CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

AFFAIRE J.J. c. PAYS-BAS

CASE OF J.J. v. THE NETHERLANDS

(9/1997/793/994)

ARRÊT/JUDGMENT

STRASBOURG

27 mars/March 1998

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SUMMARY[1]

Judgment delivered by a Chamber

The Netherlands – plaintiff in taxation proceedings in Supreme Court unable to reply to advisory opinion of advocate-general

I. ARTICLE 6 § 1 OF THE CONVENTION

A. Applicability

Applicant's appeal against fiscal penalty declared inadmissible on sole ground that court registration fee had not been paid – had Supreme Court quashed decision of Court of Appeal, it would have had full jurisdiction to substitute its own decision on the merits for that of Court of Appeal or else to refer case back to same or another court of appeal – decision of Supreme Court was decisive for determination of the "criminal charge" leading to imposition of fiscal penalty on applicant – fact that applicant's appeal on points of law to Supreme Court and latter's decision had been limited to a preliminary question of a procedural nature not sufficient to find Article 6 § 1 to be inapplicable.

B. Compliance

Similarity between essential features of procedure of Netherlands Supreme Court and Belgian Court of Cassation – the purpose of the advocate-general's advisory opinion is to assist Supreme Court and help ensure that its case-law is consistent – duty of the Procurator-General's department at Supreme Court to act with strictest objectivity.

Great importance of part played in proceedings by member of Procurator-General's department: his submissions contained an opinion intended to advise and influence Supreme Court – fact that it had been impossible for applicant to reply to advisory opinion had infringed his right to adversarial proceedings.

Conclusion: violation (unanimously).

II. ARTICLE 50 OF THE CONVENTION

Costs and expenses: partial reimbursement.

Conclusion: respondent State to pay specified sum to applicant for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

8.6.1976, Engel and Others v. the Netherlands; 21.2.1984, Öztürk v. Germany; 23.3.1994, Ravnsborg v. Sweden; 20.2.1996, Vermeulen v. Belgium; 22.2.1996, Putz v. Austria; 25.6.1997, Van Orshoven v. Belgium; 29.8.1997, A.P., M.P. and T.P. v. Switzerland

1. This summary by the registry does not bind the Court.

In the case of J.J. v. the Netherlands[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. MATSCHER,
Mr A. SPIELMANN,
Mrs E. PALM,
Mr A.N. LOIZOU,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr P. VAN DIJK,
Mr M. VOICU,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 25 November 1997 and 25 February 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 21351/93) against the Kingdom of the Netherlands lodged with the Commission under Article 25 by a Netherlands national, Mr J.J., on 12 November 1992. The applicant asked the Court not to reveal his identity.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

Notes by the Registrar

1. The case is numbered 9/1997/793/994. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings. However, he later withdrew from the proceedings after the President of the Chamber had refused to give him leave to present his own case (Rule 31 § 1).

3. The Chamber to be constituted included *ex officio* Mr P. van Dijk, the elected judge of Netherlands nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 21 February 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Matscher, Mr A. Spielmann, Mrs E. Palm, Mr A.N. Loizou, Mr P. Kūris, Mr E. Levits and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), Mr H. von Hebel, the applicant and the Delegate of the Commission, Mr E.A. Alkema, on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the orders made in consequence, the Registrar received a document setting out the applicant's claims under Article 50 of the Convention on 28 August 1997 and the Government's memorial on 1 October. Written observations of the Delegate of the Commission were received on 3 November.

5. On 25 September 1997 the Chamber had decided to dispense with a hearing in the case, having satisfied itself that the conditions for this derogation from its usual procedure had been met (Rules 27 and 40).

6. On 1 October 1997 the Commission produced copies of certain documents contained in the file on the proceedings before it, as requested by the Registrar on the instructions of the President of the Chamber.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a freelance tax consultant.

8. On 14 December 1989 the Inspector of Direct Taxes sent the applicant an assessment of supplementary income tax (*naheffingsaanslag*) for the year 1984. In accordance with the applicable provisions (see

paragraph 17 below) a fiscal penalty was additionally imposed to an amount equal to that of the assessment. The penalty came to 38,656 Netherlands guilders (NLG).

