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Legaliteitsbeginsel. Invoeren strafbepaling voortdurend misdrijf levert i.c. geen verboden terugwerkende kracht op voor gedragingen gepleegd voorafgaand aan inwerkingtreding

Barkhuysen, T.; Emmerik, M.L. van

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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS (GROTE KAMER)

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(D. Spielmann, J. Casadevall, G. Raimondi, I. Ziemele, I. Berro, E. Steiner, P. Hirvelä, M.L. Trajkovska, I. Karakaş, K. Pardalos, P. Pinto de Albuquerque, A. Pejchal, V. Gričco, F. Vehabović, D. Dedov, E. Küris, R. Spano)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 7 EVRM

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Legaliteitsbeginsel. Invoeren strafbepaling voortdurend misdrijf levert i.c. geen verboden terugwerkende kracht op voor gedragingen gepleegd voorafgaand aan inwerkingtreding.

Klager wordt in 2006 beschuldigd van het meermaals mishandelen van zijn vrouw in de periode 2000 tot en met 2006. Naast de reeds bestaande strafbaarstelling van mishandeling in het Tsjechische Wetboek van Strafrecht neemt de wetgever per 1 juni 2004 een specifieke strafbepaling op waarin het mishandelen van huis- en gezinsleden een hoger strafmaximum kent dan de algemene strafbaarstelling. Volgens het tweede lid van de nieuwe strafbepaling (artikel 215a) wordt de straf nog eens verhoogd als het feit over een langere periode wordt voortgezet. Klager wordt tot in hoogste nationale instantie schuldig bevonden aan overtreding van dit nieuwe misdrijf, met verzwaarde strafoplegging vanwege het voortduren van de mishandeling over een periode van zes jaar.

Voor de Grote Kamer van het Hof doet klager een beroep op artikel 7 EVRM. Hij betoogt onder meer dat de strafbepaling met terugwerkende kracht is toegepast en dat hem een zwaardere straf is opgelegd dan onder het oude recht het geval zou zijn geweest. Ter onderbouwing stelt hij dat diverse ten laste gelegde gedragingen zijn gepleegd voorafgaand aan de inwerkingtreding van artikel 215a op 1 juni 2004, terwijl ook deze gedragingen meegenomen zijn in de kwalificatie van het, zwaardere, voortgezette misdrijf.

Onder verwijzing naar het arrest Del Rio Prada t. Spanje roept het Hof enkele dragende uitgangspunten van artikel 7 EVRM in herinnering: zowel het strafbare feit als de hoogte van de straf dient duidelijk in een wet omschreven en voldoende voorzienbaar te zijn ten tijde van het plegen van de gedragingen. Het Hof ziet zich aldus voor de vraag gesteld of de strafrechtelijke vervolging op grond van artikel 215a voor klager voldoende voorzienbaar was. Het Hof beantwoordt deze vraag bevestigend. Uit vaste

jurisprudentie van het Tsjechische Hooggerechtshof blijkt dat een voortgezet delict bestaat uit op zichzelf staande gedragingen die juridisch worden gekwalificeerd onder het geldende strafrecht ten tijde van de voltooiing van de laatste gedraging. Nu deze jurisprudentie reeds vóór de eerste ten laste gelegde gedraging van klager bestond, de individuele gedragingen ook strafbare feiten opleverden ten tijde van het plegen van de gedragingen vóór invoering van de nieuwe strafbepaling en klager na de invoering van de nieuwe strafbepaling op 1 juni 2004 de mishandelingen heeft gecontinueerd, is het Hof van oordeel dat klager mocht en moest verwachten dat zijn gedrag strafbaar was onder het nieuwe voortgezette delict van artikel 215a. De strafrechtelijke aansprakelijkheid van klager was aldus voorzienbaar. Van een zwaardere straf is volgens het Hof evenmin sprake. Unaniem geen schending van artikel 7 EVRM.

Rohlena
tegen
Tsjechië

The Law*Alleged violation of article 7 of the convention*

41. The applicant complained that the Criminal Code had been applied retroactively in his case, pointing out that he had been convicted of a continuous offence of abusing a person living under the same roof which, according to the courts, encompassed his conduct even before that offence had been introduced into the law. He also alleged that the courts had not duly examined whether his actions prior to that date would have amounted to a criminal offence under the old law. He relied in that regard on Article 7 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

42. The Government contested that argument.

A. *The Chamber judgment*

43. In its judgment of 18 April 2013 the Chamber found that there had been no violation of Article 7 of the Convention. It accepted that, from the standpoint of Czech law, extending the application of the Criminal Code, as worded after 1 June 2004, to acts committed by the applicant prior to that date had not amounted to retroactive application of the criminal law. It also observed that the interpretation of the general concept of a continuation of a criminal offence as defined in Article 89 § 3 of the Criminal Code had been based on the clear and established case-law of the Supreme Court which had been developed prior to the date on which the applicant had first assaulted his wife. In so far as the applicant disputed the effects of that interpretation, which in his view had in fact resulted in retroactive application of the law, the Chamber held that the interpretation adopted by the courts in the present case had not in itself been unreasonable, given that a continuous offence, by definition, extended over a certain period of time and that it was not arbitrary to consider that it had ceased at the time of the last occurrence of the offence. Moreover, the Czech authorities had observed that the applicant's acts had at all times been punishable as criminal offences. In these circumstances the relevant legal provisions, together with the interpretative case-law, had been such as to enable the applicant to foresee the legal consequences of his acts and adapt his conduct accordingly.

