Eigendomsrecht. Evenredigheid boete. De oplegging van een boete aan een advocaat die weigert gehoor te geven aan een verzoek om gefinancierde rechtsbijstand te verlenen is weliswaar een inmenging daarin maar niet aan te merken als een onredelijke inbreuk op het eigendomsrecht. Ruime beoordelingsvrijheid. Geen schending van art. 1 EP EVRM

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

AB 2016/78

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
27 oktober 2015, nr. 35399/05
(G. Raimondi, P. Hirvelä, G. Nicolaou, L. Bianku, P. Mahoney, K. Wojtyczek, Y. Grozev)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 13 EVRM; art. 1 EP EVRM

NJB 2016/201
ECLI:CE:ECHR:2015:1027JUD003539905

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Klager in deze zaak is de Bulgaarse advocaat Stefanov, die verzocht wordt uitvoering te geven aan een verzoek van een regionale rechtbank een verdachte bij te staan in een strafproces. De vergoeding die Bulgaarse advocaten voor een dergelijk optreden ontvangen is vooraf vastgelegd. Stefanov laat de rechtbank tijdens een zitting weten uitsluitend op het verzoek in te gaan wanneer de rechtbank vooraf de uit te keren vergoeding zou vaststellen, hetgeen door de rechtbank wordt geweigerd. Nadat Stefanov verklaart niet bereid te zijn de verdachte bij te staan, wordt hem door de rechter een boete ter hoogte van (omgerekend) ongeveer 260 euro opgelegd. Zijn beroep daartegen wordt door de rechtbank ongegrond verklaard. Doordat de precieze hoogte van de vergoeding mede afhankelijk is van het verloop van de procedure meent de rechtbank deze uitsluitend achteraf te kunnen vaststellen.

Stefanov wendt zich tot het EHRM. Hij voert aan dat de rechtbank, door de hem toekomende vergoeding niet vooraf vast te stellen en hem een boete op te leggen, in strijd heeft gehandeld met artikel 1 EP EVRM. Daarnaast beroept hij zich op artikel 13 EVRM en stelt hij dat hem geen daadwerkelijk rechtsmiddel voor een nationale instantie ter beschikking stond ter bescherming van zijn rechten onder artikel 1 EP EVRM.

Volgens het Hof valt de klacht ten aanzien van de weigering de hoogte van de vergoeding vooraf vast stellen buiten het beschermingsbereik van artikel 1 EP EVRM. Toekomstig inkomen valt slechts binnen de reikwijdte van het eigendomsbegrip wanneer het inkomen reeds is verdiend of een afdwingbare aanspraak daarop bestaat. Ten aanzien van de opgelegde boete overweegt het Hof dat het opleggen van de boete is aan te merken als een 'significant disadvantage', mede doordat het boetebedrag in verhouding tot het minimuminkomen in Bulgarije relatief hoog is. De oplegging van de boete is dan ook aan te merken als een inbreuk op het eigendomsrecht, waarvan moet worden beoordeeld of deze redelijk is. Het Hof stelt weliswaar vast dat het niet zijn taak is om de exacte betekenis van nationaalrechtelijke bepalingen vast te stellen, maar is niet overtuigd door het argument dat sprake is van wetgeving die wegens tegenstrijdigheid niet voldoet aan de EVRM-standaarden. Daarbij is relevant dat de boete aan Stefanov is opgelegd in zijn hoedanigheid van advocaat; in die omstandigheden moet hij zich volledig bewust zijn geweest van de verantwoordelijkheid van de dienstdoende rechter voor een correct verloop van de procedure. Met de oplegging van de boete is bovendien het legitieme doel van een goede en efficiënte werking van het stelsel van rechtspraak gediend. Ten aanzien van de "fair balance"-toets overweegt het Hof dat aan nationale autoriteiten een ruime "margin of appreciation" toekomt ten aanzien van de toetsing of is voldaan aan de voorwaarden die gelden voor een rechtmatige inmenging in het eigendomsrecht, en dat de opgelegde boete daarbinnen valt. Ten slotte is de hoogte van de boete niet onredelijk bezwarend; hierbij weegt het Hof mee dat de situatie onderscheiden moet worden van gevallen waarin de uitingsvrijheid van advocaten wordt ingeperkt. Het Hof oordeelt dan ook dat geen sprake is van een schending van artikel 1 EP EVRM.

