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. 26194/03
by HANSEN and Others
against Denmark

The European Court of Human Rights (Fifth Section), sitting on 29 May 2006 as a Chamber composed of:

Mrs S. BOTOUCHAROVA, *President*,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Registrar,*

Having regard to the above application lodged on 13 August 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant family consists of the parents, Anne Vibe Hansen and Jørgen Bøggild Møller (the second applicant), and their son, Martin Vibe Bøggild Hansen, henceforth called M, all Danish nationals, born in 1956, 1951 and 1977 respectively. They are represented by the second applicant.

The Danish Government ("the Government") are represented by their Agent, Mrs Nina Holst-Christensen, of the Ministry of Justice.

A. The circumstances of the case

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

M was born at a hospital on 16 December 1977, approximately two months before expected delivery. According to the applicants, he was born six weeks before expected delivery since at birth he weighed 2000 grams and measured 43 cm. Since birth M has been multi-handicapped, amongst others severely brain damaged and blind.

On 15 January 1991 the applicant parents required access to various medical records and on 18 September 1991 they complained to a medical officer of health (*embedslægen*) that alleged malpractice had taken place when M had been born. The complaint was forwarded to the Health Service Patients Complaint Board (*Sundhedsvæsnets Patientklagenævn)* which after having heard the National Health Service (*Sundhedsstyrelsen)* dismissed it on 7 April 1992 finding that it had been submitted out of time.

The applicants complained to the Parliamentary Ombudsman *(Folketingets ombudsmand),* who in a letter of 30 March 1993 gave his opinion about the proceedings before the Health Service Patients Complaint Board.

On 19 July 1993, on behalf of M, the second applicant instituted proceedings before the High Court of Eastern Denmark *(Østre Landsret)* against the County of Funen *(Fyns Amt)* which was responsible for the above hospital. He claimed compensation in the amount of 1,500,000 Danish Kroner (DKK), equal to approximately 200,000 euros (EUR), alleging that malpractice had taken place before, during or after the birth of M. The latter was granted free legal aid during the proceedings before the High Court.

In the beginning of the proceedings before the High Court, procedural questions were determined e.g. on 13 April 1994, when the High Court found that the applicants' claim had not become time-barred.

Thereafter, the parties wished to put questions to the Medico-Legal Council *(Retslægerådet)*. The wording of the questions was left to the parties to negotiate, but a disagreement thereon arose and the parties did not request that the High Court intervened, as they could have done. Accordingly, the parties spent the period from May 1994 to February 1995 solely on coming to an agreement on the wording of the questions.

On 15 February 1995 the parties submitted forty-two questions to the Medico-Legal Council.

In order to cover the specialist field of gynaecology/obstetrics, paediatrics, anaesthesiology and ophthalmology, six deliberating experts were involved in the case, which was circulated among them three times before on 25 June 1996, they submitted their statement/reply to the questions.

Subsequently, having obtained further medical journals as to M's condition during the days after his birth, the parties wished to put supplementary questions to the Medico-Legal Council. However, during the period from September 1996 to November 1997 the parties to the proceedings were again unable to agree on the wording of the questions to be put. On 18 November 1997 a total of fifty-two questions were submitted to the Medico-Legal Council, which involved four deliberating experts in the case to cover the special fields of gynaecology/obstetrics, paediatrics, anaesthesiology and ophthalmology. The supplementary statement/reply by the Medico-Legal Council was submitted on 2 September 1998.

During 1999 and in the beginning of 2000 several procedural issues were determined, notably as to which and how many witnesses to hear, e.g. by a decision of 25 June 1999, against which leave to appeal was refused by the Leave to Appeal Board (*Procesbevillingsnævnet*) on 4 August 1999.

On 24 August 1999 M's parents intervened in the High Court proceedings with an independent claim that the defendant should pay compensation to them in an amount of DKK 3,000,000.

During a court session on 27 October 1999 the trial was scheduled to commence on 21 September 2000. Thereafter pleadings were submitted and the trial took place from 21 until 27 September 2000. The applicant parents, five doctors and three professors in medicine were heard. In addition, a substantial amount of written evidence was submitted.

