



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

AFFAIRE K.D.B. c. PAYS-BAS

CASE OF K.D.B. v. THE NETHERLANDS

(80/1997/864/1075)

ARRÊT/JUDGMENT

STRASBOURG

27 mars/March 1998

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SUMMARY¹

Judgment delivered by a Chamber

The Netherlands – plaintiff in civil proceedings in Supreme Court not notified of date on which his case would be examined and unable to reply to advisory opinion of advocate-general

I. ARTICLE 6 § 1 OF THE CONVENTION

A. Failure to notify the applicant of the date on which his case would be examined

Case-law reiterated: manner in which Article 6 § 1 applies to courts of appeal or cassation depends on special features of procedure concerned – absence of “public hearings” before a second or third instance may be justified by special features of proceedings at issue.

Appeal to Supreme Court made after applicant's claims had been heard by Regional Court, which had had full jurisdiction and had held hearing attended by applicant and his counsel – since he had been assisted by a lawyer, applicant could have been expected to request Supreme Court to hold a hearing – not shown that it would not have been possible for applicant to file written grounds of appeal before Supreme Court had started to examine his case.

Conclusion: no violation (unanimously).

B. Lack of opportunity to reply to advisory opinion of advocate-general

Similarity between essential features of procedure of Netherlands Supreme Court and Belgian Court of Cassation – purpose of the advocate-general's advisory opinion is to assist Supreme Court and help ensure that its case-law is consistent – duty of 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).

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

II. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage

Not at issue in the proceedings in which violation occurred – claim dismissed.

B. 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

22.2.1984, Sutter v. Switzerland; 26.5.1988, Ekbatani v. Sweden; 20.2.1996, Vermeulen v. Belgium; 25.6.1997, Van Orshoven v. Belgium; 19.12.1997, Brualla Gómez de la Torre v. Spain

In the case of K.D.B. v. the Netherlands¹,

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 B², as a Chamber composed of the following judges:

Mr THÓR VILHJÁLMSOON, *President*,

Mr B. WALSH,

Mr G. MIFSUD BONNICI,

Mr P. KÜRIS,

Mr J. CASADEVALL,

Mr P. VAN DIJK,

Mr T. PANTIRU,

Mr M. VOICU,

Mr V. TOUMANOV,

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

Having deliberated in private on 31 January 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 a Netherlands national, Mr K.D.B. (“the applicant”), on 6 August 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 21981/93) against the Kingdom of the Netherlands lodged by the applicant with the European Commission of Human Rights (“the Commission”) under Article 25 on 23 March 1993. The applicant asked the Court not to reveal his identity.

Mr K.D.B.'s application to the Court referred to Article 48 of the Convention as amended by Protocol No. 9, which the Netherlands have ratified. The object of the application 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 80/1997/864/1075. 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. On 26 September 1997 the Court's Screening Panel decided not to decline consideration of the case and to submit it to the Court (Article 48 § 2 of the Convention).

3. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him, Mr L.J.L. Heukels (Rule 31).

4. 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. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 25 October 1997 in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr P. Kūris, Mr J. Casadevall, Mr T. Pantiru, Mr M. Voicu and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr Thór Vilhjálmsson replaced, as President of the Chamber, Mr Ryssdal, who was unable to take part in the further consideration of the case, and Mr G. Mifsud Bonnici, substitute judge, became a member of the Chamber (Rules 10, 22 § 1 and 24 § 1).

5. As the President of the Chamber at that time (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), Mr R.A.A. Böcker, the applicant's lawyer and the Delegate of the Commission, Mr H. Danelius, on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the orders made in consequence, the Registrar received the Government's and the applicant's memorials on 12 and 15 December 1997 respectively and on 13 January 1998 the Government submitted their observations on the applicant's Article 50 claims.

6. On 31 January 1998 the Chamber 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).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1959 and lives in Snelrewaard. He has a farm where he keeps cattle for slaughter.

8. On 15 November 1991 cattle on the applicant's farm was inspected by the General Inspection Service (*Algemene inspectiedienst*) of the Ministry of Agriculture, Nature Conservancy and Fisheries (*Ministerie van Landbouw, Natuurbeheer en Visserij*). Twelve cows were singled out to

which the applicant was suspected of having administered the illegal substance clenbuterol.

The same day the public prosecutor (*officier van justitie*) ordered an interim measure pursuant to section 28 of the Economic Offences Act (see paragraph 21 below) under which the applicant was restrained from removing the twelve cows from his premises without permission and from obstructing the identification of the cows.