Gelet op de vaststelling dat er wel degelijk procedurele waarborgen bestonden om tegen de vermeende schending van artikel 1 EP EVRM op te komen, en dat daarvan ook gebruik is gemaakt, acht het Hof een toetsing aan artikel 13 EVRM onnodig.

Konstantin Stefanov
tegen
Bulgarije

The law

I. Alleged violation of Article 1 of protocol no. 1 to the Convention

35. The applicant complained that, by not paying his legal representation fee and by fining him, the Plovdiv District Court had breached his right to peaceful enjoyment of his possessions as provided in Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

36. The Government submitted, first, that the applicant's complaint about the legal fee was inadmissible as he himself had been responsible for not receiving the fee in question. Given that he had voluntarily chosen not to carry out the work required for payment of the legal fee, he did not have a claim in respect of receiving payment.

37. Secondly, as regards the complaint related to the fine, the Government asserted that the applicant had suffered no significant disadvantage and so that complaint should be dismissed. This was because the size of the fine imposed on him was small and he had not shown that it had negatively affected his financial situation.

38. The applicant disagreed. In particular he pointed out that he had been unlawfully deprived of the fee for representing a defendant in a criminal case which was due to him under domestic law.

39. Furthermore, by fining him the authorities had breached his right to peaceful enjoyment of his property.

40. Lastly, neither the size of the fee which he did not receive nor of the fine could be described as negligible. Quite apart from their monetary value (€ 280 for the legal fee and € 260 for the fine), neither of which was insignificant in itself, both represented a clear lack of respect by the court to the applicant and that had affected him negatively.

(a) Fee for legal representation

41. The Court reiterates that Article 1 of Protocol No. 1 to the Convention applies only to a person's possessions (see *Marckx v. Belgium*, 13 June 1979, § 50, Series A no. 31, and *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 64, ECHR 2007-I [GC]) which can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right (see *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], § 61; *Von Maltzan and Others v. Germany (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, § 74 (c), ECHR 2005-V;* and *Kopecký v. Slovakia* [GC], no. 44912/98, § 35 (c), ECHR 2004-IX). Importantly, Article 1 of Protocol No. 1 to the Convention does not guarantee the right to acquire property (see *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II (extracts), and *Kopecký*, cited above, § 35 (b)). Future income constitutes a 'possession' only if the income has been earned or where an enforceable claim to it exists (see *Ian Edgar (Liverpool) Ltd v. United Kingdom* (dec.), no. 37683/97, 25 January 2000; *Wendenburg v. Germany* (dec.), no. 71630/01, 6 February 2003; *Levänen and Others v. Finland* (dec.), no. 34600/03, 11 April 2006; *Anheuser-Busch Inc*, cited above, § 64; and *N.K.M. v. Hungary*, no. 66529/11, § 36, 14 May 2013).

42. In the present case the Court observes that the applicant chose of his own volition not to perform the work required for the fee to be paid. Having been told by the presiding judge that the fee would not be set at the beginning of the hearing, the applicant chose to leave the courtroom and opt out of his role as court-appointed defence counsel. He therefore neither earned the future fee nor did he have a claim to it on different grounds.

43. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(b) In respect of the fine

44. The Court notes that whether the applicant has suffered any significant disadvantage represents the main element of the criterion set forth in Article 35 § 3(b) of the Convention (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, 1 June 2010; see also *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010). Inspired by the general principle *de minimis non curat praetor*, this admissibility criterion rests on the premise that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev*, cited above). In other words, the absence of any significant disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Adrian Mihai Ionescu*, cited above). The Court observes in this connection that it has previously considered the pecuniary loss of some € 90 allegedly sustained by the applicant in the case of *Adrian Mihai Ionescu* (cited above) as not attaining the required level of significance. It has also assessed as negligible a pecuniary loss of some € 0.5 allegedly sustained by the applicant in the case of *Korolev*, cited above.

