Eerlijk proces. Strafvermindering na uitlokking van strafbare feiten door de politie niet voldoende. Onrechtmatig bewijs. Bewijsuitsluiting noodzakelijk

Barkhuysen, T.; Emmerik, M.L. van

naar bestuursrechtelijke uitspraken T. Barkhuysen, 'Smartengeld bij schending van mensenrechten', *NJB* 2011/566).
T. Barkhuysen en M.L. van Emmerik

AB 2016/70

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
23 oktober 2014, nr. 54648/09
(M. Villiger, A. Nußberger, B. M. Zupančič, A. Power-Forde, G. Yudkivska, H. Jäderblom, A. Pejchal)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 5, 6 EVRM

ECLI:CE:ECHR:2014:1023JUD005464809

Eerlijk proces. Strafvermindering na uitlokking van strafbare feiten door de politie niet voldoende. Onrechtmatig bewijs. Bewijsuitsluiting noodzakelijk.

Klager werd veroordeeld tot vijf jaar gevangenisstraf voor betrokkenheid bij een drugstransactie. De Duitse justitie kwam klager op het spoor na een undercoveroperatie van twee politieagenten. In eerste instantie werd klager niet verdacht van enige strafbare gedragingen maar werd hij betrokken in de operatie vanwege zijn zakelijke contacten met hoofdverdachte S., waarvoor hij als tussenpersoon onroerend goedtransacties sloot. De agenten deden zich daarom voor als geïnteresseerden in een aantal onroerend goedobjecten. Toen dat op niets uitliep en ook een — door de agenten geïnsinueerde — sigarettensmokkel werd afgeblazen vanwege het door de agenten geconstateerde hoge risico en lage opbrengst, stelde klager hen voor dat hij via S. aankoop en transport van cocaïne en amfetamine kon regelen. Klager zou zelf niet bij de handel betrokken zijn, maar enkel de contacten tot stand brengen en hiervoor van S. commissie ontvangen. Nadat de agenten zich enthousiast toonden, krabbelde klager terug en deelde de agenten mee niets meer met de transactie te maken te willen hebben. Daags nadien leggen de agenten opnieuw contact en wordt de transactie alsnog uitgevoerd.

Voor de nationale rechterlijke instanties voerde klager aan dat hij door de agenten is uitgelokt. Zonder aandringen van de agenten zou hij de transactie nooit tot stand hebben gebracht. De nationale rechter ging in dit betoog niet mee. Wel merkte de rechtbank van Aken op dat klager door het optreden van de agenten in de verleiding kan zijn gebracht strafbare feiten te plegen waardoor dit optreden als strafverminderende omstandigheid is meegenomen in de strafmaat. Klagers beroep op uitlokking en een beroep op uitsluiting van het hiermee verkregen bewijs leverde echter niets op.

Voor het Hof klaagt hij over schending van het recht op een eerlijk proces door het gebruik van bewijs verkregen na uitlokking. Ter beoordeling van de vraag of sprake is geweest van uitlokking bekijkt het Hof allereerst of de agenten een overwegend passieve opstelling aan de dag hebben gelegd gedurende het opsporingstraject. De onderliggende redenen om klager vanaf het begin in de operatie te betrekken en de vraag naar de aanwezigheid van enige op de verdachte gelegde druk zijn daarbij van belang. In dit kader hecht het Hof groot belang aan het hernieuwde, door de agenten geïnitieerde, contact na de eerdere terugtrekking van klager. Het Hof komt daarom tot de conclusie dat inderdaad sprake was van uitlokking en het proces tegen klager niet voldoet aan de voorwaarden gesteld in artikel 6 EVRM.

De Duitse staat verweert zich vervolgens door te stellen dat klager geen 'slachtoffer' in de zin van artikel 35 EVRM meer is van de schending, nu zijn straf door de nationale rechter is gemitigeerd vanwege het optreden van de undercoveragenten. Het Hof gaat niet mee in dit verweer en overweegt dat schending van artikel 6 EVRM vanwege uitlokking noopt tot uitsluiting van het met de uitlokking verkregen bewijs, dan wel moet een procedure met vergelijkbare consequenties van toepassing zijn. In casu is de veroordeling grotendeels tot stand gekomen door het onjuist verkregen bewijs en kan niet worden gezegd dat de strafvermindering dezelfde uitkomst tot gevolg heeft gehad als de uitsluiting van het met uitlokking verkregen bewijs. Klager heeft geen adequaat herstel van de schending van artikel 6 EVRM gehad. Klager wordt in het gelijk gesteld en het Hof kent een bedrag toe ten laste van de Duitse staat van € 8.000 als vergoeding van de immateriele schade ten gevolge van schending van het recht op een eerlijk proces. Voor de mogelijke materiële schade verwijst het Hof klager naar de beschikbare nationale procedures.

