nationale ombudsman

Report

An investigation into the handling of criminal proceedings by the Public Prosecution Service

Opinion
Based on the findings of the investigation, the National Ombudsman finds the complaint against the Public Prosecution Service to be grounded.

09 March 2020
2020/005

Contents

Summary

Following criminal proceedings instigated by the Public Prosecution Service (PPS) and spanning several years, the complainant was eventually acquitted of all charges. The matter has nevertheless had a significant impact on his life and his family. He made a complaint to the PPS, which conceded that there had been shortcomings but nevertheless declined to take matters further. The complainant therefore approached the National Ombudsman.
The National Ombudsman assessed the complaint against the standard criteria of good governance. It was also decided to undertake a full investigation, examining the manner in which the PPS had dealt with the complaint internally.
The National Ombudsman considers it important for all complaints received by public sector authorities to be assessed in a professional manner. The ombudsman concludes that, on this occasion, the PPS had failed to do so. It had merely referred the complainant to the court ruling. Professional complaints assessment demands that a public authority determines whether its conduct can be said to meet the criteria of good governance. Professional complaints assessment also requires the authority to reflect on its own actions, to learn from its mistakes, and to provide full transparency about aspects which require improvement.

The complaint

The scope of the National Ombudsman's investigation was as follows.

A. The Ombudsman investigated the complainant's assertion that the PPS had:
- taken too long to investigate and pursue charges
- divulged information about his case to a third party (the F Foundation)
- been responsible for damaging media reports following his acquittal in March 2015
- failed to forward an order for costs issued by the Court of Appeal on 1 April 2016 to the Ministry of Finance.

B. The Ombudsman also held its own investigation into the manner in which the Public Prosecutor had handled the original complaint.

Background

The complainant had been politically active on the island of Bonaire for some years and was the leader of a major political party. In November 2007, the F Foundation submitted a document to the Bonaire office of the Public Prosecution Service (the PPS). It contained allegations against a number of local officials, including the complainant. The PPS proceeded to investigate these allegations. In 2009, it instituted criminal proceedings against the complainant on suspicion of several offences including fraud and money-laundering. There followed a lengthy period during which the PPS attempted to bring various charges against the complainant. In the majority of cases, the court dismissed the charges as inadmissible. The criminal proceedings finally concluded on 12 March 2015 when the complainant was acquitted of the sole remaining charge due to lack of evidence. On 1 April 2016, the Court of Appeal awarded the complainant costs in respect of legal support during the investigation and court appearances.

Timeline:

- November 2007: the F Foundation submitted a document to the PPS in which it made allegations against a number of Bonaire officials, including the complainant.
- 8 September 2009: the PPS commenced a criminal investigation of the complainant in respect of various offences, including fraud and money-laundering.
- 8 June 2010: the supervisory judge (*rechter-commissaris*) called on the PPS to conclude its investigation no later than 1 November 2010 and to inform the complainant whether any charges were to be brought.
- 17 February 2011: the PPS issued notice that no charges would be brought. The complainant would not face trial.
- 2 March 2011: the F Foundation applied to the Court of Appeal, challenging the decision to close the case.
- 14 June 2011: the Court of Appeal ruled that the PPS should resume the investigation.
- 21 August 2013: the PPS filed five charges against the complainant, including falsification of documents and corruption in public office.
- 9 December 2013: the lower court ('court of first instance') ruled four of the five charges inadmissible because they related to offences other than those which were included in the Court of Appeal's instructions of 14 June 2011. The PPS gave notice of its intention to appeal this ruling.
- 21 March 2014: the Court of Appeal dismissed the PPS' appeal against the decision of 9 December 2013, whereupon the PPS gave notice of its intention to take the matter to the Supreme Court.
- 15 April 2014: the lower court acquitted the complainant of the one remaining charge due to insufficient evidence[1]. The PPS gave notice of its intention to appeal.
- 12 March 2015: the Court of Appeal dismissed the PPS' appeal against the decision of the lower court. Its ruling noted that further examination of the facts had merely reinforced the opinion that there was no lawful or convincing evidence to support the charge. This ruling is final and cannot be appealed further.
- 3 November 2015[2]: the Supreme Court dismissed the PPS' appeal against the Court of Appeal's ruling of 21 March 2014.

The original complaint

On 2 January 2017, the complainant made a formal complaint to the PPS stating that it had:

- taken too long to bring criminal proceedings
- failed to forward the Court of Appeal's order for costs to the Ministry of Finance, thus preventing prompt payment
- failed to conduct a responsible investigation due to lack of expertise
- divulged confidential information to (members of) the F Foundation and to a journalist
- made negative comments about him in the media
- failed to forward financial documents impounded during the investigation to the national Tax and Customs Administration.

The complaint also referred to the actions and decisions of two senior prosecutors within the PPS, identified 'L' and 'S'.

The PPS' response

Following the National Ombudsman's intervention, the PPS responded to the complaint in a letter dated 27 October 2017, signed by a very senior official, the *Procureur Generaal*. This letter states that the PPS did not consider itself competent to deal with the majority of matters raised by the complainant since they had been considered and settled by the judge(s) in earlier court hearings. For this reason, the PPS was unable to include them in any internal complaints assessment procedure. The complaint about the actions and decisions of the individuals L and S were deemed inadmissible because the complainant had provided insufficient detail.

