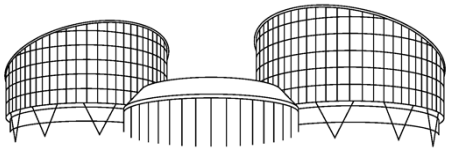

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FLEISCHNER v. GERMANY

(Application no. 61985/12)

JUDGMENT

STRASBOURG

3 October 2019

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 Fleischner v. Germany,

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

Yonko Grozev, President,
Angelika Nußberger,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, judges,

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 61985/12) 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 Gerhard Fleischner ("the applicant"), on 22 September 2012.

2. The applicant was represented by Ms F. Yavuz, a lawyer practising in Munich. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that in breach of a fair hearing as guaranteed by Article 6 § 1 of the Convention and in breach of the presumption of innocence as guaranteed by Article 6 § 2 of the Convention he had been ordered to pay compensation in liability proceedings, despite the discontinuation of the criminal proceedings against him.

4. On 12 June 2017 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1942 and lives in Schliersee.

A. Background to the case

6. The applicant was indicted, together with four co-accused, in criminal proceedings on charges of hostage-taking. They had made financial investments in the United States with the help of their financial adviser, A. When A had allegedly failed to fulfil his contractual obligations, in particular, to pay the interest due and ultimately to refund in full the invested capital, two of the co-accused had kidnapped him and kept him captive in a house in Germany. At a meeting at which the applicant and his co-accused wife had also been present, A had been forced – by threats to inform on him the US police – to sign acknowledgements of debt. After the meeting A had arranged a transfer of 75,000 euros (EUR) to the bank account of one of the co-accused. The police had eventually rescued A.

7. On 3 February 2010 the criminal proceedings against the applicant were preliminarily, and on 29 August 2011, ultimately discontinued pursuant to Article 206a of the Code of Criminal Procedure (*Strafprozessordnung)* because he was deemed unfit to stand trial.

8. At the criminal trial against the remaining co-accused, A testified that the applicant had drafted the acknowledgements of debt and had insisted that he would only be released upon receipt of the EUR 75,000.

9. On 23 March 2010 the Traunstein Regional Court convicted the co-accused, including the applicant's wife, of various criminal offences for having blackmailed A into arranging to refund their lost investments. The conviction was essentially based on A's testimony and on the statements of the co-accused. In its factual statements, based also on other witness testimony, the court described in detail on 16 pages the actions of all the co-accused, including those of the applicant.

10. Irrespective of the criminal proceedings, A commissioned a lawyer to recover the EUR 75,000. Without initiating civil court proceedings, A's lawyer sent a written request to the co-accused whose bank account had been used for the financial transaction (see paragraph 6 above). Subsequently, the money was transferred back to A and A then tried, with the help of his lawyer, to claim from the applicant and all co-accused compensation for the lawyer's fees that had been incurred in this context. However, they declined to compensate A.

B. The proceedings at issue

11. Since the applicant and the co-accused did not reimburse the lawyer's fees for recovering the EUR 75,000, A instituted a civil action against the applicant and the four co-accused, claiming EUR 1,880.20 in compensation for his lawyer's fees.

12. On 25 May 2011 the Speyer District Court ordered the service of A's statement of claim on the applicant and the co-accused and invited them to

indicate within two weeks whether they intended to defend themselves in the civil proceedings. Additionally, they were given the opportunity to submit a statement of defence within a further two weeks.

13. On 5 June 2011 the applicant notified the District Court about his intention to defend himself with the assistance of a lawyer, but he did not submit a statement of defence. He merely added that he "was not for health reasons unfit to stand trial" (*"Ich bin nicht aus Krankheitsgründen nicht verhandlungsfähig."*[sic]).

14. On 5 September 2011 the District Court informed the parties that it considered that A's claim was justified and that the Traunstein Regional Court's criminal judgment of 23 March 2010 appeared to be sufficient proof as documentary evidence. It also set a deadline for further comments within two weeks.

15. On 3 October 2011 the applicant's wife submitted her statement of defence. She did not deny her and her husband's participation in the meeting with the kidnapped plaintiff, but denied having committed the criminal offences of which she had been convicted. She argued that she had been informed about the kidnapping only after the said meeting. She requested the District Court to procure the criminal investigation files and to hear testimony from the plaintiff and the applicant.

16. On 17 October 2011 the applicant informed the District Court that he was unfit to stand trial and submitted a medical report to that effect.