45. In respect of the Government's position that the applicant in the present case had not suffered a significant disadvantage as the fine's size was negligible, the Court notes the following. The applicant was fined approximately € 260 by the domestic courts in the context of a criminal case to which he had been assigned to act as defence counsel for one of the accused. Neither party submitted information about the applicant's financial situation. The Court observes that, according to a study commissioned by the European Observatory of Working Life (a European Union agency), the minimum monthly salary in Bulgaria at the time of the facts was equivalent to about € 61. Even assuming that the applicant was a freelance lawyer whose earnings were not pegged to the minimum salary level, the Court considers the above information indicative of the general standard of living in the country at the time and, as such, of relevance.

46. The Court also notes that the fine, which is the subject of the complaint before it, was imposed on the applicant as a pecuniary sanction, or a penalty for what the domestic court considered was his disrespectful conduct during the case proceedings. Therefore, in addition to and apart from the applicant's pecuniary interest in not having been fined, it is also necessary to take into account the fact that the issue of whether he had been fined lawfully concerned a question of principle for him, which was that of respect for his position as a lawyer in the exercise of his professional activities.

47. Under these circumstances the applicant cannot, in the court's view, be deemed not to have suffered a significant disadvantage.

48. The Court notes that the admissibility criterion set forth in Article 35 § 3 (b) of the Convention is applicable only when the applicant has suffered no significant disadvantage and provided that the two safeguard clauses contained in the same provision are respected. It follows that where it has not been determined that the applicant has suffered no significant disadvantage, this admissibility criterion does not apply (see *Giuran v. Romania*, no. 24360/04, § 24, ECHR 2011 (extracts)).

49. The Court accordingly dismisses the Government's objection in respect of the fine. Noting that the applicant's complaint in respect of the fine is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and that it is not inadmissible on any other grounds, it declares it admissible.

B. Merits

50. The Government submitted that the fine imposed on the applicant cannot be considered to have unlawfully or disproportionately affected his 'possessions'. In particular, the fine had been a financial sanction explicitly provided for in domestic legislation. The State was entitled to introduce control mechanisms of different types which included fines. The fine imposed on the applicant had been lawful, given that he had been a court-appointed defence counsel at the time but had been absent from the hearing. The fine had also been proportionate to his conduct, given that it was a disciplinary punishment for unethical conduct and lack of respect displayed by the applicant towards the court. Lastly, by leaving the courtroom and by refusing to carry on representing the defendant, the applicant had caused an unjustified delay in the proceedings for which he had been rightly fined.

51. The applicant submitted that the fine imposed on him had interfered with his right to peaceful enjoyment of his possessions and was not in accordance with the law.

52. He pointed out that the court had been obliged to indicate in the decision to appoint him defence counsel the fee he was going to receive. The fee could not be smaller than the minimum amount stipulated in the Remuneration Ordinance; if the court offered a smaller fee, the lawyer had to refuse to represent the defendant or otherwise risked sanctions by the Bar under section 132(6) of the Bar Act (see paragraph 9 above). The applicant argued that, as the court had failed to indicate the fee to be paid to him in the decision appointing him counsel, the court had not acted lawfully; therefore he had effectively not been appointed counsel before he was fined. He further pointed out that he had not failed to appear at the hearing; he had in fact turned up prepared to act for the defence and had only subsequently left because of the court's unlawful refusal to guarantee a fee of no less than the legal minimum. For the above reasons, the applicant claimed, the fine had not been lawful.

(a) General Principles

53. The Court points out that Article 1 of Protocol No. 1, which guarantees in substance the right to property, comprises three distinct rules. The first rule, expressed in the first sentence of the first paragraph, is of a general nature and lays down the principle of peaceful enjoyment of one's 'possessions'. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, contained in the second paragraph, recognises that States are entitled to, among other things, control the use of property in accordance with the general interest. The Court has repeatedly held that the

second and third rules must be construed in the light of the general principle laid down in the first rule (see, among many other authorities, *Grifhorst v. France*, no. 28336/02, §§ 81–83, 26 February 2009).

54. The Court reiterates that any interference by a public authority with the peaceful enjoyment of possessions must be lawful. In particular, the second paragraph of Article 1 of Protocol No. 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing 'laws'. Moreover, the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, *mutatis mutandis, Frizen v. Russia*, no. 58254/00, § 33, 24 March 2005).