[1] https://www.uitspraken.nl/uitspraak/gerecht-in-eerste-aanleg-van-bonaire-sint-eustatius-en-saba/strafrecht/strafrecht-overig/eerste-aanleg-enkelvoudig/ecli-nl-ogeabes-2014-6
[2] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:3211

The National Ombudsman's investigation

Request to investigate the original complaint

The complainant requested the National Ombudsman to investigate his original complaint and the manner in which it had been handled. He is of the opinion that the PPS had been wrong to declare the complaint inadmissible and to exclude it from a formal assessment procedure. There was, he states, only a cursory reference to the court's ruling and the passages which led to the complaint being deemed inadmissible had not been identified. The fact that the judge had commented on irregularities of procedure did not imply that the underlying actions should be excluded from further scrutiny. The complainant asserts that the manner in which he was treated by the PPS was not in keeping with the basic principles of due diligence, even-handedness and fairness. The PPS had consistently placed its own interests above his own. Given his standing as a prominent politician and public figure, far greater attention should have been devoted to achieving an equitable balance. The complainant further asserts that the PPS' actions and omissions resulted in serious and irrevocable damage to his reputation and his standing as a successful and respected politician. He considers the PPS' response to his complaint to be offhand and indifferent; it does not do justice to his grievances. The complainant and his family continue to experience significant adverse effects, both material and non-material.

Propriety alongside legality

The National Ombudsman assesses the conduct of public authorities against the criteria of 'good governance'. These criteria are concerned with the propriety, decency and fairness of actions, and are not the same as would be applied by the criminal court, which is primarily concerned with legality. The National Ombudsman must respect the ruling of the court.

In this case, the PPS' referral to the court's ruling did not provide a substantive response to the complainant's grievances. The National Ombudsman's own investigation was prompted by the PPS' decision to exclude the complaint from any formal assessment procedure.

What did the National Ombudsman do?

The National Ombudsman investigated the grievances listed by the complainant. Staff spoke directly with the complainant and his legal representative. The ombudsman then studied the various judicial statements made by the court, insofar as they are relevant, together with written documents submitted by the complainant and the internal complaint file compiled by the PPS. Based on the information available in June 2019, the National Ombudsman submitted an interim report to the complainant and the Minister of Justice and Security,[3] setting out the circumstances and the standpoints of the parties involved. The National Ombudsman requested the minister's own standpoint on the grievances listed in the complaint and submitted a number of questions. For example, does the minister consider that the PPS' conduct in this case meets the requirement for a 'considerate approach'[4], with specific reference to:

- the length of time taken to conclude judicial proceedings, taking into account the fact that the PPS itself had admitted certain shortcomings in its decision-making.
- the provision of information to the F Foundation, given that the court had ruled that the PPS was not authorised to divulge all or part of the case file to this third party.

The National Ombudsman decided to hold its own investigation examining the manner in which the PPS had dealt with the complainant's grievances.

[3] With regard to the conduct of the Public Prosecution Department in the Caribbean Netherlands, the Procureur General is answerable only to the Minister of Justice and Security of the Netherlands (and not to the ministers of Curaçao or St Maarten). This is established by Article 31 para. 2 in conjunction with Article 1 (9) of the *Rijkswet openbare ministeries van Curaçao, van Sint Maarten en van Bonaire, Sint Eustatius en Saba.*

[4] The National Ombudsman considers it important for the government to take a considerate approach if it has made mistakes. It should refrain from challenging any reasonable claim for compensation. It should ensure that the citizen is not burdened by unnecessary and complex procedures, or required to produce substantial evidence in support of a claim. A reasonable approach to compensation claims implies that the government should work with the claimant to seek a mutually acceptable solution, even where no direct legislative basis exists.

Information revealed by the National Ombudsman's investigation

The duration of criminal proceedings

According to the complainant
On 8 September 2009, the PPS conducted a search of the complainant's home. It was at this point that the complainant was informed that he was under criminal investigation. When his lawyer applied for the case to be dropped, the court recommended that the investigation should be continued but must be concluded no later than 1 November 2010. The Public Prosecutor was unable to complete the investigation in the given time and therefore announced that it would close the case. However, this was not the end of the matter. The F Foundation lodged an objection whereupon the Court of Appeal ordered the PPS to resume its investigation. A long period of further proceedings then followed. According to the complainant, significant delays were caused by the PPS' pursuit of unnecessary investigation methods, permission for which had not been granted. It was the choices made by the PPS, he asserts, which caused the proceedings to take such a long time. Approximately five-and-a-half years elapsed between the initial search of the complainant's home and the final verdict, passed on 12 March 2015. The complainant therefore holds that the prescribed 'reasonable period' had been far exceeded. This was through no fault of his own. The personal and societal impact of the case has been huge. The PPS' decision to deploy its professional resources in bringing the case to court failed to take this impact into account, the complainant claims.

The minister's response to the complaint about the duration of proceedings
The minister notes that, in hindsight, it is possible to identify moments at which suboptimal decisions were made. He refers to communications from the PPS dated 7 March 2017 and 25 October 2017. The former lists several such moments. The choices made were nevertheless responsible and appropriate *at the time*. The overall procedure was unusual. The supervising judge had set a date by which the investigation should be completed. Moreover, the PPS' decision to discontinue proceedings was overruled by the Court of Appeal following the intervention of the F Foundation. The Court of Appeal's ruling gave the PPS no other choice than to pursue a prosecution in court, the minister states. The Court of Appeal was very closely involved in monitoring and controlling the progress of the investigation. At its request, the PPS submitted six-monthly reports, none of which served to alter the Court of Appeal's decision. These reports were also submitted to the complainant in the interests of full transparency.

The email from the PPS to the complainant dated 7 March 2017
This email, in response to the complainant's claim for compensation, states that the PPS is unable to accept that it acted unlawfully at any time. Nevertheless, viewing the process as a whole, it concedes that certain shortcomings can be identified. There were moments during both the investigation and the subsequent prosecution at which the decisions taken were not the most appropriate in the circumstances.
As examples, the PPS cites the disclosure of the case file to the F Foundation, the decision to interpret the Court of Appeal's ruling of 11 June 2011 broadly, the decision to include multiple offences on the charge sheet, and the decision to challenge the lower court's ruling that four out of the five charges were inadmissible. However, the email continues, these decisions were not totally indefensible at the time that they were made. Moreover, it is only reasonable to expect the PPS to present a case in a form that allows the court to make a reasoned judgment. The use of various investigative instruments and methods is part and parcel of a well-functioning democratic state based on the rule of law.