17. On 19 October 2011 the District Court notified the applicant that his health problems did not exonerate him from the civil proceedings and from attending the hearing on 7 November 2011. However, he could send a representative to the hearing.

18. On 28 October 2011 the applicant's wife asked the District Court to take further evidence, in particular to hear the co-accused and to procure the criminal judgment. In support of her arguments she also submitted a sworn written testimony by the applicant in which he described the events and not only denied any involvement on the part of his wife, but also claimed that he had had no knowledge of the kidnapping when A had agreed to transfer the money. The applicant elaborated that he had had the impression that A had been staying voluntarily at the house and maintained that he and his wife had only learned afterwards about the kidnapping.

19. On 2 November 2011 the District Court received a submission from the applicant, dated 30 October 2011. The applicant, who contrary to his prior announcement had not chosen to be represented by a lawyer, repeated that his health problems required a discontinuation of the civil proceedings. He argued that in the light of the plaintiff's failure to present sufficient evidence of his participation in any unlawful acts, the health risks for him rendered the proceedings disproportionate. The criminal proceedings had not demonstrated his participation in either the kidnapping or the transfer of the EUR 75,000. The civil action had been based only on allegations, but

there was no evidence of the applicant taking charge of or committing an act of coercion against A.

20. On 7 November 2011 the applicant was represented by his daughter at an oral hearing before the District Court. She applied for the dismissal of the action. The transcript of the hearing did not document any taking of evidence, nor any request in this respect on behalf of the applicant.

21. On 2 December 2011 the District Court awarded the plaintiff the claimed EUR 1,880.20, plus interest and legal expenses. The applicant and the four co-accused were held liable as joint debtors (*Gesamtschuldner*) for damages in accordance with Article 823 § 2 of the Civil Code (*Bürgerliches Gesetzbuch)*. As to the basis for civil liability, the judgment referred to the relevant articles of the Civil Code which, for their part, referred to the relevant articles of the Criminal Code (Articles 823 § 2, 840 of the Civil Code, 239, 240 of the Criminal Code) and found on this basis:

> "Defendants nos. (1) to (4) [the applicant] have jointly fulfilled the constitutive elements (Tatbestand) of deprivation of liberty under Article 239 of the Criminal Code and of coercion under Article 240 of the Criminal Code.
>
> ...
>
> Insofar as defendant no. (4) takes the view that he was not involved in the criminal acts, reference is made to the submission of defendant no. (3) [the applicant's wife] before the Traunstein Regional Court. Like defendant no. (3), defendant no. (4) failed to end the deprivation of liberty despite knowledge of the circumstances of the plaintiff's relocation (*Verbringung*). In addition, reference is made to the plaintiff's submission before the Traunstein Regional Court. According to that, defendant no. (4) had prepared various documents which the plaintiff had to sign. To that extent, the defendant actively took part in the coercion."
>
> [„Die Beklagten zu 1) bis 4) haben gemeinschaftlich den Tatbestand der Freiheitsberaubung gem. § 239 StGB und der Nötigung gem. § 240 StGB erfüllt.
>
> ...
>
> Soweit der Beklagte zu 4) meint, er sei an den Taten nicht beteiligt gewesen, wird auf die Einlassung der Beklagten zu 3) vor dem LG Traunstein verwiesen. Ebenso wie die Beklagte zu 3) hat es der Beklagte zu 4) trotz Kenntnis von den Umständen der Verbringung des Klägers unterlassen die Freiheitsberaubung zu beenden. Desweiteren wird auf die Einlassung des Klägers vor dem LG Traunstein verwiesen. Nach dieser hat der Beklagte zu 4) diverse Dokumente vorbereitet, die der Kläger unterschreiben musste. Insoweit hat sich der Beklagte aktiv an der Nötigung beteiligt."]

22. The District Court relied on the plaintiff's submissions in the civil proceedings insofar as those had not been disputed by the defendants. With regard to the disputed facts, it relied on the findings of fact set out in the criminal judgment delivered by the Traunstein Regional Court. By indicating the corresponding pages of the criminal judgment, it referred to the submissions therein of the co-accused and the applicant's wife and to the testimony of the plaintiff during the criminal proceedings. At the hearing in the criminal proceedings the co-accused had, *inter alia*, confirmed the applicant's participation in the meeting (see paragraph 6 above), but they

had been ambiguous regarding whether the applicant had known about the kidnapping beforehand, whereas the applicant's wife had submitted that she and her husband had only learned about the circumstances of the plaintiff's relocation on the occasion of the meeting. The plaintiff had also testified about the applicant's role during the meeting (see paragraph 8 above) and had described in detail the circumstances of the kidnapping by two of the co-accused.

