

AB 2015/54

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

2 oktober 2014, nr. 15319/09

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Art. 6 EVRM

NJB 2015/208

ECLI:NL:XX:2014:581

Rechterlijke motiveringsplicht, in het bijzonder in een systeem van verkorte wijze van afdoening. In casu mocht de Noorse hoger beroepsrechter gelet op de gang van zaken in eerste aanleg niet volstaan met het oordeel dat het hoger beroep kennelijk geen kans van slagen heeft.

Klager in deze zaak is een Noorse burger die opkomt tegen de weigering van het gerechtshof (rechtsprekend in tweede instantie) om zijn hoger beroep in behandeling te nemen. Klager en zijn inmiddels voormalige vrouw hebben in 1990 en 1995 huwelijkse voorwaarden vastgesteld. In 1995 zijn zij overeengekomen dat zij elk vijftig procent van het onroerend goed 'Ekheim' bezitten. Na de scheiding heeft het stadsgerecht in 2001 geoordeeld dat de huwelijkse voorwaarden rechtsgeldig zijn en dat de overeenkomst omtrent mede-eigendom niet rechtsgeldig is. De voormalige vrouw van de klager heeft daarna het onroerend goed verkocht aan een vennootschap met beperkte aansprakelijkheid. Klager was van mening dat zijn ex-vrouw alleen bevoegd was om de helft van het onroerend goed in eigendom over te dragen en startte daarom een civiele procedure bij het stadsgerecht. Dit gerecht ging niet mee met de stelling van de klager en verwees daarbij naar de eerdere uitspraak uit 2001. Klager is hierna in hoger beroep gegaan bij het gerechtshof. Hij beklaagt zich over (vermeende) verwarring over zijn pleidooi en verwijzingen naar de doctrine. Ook beklaagt hij zich over de aanzienlijke beperking van de totale omvang van de hoorzitting: van drie dagen tot vijf uur. Dit beperkte hem in zijn mogelijkheid om getuigen te laten horen. Het gerechtshof weigerde het hoger beroep in behandeling te nemen. Dit deed het hof op grond van artikel 29-13 lid 2 Wetboek van Burgerlijke Rechtsvordering, waarin staat dat het een hoger beroep, dat kennelijk geen kans van slagen heeft, kan weigeren. Een gang naar de hoogste rechter heeft geleid tot een vergelijkbare uitkomst.

Klager wendt zich tot het EHRM en doet een beroep op artikel 6 lid 1 EVRM. De uitspraak van het

gerechtshof mist volgens klager een toereikende motivering. Volgens de staat is de zaak door de nationale rechters zorgvuldig bekeken alvorens een uitspraak is gedaan over de kans van slagen van het hoger beroep.

Het Hof overweegt dat de bevoegdheid van het gerechtshof zich niet alleen uitstrekt tot rechts- en procedurele vragen maar ook tot vragen omtrent de feiten. In de voorliggende zaak is de mogelijkheid van de klager om onder andere getuigenbewijs te leveren aanzienlijk beperkt. Het Straatsburgse Hof overweegt daarom dat het niet overtuigd is dat de motivering van het gerechtshof recht doet aan zijn rol als hoger beroepsinstantie, die belast is met de uitvoering van een volledige inhoudelijke toets met 'full jurisdiction'. Door de tekortschietende motivering kon de klager ook niet effectief in cassatie gaan bij de hoogste nationale rechter.

Het Hof neemt om deze redenen een schending aan van artikel 6 lid 1 EVRM.

Hansen,
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Noorwegen.

The Law

I. Alleged violation of Article 6 § 1 of the Convention

47. The applicant complained that in its decision of 12 June 2008 the High Court had dismissed his appeal against the City Court's judgment of 21 January 2008 without providing adequate reasons, in breach of the fair hearing guarantee in Article 6 § 1 of the Convention, which reads as follows:

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

48. The Government contested that argument.

A. Admissibility

1. The Government's submissions

49. The Government disputed the applicability of Article 6 § 1 of the Convention to the impugned decision taken by the High Court to refuse to admit the applicant's appeal for examination on the merits. Although the dispute was one that concerned his 'civil rights', the decision in question could not be said to constitute a 'determination' of that right within the meaning of Article 6 § 1. In this connection, relying on *Athanassoglou and Others v. Switzerland* [GC] (no. 27644/95, § 43, ECHR 2000-IV), the Government emphasised that '[t]he outcome of the proceedings must be directly decisive for the right

in question' and that 'mere tenuous connections or remote consequences [were] not sufficient to bring Article 6 § 1 into play'. Moreover, in *Gorou v. Greece (no. 2)* [GC] (no. 12686/03, § 29, 20 March 2009) the Grand Chamber had held that 'in assessing whether there [was] a dispute over a civil right, one must look beyond the appearances and the language used and concentrate on the realities of the situation ... according to the circumstances of each case'.

