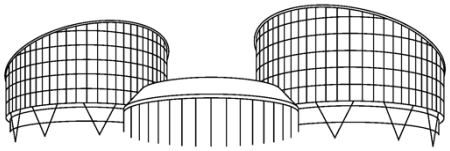

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF PASQUINI v. SAN MARINO (No. 2)

(Application no. 23349/17)

JUDGMENT

Art 6 § 2 • Presumption of innocence • Judge of Criminal Appeals' remarks while deciding compensation to the victim after having discontinued charges as time-barred •Statements not merely use of unfortunate language and amounting to imputation of criminal liability • Extra care to be exercised when formulating reasoning in a civil judgment after discontinuation of criminal proceedings

STRASBOURG

20 October 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Pasquini v. San Marino (no. 2),

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Erik Wennerström,
Ana Maria Guerra Martins, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having deliberated in private on 8 September and 22 September 2020,

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

PROCEDURE

1. The case originated in an application (no. 23349/17) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Enrico Maria Pasquini ("the applicant"), on 20 March 2017.

2. The applicant was represented by Mr A. Pagliano and Ms L. Conti, lawyers practising in Naples and San Marino, respectively. The Government of San Marino ("the Government") were represented by their Agent, Mr L. Daniele.

3. The applicant alleged that the presumption of innocence had been violated in his respect, in so far as in the absence of a finding of guilt, the judgment of the Judge of Criminal Appeals nevertheless reflected the judge's conviction that he was guilty. Moreover, he was made to pay damages precisely on the basis of this declaration of criminal responsibility without this having been ascertained in the criminal proceedings.

4. On 4 September 2017 notice of the complaint concerning Article 6 § 2 was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The Italian Government, who had been notified of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44), did not indicate that they intended to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1948 and lives in San Marino.

A. The first-instance proceedings

7. On 1 June 2011, following an inspection of the headquarters of company S.M.I. (a fiduciary company operating in San Marino), the Central Bank of San Marino (*Banca Centrale*) submitted to the investigating judge (*Commissario della Legge Inquirente*) a report concerning, *inter alia*, some suspicious financial operations carried out by the applicant (at the material time the chairman and sole shareholder of company S.M.I.) and another person, B. (at the material time the director of company S.M.I.), in their respective roles in the company. The report alleged the commission of various offences on the part of the applicant and B.

8. On an unspecified date criminal proceedings were instituted against the applicant and B. In particular, the applicant was charged with: i) the offence of "exercising fiduciary activity without a licence"; ii) three counts of the offence of "obstruction of surveillance"; iii) the offence of "misreporting to shareholders and supervisory boards"; and iv) the continuing offence of embezzlement (aggravated because of his role as administrator). As to the latter charge, according to the prosecution the applicant, between April 2009 and 10 March 2010, had personally withdrawn 2,633,055.77 euros (EUR) from a fiduciary account opened by company S. and administered by company S.M.I. According to the prosecution the applicant was the beneficial owner (*titolare effettivo*) of company S., and he had withdrawn those funds in order to pay invoices issued for non-existent services notionally provided to company S.M.I. by company S. and other named foreign companies. In that way, in the prosecution's opinion, the applicant had embezzled the above-mentioned sums of money, to the detriment of company S.M.I.

9. On an unspecified date company S.M.I., represented by its liquidators, as it had meanwhile gone into compulsory liquidation (*liquidazione coatta amministrativa*), joined the criminal proceedings as a civil party.

10. By a judgment of 8 April 2014 the first-instance judge (*Commissario della Legge Decidente*) found the applicant (and B.) guilty of all the offences as charged, and sentenced the applicant to four years' imprisonment and a fine, and also ordered him to compensate company S.M.I. by paying it a sum of money to be quantified in separate civil proceedings. However, the judge issued an interim compensation order (*provvisionale*) of EUR 2,633,055.77 in favour of the civil party.

11. As to the aggravated embezzlement, according to the first-instance judge the investigation carried out by the Central Bank had shown that the accused persons had established a complex system consisting in the creation of multiple foreign companies (acting as brokers) through which they had misappropriated funds [belonging to company S.M.I.] by means of simulated business brokerage operations. All those irregular operations were traceable back to the representatives of company S.M.I. in their capacity as

natural persons, as clearly shown by the fact that the payments had been repeated each year, whereas normally, business brokerage services were payable as a lump sum paid all at once, not in parts over a period of time. According to the judge, the payments had not been [real] commissions as claimed by the applicant, given that, on the one hand, company S.M.I. had paid large amounts of money and, on the other hand, there had been no real and documented business relationships between the brokers and company S.M.I. According to the judge, [the payment of] such large amounts of money would have required the services to be carried out by well-organised and, most importantly, active broker companies. This had not been the case, in the light of the fact that the brokerage companies involved had their headquarters in countries which were known to be tax havens (*paesi a fiscalita' privilegiata*) and that they did not have the corresponding administrative structure. Moreover, the evidence had shown that the applicant and B. had deposited the money (which they had obtained through the payment of undue commissions) in bank accounts that, despite being formally registered in the broker companies' names, were actually traceable back to the applicant and B., and the latter had repeatedly withdrawn money from them.

12. According to the judge, the Central Bank had indicated in detail in its report the amount of the illicit movements [of money], the bank transfers, their reasons (*causali*), the dates on which they had been made, and the individual role of the applicant and B. In the judge's view, those elements had shown both the commission of the crime of embezzlement and the existence of the aggravating circumstances (the latter, in the light of the management role of the accused person in company S.M.I., which was indisputable).

13. In the judge's opinion, the justification put forward by the applicant (according to whom, given that he was the sole shareholder of company S.M.I. he had in fact appropriated his own funds) derived from an erroneous understanding of the term company as a separate legal person. As a shareholder, the applicant could have appropriated such funds via the collection of dividends. But on the contrary, he had opted to pay fictitious commissions in order to pauperise company S.M.I.'s patrimony, namely the patrimony of a different legal person [separate from the applicant as a natural person], having an economic patrimony which was distinct from the one that the shareholders held in their own name. Fictitious invoices and fictitious reasons for payment (*causali*) had been used in order to manipulate and abuse the patrimony of the company, so as to obtain benefits to the exclusive advantage of the applicant and B. The interest of the company had been made completely subject to the interests of the applicant and, to a lesser extent, of B., who made payments lacking any business logic.

B. The appeal proceedings and the proceedings before the constitutional jurisdiction

14. The applicant appealed, arguing, *inter alia*, that the statutory limitation period of the offence of embezzlement as provided by the relevant law had meanwhile expired.