55. Further, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *SCHNEIDER AUSTRIA GmbH v. Austria* (dec.), no. 21354/93, 30 November 1994). The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see *Valico S.r.l. v. Italy* (dec.), no. 70074/01, 21 March 2006). Consequently, a financial liability arising out of a fine may undermine the guarantee afforded by that provision if it places an excessive burden on the person or fundamentally interferes with his or her financial position (see *Valico S.r.l.*, cited above). The fair balance requires procedural guarantees to establish the applicant's liability whereby the applicant is afforded an adequate opportunity to put his or her case to the responsible authorities in order to plead, as the case might be, illegality or arbitrary and unreasonable conduct (see *Yildirim v. Italy* (dec.), no. 38602/02, 10 April 2003).

56. The Court reiterates also that it is primarily for the national authorities to decide what kind of taxes or contributions are to be collected. Such decisions will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the competence of the Contracting States. The Court has repeatedly held that the margin of appreciation of the Contracting States in those areas is a wide one (see, among many other authorities, *Gasus Dosier — und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 60, Series A no. 306-B. See also, *mutatis mutandis,* in relation to fiscal policy, *Baláž v. Slovakia* (dec.), no. 60243/00, 16 September 2003).

(b) Application of those principles to the present case

57. The Court observes that the 'possession' which forms the object of this complaint is a sum of money, that is to say the EUR 260 which was imposed as a fine on the applicant (see paragraphs 14 and 19). It considers that this measure amounts to an interference with the applicant's right to peaceful enjoyment of possessions. Article 1 of Protocol No. 1 to the Convention is therefore applicable.

58. The fine constitutes a 'penalty' within the meaning of the Convention. It therefore falls within the scope of the second paragraph of Article 1 of Protocol No. 1 which allows the Contracting States to control the use of property to secure the payment of, *inter alia*, penalties.

59. In respect of the 'lawfulness' of the interference, the applicant submitted both in the national proceedings and before this Court, that he had not been appointed as legal counsel in accordance with the applicable law, as in the decision appointing him the national court failed to indicate the fee to be paid to him as *ex officio* counsel. This was something explicitly required by national law at the time. As the applicant had not been duly appointed counsel in the proceedings, in accordance with the applicable legal requirements, he could not have been fined for failing to appear and thus obstructing the judicial proceedings. The Government insisted that the applicant had been appointed counsel by the court before it fined him on the basis of Article 269 of the CCP and, therefore, that the fine was lawful.

60. The Court notes that, indeed, conflicting provisions existed under national law, regulating the appointment by the courts of *ex officio* legal representatives, and this gave rise to a dispute as to their proper interpretation. The dispute was about the time when legal fees of *ex officio* lawyers should be determined by the courts, as well as their amount. Section 44(2) of the Bar Act, applicable at the time, stipulated that the court had to indicate the amount of legal fee to be paid to counsel in the decision with which the court appointed that counsel to act in the proceedings. This was also explicitly confirmed by the domestic court before which the applicant appealed the disputed fine. The Bar Act further stipulated that the courts should follow minimum fees, as determined by the National Bar Council, something, which it appears the national courts have failed to do.

61. The Court notes in that respect, that it is not its role to interpret and define the precise meaning of national law, a task that clearly falls within the realm of the national courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no.

13279/05, § 50, first sentence, 20 October 2011, with further references). It is eventually for the national courts to determine the lawfulness under national law of an impugned interference the court's role in that respect being limited. The Court further notes that conflicting legal provisions are an inevitable part of any legal system and that the purpose of the requirement of lawfulness, and consequently of clarity and foreseeability of the domestic law, is there to allow everyone to foresee, to a degree that is reasonable in the particular circumstances, the consequences which a given action may entail (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III). Domestic legislation could not in any case provide for every eventuality and the level of precision required depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII).