23. In its reasoning the District Court elaborated on the causal link between the incident and the damage. It calculated the amount of the compensation and explained why the co-accused could not set off possible claims from their failed investments against A's compensation claim (*Aufrechnung)*.

24. On 2 January 2012 the applicant, who was then represented by a lawyer, appealed. He argued in particular that the District Court had wrongly assumed that the criminal judgment had established his criminal liability for deprivation of liberty and coercion.

25. On 14 March 2012 the Frankenthal (Pfalz) Regional Court informed the applicant of its intention to reject the appeal without a hearing, pursuant to Article 522 § 2 of the Code of Civil Procedure (*Zivilprozessordnung*). Following a preliminary assessment, it found that the applicant's appeal lacked any prospect of success because the District Court had lawfully established the applicant's civil liability. It invited the applicant to submit written comments within two weeks. It remains unclear whether the applicant then sent further comments.

26. On 10 April 2012 the Regional Court, by a unanimous decision of three judges, rejected the appeal without having an oral hearing. It found that the appeal had no prospect of success, that the matter at issue was not of fundamental importance, and that it was not necessary to allow the appeal in order to ensure a consistent application of the law. It relied on the facts established by the first-instance District Court pursuant to Articles 314 and 529 § 1 of the Code of Civil Procedure. It declined to order any new fact-finding measures because the applicant had failed to request rectification of the facts before the District Court pursuant to Article 320 of the Code of Civil Procedure.

27. On 11 July 2012 the Federal Constitutional Court declined to consider a constitutional complaint lodged by the applicant, without providing reasons (no. 1 BvR 1306/12).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Criminal Procedure

28. Article 206a of the Code of Criminal Procedure contains rules on the termination of criminal proceedings. It reads, insofar as relevant, as follows:

"(1) Where a procedural impediment arises after the main proceedings have been opened, the court may terminate the proceedings by a court order made outside the main hearing.

..."

B. Criminal Code

29. The relevant provisions of the Criminal Code read, insofar as relevant, as follows:

Article 239
Deprivation of liberty

"(1) Whosoever imprisons a person or otherwise deprives him of his freedom shall be liable to a term of imprisonment not exceeding five years or a fine.

..."

Article 240
Using threats or force to cause a person to carry out, suffer or omit to carry out an act (coercion)

"(1) Whosoever unlawfully with force or threat of serious harm coerces a person into carrying out, suffering or omitting to carry out an act shall be liable to imprisonment not exceeding three years or a fine.

(2) The act shall be unlawful if the use of force or the threat of harm is to be deemed reprehensible in relation to the aim pursued.

..."

30. Under German criminal law there are three basic conditions that must be met in order to establish criminal liability:

(1) the accused has fulfilled the objective and subjective constitutive elements (*Tatbestand*) of a criminal offence:

(a) objective constitutive element *(objektiver Tatbestand)*: the accused has committed the proscribed act or omission which is contrary to a penal provision;

(b) subjective constitutive element *(subjektiver Tatbestand)*: the accused has acted with intent, unless the relevant penal provision requires only negligence;

(2) there are no exonerating circumstances, e.g. self-defence *(keine Rechtfertigungsgründe)*;

(3) the offence has been committed with criminal guilt *(Schuld)*, i.e. the accused was capable of appreciating the wrongfulness of an act and of acting in accordance with such appreciation, e.g. being of sound mind; If the accused considered wrongly the act or omission to be lawful, he acted with criminal guilt when he could have avoided such a misapprehension.

Only if all three elements are fulfilled, it is established that the person concerned is criminal liable.

C. Code of Civil Procedure

31. Appeal proceedings are primarily devised as a means of checking and rectifying errors made by the courts of first instance. However, they do not allow a complete review of both facts and law. In particular, the appellate court has to base its decision on the facts established by the court of first instance. A prior rectification request can be lodged before the court of first instance in order to correct inaccuracies of facts in the judgment. The relevant provisions read as follows:

Article 314
Evidentiary value of the part of the judgment addressing the facts of the case

"The part of the judgment that addresses the facts of the case shall establish evidence of the submissions made by the parties in oral argument. Such evidence can be invalidated only by the record of the hearing."