50. The Government submitted that in the instant case the 2001 judgment of the City Court was final and also settled the dispute between the parties to the 2008 proceedings. The decision concerning the appeal to the High Court in 2008, however, determined a different question, namely whether or not the applicant's case should be examined again. The High Court's decision – having regard to 'the realities of the situation' in the circumstances of the applicant's case – had only tenuous connections or remote consequences to the 'civil right' in question. It differed, for example, from a decision that either confirmed or quashed a previous judgment.

51. Thus, with reference to the particular circumstances of the case, the Government invited the Court to hold that Article 6 § 1 did not apply to the case at hand and to declare the application inadmissible as being incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 35 §§ 3(a) and 4.

2. *The applicant's submissions*

52. The applicant, disagreeing with the Government, maintained that from the Court's case-law it followed that the scope of applicability of Article 6 § 1 of the Convention ought not to be interpreted restrictively. Not only the City Court but also the High Court expressly determined the private property rights of the applicant and their decisions were 'directly decisive' for the existence, scope or modalities of the rights and obligations concerned.

53. The Government's suggestion that the 2001 proceedings provided a final determination of the applicant's property rights and that the 2008 proceedings simply regarded the question of whether the case should be examined again was incorrect. Whilst it was true that the 2008 proceedings concerned some elements that had also been assessed during the 2001 proceedings, in the 2008 case the applicant also presented several arguments that had not been examined in the 2001 case, notably circumstances occurred after the 2001 judgment (see paragraph 11 (d) above). The 2008 proceedings clearly consisted of more than a simple review of the 2001 judgment, as was confirmed by the fact that in 2008 the City

Court held a hearing and delivered a judgment in a procedure for decision on the merits, instead of dismissing the case as having been previously decided.

54. Thus, both formally and substantively, the 2008 proceedings involved a 'determination' of the applicant's private property rights. Article 6 § 1 was accordingly applicable to the proceedings at issue.

3. *Assessment by the Court*

55. The Court, having regard to the applicant's submissions to the City Court in the proceedings leading to its judgment of 2008 and its own case-law, is satisfied that they concerned a dispute over a civil right, namely his claim against the respondent company of a right of ownership to a part of the property in question, that could be said, at least on arguable grounds, to be recognised under domestic law (see, for instance, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 40, ECHR 2007-II; and *K.T. v. Norway*, no. 26664/03, § 82, 25 September 2008). The dispute was genuine and serious; it related not only to the actual existence of a right but also to its scope and the manner of its exercise (*ibid.*). The Court further observes that the City Court rejected the applicant's claim on the ground that the company had derived his rights from the applicant's former wife and that the City Court had previously ruled in her favour in its 2001 judgment. The City Court's 2008 judgment must be considered to have determined the dispute since, following the High Court's refusal to admit the appeal, the result of these proceedings seen as a whole was directly decisive for the right in question (*ibid.*). Article 6 § 1 was accordingly applicable to those proceedings. In reaching this conclusion, the Court is aware that, as noted in *Valchev and Others v. Bulgaria* (dec.) nos. 47450/11, 26659/12 and 53966/12, 21 January 2014), there have been cases in which such proceedings were found not to involve a 'determination' of the applicant's 'civil rights' and the provision was therefore considered inapplicable (*ibid.*, § 72). However, the prevailing approach seems to be that Article 6 § 1 is applicable also to leave-to-appeal proceedings (*ibid.*, §§ 69–71; *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 54, Series A no. 115; and *Martinie v. France* [GC], no. 58675/00, §§ 11 and 53–55, ECHR 2006-VI), and that the manner of its application depends on the special features of the proceedings involved, account being taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (*Monnell and Morris*, cited above, § 56).

56. The Court is therefore unable to agree with the Government that the applicant's complaint is incompatible *ratione materiae* with the provisions of the Convention. Nor does the Court find that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or that it is inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

57. The applicant maintained that, due to the lack of reasoning in the High Court's decision of 12 June 2008 dismissing his appeal, it was not apparent that his appeal had been reviewed in a manner complying with the Article 6 § 1 requirements.