15. By a decision of 1 December 2015 the Judge of Criminal Appeals (*Giudice d'Appello Penale*) acknowledged that the limitation period for the offence of embezzlement had expired. However the judge, of his own motion, referred the question of the constitutionality of Article 196 of the Code of Criminal Procedure (concerning the jurisdiction of the judge on appeal – see relevant domestic law below) to the Constitutional Court (*Collegio Garante della Costituzionalita' delle Norme*). In the judge's opinion, the latter provision ran counter to Article 15 §§ 1, 2, and 3 of the San Marino Fundamental Human Rights Charter (*Dichiarazione dei diritti dei cittadini e dei principi fondamentali dell'ordinamento Sammarinese*) and to Article 6 § 1 of the Convention since it failed to provide that, where an offence became time-barred, the appeal judge could nevertheless decide on the merits of the civil claims concerning compensation and restitution (to the civil party). According to the judge such a lacuna contravened the principles of reasonable length of proceedings and procedural economy and the rights of defence of a civil party.

16. Law No. 189 of 22 December 2015 entered into force on 27 December 2015. It introduced Article 196 *bis* of the Code of Criminal Procedure, which provided that the Judge of Criminal Appeals, declaring an offence time-barred, could nonetheless decide on the civil obligations deriving from that offence. By a judgment of 26 January 2016 the Constitutional Court ordered the restitution of the case file to the Judge of Criminal Appeals, in order for the latter to decide whether, in his opinion, in the light of the above-mentioned new law, the reasons for the constitutional complaint against Article 196 of the Code of Criminal Procedure still existed.

17. By a judgment of 19 September 2016, published on 22 September 2016, the Judge of Criminal Appeals rejected the applicant's argument that the new provision could not be applied in the case at hand. In the judge's view, the new provision had a clearly procedural nature since it empowered the judge to deliberate on compensation for the damage deriving from an offence. Thus, on the basis of the *tempus regit actum* principle, the new provision had to be applied in all the proceedings which were ongoing on the date of its entry into force.

18. Further, the Judge of Criminal Appeals (i) acquitted the applicant and B. of the offence of "exercising fiduciary activity without a licence", for lack of evidence concerning deliberate intent (*dolo*); (ii) acquitted the applicant of one of the counts of "obstruction of surveillance" for lack of

evidence concerning the subjective element (but confirmed the others); (iii) ruled that the offences of "obstruction of surveillance" (the other counts), "misreporting to shareholders and supervisory boards" and aggravated embezzlement were time-barred, and discontinued the latter charges; (iv) upheld the remaining parts of the first-instance judgment, including the compensation order.

19. In particular, according to the judgment, in relation to the charges which had become time-barred (including that of embezzlement), in line with the domestic law requirements (see paragraph 24 below), the Judge of Criminal Appeals considered that the reasoning of the first-instance judgment had not indicated that the alleged facts had never occurred or that the accused had not committed them, thus there was no room for any other finding save that of declaring the charges discontinued.

20. The Judge of Criminal Appeals then examined the remaining charges which were not time-barred, and made his findings on the merits in respect of those charges (see paragraph 17 above).

21. Lastly, the Judge of Criminal Appeals specified that he had to scrutinise the elements on which the applicant's first-instance conviction of the continuing offence of aggravated embezzlement had been based, exclusively in order to decide on compensation for damage (*statuizioni civili*), in the light of the fact that the relevant charges (for aggravated embezzlement) had been discontinued.

22. Thus, as to the merits of the civil claims, having considered the submissions made on appeal, the Judge of Criminal Appeals upheld the first-instance judge's finding of fact that the applicant and B. had created multiple foreign companies via which they had misappropriated the funds of company S.M.I. In particular, they had simulated brokerage services which had never in fact been provided. According to the Judge of Criminal Appeals, the elements mentioned below had shown that the payment of these commissions (*provvigioni*) covered the misappropriation of company S.M.I.'s funds – which in the judge's opinion had allowed the applicant to obtain a considerable amount of money in a non-transparent way. In particular, the judge considered: (i) the amount of the sums payable, which was far greater than the percentage ordinarily payable in commissions, and in certain cases had amounted to approximately 50% of the sums which had [notionally] been paid by the fictitious clients; (ii) the fact that the payments were repeated annually, whereas business brokerage was normally a one-off service; (iii) the absence of real and documented business relationships between company S.M.I. and the brokerage companies, which were located in low-tax jurisdictions and did not have the appropriate administrative structures; and (iv) the fact that the brokerage companies were, in reality, traceable back to the applicant and B., to the extent that the latter had made multiple withdrawals [of money] from the companies' bank accounts. Such withdrawals were sometimes made in more or less the same periods as the

payments made by company S.M.I., as indicated, in detail, in the Central Bank's report (*inter alia*, the withdrawals made by the applicant from the account in the name of company S.). According to the judge, all the payments which had been made to the brokerage companies and which had been indicated in the indictment had concealed the transfer of money from company S.M.I. to other companies which were traceable back to the applicant and B. The accused persons, who could have, legitimately, kept the profits and remuneration for their activity (registered in the accounts as payments to them from company S.M.I.), had, instead, irregularly disposed of company S.M.I.'s funds, by registering large sums of money in the name of foreign brokerage companies, in order to evade taxes and to leave no trace of the origin of the money in question. In that way, company S.M.I. (rather than the brokers) had suffered damage from the crime of embezzlement. In the judge's view, such conduct indisputably had to be characterised as such (*pacificamente configurabile come tale*), given that the patrimony of a company is distinct from the shareholder's personal patrimony. The judge noted that, in order to dispose of a company's funds, it was necessary to document, in a legitimate and transparent way, the various financial movements and the reasons for such movements, in order to safeguard creditors and third parties. In the judge's opinion, it was evident that the accused persons had not made use of the sums in question to the advantage, or in the interests, of company S.M.I.

23. The fact that the accused persons had appropriated those sums and had disposed of them as though they were their own had thus amounted to the acts of misappropriation of funds, i.e. the conduct with which they had been charged (*integra agevolmente gli estremi della condotta appropriativa contestata*). Moreover, there was no doubt as to the existence of deliberate intent (*dolo*), since the entire plan (*meccanismo*) had been put in place in order to carry out abusive acts in relation to the company's funds. Nor was it credible that the applicant and B. had truly believed that they had the right to use the sums as if they were their own, since, had that been so they would not have orchestrated the various transfers but would simply have withdrawn the money directly. It followed that, while the criminal charges had to be discontinued as being time-barred, the civil claims upheld at first instance on the presupposition of the [applicant's] criminal responsibility had to be maintained in accordance with Article 196 *bis* of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code

24. Articles 54, 59 and 140 of the Criminal Code read, in so far as relevant, as follows:

Article 54

"An offence is time-barred:

(2) within three years if it is punished by imprisonment of the second degree, by prohibition of the third or fourth degree, by a fine..."