Furcht
tegen
Duitsland

The law

I. Alleged violation of Article 6 § 1 of the Convention

32. The applicant complained that the criminal proceedings against him had been unfair as he had been convicted of drug offences which he had been incited to commit by undercover police officers and essentially on the basis of the evidence obtained by that entrapment. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

"In the determination of … any criminal charge against him, everyone is entitled to a fair … hearing … by [a] … tribunal …"

33. The Government contested that argument.

A. Admissibility

34. The Court observes that in its judgment convicting the applicant of drug trafficking, the Regional Court found that the applicant had been incited by a State authority to commit offences and mitigated the applicant's sentence because of that incitement. Therefore, the question arises whether the applicant lost his status as a victim of a breach of Article 6 § 1 of the Convention, for the purposes of Article 34 of the Convention. In the Court's view, the adequacy or otherwise of the authorities' response to the impugned police measure must be considered in the light of the extent of the possible unfairness of the applicant's trial as a result of that measure. The issue whether the applicant lost his victim status shall therefore be examined under the merits of the applicant's complaint under Article 6 § 1.

35. 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. Whether the criminal proceedings of the applicant were contrary to Article 6

(a) The parties' submissions

(i) The applicant

36. The applicant submitted that the criminal proceedings against him had been unfair and in breach of Article 6 § 1 of the Convention.

37. The applicant considered that he had been instigated by undercover agents to commit the offences he had later been convicted of. He submitted that at the time when the undercover agents started their investigations and established contacts with him, the court order of 18 October 2007 concerning their intervention had not authorised their acts against him, but had only covered S. and five other suspects. He did not have a criminal record and there had not been any suspicion of his having been involved in drug trafficking. This had expressly been confirmed by the Aachen Regional Court in its judgment.

38. The applicant argued that he had not been predisposed to commit drug offences. When contacted by the undercover agents, he had owned and had been running a restaurant in Aachen. The undercover agents, meeting him regularly for a long period of time, had then persistently induced him to participate in the offences at issue. After he had made numerous fruitless offers for sale of real estate to them, they had made him understand that they were interested in business of all kinds, provided that it was worth taking a high risk, which had made him reflect on drug deals. Despite the fact that he had clearly declared on 1 February 2008 not to be interested in any such business any longer, the undercover agents had re-contacted and again induced him to participate in the drug deal. The undercover agents thus had even continued inciting him to commit the offences after and despite the fact that they had achieved the aim pursued by contacting him already since January 2008, namely to establish contacts with suspect S. His only contribution to the drug deals had been to report the undercover agents' interest in buying drugs to S. and to shield off the latter against the undercover agents.

39. The applicant further submitted that the undercover police officers had initially acted without a court order covering their actions against him. At the time of the court order of 7 February 2008 authorising the use of undercover agents to investigate also against him, he had already retracted himself, on 1 February 2008, from further participation in offences. This had not been disclosed by the prosecution to the Aachen District Court. Therefore, it could not be said that the intervention of the undercover agents had been properly monitored by the domestic courts.

40. The applicant stressed that the Aachen Regional Court had expressly recognised in its judgment that he had been incited (*verleitet*) to commit the drug offences he had been found guilty of. In any event, the intervention of the undercover agents amounted to an undue incitement for the purposes of the Court's case-law as the agents provocateurs had raised his willingness to participate in offences.

(ii) The Government

41. In the Government's view, the criminal proceedings against the applicant had complied with Article 6 § 1 of the Convention. The use of the undercover investigators and of the evidence obtained as a result of their intervention had not rendered the trial against the applicant unfair.

42. The Government submitted, in particular, that the applicant had not been induced by the two undercover agents, within the meaning of the Court's case-law, to commit the drug offences in question. They argued that the applicant had been predisposed to commit these offences prior to the undercover agents' intervention. In particular, in a conversation with undercover

agent D. on 23 January 2008, the applicant had not only mentioned his access to a group of cigarette smugglers, but had also raised himself the possibility of delivering cocaine and amphetamine and had himself proposed the quantities of drugs to be delivered. Moreover, the applicant had described himself as part of a group with S. and had been able to initiate drug deals quickly via his contacts with S. Given the amount of drugs involved, a speedy conclusion of the drug deals would not have been possible without an organised crime structure involving the applicant. Even though the applicant had not had a leading role in the negotiations of the deals, he was to receive an equal share of the profits as S. from the transactions.

43. Moreover, the Government considered that the undercover agents had remained essentially passive in the course of their intervention and that the applicant would also have become involved in drug deals managed by S. without their intervention. It was true that in the telephone conversation between the applicant and P. on 1 February 2008 the applicant had declared that he no longer wished to prepare a drug purchase. By re-contacting the applicant on 8 February 2008, the undercover agents had only intended passively to establish the reasons for the applicant to refrain from the drug deal. However, it had become clear in the conversation that the applicant had not been willing to generally renounce drug trafficking, but had only intended to test the undercover agents' trustworthiness. The undercover agents further left it to the applicant and S. to take the initiative in preparing the drug deals.

44. The Government conceded that the Regional Court had used the term *'verleiten'* in order to describe the activities of the undercover agents. However, it became clear from the context that it had used the term in the sense of 'encourage'. It had not meant that there had been undue incitement, inducement or instigation for the purposes of the Court's case-law. The undercover agents had not instigated the applicant to commit the drug offences because they had waited for the applicant to propose drug deals.