58. Like in *Hirvisaari v. Finland* (no. 49684/99, §§ 31–32, 27 September 2001), his appeal to the High Court had to a large extent concerned the inadequacy of the first-instance Court's reasoning, in particular the City Court's confusion regarding the applicant's arguments on points of law and its refusal to hear certain witnesses.

59. Whilst an appellate court could, in principle, endorse the reasons of the lower Court's decision (*Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, § 88, 17 June 2008), the High Court had not done so in the applicant's case. Paraphrasing the provision in question, it had merely stated that it found it 'clear' that the appeal would not succeed. This was not the same as endorsing a decision explicitly. Indeed, provided it upheld the first-instance Court's conclusion, the High Court could dismiss an appeal without giving reasons, even if it disagreed with the latter's reasoning and the first-instance court procedure suffered from deficiencies.

60. Even when an appellate court simply endorsed the reasons of the lower Court's decision, Article 6 § 1 required that the appellate court 'did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by the lower court' (*Helle v. Finland*, 19 December 1997, § 60, *Reports of Judgments and Decisions* 1997-VIII). In the applicant's case, the possibility of verifying whether the High Court had done so was non-existent (in contrast to *Meltex Ltd and Movsesyan*, cited above, § 88, where this transpired from the relevant national judgments).

61. The High Court should at least have provided 'very limited reasoning'. The Strasbourg Court had accepted that this could satisfy the Article 6 requirement 'where a Supreme Court refused to accept a case on the basis that the legal

grounds for such a case had not been made out' (*Marini v. Albania*, no. 3738/02, § 106, ECHR 2007-XIV (extracts)).

62. The extent of the requirement to give reasons depended not on the form but rather on the substance of the decision. The condition for rejecting an appeal under Article 29-13 (2) of the Code of Civil Procedure (i.e. that the High Court '[found] it clear that the appeal [would] not succeed'), reflected that such a decision effectively determined the subject matter of the case and explained why the reasons ought to be thorough in order to be deemed adequate for the purposes of Article 6 § 1.

63. In the present case, a number of factors spoke in favour of requiring the High Court to state adequate reasons and for rejecting the Government's invitation to the Court to rely on its previous rulings in which it had accepted that appellate courts give limited or even no reasoning when rejecting an appeal:

(i) The case-law in question was very specific and had been limited to dealing with decisions taken by national supreme- or constitutional courts or similar tribunals of last and final jurisdiction, with inherent features suggesting a more lenient duty to state reasons (see for instance, *X v. Germany*, (dec.) no. 8769/79, 16 July 1981; *Müller-Eberstein v. Germany* (dec.), no. 29753/96, 27 November 1996; *Immeubles Groupe Kosser v. France* (dec.), no. 38748/97, 9 March 1999; *Bufferne v. France* (dec.), no. 54367/00, ECHR 2002-III (extracts)); *Burg and Others v. France* (dec.), no. 34763/02, ECHR 2003-II; *Sale v. France*, no. 39765/04, 21 March 2006); *Nerva and Others v. the United Kingdom* (dec.), no. 42295/98, 11 July 2000; *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI; and *E.M. v. Norway* (dec.), no. 20087/92, 26 October 1995).

(ii) That case-law had generally concerned situations where the merits of the case had been thoroughly assessed in two lower instances and where a reduced requirement for stating reasons in the last and final instance refusing the appeal had been justified. However, the merits of the present case had not been thoroughly assessed even once. Although the City Court had accepted to hear the case on the merits (thus accepting that the 2001 proceedings were not legally binding on the 2008 proceedings), it had considerably restricted the scope of the hearing by not allowing the applicant to examine any witnesses or present any other evidence, thereby generally preventing him from putting forth his arguments. Despite his having pointed to these errors in his appeal (see paragraph 11 above), the High Court had failed to hear oral argument and to take any steps to rectify them. All it did before rejecting the

appeal was to obtain one set of written pleadings from the applicant (who was not represented by counsel at the domestic level). Thus, a strict requirement ought clearly to apply to the High Court's reasoning.

(iii) Whereas the above case-law commonly related to provisions offering a court of last and final jurisdiction the possibility of granting leave to appeal, the present case concerned a situation where the legislator had opted for a provision offering the applicant a right to appeal to the High Court (Article 29-13 (2) of the Code of Civil Procedure). This was presumably on the ground that the former type of appeal scheme (which was the rule of appeal to the Supreme Court, see Article 30-4 (1) of the Code) would offer insufficient legal protection where the case had only been reviewed once, at first instance.