9. On 20 December 1989 the applicant lodged an appeal against this assessment with the Taxation Division of the Leeuwarden Court of Appeal (*gerechtshof*). By letter of 21 December the registrar of that court asked the applicant to pay a court registration fee of NLG 75 pursuant to section 5 of the Taxation Disputes (Administrative Jurisdiction) Act (*Wet administratieve rechtspraak belastingzaken*).

10. The applicant's appeal was declared inadmissible by the President of the Taxation Division on 23 March 1990 on the ground that the court registration fee had not been paid.

11. On the same day the applicant lodged an objection (*verzet*) against this decision with the Taxation Division. He submitted that he had sent an order to his bank for the payment by bank transfer of the court registration fee, but that that order had not been carried out. In his view this error on the part of the bank could not be held against him.

12. Having held a hearing on 19 September 1990, the Taxation Division of the Court of Appeal declared the applicant's objection unfounded on 26 October. It held that, as the applicant had himself chosen to make use of the services of a bank, it had been up to him to see to it that his order was correctly carried out.

13. The applicant lodged an appeal on points of law with the Supreme Court (*Hoge Raad*) on 20 November 1990. He submitted that the Court of Appeal had erred in law by holding him responsible for a mistake made by his bank in carrying out his transfer order. In the alternative, he submitted that the imposition of a fiscal penalty amounted to a penal sanction, and that it was inappropriate to levy a court registration fee in any case concerning the determination of a "criminal charge".

The Deputy Minister of Finance (*Staatssecretaris van Financiën*) filed a written statement of defence (*vertoogschrift*).

14. One of the advocates-general to the Supreme Court submitted an advisory opinion on 19 November 1991. He did not address the applicant's primary submission, apart from expressing the view that the decision of the Court of Appeal had been correct, but gave extensive reasons why the alternative submission should be rejected.

15. The applicant did not receive a copy of the advisory opinion until the Supreme Court delivered its judgment.

16. The Supreme Court dismissed the applicant's appeal on 17 June 1992.

It held that a failure on the part of a bank to carry out an order for the transfer of a court registration fee could not be held against the person who had given such an order if the latter saw to it that the payment was made as soon as possible after he could reasonably be expected to be aware of such failure. Nevertheless, it appeared that the applicant had not paid the court registration fee at all and his primary submission had therefore to be rejected.

It further held that the court registration fee in question was not such as to constitute any real impediment to a taxpayer's right of access to a court, and that in appropriate cases a reduction of the fee in question could be granted. The applicant's alternative submission was therefore also rejected.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The General Act on State Taxes

17. Pursuant to section 20(1) of the General Act on State Taxes (*Algemene wet inzake rijksbelastingen*) a demand for supplementary tax is made if a tax for which the taxpayer is under an obligation to file a declaration (*die op aangifte behoort te worden voldaan of afgedragen*) is not paid in its entirety or not paid at all.

In such cases a fiscal penalty is additionally imposed to an amount equal to the amount due in tax (section 21(1)).

18. It is open to a taxpayer to submit an administrative objection (*bezwaarschrift*) to the competent tax inspector (section 23).

An appeal against the latter's decision lies to the Taxation Division of the Court of Appeal (section 26).

19. It is, however, also open to the taxpayer to lodge an appeal directly to the Taxation Division of the Court of Appeal without first submitting an administrative objection to the tax inspector (section 26(2)). This was the course followed by the applicant in the present case.

B. The Taxation Disputes (Administrative Jurisdiction) Act

20. A taxpayer who lodges an appeal with the Taxation Division of the Court of Appeal is required to pay a court registration fee, which at the relevant time amounted to NLG 75 (section 5(1) of the Taxation Disputes (Administrative Jurisdiction) Act). This fee is reduced by NLG 35 if the financial interest is very small (section 5(3)), or if the taxpayer is indigent (section 5(4)).