B. *The parties' submissions to the Grand Chamber*

1. *The applicant*

44. While admitting that the domestic courts' interpretation of Article 89 § 3 of the Criminal Code was foreseeable and generally accepted, the applicant asserted that it should not have been applied in his case since the conditions for applying the provision in question had not been met. In his opinion, the domestic authorities ought not to have classified his acts as a continuous offence because his assaults had not been driven by the same intent, nor had they been closely connected in time since there had been an interval of several years between the different assaults. He also pointed out that when the proceedings took place before the first-instance court, the prosecution of two individual assaults had already been statute-barred and they could not therefore be the subject of criminal proceedings.

45. Furthermore, the domestic courts had never established that all the constituent elements of the criminal offences defined by the Criminal Code as in force until 1 June 2004 (violence

against an individual or group of individuals within the meaning of Article 197a, or assault occasioning bodily harm under Article 221) had been made out. In the applicant's opinion, his acts had not been punishable as criminal offences but simply as regulatory offences. He had thus been convicted of acts which did not constitute a criminal offence under national or international law at the time they were committed, in breach of Article 7 of the Convention.

46. Finally, the applicant maintained that he did not enjoy sufficient safeguards against the imposition of a heavier penalty than the one applicable at the time of the commission of the offence. On the contrary, had the individual assaults been tried separately it would not have been possible to impose such a heavy sentence on him.

2. *The Government*

47. The Government noted that both Article 89 § 3 and Article 215a of the Criminal Code had been incorporated into the Czech legal system well before the applicant had ceased his criminal conduct in February 2006. At the relevant time there had also existed a considerable body of case-law in respect of continuous offences and the interpretation of Article 89 § 3 of the Criminal Code which followed the same logic as that applied in the instant case. It was thus clearly established that the conduct should be assessed as a single offence under the law in force at the time it came to an end. Moreover, in the Government's view, the introduction on 1 June 2004 of Article 215a of the Criminal Code had rendered the likelihood of the applicant's being held criminally liable even clearer and more foreseeable. Indeed, the new Article 215a of the Criminal Code dealt with unlawful conduct in a more comprehensive manner than Articles 197a and 221. Since the applicant had continued his unlawful acts after 1 June 2004, he could and should have expected to be held criminally liable under Article 215a of the Criminal Code for all his acts including those that had preceded the change in the legislation.

48. Contrary to what had been suggested by the applicant, the Government asserted that the requirement of a close temporal connection between the assaults constituting the continuous offence had also been satisfied in this case. They conceded that the close temporal connection as defined by domestic judicial practice generally referred to days, weeks or months. However, a maximum limit had never been set and the notion necessarily allowed for flexibility depending on the nature of the offence in question. It followed from the evidence gathered in the case and from the domestic courts' reasoning that the three incidents of 24 June 2000, 17 July 2003

and 8 February 2006 had been singled out as the most violent. The courts had consistently held that the applicant's unlawful conduct had spanned a period of several years and that the individual assaults perpetrated by him had been of varying intensity and recurrent in nature, occurring within weeks of each other. Furthermore, the bill of indictment as well as the domestic courts' decisions had clearly stated that the applicant was being tried for actions carried out before and after the entry into force of Article 215a which could not be separated from each other. The requirement of legal certainty had thus been met as a result of the consistent assessment of the case by the prosecution and the courts (the Government cited, to converse effect, *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, §§ 33–35, ECHR 2001-II). It was clear from the conviction itself that the courts were also of the view that the applicant's actions taken as a whole had disclosed the elements of the offence defined by Article 215a of the Criminal Code.

49. The Government therefore concluded that the requirement of a sufficiently clear and foreseeable legal basis had been satisfied, that the new criminal law had not been applied retroactively and that the applicant had not been given a heavier penalty than under the old law. In this regard, they assumed that, had the concept of a continuous offence as understood by the Czech courts been abandoned and the applicant's actions before and after 1 June 2004 been assessed separately, the applicant's possible sentence would have been either the same or more severe than the one actually imposed. Indeed, in that event the applicant would have been tried for multiple offences punishable by a concurrent sentence which would have been defined on the basis of the provision concerning the most serious offence, that is to say, Article 215a of the Criminal Code. Moreover, the existence of multiple criminal offences and the duration of the conduct in question would have constituted aggravating circumstances.

C. *The Court's assessment*

1. *General principles*

50. The Court recalls that in *Del Rio Prada v. Spain* ([GC], no. 42750/09, ECHR 2013), its most recent Grand Chamber judgment concerning Article 7 of the Convention, it stated the following general principles that are relevant to its determination of the present case:

“(a) *Nullum crimen, nulla poena sine lege*

77. The guarantee enshrined in Article 7, which is an essential element of the rule of law,

occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom and C.R. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B, and § 32, Series A no. 335-C, respectively, and *Kafkaris*, cited above, § 137).