(iv) While the said case-law had generally concerned appeals limited to questions of law, as was common for appeals to a court of last and final jurisdiction, an appeal to the High Court, as was the situation here, could concern questions of fact, law and procedure (Article 29-3 (1) of the Code). Since the High Court failed to state any reasons for its decision it was impossible to understand why it had found it 'clear that the appeal will not succeed' (Article 29-13 (2) of the Code).

(v) The aforementioned case-law commonly concerned situations where the decision in question could not itself form the subject of a further appeal and the need for reasoning was accordingly more limited. In contrast, in the case at hand, the High Court's decision was one that could be appealed to the Supreme Court under Article 30-1(1) of the Code but, because it stated no reasons, it would be impossible for the appellate court to review it. Since Norwegian law provided that a High Court decision could be appealed, the decision ought to be reasoned in such a manner as to enable the Appeals Leave Committee of the Supreme Court to carry out a review of the High Court procedure. In this context, the applicant prayed in aid the *Hadjianastassiou v. Greece* judgment (16 December 1992, § 33, Series A no. 252).

64. The latter point had also been stressed by the Supreme Court when modifying its practice in criminal procedure to the effect that a dismissal of an appeal must state the reasons as a consequence of the requirement in Article 14 (5) of the Covenant (see paragraph 35 above). In addition, the applicant argued, the lack of reasons in the High Court's decision had prevented public scrutiny of the administration of justice.

2. *The Government's submissions*

65. The Government maintained that, as a point of departure, it ought to be emphasised that the impugned decision of the High Court had in fact contained reasons, namely by stating that it was 'clear' to High Court that the appeal 'had no prospect of success'. This was sufficient under the Court's case-law (see *Gorou*, cited above, § 41).

66. The Government contested the applicant's unsubstantiated view that the High Court's decision did not demonstrate that his appeal had been subjected to such review as was required by Norwegian law and the Court's Article 6 § 1 case-law. When the three judges comprising the High Court had unanimously stated that they found it clear that the appeal had no prospect of success, it ought to be assumed that their decision had in fact been based on a careful review of the City Court's judgment, the applicant's appeal and three written pleadings. The applicant's allegations to the contrary suggested that they had neglected their professional duties.

67. It was true, as the applicant pointed out, that it would have been possible for the High Court to refuse to admit the appeal even if it did not fully agree with the lower Court's reasoning provided that it agreed with the conclusion. However, this was a merely hypothetical scenario as the present case was clear-cut and could not have been decided in any other way.

68. The case-law which the applicant prayed in aid had in fact little bearing on the concrete assessment which the Court was called on to make in this case. The Government found no compelling reasons for distinguishing filtering based on a refusal of admission of an appeal (paragraph 2 of Article 29-13 of the Code of Civil Procedure) from the type based on leave-to-appeal procedure (paragraph 1 of the said provision). Even though they represented two different systems of appeal they both served the same filtering purpose and might produce the same results depending on the circumstances. Were the requirement to provide reasons in the procedure at issue here to be stricter than was the case with regard to leave-to-appeal proceedings, it would have the unfortunate consequence of encouraging States to offer the latter kind which was less furnished with Article 6 guarantees.

69. The Government were thus of the opinion that the reasoning provided by the High Court in the case under consideration satisfied the 'fair hearing' requirement in Article 6 § 1 of the Convention.

70. In this connection, account ought to be taken of 'the entirety of the proceedings' (see, amongst other authorities, *Sutter v. Switzerland*, 22 February 1984, § 28, Series A no. 74; and *Mon-*

nell and Morris, cited above, § 56), notably the reasons contained in the City Court's judgment, from which it transpired that the applicant's legal arguments had no prospects of success whatsoever. Regard must also be had to the procedural safeguards that applied when a first instance judgment was appealed. In particular, before delivering its decision the High Court had warned the applicant that it envisaged refusing to admit his appeal and had in accordance with Article 20-13(4) of the Code of Civil Procedure given him an opportunity to comment, of which he availed himself. Thus the procedure conducted by the High Court before taking its decision fully complied with the right to an adversarial process guaranteed by the right to a 'fair hearing' in Article 6 § 1 (see *Vermeulen v. Belgium*, 20 February 1996, § 33, *Reports of Judgments and Decisions* 1996-I).