9. After tests had borne out that clenbuterol had been administered to nine of the twelve cows, the General Inspection Service seized these nine cows on 3 December 1991 pursuant to section 18 of the Economic Offences Act (see paragraph 23 below).

The applicant was given a receipt for these cows, which stated that an objection against the seizure could be lodged with the Utrecht Regional Court pursuant to Article 552a of the Code of Criminal Procedure (*Wetboek van Strafvordering* – see paragraph 24 below).

It appears that the restrictions affecting the other three cows were lifted.

10. On 5 December 1991 the public prosecutor applied under Article 117 of the Code of Criminal Procedure (see paragraph 26 below) to the Utrecht Regional Court for permission to have the nine cows destroyed. The reasons given were that since they had been contaminated by an illegal substance, they would never again be marketable for human or animal consumption, and that moreover it was impracticable and costly to keep them for any length of time.

11. On 9 December 1991 the applicant applied for the interim measure ordered on 15 November (see paragraph 8 above) to be lifted.

12. The Regional Court held a hearing in camera on 10 December 1991. At that hearing the public prosecutor announced that the interim measure of 15 November would be withdrawn. It does not, however, appear that this had happened by the time the Regional Court gave its decision.

13. On 21 January 1992 the applicant again applied to the Regional Court for an order to have the interim measure lifted, or in the alternative to have the cows tested anew and to order the lifting of the interim measure if it was shown that the concentrations of clenbuterol did not exceed legal limits.

A hearing was held in camera the same day. In his oral submissions the applicant's lawyer referred to EEC Council Directive 86/469 of 16 September 1986, which contained rules for testing cattle which had in his submission been disregarded in the present case.

14. On 4 February 1992 the Regional Court rejected the applicant's applications of 9 December 1991 and 21 January 1992. It held that the applicant had no legal interest in applying for the interim measure complained of to be lifted since the public prosecutor had already

announced that this would be done. In the same decision it authorised the public prosecutor to have the cows destroyed, since it appeared from the case file that it was in any event unlikely that the cows would not eventually be declared forfeit (*onttrokken aan het verkeer*).

15. The cows were slaughtered shortly after the Regional Court's decision.

16. On 13 February 1992 the applicant, through his lawyer, lodged an appeal on points of law to the Supreme Court (*Hoge Raad*). The lawyer did not submit any grounds of appeal in writing.

17. On 24 December 1992 the Procurator-General of the Supreme Court submitted an advisory opinion to the effect that no grounds of appeal had been submitted and that there were no reasons for the Supreme Court to quash the decision appealed against *ex officio*. He appended to his opinion a copy of a preliminary ruling of the Court of Justice of the European Communities concerning the interpretation of EEC Council Directive 86/469.

It appears that neither the applicant nor his lawyer received any notice of this until after the Supreme Court had given judgment.

18. On 1 March 1993 the applicant was notified by the Procurator-General that the Supreme Court had dismissed his appeal on 19 January.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Substantive and general

19. The 1991 Ordinance on substances with a sympathomimetic effect (*Verordening stoffen met sympathico mimetische werking*) makes it illegal to administer animal medicines with a sympathomimetic effect containing clenbuterol to beef cattle older than fourteen weeks. Section 3(1) of that Ordinance makes it illegal to have in stock, sell or purchase beef cattle to which such substances have been administered, and section 4(1) makes it illegal to have in stock, sell or purchase their meat.

Clenbuterol is, moreover, an unregistered animal medicine the use or possession of which is prohibited by section 2 of the Animal Medicines Act (*Diergeneesmiddelenwet*).

The offences here described are economic offences for the purposes of the Economic Offences Act (section 1 of that Act).

20. The Economic Offences Act lays down particular rules for the prosecution and punishment of economic offences. In so far as procedure is concerned, it is a *lex specialis* in relation to the Code of Criminal Procedure, the provisions of the latter remaining applicable in so far as the Economic Offences Act does not provide otherwise (section 25 of that Act).

B. Interim measures

21. Section 28(1) of the Economic Offences Act empowers the public prosecutor, until the beginning of the court hearing in the case, to order a person against whom a serious suspicion has arisen, by way of interim measure, to desist from particular actions or to keep or store particular goods in a particular place.