45. The Government further stressed that the involvement of the undercover agents had been ordered by a court and had been subject to permanent judicial supervision. The initial court order of 18 October 2007 authorising the intervention of undercover agents to investigate against S. and others on suspicion of drug trafficking had not covered the applicant, who had not been suspected of drug trafficking at that time. However, the court order of 7 February 2008 had extended the use of the undercover agents also against the applicant after the latter had shown interest and involvement in cigarette and drug trades.

(b) The Court's assessment

(i) Relevant principles

46. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court, for its part, must ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV; and *Ramanauskas v. Lithuania* [GC], no. 74420/01, § 52, ECHR 2008).

47. The use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards (see *Teixeira de Castro*, cited above, §§ 35–36; and *Ramanauskas*, cited above, § 54). While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience (see *Teixeira de Castro*, cited above, § 36). The public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset (see, *inter alia, Teixeira de Castro*, cited above, §§ 35–36; *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 48, ECHR 2004-X; *Vanyan v. Russia*, no. 53203/99, § 46, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, § 133, ECHR 2006-XII (extracts); *Ramanauskas*, cited above, § 54; and *Bannikova v. Russia*, no. 18757/06, § 34, 4 November 2010).

48. When faced with a plea of police incitement, or entrapment, the Court will attempt to establish whether there has been such incitement or entrapment (substantive test of incitement; see *Bannikova*, cited above, § 37). Police incitement occurs where the officers involved do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution (see *Ramanauskas*, cited above, § 55 with further references; and *Bannikova*, cited above, § 37; compare also *Pyrgiotakis v. Greece*, no. 15100/06, § 20, 21 February 2008). The rationale behind the prohibition on police incitement is that it is the

police's task to prevent and investigate crime and not to incite it.

49. In order to distinguish police incitement, or entrapment, in breach of Article 6 § 1 from the use of legitimate undercover techniques in criminal investigations, the Court has developed the following criteria.

50. In deciding whether the investigation was 'essentially passive' the Court will examine the reasons underlying the covert operation and the conduct of the authorities carrying it out. The Court will rely on whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence (see *Bannikova*, cited above, § 38).

51. The Court has found, in that context, in particular, that the national authorities had had no good reason to suspect a person of prior involvement in drug trafficking where he had no criminal record, no preliminary investigations had been opened against him and there was nothing to suggest that he had a predisposition to become involved in drug dealing until he was approached by the police (see *Teixeira de Castro*, cited above, § 38; confirmed in *Edwards and Lewis*, cited above, §§ 46 and 48; *Khudobin*, cited above, § 129; *Ramanauskas*, cited above, § 56; and *Bannikova*, cited above, § 39; see also *Pyrgiotakis*, cited above, § 21). In addition to the aforementioned, the following may, depending on the circumstances of a particular case, also be considered indicative of pre-existing criminal activity or intent: the applicant's demonstrated familiarity with the current prices for drugs and ability to obtain drugs at short notice (compare *Shannon v. the United Kingdom* (dec.), no. 67537/01, ECHR 2004-IV) and the applicant's pecuniary gain from the transaction (see *Khudobin*, cited above, § 134; and *Bannikova*, cited above, § 42).

52. When drawing the line between legitimate infiltration by an undercover agent and incitement of a crime the Court will further examine the question whether the applicant was subjected to pressure to commit the offence. In drug cases it has found the abandonment of a passive attitude by the investigating authorities to be associated with such conduct as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms (see, among other cases, *Bannikova*, cited above, § 47; and *Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, § 92, 2 October 2012).

53. When applying the above criteria, the Court places the burden of proof on the authorities. It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In practice, the authorities may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation (see *Bannikova*, cited above, § 48). The Court has emphasised in that context the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It considered judicial supervision as the most appropriate means in case of covert operations (see *Bannikova*, cited above, §§ 49 50; compare also *Edwards and Lewis*, cited above, §§ 46 and 48).

(ii) Application of these principles to the present case

54. The Court is called upon to determine whether the applicant committed the drug offences he was convicted of as a result of police incitement in breach of Article 6 § 1 (substantive test of incitement). This was the case if the undercover police officers must be considered not to have investigated the applicant's activities in an essentially passive manner, but to have exerted such an influence on him as to incite the commission of drug offences he would not have committed otherwise.

55. Having regard to the criteria established in the Court's case-law in order to distinguish police incitement from legitimate undercover techniques (see paragraphs 49–53 above), the Court notes that at the time the applicant was first approached by the undercover agents in November 2007, there were no objective suspicions that he was involved in drug trafficking. The Aachen District Court's order of 18 October 2007 authorised criminal investigations by undercover police officers only against S. and five other persons not including the applicant. No criminal investigations were instituted against the applicant at that time. The applicant, who had no criminal record, was approached by the undercover agents not on suspicion of any involvement in drug trafficking, but because he was a good friend of the suspect S. and was therefore seen as a means to establish contacts with S.