3. The Court's assessment

(a) General principles

71. The Court reiterates that while the Convention does not compel the Contracting States to set up courts of appeal or of cassation and does not guarantee a right to appeal as such in civil cases, a State which does so is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (*Delcourt v. Belgium*, 17 January 1970, p. 14, Series A no. 11). As to the requirement to state reasons, which is at issue in the case under consideration, in *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I, it held as follows:

"26. ... [A]ccording to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see the *Ruiz Torija v. Spain* and *Hiro Balani v. Spain* judgments of 9 December 1994, Series A nos. 303-A and 303-B, p. 12, § 29, and pp. 29–30, § 27; and the *Higgins and Others v. France* judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 60, § 42). Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see the *Van de Hurk v. the Netherlands* judgment of 19 April 1994, Series A no. 288, p. 20, § 61). Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower Court's decision (see, *mutatis mutandis*,

the Helle v. Finland judgment of 19 December 1997, *Reports* 1997-VIII, p. 2930, §§ 59–60)."

72. The Court has also stated that a lower court (or authority) in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal (see *Hadjianastassiou*, cited above, § 33; *Hirvisaari*, cited above, § 30; and *Sanchez Cardenas v. Norway*, no. 12148/03, § 49, 4 October 2007). The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention (see *Hadjianastassiou*, *ibid.*).

73. Furthermore, the manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134; and *Monnell and Morris*, cited above, § 56). In order to determine whether the requirements of fairness in Article 6 were met in the present case, it is necessary to consider matters such as the nature of the filtering procedure and its significance in the context of the civil proceedings as a whole, the scope of the powers of the High Court, and the manner in which the applicant's interests were actually presented and protected before the High Court (*Monnell and Morris*, cited above, *ibid.*).

74. In this context it should be borne in mind that, with regard to the decision of an appellate court on whether to grant leave to appeal, the Court has held that Article 6 § 1 cannot be interpreted as requiring that the rejection of such leave be subject itself to a requirement to give detailed reasons (see *Sawoniuk*, cited above).

(b) Application of the above principles to the present case

75. Turning to the particular circumstances of the present case, the Court first notes the applicant's argument that, in view of the shortcomings in the City Court's procedure and reasoning, the High Court should have given more detailed reasons for its refusal of admission in the instant case. In his appeal to the High Court, he had complained of the City Court's decision to shorten the overall duration of the hearing from the three days initially scheduled to five hours, including the hearing of the applicant's witnesses and the presentation of documentary evidence, and of the City Court's assessment of the legal issues to be determined.

76. However, the Court observes that the City Court had held an adversarial hearing at which both parties were heard and evidence was

presented, the applicant having opted to plead his own case and his opponent being represented by a lawyer. While it is not the Court's task to express any view on whether the City Court's interpretation of Norwegian law was correct or to substitute its own assessment for that of the City Court with regard to any factual issues brought before it (see *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B; *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 31, Series A no. 274; and *Botten v. Norway*, 19 February 1996, § 48, Reports 1996-I), it finds nothing to indicate that the City Court transgressed the normal discretion enjoyed by national courts in assessing the admissibility and relevance of evidence in cases before them and making findings of facts (see, for example, *Eskelinen and Others v. Finland*, no. 43803/98, § 31, 8 August 2006; *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 44, 5 July 2007; and *Bergsson and Others v. Iceland* (dec.), no. 46461/06, 23 September 2008). Nor does it appear that the City Court's own reasoning was inadequate for the purposes of Article 6 § 1 of the Convention (compare *Hirvisaari*, cited above, §§ 31–33). There is no appearance of any failure on the part of the City Court to observe the Article 6 fairness requirements in the applicant's case (see *Sawoniuk*, cited above; and *Nerva and Others*, cited above).

77. The question nonetheless remains whether the High Court, notwithstanding the above findings, could be said to have failed to give sufficient reasons for its refusal of 12 June 2008 to admit the applicant's appeal for examination. The reasons stated by the High Court in the present case consisted of a paraphrasing of the contents of Article 29-13 (2), first sentence, according to which such admission could be refused if the High Court 'found it clear that the appeal would not succeed'.

78. By way of general observation, the Court notes that the impugned decision had been taken within the framework of a filtering procedure introduced by the 2005 Code of Civil Procedure in the interests of procedural economy. It was recognised that in order to avoid that the parties and the judiciary incur considerable additional costs there was a need to stop clearly unmeritorious appeals to the High Court. Whilst the right to appellate review of a decision on the merits was deemed an important safeguard, an unlimited and extensive right in this respect could be counterproductive to the rule of law (see paragraphs 18, 25 and 26 above).