Article 59

"At every stage of the proceedings and level of jurisdiction the judge shall apply amnesty or prescription, unless it is already established that the alleged facts had never occurred (*il fatto non sussiste*), that the accused had not committed them, or that the alleged facts did not constitute a crime, in which cases the judge must acquit the accused by the prescribed formula."

Article 140

"The accused is responsible for the following obligations with all his patrimony present and future:

...

(2) Compensation for physical or moral damage, patrimonial or not, and the restitution of goods which he or she came into possession of or misappropriated;

...

(5) costs of the proceedings."

Article 143

"The expiry of the relevant limitation period in relation to an offence extinguishes solely the obligation arising from Article 140(5)"

Article 146

"The person who is civilly liable is responsible for the obligations arising from Article 140 (1), (2) and (3) ..."

B. Code of Criminal Procedure

25. Articles 1 and 3 of the Code of Criminal Procedure read, as follows:

"1. A civil action can be instituted separately, in which case it is regulated by the norms of civil procedure, or contemporaneously with the criminal action. In the latter case the claim for damage is registered in the criminal proceedings, and the deciding judge will decide on the matter as established in Chapter XX1 of this Code.

3. Every crime gives rise to a criminal action. A civil action also arises when the crime causes damage, physical or moral, to the passive subject of the crime [the victim] and the civil action may be pursued by anyone having an interest in obtaining indemnification."

26. Article 196 of the Code of Criminal Procedure reads, in so far as relevant, as follows:

Article 196

"A judge of appeal is competent to decide only on the parts of the [first-instance] judgment to which the pleas put forward refer."

27. According to established domestic case-law (before the entry into force of Article 196 *bis*, see below), where an offence became time-barred during the appeal proceedings, all the parts of a first-instance judgment concerning the civil effects (see Article 140 above) deriving from the finding of the accused's criminal responsibility at first instance had to be revoked (*caducazione*). Thus, a Judge of Criminal Appeals could not determine the civil effects deriving from a time-barred offence (see, among other authorities, the judgments of the Judge of Criminal Appeals of 11 July 1994, 13 September 1994, 12 January 1995, 30 November 1995, 30 July 1997, 8 August 1997, 18 February 1998, 16 June 1999, 23 August 2000).

28. Article 196 *bis* of the Code of Criminal Procedure, introduced by Article 78 of Law No. 189 of 22 December 2015 reads as follows:

Article 196 *bis*

"When an accused person has been sentenced to restitute items or to pay to a civil party compensation for damages caused by an offence - even if the damages are yet to be quantified - the judge of appeal, who declares the offence time-barred, shall decide on the pleas concerning the obligations deriving from the offence, in accordance with Article 140 of the Criminal Code."

THE LAW

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

29. The applicant complained of a violation of the presumption of innocence, as provided in Article 6 § 2 of the Convention, which reads as follows:

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

30. The Government contested that argument.

A. Admissibility

31. The Court observes that the Government have not raised any objection *ratione materiae*. However, it reiterates that the applicability of a provision relates to the Court's competence *ratione materiae* to assess a complaint, and therefore is a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see,

mutatis mutandis, *Pasquini v. San Marino*, no. 50956/16, § 86, 2 May 2019).

1. General principles

32. Article 6 § 2 safeguards "the right to be presumed innocent until proved guilty according to law". 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 and the case-law cited therein for examples of the above situations).

33. However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect 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 (ibid., § 94).

34. As expressly stated in the terms of the Article itself, Article 6 § 2 applies where a person is "charged with a criminal offence". The Court has repeatedly emphasised that this is an autonomous concept and must be interpreted according to the three criteria set out in its case-law, namely the classification of the proceedings in domestic law, their essential nature, and the degree and severity of the potential penalty (see, among many other authorities on the concept of a "criminal charge", *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22, and *Phillips v. the United Kingdom*, no. 41087/98, § 31, ECHR 2001-VII). To evaluate any complaint under Article 6 § 2 arising in the context of judicial proceedings, it is first of all necessary to ascertain whether the impugned proceedings involved the determination of a criminal charge, within the meaning of the Court's case-law (see *Allen*, cited above, § 95).

35. However, in cases involving the second aspect of the protection afforded by Article 6 § 2, which arises when criminal proceedings have terminated, it is clear that the application of the foregoing test is inappropriate. In these cases, the criminal proceedings have, by necessity, been concluded and unless the subsequent judicial proceedings give rise to a new criminal charge within the Convention's autonomous meaning, if Article 6 § 2 is engaged, it must be engaged on different grounds (ibid., § 96).

36. The Court has in the past been called upon to consider the application of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings, either by way of discontinuation or

after an acquittal, in proceedings concerning, *inter alia*, the imposition of civil liability to pay compensation to the victim (see *Ringvold v. Norway*, no. 34964/97, § 36, ECHR 2003-II; *Y. v. Norway*, no. 56568/00, § 39, ECHR 2003-II; *Orr v. Norway*, no. 31283/04, §§ 47-49, 15 May 2008; *Erkol v. Turkey*, no. 50172/06, §§ 33 and 37, 19 April 2011; *Vulakh and Others v. Russia*, no. 33468/03, § 32, 10 January 2012; *Diacenco v. Romania*, no. 124/04, § 55, 7 February 2012; *Lagardère v. France*, no. 18851/07, §§ 73 and 76, 12 April 2012; *Constantin Florea v. Romania*, no. 21534/05, §§ 50 and 52, 19 June 2012; *Vella v. Malta*, no. 69122/10, § 44, 11 February 2014; *N.A. v. Norway*, no. 27473/11, § 42, 18 December 2014; and *Fleischner v. Germany*, no. 61985/12, § 62, 3 October 2019).

37. In *Allen* (cited above, §§ 103-04) the Grand Chamber formulated the principle of the presumption of innocence in the context of the second aspect of Article 6 § 2 as follows:

> "[T]he presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases.
>
> Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt."

