THE NETHERLANDS / PAYS-BAS
21 May/mai 2015

Criminal proceedings

The Code of Criminal Procedure was amended in September 2002 (which amendment entered into force in January 2003) so as to allow applications for the review of final judgments following judgments of the Strasbourg court. Pursuant to Article 457 § 1 (b) of the Code of Criminal Procedure, an application for review can be lodged before the Supreme Court on the grounds that the Court has ruled that the Convention was violated in proceedings that led to the applicant's conviction or to a conviction for the same offence, and based on the same evidence, if such review is necessary in order to provide just satisfaction within the meaning of Article 41 of the Convention. Pursuant to Article 465 § 2, in cases as referred to in Article 457 § 1 (b) such an application must in principle be lodged within three months after something has taken place from which it can be inferred that the convicted person is aware of the Court judgment. Pending the decision on the application for review, the Supreme Court may at any time suspend the execution of the judgment (Article 473 § 4). Pursuant to article 472 § 1, if the Supreme Court considers that an application concerning a case as referred to in article 457 § 1 (b) is well founded, it can either decide the case itself or it can order the suspension or interruption of the execution of the final judgment and the referral of the case under Article 471, in order either to uphold the said judgment or to overturn it and render judgment, having regard to the judgment of the Supreme Court.

So far, four applications for review of a final judgment have been brought on the basis of Article 457 § 1 (b). The first application resulted in a successful reopening of the case. Due to the established violation by the Court in the case *M.M. v. the Netherlands*[1], the Supreme Court decided to reduce the fine and accompanying term of default detention in this case.[2] The second application was withdrawn by the applicant, because it had not been submitted within the prescribed time limit.[3] The third application resulted in a reduction of the sentence as well, after the Supreme Court set aside the judgment.[4] As a result of the most recent application based on the case *Vidgen v. the Netherlands*[5], the Supreme Court set aside the judgment and ordered the suspension of the execution of the final judgment and referred the case back to the Court of Appeal.[6] From the Conclusion of the Attorney General in the second case, it can be deduced that difficulties might arise in determining when something has taken place from which it can be inferred that the convicted person is aware of the Court judgment. It follows however from the Explanatory Memorandum, that such an open wording was considered necessary to ensure a real possibility for the convicted person to file an application for reviewing the case when a violation has been established by the Court.

Civil proceedings

[1] ECHR 8 April 2003, appl. no. 39339/98.
[2] HR 27 September 2005, NJ 2007/453.
[3] HR 20 February 2007, NJ 2007/373.
[4] HR 10 February 2009, NJ 2009/167.
[5] ECHR 10 July 2012, appl. no. 29353/06.
[6] HR 4 June 2013, NJ 2013/333.

The Dutch Code of Civil Procedure contains a chapter on what is known as "herroeping" (formerly known as 'requeste civiel'), Articles 382-389. A court decision in a civil case may – despite the fact it has the force of res judicata – be revoked at the request of a party if:

a. it is based on deception committed by the other party to the proceedings,

b. it is based on documents whose falsehood after the judgment is recognized or established by a final judgment, or

c. the party is in possession of a piece of evidence of a decisive nature, which was withheld by the other party previously.

The last time that the issue of reopening civil-law proceedings following an adverse Court judgment was discussed in Parliament dates back to 2005 (when '*requeste civiel*' still existed). By letter of 12 August 2005 the Minister of Justice notified the House of Representatives of the States General that this option would not be added to the Dutch Code of Civil Procedure. If provision were made for overturning judgments in cases in which judgments of the Court have found a breach of the Convention, the effect would be to produce a lack of legal certainty for the parties to proceedings and any third parties until the moment at which the Court decides whether or not to overturn the judgment. As a consequence, the position taken by the Government was that reopening should only be possible in highly exceptional circumstances.

It should be observed that the Netherlands has rarely been confronted with Court judgments which represent this situation. Furthermore, there are other ways of providing for a judicial remedy in civil cases. For instance, the State can be sued for tort (unlawful dispensation of justice). It is clear from the Supreme Court's case law that stringent criteria are applied when deciding whether a party to proceedings is eligible for compensation on grounds of unlawful dispensation of justice. The State is held liable only if no legal remedies remain open and the fundamental principles of law were so badly neglected when preparing the decision that the parties can no longer be said to have had their case heard in a fair and impartial manner. In one case this resulted in compensation for the applicant on this ground.[7]

[7] Court of Appeal The Hague 17 July 1997, NJK 1997/75.