56. As to the Government's argument that the applicant was nevertheless predisposed to commit a criminal offence because he had himself raised the possibility to deliver drugs, had proposed the quantities of drugs to be delivered, had described himself as part of a group with S. and had been able to initiate drug deals quickly via his contacts with S., the Court notes the following. The relevant time for determining whether there were objective suspicions that the

person concerned was predisposed to commit a criminal offence is the time when the person was (first) approached by the police (see paragraph 51 above). As found above, when the undercover officers started contacting and meeting the applicant in November 2007, the investigation authorities, as clearly established by the Aachen Regional Court in its judgment, did not consider that the applicant was predisposed to traffic in drugs. It is therefore irrelevant that the Aachen District Court's authorisation extending the scope of the investigations so as to cover also the applicant (see paragraph 11 above) was based on the assumption of such a predisposition, all the more as the applicant had already explained at that moment not to be interested in any business other than the restaurant he ran (see paragraph 10 above). According to the applicant, this important information had not even been communicated to the Aachen District Court by the prosecution (see paragraph 39 above). In these circumstances, the elements mentioned by the Government cannot serve to prove that it was reasonable to conclude that the applicant was predisposed to trade in drugs.

57. The Court shall further examine the question whether the applicant was subjected to pressure by the undercover agents to commit the offences he was convicted of. It notes in that context that the Regional Court, having regard to the reports drawn up by the agents throughout the undercover measure and to the applicant's submissions, established that the agents had been careful not to propose concrete illegal business transactions or specific types or amounts of drugs before their respective counterparts, the applicant or S., took the first step. In that context, it is of relevance, as stressed by the Government, that the applicant was found to have raised the possibility to arrange for drugs to be sold by S., albeit in a context thoroughly prepared by the undercover agents and aimed at arriving at a sale of drugs by S. to them.

58. However, the Court cannot but note that on 1 February 2008 the applicant, having been called by undercover agent P., explained to the latter that he was no longer interested in participating in a drug deal. Despite this, undercover agent P. re-contacted the applicant on 8 February 2008 and persuaded him to continue arranging the sale of drugs by S. to the undercover agents. By that conduct against the applicant the investigating authorities clearly abandoned a passive attitude and caused the applicant to commit the offences. In view of the material before it, the authorities re-approached the applicant in order to make it possible to establish drug trafficking and to institute a prosecution both against the applicant, against whom a court order authorising the use of undercover agents had been obtained on 7 February 2008, and against S., with whom the authorities could only communicate via the applicant.

59. In the light of the above considerations, the Court concludes that the undercover measure at issue went beyond the mere passive investigation of pre-existing criminal activity and amounted to police incitement, as defined in the Court's case-law under Article 6 § 1 of the Convention. The evidence obtained by police incitement was further used in the ensuing criminal proceedings against the applicant.

2. Whether the applicant lost his victim status

(a) The parties' submissions

(i) The applicant

60. The applicant took the view that his conviction had essentially been based on the evidence obtained by entrapment, which had rendered his trial unfair. In his view, it had not been sufficient that the Regional Court, in compliance with the Federal Court of Justice's well-established case-law (see paragraphs 26–31 above), had mitigated his sentence as a result of the police entrapment in breach of the Convention. Referring, inter alia, to the Court's case-law established in the cases of *Teixeira de Castro* (cited above) and *Vanyan* (cited above), he argued that the proceedings against him should have been discontinued.

(ii) The Government

61. The Government submitted that the use of the evidence obtained by the undercover agents at the trial against the applicant had not rendered the proceedings against him unfair. The Regional Court had considerably mitigated the applicant's sentence because, despite the fact that that court had not considered that there had been undue police incitement for the purposes of the Court's case-law, there had been an incentive for committing the offences by the State through its undercover agents. Moreover, the reports drawn up by the undercover agents had been disclosed in the criminal proceedings against the applicant. The Regional Court had examined allegations of an undue incitement made by the applicant, who had been able to exercise his defence rights in this respect.

(b) The Court's assessment

(i) Relevant principles

62. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention (see, *inter alia, Siliadin v. France,* no. 73316/01, § 61, ECHR 2005-VII, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 179, ECHR 2006-V). A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a 'victim' for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (*see, inter alia, Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Scordino (no. 1)*, cited above, § 180; and *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010).

63. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Gäfgen*, cited above, § 116; compare also *Scordino (no. 1)*, cited above, § 186).

64. In cases of police incitement in breach of Article 6 § 1 of the Convention, the Court, in its well-established case-law, reiterates that the public interest in the fight against serious crimes, such as drug trafficking, cannot justify the use of evidence obtained as a result of police incitement (see the case-law cited above at paragraph 47). For the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see *Lagutin and Others v. Russia*, nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, § 117, 24 April 2014 with further references).

(ii) Application of these principles to the present case

65. In determining whether the domestic courts have acknowledged, either expressly or in substance, a breach of Article 6 § 1, the Court observes that in its judgment convicting the applicant of drug trafficking, the Aachen Regional Court, having established in detail the facts underlying the undercover measure, found that the applicant had been incited (verleitet) — but not instigated (angestiftet) — by a State authority to commit offences. The Regional Court based this finding essentially on the same facts on which the Court based its finding that the undercover measure at issue amounted to police incitement as defined in the Court's case-law under Article 6 § 1 of the Convention. The Regional Court stressed, in particular, the lack of suspicion of involvement in drug trafficking against the applicant prior to the undercover measure concerning him and the fact that the authorities, despite their otherwise cautious approach, re-contacted the applicant and dispersed his suspicions and fear after the latter had renounced any participation in the drug transaction (see paragraphs 16–18 above).