2. Application to the present case

38. The Court notes that in the present case the criminal proceedings ended on appeal with a discontinuation of proceedings because they had become time-barred. As a result of the new law, the same Judge of Criminal Appeals who had determined the criminal charge was also competent to decide the compensation due to the victim. In the Court' view, while the proceedings were one and the same, the determination of the compensation to the victim was a stage which was subsequent to the discontinuance of the criminal proceedings. At that stage, the Judge of Criminal Appeals was required to analyse the prior criminal findings and to engage in a review or evaluation of the evidence in the criminal file. He or she also had to assess the applicant's participation in some or all of the events leading to the criminal charge and comment on the subsisting indications of the

applicant's possible guilt. It follows that there is no doubt that there existed a link between the two determinations (see, *a contrario*, *Martìnez Agirre and Others v. Spain*, (dec.), nos. 75529/16 and 79503/16, § 52, 25 June 2019), which in the present case occurred in the same set of proceedings, and that therefore Article 6 § 2, under its second limb, is applicable to the present proceedings.

39. The Court notes that this complaint 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

40. The applicant argued that, for the purposes of Article 6 § 2, a judgment dismissing a case owing to the expiry of a limitation period was comparable to a judgment of acquittal on the merits, and that neither type of judgment could contain a declaration of the defendant's criminal responsibility, in the abstract or in practice. The applicant noted that, for the purposes of Article 6 § 2, in *Lagardère v. France* (no. 18851/07, 12 April 2012) the Court had distinguished between judgments of conviction and judgments of dismissal, while in *Allen* (cited above, § 94) it had compared an acquittal on the merits to the dismissal of a case. In particular, in *Allen*, cited above, the Court had found that the fact that a judgment of acquittal which had also decided on compensation had contained a declaration of criminal responsibility had violated the presumption of innocence. Moreover, in *Ringvold* and *Y. v. Norway* (both cited above) the Court had held that the fact that a domestic decision on compensation contained a statement imputing criminal liability to an applicant could raise an issue in connection with Article 6 § 2.

41. According to the applicant, the Judge of Criminal Appeals, while discontinuing the charges on the grounds of expiry of the relevant limitation period (therefore, in the absence of a final judgment of conviction) had not only raised a mere suspicion concerning his criminal liability, but had clearly stated that he had committed the offence of embezzlement to the detriment of company S.M.I. The latter finding had been the result of an assessment carried out by that court, in the same criminal proceedings, while deciding on compensation for damage. Thus, as in *Garycki v. Poland* (no. 14348/02, § 67, 6 February 2007) the declaration of the applicant's criminal liability by the judge had been made outside the context of a conviction, which had therefore violated Article 6 § 2.

(b) The Government

42. The Government emphasised that at both first and second instances the domestic courts had fully established the applicant's criminal responsibility for the offence of embezzlement, and that, on appeal, the applicant's case had been discontinued in part solely because the relevant limitation period had expired.

43. The Government noted that, in accordance with Article 59 of the Criminal Code (see paragraph 24 above), when the relevant limitation period had expired, at any stage in the proceedings, the judge had to apply the statute of limitation, unless, up to that point, it was already clearly established that the defendant was innocent. Only in the latter case was the judge obliged to acquit the defendant on the merits without dismissing the case on the grounds of expiry of the limitation period. Thus, in the Government's view, a judgment dismissing a case on the grounds of expiry of the relevant limitation period was not the same as an acquittal on the merits but, on the contrary, was equivalent to a "hypothetical judgment of conviction" (*sentenza di condanna in ipotesi*), given that the latter judgment had assessed the defendant's criminal liability for a given crime in the abstract (even without applying the relevant punishment).

44. In the Government's opinion, the fact that the Judge of Criminal Appeals had decided to discontinue the charges on the grounds of expiry of the limitation period and had not acquitted the applicant on the merits (in the absence of the conditions required by law for an acquittal at that stage) implied that the judge, *de facto*, had found the applicant guilty of the offence as charged, even without applying the relevant penalty in accordance with the statute of limitations.

45. According to the Government, it followed that, in the light of the above-mentioned Article 59 of the Criminal Code, the presumption of innocence had not been violated (and could not even be applied to the appeal judgment) since the applicant's innocence had been clearly excluded by the Judge of Criminal Appeals.

46. In addition, the Government noted that, pursuant to Article 196 *bis* of the Code of Criminal Procedure (see paragraph 26 above) (a provision which is similar to Article 578 of the Italian Code of Criminal Procedure) the Judge of Criminal Appeals had assessed and rejected all the pleas submitted by the applicant only in order to decide on the compensation of the damage deriving from the offence.

47. Relying on *Allen*, and *Y. v. Norway* (both cited above), the Government acknowledged that the Court had found a violation of the presumption of innocence if, in the absence of a final judgment of conviction, a judicial decision had given the idea that the defendant was guilty, and, likewise, if a judgment establishing non-contractual negligence had contained statements attributing criminal liability to the defendant. However, they considered that the Court had drawn a distinction between

cases where criminal proceedings had been simply discontinued and cases where a final judgment of acquittal had been delivered (see *Sekanina v. Austria*, 25 August 1993, Series A no. 266-A). Moreover, the Government pointed out that the Court had not adopted one single approach to ascertaining an alleged violation of Article 6 § 2, since much depended on the nature and context of the proceedings in which the impugned decision had been adopted (as the Court had established in *Allen*, cited above, § 125).

2. The Court's assessment

(a) General principles

48. The second aspect of the protection afforded by the presumption of innocence aims to protect 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, generally, *Allen*, cited above, §§ 93-94, and *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 314, 28 June 2018).

49. The second aspect of the protection of the presumption of innocence comes into play when the criminal proceedings end with a result other than a conviction (see, for example, *Tendam v. Spain*, no. 25720/05, §§ 35-41, 13 July 2010, and *Vlieeland Boddy and Marcelo Lanni v. Spain*, nos. 53465/11 and 9634/12, §§ 38-49, 16 February 2016). Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory (see *Allen*, cited above, § 94). The Court has found that "following discontinuation of criminal proceedings the presumption of innocence requires that the lack of a person's criminal conviction be preserved in any other proceedings of whatever nature" (see *Allen*, cited above, § 102). What is also at stake once the criminal proceedings have ended 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, for example, *Zollman v. the United Kingdom* (dec.), no. 62902/00, ECHR 2003‑XII, and *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, §§ 27 and 56-59, 16 October 2008).

