CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 16469/05
by Erik ØVLISEN
against Denmark

The European Court of Human Rights (Fifth Section), sitting on 30 August 2006 as a Chamber composed of:

Mrs S. BOTOUCHAROVA, *President*,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 26 April 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Erik Øvlisen, is a Danish national who was born in 1966 and lives in Roskilde. He is represented before the Court by Mr Kenneth Tygesen, a lawyer practising in Roskilde.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a lawyer by profession.

On 30 December 1998 a pensioner, henceforth called SN, instituted civil proceedings before the High Court of Eastern Denmark (*Østre Landsret*) against the Ministry for Taxation (*Skatteministeriet*) and the Ministry for Social Affairs *(Socialministeriet*), claiming compensation in the amount of approximately 4,000 Danish kroner (DKK), equal to approximately 534 euros (EUR), alleging that the Ministries had used a wrong yearly regulating price index concerning the years from 1995 until 1998, which had been detrimental to his retirement pension received during those years. A successful outcome to the proceedings for SN would have had a significant impact on other pensioners, recipients of social welfare etc., resulting in them having claims of up to DKK 50 billion (approximately EUR 6.5 billion).

The Ministries were represented by the Legal Adviser to the Danish Government (*Kammeradvokaten*), who is a private lawyer. When working for the Treasury it is on the basis of a contract on special conditions e.g. that his fee corresponds to 2/3 of a normal billing rate for lawyers.

On 20 April 1999, the High Court ordered that SN be represented by a lawyer and the applicant agreed to represent him. SN's insurance company paid DKK 60,000 in legal insurance coverage to the applicant. Moreover, on 31 January 2000 the Directorate of Civil Law (*Civilretsdirektoratet*) granted SN free legal aid (*fri proces*) with the consequence that all legal costs and expenses incurred before the High Court were to be paid by the Treasury and that it was for the High Court to decide on the fee to be awarded to the applicant.

On 16 March 2001, the applicant informed the High Court that at that stage he had spent at least 584 hours on the case. By decision of 20 March 2001, the High Court exceptionally granted the applicant a provisional fee amounting to DKK 250,000 plus VAT, equal to approximately EUR 33,333, and informed him that the final calculation of the fee had to await the passing of the judgment in the case.

On 30 November 2001 the Legal Adviser to the Danish Government announced that he was ready for the High Court to schedule the trial.

At a hearing on 7 December 2001 the High Court drew the applicant's attention to section 336 c of the Administration of Justice Act *(Retsplejeloven*), according to which an appointed lawyer was entitled to an appropriate fee, and noted that, according to established practice the calculation of the fee took the guiding rates as the starting point and further depended on the scope of the work, the nature of the case and the values involved. Moreover, the High Court invited the applicant to concentrate on the crucial issues of the case.

By letter of 19 March 2002 the applicant requested that the High Court grant him another provisional fee. He contended that 400 hours of work were still unpaid and that he had spent an additional 121 hours on the case

since his last request. The request was refused by the High Court on 27 March 2002, noting that the decisive factor when calculating the fee was the value of the legal action, which in the present case amounted to DKK 5,000 maximum.

On 2 October 2002, the High Court again invited the applicant to concentrate on the crucial issues and asked him whether the trial could be scheduled.

On 28 February 2003 the High Court scheduled the trial to take place over ten days in February and March 2004.

By letter of 14 March 2003, the applicant requested anew to be granted a provisional fee. He maintained that so far he had received remuneration for only 200 hours of work, whereas 720 hours were still unpaid. Moreover, the applicant estimated that he would need another 300 hours to finish the case, including the ten days for the trial itself.

The High Court refused the request on 15 April 2003 and noted, among other things, that the trial had been fixed for a longer duration, which in itself could be expected to give rise to a not insignificant fee at the end of the case.

The applicant requested that the Leave-to-Appeal Board (*Procesbevillingsnævnet*) grant him leave to appeal against the decision to the Supreme Court (*Højesteret)*. In support thereof he maintained that there was a clear disproportion between the remuneration that he had received and the remuneration that the Legal Adviser to the Danish Government had received. At the relevant time the latter had been paid DKK 1,050,000, equal to EUR 140,000. The Danish Bar and Law Society *(Advokatsamfundet*) intervened on the applicant's behalf and maintained that the said disproportion was a breach of the principle of equality of arms within the meaning of Article 6 of the Convention.