Statement dated 25 October 2017
This statement by the Chief Public Prosecutor (*Hoofdofficier van Justitie),* addresses the complainant's grievances in the context of the internal complaints assessment procedure. It states that the PPS was required to take many decisions between 2009 and the end of 2015, which it did based on the knowledge available at the time. Clearly, that knowledge did not extend to the final outcome of the judicial proceedings, the complainant's acquittal. At the start of the investigation there was sufficient reason to believe that a criminal offence had been committed. Suspicion had fallen on a prominent politician and public official; the alleged offences were largely in connection with his public responsibilities. This 'starting position' did much to determine the PPS' approach throughout the remainder of the process. In addition, the PPS had to contend with judicial instructions which were not entirely clear. The decisions made in the case were, according to the

Chief Public Prosecutor, entirely within the role and responsibilities of his department, as established by law. Given the public interest represented by the case, those decisions were taken further to broad internal consultation. This, the statement continues, is what the Chief Public Prosecutor had meant when he told the *Antilliaans Dagblad* newspaper that when reviewing the process, he could not identify any point at which the Public Prosecutor “did anything wrong.”
The statement goes on to note that the process had been subject to a full internal evaluation from which the PPS concluded that it had been “less than perfect”. With the benefit of hindsight, it is indeed possible to identify moments at which a suboptimal decision was made. The Chief Public Prosecutor believes that the complainant has interpreted this conclusion to mean that the PPS deliberately or negligently set about damaging his public reputation, even though it has acknowledged mistakes both internally and in its communications with the complainant. In his interview with the *Antilliaans Dagblad,* the Chief Public Prosecutor stated that the PPS agrees that the process took longer than might be considered acceptable, and that it acknowledges the adverse impact this would have on those directly affected.
The Chief Public Prosecutor understands the sense of injustice felt by the complainant due to the consequences of the process. However, he takes the view that the complainant has gone to some lengths to list all decisions that could possibly have had another outcome, thus creating the impression of a long succession of mistakes. Viewed in combination, those mistakes might suggest carelessness at best, or vindictiveness at worst. The Chief Public Prosecutor stresses that all decisions and actions were entirely within the letter of the law. Each decision must be evaluated individually and in the context of the situation at the time. The fact that the choices made could have been better, or at least different, does not make them grounds for complaint.

The disclosure of information to the F Foundation

According to the complainant
On 17 February 2011, the PPS decided to discontinue proceedings; it would not therefore bring any charges against the complainant. It notified the F Foundation that, as an interested party, the foundation was entitled to refer this decision to the Court of Appeal. With this possibility in mind, the PPS further informed the foundation that it was entitled to acquaint itself with the information contained in the case file. The PPS provided a copy of that file. The F Foundation did indeed lodge an appeal against the PPS' decision. The complainant holds that the PPS was wrong to inform the foundation that it could appeal the decision. It could not be regarded as an 'interested party' because, at the time, it was still 'in formation' and had yet to achieve the status of a formal legal entity. The complainant further asserts that, by providing a copy of the case file to this 'foundation in formation', the PPS had seriously violated his privacy. According to the complainant, the court described this situation as an 'irreversible mistake during the preliminary investigation'. Nevertheless, the Public Prosecutor has made no attempt to apologise for this mistake, nor to provide any form of compensation.

The PPS' response
Internal complaints procedure
The PPS responded to the original complaint on 27 October 2017. It concludes that the Court of Appeal had already considered this aspect. It rejected the complainant's standpoint. The response refers to Section 3.3 of the ruling handed down on 15 April 2014.[5]

The minister's response to the National Ombudsman
In his response to the National Ombudsman, the minister points out that the Court of Appeal had determined that the F Foundation was an 'interested party' whereupon its appeal against the PPS' decision to drop the charges was admissible. Moreover, although standards had been breached, the court considered it inappropriate to impose any sanction and ruled that there would be no further consequences. The PPS had been fully transparent in its communication, the minister states, referring to the six-monthly reports submitted to both the Court of Appeal and the complainant. According to the ruling of that court, the PPS had not undermined the complainant's interests, either deliberately or otherwise, and had not detracted from his right to a fair trial. The minister concludes that there was therefore no reason to offer compensation.

The court ruling of 15 April 2014
During the hearing of April 2014, the complainant argued that the disclosure of the case file to the F Foundation was a direct violation of Article 6 para. 2 of the European Convention on Human Rights (see Literature and Legislation) and for this reason, the charge(s) should be ruled inadmissible. In response to this line of defence, the court noted the following. The PPS had provided a copy of the case file to the F Foundation (then 'in formation') in order to facilitate an appeal against the decision to discontinue proceedings. In so doing, the PPS had overlooked the fact that Article 20 of the *Wetboek van Strafvordering* BES[6] (Criminal Code of the Caribbean Netherlands) stipulates that it is for the President of the Court of Appeal to decide whether an appellant is to have access to relevant documents. At the time it was given the case file, the foundation was not an 'appellant'. It was still 'in formation' and was still considering whether to pursue an appeal. According to the court, there was an 'irreversible breach of standards' during the preliminary investigation, in that the contents of the case file had been disclosed to the F Foundation *before* the appeal procedure had begun. As noted above, the foundation was not an 'appellant' at this time. The court found that there had indeed been a breach of Article 6.2 of the ECHR. However, it also found that there had been no serious violation of the principles of due process or rules of procedure. Due to the size of the case file, the PPS had decided to provide the F Foundation with a copy rather than allowing it to consult the document at the PPS offices. It had been entirely transparent about this decision, whereupon it was not possible to conclude that the PPS undermined the complainant's interests or impinged upon his right to a fair process.