50. The Court reiterates that in defining the requirements for compliance with the presumption of innocence, it has previously drawn a distinction between cases where a final acquittal judgment had been handed down and those where criminal proceedings had been discontinued. In cases concerning statements made after an acquittal had become final, it has considered that the voicing of suspicions regarding an accused's innocence was no longer admissible (see *Sekanina*, cited above, § 30, for the standards

in that regard, and *Allen*, cited above, § 122 with further references). In contrast, the Court has previously considered that the presumption of innocence will be violated in cases concerning statements after the discontinuation of criminal proceedings if, without the accused's having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence, a judicial decision concerning him reflects an opinion that he is guilty (see, *inter alia*, *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62, and *Englert v. Germany*, 25 August 1987, § 37, Series A no. 123; see also, most recently, *G.I.E.M. S.R.L. and Others*, cited above, §§ 315-16, and *Stirmanov v. Russia*, no. 31816/08, § 45, 29 January 2019).

51. In cases concerning 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. However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive (see *Allen*, cited above, §§ 125-26 with further references).

52. In cases involving civil compensation claims lodged by victims, regardless of whether the criminal proceedings ended in discontinuation or acquittal, the Court has emphasised that while exoneration from criminal liability ought to be respected in the civil compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention (see *Allen*, cited above, § 123 and the case-law cited therein, and more recently *N.A. v. Norway*, cited above, § 30).

53. Extra care ought to be exercised when formulating the reasoning in a civil judgment after the discontinuation of criminal proceedings (see *Fleischner*, cited above, §§ 64 and 69). While use of some unfortunate language may not necessarily be incompatible with Article 6 § 2 depending on the nature and context of the particular proceedings (see paragraph 51 above), the Court has found that the presumption of innocence was violated in situations where the civil courts held that it was "clearly probable" that the applicant had committed a criminal offence or expressly indicated that the available evidence was sufficient to establish that a criminal offence had been committed (see *Allen*, cited above, §§ 125-26, with further references to the relevant precedents, including *Y. v. Norway*, cited above, § 46, and *Diacenco*, cited above, § 64).

54. When assessing the impugned statements, the Court must determine their true sense, having regard to the particular circumstances in which they were made (see *Bikas v. Germany*, no. 76607/13, § 46, 25 January 2018). Even the use of expressions from the sphere of criminal law has not led the

Court to find a violation of the presumption of innocence where, read in the context of the judgment as a whole, the use of the said expressions could not reasonably have been understood as an affirmation imputing criminal liability (see *Fleischner*, cited above, §§ 64-65).

(b) Application to the present case

55. The Court notes that, following the discontinuance of the relevant charges including that of aggravated embezzlement, in deciding on compensation, the Judge of Criminal Appeals confirmed the compensation order which had been based on the presupposition of the applicant's criminal responsibility as resulted from the first-instance judgment which sentenced the applicant. The Judge of Criminal Appeals held, *inter alia*, that company S.M.I. had suffered damage from the crime of embezzlement; that the applicant's conduct amounted to the acts of misappropriation of funds, with which he had been charged, and that there was no doubt as to the existence of the deliberate intent (*dolo*) (see paragraphs 22 and 23 above).

56. The Court takes note of the Government's submission that, according to domestic law, the judge would not have been able to pronounce the discontinuance of the case had the applicant been innocent (see paragraph 43 above). However, without prejudice to whether or not Article 59 of the Criminal Code is of itself compatible with Article 6 § 2 of the Convention, the Court notes that the impugned wording in the present case does not relate to the conclusion reached for the purposes of the discontinuance of the criminal proceedings, but to the wording uttered for the purposes of the civil aspect of the proceedings, namely the compensation payable to the victim. Thus, the Government's questionable defence relying on Article 59 of the Criminal Code has no bearing on the complaint as submitted by the applicant.

57. The question for the Court in the present case is whether the wording used by the Judge of Criminal Appeals at that stage (see paragraphs 22 and 23 above) should be construed as imputing criminal liability to the applicant. Accordingly, the Court will look at the context of the proceedings as a whole and their special features in order to determine whether by using such a statement the court determining the civil claim breached Article 6 § 2 of the Convention (compare *Fleischner*, cited above, § 65).

58. Firstly, the Court notes that the civil claim was dealt with in the ambit of the criminal proceedings (compare *Lagardère*, cited above, § 46 and see, *a contrario*, *Fleischner*, cited above, § 66). Thus, while the Judge of Criminal Appeals had to determine the compensation claim on the basis of the applicant's civil responsibility and therefore the applicable civil law, it was not undertaken within a different framework from that of the criminal proceedings (see, *a contrario*, *Fleischner* and *Vella*, both cited above, §§ 66 and 60 respectively).

59. Secondly, the determination of the Judge of Criminal Appeals which concerned precisely the same facts imputed to the applicant during the criminal proceedings (see, *a contrario*, *Fleischner*, cited above, § 68) - namely, whether the applicant had or had not embezzled funds to the detriment of S.M.I. - was carried out without any distinction as to the legal characterisation of those acts (in this connection see paragraph 22 above with reference to the "crime of embezzlement").

60. Thirdly, the Judge of Criminal Appeals had to rely on the same evidence which existed in the criminal case-file, and no new evidence had been submitted (see, *a contrario*, *Fleischner* and *Vella*, both cited above, §§ 67 and 59 respectively).

61. Further, the Judge of Criminal Appeals, albeit making his own assessment of those facts, ultimately confirmed the criminal court's finding of fact at first-instance, and proceeded to confirm the interim compensation order (which had originally to be decided definitively in a separate civil court) without undertaking any relevant considerations as to the amount of that damage which was now being awarded definitively (see, *a contrario*, *Fleischner*, cited above, § 67). Thus, on this matter the Judge of Criminal Appeals relied entirely on the first-instance judgment.

62. Moreover, in the context of deciding on the civil claims, the Judge of Criminal Appeals based his decision on a clear finding that S.M.I. had suffered damage from the crime of embezzlement and that the conduct of the accused (the applicant and B.) amounted to the acts of misappropriation of funds with which they had been charged. Thus, the Judge of Criminal Appeals established unequivocally that the applicant's actions amounted to the criminal acts of which he had been charged (see *Lagardère*, cited above, § 46), going even further by explicitly finding that the applicant had committed those acts with deliberate intent (*dolo*) (see paragraph 23 above). In other words, the Judge of Criminal Appeals did not only determine the *actus reus*, but went further and stated that the applicant's acts were made with the requisite *mens rea* – which in this case he considered to be *dolo.*

63. It is true that, in the present case, the applicant had already been found guilty at first-instance. However, the Court's case-law does not distinguish between cases where charges are discontinued (because they become time-barred) before any criminal determination is made, or those which are discontinued (for the same reason) after an initial finding of guilt. It follows that first-instance findings, which are not final, cannot taint subsequent determinations and the Court reiterates that extra care ought to be exercised when formulating the reasoning in a civil judgment after the discontinuation of criminal proceedings (see *Fleischner*, cited above, § 64).