66. The Court observes, however, that in the Government's submission, the Regional Court did not mean to acknowledge, by these statements, that there had been undue police incitement for the purposes of the Court's case-law. The Court notes that the Regional Court did not expressly refer either to Article 6 § 1 of the Convention, to corresponding rights under the Basic Law or to the Federal Court of Justice's well-established case-law on undue police incitement (see paragraphs 26–31 above), which with the Regional Court's reasoning appears to be in line. Nonetheless, it considers that it can leave open the question whether the Regional Court, by its above findings, can be considered to have acknowledged in substance a breach of Article 6 § 1 in view of the following.

67. Even assuming an acknowledgement, by the Regional Court, of a breach of Article 6 § 1 of the Convention, the Court must further determine whether that court afforded sufficient redress for the breach of the Convention. It notes that the Regional Court expressly stated that it had been a particularly weighty factor mitigating the sentence that the applicant had been incited by a State authority to commit offences.

68. In determining whether a considerable mitigation of the sentence may be considered as having afforded the applicant sufficient redress for a breach of Article 6 § 1, the Court observes the following. Under the Court's well-established case-law, Article 6 § 1 of the Convention does not permit the use of evidence obtained as a result of police incitement. For the trial to be fair within that provision, all evidence obtained as a result of police incitement must be excluded or a procedure with similar consequences must apply (see paragraphs 47 and 64 above). In view of this case-law, it must be concluded that any measure short of excluding such evidence at trial or leading to similar consequences must also be considered as insufficient to afford adequate redress for a breach of Article 6 § 1.

69. The Court notes that in the present case the evidence obtained by police incitement was used at the applicant's trial and his conviction was based on that material. Moreover, not least in view of the importance of that material to prove

the applicant guilty, the Court is not convinced that even a considerable mitigation of the applicant's sentence can be considered as a procedure with similar consequences as an exclusion of the impugned evidence. It follows that the applicant has not been afforded sufficient redress for the breach of Article 6 § 1.

70. The Court would add that, even though it appears plausible that the sentence imposed on the applicant for drug trafficking was considerably mitigated as a result of the police incitement, the exact reduction of the sentence was not fixed in the judgment and was thus not clearly measureable.

71. In view of the foregoing, the applicant may still claim to be the victim of a breach of Article 6 § 1.

3. Conclusion

72. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II. Application of Article 41 of the Convention

73. 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

74. The applicant claimed a total of € 85,525.67 (EUR) in respect of pecuniary damage. This sum comprised € 68,799.99 (€ 2,000 per month) for loss of gains from the closure of his restaurant in September 2008 as a result of his detention until his release on 12 July 2011. He further claimed € 2,090.71 per month and person for expenses incurred for employing two replacement cooks in his restaurant between May and August 2008 in his restaurant. He refers to copies of documents attached to his application (a calculation by a tax consultant of the gains from his restaurant between January and July 2008 and several pay slips of two of his employees during the relevant period) to support his claim.

75. The applicant further claimed a total of at least € 11,749.99 in respect of non-pecuniary damage. This sum comprised € 8,249.99 in compensation for his pre-trial detention and detention for 3.3 years (he relied on unspecified case-law to explain his calculation) and at least € 3,500 in compensation for the length of the proceedings.

76. The Government considered that, even if there had been a breach of the Convention, the applicant did not sufficiently substantiate his claims for compensation for pecuniary damage. Even though there may have been an average operating result of his restaurant of some € 2,000 per month prior to his detention, it was unclear whether the applicant would have continued running his restaurant and earning that sum during the period in which he had been detained. Moreover, it was unclear from the pay slips submitted by the applicant whether the employment of the two persons mentioned therein had any link to the applicant's detention since May 2008.

77. As to the compensation the applicant apparently claimed for non-pecuniary damage, the Government argued that the applicant failed to demonstrate that he would not have been convicted without the intervention of the undercover agents.

78. The Court, examining the applicant's claim relating to pecuniary damage, would stress that the award of damages in this case relates to the manner in which the proceedings were conducted. The link between that manner and the specific amounts of pecuniary damage claimed are matters to be assessed in domestic proceedings. In case of an acquittal, the applicant could claim compensation for damage suffered on account of his conviction, and the domestic courts would then be in the best position to deal with that claim (compare also, *mutatis mutandis, Veselov and Others*, cited above, §§ 135–136).

79. The Court further considers that the applicant must have suffered distress as a result of the fact that he did not have a fair trial on account of his conviction for drug offences the commission of which had been incited by the police. The Court considers that the finding of a violation of Article 6 § 1 does not constitute in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant. Making its assessment on an equitable basis, the Court awards the applicant € 8,000 in this respect, plus any tax that may be chargeable on that amount. The claim for compensation for length of proceedings must be dismissed as the applicant's complaint in this respect has been declared inadmissible (see paragraph 4 above).

