cannot but note that the impugned statements as such, viewed in isolation, appear to indicate that the Regional Court considered the applicant guilty of sexual abuse of A. However, in determining whether the statements amounted to a breach of the presumption of innocence, the Court must have regard to the nature of the particular proceedings in which the statements were made and their true meaning in that context.

58. The Court observes in this respect that the impugned statements were made in the reasoning of a criminal court's judgment acquitting the applicant of charges of serious sexual abuse of A. for want of evidence. When giving its judgment, the Regional Court, under domestic law, was called upon to assess both the evidence incriminating the applicant and the exonerating evidence. It was to determine whether there were not only sufficient grounds for suspecting that the applicant committed the sexual offences he had been charged with, as required for opening the trial against him (see Article 203 of the Code of Criminal Procedure, paragraph 21 above), but whether, having examined all the evidence before it, it was convinced beyond reasonable doubt that the applicant committed the offences in question.

59. The Court notes that the Regional Court, in its reasons for the acquittal for want of evidence, found, on the one hand, that the specific offences the applicant had been charged with had not been proven with the certainty necessary for a criminal conviction. The Regional Court stated that it was not convinced by A.'s testimony in the hearing that the charges were completely correct, in particular, in terms of a clear definition of the criminal acts and their time. Owing to the inconsistencies in A.'s statements, it had been impossible to establish precise facts, in particular in respect of the intensity of the applicant's acts, as necessary for their classification as an offence, but also in respect of the number of acts and the place and the time frame in which they were carried out. The Regional Court therefore did not consider the applicant proven guilty, in accordance with the law, of the criminal offences as defined in the Criminal Code he had been charged with. On the other hand, and despite these findings, the Regional Court, considering that A. had not been influenced by third

persons, made its impugned statement that the core events described by the victim had a factual basis and that the accused actually carried out sexual assaults on his daughter in his car.

60. Furthermore, in determining the true meaning of the impugned statements in that context, the Court must have regard to the language used by the Regional Court. It observes that by referring to "sexual assaults" ("*sexuelle[n] Übergriffe[n]*") the Regional Court used a general, non-judicial term which is not contained in the definition of the offences of serious sexual abuse of children and sexual abuse of a person entrusted to him for upbringing the applicant was charged with (see paragraphs 19-20 above). It is true that this term as such therefore does not legally specify the criminal (as opposed to moral) relevance of the applicant's acts.

61. However, the Regional Court's finding "*that the accused actually carried out sexual assaults on his daughter in his car*" is phrased in a straightforward and unconditional manner. Read in the context of the charges against the applicant of serious sexual abuse of his daughter mostly in his car, it cannot but convey to the reader of the judgment that the applicant was in fact guilty of having sexually abused his daughter.

62. The Court further takes note of the applicant's argument that the Regional Court's impugned statements had negative consequences, in particular, because the family court, in subsequent proceedings, excluded any contacts with his daughter. It refers in this context to its above case-law that the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence after the applicant's final acquittal. Every authority which refers, directly or indirectly, to his criminal responsibility in respect of the offences he was charged with must respect the operative provisions of the Regional Court's judgment acquitting him (compare paragraph 36 above).

63. It is true that the proceedings before the family courts, in respect of which the applicant neither submitted copies of any decisions nor demonstrated, as the Government rightly noted, that he exhausted domestic remedies, are not the subject-matter of the present application. However, in view of the potential relevance of the reasoning of a criminal court's judgment for subsequent legal proceedings, it is of critical importance to avoid in that judgment any reasoning suggesting that the court considers the accused as guilty even in the absence of any formal finding of guilt. Only in that manner the protection guaranteed by the presumption of innocence enshrined in Article 6 § 2 is rendered practical and effective (compare for the relevant case-law, *inter alia*, *Allen v. the United Kingdom* [GC], no. 25424/09, § 92, ECHR 2013 with further references).

64. In view of these elements, the Court considers that the Regional Court's impugned statements went beyond a mere description of a state of (remaining) suspicion by using unfortunate language. They must be said, in the circumstances, to have contradicted or "set aside" the applicant's

acquittal (compare *Orr v. Norway*, no. 31283/04, § 53, 15 May 2008) by amounting to a finding that the applicant was guilty of the offences he was charged with.

65. In view of the foregoing considerations, the Court concludes that there has been a violation of Article 6 § 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage. He argued that he had suffered the same prejudice as a result of the impugned statements as a person convicted despite that person's innocence would have sustained.

68. The Government argued that there was no ground for an award of compensation as there had been no violation of the Convention.

69. The Court considers that the applicant must have suffered distress as a result of the breach of the presumption of innocence by the impugned statements. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 in this respect, plus any tax that may be chargeable on that amount.

B. Costs and expenses

70. The applicant also claimed EUR 1,213.80 gross for the costs and expenses incurred before the Federal Constitutional Court (he submitted a bill as documentary proof only when lodging his application, to which he subsequently referred). He further claimed EUR 9,520 gross (calculated on the basis of 40 hours of work at a rate of EUR 200 net per hour plus value-added tax) for the costs and expenses incurred before the Court.

71. The Government contested the calculation of the costs incurred before the Federal Constitutional Court for lack of supporting documents. They further considered the sum claimed for costs incurred in the proceedings before this Court excessive.

72. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 (net) covering costs and expenses under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

73. The Court considers it appropriate that the default interest rate 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. *Dismisses* the Government's objection that Article 6 § 2 of the Convention was inapplicable;

2. *Declares* the application admissible;

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

4. *Holds*
   (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, the following amounts:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President