The entire fee is paid back to the taxpayer if his appeal is upheld in whole or in part (section 5(7)).

21. An appeal on points of law against the decision of the Taxation Division of the Court of Appeal lies to the Supreme Court (section 19). Such an appeal may be lodged by the competent tax inspector or other tax authority as well as by the taxpayer.

22. The defendant party – tax authority or taxpayer, as the case may be – may submit a written statement of defence (section 22(2)).

23. The Supreme Court does not hold an oral hearing unless it is asked to do so by one of the parties. Such a request may be made in either the statement of points of appeal or the statement of defence, or after the filing of those statements, by the party which has lodged the appeal on points of law; in the latter case the time-limit for so doing is fourteen days after the statement of defence was sent to the party concerned (section 23(1)).

24. If the Procurator-General expresses the wish to be heard, the case file is sent to him after the hearing, or after the filing of the written statements if no hearing is held (section 24(1)). He must submit his advisory opinion in writing (section 24(2)).

It is not provided that the taxpayer must be supplied with a copy of the advisory opinion before the delivery of the judgment of the Supreme Court.

25. The Supreme Court deliberates in camera. Although there is no legal provision prohibiting the Procurator-General from attending the Supreme Court's deliberations, in practice he never attends.

26. The Supreme Court may quash the decision appealed against on the grounds adduced or on other grounds (section 25). In that event it decides on the merits of the case, substituting for the decision of the Taxation Division of the Court of Appeal the decision on the merits which the latter ought to have given. Only if the decision on the merits depends on important facts which have not been established at an earlier stage of the proceedings does the Supreme Court refer the case back to the Court of Appeal which gave the decision appealed against or one of the other courts of appeal (ibid.).

C. The Judiciary (Organisation) Act

27. The duties and position of the Procurator-General's department (*openbaar ministerie*) are defined in the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*).

28. The Procurator-General's department consists of the Procurator-General and advocates-general of the Supreme Court, the procurators-general and advocates-general of the courts of appeal and the public prosecutors of the regional and district courts (section 3(1) of the Judiciary (Organisation) Act). The advocates-general of the Supreme Court act as deputies of the Procurator-General of that court and are subordinate to him (sections 3(2), 5a and 6(1)).

29. The Procurator-General's department must be heard by the courts in so far as the law so prescribes (section 4). The advisory opinion of the Procurator-General or an advocate-general to the Supreme Court takes the form of a learned treatise containing references to relevant case-law and legal literature and a recommendation, which is not binding on the Supreme Court, to uphold or reject points of appeal.

PROCEEDINGS BEFORE THE COMMISSION

30. In his application to the Commission of 12 November 1992, the applicant alleged violations of Article 6 § 1 of the Convention in that the levying of a court registration fee had infringed his right of access to a court and in that he had not been able to reply to the advisory opinion submitted to the Supreme Court by the advocate-general.

31. On 16 October 1995 the Commission declared the application (no. 21351/93) admissible in so far as it concerned the failure to allow the applicant an opportunity to reply to the advocate-general's advisory opinion and inadmissible for the remainder. In its report of 15 October 1996 (Article 31), it expressed the opinion that there had been a violation of Article 6 § 1 of the Convention (by twenty-six votes to four). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

32. The Government concluded their memorial by expressing the view that Article 6 was not applicable to the present case.

The applicant claimed that Article 6 § 1 was applicable and had been violated.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

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

33. The applicant claimed that he had been a victim of a violation of Article 6 § 1 of the Convention in that he had not been able to reply to the advisory opinion submitted to the Supreme Court by the advocate-general.

Article 6 § 1, in so far as relevant, provides as follows:

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

The Commission agreed with the applicant that that provision had been violated. The Government disputed its applicability.