B. Costs and expenses

80. The applicant also claimed a total of € 10,685.03 plus value-added tax for the costs and expenses incurred in the proceedings before the domestic courts. This sum included € 4,201.68 net for lawyer's costs in the proceedings before the Regional Court, € 5,000 net for lawyer's costs in the proceedings before the Federal Court of Justice and € 1,483.35 net for lawyer's costs in the proceedings before the Federal Constitutional Court. The applicant submitted copies of bills is-

sued to him by his lawyer in respect of the latter two amounts.
81. Submitting documentary evidence, the applicant further claimed € 2,654.72 plus value-added tax for lawyer's costs incurred in the proceedings before the Court.
82. The Government considered that the applicant did not sufficiently substantiate his costs and expenses either. It was unclear from the invoices submitted, which referred to 'the criminal case of' the applicant, whether they referred to the proceedings at issue and which services had been paid for and on what basis.
83. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of € 8,500 covering costs under all heads, plus any tax that may be chargeable to the applicant.

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

For these reasons, the Court, unanimously,

1. *Declares* the application admissible in so far as it concerns the applicant's complaint about the alleged unfairness of the criminal proceedings against him;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
(i) € 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) € 8,500 (eight thousand five hundred 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* the remainder of the applicant's claim for just satisfaction.

Noot

1. Deze strafrechtelijke uitspraak is opgenomen vanwege het bewijsrechtelijke aspect daarvan. Meer in het bijzonder omdat zij iets meer inzicht geeft in de wijze waarop het EHRM onrechtmatig verkregen bewijs beoordeelt en bepaalt of dit al dan niet mag worden gebruikt om een veroordeling (mede) op te baseren. Dat is voor het bestuursrecht relevant omdat daar al lange tijd wordt gediscussieerd of de thans geldende vaste jurisprudentie terzake (de zogenaamde 'zozeer indruist tegen-regel', waarover hierna meer) al dan niet zou moeten worden heroverwogen. In het bestuursrecht leidt onrechtmatig verkregen bewijs immers als bekend slechts in uitzonderlijke omstandigheden tot volledige uitsluiting van de op deze wijze verkregen informatie. Zie voor een recent voorbeeld ABRvS 3 juni 2015, *AB* 2015/229, m.nt. O. Jansen: bij onderzoek naar naleving van de Wet arbeid vreemdelingen zijn alleen mensen met een getinte huidskleur om hun identiteitsdocumenten gevraagd, hetgeen in strijd met het discriminatieverbod is; in de noot van Jansen worden nog verdere voorbeelden van bewijsuitsluiting genoemd, namelijk in geval van schending van het huisrecht en ten aanzien van bewijs verkregen via een commercieel uitkeringscontrolebureau.
2. Eerst de lijn van het Hof. Uitgangspunt is dat het Hof het onder art. 6 EVRM aan de verdragsstaten overlaat of en zo ja welke gevolgen te verbinden aan onrechtmatig verkregen bewijs. Het Hof gaat alleen na of de procedure als geheel al dan niet eerlijk is verlopen waarbij de omgang met het bewijs één van de toetsstenen is (zie de uitspraken genoemd in r.o. 46; zie eerder bijv. ook EHRM 12 mei 2000, *Khan tegen Verenigd Koninkrijk*, *NJ* 2002/180, m.nt. T. Schalken). Als het echter gaat om uitlokking van strafbare feiten, vaart het Hof een strengere koers. Als daarvan in strijd met art. 6 EVRM sprake is — zoals in de hier opgenomen zaak — dan moet voor die schending adequaat rechtsherstel worden geboden die er alleen in kan bestaan het met de uitlokking verkregen bewijs niet te gebruiken. Dat leidt in casu tot een schending omdat de Duitse rechter het bewijs wel gebruikt had en alleen een (weliswaar forse) strafvermindering toekende en dus een deel van de straf in stand bleef dat gebaseerd was op het onrechtmatig verkregen bewijs. Het gebruik van buiten situaties van uitlokking in strijd met het EVRM verkregen bewijs wordt ook kritisch benaderd, hoewel het Hof daarvoor meer ruimte lijkt te laten afhankelijk van de omstandigheden van

het geval en de vraag of de schending al dan niet erkend is op nationaal niveau (vgl. EHRM 30 juni 2008, *Gäfgen t. Duitsland*, *EHRC* 2008/99, m.nt. J. van der Velde).

3. Nu zal een casus als in de hier opgenomen uitspraak zich niet heel snel voordoen in het Nederlandse (punitieve) bestuursrecht maar uitgesloten is het ook niet dat er bijvoorbeeld bij de (bestuursrechtelijke) opsporing van de overtreding van belastingwetgeving, mededingingsregels, dan wel de regels van de Drank- en Horecawet (verkoop van alcohol aan minderjarigen) sprake is van op grond van art. 6 EVRM blijkens de door het Straatsburgse Hof ontwikkelde criteria ongeoorloofde uitlokking.