22. It is open to the person to whom such an order has been issued to apply to the trial court which is to deal with the case for the order to be lifted (section 28(3) of the Economic Offences Act).

An appeal against a refusal lies to the Court of Appeal (section 30).

A further appeal on points of law lies to the Supreme Court (section 30a). The accused is required to have a written statement of grounds of appeal submitted by a lawyer within one month of lodging the appeal, failing which his appeal will be declared inadmissible. The Supreme Court shall decide as soon as possible.

It would appear that this procedure was not followed in the present case, since the appeal was not lodged with the Court of Appeal but directly with the Supreme Court.

C. Seizure and destruction of goods

23. Goods or objects which may help to establish the truth or the existence of illegal gains, or which may be declared forfeit, may be seized by officers invested with investigative competence (*opsporingsambtenaren*) (section 18(1) of the Economic Offences Act taken together with Article 94 of the Code of Criminal Procedure).

24. Interested parties may lodge a written complaint (*schriftelijk zich beklagen*) against such seizure with the trial court before which the case is pending (Article 552a § 1 of the Code of Criminal Procedure). The parties concerned have the right to be heard (Article 552a § 4).

An appeal lies on points of law to the Supreme Court (Article 552d).

It would appear that this was the procedure followed in the present case.

25. The accused has the right to submit written grounds of appeal within one month of lodging his appeal on points of law (Article 447 § 3 of the Code of Criminal Procedure), but his appeal is not automatically declared inadmissible if he does not.

26. If the said goods or objects cannot be stored, the trial court may authorise the public prosecutor to have them sold, destroyed, abandoned (*prijsgegeven*) or used for some purpose other than the criminal investigation (Article 117 of the Code of Criminal Procedure). No appeal lies against the trial court's decision (Article 445).

If it emerges that it is appropriate to return seized goods to the owner but that this is impossible because the goods have been lawfully sold, destroyed or abandoned, then the interested party shall be paid compensation to an amount equivalent to the price for which the goods might reasonably have been sold (Article 119 § 2).

D. Procedure

27. All matters which may arise in the course of criminal proceedings which are not required to be decided in open court are dealt with in camera (Article 21 § 1 of the Code of Criminal Procedure); matters so dealt with include interim measures under the Economic Offences Act and seizures.

28. In the case of appeals on points of law against a judgment delivered in open court (*uitspraak*) the accused is entitled to submit at the hearing grounds of appeal not filed at an earlier stage (Article 433 of the Code of Criminal Procedure). There is no equivalent provision for appeals on points of law against orders given in camera (*beschikkingen*).

E. The Judiciary (Organisation) Act

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

30. 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)).

31. 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

32. Mr K.D.B. applied to the Commission on 23 March 1993. He relied on Article 6 § 1 of the Convention, complaining that he had not been

informed of the date on which the Supreme Court would consider his appeal on points of law and that he had not been put in a position to respond to the advisory opinion of the Procurator-General.

33. The Commission (Second Chamber) declared the application (no. 21981/93) admissible on 17 January 1996. In its report of 21 May 1997 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 6 § 1 in the latter regard but not in the former. The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment¹.

AS TO THE LAW

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

34. The applicant alleged a breach of Article 6 § 1 of the Convention, which, in so far as relevant, provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an ... impartial tribunal...”

He complained, firstly, that he had not been informed of the date on which the Supreme Court would examine his case and, secondly, that he had not been given an opportunity to reply to the advocate-general's written advisory opinion.

It has not been disputed that the case concerns a “civil right” within the meaning of this provision.

A. Failure to notify the applicant of the date on which his case would be examined

35. The applicant argued that he should have been informed of the date on which the Supreme Court was to examine his case. This would have allowed him to submit in due time a written statement of grounds of appeal or to ask for an oral hearing.

36. The Government point out that, as a rule, appeals on points of law against orders given in camera (*beschikking*) as provided for by Article 138 of the Code of Criminal Procedure are dealt with by the Supreme Court without prior oral hearings, since no facts can be examined at this stage. However, the Supreme Court can depart from this rule upon request by the

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.

appellant, especially when the latter has not previously submitted in writing his grounds of appeal. If a request for an oral hearing has been made, a date for a hearing is fixed and the appellant and/or counsel are called to appear.