[5] Court of First Instance of Bonaire, Sint Eustatius and Saba, BES.36/11/1B.
[6] The relevant passage reads (here in translation): "The President of the Court of Appeal shall, except where the provisions of Article 17 apply, permit disclosure of material relating to a case to the defendant in that case, to the defendant, the aggrieved party, to a material witness, or to the legal representatives of same, upon request. Disclosure is to take the form stipulated by the President. The President can, either on his/her own authority or acting on the instructions of the Procureur General, withhold and exclude certain documents and exhibits from the disclosure where this may be considered to be in the interests of personal privacy, an ongoing investigation, due process, or any significant public interest."

Media statements

According to the complainant

The complainant asserts that the Chief Public Prosecutor made several negative remarks about the case and the complainant himself in an interview published by the *Antilliaans Dagblad* newspaper on 5 November 2015. Despite his acquittal, these remarks caused further irreversible damage to the complainant's reputation. In particular, he takes objection to the following statement (here in translation): "The PPS works on the principle that if we are going to do anything, we are going to do it properly. Because this was not possible within the time allowed, we decided to discontinue all proceedings." In the complainant's opinion, this suggests that prosecutors would have been able to build a successful case and prove the complainant's guilt if only there had been more time. The complainant believes that this statement does not respect the judgment of the court. Later in the interview, the Chief Public Prosecutor states, "An apology would imply that it could have been done differently. However, looking back on the case I cannot identify any point at which the PPS did anything wrong." The complainant finds this statement to be equally detrimental.

The PPS' response

Internal complaints procedure

The PPS responded to the original complaint on 27 October 2017. It states that the Court of Appeal had considered this aspect and had rejected the complainant's standpoint. The response refers to Section 3.3 of the ruling handed down on 15 April 2014.[7]

Response of the minister to the National Ombudsman

According to the minister, the complainant had been extremely selective in citing short passages from the interview published on 5 November 2015. When the interview is read in full, the Chief Public Prosecutor sets out a broader picture from which it is clear that the rules of procedure applicable at the time had been followed to the letter. (*Aanwijzing voorlichting opsporing en vervolging:* see Literature and legislation.) In the interview, the Chief Public Prosecutor also expresses understanding for the complainant's position, stating that his department finds it 'regrettable' that the process took such a long time thus causing much uncertainty for the complainant.

Court ruling of 15 April 2014

At this hearing, the complainant asserted that the charge should be deemed inadmissible because negative statements made by the Chief Public Prosecutor and published in the media constituted a violation of his rights under ECHR Article 6.2. The court disagreed, finding that the articles submitted by the complainant in evidence did not establish that any deleterious statement had been made. The articles contained no remarks directly pertaining to the alleged offences or the defendant himself.

The interview published by the Antilliaans Dagblad on 5 November 2015

The Chief Public Prosecutor gave an interview to the *Antilliaans Dagblad* newspaper. The published version included the following statements, here in translation.

"The Bonaire PPS does not intend to apologise to (the complainant) [...] now that, after seven years of proceedings as far as the Supreme Court, the defendants were acquitted of all charges."[…] "If you apologise, you are actually admitting that you were at fault. I can empathise with the defendants because they suffered uncertainty for such a long time. It must have been a very distressing time for them. We understand that."

"An apology implies that you could have done things differently. However, looking back on the case I cannot identify any point at which the PPS did anything wrong. The process caused some distress and proved to be more time-consuming than we had hoped. For a suspect to be subject to proceedings for so long is never a deliberate choice."

"The PPS and the police launched an extensive investigation. At a certain moment, the supervisory judge imposed a deadline by which the investigation had to be completed. The PPS works on the principle that if we are going to do anything, we are going to do it properly. Because this was not possible within the time allowed, we decided to discontinue all proceedings."

[7] Court of First Instance of Bonaire, Sint Eustatius and Saba, BES.36/11/1B.

The failure to forward the costs order to the Ministry of Finance

Having handed down its final and irrevocable ruling (in accordance with Articles 648 and 649 of the Criminal Code of the Caribbean Netherlands), on 1 April 2016 the Court of Appeal awarded the complainant costs in respect of all necessary expenses incurred during the investigation and his legal representation in court.

According to the complainant

The complainant asserts that it is standard practice for the PPS to arrange payment of a costs order by the government. He refers to another case in which the PPS, via Rijksdienst Caribisch Nederland,[8] issued instructions for the payment of costs. In his own case, he claims that the Public Prosecutor deliberately withheld cooperation with the Ministry of Finance which was therefore unable to make prompt payment. According to the complainant, he received the amount due only after a report appeared in the media suggesting that the government was unwilling to act on the instructions of the Court of Appeal. The report states that the complainant contacted the Ministry of Finance himself having been instructed to do so by the PPS. When no payment was forthcoming despite several requests and reminders, the complainant's legal representative contacted the State Advocate. This intervention did not have the desired effect, whereupon the complainant retained the services of bailiffs to enforce the court order. The newspaper article states that the complainant was on the point of obtaining an 'attachment order' against the Ministry of Justice, which would have authorised bailiffs to remove property to the value of the amount owed. Shortly thereafter, the Ministry of Finance announced that it would process the payment forthwith. On 14 October 2016, the complainant received the full amount awarded by the Court of Appeal, plus interest and the bailiffs' fees. The complainant notes that these extra costs were unnecessary, being incurred solely further to the lack of cooperation on the part of the PPS. He regards the delay in payment as a deliberate act of vindictiveness on the part of the PPS.

[8] The Rijksdienst Caribisch Nederland represents the various ministries on the islands of Bonaire, Saba and Sint Eustatius.