79. The High Court's role in appeal proceedings in a civil case was not to examine the case afresh but to review the first-instance Court's decision that formed the subject of the

appeal. After carrying out an examination of the merits of the case, normally on the basis of the case file, the High Court could refuse admission of an appeal provided that it found it 'clear' that the appeal had no prospects of success. This requirement implied a high degree of certainty that the outcome would remain unaltered after an ordinary appeal hearing. It was not a condition for refusing admission of an appeal that the High Court agreed with the City Court's reasoning or was of the view that its reasoning would stand after the High Court's review of the case. It was sufficient that the High Court found it clear that the outcome would be maintained, possibly on the basis of a different reasoning than that given by the City Court. It was moreover a condition that the three judges taking part in the decision to refuse admission of an appeal unanimously found that the appeal would not succeed (see paragraph 29 above). A decision to refuse admission of an appeal was taken at the preparatory stage of the proceedings (Article 29-14) and, once final, had the effect that the lower Court's judgment gained legal force (see paragraph 28 above).

80. In this connection, the Court reiterates that 'as regards the preliminary procedure for the examination and admission of appeals on points of law by an organ operating within the Court of Cassation, it has ... acknowledged that an appellate court is not required to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation' (see, for instance, *Gorou*, cited above, § 41; and *Wnuk v. Poland* (dec.), no. 38308/05, 1 September 2009, cited above, both with further references). This principle, which it has thus affirmed in such general terms, the Court has also applied with respect to the dismissal of an appeal made on factual grounds (see *Wnuk* and *E.M.*, both cited above).

81. Moreover, in substance, the High Court's specific role at this stage of the national proceedings when *refusing admission of an appeal* can hardly be distinguished from that assumed by a national appellate court when *refusing leave to appeal* on the ground of no reasonable prospects of success. In a number of previous cases the Court has had to examine each type of situations and, without drawing any such distinction, has found that reasoning such as here did not give rise to a breach of the Article 6 fair hearing guarantee (as examples of the first type, see for instance, *Immeubles Groupe Kosser*; *Burg and Others*; and *Salé*, all cited above; as examples of the second situation, see *Sawoniuk*, *Nerva and Others*; and *E.M.*, all cited above). Nor has it differentiated between filtering decisions taken as here at second instan-

ce and such decision taken at third instance (see other cases above). Indeed, the nature of the issue to be determined, namely the existence or not of reasonable prospects of success, is in substance the same.

82. However, the Court observes that the High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of fact. In the case under consideration, the applicant appealed to the High Court against the City Court's examination of his pleas on points of law and its sudden decision to drastically shorten the hearing from three days to five hours thereby substantially reducing his opportunity to adduce witness- and documentary evidence regarding certain issues of fact (see paragraph 13 above). The Court is not convinced in the concrete circumstances that the High Court's reasoning in its decision of 12 June 2008 did address the essence of the issue to be decided by it (compare, *mutatis mutandis*, *Helle*, cited above, § 60) in a manner that adequately reflected its role at the relevant procedural stage as an appellate court entrusted with full jurisdiction and that it did so with due regard to the applicant's interests (see *Monnell and Morris*, cited above, § 56).

83. Furthermore, it should be noted that when refusing to admit the applicant's appeal, the High Court did not act as the final instance in so far as its procedure could form the subject of an appeal to the Appeals Leave Committee of the Supreme Court. Whilst the latter's jurisdiction did not extend to the merits of the applicant's appeal to the High Court or of the latter's refusal to admit his appeal (compare *Hadjianastassiou*, cited above, § 33; and *Hirvisaari*, cited above, §§ 31–32), its review did encompass the High Court's application of the law and assessment of the evidence in as much as it related to points of procedure. It could also review whether in the light of the High Court procedure, seen as a whole, it was justifiable from a fair hearing point of view, notably the guarantees in Article 6 § 1 of the Convention, for the High Court to refuse admission of the appeal. This review included whether the subject matter could be adequately dealt with on the basis of the written case-file in a simplified procedure (see paragraph 38 above). Against this background, the Court cannot but welcome the developments in national judicial practice (see paragraph 44 and also paragraph 35 above) and the legislative changes (see paragraphs 45 to 46 above) in this area after the impugned proceedings. Thus, while the said review would be based on the same case-material as before the High Court (see paragraph 39 above), the Court is not persuaded that the reasons stated by the High Court for refusing to admit his appeal made it possible for the appli-

cant to exercise effectively his right to appeal (see *Hadjianastassiou*, cited above, § 33; *Hirvisaari*, cited above, § 30) against the High Court's procedure to the Supreme Court, for the purposes of Article 6 § 1 of the Convention.