78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see *Welch v. the United Kingdom*, 9 February 1995, § 36, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 35, Series A no. 317-B; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and *Mihai Toma v. Romania*, no. 1051/06, §§ 26–31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 42–43, ECHR 1999-IV).

79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provi-

sion which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV).

(b) *The concept of a 'penalty' and its scope*
...

(c) *Foreseeability of criminal law*

91. When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Kokkinakis*, cited above, §§ 40–41; *Cantoni*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis*, cited above, § 40, and *Cantoni*, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Kafkaris*, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (*ibid.*). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see

S.W. and C.R. v. the United Kingdom, cited above, § 36 and § 34 respectively; *Streletz, Kessler and Krenz*, cited above, § 50; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Korbely v. Hungary* [GC], no. 9174/02, § 71, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, §§ 35–36, 10 October 2006, and *Dragotiniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43–44, 24 May 2007; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, §§ 154–162, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated."

51. The Court also reiterates that it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence (see, *mutatis mutandis*, *Florin Ionescu v. Romania*, no. 24916/05, § 59, 24 May 2011). More generally, the Court points out that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. Its role is thus confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; *Korbely v. Hungary* [GC], no. 9174/02, §§ 72–73, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 197, ECHR 2010).

52. However, the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention. To accord a lesser power of review to this Court would render Article 7 devoid of purpose (see *Kononov*, cited above, § 198).

53. In sum, the Court must examine whether there was a sufficiently clear legal basis for the applicant's conviction (see *Kononov*, cited above, § 199).

2. *Application of the above principles to the present case*

54. The Court observes that the core of the applicant's arguments consisted in maintaining, firstly, that his acts prior to 1 June 2004 had not been punishable under the criminal law applicable at the time they were committed, since they had not comprised the constituent elements of the offences referred to by the authorities, namely those covered by Articles 197a and/or 221 of the Criminal Code, but had amounted solely to regulatory offences; and, secondly, that the different assaults could not be classified as a continuous offence because they had not been driven by the same intent or been closely connected in time, there being no actual evidence to that effect.

55. However, it follows from the limitations referred to in paragraphs 51–52 above that the Court is not called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. It was indeed for the domestic authorities to assess the findings of facts and the applicant's intent on the basis of the evidence presented before them and to decide, pursuant to the domestic law as interpreted in judicial practice, whether the applicant's conduct ought to be classified as a continuous offence, a continuing offence or as repeated or cumulative offences. Thus, it is not for the Court to express an opinion on whether the acts committed by the applicant before 1 June 2004 comprised the constituent elements of criminal offences defined by the above provisions (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998–VII) or whether the applicant's conduct was to be classified as a continuous offence under domestic law.

56. Rather, the Court's function under Article 7 § 1 is twofold in the present case. Firstly, it must examine whether, at the time they were committed, the applicant's acts, including those carried out before the entry into force of Article 215a of the Criminal Code on 1 June 2004, constituted an offence defined with sufficient foreseeability by domestic law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 51, ECHR 2001-II; *Veeber v. Estonia* (no. 2), cited above, § 33; and *Korbely*, cited above, §§ 72–73), the question of accessibility not being in issue here. Secondly, the Court must determine whether the application of this provision by the national courts to encompass those acts that were committed before 1 June 2004 entailed a real possibility of the applicant's being subjected to a heavier penalty in breach of Article 7 of the

Convention (see, *mutatis mutandis*, *Maktouf and Damjanović*, cited above, § 70).

(a) *Whether the offence was defined with sufficient foreseeability*

57. The Court has previously been called upon to examine the merits of two cases concerning the conviction of an applicant for a continuing or continuous criminal offence, albeit without distinguishing between these two types of offence (see *Ecer and Zeyrek* and *Veeber* (no. 2), both cited in paragraph 28 above). In the aforementioned judgments it observed that, by definition, such an offence was a type of crime committed over a period of time (see *Veeber* (no. 2), cited above, § 35). It further held that, when an accused was charged with a 'continuing' offence, the principle of legal certainty required that the acts which went to make up that offence, and which entailed his criminal liability, be clearly set out in the bill of indictment. Furthermore, the decision rendered by the domestic court also had to make it clear that the accused's conviction and sentence resulted from a finding that the elements of a 'continuing' offence had been made out by the prosecution (see *Ecer and Zeyrek*, cited above, § 33).

58. The Court also reiterates that in any system of law it is for the domestic courts to interpret the provisions of substantive criminal law in order to determine, by reference to the structure of each offence, the date on which, all the requirements of the offence being present, a punishable act was committed. The Convention may not act as a bar to this kind of judicial interpretation, provided that the conclusions reached by the domestic courts are reasonably foreseeable within the meaning of the Court's case-law (see *Previti v. Italy* (dec.), no. 45291/06, § 283, 8 December 2009).