62. Taking into account those principles and the circumstances of the present case, the Court is not convinced, despite the apparent conflict between different provisions of domestic legislation, that the impugned fine was based on law that failed to meet Convention standards. It is of particular importance in the present case that the fine was imposed on a professional lawyer, by a trial court before which he was appearing in his professional capacity. Under those circumstances the applicant must have been fully aware of the ultimate responsibility of the judge presiding the judicial proceedings for their proper conduct. The applicant was instructed in no unclear terms by the domestic court that he was appointed as defense counsel, before he was fined for choosing to leave the court hearing. The domestic court fined the applicant specifically referring to a legal provision which was part of the Criminal Procedure Code, vesting ultimate authority for the proper administration of the proceedings in the judge. Given that the applicant was a lawyer, both this basic principle and the content and meaning of the particular provision of the CPC should have been sufficiently clear to him and the consequences of its application foreseeable. Any dispute about the remuneration of the applicant as an *ex officio* counsel could not have been expected to take precedence over the proper conduct of the judicial proceedings and those judicial proceedings could not have been expected to be the forum where such a dispute should be resolved.

63. In view of the above, the Court is prepared to accept that the applicant, as a representative of a party in criminal proceedings, was fined as a result of his absence from the hearing. As it cannot be said that the application of the law to the applicant's situation was arbitrary, the Court finds that he was fined lawfully, that is to say on the basis of an accessible, clear and foreseeable legal provision.

64. Furthermore, the law pursued the legitimate aim of ensuring the smooth operation of the justice system (see *Dimitrov and Hamanov v. Bulgaria*, nos. 48059/06 and 2708/09, § 70, 10 May 2011 with further references to the importance of administering justice without delays which might jeopardise its effectiveness and credibility). The Court recognises that, undeniably, it is in the general interest of society to have a justice system which operates efficiently and this includes court proceedings unhindered by unjustified delays.

65. It remains to be determined whether a 'fair balance' was struck between the demands of the general interest and the requirements of the protection of the applicant's fundamental rights. In the present case, causing the postponement of the hearing without a valid reason, as established by the national courts, represented an obstacle to the smooth functioning of the justice system; courts are called upon to ensure the latter. The issue of whether the conduct leading to that obstacle should be punished by a financial sanction with a deterrent effect, such as the fine in the present case, comes within the margin of appreciation of the State. That margin is a wide one (see paragraph 56 above).

66. Importantly, the applicant had at his disposal a procedural guarantee by which to challenge the penalty, specifically a possibility to bring judicial review proceedings in respect of the fine. He made use of that remedy (see paragraph 18 above) and there is nothing to show that the decision-making process resulting in the fine complained of was unfair or arbitrary.

67. Lastly, although the fine imposed on the applicant was in the maximum possible amount under the relevant legal provision, it is neither prohibitive, nor oppressive or otherwise disproportionate (see for a similar approach *Allianz-Slovenska-Poistovna, A.S., and Others v. Slovakia* (dec.), no. 19276/05, 9 November 2010).

68. The Court points out that the situation in the present case has to be distinguished from cases which concern the right of lawyers to express themselves freely in their capacity as defence counsel; in those cases complaints have been made by applicants and examined by the Court under Article 10 of the Convention (see, for example, *Nikula v. Finland*, no. 31611/96, §§ 29–56, ECHR 2002-II; see, more recently, *Morice v. France* [GC], no. 29369/10, § 174, 23 April 2015). In *Nikula* and *Morice*, both cited above, the applicants were convicted for having criticised respectively

a prosecutor and a judge in a manner which the domestic courts found defaming. The Court held that the issue concerned the applicants' freedom of expression; in *Morice* specifically it was part of a debate on a matter of public interest about the functioning of the justice system and in the context of a case which had received wide media coverage from the outset. In the present case, the applicant was sanctioned with a fine for having abandoned his duty to represent the accused; that duty stemmed from the fact that the court had appointed the applicant defence counsel and no objective reasons rendered the discharge of his legal representation duties impossible (see paragraphs 23 and 24 above).

69. In the circumstances of the present case, in view of all said above the Court finds that the authorities have struck a fair balance between, on the one hand, the general interest and, on the other, respect for the applicant's right to property. The interference did not, therefore, impose an excessive burden on the applicant.

70. It follows that there has been no violation of Article 1 or Protocol No. 1 to the Convention.

II. Alleged violation of Article 13 of the Convention

71. The applicant also complained that he had not had at his disposal an effective domestic remedy in connection with his complaint about the peaceful enjoyment of possessions, contrary to the requirement of Article 13 of the Convention. That provision reads as follows:

> "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."

72. The Government contested that argument.

A. Admissibility

73. The Court notes that this complaint is linked to the one examined above, and must therefore likewise be declared admissible.