4. In het Nederlandse bestuursrecht geldt waar het gaat om het gebruik van onrechtmatig verkregen bewijs als bekend al lang de genoemde 'zozeer indruist regel', zoals geformuleerd door de belastingkamer van de Hoge Raad in 1992. Kort gezegd, houdt deze regel in dat de belastinginspecteur bij de vaststelling, of ter ondersteuning van een belastingaanslag (met verhoging) ook gebruik mag maken van strafrechtelijk onrechtmatig verkregen bewijsmiddelen, waarvan hij zonder wettelijke belemmering had kunnen kennis nemen, ook indien de onrechtmatige handelingen van de betrokken strafrechtelijke instantie(s) niet hadden plaatsgevonden. Het gebruik van deze bewijsmiddelen door de inspecteur is 'slechts dan niet toegestaan, indien zij zijn verkregen op een wijze die zozeer indruist tegen hetgeen van een behoorlijk handelende overheid mag worden verwacht, dat dit gebruik onder alle omstandigheden ontoelaatbaar moet worden geacht', aldus HR 1 juli 1992, *BNB* 1992/306, m.nt. P. den Boer. Dit zogenaamde 'alles-of-niets-criterium' — dat ook door de andere bestuursrechters is omarmd — heeft advocaat-generaal Wattel ruim twintig jaar later aanleiding gegeven tot het schrijven van een uitvoerige, goed gedocumenteerde en zeer lezenswaardige conclusie (ECLI:NL:PHR:2014:521). In deze conclusie bepleit hij — kort gezegd — af te stappen van het 'zo zeer indruist'-criterium als het gaat om de gevolgen die verbonden moeten worden aan het gebruik van onrechtmatig verkregen bewijs en aansluiting te zoeken bij de meer gedifferentieerde benadering in het strafrecht, zoals mogelijk gemaakt op grond van art. 359a Sv. De rechtsontwikkeling van de afgelopen twintig jaar en de wenselijkheid van rechtseenheid tussen strafrecht en punitief bestuursrecht nopen er volgens Wattel toe onderscheid te maken tussen enerzijds strafrecht en punitief bestuursrecht (zoals de belastingboete) en anderzijds niet-punitief bestuursrecht (zoals de belastingaanslag). Hij stelt daartoe voor bij de bestuursrechtelijke beoordeling van de (on)rechtmatigheid van de verkrijgingswijze van strafvorderlijk verkregen bewijsmateriaal aan te sluiten bij het oordeel van de strafrechter. Voor het bepalen van de gevolgen van het gebruik van dit aldaar onrechtmatig verkregen bewijs voor bestuurlijke boetes, wordt aangesloten dan bij de strafvorderlijke regels voor de consequenties van vormverzuim, zoals neergelegd in art. 359a Sv (op basis waarvan de strafrechter aan onherstelbare vormverzuimen het gevolg kan verbinden van niet-ontvankelijkheid van het OM, bewijsuitsluiting of strafvermindering), waarbij hij wel ruimte laat voor een inherente afwijkingsmogelijkheid voor de bestuursrechter met oog voor het verschil tussen de strafbare feiten in het strafrechtelijk traject en de fiscale vergrijpen terzake. Voor het niet-punitief gebruik van onrechtmatig verkregen materiaal (zoals een belastingaanslag) kan worden aangesloten bij het bestaande toetsingskader voor bestuurlijk "onbevoegdelijk" verkregen bewijsmateriaal, namelijk de algemene beginselen van behoorlijk bestuur. Op deze wijze wordt het knellende kader uit 1992 zowel op het punitieve als niet-punitieve vlak genuanceerd ten behoeve van zowel meer flexibiliteit als meer rechtseenheid, aldus de A-G.

5. De Hoge Raad volgt het advies van de A-G echter niet en houdt vast aan de oude striktere lijn uit 1992, die in gevallen dat art. 6 EVRM niet dwingt tot bewijsuitsluiting, nog steeds op — volgens de Raad — juiste wijze tot uitdrukking brengt de nog steeds gewenste zeer terughoudende koers ten aanzien van de uitsluiting van onrechtmatig verkregen bewijs in belastingzaken (punitief dan wel niet-punitief). De Hoge Raad vindt de door de A-G bepleite algemene uitsluiting van strafrechtelijk onrechtmatig verkregen bewijs in belastingzaken een te vergaande maatregel om rechtmatig optreden van de met opsporing en vervolging van strafbare feiten belaste ambtenaren te stimuleren. Wel bestaat er volgens de Hoge Raad ook in belastingzaken in uitzonderlijke gevallen — dus in geval art. 6 EVRM daar niet al toe verplicht — de mogelijkheid om als rechtsstatelijke waarborg het strafrechtelijk onrechtmatig verkregen bewijs uit te sluiten, als bijvoorbeeld een belangrijk (strafvorderlijk) voorschrift of rechtsbeginsel in zo aanzienlijke mate is geschonden, dat de uitkomst van dat onderzoek ook in een belastingzaak van het bewijs dient te worden uitgesloten (HR 20 maart 2015, *AB* 2015/187, m.nt. R. Stijnen).