59. Turning to the specific circumstances of the present case, the Court notes from the outset that the applicant was convicted as charged, namely for having, at least between 2000 and 8 February 2006, repeatedly physically and mentally abused his wife while he was drunk (for further details see paragraph 10 above). As a result, his wife had sustained serious injuries obliging her to seek medical assistance on 26 June 2000, 18 July 2003 and 8 February 2006 (see paragraph 10 above). In its judgment of 21 February 2008 the Supreme Court upheld the lower courts' legal classification of the offence as abuse of a person living under the same roof within the meaning of Article 215a of the Criminal Code, as in force since 1 June 2004, and applied that provision also to the abuse perpetrated by the applicant against his wife before that date. In that connection, the

Supreme Court referred to its ruling (Tzn 12/93) of 8 December 1993 to the effect that a continuous criminal offence was to be considered as a single act and that its legal classification in criminal law had to be assessed under the law in force at the time of completion of the last occurrence of the offence. Thus Article 215a also applied to the earlier assaults, provided that these would have amounted to criminal conduct under the previous law, and the applicant's conduct prior to the amendment of 1 June 2004 had amounted at least to an offence punishable under Article 197a or Article 221 § 1 of the Criminal Code. After having examined the file, the Supreme Court concluded that the applicant's actions disclosed all the constituent elements of the offence of abusing a person living under the same roof within the meaning of Article 215a §§ 1 and 2(b) of the Code. Since the offence in question had been perpetrated at least from 2000 until 8 February 2006, the material conditions for considering the offence as aggravated on the ground of its long duration, in accordance with paragraph 2(b) of Article 215a, had been fulfilled (see paragraph 13 above).

60. The Court further observes that it is implicit from the Supreme Court's reasoning as outlined above, stated with reference to the ruling of 8 December 1993, that its interpretation did have regard to the particular standard contained in Article 89 § 3, by means of which the concept of a continuation of a criminal offence developed by the case-law was introduced into the Criminal Code in 1994 (see paragraphs 20 and 24 above), that is to say, prior to the first assault on his wife of which the applicant was convicted (see, conversely, *Veeber*, cited above, § 37). Indeed, as the applicant confirmed in his pleadings to the Court, he did not dispute the foreseeability of the national courts' application of the Article 89 § 3 standard to his case.

61. Under this provision, a continuation of a criminal offence was defined as consisting of individual acts driven by the same purpose, which constituted the same offence and were linked by virtue of being carried out in an identical or similar manner, occurring close together in time and pursuing the same object. It emerges from the clear and settled case-law of the Supreme Court (see paragraphs 25–27 above) and from the views expressed in the legal literature (see paragraph 24 above) that a continuous offence was considered to constitute a single act, whose classification in Czech criminal law had to be assessed under the rules in force at the time of completion of the last occurrence of the offence, provided that the acts committed under any previous law would have been punishable also under the older law.

62. Since the applicant's conduct before 1 June 2004 amounted to punishable criminal offences under Article 197a or Article 221 § 1 of the Criminal Code and comprised the constituent elements of the Article 215a offence, the Court accepts that the fact of holding the applicant liable under the said provision also in respect of acts committed before that date did not constitute retroactive application of more detrimental criminal law as prohibited by the Convention. Moreover, in its judgment of 10 June 2008 the Constitutional Court held that the national courts' decisions in the applicant's case had been logical and coherent and had not had any retroactive effect prohibited by the Constitution. The Court finds nothing to indicate that this stance was in any way tainted with unforeseeability as proscribed by Article 7 of the Convention.

63. In these circumstances, and bearing in mind the clarity with which the relevant domestic provisions were formulated and further elucidated by the national courts' interpretation, the Court is of the view that since the applicant's conduct continued after 1 June 2004, the date on which the offence of abusing a person living under the same roof was introduced into the Criminal Code, he could and ought to have expected, if necessary with the appropriate legal advice, to be tried for a continuous offence assessed according to the law in force at the time he committed the last assault, that is to say, Article 215a of the Criminal Code. It finds no reason to doubt that the applicant was in a position to foresee, not only as regards the period after the entry into force of this provision on 1 June 2004 but also as regards the period from 2000 until that date, that he might be held criminally liable for a continuous offence as described above, and to regulate his conduct accordingly (see, *mutatis mutandis*, *Streletz, Kessler and Krenz*, cited above, § 82, and *Achour v. France* [GC], no. 67335/01, §§ 52–53, ECHR 2006-IV).

64. Against this background, the Court is satisfied that the offence of which the applicant was convicted not only had a basis in the relevant 'national ... law at the time when it was committed' but also that this law defined the offence sufficiently clearly to meet the quality requirement of foreseeability flowing from the autonomous meaning of the notion of 'law' under Article 7 of the Convention.

(b) *Whether the penalty imposed on the applicant under Article 215a was more severe*

65. The Court is moreover unable to accept the applicant's argument that the national courts' imposition of a penalty under Article 215a also in respect of acts committed before 1 June 2004

had resulted in a more severe penalty than would have otherwise been the case.

66. As already mentioned above, on the basis of the reasoning of the domestic courts, and in particular that of the Supreme Court in its judgment of 21 February 2008, it can be concluded that all the constituent elements of the offence set forth in Article 215a §§ 1 and 2(b) of the Criminal Code were made out also with regard to the acts committed by the applicant prior to the entry into force of that provision on 1 June 2004. With reference to those acts, the courts also expressly stated that they would have been punishable under the old law.

