



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

1959 · 50 · 2009

FIFTH SECTION

CASE OF NIELSEN v. DENMARK

(Application no. 44034/07)

JUDGMENT

STRASBOURG

2 July 2009

FINAL

02/10/2009

This judgment may be subject to editorial revision.

In the case of Nielsen v. Denmark,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Rait Maruste, *President*,

Peer Lorenzen,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 9 June 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44034/07) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Danish national, Mr Rolf Nielsen (“the applicant”), on 12 September 2007.

2. The applicant was represented by Mr K.L. Németh, a lawyer practising in Copenhagen. The Danish Government (“the Government”) were represented by their Agent, Mrs Nina Holst-Christensen of the Ministry of Justice.

3. On 28 March 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

4. The applicant was born in 1955 and lives on the island of Samsø.

5. In the beginning of the 1990s a new concept called “tax asset stripping” (*selskabstømmersager*) came into existence in Denmark. It related mainly to a criminal activity whereby the persons involved committed aggravated debtor fraud by buying up and selling numerous inactive solvent private limited companies within a short period and, for

their own profit, “stripped” the companies of assets including deposits earmarked for payment of corporation tax. The persons involved were usually closely interconnected and collaborated on their criminal activities, which involved very large amounts of money. According to a survey conducted by the customs and tax authorities, approximately one thousand six hundred companies with a total tax debt exceeding two billion Danish kroner (DKK) were stripped in the period from the late 1980s until 1994. In addition to the criminal cases, tax asset stripping gave rise to a large number of cases for damages relating to the sellers’ and the buyer banks’ liability for the loss arising when the companies were stripped of their funds in connection with the sale. Following a number of legislative amendments, the trade in inactive solvent companies largely ceased in the summer of 1993.

6. On 27 November 1992, in his role as owner and managing director, the applicant sold a private limited company originally called *Soft TUX Aps*, the name later being changed to *HOP no. 49*.

7. On 30 March 1995 *HOP no. 49* went bankrupt. A trustee in bankruptcy was appointed to manage the estate and settle the accounts.

8. On 6 October 1997 the trustee, on behalf of the bankrupt *HOP no. 49*, initiated civil proceedings before the High Court of Eastern Denmark (*Østre Landsret*), the High Court, against the applicant and a bank (*BG Bank A/S*), requesting that the defendants be ordered jointly and severally to pay approximately 4.4 million Danish kroner (DKK), equivalent to approximately 594,000 euros (EUR). The trustee alleged that the defendants had been responsible for stripping the company of assets in connection with the above-mentioned sale in 1992.

9. On 18 November 1997 the defendant *BG Bank A/S* joined the proceedings and raised an individual claim against the applicant, an accountancy firm (*Revisorhuset A/S*) and two lawyers, HAV and PF, as defendants in the main proceedings.

10. On 20 November 1997, maintaining that he had been misled by his advisers, the applicant brought proceedings against a lawyer CH, a law firm G & N, an accountant JOL, *Revisorhuset A/S* and *BG Bank A/S* as defendants in the main proceedings.

11. Formally the proceedings included twelve parties. However, since the applicant and *BG Bank A/S* acted both as defendants and third-party defendants, and *Revisorhuset A/S* had been joined to the proceedings by both the applicant and *BG Bank A/S*, the proceedings included nine different parties. Subsequently, in 2002 the proceedings against *Revisorhuset A/S* were abandoned because it ceased to exist. Six of the remaining eight parties were represented by five different counsels and two of them had no legal representation.

12. Seven hearings were held and several written pleadings exchanged between October 1997 and 17 September 1999.

13. On the latter day all parties, including the applicant, agreed to adjourn the proceedings until 14 January 2000 pending a Supreme Court judgment in a similar case, hereafter called the *Else Thrane* case. In that case, as in the present case, an estate in bankruptcy had sued the seller of the company for damages as the company had been stripped of its assets in connection with the sale and was therefore unable to pay corporation taxes. Thus, the crucial matter concerned the question of liability of the buyer's bank and the buyer's attorney and accountant for the advice provided by them.

14. The judgment in the *Else Thrane* case was passed by the Supreme Court on 24 November 1999 (published in the Danish Weekly Law Reports (*Ugeskrift for Retsvæsen* 2000, page 365/2), in the light of which the proceedings in the present case were adjourned awaiting the parties' settlement negotiations. The proceedings and the settlement negotiations were adjourned on 7 April 2000 and several times thereafter because the applicant's first counsel (L) resigned and the applicant had to appoint a new one.

15. In October 2000 new counsel (D) submitted a pleading and the exchange of pleadings and settlement negotiations were therefore resumed until the end of April 2001, when the applicant stated that he did not wish to enter into a settlement. Immediately thereafter, the High Court summoned the parties for a hearing to take place on 15 June 2001, during which the applicant mentioned that it might be possible to reach a settlement if various requests were met. The parties, including the applicant, thus agreed to adjourn the proceedings anew in order to reach a settlement.

16. In November 2001, the applicant informed the High Court that his counsel had resigned and that he did not wish to enter into a settlement.