By decision of 3 July 2003 the Leave-to-Appeal Board refused to grant leave to appeal against the High Court's decision of 15 April 2003 as it did not find that the matter raised questions of principle as required by section 392, subsection 2 of the Administration of Justice Act. The decision gave rise to attention from the media and in parliament.

On 13 August 2003 again the applicant applied for a provisional fee, which was granted by the High Court on 20 August 2003 in the amount of DKK 250,000 plus VAT, equal to approximately EUR 33,000. The High Court took note of the fee that had been paid by the Treasury to the Legal Adviser to the Danish Government. At the same time it pointed out that the final determination of the fee to be paid to the applicant had to await the closing of the case before it.

By judgment of 4 June 2004, which ran to 103 pages, the High Court found against SN. The latter was granted leave to appeal against the judgment to the Supreme Court, where the case is still pending. In these proceedings SN was also granted free legal aid.

By decision of 4 June 2004 the High Court also determined the final fee to be paid to the applicant, who had submitted that since the lodging of the case he had spent 1,494 hours on the case. The High Court awarded him a final additional fee for his work before it in the amount of DKK 1,000,000, equal to approximately EUR 133,000, plus reimbursement for costs incurred in the amount of DKK 16,789.

Thus, altogether, for his work before the High Court the applicant was paid DKK 1,560, 000 (approximately EUR 208,000).

The Legal Adviser to the Danish Government was paid an amount of DKK 3,675,000, equal to EUR 490,105, by the Treasury for his work and expenses before the High Court.

On SN's behalf, maintaining that he had been paid too little, the applicant requested that the Leave-to-Appeal Board grant him leave to appeal to the Supreme Court against the High Court's decision of 4 June 2004 concerning the fee.

The request was refused by the Leave-to-Appeal Board on 27 October 2004 as it did not find that the matter raised questions of principle as required by section 392, subsection 2 of the Administration of Justice Act.

On 26 January 2005 the applicant requested that the Leave-to-Appeal Board re-open the case. In support thereof, he referred *inter alia* to a decision of 30 November 2004 (published in the Danish Weekly Law Reports (*Ugeskrift for Retsvæsen*) for 2005. 743H) in which the Supreme Court had increased the fees to be awarded to four lawyers in a concrete case. The applicant also submitted the bill of the Legal Adviser to the Danish Government to the Treasury from which it followed that the former was entitled to approximately DKK 4,000,000. Had the normal hourly billing rate for lawyers been applied, however, the Legal Adviser would have been entitled to approximately DKK 6,000,000 for his work before the High Court.

Before the Leave-to-Appeal Board the applicant also filed an internal note from the High Court specifying that when determining the fee to the applicant it had accepted that he had spent 1330 hours on the case.

On 11 April 2005 the Leave-to-Appeal Board refused to re-open the case.

B. Relevant domestic law and practice

The public legal aid in civil proceedings (*fri proces*) covers expenses of civil actions for persons whose personal income and capital income do not exceed DKK 236,000, or for married couples the amount of DKK 300,000. Applications for aid in civil actions are examined by the Directorate of Civil Law (*Civilretsdirektoratet*) and granted in view of the expected outcome of

the lawsuit. However, granted aid will be paid without regard to the actual findings of the court.

The relevant provisions of the Administration of Justice Act (*Retsplejeloven*) read as follows:

Section 336 c

> 1. The appointed lawyer is entitled to an appropriate fee, in addition to reimbursement for expenses, including travelling costs, which have reasonably been incurred as part of his work.
>
> ...
>
> 4. The court appointing a lawyer also determines the fee and the reimbursement to be paid. The determination thereof is made in an independent decision at the end of the case or the legal action.
>
> 5. The appointed lawyer may not receive fee or reimbursement but for the amount set by the court. ...

In addition, various private insurance companies offer legal insurance coverage often as integrated in the basic family insurance.

Pursuant to Section 392, subsection 2 of the Administration of Justice Act, the Leave-to-Appeal Board may grant leave to appeal to the Supreme Court against the High Court's decisions. Leave to appeal may be granted if the case raises questions of principle.