B. Merits

74. Having regard to its findings in respect of the procedural guarantees under Article 1 of Protocol No. 1 to the Convention which had been available to the applicant (see paragraph 66 above), the Court considers it unnecessary to examine this issue also under Article 13 of the Convention.

For these reasons, the court, unanimously,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention.

Noot

1. De vraag of (gefixeerde) boetes al dan niet evenredig zijn en hoe intensief de rechter dat moet toetsen, wordt in de regel in de sleutel van art. 6 EVRM geplaatst. De hier opgenomen uitspraak laat zien dat ook het eigendomsrecht van art. 1 EP EVRM (al dan niet in combinatie met art. 13 EVRM) een rol kan spelen bij het garanderen van evenredige (bestuurlijke) boetes. Immers de oplegging van een dergelijke boete wordt gezien als een inmenging in het eigendomsrecht die moet voldoen aan de eisen van legaliteit, algemeen belang en proportionaliteit. Wat betreft de hoogte van de boete komt de nationale autoriteiten een ruime beoordelingsvrijheid toe, zodat pas in strijd met het eigendomsrecht wordt gekomen bij een evident onevenredige boete. De tekst van art. 1 EP EVRM biedt daarvoor het aanknopingspunt, nu daarin is bepaald dat de bescherming van het eigendomsrecht de oplegging van boetes niet verhindert (lid 2 van art. 1 EP spreekt immers onder meer van het recht van staten om het gebruik van eigendom te reguleren onder meer om de betaling van belastingen of boeten te verzekeren, zoals het Hof ook opmerkt in r.o. 58). Waar art. 6 EVRM zich meer richt op de rechter als hoeder van de evenredigheid van boetes, richt art. 1 EP EVRM zich meer direct op de wetgever en/of beleidsregelgever alsmede de boeteopleggende autoriteiten. Zij dienen initieel rekening te houden met de evenredigheidseisen.

2. De toepassing van art. 1 EP ten aanzien van boetes is niet uniek. Het Hof verwijst in r.o. 53-56 naar precedenten waaraan voor Nederland kan worden toegevoegd EHRM 28 juni 2011, *Financiele Dagblad t. Nederland*, *AB* 2012/15, m.nt. R. Stijnen. Wat in ieder geval uit deze Straatsburgse jurisprudentie kan worden opgemaakt, is dat het Hof slechts in geval van evidente onevenredigheid tot een schending van het eigendomsrecht van art. 1 EP concludeert op dit punt (zie voor meer voorbeelden M.L. van Emmerik & C.M. Saris, *Evenredige bestuurlijke boetes*, VAR-preadvies 2014, Den Haag, Boom Juridische Uitgevers 2014, op p. 142-144).

3. Interessant is het nog om iets meer in detail te bezien wanneer een boete niet meer door de beugel kan en met welke factoren het Hof daarbij rekening houdt. Kernpassage uit de

beslissing van het Hof is te vinden in r.o. 55: "… Consequently, a financial liability arising out of a fine may undermine the guarantee afforded by that provision if it places an excessive burden on the person or fundamentally interferes with his or her financial position (…)." Dat wordt als volgt nader ingevuld in r.o. 67: "(…) although the fine imposed on the applicant was in the maximum possible amount under the relevant legal provision, it is neither prohibitive, nor oppressive or otherwise disproportionate." Daarbij hecht het Hof veel belang aan het feit dat de boete niet verhinderde dat de advocaat uitkwam voor zijn mening over de kwestie.

4. Voor het Nederlandse (bestraffende) bestuursrecht is er daarmee niet veel nieuws onder de zon. Hooguit kan worden vastgesteld dat de evenredigheid van boetes naast art. 6 EVRM ook een verankering kan hebben in het eigendomsrecht. Tegelijk zal niet snel sprake zijn van een onevenredige boete in de zin van dat recht, wetende dat het mimumloon in Bulgarije ongeveer € 61 per maand is en de opgelegde en door het Hof niet onevenredig bevonden boete € 260 bedroeg.