The PPS' response
The PPS asserts that the financial aspects of judicial proceedings, in this case the payment of a costs order, are administered by the Court of Appeal itself. It refers to the order issued by that court on 1 April 2016, which states that "the President of the Court orders and requires the Minister of Finance to pay the amount of €156,834.69 to (complainant)." According to this line of argument, it is therefore the complainant or his legal representative who must pursue the matter with the ministry, not the PPS since, in legal terms, the PPS is not subject to any 'enforceable title'. The response goes on to state that the complainant (or his legal representative) was well aware of this fact and, at the time, made no suggestion that the PPS should be involved in any way. The PPS denies the complainant's later assertion that it is 'standard practice' for the department to arrange payment of a costs order. The case cited by the complainant was entirely different and involved a miscarriage of justice which had serious consequences for those involved. The PPS rejects any blame for the delay in the payment of the complainant's costs. The current arrangements, whereby the PPS requests the Rijksdienst Caribisch Nederland (RCN) to pay the costs and reclaim the amount from the Ministry of Finance, date from 1 December 2018.

The Court of Appeal ruling of 1 April 2016
Section 3.5 of the ruling handed down by the Court of Appeal refers to Articles 648(4) and 649(4) of the Criminal Code of the Caribbean Netherlands and states that payment of costs is to be made by or on behalf of the Minister of Finance of the Netherlands.

The internal complaints procedure

Timeline
The complainant put his grievances to the PPS in a letter dated 2 January 2017. He requested compensation in respect of material and non-material damages. The Public Prosecutor invited the complainant to attend a meeting at which he would have the opportunity to explain his grievances and substantiate his claim for compensation. In a letter dated 14 February 2017, the complainant indicated that he would be willing to accept this invitation and provided some further explanation. There followed an exchange of emails between the parties. In an email dated 7 March 2017, the PPS department stated that there had been no unlawful act or omission. It conceded that – reviewing the process as a whole – there had been certain shortcomings. The message goes on to state the PPS' willingness to meet with the complainant to bring matters to a satisfactory conclusion. However, it was not prepared to make any offer of compensation.

In a letter dated 17 July 2017, the complainant requested the National Ombudsman to review his original complaint.
On 22 August 2017, the National Ombudsman requested the PPS to respond to the complaint.
On 28 September 2017, the PPS requested the complainant to clarify his grievances.
In a letter dated 27 October 2017, the PPS responded to the complaint, declaring most aspects to be 'inadmissible'.

According to the complainant
The complainant disagrees with the PPS' opinion that the majority of grievances are inadmissible. He believes that the PPS should review the entire process, and he further believes that compensation, a gesture of goodwill, or at the very least an apology, is in order.

The minister's response
The Minister of Justice and Security informed the National Ombudsman that the complainant's insistence on compensation had stood in the way of an open and constructive discussion. He refers to the statement issued by the relevant Chief Public Prosecutor on 25 October 2017, which notes that the entire criminal process against the defendant had already been subject to internal review and evaluation. His complaint was therefore not necessary to prompt the department to learn from its mistakes. The conclusion of the evaluation was that there had indeed been certain shortcomings. Moreover, in his interview with the *Antilliaans Dagblad* the Chief Public Prosecutor had already conceded that the process had taken too long and had acknowledged its impact on the complainant. The PPS understood the complainant's sense of injustice, but this sense of injustice must not be confused with any unlawful violation of his rights.

The National Ombudsman's opinion

The duration of the criminal process

Public sector authorities are required to observe the principle of 'professionality' which means that all staff must work according to appropriate professional standards. The public is entitled to expect a high level of expertise. Government departments must therefore reflect on their own actions, learn from their mistakes and provide full transparency.

The National Ombudsman finds the complaint relating to the duration of the criminal process to be grounded.

The PPS itself admitted that various aspects of the process had taken too long and that there were moments at which different, better decisions could have been made. The PPS understands that the delays gave rise to a feeling of injustice on the part of the complainant but does not acknowledge any wrongful or unlawful action. It identifies several suboptimal choices, such as the decision to apply a broad interpretation to the Court of Appeal's instructions of 11 June 2011, which led to multiple charges being included in the indictment, and the decision to challenge the court's ruling that some of these charges were inadmissible. However, the PPS asserts that these decisions were 'not totally indefensible' at the time they were made.

In the National Ombudsman's view, such arguments are unsatisfactory. To use a term such as 'not totally indefensible' fails to recognise the seriousness of the complainant's situation. Several decisions made by the Public Prosecutor drew comment from both the lower court and the Court of Appeal. It is not for the ombudsman to make any further comment; he must respect judicial decisions. Nevertheless, when a government department reflects on its own actions and concludes that poor decisions or mistakes were made, it must acknowledge those mistakes. It must be fully transparent, admitting that "we got it wrong.'' Such openness must be shown not only towards the people directly involved, but also to the media and general public. In this case, transparency and openness fell short of the required level.

The National Ombudsman therefore finds that the PPS failed to meet the required standard of professionality.

Disclosure of information to the F Foundation

A prerequisite of good governance is that all government authorities respect the constitutional rights of citizens, including the right to privacy. This right is clearly under threat if a public sector body divulges personal information to a third party. The disclosure of personal information is permitted only in certain situations and circumstances, as described in the relevant legislation.

The National Ombudsman therefore finds the complaint with regard to the PPS' disclosure of information to the F Foundation to be grounded.

The court described this situation as an 'irreversible violation of standards' by the PPS, stating that the case file should not have been passed to the F Foundation for the purposes of preparing an appeal against the PPS' decision to discontinue the investigation. This is because the law stipulates that only (the President of) the Court of Appeal can decide whether to grant a request for information. The National Ombudsman concurs with the lower court's ruling and concludes that the Public Prosecutor was wrong to release the case file (which included not only the complainant's personal details but also extremely sensitive information relating to this case and any antecedents) without first obtaining the permission of the complainant or in the absence of instructions from the Court of Appeal. The PPS' actions represent a serious violation of the complainant's privacy.
The complainant remains affronted that the PPS has made no attempt to apologise for this mistake or to offer any form of compensation. The National Ombudsman finds this omission inexplicable. A gesture or an apology is clearly in order. The PPS has merely referred to the court's ruling which states that there was indeed a violation of standards but not one which was likely to lead to adverse consequences *within* the framework and context of the case being heard. The

National Ombudsman takes the view that the PPS should have considered the possible consequences *beyond* the case itself. It had failed to examine the situation from the complainant's perspective. Taking all aspects into consideration, the PPS had not done justice to the complainant's situation.