COMPLAINTS

1. The applicant complained under Articles 6 and 13 of the Convention that without any reasoning he was refused leave to appeal against the High Court's decision of 4 June 2004 concerning his fee. Thus, he maintained, he did not have access to a tribunal regarding his claim that the fee was too little.

2. Under the same provisions the applicant also complained that the proceedings before the High Court were unfair in that SN was placed at a disadvantage vis-à-vis his opponents, the ministries, in respect of the unequal resources allowed to be paid to the parties' lawyers.

THE LAW

1. The applicant invoked Articles 6 and 13, which in so far as relevant provide:

Article 6 § 1

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Access to court

The Court recalls that Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations, however, it extends only to "contestations" (disputes) over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law.

As to the notion "civil rights and obligations", merely showing that a dispute is pecuniary in nature is not in itself sufficient to attract the applicability of Article 6 § 1 under its "civil" head. In particular, according to the traditional case-law of the Convention institutions, there may exist pecuniary obligations vis-à-vis the State or its subordinate authorities which, for the purpose of Article 6 § 1, are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of "civil rights and obligations". Apart from fines imposed by way of 'criminal sanction', this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society..." (see, for example, *Ferrazzini v. Italy* [GC], no. 44759/98, § 25, ECHR 2001-VII).

The Court also recalls that notwithstanding the specific character of professions which are exercised in the general interest and which entails special duties incumbent on its members, the Court has found Article 6 § 1 applicable when a private right was at issue (see, *inter alia*, *Le Compte, Van Leuven and De Meyere v. Belgium,* judgment of 23 June 1981, Series A no. 43).

More specifically as regards the profession of lawyers, so far the Court has found Article 6 § 1 applicable in cases concerning respectively the readmission to the Bar of an advocate who had been struck off the Roll, and a refusal to enrol a person on the list of pupil advocates (see *H. v. Belgium,*

*(*judgment of 30 November 1987, Series A no. 127-B, §§ 46-47 and *De Moor v. Belgium,* judgment of 23 June 1994, Series A no. 292-A). In the former judgment the Court noted, among other things, that "unless officially assigned to a case by the court, an [avocat] has clients whom he chooses voluntarily and directly, without any intervention by a public authority; he can refuse to act if his conscience so dictates and even for other reasons. The instructions to act, which bind him to his client are revocable at will by either party and constitute a private-law relationship. As to fees, the avocat fixes them himself "with the judiciousness to be expected of [his] office"(*ibidem*).

In the present case, the Court does not find it necessary to determine whether the applicant's complaint concerns a "civil right", but will in the following proceed on the assumption that such was at stake (see, for example, *Kiiskinen and Kovalainen v. Finland*, no. 26323/95, Commission decision of 28 May 1997).

The next question that arises is thus whether, and in the affirmative, with whom the applicant had a dispute over a civil right.

The Court recalls that the principles relating to the notion "dispute" (see, for example, *Benthem v. the Netherlands*, (judgment of 23 October 1985, Series A no. 97, § 32) include the following:

> "(a) Conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning"
>
> (b) The dispute may relate not only to "the actual existence of a ... right" but also to its scope or the manner in which it may be exercised. It may concern both "questions of fact" and "questions of law"
>
> (c) The dispute must be genuine and of a serious nature
>
> (d) A dispute over civil rights and obligations covers all proceedings the result of which is decisive for [such] rights and obligations. However, a tenuous connection or remote consequences do not suffice for Article 6 § 1. Civil rights and obligations must be the object - or one of the objects - of the dispute and the result of the proceedings must be directly decisive for such a right."

The applicant submitted that the dispute in question arose between him and the High Court since it was for the latter to determine his fee and it was the amount thereof which became the object of the dispute.

The Court is not convinced by this construction. Evidently, the applicant's right to a reasonable fee represented one interest. His right thereto was set out in section 336 c of the Administration of Justice Act, stating that an appointed lawyer is entitled to an appropriate fee for his work before the court (in addition to reimbursement for expenses, including travelling costs, which had reasonably been incurred as part of his work).