64. In the present case the impugned statements cannot be considered solely as the use of unfortunate language. The Court considers that the words used by the Judge of Criminal Appeals when deciding on the matter of compensation, finding that the applicant's behaviour had amounted to the

acts of misappropriation of funds with which he had been charged, and that there was no doubt as to the existence of the deliberate intent (*dolo*), went too far and amounted to statements imputing criminal liability to him (compare, *Y. v. Norway*, cited above, § 46; *Diacenco,* cited above § 64, *Panteleyenko v. Ukraine*, no. 11901/02, § 70, 29 June 2006, and *Farzaliyev v. Azerbaijan*, no. 29620/07, § 67, 28 May 2020). Indeed, that terminology went beyond a reference to the constitutive elements of an offence - which could be relevant both for civil as well as criminal responsibility - but expressly found that the applicant's actions had amounted to the acts with which he had been charged. Those words thus amounted to an unequivocal pronouncement that the applicant had committed a criminal offence (see *Lagardère*, cited above, § 81, *Farzaliyev*, cited above, § 67 and, *a contrario*, *Fleischner*, cited above, § 63). Therefore, those findings were inconsistent with the discontinuance of the relevant charges owing to the expiry of a limitation period. It follows that the wording used by the Judge of Criminal Appeals violated the applicant's right to the presumption of innocence.

65. There has accordingly been a violation of Article 6 § 2.

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 the restitution of all the sums of money that he had been sentenced to pay in respect of pecuniary damage, and a sum between EUR 10,000 and EUR 20,000 in respect of non-pecuniary damage, owing to the distress and the moral suffering resulting from the violation of his Convention rights.

68. Referring to the Court's case-law the Government noted that damage had to be in a relationship of cause and effect with the established violation. In the Government's opinion, in the instant case there was no causal link between the alleged violation and the pecuniary damage alleged by the applicant. Moreover, the applicant had presented his claims in a generic way. The applicant had not even indicated the precise amount of money that he claimed in respect of pecuniary damage, nor had he provided evidence that he had actually returned to company S.M.I. the money that he had been sentenced to pay. Moreover, as to non-pecuniary damage, the applicant had based his request on a generic and not substantiated "distress and moral

suffering" and had failed to indicate on the basis of which parameters he had calculated the amount of the alleged damage.

69. The Court considers that it cannot speculate as to what the outcome of the proceedings relating to the civil claim would have been had the Judge of Criminal Appeals not disregarded the applicant's right to the presumption of innocence. It therefore considers that no award can be made in respect of the applicant's claim for pecuniary damage. The Court, however, awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

70. The applicant claimed EUR 139,360.35 for legal costs and expenses in the proceedings before the domestic courts and EUR 20,000 in the proceedings before the Court.

71. As to the claim for reimbursement of legal costs incurred at national level, the Government considered that the applicant had provided no evidence of having actually paid such costs. Moreover, the latter referred to services that would in any case have been provided for the applicant's legal assistance in the domestic proceedings. In this connection, the Government noted that in such proceedings the applicant had not only been charged with aggravated embezzlement, but also with the offences of unlawful exercise of fiduciary activity, false corporate reporting and obstacle to the exercise of fiduciary functions. Thus, the applicant's claim was not directly related to the alleged violation, given that he had not specified which part of such sums had been devoted to remedying the alleged violation. In any case, it was undisputed that the alleged violation had solely concerned the appeal proceedings and not the proceedings in their entirety, while the sums claimed by the applicant appeared to refer to his legal assistance at both instances.

72. The Government also rejected the claim for reimbursement of the costs for the proceedings before the Court because the applicant had provided no evidence that he had actually paid them.

73. 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. Regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings which would in any event have been incurred and have not arisen as a result of the violation as upheld, and considers it reasonable to award the sum of EUR 5,000 for the proceedings under the Convention.

C. Default interest

74. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds*, by six votes to one,
   (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 10,000 (ten 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;

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

Done in English, and notified in writing on 20 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova	Paul Lemmens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Felici is annexed to this judgment.

P.L.
O.C.

DISSENTING OPINION OF JUDGE FELICI

1. I respect the reasoning of the Chamber and the decision it has reached, with which – however – I do not agree. The reasons, which I will illustrate very briefly, concern both the application of the principles in force in this case and the interpretation given in general terms of the so-called second aspect of Article 6 § 2 of the Convention.

2. The judgment (in paragraphs 48-54) contains an accurate overview of the principles established by the Court in relation to the second aspect of the protection afforded by the presumption of innocence. The main reference is to the Grand Chamber's judgment in *Allen v. United Kingdom* ([GC], no. 25424/09, ECHR 2013).

The aim is to protect 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 if they are in fact guilty of the offence charged. Without protection to ensure respect for the acquittal or the discontinuance decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. Once the criminal proceedings have ended, what is also at stake is the person's reputation and the way in which that person is perceived by the general public. The voicing of suspicions about the possible guilt of a defendant is no longer admissible once a final judgment of acquittal has been handed down; the right to be presumed innocent will be violated in cases concerning statements made after the discontinuance of criminal proceedings where, without the person previously having been proved guilty according to law and, in particular, without his having had an opportunity to exercise defence rights, a judicial decision concerning him reflects an opinion that he is guilty (see, *inter alia*, *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62). In cases concerning respect for the presumption of innocence, the language used by the decision-maker will be of critical importance; but consideration has to be given also to the nature and context of the particular proceedings. Having regard to that nature and context, sometimes even the use of "unfortunate" language may not be decisive. The fact that exoneration from criminal liability ought to be respected in civil compensation proceedings should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof: if the domestic decision on compensation were to contain a statement imputing criminal liability to the defendant, an issue falling within the ambit of Article 6 § 2 of the Convention would arise. Even the use of expressions from the sphere of criminal law has not led the Court to find a violation of the right to the presumption of innocence where, read in the context of the judgment as a whole, the use of the said expressions could not reasonably have been

understood as an affirmation imputing criminal liability (see *Fleischner v. Germany*, no. 61985/12, §§ 64-65, 3 October 2019).