The National Ombudsman therefore finds that the PPS failed to respect the complainant's privacy.

The media statements

Here too, the National Ombudsman must assess the actions of the PPS against the yardstick of professionality. One aspect of professionality is that statements made to the media by anyone representing the PPS in an official capacity must be factual and unnuanced so as to address the general interest of providing information about a case to the public. A spokesperson for the PPS must refrain from making any statement which is likely to escalate or exacerbate the situation,[9] and should provide full openness with regard to any mistakes made.

The National Ombudsman finds the complaint about statements made to the media by the Chief Public Prosecutor to be grounded. This conclusion is based on the following considerations.

The criminal proceedings against the complainant attracted – and continue to attract – much media interest. Given the very small community within which the events unfolded and the public position held by the complainant, such media attention has added to the enormous impact that the case itself has had on his life and that of his family. In the National Ombudsman's view, the Chief Public Prosecutor made statements which were likely to exacerbate the situation despite being aware of that possibility. At no time did the PPS consider the consequences that these statements would have for the complainant.

With regard to the extract translated above as, "[t]he *PPS and the police launched an extensive investigation. At a certain moment, the supervisory judge imposed a deadline by which the investigation had to be completed. The PPS works on the principle that if we are going to do anything, we are going to do it properly. Because this was not possible within the time allowed, we decided to discontinue all proceedings",* the Ombudsman finds that the Chief Public Prosecutor should have realised that such statements are likely to create the impression that it was only due to time constraints that the charges could not be proven. The complainant regarded this as an additional body blow because the statement seems to suggest that he was indeed guilty and would certainly have been convicted if only there had been more time. The inclusion of this sentence in the interview was not necessary to provide the public with information about the case. A spokesperson for the PPS can be expected to refrain from making statements which are likely to cause any escalation of the situation. Although the interview states that the PPS understands why the complainant is dissatisfied, this does not alter the fact that such a nuanced and suggestive remark falls far short of the required standards of professionality.

The next contentious statement is, "*[a]n apology implies that you could have done things differently. However, looking back on the case I cannot identify any point at which the PPS did anything wrong. The process caused some distress and proved to be more time-consuming than we had hoped. For a suspect to be subject to proceedings for so long is never a deliberate choice.*" This statement is contradicted by the PPS' later admission that mistakes had been made, as communicated both internally and in the email sent to the complainant on 7 March 2017. The complainant's grievance is that the mistakes were not publicly acknowledged, an omission which fails to do justice to the complainant's situation. The interview therefore increased his sense of having experienced a double blow. The Chief Public Prosecutor's failure to acknowledge mistakes in the interview is a further example of inadequate professionality.

The National Ombudsman finds that the PPS failed to meet the required standard of professionality.

[9] Report National Ombudsman 2010/055.

Failure to forward the costs order to the Ministry of Finance

No two situations are identical. Where necessary and appropriate, a government organisation must be willing and able to deviate from standard policy and guidelines in order to avoid unintended consequences. We can refer to this as the 'principle of flexibility'.

The National Ombudsman finds the complaint with regard to the PPS' failure to forward the costs order to the Ministry of Finance to be grounded. The PPS was able to deviate from (what it claims to be) the standard procedure which requires the complainant or his legal adviser to approach the Minister of Finance directly. It could have instructed the RCN to make payment and reclaim the amount concerned from the ministry. This is a prime example of a situation in which a lengthy delay in payment would have adverse consequences. This being so obvious, everything possible should have been done to expedite matters. Aside from the question of whether the complainant's case is directly comparable to the case he cites in his complaint, it is clear that the PPS has opted to apply the alternative approach in the past. Since 1 December 2018, the involvement of the RCN as 'go-between' has been standard policy. The National Ombudsman finds the PPS' unwillingness to arrange prompt payment via the RCN to be in breach of the principle of flexibility.

The National Ombudsman further notes that the Ministry of Finance did not make prompt payment when first requested to do so by the complainant.

Conclusion

The National Ombudsman considers the complaint relating to the conduct of the Public Prosecution Service to be grounded with regard to:

- the duration of the overall process, this being a breach of the requirement of professionality;
- the disclosure of the case file to a third party, this being a breach of the requirement to respect the individual's constitutional right of privacy;
- the statements made by an official spokesman to the media, this being a breach of the requirement of professionality;
- the failure or refusal to forward the costs order to the Ministry of Finance, this being a breach of the principle of flexibility.

The National Ombudsman's investigation of the internal complaints procedure

Hearing the citizen
Chapter 9 of the *Algemene wet bestuursrecht* (General Administrative Law Act) provides a legislative framework for complaints procedures within the public sector. It expressly states that a citizen with a grievance must be 'heard', i.e. given reasonable opportunity to present that grievance. It is for the citizen to decide whether or not to exercise this right.

The National Ombudsman notes that there were several occasions during the (internal) processing of the complaint on which the PPS made contact with the complainant (or his legal adviser) with a view to arranging a personal, face-to-face meeting. It appears that no such meeting took place because the complainant insisted that the matters to be discussed must include the question of compensation. This is why he chose to conduct all further communication in writing. The National Ombudsman therefore considers it reasonable for the PPS to have proceeded directly to the written stage of the complaints assessment procedure without first holding a personal meeting.