By judgment of 13 December 2000 the High Court found against the applicants. M was ordered to pay legal costs to the defendant in the amount of DKK 100,000 equal to approximately EUR 13,330. This sum was covered by M's grant of legal aid. The applicant parents were ordered to pay legal costs to the defendant in the amount of DKK 50,000 equal to approximately EUR 6,660.

On 5 February 2001 the applicants appealed against the judgment to the Supreme Court (*Højesteret*) repeating their claim. In addition, the applicants involved the High Court's judges in the proceedings, claiming that they be ordered to pay compensation pursuant to section 322 cf. section 321 of the Administration of Justice Act.

The applicants' request for free legal aid in the appeal proceedings was refused by the Directorate of Civil Law (*Civilretsdirektoratet*) on 20 February and 21 March 2001.

On 23 February and 9 March 2001 the applicant parents reported various doctors to the police. By letters of 20 and 22 March 2001 the Copenhagen Police (*Københavns Politi*) informed the applicants that they found no reason to instigate criminal proceedings against the relevant doctors, a decision that was upheld on appeal by the Regional State Prosecutor (*Statsadvokaten*) on 29 June 2001.

On 13 February 2003 the applicant parents submitted a complaint about the Medico-Legal Council to the Ministry of Justice *(Justitsministeriet*), which dismissed it on 17 March 2003.

Before the Supreme Court additional written evidence was submitted and one of the doctors, who had been heard before the High Court, gave a supplementary statement on 27 June 2002. By decision of 20 September 2002 the Supreme Court refused the applicants' request that additional witnesses be heard.

The trial took place on 9 April 2003.

By judgment of 24 April 2003 the Supreme Court found against the applicants. In those proceedings, none of the applicants had been granted free legal aid. Therefore, since the Supreme Court had found for the defendant, in ordinary circumstances the applicants would have been obliged to pay the costs incurred by the defendant party. However, having regard to the length of the proceedings the Supreme Court stated as follows:

> "The Supreme Court finds, having regard to the extraordinary long duration of the proceedings since their initiation in 1993, that [all the applicants] should be exempted entirely from paying costs to the defendant public authorities, in spite of the outcome of the case before both the High Court and the Supreme Court".

B. Relevant domestic law

Danish law does not refer to a remedy specifically designed or developed to provide redress in respect of complaints about an excessive length of civil proceedings. Accordingly to domestic case-law, however, in civil proceedings initiated by an individual against or involving Government Institutions, if the courts, having examined a length-of-proceedings complaint, finds a violation, they may grant redress therefore by for example exempting the individual from paying legal costs or by deciding that expenses and fees shall be covered by the Treasury (see, *inter alia*, *Kirsten Norman v. Denmark* (dec.), no. 44704/98, 14 June 2001).

COMPLAINTS

The applicants complained under Article 6 § 1 of the Convention that the proceedings and their outcome were unfair before the various authorities which were involved with the case. With regard to the judicial instances the applicants complained, notably, that the judges were partial and the evidence was assessed wrongly. Also, invoking the same provision, the applicants complained about the length of the proceedings.

THE LAW

The applicants invoked Article 6 § 1 of the Convention which read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The applicants' complaint about the length of the proceedings

The Government maintained that although the Supreme Court did not expressly mention Article 6 § 1, nevertheless in substance it recognised that the proceedings had taken a long time and provided redress therefore in accordance with the Convention. Thus, in their view the applicants could no longer claim to be victims within the meaning of Article 34 of the Convention.

The applicants contended that although the Supreme Court exempted them from paying costs before it, they could still be considered victims within the meaning of Article 34. In their view the Supreme Court had failed both to acknowledge in a clear and sufficient way that the length of the proceedings had exceeded the reasonable time requirement of Article 6 § 1 and failed to provide sufficient compensation therefor. As to the latter the applicants submitted that they did not receive any compensation, they were merely spared from suffering yet another allegedly unfair financial loss. They pointed out in this respect that since only M had been granted free legal aid in the proceedings before the High Court, the applicant parents' had to pay 55,000 Danish kroner (DKK) for court fees and fees to the lawyer representing them (i.e. own costs as opposed to the defendant party's costs). Moreover, before the Supreme Court, none of the applicants were granted free legal aid, thus court fees were incurred them in the amount of DKK 162,690. Furthermore, the second applicant, who had represented the applicants before the Supreme Court, had not been paid for his work.