6. De Hoge Raad blijft met deze gekozen benadering zeker in de Straatsburgse pas, waar hij ook genoeg ruimte laat om in strijd met art. 6 EVRM onrechtmatig verkregen strafrechtelijk bewijs uit te sluiten in de eventueel daarop volgen-

de belastingprocedure (punitief of niet-punitief). De vraag is of deze koers van de Hoge Raad ook wenselijk is en het niet meer in de rede had gelegen aan te sluiten bij de door A-G Wattel bepleite genuanceerde benadering, waarbij het eventueel uitsluiten van onrechtmatig verkregen bewijs in een daarop volgende bestuursrechtelijke procedure een extra stimulans kan vormen om bewijs op rechtmatige wijze te vergaren. Zeker als het gaat om het gebruik van onrechtmatig verkregen bewijs in een punitief bestuursrechtelijk vervolgtraject, komt het ons vreemd voor dat dit bewijs wel zou mogen worden gebruikt, terwijl dit niet zou kunnen in het strafrechtelijk traject. Daarbij verdient de door Wattel op dit punt bepleite uniforme benadering naar ons oordeel navolging.

7. Verder zou ten aanzien van andere mogelijk te verbinden gevolgen aan onrechtmatige bewijsgaring ook kunnen worden gedacht aan vermindering van de boete dan wel vergoeding van de hierdoor geleden immateriële schade. Wat in ieder geval vaststaat, is dat de Straatsburgse jurisprudentie in dezen veel ruimte laat aan de nationale autoriteiten. De hier opgenomen uitspraak laat wel zien dat bij onrechtmatige uitlokking in de zin van artikel 6 EVRM het hierdoor onrechtmatig verkregen bewijs moet worden uitgesloten, dan wel moet een procedure met vergelijkbare consequenties van toepassing zijn (te denken valt aan de niet-ontvankelijkverklaring van het Openbaar Ministerie, zie F.P. Ölcer in haar noot bij deze uitspraak in *EHRC* 2015/14) dan wel moet een reactie met vergelijkbare consequenties volgen (zoals de niet-ontvankelijkverklaring van het OM).

T. Barkhuysen en M.L. van Emmerik

AB 2016/71

HOF VAN JUSTITIE VAN DE EUROPESE UNIE
17 december 2015, nr. C-239/14
(L. Bay Larsen, J. Malenovský, M. Safjan, A. Prechal, K. Jürimäe; P. Cruz villalón)
m.nt. M. Reneman

Art. 47 Handvest van de grondrechten van de Europese Unie; art. 39 Richtlijn 2005/85/EG

ECLI:EU:C:2015:824
ECLI:EU:C:2015:531

Het Unierecht verzet zich niet tegen een nationale wettelijke regeling die geen schorsende werking verleent aan een beroep tegen een beslissing om een hernieuwd asielverzoek niet opnieuw te behandelen.

Artikel 39 van richtlijn 2005/85/EG van de Raad van 1 december 2005 betreffende minimumnormen voor de procedures in de lidstaten voor de toekenning of intrekking van de vluchtelingenstatus, gelezen in het licht van de artikelen 19, lid 2, en 47 van het Handvest van de grondrechten van de Europese Unie, moet aldus worden uitgelegd dat het zich niet verzet tegen een nationale wettelijke regeling die geen schorsende werking verleent aan een beroep dat is ingesteld tegen een beslissing zoals aan de orde in het hoofdgeding, om een hernieuwd asielverzoek niet opnieuw te behandelen.

Abdoulaye Amadou Tall
tegen
Openbaar Centrum voor Maatschappelijk Welzijn van Hoei, in tegenwoordigheid van:
Federaal agentschap voor de opvang van asielzoekers (Fedasil)

Arrest

1 Het verzoek om een prejudiciële beslissing betreft de uitlegging van artikel 39 van richtlijn 2005/85/EG van de Raad van 1 december 2005 betreffende minimumnormen voor de procedures in de lidstaten voor de toekenning of intrekking van de vluchtelingenstatus (PB L 326, blz. 13) en van artikel 47 van het Handvest van de grondrechten van de Europese Unie (hierna: 'Handvest').

2 Dit verzoek is ingediend in het kader van een geding tussen Tall en het Openbaar Centrum voor Maatschappelijk Welzijn van Hoei (hierna: 'OCMW') over de beslissing tot intrekking van sociale bijstand die het OCMW ten aanzien van hem heeft genomen.

Toepasselijke bepalingen

EVRM

3 Artikel 3 van het Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden, ondertekend te Rome op 4 november 1950 (hierna: 'EVRM'), met als opschrift 'Verbod van foltering', bepaalt:

> "Niemand mag worden onderworpen aan folteringen of aan onmenselijke of vernederende behandelingen of bestraffingen."

4 Artikel 13 van het EVRM, met als opschrift 'Recht op een daadwerkelijk rechtsmiddel', luidt:

> "Eenieder wiens rechten en vrijheden die in dit verdrag zijn vermeld, zijn geschonden, heeft recht op een daadwerkelijk rechtsmiddel voor een nationale instantie, ook indien deze schending is begaan door personen in de uitoefening van hun ambtelijke functie."