Full explanation of decisions
The National Ombudsman has produced a 'vision document' which sets out the criteria that a competent and conscientious complaints assessment procedure will meet.[10] Professional complaints assessment demands that the organisation concerned provides a full, detailed explanation of its decisions and how it arrived at those decisions. It should also indicate whether the complaint has prompted any improvement action to prevent a recurrence. The letter notifying the complainant of the final outcome of an internal complaints procedure should draw attention to the possibility of further consideration by an appropriate external body such as the National Ombudsman.

The PPS did not consider itself to be competent or authorised to deal with the majority of grievances included in the complainant's complaint. It held that most aspects had already been addressed by one or more courts and were therefore 'inadmissible'.
The National Ombudsman takes the view that the PPS was wrong to exclude these grievances from proper consideration, instead making a very cursory reference to the various court rulings. Moreover, the reference to the ruling of 15 April 2014 (which supposedly deals with the statements made to the media) cannot be correct since the interview in question was published by the *Antilliaans Dagblad* some considerable time later, on 5 November 2015. The National Ombudsman further notes that the statement issued by the Chief Public Prosecutor on 25 October 2017 asserts that the entire criminal process had been subject to internal evaluation, but no reference to any such evaluation appears in the final response to the complaint. It appears that lessons were indeed learnt, but this does not absolve the PPS from its obligation to conduct a full and conscientious complaints assessment procedure. The department should have used the information gleaned from the internal evaluation to support its internal complaints process. Not doing so means that it could not do full justice to the complainant's grievances. In his statement of 25 October 2017, the Chief Public Prosecutor says that the complaint had not been needed to encourage the department to draw lessons. The National Ombudsman does not concur: a complaints procedure will often reveal aspects from which the organisation can learn. An internal evaluation is not the same as a complaints assessment procedure in which the perspective of the individual citizen comes to the fore. Professional complaints assessment is a requirement; not an optional extra.
Finally, it is noted that the Public Prosecutor did not draw attention to the possibility of referring the complaint to the National Ombudsman. Although this is not a particularly serious omission because the complainant (or his legal adviser) had already been in contact with the National Ombudsman, the notification of the final decision should always include this information. The complainant then knows how to proceed if dissatisfied.

Legitimate and fair
Professional complaints assessment requires the government organisation concerned to examine whether its actions have been legitimate, i.e. within both the letter and spirit of the law. However, it is equally important to the individual that

[10] Vision of professional complaints assessment, 19 March 2018, report no. 2018/005.

he or she is treated fairly and with respect. The National Ombudsman notes that the PPS' internal complaints procedure did indeed examine the legitimacy of its actions. However, it did not examine whether those actions had been fair and reasonable. In his statement of 25 October 2017, the Chief Public Prosecutor says that his department understands the sense of injustice experienced by the complainant, but no similar remark appears in the official response to the complaint.

Taking all aspects into consideration, the National Ombudsman concludes that the PPS fell short of the required standard of professional complaints assessment on this occasion. The conduct examined during the investigation cannot said to be fair, thorough and conscientious.

Conclusion

The National Ombudsman finds that the PPS' complaints assessment procedure was unsatisfactory and did not meet the criteria of good governance.

Recommendations

In view of the above findings, the National Ombudsman considers it appropriate to make certain recommendations. The Ombudsman believes that it is important for a government organisation to adopt a flexible, considerate and reconciliatory attitude when it has made mistakes. In this case, the PPS acknowledges that mistakes and poor decisions were indeed made.
Whenever a citizen is unreasonably disadvantaged by the actions or omissions of a public authority, the National Ombudsman considers an apology to be appropriate, perhaps accompanied by a suitable gesture of goodwill. Given the actions and decisions of the PPS at various points of the criminal process involving the complainant, the National Ombudsman recommends that the PPS should extend a full apology within six weeks, and should enter into a dialogue with the complainant with a view to identifying an appropriate and mutually acceptable gesture of goodwill.

The National Ombudsman
Reinier van Zutphen

Literature and legislation

Artikel 648 Wetboek van Strafvordering BES
1. Aan de gewezen verdachte of zijn erfgenamen wordt uit 's Rijks kas een vergoeding toegekend voor de kosten, die ingevolge het bij en krachtens het Besluit tarief justitiekosten strafzaken bepaalde ten laste van de gewezen verdachte zijn gekomen, voor zover de aanwending van die kosten het belang van het onderzoek heeft gediend of door de intrekking van dagvaardingen of rechtsmiddelen door het openbaar ministerie nutteloos is geworden.
2. Het bedrag van de vergoeding wordt op verzoek van de gewezen verdachte of zijn erfgenamen vastgesteld. Het verzoek moet worden ingediend binnen drie maanden na het eindigen van de zaak bij de president van het Hof van Justitie. Deze kan een van de rechters die over de zaak hebben gezeten, tot de vaststelling van de vergoeding aanwijzen. De rechter geeft voor het bedrag van de vergoeding een bevelschrift van tenuitvoerlegging af.
3. Degenen, die het verzoek hebben ingediend, kunnen worden gehoord. Indien zij dit verlangen, worden zij gehoord, althans daartoe behoorlijk opgeroepen.
4. Uitbetaling geschiedt door of vanwege Onze Minister van Financiën.
5. Een en ander vindt overeenkomstige toepassing op rechtsgedingen tot herkenning van veroordeelden of van andere gevonniste personen en op de behandeling van klaagschriften, als bedoeld in de artikelen 150 tot en met 151.