67. There is nothing to indicate that the above-mentioned approach by the domestic courts had the adverse effect of increasing the severity of the applicant's punishment (see, conversely, *Veeber* (no. 2), cited above, § 36). On the contrary, had the acts perpetrated by him prior to 1 June 2004 been assessed separately from those he committed after that date, the relevant sentencing rule in Article 35 § 1 of the Criminal Code would have resulted in sentence being passed on the basis of the legal provision concerning the most serious of the offences, namely Article 215a of the Criminal Code. In that event, as pointed out by the Government, he would have received at least the same sentence as the one actually imposed, or even a harsher one, on the ground that the existence of multiple offences was likely to be deemed an aggravating circumstance under Article 34k of the Criminal Code.

68. The Court also finds unpersuasive the applicant's suggestion that, had his assaults been considered separately, the prosecution of two of them (presumably those of 24 June 2000 and 17 July 2003) would have been statute-barred. Under Article 67 § 1 (d) of the Criminal Code, the statutory limitation period was three years in respect of offences punishable by a maximum sentence of less than three years. Therefore, even if he had been prosecuted only in respect of the three incidents highlighted by the domestic courts, he could in any event have been tried at least for the assault committed under the old law on 17 July 2003 and the one committed under the new law on 8 February 2006.

69. In the light of the above, the Court is convinced that the fact that the acts committed before the entry into force of the new law were assessed under the latter did not operate to the applicant's disadvantage as regards sentencing. Indeed, he was given only one single sentence which he would have incurred in any event for the acts committed after the entry into force of the new law (see paragraph 37 above and, con-

versely, *Maktouf and Damjanović*, cited above, § 70).

(c) *Conclusion*

70. The foregoing considerations are sufficient to enable the Court to conclude that the sentence imposed on the applicant, who was found guilty of the continuous criminal offence of abusing a person living under the same roof, was applicable at the time when this offence was deemed to have been completed, in accordance with a 'law' which was foreseeable as to its effect. There was no retroactive application of the criminal law and the applicant was not subjected to more severe sentencing rules than those that would have been applicable had he been tried for several separate offences.

71. The Court is satisfied that the approach followed by the Czech courts in the instant case is consonant with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 50 above). In addition, by reinforcing the national legal protection against domestic violence — such violence perpetrated against women being still a matter of grave concern in contemporary European societies (see paragraph 38 above and *Opuz v. Turkey*, no. 33401/02, ECHR 2009) — it also conforms to the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom (see, *mutatis mutandis*, *C.R. v. the United Kingdom*, 22 November 1995, § 42, Series A no. 335-C).

72. In reaching the above conclusions, the Court has examined from the standpoint of Article 7 of the Convention the application in the applicant's case of the continuous offence under Czech law of abuse of a person living under the same roof. By way of comparison it is worth noting in this context that the notion of a continuous criminal offence as defined in Czech law is in line with the European tradition reflected in the national laws of the vast majority of Council of Europe member States (see paragraphs 31 and 33 above) and that, accordingly, the situation as regards the issue of foreseeability raised in the present case appears not to be markedly different from that obtaining in relation to such offences in the national legal systems of other Contracting Parties to the Convention. As can be seen from the domestic authorities' description of the applicant's conduct, his acts were directed against a specific victim, namely his wife, and particularly against her legal interests of physical and mental integrity as well as honour. It is also clear that the *modus operandi* was the same, consisting of attacks committed under the same roof; that there

was a temporal connection between the various acts, which spanned several years; that each assault committed during this period of time was driven by the same criminal intent; and that the applicant's conduct was on each occasion in breach of the criminal law. In other words, the offence of which the applicant was convicted shared a number of characteristics common to such offences elsewhere in the Convention community, as did the response of the criminal justice system, in the form of a sentence handed down for one single offence (see paragraphs 33–37 above).

73. In sum, there has been no violation of Article 7 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,
Holds that there has been no violation of Article 7 of the Convention.

Noot

1. Deze Grote Kameruitspraak van het Hof verdient een korte signalering in de AB, nu de aan de orde zijnde overgangsrechtelijke kwesties in verband met voortdurende (strafrechtelijke) overtredingen in de sleutel van artikel 7 EVRM worden geplaatst en ook van betekenis kunnen zijn voor de wetgever in het bestraffende bestuursrecht en daarmee ook voor de rechter die over dit overgangsrecht moet oordelen (zodanig hierna blijkt onder meer in een zaak voor de Centrale Raad van Beroep). Voor de betekenis voor het strafrecht verwijzen wij graag naar de uitvoerige noot van M.A.P. Timmerman bij deze uitspraak *EHRC 2015/94*, alsook naar zijn eerdere annotatie bij de Kamer-uitspraak (EHRM 18 april 2013, *EHRC 2013/146*).