84. There has accordingly been a violation of this provision.

II. Application of article 41 of the convention

85. Article 41 of the Convention provides:

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

A. Damage

86. The applicant (1) invited the Court to hold that he was entitled to appropriate remedies under Article 13 of the Convention, referring to *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI. He (2) further asked the Court to award him an appropriate amount of compensation for the non-pecuniary damage inflicted on him by the wrongful treatment he had suffered in the proceedings before the High Court. The fact that the High Court would not take his appeal seriously and had deprived him of basic Article 6 guarantees had caused him considerable distress.

87. The Government disputed item (1) above, stressing that, in the event that the Court were to find a violation of the Convention, it only had competence to award the applicant just satisfaction under Article 41. As to item (2), they requested the Court to reject it as being unsubstantiated. In any event, they were of the view that the finding of a violation would constitute adequate just satisfaction in the present case.

88. As to item (1), the Court notes from the outset that the applicant did not complain of a violation of Article 13 of the Convention. While referring to the above-cited *Kudła* judgment, he invoked this provision in asking the Court to hold that he was ‘entitled to appropriate remedies’, but without elaborating specifically on the grounds for his request. His claim can be understood to imply an invitation to the Court to indicate to the respondent State what measures, beyond the payment of compensation under Article 41 of the Convention, should be adopted by it to implement the present judgment under Article 46. However, bearing in mind its case-law in this area (see, as a recent authority, *Del Rio Prada v. Spain* ([GC], no. 42750/09, §§ 137–138 ECHR 2013, with further references), the Court does not find in the concrete circumstances of the present case that the violation found by it is of such a character

as to warrant indicating to the respondent State any individual or general measures for its domestic legal order to put an end to the violation and to redress the effects thereof.

89. As regards item (2), an award under Article 41 can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 § 1. The Court cannot speculate as to the outcome of any judicial review had the violation of this provision not materialised in the instant case but is prepared to accept that the applicant must have suffered some anguish and distress therefrom. Bearing in mind the domestic judicial and legislative changes related to the subject-matter in question (see paragraphs 44 and 46 above), the Court considers that the present finding of a violation constitutes adequate just satisfaction in this respect.

B. Costs and expenses

90. The applicant also claimed 164,387 Norwegian kroner (NOK) (corresponding to approximately € 21,500 on 26 March 2012) for his lawyers work (105 hours, including 47.50 hours at NOK 1,264 per hour and 46.75 hours at NOK 2,050 per hour) in the Strasbourg proceedings, incurred by him on a pro bono basis.

91. The Government requested the Court to carefully examine the claim in the light of the Court's case-law, according to which only costs that are necessarily incurred and are reasonable as to quantum should be reimbursed.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the specification of costs submitted and the above criteria, the Court considers it reasonable to award the sum of € 12,500 for the proceedings before the Court, plus any tax that may be chargeable to the applicant on this amount.

C. Default interest

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

For these reasons, the court

1. Declares, unanimously, the application admissible;
2. Holds, by six votes to one, that there has been a violation of Article 6 § 1 of the Convention;
3. Holds, unanimously,

(a) that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

(b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, € 12,500 (twelve thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. Dismisses, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

(...)

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Møse is annexed to this judgment.

Dissenting opinion of judge Møse

I. Introduction

1. The main issue in this case is to what extent a court of appeal – acting as the second instance – is required under Article 6 § 1 of the Convention to give reasons in filtering proceedings, and in particular whether it may limit itself to a general formulation to the effect that the case has no prospect of success. In the view of the majority, such brief reasoning was not acceptable (see paragraphs 82-83 of the judgment). I am not convinced that this is correct.

2. It is common ground that as a consequence of subsequent judicial and legislative developments in Norway (see paragraphs 32 to 46) the situation in the *Hansen* case will no longer occur. But the exact requirements of the Convention involve questions of principle which may arise in future cases.

3. First, a few words about the case as it evolved at the national level. In 2001 Fredrikstad City Court gave judgment in the real-estate dispute between the applicant and his former wife. It found against the applicant, who did not appeal (see paragraph 8). In 2007 he instituted proceedings against the company which had bought the property. In its judgment of 21 January 2008, the City Court again found against the applicant,

attaching particular weight to its 2001 judgment (see paragraphs 10 to 12). Its decision to declare evidence inadmissible and to shorten the proceedings was also based on the premise that the dispute about ownership had been decided in 2001.