Artikel 649 Wetboek van Strafvordering BES
1. Indien de zaak eindigt zonder oplegging van straf of maatregel, maar niet indien de gewezen verdachte is schuldig verklaard zonder oplegging van enige straf of maatregel, wordt aan de gewezen verdachte of zijn erfgenamen uit 's Rijks kas een vergoeding toegekend voor zijn ten behoeve van het onderzoek en de behandeling van de zaak gemaakte reis- en verblijfkosten, berekend op de voet van het bij en krachtens Besluit tarief justitiekosten strafzaken bepaalde.
2. Indien de zaak eindigt zonder oplegging van straf of maatregel, maar niet indien de gewezen verdachte is schuldig verklaard zonder oplegging van enige straf of maatregel, kan aan de gewezen verdachte of zijn erfgenamen uit 's Rijks kas een vergoeding worden toegekend voor de schade, die hij ten gevolge van hem niet toe te rekenen tijdverzuim door het voorbereidend vooronderzoek en de behandeling van de zaak ter terechtzitting werkelijk heeft geleden, alsmede in de kosten van een raadsman. Een vergoeding voor de kosten van een raadsman gedurende de verzekering en de voorlopige hechtenis is hierin begrepen. Een vergoeding voor deze kosten kan voorts worden toegekend in het geval dat de zaak eindigt met oplegging van straf of maatregel op grond van een feit, waarvoor voorlopige hechtenis niet is toegelaten.
3. Het eerste en tweede lid zijn van overeenkomstige toepassing voor ouders van een minderjarige verdachte, die zijn opgeroepen ingevolge artikel 489, eerste lid.
4. De artikelen 178, vijfde lid, en 648 tweede tot en met vierde lid, zijn van overeenkomstige toepassing.
5. Indien de gewezen verdachte na het indienen van zijn verzoek overleden is, geschiedt de toekenning ten behoeve van zijn erfgenamen.

Artikel 6, lid 2, EVRM
2. Een ieder tegen wie een vervolging is ingesteld, wordt voor onschuldig gehouden totdat zijn schuld in rechte is komen vast te staan.

Aanwijzing voorlichting opsporing en vervolging (2012A009)

(..)

Samenvatting

Het Openbaar Ministerie (OM) en de politie hanteren een (pro)actief en alert voorlichtingsbeleid. Als strafrechtelijk handhaver van de rechtsorde levert het OM een bijdrage aan de maatschappelijke veiligheid. Deze maatschappelijke doelstelling vraagt om een OM dat zichtbaar, merkbaar en herkenbaar is. Het persbeleid sluit daarbij aan en draagt bij aan het verwezenlijken van deze ambities. Deze aanwijzing ziet op communicatie over de prioriteiten bij de aanpak van criminaliteit en op de voorlichting over de ontwikkeling in concrete onderzoeken en strafzaken door politie en OM. De aanwijzing richt zich in het bijzonder tot woordvoerders van de politie en het OM.

Achtergrond

(…)

Openheid

De maatschappelijke opdracht van OM en politie [1] brengt niet alleen de verantwoordelijkheid mee om in de invulling van hun taak een effectieve bijdrage te leveren aan een veilige en rechtvaardige samenleving. Deze taakstelling vereist ook dat interventies zichtbaar, merkbaar en herkenbaar zijn voor slachtoffers, daders en hun omgeving, en dat OM en politie open zijn over hun afwegingen en fouten. De burger heeft het recht goed en tijdig te worden geïnformeerd over ontwikkelingen in concrete onderzoeken en strafzaken.

(…)

Privacybescherming en onderzoeksbelang

Bij de voorlichting over strafzaken is van groot belang dat de juiste balans gevonden wordt tussen openheid en transparantie enerzijds en de belangen van een eerlijke procesgang en de privacy van de betrokkenen anderzijds. Het OM heeft toe te zien op een eerlijke procesgang waarbij respect wordt getoond voor de positie van de rechter en de verdediging, waarbij recht wordt gedaan aan de verdachte en het slachtoffer en waarbij de privacy van verdachten, (nabestaanden van) slachtoffers en getuigen gewaarborgd is. In beginsel worden geen persoonsgegevens verstrekt wanneer deze verstrekking kan leiden tot identificatie van de persoon en schending van diens privacy. Verstrekking van persoonsgegevens aan de pers die kunnen leiden tot identificatie dient altijd afgestemd te worden met de onderzoeksleiding.

Daarnaast moet ook de balans in het oog gehouden worden tussen enerzijds openheid en transparantie en anderzijds het belang van het onderzoek. Het uitgangspunt hierbij is: openheid waar het mogelijk is, terughoudendheid waar het nodig is. Bij de opsporing en vervolging is de waarheidsvinding het uiteindelijke doel van OM en politie. Het verstrekken van informatie aan de pers kan het onderzoek naar de ware toedracht van een zaak schaden. Daarom kan onderzoeksbelang een reden zijn bepaalde informatie niet te verstrekken.

(..)

INFORMATIEVERSTREKKING

(…)

4.1.3 Gezamenlijke voorlichting bij geruchtmakende zaken

Geruchtmakende zaken – bijvoorbeeld zaken waar personen bij betrokken zijn die op de een of andere manier in het oog springen, of die in ernstige mate afwijken van de dagelijkse praktijk – overstijgen het operationele niveau. In dit soort zaken trekken OM en politie gezamenlijk op. De woordvoering wordt uit beider naam gedaan, voor persberichten en andere uitingen geldt hetzelfde. De politie beperkt zich in zijn uitingen tot de operationele kant van de zaak, het OM behandelt de juridische en strategische aspecten. Er vindt constant afstemming plaats tussen OM en politie. De communicatie door de politie heeft hierbij als belangrijk doel een bijdrage te leveren aan de vermindering van de gevoelens van onrust of onveiligheid.

(…)

4.2.6 Berichtgeving na de uitspraak
Het OM neemt vanuit zijn eigen verantwoordelijkheid de ruimte om in de media te reageren op uitspraken van de Rechtspraak. Dat doet het OM pas nadat de Rechtspraak over dit voornemen is geïnformeerd. Indien de officier van justitie heeft besloten in hoger beroep te gaan, wordt dat, nadat de betrokken partijen zijn geïnformeerd, door het OM aan de media gemeld. De Cassatiedesk – organisatorisch ondergebracht bij de Landelijke Ressortelijke Organisatie – informeert de media over zaken waarin door het OM beroep in cassatie is ingesteld.