Article 320
Correction of the part of the judgment addressing the facts of the case

"(1) Should the part of the judgment addressing the facts of the case contain inaccuracies not governed by the provisions of the preceding Article, or omissions, obscure passages, or contradictions, their correction may be applied for within a period of two weeks by submitting a written pleading to this effect.

(2) ...

(3) The application shall be heard in oral argument, should one of the parties have lodged a corresponding application.

(4) The court shall rule without taking evidence. Solely those judges who contributed to the original judgment may contribute to the decision. ...

(5) Any correction of the part addressing the facts of the case shall not result in modifying the remainder of the judgment."

Article 513
Grounds of appeal

"(1) An appeal can only be lodged on the grounds that the decision is based on a violation of the law ... or that the facts which are relevant under Article 529 justify a different decision.

..."

Article 522
Examination of admissibility, decision on rejection

"(1) The appellate court has to establish on its own motion whether the appeal is admissible and whether it has been lodged in accordance with the formalities and time-limits as prescribed by law. If any of these prerequisites is lacking, the appeal has to be rejected as being inadmissible. The decision is taken by court order, which is amenable to an appeal on points of law.

(2) The appellate court shall promptly reject the appeal by unanimous decision if it is convinced that

1. the appeal does not have any prospect of success,

2. the legal matter is not of fundamental importance and

3. the development of the law or the safeguarding of consistent jurisprudence does not require that a decision be given by the appellate court.

The appellate court or its presiding judge shall inform the parties of their intention to reject the appeal and the reasons therefor, and shall give the appellant the opportunity to submit observations within a set time-limit. A decision pursuant to the first sentence [of this paragraph] has to be reasoned, if the reasons for the rejection are not included in the letter of information pursuant to the second sentence.

(3) A decision given pursuant to the first sentence of paragraph (2) above is not amenable to appeal. "

Article 529
Scope of examination by the appellate court

"(1) The appellate court shall base its hearing and decision on:

1. the facts established by the first-instance court, unless there are concrete indications that raise doubts as to the correctness or completeness of the establishment of the relevant facts which warrant a fresh examination;

2. new facts, as long as it is admissible to consider these.

..."

D. Civil Code

32. Compensation claims in tort are governed by Article 823 of the Civil Code, which reads as follows:

Article 823
Liability for damages

"(1) Whosoever, intentionally or negligently, unlawfully harms the life, body, health, freedom, property or another right of another person, is liable to pay compensation to the other party for the damage caused.

(2) The same obligation is placed on anyone who breaches a statute that is intended to protect others ..."

33. For the purpose of Article 823 § 2 of the Civil Code, statutes designed for the protection of others are, for example, Articles 239 and 240 of the Criminal Code. Under the general principles on civil proceedings the injured party relying on Article 823 § 2 of the Civil Code must show in the first place that the defendant committed a wrongful act, that is, fulfilled the objective and subjective constitutive elements of a criminal offence. This does not include the finding of criminal guilt, which is not a constitutive element of a criminal offence according to German legal methodology (see paragraph 30 above). While fulfilling the objective and subjective constitutive elements of a criminal offence may be the basis for both criminal and civil liability, there are further steps in tort law to give rise to civil liability, which differ from the elements of a criminal offence. The injured party must additionally prove causation, damage and the amount of the financial loss in accordance with the principle of civil law. Finally, while similar exonerating circumstances may exclude both criminal and civil liability, the concepts of criminal guilt and civil fault are not only embedded in different laws, namely the Criminal and the Civil Code, but are also different.

While the degree of criminal guilt has a direct effect on the amount of the penalty or even excludes criminal liability, in tort law it is decisive whether the accused had acted with or without civil fault. While the punishment in criminal law is measured on a basis of the degree of criminal guilt (*schuldangemessene Strafe*), in tort law the full loss is always to be compensated when civil fault has been established (see Hellwege, P. & Wittig, P. (2015), "*Delictual and criminal liability in Germany"*, Chapter 4, in M. Dyson (Ed.), "*Comparing Tort and Crime: Learning from across and within Legal Systems*", p. 155).