T. Barkhuysen en M.L. van Emmerik

AB 2016/79

HOGE RAAD (STRAFKAMER)
13 oktober 2015, nr. 14/00749
(Mrs. W.A.M. van Schendel, B.C. de Savornin Lohman, J. de Hullu, H.A.G. Splinter-van Kan, Y. Buruma)
m.nt. J.G. Brouwer en A.E. Schilder

Art. 2, 3, 13b Opiumwet; art. 3.3.4 APV Rotterdam 2008

NJB 2015/1915
RvdW 2015/1135
NJ 2015/468
ECLI:NL:PHR:2015:706
ECLI:NL:HR:2015:3031

Drugsoverlastbepaling APV Rotterdam niet in strijd met Opiumwet.

Blijkens de toelichting op art. 3.3.4 APV Rotterdam 2008 strekt dit artikel ertoe te voorkomen dat gevoelens van onbehagen en onveiligheid bij het publiek ontstaan die worden veroorzaakt door het in het openbaar gebruiken van drugs. Met deze bepaling is dus het belang van de handhaving van de openbare orde gediend. Daartoe is — voor zover in cassatie van belang — strafbaar gesteld het op of aan de weg, op een andere voor het publiek toegankelijke plaats of in een voor het publiek toegankelijk gebouw middelen als bedoeld in de art. 2 of 3 van de Opiumwet te gebruiken.

De Opiumwet stelt, zoals volgt uit hetgeen is weergegeven in 2.5.1 en 2.5.2, het enkele gebruiken van een middel als bedoeld in art. 2 en 3 van deze wet niet als zodanig strafbaar. De tekst van het arrest HR 14 december 2004, ECLI:NL:HR:2004:AR4923 heeft in dit verband aanleiding gegeven tot misverstand. Het ging in dat arrest (onder meer) om de vraag of de door de Noorse autoriteiten verzochte uitlevering gelet op het vereiste van dubbele strafbaarheid ook ter zake van de veroordeling voor het roken van hasj toelaatbaar kon worden verklaard. Deze vraag is door de Hoge Raad bevestigend beantwoord. Daartoe is in de specifieke context van de beoordeling van de dubbele strafbaarheid in het uitleveringsrecht onder meer overwogen dat "het roken van hasj immers het aanwezig hebben ervan [impliceert], waarop bij art. 3, aanhef en onder C, in verbinding met art. 11, eerste lid, Opiumwet hechtenis is gesteld voor ten hoogste een maand". In het oordeel van de Hoge Raad dat de uitlevering toelaatbaar kan worden verklaard, ook voor zover betrekking hebbende op het aanwezig hebben van hasj, ligt niet als zijn oordeel besloten dat in art. 3, aanhef en onder C, Opiumwet ook het gebruiken van hasj strafbaar is gesteld.

Gelet op art. 149 Gemeentewet, inhoudende dat de raad van een gemeente de verordeningen maakt die hij in het belang der gemeente — waaronder de handhaving van de openbare orde — nodig oordeelt, en art. 121 Gemeentewet, inhoudende, kort gezegd, dat een gemeente bevoegd is tot het maken van (aanvullende) verordeningen, voor zover deze niet in strijd zijn met hogere regelingen, en in aanmerking genomen dat — gezien hetgeen hiervoor is overwogen — voormeld art. 3.3.4 APV Rotterdam 2008 wat betreft bedoeld 'gebruiken' de voorschriften van de Opiumwet niet dupliceert, moet worden geoordeeld dat de Raad van de gemeente Rotterdam met betrekking tot dat verbod niet buiten zijn verordenende bevoegdheid is getreden door in art. 3.3.4 mede te verbieden het op of aan de weg, op een andere voor publiek toegankelijke plaats of in een voor publiek toegankelijk gebouw middelen als bedoeld in de art. 2 of 3 van de Opiumwet gebruiken (vgl. HR 19 februari 2013, ECLI:NL:HR:2003:BY5725, NJ 2013/323 en RvS 1 mei 2013, ECLI:NL:RVS:2013:BZ9048 ten aanzien van art. 2.7 lid 2 APV Amsterdam 2008). Anders dan het middel betoogt, staat de Opiumwet in zoverre niet in de weg aan de verbindendheid van deze APV-bepaling. Het oordeel van het Hof is dus juist.

Arrest op het beroep in cassatie tegen een arrest van het Gerechtshof Den Haag van 6 februari 2014, nummer 22/000720-13, in de strafzaak tegen: verdachte.