In the instant case, the applicant never informed the Supreme Court that he wished to set out his grounds of appeal at a hearing. Therefore no date was fixed for oral proceedings. For the Government, however, who refer *inter alia* to the Sutter v. Switzerland judgment of 22 February 1984 (Series A no. 74), this did not amount to a breach of the applicant's right to a fair trial, since at first instance the Utrecht Regional Court had held an oral hearing at which both the applicant and his counsel had been present.

37. The Commission noted that the applicant could have requested the Supreme Court to hold a hearing, that a hearing had taken place before the Utrecht Regional Court and that the Supreme Court does not review facts but only considers questions of law and compliance with procedural requirements. The Commission therefore concluded that in the circumstances of the present case the applicant had not been deprived of the possibility of putting his case to the Supreme Court in a concrete and effective manner.

38. The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or courts of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that litigants enjoy an effective right of access to the courts for the determination of their "civil rights and obligations".

The manner in which Article 6 § 1 applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them (see, among other authorities, the Brualla Gómez de la Torre v. Spain judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2956, § 37).

39. Furthermore, the Court has on a number of occasions held that, provided that there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceedings and proceedings involving only questions of law may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see, among other authorities, the Ekbatani v. Sweden judgment of 26 May 1988, Series A no. 134, p. 14, § 31).

40. The Court notes that in the instant case, the appeal to the Supreme Court was made after the applicant's claims had been heard by the Utrecht Regional Court, which had full jurisdiction over questions of fact and law

and which had held an oral hearing attended by the applicant and his counsel. The fairness of these proceedings has not been called into question by the applicant in any respect before the Court.

The Court also observes that as a rule, the Supreme Court holds no hearing before deciding on appeals on points of law lodged against orders given in camera. Since the applicant was assisted by a lawyer, he could be expected to request the Supreme Court to hold a hearing if he wanted to appear in person before that court, but he failed to do so.

Finally, it has not been shown that it would not have been possible for the applicant to file written grounds of appeal before the Supreme Court started to examine his case.

41. In sum, given the role of the Supreme Court as a Court of Cassation and having regard to the proceedings as a whole, the Court considers that the failure to inform the applicant of the date on which the Supreme Court would examine his case did not amount to a breach of Article 6 § 1.

B. Lack of opportunity to reply to the advisory opinion of the advocate-general

42. The parties 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 reply to the advocate-general's advisory opinion to the Supreme Court. The Government pointed out that measures had been taken at national level to avoid such violations in the future.

43. The Court notes that for 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 the 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).

44. Regard being had 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 Van Orshoven judgment, p. 1051, § 41).

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

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

45. 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.”

A. Pecuniary damage

46. The applicant claimed 40,500 Netherlands guilders (NLG) for pecuniary damage: NLG 27,000 for the loss of nine cows and NLG 13,500 for the fine eventually imposed on him.

47. The Government argued that the loss of cows and the fine imposed in the domestic proceedings are an issue which is to be dealt with in the criminal proceedings against the applicant and which has no relation with the alleged violation of the Convention. Moreover, the advocate-general's written observations did not contain any substantive legal arguments which might have changed the outcome of the proceedings.

48. The Court notes that the pecuniary damage claimed by the applicant was not at issue in the proceedings in which the violation found by the Court occurred. The claim is therefore to be dismissed.

B. Costs and expenses

49. The applicant further sought costs and expenses amounting to a total of NLG 18,700. His claim included NLG 8,950 for the domestic proceedings and NLG 9,750 for the Strasbourg proceedings.

50. For the reasons set out in respect of the claim for damages (see paragraph 47 above), the Government contended that there could be no reimbursement of the costs incurred in the domestic proceedings.

51. The Court considers that apart from a formal appeal, there was no representation of the applicant before the Supreme Court. The Court therefore decides to award NLG 9,750 as compensation only for the costs incurred for the applicant's representation in Strasbourg, together with any value-added tax that may be chargeable.

C. Default interest

52. 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 has not been violated with respect to the failure to notify the applicant of the date on which his case would be examined by the Supreme Court;
2. *Holds* that Article 6 § 1 of the Convention has been violated with respect to the lack of opportunity for the applicant to respond to the advisory opinion submitted by the advocate-general to the Supreme Court;
3. *Holds*
 - (a) that the respondent State is to pay to the applicant, within three months, for costs and expenses, 9,750 (nine thousand seven hundred and fifty) Netherlands guilders, together with any value-added tax that may be chargeable;
 - (b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *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: THÓR VILHJÁLMSSON
President

Signed: Herbert PETZOLD
Registrar