In exceptional cases a defendant without civil fault can still be liable when equity requires compensation (ibid., Chapter 4, p. 158). With regard to procedural law, unlike in criminal law, the civil courts cannot carry out investigations of their own motion (*Amtsermittlungsgrundsatz*), but generally have to rely on the facts and evidence presented by the parties. Rules on the burden of proof apply in the event of doubt, but there is no general rule that any reasonable doubt must benefit the defendant (*in dubio pro reo*), as in criminal law. Moreover, while the criminal court has to establish the accused's guilt beyond doubt, in tort law the defendant has to prove the reasons which would exonerate him from civil liability, in particular also that he acted without civil fault (ibid., Chapter 4, pp. 163/164).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained that the civil proceedings had been unfair because the District Court had based its decision solely on the findings of fact set out in the previous criminal judgment. He further complained that he had been prevented from presenting his arguments during an oral hearing at the appeal level. The applicant relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

A. Civil proceedings before the District Court

1. The parties' submissions

35. The Government submitted that the applicant had not fully availed himself of the opportunities to raise his arguments. He had only alleged his unfitness to stand trial, even though the District Court had invited him twice to make submissions on the merits. His substantive pleadings had arrived after the deadline for submissions and only five days before the scheduled oral hearing. During the oral hearing he had had another opportunity to raise his arguments. The Government further argued that the District Court had established the applicant's liability predominantly on indisputable facts, in particular, that he had participated in the meeting with the plaintiff, knowing about the kidnapping. The criminal judgment had also constituted admissible documentary evidence in the civil proceedings. Moreover, the District Court had addressed the applicant's belated submissions that he had not been involved in the kidnapping, but had concluded that he had endorsed the deprivation of liberty.

36. The applicant contested that he had been given the opportunity to disprove the findings of fact in the criminal judgment. Those findings had been wrong because he had been not involved in any criminal acts. He had not been able to exercise his defence rights during the criminal proceedings because they had been discontinued in respect of him. During the subsequent civil proceedings his and his wife's written statements, including evidence requests, had been ignored. He had not made a submission on the merits before 30 October 2011 because he had been expecting the civil proceedings to be discontinued. The District Court had informed him too late that it would not accept his inability to stand trial.

2. The Court's assessment

37. The Court reiterates that it is in the first place for the domestic courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced (see *Van Kück v. Germany*, no. 35968/97, §§ 46-47, ECHR 2003-VII with further references). It is also not the Court's function to deal with errors of fact or law unless the domestic courts' decisions appear arbitrary or manifestly unreasonable (see, for example, *Carmel Saliba v. Malta*, no. 24221/13, § 62, 29 November 2016).

38. The domestic courts are under a duty to examine properly the submissions, arguments and evidence adduced by the parties (see *Dulaurans v. France*, no. 34553/97, § 33, 21 March 2000). While the domestic courts have a greater latitude when dealing with civil cases (see *Perić v. Croatia*, no. 34499/06, § 18, 27 March 2008, and *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 32, Series A no. 274), in cases imputing civil responsibility for damage arising out of criminal acts it is imperative that the domestic decisions are based on a thorough assessment of the evidence (see *Carmel Saliba,* cited above, §§ 67 and 73).

39. The Court observes that in the present case the District Court based its decision on the factual statements in the criminal judgment as documentary evidence, without taking further evidence (see paragraphs 21 and 22 above). However, the applicant's submissions before the District Court included little detail on the merits and referred essentially to his health problems. Although the applicant must have known that the civil court did not accept his inability to stand trial, it was solely in his letter of 30 October 2011 that he argued that the plaintiff's allegations had not been based on sufficient evidence. Nevertheless, he did not request the taking of further evidence. Even at the oral hearing his representative simply requested that the action be dismissed (see paragraphs 13, 16, 19 and 20 above).

40. The Court thus takes the view that the applicant did not fully avail himself of the opportunities to raise his arguments. It does not share the applicant's view that he was not given the opportunity to disprove the findings in the criminal judgment and that his statements were ignored. The District Court invited him several times to comment on the merits and additionally informed him about its intention to base its findings on the criminal judgment as documentary evidence. However, only the applicant's wife submitted requests for evidence. Even though the applicant denied his involvement in any criminal acts in a written testimony appended to his wife's submissions, those submissions evidently constituted his wife's exclusive defence statement. The Court has no doubts that the applicant understood that in civil proceedings each party was obliged to bring forward its own arguments and pieces of evidence. The applicant's own correspondence with the District Court shows that he knew about his

procedural obligations. Nevertheless, he continued to insist on discontinuation of the civil proceedings instead of asking for further evidence or naming witnesses. Moreover, the applicant never argued that there had been any misunderstanding concerning his and his wife's correspondence with the District Court. The District Court therefore did not deprive the applicant of an opportunity to prove his case (contrast *Gryaznov v. Russia*, no. 19673/03, § 61, 12 June 2012).