3. In the present case, the applicant had been found guilty at first instance in proceedings in which he had fully participated and in which his defence rights had been secured (contrast *Didu v. Romania*, no. 34814/02, §§ 40-42, 14 April 2009; *Giosakis v. Greece* (no. 3), no. 5689/08, § 41, 3 May 2011; and *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 317-318, 28 June 2018, where the Court found Article 6 § 2 of the Convention to have been breached by the fact that the appeal courts had quashed previous acquittals whereas they had at the same time found the proceedings to be statute-barred; see also *Farzaliyev v. Azerbaijan*, no. 29620/07, § 62, 28 May 2020). At second instance, the Judge of Criminal Appeals upheld the compensation order issued by the first-instance court which had sentenced the applicant. In respect of the charge of embezzlement, the judge stated that it had to be dropped as the proceedings were time-barred. He also stated that the applicant's conduct could be characterised as the acts of misappropriation of funds with which he had been charged and that there was no doubt as to the existence of deliberate intent (*dolo*). To be precise, he held: "in that way, company S.M.I. [rather than the brokers] had suffered damage from the crime of embezzlement – such conduct indisputably had to be characterised as such, given that the patrimony of a company is distinct from the shareholder's personal patrimony"; also finding that "the fact that the accused persons had appropriated those sums and had disposed of them as though they were their own had thus amounted to the acts of misappropriation of funds, i.e. the conduct with which they had been charged"; and lastly that "there was no doubt as to the existence of deliberate intent".

4. If the above principles are to be applied to the present case, it is my opinion that the most appropriate decision would be one in favour of no violation.

5. First of all, it must be considered that, following a first-instance finding of guilt, the applicant opted to raise the objection that the relevant charges were time-barred and thus waived his right to defend himself on the merits of those charges at the appeal stage. More importantly, the applicant chose to take that approach, even though he, or his legal representative, was or should have been aware that under domestic law, a judge would not be able to declare a charge statute-barred if the judge was of the view that the accused was innocent of that charge (see paragraph 24 of the judgment). In consequence, having regard to the domestic law as it stood, the applicant was or should have been aware that in order to uphold his plea that the proceedings were statute-barred (owing to the expiry of a limitation period), the judge would have had to consider the possibility that he was not innocent, and thus that the judge would explicitly raise a suspicion as to his guilt. In choosing to proceed with that plea of his own free will, the

applicant was thus prepared to cast doubt on his innocence, in so far as it enabled him to avoid punishment. In this connection, the Court recognises that, in the context of any criminal proceedings, decisions must be made as to how best to present an accused's defence at trial. In many cases several options will be available and it is the responsibility of the accused to select, with the advice of counsel, the defence which he wishes to put before the court (see *Ebanks v. the United Kingdom*, no. 36822/06, § 82, 26 January 2010). However, he or she must then assume the consequences of those choices. This is an element which characterises both the context and the nature of the proceedings in the light of the specificities of the domestic legal framework. It is the applicant who consciously chose not to have the criminal charge against him examined on the merits, even though this would have allowed the applicant, if his guilt was unproven, to avoid any considerations of a civil nature.

6. In such cases, where proceedings are discontinued following a first-instance judgment finding guilt, and within which the accused's defence rights have been respected, a mere voicing of suspicions may be conceivable and would not necessarily raise an issue under Article 6 § 2.

7. A close analysis of the words used in the judgment by the Judge of Criminal Appeals shows that he never explicitly stated that the applicant was guilty of the crime of embezzlement, but rather asserted that the applicant had materially behaved in the manner alleged in the indictment. In particular, the statement according to which S.M.I. had sustained damage from the crime of embezzlement must be read in the whole context of the reasoning, from which it can clearly be seen that the Judge intended to underline the distinction between the assets of the company and those of the shareholder, in order to affirm the prohibition on embezzlement by the latter of the company's assets. Thus the misappropriation was the material part of the charge, and the Judge referred exclusively to it when he mentioned "the conduct of which they [the applicant and Mr. B, a co-accused in the domestic proceedings] had been charged". In other words, there is no clear and indisputable statement that attributes criminal liability in the full sense of the term to Mr Pasquini.

8. As mentioned above, the Court's case-law considers that such statements have to be seen in their context. Indeed, the statements were made by the Judge of Criminal Appeals in his examination of the facts, and in particular of the conduct at issue, solely for the purposes of determining the applicant's civil liability and not his criminal liability.

9. In the specific circumstances of the present case, and particularly in view of the relations between S.M.I. and the applicant at the time of the impugned conduct (at the material time the applicant was the chairman of company S.M.I.) it was difficult to determine the applicant's civil liability for the damage sustained by S.M.I. without determining that his actions were likely, at least to the degree necessary in civil proceedings, to

constitute misappropriation of funds; indeed, because of this misappropriation, the damage in question existed.

10. In reality, under domestic law, the judge had to examine the conduct imputed to the applicant, in so far as that was necessary or useful to determine his civil liability, but the examination did not require a finding of guilt. More importantly, under domestic law, compensation for civil damage is provided for by the *actio ex lege Aquilia*. The *actio* provides compensation for damage that the plaintiff claims to have suffered as a result of unlawful behaviour by the defendant. The subjective elements of this action are deliberate intent (*dolo*) or negligence (*colpa*), which must exist together with the causal link between the event and the conduct of the injuring party (*damnum* and *iniuria).* It is therefore the duty of the judge whose role it is to assess the existence of such liability to ascertain the mental attitude of the defendant (the subjective element), which can be either deliberate intent or negligence. In the present case, therefore, an assessment of the mental attitude of the applicant (as defendant), was in any event necessary to establish the existence or not of his civil liability.

This does not consist in a new position; indeed, civil liability also, even though *levissima culpa venit*, rarely takes the form of merely objective liability. In the present case, therefore, it was up to the judge to establish whether the action that caused the damage stemmed from a mental attitude, be it negligence or wilful misconduct (*dolo*). The above-mentioned legal framework does not dispense the respondent State, and specifically the courts ruling on the matter, from respecting the rights arising under Article 6 § 2 of the Convention. Thus the Court must nevertheless assess the language used by the decision-maker, which is of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2. However, it should do so bearing in mind the relevant context and the requirements imposed by the domestic law, as well as the fact that the civil determination was being made in the same proceedings as those brought to determine criminal liability.