The Court reiterates that under Article 34 of the Convention it may "receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting parties of the rights set forth in the Convention or the Protocols thereto..." and that in principle a decision or measure favourable to an applicant is not sufficient to deprive him of his status as a "victim" unless, the national authorities have acknowledged,

either expressly or in substance, the failure to observe the reasonable time requirement and then provided redress therefor (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-...; *Riccardi Pizzati v. Italy* [GC], no. 62361/01; *Musci v. Italy* [GC], no. 64699/01; *Giuseppe Mostacciuolo v. Italy* (No. 1) [GC], no. 64705/01; *Giuseppe Mostacciuolo v. Italy* (No. 2) [GC], no. 65102/01; *Cocchiarella v. Italy* [GC], no. 64886/01; *Apicella v. Italy* [GC], no. 64890/01; *Ernestina Zullo v. Italy* [GC], no. 64897/01; and *Giuseppina and Orestina Procaccini v. Italy* [GC], no. 65075/01, all of 29 March 2006; Eckle v. Germany judgment of 15 July 1982, Series A no. 51, § 66; *Jensen v. Denmark* (dec.), no. 48470/99, 20 September 2001, ECHR 2001-X and *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001, unpublished).

In the present case it will be recalled that in spite of the fact that the applicants lost their case before both the High Court and the Supreme Court, the latter "having regard to the extraordinary long duration of the proceedings since their initiation in 1993", found that all three applicants should be exempted entirely from paying costs to the defendant public authorities.

Although the Supreme Court's reasoning could have been more precise, the Court is satisfied that at least in substance it acknowledged a failure to observe the reasonable time requirement (see for example *Kelling v. Denmark* (dec.), no. 32460/96, 2 February 1999; and *mutatis mutandis Beck v. Norway*, no. 26390/95, § 28, 26 June 2001).

Accordingly, the crucial issue remains whether the applicants were granted sufficient redress therefore.

In the above mentioned nine cases against Italy (for example *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-...) the Italian Government had raised, among other things, a preliminary objection relating to the victim status of the applicants as in their view, by awarding the applicants compensation the domestic courts had not only acknowledged the violation of the right to a hearing within a reasonable time, they had also made good the loss sustained. The Court had regard to what it would have awarded in the same situation and noted that the sums awarded by the Italian courts were at the lowest 8% and at the highest 27%, according to the case, of what it generally awarded in similar cases. In conclusion, the Court found that various requirements had not been satisfied and that the redress was therefore insufficient. Thereafter, having found a violation, under Article 41 of the Convention the Court awarded the applicants an additional compensation.

In the present case the Supreme Court exempted the three applicants entirely from paying costs to the defendant public authorities, both before the High Court and before the Supreme Court.

More specifically, before the High Court the applicant parents were exempted from paying an amount equivalent to EUR 6,660 to the defendant

as ordered by the High Court in its judgment of 13 December 2000 (the amount of approximately EUR 13,330 that the High Court in the same judgment ordered that M pay to the defendant must be disregarded in this respect, since M was granted free legal aid in those proceedings so that the amount in any event had to be paid by the Treasury).

In the proceedings before the Supreme Court, none of the applicants was granted free legal aid. Therefore, all of them were exempted from paying the costs incurred by the defendant, namely the County of Funen (and the three High Court Judges that the applicants had involved in the Supreme Court proceedings). The exact amount of those costs is unknown.

Having regard to the duration of the proceedings which lasted almost ten years and the applicants' contribution to this length, the Court is satisfied that the overall redress awarded by the Supreme Court, even if it cannot be exactly quantified, was reasonable in comparison to what the Court would have awarded in a similar case.

The applicants cannot, therefore, complain to be victims of a violation of their right to a hearing within a reasonable time, as guaranteed under Article 6 § 1.

It follows that this part of the application must be rejected in accordance with Article 35 § 3 and § 4 of the Convention.

The remainder of the applicants' complaints

The Court has examined the remainder of the applicants' complaints as they have been submitted. In the light of all the material in its possession, and in so far as the criteria set out in Article 35 § 1 have been complied with and the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia WESTERDIEK
Registrar

Snejana BOTOUCHAROVA
President