41. The applicant's failure to submit a request for evidence renders this case different from cases where the Court has found that the domestic courts were obliged to give reasons for not admitting the evidence adduced by the applicant (see *Perić*, cited above, § 21). The Court takes the view that it was therefore sufficient to refute the applicant's statements by referring to the submissions and testimony in the criminal judgment. The applicant did not argue that he had expected that the plaintiff's or the co-defendants' testimonies before the District Court would have been different from those given during the criminal proceedings. Unlike in *Carmel Saliba* (cited above, §§ 69-70), the plaintiff's testimony in the criminal judgment about the applicant's involvement was not inconsistent, in particular, as regards the allegation that the applicant had prepared the documents for the acknowledgement of debt. Furthermore, the District Court's conclusion that the applicant's involvement, in particular his failure to end the plaintiff's deprivation of liberty, rendered him liable appears neither arbitrary nor manifestly unreasonable.

42. Furthermore, the Court does not share the applicant's view that the District Court failed to inform him in due time that it would not discontinue the civil proceedings because of his health problems. Since the applicant had announced that he would be represented by a lawyer, it was reasonable for the District Court to have assumed that he would receive adequate advice. Even though ultimately he did not appoint a lawyer, the applicant has never claimed that he had been unable to do so. Moreover, his first statement about being "not unfit to stand trial for health reasons" (see paragraph 13 above) was ambiguous. When he subsequently stated that he was unfit to stand trial in clear terms, the District Court immediately informed him that this would not exonerate him from the proceedings (see paragraph 17 above).

43. In conclusion, the Court finds no indication that the civil proceedings before the District Court were unfair or otherwise contrary to Article 6 § 1 of the Convention.

44. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. No oral hearing before the appellate court

45. Relying on the Court's case-law in *Rippe v. Germany* ((dec.), no. 5398/03, 2 February 2006), the Government submitted that no further taking of evidence had been required at the appeal level because the District Court had established all the elements for civil liability. The appellate court had been bound by the factual findings of the District Court because the applicant had failed to request a rectification under Article 320 of the Code of Civil Procedure.

46. The applicant contested that assertion and argued that the appellate court had been required to correct the erroneous findings of the District Court. A prior rectification request pursuant to Article 320 of the Code of Civil Procedure had not been the correct legal remedy because he had not sought the correction of errors, but had complained about the taking of the evidence at the first-instance level.

47. The Court has previously held in *Rippe* (cited above) that Article 522 § 2 of the Code of Civil Procedure, allowing the appellate court to dismiss without an oral hearing and by unanimous decision an appeal that obviously does not have prospects of success, is in general compatible with the requirements of Article 6 of the Convention.

48. The Court finds that the applicant in the instant case was afforded the same procedural safeguards as in *Rippe* (cited above). He notably had a public hearing at first intance; the Regional Court informed him about its intention to reject his appeal and granted him the opportunity to submit comments; and the decision was taken unanimously by three judges. It follows that the applicant, who was then represented by counsel, had ample opportunity to submit arguments as he saw fit. Moreover, an oral hearing was not required because the Regional Court was bound by the District Court's factual findings. Consequently, all the questions of fact and law could be adequately resolved on the basis of the case file and the parties' written observations.

49. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

50. Relying on Article 7 of the Convention, the applicant submitted that the District Court's order to pay damages in tort had no legal basis in domestic criminal law. Article 7 of the Convention reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

51. The Court considers that neither the purpose of the compensation award nor its size conferred on the measure the character of a conviction or penal sanction for the purposes of Article 7 of the Convention. The applicant was solely ordered to compensate the plaintiff for his financial losses, in particular to reimburse him for the lawyer's fees incurred when claiming back the EUR 75,000.

52. It follows that this complaint is incompatible *ratione materiae* (see *Société Oxygène Plus v. France* (dec.), no. 76959/11, §§ 40-51, 17 May 2016) and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

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

53. The applicant complained that he had been held liable for a criminal offence even though the criminal proceedings against him had been discontinued. In substance, he relied on Article 6 § 2 of the Convention, which reads as follows:

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

54. The Government contested that argument.

A. Admissibility

55. 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

56. The applicant submitted that the District Court had found him liable for having committed a criminal offence.

57. The Government pointed out that the criminal proceedings, which had been discontinued pursuant to Article 206a of the Code of Criminal Procedure, could have been continued once the applicant had been fit to stand trial again. They submitted that the judgment on civil liability did not contain statements on the applicant's liability under criminal law. The District Court had simply stated that the applicant's actions had fallen under

the statutory definitions of deprivation of liberty and coercion, which were the basis for civil liability. It was of no relevance that the criminal judgment had not been rendered against the applicant, because the findings therein had not been binding on the civil court. While that judgment was an admissible piece of documentary evidence, the District Court had not adopted the findings in the criminal judgment without further scrutiny, but had made its own evaluation of the plaintiff's testimony and the confessions of the co-accused.