Opposite, however, the Treasury had an interest not to pay an amount exceeding the reimbursement of fees and expenses, which had reasonably been incurred. It will be recalled in this respect that SN had been granted free legal aid and that consequently all legal costs and expenses incurred before the High Court were to be paid by the Treasury.

Seen in this light, the Court cannot but consider the dispute in substance as one between the applicant and the Treasury.

Turning to the proceedings before the High Court, which related to the dispute about the fee to be paid, the applicant was heard both before the High Court made its decisions exceptionally to grant him provisional fees on respectively 20 March 2001 and 20 August 2003, and before the High Court made its final determination of the fee on 4 June 2004. On the same day it passed judgment in the main proceedings between on the one hand SN and on the other hand the Ministry for Taxation and the Ministry for Social Affairs.

In connection with the final determination of the fee, the applicant had submitted that he had spent 1,494 hours on the case. The High Court accepted that 1,330 hours had appropriately been spent and awarded him an amount of DKK 1,560, 000, equal to EUR 208,000, including the provisional fees.

In these circumstances the applicant's dispute with the Treasury was indeed determined by a court, and the Court has found no elements which could suggest that the decision thereon was arbitrary or that the proceedings in other respect failed to live up to the requirements of Article 6 of the Convention. Thus, the applicant did have access to a tribunal regarding his claim in question under that provision.

Moreover, in so far as the applicant's complaint related to the outcome of these proceedings, the Court recalls that it is not its function to substitute its own assessment of the facts and evidence for that of the national courts or to act as a fourth instance appeal (see, among many other examples, *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, § 34). The Court furthermore recalls that Article 6 of the Convention does not guarantee the payment of any particular amount under a legal aid scheme (see *Kiiskinen and Kovalainen v. Finland*, quoted above).

Accordingly, the Court finds no appearance of any violation of Article 6 of the Convention as regards this aspect of the case.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention

The decision to refuse leave to appeal

The applicant also complained that he was refused leave to appeal against the High Court's decision of 4 June 2004 concerning his fee and that the Leave-to-Appeal Board did not reason its decision thereon.

The Court reiterates that in civil cases the Convention does not guarantee a right of appeal and that a procedure requiring leave to be obtained for an appeal is consistent with the Convention. It notes, further, that although the concept of fairness referred to in Article 6 § 1 of the Convention requires judicial decisions to contain sufficient reasoning, it cannot be understood as requiring a detailed answer to every argument (see, among other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-1).

In the present case, on 27 October 2004 the Leave-to-Appeal Board refused the applicant's request for leave to appeal to the Supreme Court against the High Court's decision of 4 June 2004 since it did not find that the matter raised questions of principle as required by section 392, subsection 2 of the Administration of Justice Act.

The Court finds that the Leave-to-Appeal Board's decision contained sufficient reasons for the purposes of Article 6 § 1 (see, *inter alia*, *Bufferne v. France* (dec.), no. 54367/00, ECHR 2002-III (extracts) and *Burg and Others v. France* (dec.), no. 34763/02, ECHR 2003-II).

Consequently, this part of the application is manifestly ill-founded and must be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The Court recalls that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.

Having regard to its above conclusion as to the complaint under Article 6 § 1, the Court considers that it is not necessary to examine the case under Article 13 since its requirements are less strict than, and are here absorbed by, those of Article 6 § 1 (see, for example, *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, § 43, ECHR 2004-IX).

It follows that the complaint under Article 13 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Finally, the applicant complained that the main proceedings before the High Court, between on the one hand SN and on the other hand the Ministry for Taxation and the Ministry for Social Affairs, were unfair, notably because SN was placed at a disadvantage vis-à-vis his opponents in respect of the unequal resources allowed to be paid to the parties' lawyers.

The Court notes that SN was granted leave to appeal against the High Court judgment of 4 June 2004 to the Supreme Court, where the case is still pending. Therefore the question of fairness of the proceedings may be raised before the Supreme Court. In any event, the Court finds that the applicant in the present case was not directly affected by this complaint, as opposed to SN, and that therefore he cannot claim to be a victim of that alleged violation, as required by Article 34 of the Convention. Accordingly, this complaint is incompatible *ratione personae* with the provisions of the Convention, within the meaning of Article 35 § 3.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

Snejana BOTOUCHAROVA
President