A. Applicability of Article 6 § 1

34. In the Government's view, the Supreme Court had not determined a "criminal charge" against the applicant. Article 6 § 1 was therefore not applicable. They based their argument on the premise that the proceedings in issue related to nothing more than the requirement to pay a court registration fee. They referred to the criteria developed by the Court in its case-law, starting with the Court's judgments in the cases of Engel and Others v. the Netherlands (judgment of 8 June 1976, Series A no. 22, p. 35, § 82) and Öztürk v. Germany (judgment of 21 February 1984, Series A no. 73, p. 18, § 50), namely whether or not the text defining the offence in issue belonged, according to the legal system of the respondent State, to criminal law, the nature of the offence charged and the nature and degree of severity of the penalty which the person concerned risked incurring.

As to the first criterion, they noted that as a matter of Netherlands law the levying of court registration fees fell outside the realm of criminal law.

As to the second, they stated that court registration fees were not punitive in nature but served the purpose of ensuring the proper administration of justice. This they did by covering part of the expenses of the administration of justice and discouraging appeals which had no prospect of success. Since they were procedural rules and not criminal sanctions, the present case was more akin to that of Ravnsborg v. Sweden (judgment of 23 March 1994, Series A no. 283-B), where the Court had held a fine for disorderly conduct in court to "derive from the indispensable power of a court to ensure the proper and orderly functioning of its own proceedings" (loc. cit., p. 30,

§ 34), and to that of Putz v. Austria (judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-I).

The third criterion, the nature and degree of severity of the penalty, was clearly not relevant.

35. The applicant stated that the case before the Court concerned the imposition of a fiscal penalty, which had to be equated with a criminal sanction.

36. The Commission expressed the opinion that although the proceedings before the Supreme Court had been limited to a procedural issue, namely whether the Court of Appeal had been right to declare the applicant's appeal inadmissible for failure to comply with a procedural requirement, the case had nonetheless concerned the determination of a "criminal charge". Had the Supreme Court come to the conclusion that the Court of Appeal had erred in so doing, it would have recovered full jurisdiction to rule on the merits of the case (section 25 of the Taxation Disputes (Administrative Jurisdiction) Act – see paragraph 26 above).

The Commission's Delegate, in his written observations (see paragraph 4 above), added that the Supreme Court in its decision had addressed the applicant's argument that the levying of court registration fees was not permissible in cases concerning a "criminal charge"; in so doing it had ruled on the important question of access to court in criminal cases. This implied that, as a matter of national law also, the proceedings in question belonged to the criminal sphere.

37. The Court observes that none of those taking part in the proceedings before it have denied that the fiscal penalty imposed on the applicant (see paragraph 8 above) was a "criminal sanction". The Court finds no reason to consider that it was not (see, as a recent authority, the A.P., M.P. and T.P. v. Switzerland judgment of 29 August 1997, *Reports* 1997-V, p. 1488, §§ 39-43). Article 6 accordingly entitled the applicant to a procedure before a court. Netherlands law in fact provides for such a procedure in the form of an appeal to the Taxation Division of the Court of Appeal (see paragraphs 18 and 19 above).

38. The President of the Taxation Division on 23 March 1990 declared the applicant's appeal inadmissible on the sole ground that the court registration fee had not been paid (see paragraph 10 above). After the applicant had lodged an objection, this decision was upheld on 23 April 1990 by the Taxation Division (see paragraph 11 above). The applicant's grounds of appeal on points of law to the Supreme Court were thus limited to the question whether or not the Court of Appeal ought to have declared the applicant's appeal admissible – which the Supreme Court answered in the negative (see paragraphs 13 and 16 above).

39. The Supreme Court had jurisdiction to quash the decision of the Court of Appeal on the grounds adduced or *ex officio* on other grounds. Had it done so, it would have had full jurisdiction to substitute its own decision on the merits for that of the Court of Appeal, ruling on the basis of the case file before it, or else to refer the case back to the Court of Appeal which had given the decision appealed against or one of the other courts of appeal for a complete rehearing if necessary (section 25 of the Taxation Disputes (Administrative Jurisdiction) Act – see paragraph 26 above). However, it did not, for reasons which it is not for the European Court to enter into (see paragraphs 16 and 32–33 above). The effect of the decision of the Supreme Court was to ratify the imposition of the fiscal penalty on the applicant. It was thus decisive for the determination of the "criminal charge" leading to the imposition on him of the penalty.