11. Firstly, in deciding on the civil claim, the judge found that S.M.I. had sustained damage as a result of the offence of embezzlement and that the impugned conduct had clearly amounted to the acts of misappropriation of funds with which the applicant had been charged (the objective element). It also excluded any good faith on the part of the applicant, holding that there had been the necessary *dolo* (subjective element). While relevant to an assessment of criminal liability, both these elements also had a direct incidence on the assessment of civil liability, and were therefore part of the normal exercise of the judge's duty to determine both the existence of civil liability and the amount of the damages due (the *an* and *quantum*). Further, the Judge of Criminal Appeals never examined the applicant's guilt for the offence of embezzlement and never ruled that the applicant was guilty (see above, paragraph 7). Moreover, in his conclusion, the Judge of Criminal

Appeals explicitly held that while the relevant criminal charges (including embezzlement) had to be discontinued as being time-barred, the civil claims upheld in the first-instance judgment, by which the applicant had been sentenced, had to be maintained. It follows that, when reading the appellate judgment in its entirety, there is no doubt that the applicant was not declared guilty, but that he was nevertheless held civilly liable for the damage sustained by S.M.I. based on the considerations made by the Judge of Criminal Appeals. This particular context in the present case is a central element in making a correct assessment of the measure, which as a whole does not contain any finding of guilt. In particular, it should be stressed that the finding of *dolo* does not contain any reference to criminal liability: the judge is referring, in fact, to "deliberate intent" and not to "criminal intent".

12. The reading of the judgment does not affect the public's perception of the applicant's reputation, namely that of a person who was charged with acts of embezzlement in proceedings that have since been declared statute-barred and who is required to compensate for the damage caused by the misappropriation of funds belonging to others. From this standpoint, the close proximity and concomitance of the two outcomes – declaration of statute-barred proceedings, and award of damages for the same acts – constitute a guarantee that no one should be led to believe that the applicant was found guilty under the criminal law. The representation of the applicant resulting from the judgment is that determined by the reality of the case: a person who has not been declared criminally liable because the charge became time-barred during the proceedings, and who has been sentenced to pay compensation for damage resulting from the misappropriation of which he was accused.

13. It is necessary to reiterate, in this connection, that if the mere finding of liability for payment of damages, in spite of an acquittal or discontinuance, were to raise an issue under Article 6 § 2, one would have to abolish such civil liability actions, which are in fact present and common in many judicial systems and which are in principle compatible with the Convention, as evidenced by case-law (see, *mutatis mutandis*, *Vella v. Malta*, no. 69122/10, § 60, 11 February 2014).

14. In the present judgment, the Chamber refers repeatedly to the case of *Fleischner* (cited above). In that case the charges against the applicant were also time-barred. In subsequent civil proceedings, however, the civil judge stated that the applicant's actions had "fulfilled the constitutive elements of deprivation of liberty under Article 239 of the Criminal Code and of coercion under Article 240 of the Criminal Code". The judgment goes on to establish that: "this was not a statement about the applicant's guilt", explaining that "[t]he District Court [had] deliberately used the technical legal term 'constitutive elements' (*Tatbestand*) to make it clear that it had solely assessed certain elements of a penal provision that could be the basis for both criminal and civil liability. It [had] limited itself to that finding and

[had] not expressly [found] that the applicant had committed the offences" (ibid., § 63). The judgment then underlines the fact that the civil claim had not been brought in the criminal proceedings, but separately and subsequently before another judge. It will be difficult for national judicial authorities in general to understand the reason why a direct statement relating to the fulfilment of the elements – objective and subjective – of the offence should not be equated with the statements made in the judgment of the Judge of Criminal Appeals; there being no direct statement of criminal liability in the judgment of the latter either (as explained above in paragraph 7). The act of embezzlement, and the existence of a certain mental attitude, are constitutive elements of both civil and criminal liability also in the San Marino system (as explained above in paragraph 10). Even the Judge of Criminal Appeals confined himself to saying that the applicant misappropriated the sums (as is clear from the subsequent reference to the need to distinguish between the assets of the company and those of the shareholder; see paragraph 3 above), and to ascertaining his mental attitude in doing so, without any criminal characterisation ("deliberate intent", not "criminal intent"). There was no reasoning suggesting that the court regarded the accused as "guilty" (see *Bikas v. Germany*, no. 76607/13, 25 January 2018). The claim for civil relief and the related assessment were actually part of the same criminal proceedings. However, as mentioned in paragraph 12 above, this circumstance can rather be regarded as an element that reinforces the impression that the applicant did not commit any crime, precisely because at the same time, and alongside the civil award of damages, the discontinuance of the criminal proceedings was established. Paragraph 62 of the judgment states that "[i]n other words, the Judge of Criminal Appeals did not only determine the *actus reus* but went further and stated that the applicant's acts were made with the requisite *mens rea* – which in this case he considered to be *dolo*". The same thing can be found in paragraph 63 of the *Fleischner* judgment (cited above), where it refers to "constitutive *elements*" in the plural. Therefore, the objective element, with the subjective element (*Tatbestand*, in San Marino law *fattispecie*), are insufficient to entail criminal guilt in both cases. The assessment as to a violation of the presumption of innocence principle should perhaps consider whether the judgment in question imputes criminal liability in a more global, less sophisticated, way. The impact on a person's reputation and public perception are the most important elements, which the Court's jurisprudence has long identified, in this connection. In the light of the above, in my opinion, the present judgment appears not to be completely consistent with the Court's previous case-law.

15. From a general point of view, therefore, the type of mental attitude held by the injuring party, already at a purely logical level, does not constitute a neutral circumstance with respect to the existence and quantification of the non-pecuniary damage. The consequences for the

injured party, from this perspective, change significantly if the damage was inflicted with the will to cause damage or as a result of mere negligence. For example, the moral impact and suffering caused by a deliberate punch to a person's face will be different if the same blow comes from a sudden and involuntary movement. It is therefore relevant, also for the civil judge, to carry out an assessment, even a detailed one, of the defendant's mental attitude.

16. It is also necessary to take into account the fact that the laws of some countries – see, for example, the combined provisions of Article 2059 of the Italian Civil Code and Article 185 of the Italian Criminal Code – provide that non-pecuniary damage can be compensated for only where the commission of a criminal offence is established. In such cases, the civil judge is not only entitled to ascertain the existence of the crime, but must do so every time criminal proceedings have not taken place, as well as when they have not reached a decision on the merits. It is important for the judge also to rule on this latter aspect. The civil judge can legitimately, in my opinion, and without incurring any violation of Article 6 § 2, establish, while respecting certain procedural safeguards, that a person has committed or has not committed a criminal offence, in order to decide – among other things – on the existence of, and compensation for, the damage deriving from that offence. This is a conclusion that does not appear to be in contrast with what was established by the Grand Chamber in the *Allen* case (cited above) – which does not contain any prohibition for the civil judge to proceed with a verification of the existence of the offence as such – but one on which there does not seem to be a clear position in the Court's jurisprudence, which tends rather towards a very detailed assessment of the language used.