17. A hearing was held on 22 February 2002, in agreement with the applicant the High Court requested that a new counsel be retained, *inter alia* to submit a pleading stating on which points, in the applicant's opinion, the present case differed so much from the *Else Thrane* case that the Supreme Court's judgment in that case could not guide the outcome of the present case. A hearing was scheduled for 12 April 2002, at which new counsel (B) appeared for the applicant. However, he informed the High Court on 22 August 2002 that he was no longer handling the applicant's interests. At a hearing the following day, the applicant was represented by another counsel (S), who although given until 27 September 2002, submitted the awaited pleading on 10 January 2003. Thereafter, pleadings were exchanged regularly and several hearings held.

18. At a pre-trial review held on 2 February 2004 only counsel for *BG Bank A/S* was present. He was requested to investigate whether the applicant was represented by counsel, since the case seemed ready for trial.

19. In March 2004, upon request the High Court adjourned the proceedings until 19 January 2005 awaiting the Supreme Court's decision

regarding a claim from *BG Bank A/S* that it was entitled to a contribution from one of the third-party defendants.

20. On 4 March 2005 the applicant complained about the adjournment and invited the High Court to schedule the trial and accordingly a hearing was held on 22 March 2005. In order to discuss how to schedule the main proceedings and/or the third party cases, a pre-trial review was scheduled to take place on 23 November 2005.

21. In a letter of 9 November 2005 to the High Court, the applicant complained about the length of the proceedings and at the same time requested an adjournment of the forthcoming pre-trial review since he wanted a new counsel. He also stated that he would not be in Denmark until Christmas.

22. On 22 November 2005 the High Court refused the applicant's request since, according to the information available, the applicant had not been legally represented since 2 February 2004, and the pre-trial review had been scheduled since 22 March 2005.

23. The pre-trial review was held on 23 November 2005 without the applicant's presence.

24. By letter of 8 December 2005, a new counsel, namely the lawyer representing the applicant in the proceedings before the Court, informed the High Court that he was representing the applicant in the domestic proceedings.

25. Accordingly, and since the applicant alleged that he had not been summoned to the pre-trial review on 23 November 2005, the High Court summoned the parties to another pre-trial review to take place on 4 May 2006. During that review the trial was fixed for five days in August 2007.

26. On 23 August 2006, the High Court rescheduled the trial at the request of one of the parties and suggested three alternative periods during the autumn and winter of 2007 which were submitted to the respective parties for comments. The trial was thereafter postponed to take place in September 2007.

27. Court sessions were held on 20 August and on 14, 24 and 26 September 2007. A new legal issue arose between the *BG Bank A/S* and a third-party defendant and the High Court therefore chose to use some of the days reserved for the trial to clarify the matter and for settlement negotiations. At the last session, the trial was scheduled to take place "possibly" from 9 to 11 April 2008, in case the negotiations proved fruitless.

28. At the beginning of the trial on 9 April 2008, the applicant claimed that one of the High Court judges had to vacate his seat due to disqualification. Although indicating that it did not find the relevant judge disqualified, the High Court did not want to conduct the trial without the

requisite respect for the court's impartiality. Thus it re-scheduled the trial for October 2008.

29. The trial was held in October 2008. On 10 December 2008 the High Court passed judgment finding against the applicant.

30. The applicant appealed against the High Court judgment to the Supreme Court (*Højesteret*) on 19 December 2008.

THE LAW

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

31. The applicant complained that the length of the proceedings before the High Court had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

32. In the Government's view the application should be declared inadmissible as being manifestly ill-founded.

33. The applicant disagreed.

34. The Court considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to take into consideration

35. It is common ground that the proceedings complained about commenced on 6 October 1997, when the company *HOP nr. 49 APS* issued a writ against the applicant and *BG Bank A/S*, and ended on 10 December 2008, when the High Court passed its judgment. The proceedings thus lasted eleven years and two months. The subsequent appeal proceedings do not come within the scope of the case as submitted by the applicant.

2. Reasonableness of the length of the proceedings

36. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

a. Complexity of the case

37. The applicant submitted that the proceedings were by no means more complex than other tax asset stripping cases brought before the Danish courts.

38. In the Government's view the case was very complex as regards the facts, which contributed greatly to the length of the proceedings.

39. The Court observes that the case concerned so-called tax asset stripping with complicated financial transactions and several persons involved, who were intricately interconnected, which usually renders such proceedings of extraordinary scope and of particular complexity (see, *mutatis mutandis*, *Petersen v. Denmark* (dec.) 6315/02, *Frederiksen v. Denmark*, (dec.), application no. 23012/02, and *Wallin Karlsen v. Denmark* (dec.), 23523/02). In the present case, originally nine different parties were involved, and although the proceedings were civil in nature, the Court considers that the proceedings were time-consuming and difficult, and for the purposes of Article 6 of the Convention, of a complex nature.

b. The applicant's conduct

40. The applicant maintained that the length of the proceedings could not be attributed to him.

41. The Government considered that the applicant's conduct contributed considerably to the length of the proceedings.

42. At the outset, the Court points out that the first time the applicant objected to the length of the proceedings was in March 2005, when the proceedings had lasted almost seven years and six months. Accordingly, a hearing was held on 22 March 2005 during which a pre-trial review was scheduled to take place on 23 November 2005. Nevertheless on 9 November 2005, although repeating his complaint about the length of the proceedings, the applicant himself requested an adjournment of the proceedings, *inter alia* to find a new counsel. Subsequently, whether in 2006, 2007 or 2008, there is no indication that the applicant before the High Court objected to the adjournments, the scheduling of the trial, or in general complained about the length of the proceedings.