40. That being so, the fact that the applicant's appeal on points of law to the Supreme Court and the latter's decision were limited to a preliminary question of a procedural nature cannot suffice to find that Article 6 § 1 is inapplicable.

The Court must accordingly rule on the question whether the criminal proceedings against the applicant complied with that provision.

B. Compliance with Article 6 § 1

41. The applicant and the Commission concurred in considering that Article 6 § 1 had been violated by the fact that the applicant had not had the opportunity to respond to the advocate-general's advisory opinion to the Supreme Court.

The Government, for their part, conceded that if the Court were to hold that Article 6 § 1 was applicable then a violation would have to be found.

42. The Court notes that for the present purposes the essential features of the procedure of the Netherlands Supreme Court and that of the Belgian Court of Cassation are similar. Firstly, the purpose of the advocate-general's advisory opinion is to assist the Supreme Court and to help ensure that its case-law is consistent. Secondly, it is the duty of the Procurator-General's department at the Supreme Court to act with the strictest objectivity (see *inter alia* and *mutatis mutandis*, the Vermeulen v. Belgium judgment of 20 February 1996, *Reports* 1996-I, p. 233, §§ 29 and 30, and Van Orshoven v. Belgium judgment of 25 June 1997, *Reports* 1997-III, pp. 1050-51, §§ 37 and 38).

As in the Belgian cases referred to, the Court considers, however, that great importance must be attached to the part played in the proceedings before the Supreme Court by the member of the Procurator-General's department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the Procurator-General's department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Supreme Court (see the above-mentioned Vermeulen judgment, p. 233, § 31, and Van Orshoven judgment, p. 1051, § 39).

43. The Court has already found that the outcome of the proceedings before the Supreme Court determined a "criminal charge" against the applicant (see paragraphs 39–40 above). Regard being had, therefore, to what was at stake for the applicant in the proceedings and to the nature of the advisory opinion of the advocate-general, the fact that it was impossible for the applicant to reply to it before the Supreme Court took its decision infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see the above-mentioned Vermeulen judgment, p. 234, § 33, and the Van Orshoven judgment, p. 1051, § 41).

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

44. Article 50 of the Convention provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

45. The applicant did not claim damages.

A. Costs and expenses

46. The applicant claimed the following sums:

(a) Court registration fee for the Supreme Court proceedings: 300 Netherlands guilders (NLG);

(b) Travel expenses incurred in order to attend the hearing of the Taxation Division of the Leeuwarden Court of Appeal: NLG 180;

(c) Working time spent in connection with the proceedings before the Leeuwarden Court of Appeal and the Supreme Court: NLG 4,050;

(d) Office expenses: NLG 100.

His claims thus came to a total of NLG 4,630.

47. The Government argued that these sums were for the most part connected with the proceedings before the domestic courts. The violation, if

violation there had been, had occurred at the very end of the domestic proceedings, after these expenses had allegedly been incurred. The applicant was accordingly entitled only to reimbursement of expenses not explicitly related to the domestic proceedings, which as appeared from his claim could not amount to more than NLG 100.

48. The Commission's Delegate considered that the applicant should be awarded compensation for all costs and expenses referable to the Supreme Court proceedings. A fair estimate of these was in his view NLG 1,500.

49. The Court notes that the violation found relates solely to the failure to offer the applicant the opportunity to respond to the advocate-general's advisory opinion to the Supreme Court. Deciding on an equitable basis, the Court awards the applicant NLG 1,000.

B. Default interest

50. According to the information available to the Court, the statutory rate of interest applicable in the Netherlands at the date of the adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that Article 6 § 1 of the Convention is applicable and has been violated;

2. *Holds*
(a) that the respondent State is to pay the applicant, within three months, 1,000 (one thousand) Netherlands guilders in respect of costs and expenses;
(b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 March 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD

Registrar