2. De Centrale Raad van Beroep haalt immers in zijn bekende uitspraak van 24 november 2014 (AB 2015/8, m.nt. R. Stijnen) een streep door het in de Wet aanscherping handhaving en sanctiebeleid SZW-wetgeving (ook wel de Fraudewet genoemd, *Stb. 2012,462*) voorziene overgangsrecht. Dit overgangsrecht voorziet er – kort gezegd – in dat bij overtredingen van de inlichtingenplicht, aangevangen vóór 1 januari 2013 maar voortdurend na die datum, het nieuwe verscherpte boeteregime geldt, zij het dat voor degenen die uiterlijk 31 januari 2013 tot inkeer komen, het oude lichtere sanctiestelsel van toepassing is. De Raad overweegt dat in casu sprake is van toepassing door het Uwv van 'more stringent criminal laws' op overtredingen die vanuit het perspectief van het Nederlandse sociaal zekerheidsrecht moeten worden gekwalificeerd als voortdurende overtredingen ('continuing offences'), zoals gedefinieerd in de Straatsburgse rechtspraak inzake artikel 7 EVRM. Op

deze wijze worden betrokkenen, die niet gebruik maken van de inkeerregeling, geconfronteerd met veel zwaardere sancties dan in het geval hun overtreding zou worden bestraft volgens het oude boeteregime. In dit verband doet het Uwv volgens de Centrale Raad vergeefs een beroep op de Straatsburgse (Kamer-)uitspraak *Rohlana*. In de hier opgenomen zaak is de klacht ingediend door een Tsjechische man die vervolgd is wegens het meerdere keren mishandelen van zijn echtgenote in de periode 2000–2006. Uiteindelijk wordt hij veroordeeld wegens overtreding van het in 2004 in het Tsjechische Wetboek van Strafrecht opgenomen specifieke misdrijf huiselijk geweld, waarop een hogere straf stond dan op de 'gewone' mishandeling waaraan hij zich daarvoor had schuldig gemaakt. Volgens de Centrale Raad is de zaak *Rohlana* echter niet vergelijkbaar met de onderhavige zaak, nu het handelen of nalaten in strijd met de inlichtingenverplichting verricht vóór de wijziging van de regelgeving niet nodig is om tot een straf- en beboetbaar feit na de wijziging van de regelgeving per 1 januari 2013 te komen. Het handelen of nalaten in strijd met de inlichtingenverplichting vóór en na 1 januari 2013 kan immers – los van elkaar – bestraft worden met een boete naar het dan geldende sanctieregime. De Raad concludeert dan ook dat het toepassen van het zwaardere sanctiestelsel zoals dat geldt na 1 januari 2013 op handelen of nalaten verricht vóór 1 januari 2013 is strijdig met de artikelen 7 EVRM en 15 IVBPR.

3. Hoezeer wij ook kunnen instemmen met deze uitkomst van de Centrale Raad, is deze conclusie bij nadere bestudering van de inmiddels door de Grote Kamer van het EHRM bevestigde Kameruitspraak inzake *Rohlana* minder evident dan zij op het eerste gezicht lijkt. Daarbij komt dat het ook in de zaak *Rohlana* ging om een 'voortdurend' delict dat zowel vóór als na de relevante wetswijziging (met strafverhoging) strafbaar was. Voor de Centrale Raad maakt daarbij mogelijk verschil dat het in de zaak *Rohlana* ging om twee verschillende delictomschrijvingen, anders dan bij de schending van de inlichtingenplicht in het kader van de wet aanscherping. Hoe dit ook zij, de Grote Kamer lijkt in de hier opgenomen uitspraak geen waarde aan dit verschil te hechten, waar zij de nadere voorwaarden formuleert waaraan in een zaak als *Rohlana* moet zijn voldaan, wil geen sprake zijn van terugwerkende kracht van een strafbepaling in strijd met artikel 7 EVRM. Daarbij moet wel worden opgemerkt dat de Grote Kamer, anders dan in eerdere jurisprudentie (inclusief de Kameruitspraak inzake *Rohlana*) waarin alle delicten die gedurende een langere periode werden voltooid op één hoop werden gegooid (namelijk van de "continuing criminal offences"), nu na-

der onderscheidt tussen een voortdurend delict ("continuing criminal offence") en een voortgezet delict ("continuous criminal offence").

4. Bij een voortdurend delict noemt het Hof (in par. 28) het voorbeeld van het helpen en verborgen houden van leden van een illegale organisatie, zoals in EHRM 27 februari 2001, *Ecer en Zeyrek t. Turkije*, klacht no. 29295/95. Naar Nederlands strafrecht gaat het bij een voortdurend delict om het doen (voort)bestaan van een verboden toestand, strafbaar gesteld in één strafbepaling, zoals iemand in strijd met art. 282 Sr van zijn vrijheid beroofd houden. Het betreft dan één strafbaar feit, zolang deze verboden toestand niet is beëindigd (zie T&C Strafrecht, Artikel 56 Wetboek van Strafrecht, voortgezette handeling). Bij een voortgezet delict noemt het Hof (in par. 28) het voorbeeld van het gedurende een bepaalde tijd stelselmatig achterhouden van bedragen voor de inkomstenbelasting (zoals in EHRM 21 januari 2003, *Veeber t. Estland* (2), klacht no. 45771/99).