2. The Court's assessment

58. The Court reiterates that the presumption of innocence does not only apply in the context of pending criminal proceedings, but also protects individuals 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 *Bikas v. Germany*, no. 76607/13, 25 January 2018, and *Allen v. the United Kingdom* [GC], no. 25424/09, § 94, ECHR 2013).

59. The Court has previously adjudicated cases in which it had to examine the application of Article 6 § 2 of the Convention to judicial decisions taken following the conclusion of criminal proceedings, either by way of discontinuation or after an acquittal, in proceedings concerning the imposition of civil liability to pay compensation to the victim (see *Vella v. Malta*, no. 69122/10, § 42, 11 February 2014, and *Allen*, cited above, § 98, with further references). In those cases, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent civil proceedings.

60. The Court is ready to accept that an indirect link existed in the present case as the lawyer's fees were connected to the follow-up of the criminal proceedings (see *Vella*, cited above, § 43, and *Allen*, cited above, § 104; contrast *Kaiser v. Austria* (dec.), no. 15706/08, § 46, 13 December 2016), even though the criminal judgment had been rendered solely against the co-accused. The District Court had to determine the applicant's civil liability in the context of A's legal costs incurred for retrieving the EUR 75,000 and had therefore to assess the applicant's participation in the events leading to the transfer of that amount.

61. The Court must therefore determine whether the District Court's reasoning was in compliance with the presumption of innocence under Article 6 § 2 of the Convention. It reiterates that there is no single approach to ascertain the circumstances in which Article 6 § 2 of the Convention will be violated in the context of proceedings which follow the conclusion of criminal proceedings. Much will depend on the nature and context of the proceedings in which the impugned decision was adopted (see *Allen*, cited above, § 125). In this context, the Court has repeatedly emphasised that while exoneration from criminal liability ought to be respected in 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 (see *Allen*, cited above, § 123, with further references). Nevertheless, it emerges from the Court's case-law that the language used by the domestic courts is of critical importance (see *Vella*, cited above, § 57, and *Allen*, cited above, § 126, with examples of language used). A distinction has been drawn between cases where a final acquittal judgment has been handed down and those where criminal proceedings have been discontinued. In cases after an acquittal, the voicing of suspicion regarding an accused's innocence is no longer admissible. In contrast, the presumption of innocence will only be violated after a discontinuation, when a judicial decision concerning him reflects an opinion that he is guilty (see *Bikas,* cited above, § 44, and *Allen,* cited above, § 122).

62. The Court points out that in the present case the civil liability arose in the first place out of the applicant's refusal to compensate A for his lawyer's fees incurred for retrieving the EUR 75,000. A had not claimed compensation for his deprivation of liberty and coercion. The compensation claim was therefore not based on exactly the same facts - in particular that A had been deprived of his liberty and coerced - in respect of which the criminal proceedings against the applicant had been discontinued.

63. With regard to the language used, the Court observes that the District Court's judgment contained the statement 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" (see paragraph 21 above). This was not a statement about the applicant's criminal guilt. The District Court 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 (see paragraph 33 above). It limited itself to that finding and did not expressly find that the applicant had committed the offences of which he had been accused and in relation to which the criminal proceedings had been discontinued (a contrario, *Lagardère v. France*, no. 18851/07, §§ 85-87, 12 April 2012).

64. The Court emphasises that the language used by the decision-maker will be critical in assessing the compatibility of the decision and its reasoning with Article 6 § 2. In *Orr v. Norway* (no. 31283/04, § 51, 15 May 2008), the Court has for example found in a case of an alleged rape involving two persons, that the domestic courts had overstepped the bounds of the civil forum by using criminal terms. However, it has subsequently held that the terminology as such may not be decisive in finding a violation of Article 6 § 2 of the Convention when regard is had to the nature and context of the particular proceedings (see *Müller v. Germany*, no. 54963/08, § 46, 27 March 2014; *A.L.F. v. United Kingdom* (dec.), no. 5908/12, § 24, 12 November 2013; *Adams v. the United Kingdom* (dec.), no. 70601/11,

§ 41, 12 November 2013; and *Allen*, cited above, § 126). Even the use of expressions from the sphere of criminal law, such as "deprivation of liberty" and "coercion" in the present case, has not led the Court to find a violation of that provision 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, *mutatis mutandis*, *N.A. v. Norway*, no. 27473/11, § 48, 18 December 2014).