43. More importantly, during the proceedings the applicant changed counsel five times, and during some periods was not legally represented,

which unavoidably had a detrimental impact on the length of the proceedings, see for example the periods from April to October 2000, November 2001 to April 2002, August 2002 to January 2003 and February 2004 to December 2005.

44. In these circumstances the Court considers that the conduct of the applicant and his lawyers caused delay in the examination of the case.

c. Conduct of the national authorities

45. The applicant contended that the High Court did not show due diligence in dealing with the matter, notably due to its delays in fixing court hearings and its fruitless attempts to reach a settlement.

46. The Government maintained that there were no inactive periods attributable to the State before the High Court and that based on an overall assessment, and in the light of the special circumstances, the proceedings were accomplished within a reasonable time.

47. As to the conduct of the relevant authorities, the Court points out that the case was pending before the High Court from 6 October 1997 to 10 December 2008 and accordingly lasted eleven years and two months, which does appear excessive for one judicial instance in such a case.

48. The applicant submitted that the High Court delayed the proceedings by its fruitless attempts to obtain a settlement in the case. The Court notes in this respect that settlement negotiations took place: from 24 November 1999, when the Supreme Court passed its judgment in the *Else Thrane* case to 7 April 2000, when the applicant's first counsel resigned; from October 2000 to the end of April 2001, when the applicant stated that he did not wish to enter into a settlement; from 15 June 2001, when the applicant mentioned that it might be possible to reach a settlement, to November 2001, when he informed the High Court that he did not wish to enter into a settlement; and finally in the period from September 2007 until April 2008, but during the latter period the trial was already scheduled. Thus, it may be argued that in total approximately sixteen months passed with a view to entering a settlement between, at the relevant time, nine different parties. The Court does not find such a period excessive, notably since pleadings were also exchanged during this time and all parties at the relevant time agreed to enter into settlement negotiations.

49. The applicant also submitted that there were scheduling problems before the High Court. The Court notes in this respect that subsequent to the applicant's complaint about the length of the proceedings, on 22 March 2005 the High Court scheduled a pre-trial review to take place on 23 November 2005, thus eight months thereafter. Moreover, during the pre-trial review on 4 May 2006, the trial was fixed for five days to take place in August 2007, thus fifteen months thereafter. Finally, on 23 August 2006 the trial was re-scheduled to take place in September 2007, thus thirteen months thereafter. In the Court's view, although those

scheduling periods are not in themselves sufficiently long to raise an issue in respect of the length of the proceedings, they did contribute thereto.

50. Finally, the Court notes that the High Court adjourned the proceedings for other reasons, for example from March 2004 until January 2005 awaiting the Supreme Court's decision as to a claim from *BG Bank A/S*, and from September 2007 to April 2008 because a legal issue concerning *BG Bank A/S* and a third-party defendant had to be solved on the dates already reserved for the trial. Although those periods, which lasted almost seventeen months, may not as such be imputable to the High Court, nevertheless the latter had authority and the obligation to monitor the progress of the proceedings and to ensure that they were not delayed.

d. Overall assessment

51. Consequently, having regard to the circumstances of the case and taking into account the overall duration of the proceedings before the High Court, the Court concludes that the requirement of a "reasonable time" laid down in Article 6 § 1 of the Convention was not complied with in the present case. There has accordingly been a breach of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

53. A. Damage

54. It appears that the applicant claimed DKK 50,000 (approximately EUR¹ 6,705) in compensation for the violation of his right to a fair trial within a reasonable time.

55. Subject to the Court finding a violation, the Government agreed that generally compensation should be awarded. They found, however, that the applicant's claim was excessive and disproportionate.

56. The Court considers that the applicant must have sustained non-pecuniary damage. Having regard to its finding above, notably as to the complexity of the case and the conduct of the applicant (see, for example, *Kyriakidis and Kyriakidou v. Cyprus*, no. 2669/02, §§ 29 and 38, 19 January 2006, *Iversen v. Denmark*, no. 5989/03, § 80, 28 September 2006, and *Christensen v. Denmark*, no. 247/07, § 108,

¹ On 11 September 2008, when the applicant submitted his claim.

22 January 2009), and ruling on an equitable basis, it awards him EUR 6,000.

B. Costs and expenses before the Court

57. The applicant has not claimed any compensation for the costs and expenses incurred before the domestic courts or for those incurred before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the length of the proceedings before the High Court;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), in respect of non-pecuniary damage plus any tax that may be chargeable on this amount, which is to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Rait Maruste
President