5. In de casus *Rohlana* gaat het dan om de laatste categorie (voortgezet delict) en dit betekent dat het meerdere met elkaar verband houdende, maar wel te onderscheiden strafbare feiten betreft. Vertaald naar het Nederlandse strafrecht gaat het dan om een voortgezette handeling in de zin van artikel 56 Wetboek van Strafrecht: het betreft dan meerdere strafbare feiten in de zin van het meermaals begaan van hetzelfde delict of overtreding van verschillende gelijksoortige delictomschrijvingen. Art. 56 Sr beoogt in een dergelijk geval cumulatie van straffen tegen te gaan (zie T&C Strafrecht, Artikel 56 Wetboek van Strafrecht, voortgezette handeling en uitgebreid in dit verband de genoemde noten van Timmerman). Met de kwalificatie als voortgezet delict wordt de toepassing van een lager strafmaximum beoogd (in vergelijking met de situatie dat de afzonderlijke feiten ieder voor zich apart zouden worden bestraft). Bij een voortdurend delict gaat het om één feit dat zich over een langere periode uitstrekt, bijvoorbeeld een verboden toestand die door de verdachte in het leven is geroepen en niet is beëindigd. Dit is dus aan de orde bij de (voortdurende) schending van de inlichtingenplicht in de sociale zekerheid. Strikt genomen is de Grote Kameruitspraak in *Rohlana* daarop niet rechtstreeks van toepassing, zoals annotator Timmerman terecht opmerkt, nu het volgens het Hof in die zaak ging om een voortgezette handeling. Tegelijkertijd zouden wij ons kunnen voorstellen dat het Hof in een toekomstige zaak over de verenigbaarheid van terugwerkende kracht van een strafbepaling met artikel 7 EVRM maar dan ten aanzien van een voortdurend delict uitgaat van dezelfde beginselen zoals geformuleerd in de Grote Kamerzaak *Rohlana* (en ook in de eer-

dere Straatsburgse jurisprudentie waarin het eerder genoemde onderscheid tussen voortdurende en voortgezette delicten nog niet werd gemaakt en dit onderscheid ook niet altijd heel goed te maken lijkt). Daarin was voor het Hof van groot belang dat in het kader van de 'voorzienbaarheid' (als onderdeel van het "law"-vereiste uit artikel 7 EVRM) er duidelijke en vaste jurisprudentie is van de hoogste rechter waaruit kan worden opgemaakt dat bij een voortdurende overtreding het voor betrokkene duidelijk is dat zijn voor de verzwaaring gestarte maar daarna voortdurende overtreding kan worden bestraft volgens het nieuwe zwaardere boeteregime. De Rechtbank Rotterdam overweegt in haar uitspraak terzake van de regeling waarover de Centrale Raad moest oordelen in dit verband terecht dat de overgangsregeling op zichzelf niet in strijd is met artikel 7 EVRM maar dat het per 1 januari 2013 sterk verzwaarde sanctieregime vóór 1 januari 2013 redelijkerwijs niet voorzienbaar was en daarmee alsnog in strijd met artikel 7 EVRM, Rb. Rotterdam 27 maart 2014, ECLI:NL:RBROT:2014:2157. Daarbij gaat het erom dat deze uitleg voorzienbaar was voor betrokkene en in overeenstemming blijft met de essentie van het strafbare feit.

6. Al met al lijkt de Straatsburgse jurisprudentie onder deze voorwaarden juist bij voortdurende (in brede zin) delicten wel ruimte te laten voor toepassing van een zwaarder sanctieregime op een voortdurend delict dat is aangevangen voordat deze verzwaaring wettelijk werd veranderd. Daarbij lijkt dan wel vereist dat de gedraging in kwestie zowel vóór als na de verzwaaring kan worden gekwalificeerd als een strafbaar feit en aldus voorzienbaar was. Vgl. bijv. ook EHRM 21 januari 2003, *Veeber (No. 2) tegen Estland*, EHRC 2003/23: in casu was de verzwaaring van het sanctieregime bij – voortdurende – belastingontduiking niet voorzienbaar voor betrokkene, nu duidelijke jurisprudentie terzake van de hoogste rechter dateerde van na het tijdvak waarin de klager de overtreding pleegde.

7. De voorzienbaarheid is natuurlijk hoe dan ook kwestieus bij de Wet aanscherping. Weliswaar heeft de Centrale Raad de schending van de inlichtingenplicht aangemerkt als een voortdurende schending (anders nog in CrVB 10 mei 2000, ECLI:NL:CRVB:2000:AA6466) maar of de op handen zijnde strengere boetewetgeving nu zo duidelijk op het netvlies van betrokkenen stond kan ten eerste worden betwijfeld. Daar komt nog bij dat toepassing van het overgangsrecht leidt tot aanmerkelijk hogere sancties voor betrokkenen, terwijl het Hof in *Rohlana* er ook grote waarde aan lijkt te hechten dat de klager door toepassing van het nieuwe zwaardere strafregime uiteindelijk lager gestraft werd dan in

geval van afzonderlijke vervolging van alle feiten volgens het oude regime. Al met al kunnen wij ons zeker vinden in de conclusie van de Centrale Raad, te meer ook nu een makkelijke knip kan worden gemaakt tussen de periode vóór en na 1 januari 2013 ter bepaling van de hoogte van de op te leggen boete en er sprake is van een wel erg drastische verhoging.