65. In cases of unfortunate language the Court has considered it necessary to look at the context of the proceedings as a whole and their special features (see *N.A. v. Norway*, cited above, §§ 41, 42 and 49; *Reeves v. Norway* (dec.), no. 4248/02, 8 July 2004; and *Ringvold v. Norway*, no. 34964/97, § 38, ECHR 2003 II). These features became decisive factors in the assessment of whether that statement gave rise to a violation of Article 6 § 2 of the Convention. The Court considers that these features are also applicable where the language of a judgment might be misunderstood but can, on the basis of a correct assessment of the domestic law context, not be qualified as a statement of criminal guilt.

66. The Court notes therefore that in the present case A had not joined criminal proceedings as a civil party, but the compensation claim was dealt with in proceedings separate from any criminal charges (see *Lundkvist v. Sweden* (dec.), no. 48518/99, 13 November 2003). Not only were the civil proceedings instituted later, but they also took place before a different court with a different composition of judges. They were therefore neither an accessory to the criminal proceedings (*a contrario, Lagardère*, cited above, §§ 7 and 81) nor merely a continuation of the criminal proceedings (see *Ringvold*, cited above, § 41).

67. While certain aspects of the conditions for civil liability overlapped with those establishing criminal liability (see, *mutatis mutandis*, *Ringvold*, cited above, § 38), the District Court had nevertheless to determine the compensation claim on the basis of tort law. By reference to the relevant articles of the Civil Code, which for their part referred to the relevant articles of the Criminal Code (see paragraph 21 above), the District Court made it clear that it had to examine a compensation claim and no acknowledgment of criminal liability was intended. Furthermore, pursuant to German tort law, stating that the constitutive elements of deprivation of liberty and coercion had been fulfilled was not sufficient to establish civil liability. The injured party had additionally to prove causation, damage and the amount of the financial loss in accordance with the principles of civil law (see paragraph 33 above). The District Court focused also on elements that were exclusively relevant for ascertaining civil liability (see *N.A. v. Norway*, cited above, § 47) because its reasoning included the finding of liability as joint debtors, the calculation of the amount of compensation and an examination of possible counterclaims (see paragraph 23 above). Moreover, the District Court had to determine the

compensation claim on the basis of the general principles on civil proceedings and in a different framework from that of the criminal proceedings (see *Vella*, cited above, § 60). Unlike criminal procedural law, the civil courts had to rely on the evidence presented by the parties and rules on the burden of proof applied (see paragraph 33 above).

68. Lastly, although the District Court based its findings on the submissions and witness testimony reproduced in the criminal judgment concerning the four co-accused as documentary evidence, it had been required to examine and re-evaluate the submissions therein (see, *mutatis mutandis*, *Vella*, cited above, § 59). In this context, it must be reiterated that even though the events resulting into the applicant's civil liability were connected with those in respect of which the applicant had been charged in the criminal proceedings, compensation was primarily awarded for retrieving A's money. That had been not the subject of the criminal proceedings. Thus, the civil proceedings did not concern the "same facts" (see paragraph 61 above). Since the outcome of the criminal proceedings was not binding for the civil courts (see, *mutatis mutandis*, *N.A. v. Norway*, cited above, § 51), the District Court made a separate assessment of the facts in order to determine whether the constitutive elements of an offence had been fulfilled, but also assessed the additional elements for establishing civil liability. It did not set out first to demonstrate that the applicant had in fact committed a criminal offence in order then to be able to rule on the compensation claim (*a contrario, Lagardère*, cited above, § 81).

69. In the light of the foregoing, the Court reiterates that extra care ought to be exercised when formulating the reasoning in a civil judgment after the discontinuation of criminal proceedings. However, taking into account the nature and context of the civil proceedings in the present case as well as the well-established meaning and effect under domestic law of the concrete legal terms used, it considers that the finding of civil liability was not contrary to the presumption of innocence. Those terms could not reasonably have been read as an affirmation imputing criminal liability. There has accordingly been no violation of Article 6 § 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 6 § 2 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 2 of the Convention.

Done in English, and notified in writing on 3 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Yonko Grozev
Registrar	President