T. Barkhuysen en M.L. van Emmerik

AB 2016/30

HOGE RAAD (CIVIELE KAMER)

18 september 2015, nr. 14/00189

(Mrs. E.J. Numann, C.A. Streefkerk, G. Snijders, V. van den Brink, T.H. Tanja-van den Broek)
m.nt. R.J.G.M. Widdershoven

Art. 4 lid 3 VEU; art. 288 volzin 3 VWEU; art. 7 Richtlijn 93/104/EG; art. 7 Richtlijn 2003/88; art. 93, 94, 120 Grondwet; art. 6:162, 7:635 lid 4 (oud) BW.

O&A 2015/86

JAR 2015/257

NJB 2015/1684

O&A 2015/97

JWB 2015/316

RvdW 2015/990

Prg. 2015/273

O&A 2015/90

ECLI:NL:HR:2015:2722

ECLI:NL:PHR:2015:356

Schadevergoeding wegens schending van EU-recht door formele wetgever. Toetsingsverbod niet relevant. Met de schending is de onrechtmatigheid in de zin van art. 6:162 BW gegeven. Onrechtmatigheid is toerekenbaar aan de Staat.

Het in art. 94 Grondwet bepaalde brengt mee dat wetgeving in formele zin moet worden getoetst aan een ieder verbindende bepalingen van verdragen en van besluiten van internationale volkenrechtelijke organisaties. Is wetgeving in formele zin in strijd met zulke bepalingen, dan heeft dat niet alleen tot gevolg dat de desbetreffende wetgeving buiten toepassing moet blijven, maar ook dat het uitvaardigen en handhaven van die wetgeving onrechtmatig is en daarom op grond van art. 6:162 BW de Staat verplicht tot betaling van schadevergoeding, mits aan de overige voorwaarden voor aansprakelijkheid op grond van onrechtmatige daad is voldaan.

Dat in dat geval aansprakelijkheid uit onrechtmatige daad bestaat, strookt met de aan de art. 93 en 94 Grondwet ten grondslag liggende gedachte

dat de daar genoemde bepalingen zoveel mogelijk in de nationale rechtsorde tot gelding moeten komen, zonder dat de wetgever daarin afzonderlijk behoeft te voorzien. Daarmee wordt verzekerd dat de rechtstoepassing in Nederland in overeenstemming is met die bepalingen, tot welk resultaat de Staat zich heeft verplicht door zich te binden aan de in deze artikelen genoemde verdragen en besluiten. De verplichting tot vergoeding van schade vormt bij uitstek een effectieve en adequate remedie bij naleving van die bepalingen door de Staat.

Er is dan ook geen grond om voor het uitvaardigen en handhaven van wetgeving in formele zin een uitzondering te maken op het in art. 6:162 BW bepaalde. Het toetsingsverbod van art. 120 Grondwet brengt niet iets anders mee, nu dat verbod ziet op de toetsing van wetgeving in formele zin aan de Grondwet en aan fundamentele rechtsbeginselen, en dat verbod geen betrekking heeft op de toetsing aan bepalingen als bedoeld in art. 94 Grondwet (HR 14 april 1989, ECLI:NL:HR:1989:AD5725, NJ 1989/469 (Harmonisatiewet)).

Anders dan het onderdeel betoogt, geldt het hiervoor in 3.4.2 overwogene ook bij strijd met rechtstreeks werkend Unierecht, welk recht krachtens het VWEU uit eigen hoofde in de lidstaten geldt (onder meer HvJEU 5 februari 1963, zaak C-26/62, ECLI:EU:C:1963:1 (Van Gend & Loos), en HvJEU 15 juli 1964, zaak C-6/64, ECLI:EU:C:1964:66, (Costa/ENEL), en dus ook in de Nederlandse rechtsorde (HR 2 november 2004, ECLI:NL:HR:2004:AR1797, NJ 2005/80). Er bestaat geen grond om voor dat recht een uitzondering te maken. Integendeel, het van het Unierecht deel uitmakende gelijkwaardigheidsbeginsel verzet zich juist daartegen.

In het arrest Staat/Van Gelder is beslist dat indien een overheidslichaam een onrechtmatige daad pleegt door een met een hogere regeling strijdig voorschrift uit te vaardigen en op grond van dit voorschrift te handelen, daarmee in beginsel de schuld van het overheidslichaam is gegeven (lees thans: de toerekenbaarheid aan het overheidslichaam is gegeven). Er bestaat onvoldoende grond om deze regel niet toe te passen ingeval wetgeving in formele zin strijdt met rechtstreeks werkend internationaal recht of met de verplichting tot implementatie van een Europese richtlijn. De wetgever in formele zin en dus de Staat draagt immers de verantwoordelijkheid ervoor te zorgen dat de door hem uitgevaardigde wetgeving daarmee in overeenstemming is. Het ligt op de weg van de Staat de feiten en omstandigheden te stellen die in het voorliggende geval een uitzondering op het in dat arrest genoemde beginsel rechtvaardigen.

Het hof heeft in dit geval geen grond aanwezig geoordeeld voor een uitzondering op het beginsel van genoemd arrest. Dat geeft geen blijk van een onjuiste rechtsopvatting. De Staat diende immers in