4. In his appeal to Borgarting High Court the applicant challenged the City Court's approach primarily by raising various points of law, including alleged procedural errors. After warning the applicant that his appeal could be refused, extending the deadline for his comments and receiving two sets of submissions from him, the High Court by a unanimous decision of 12 June 2008 found it clear that the appeal would not succeed (see paragraphs 13 to 15). On 19 September 2008 the Appeals Leave Committee of the Supreme Court unanimously found it clear that the applicant's appeal would not succeed and rejected it (see paragraphs 16-17).

II. *The Court's case-law*

5. I agree with the description in the judgment (see paragraphs 71 to 74) of the general principles elaborated in the Court's case-law and share the view that an appeal system based on *refusing admission of an appeal* can hardly be distinguished from a model based on *refusing leave to appeal* on the ground of no reasonable prospect of success (see paragraph 81 of the judgment).

6. In my view the Court has until now applied these general principles in a cautious way. Firstly, there has been uncertainty in the case-law of the Convention organs as to whether Article 6 is applicable at all to leave-to-appeal proceedings and similar filtering processes. As noted in *Valchev and Others v. Bulgaria* (dec.) nos. 47450/11, 26659/12 and 53966/12, § 72, 21 January 2014, there have been cases in which such proceedings were found not to involve a 'determination' of the applicant's 'civil rights'. In *Valchev* the Court decided to leave the issue open as the applicants' complaint was in any event inadmissible (ibid. § 73). For my part, I share the view expressed in the present judgment (see paragraph 55) that the prevailing approach seems to be that Article 6 § 1 is applicable also to filtering proceedings. However, the above-mentioned discrepancy in the case-law on the applicability of Article 6 to filtering proceedings, and the fact that the Court as recently as in early 2014 decided to describe the two trends without finding it necessary to rule on the matter, illustrate the Court's prudence in this field.

7. Secondly, the cases referred to in paragraphs 60, 63 (i), 70, 73-74 and 81 of the judgment clearly show that the Court has been reluctant to require national appellate courts to give detailed

reasons when exercising their filtering role. In most of these cases the applicants' complaints of insufficient reasoning were declared inadmissible as manifestly ill-founded. In the very few judgments on the merits concerning the reasons in filtering proceedings, the Court did not find a violation of Article 6 § 1. The *Hansen* judgment is the first time it does so.

8. It may be argued that the previous cases focussed on filtering before national supreme courts, constitutional courts or courts of cassation. However, that is not entirely correct. As stated in the judgment (see paragraph 80), the Court has in some cases accepted filtering decisions with very brief reasoning at second and third instance, and on the basis of legal and factual grounds. Indeed, paragraph 80 reiterates that 'an appellate court is not required to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success, without further explanation' and then refers to three cases.

9. The first case is *Gorou v. Greece* (no. 2) [GC] (no. 12686/03, 20 March 2009), where the prosecutor had not given reasons for rejecting a civil party's request that he appeal an acquittal to the Court of Cassation on points of law. Based on the individual circumstances of the case (see §§ 37-42), the Court found no violation of Article 6 § 1. That case was of course different from the *Hansen* case in several ways, but I note that the Court of Cassation was the second instance.

10. Paragraph 80 also mentions *Whuk v. Poland* (dec.), no. 38308/05, 1 September 2009, which involved the Supreme Court as the third instance. That appeal included assessment of the evidence and the application of incorrect criteria by the lower courts in respect of the value of the appellant's claim. The Supreme Court refused to entertain the cassation appeal, relying on a provision concerning manifestly ill-founded appeals and appeals in cases where no serious legal issues arose. The decision, which was taken by a single judge sitting in camera, referred to the criteria listed in the provision, stated that none of the circumstances was present, and found it justified to refuse to entertain the cassation appeal.

The Court declared *Whuk's* complaint inadmissible. It stated that when a Supreme Court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6. It also repeated the formulation in *Gorou* and some other cases that there is no need for appellate courts to give detailed reasoning as regards points of law (see para. 10 above), and – again referring to case-law – did not rule out the possibility that, in the circumstances of a particu-

lar case, a Supreme Court may be required to give more adequate reasons.

Wnuk differs from *Hansen* in at least two ways: the screening in *Wnuk* took place in the Supreme Court as the third instance, and the case had already been examined on the merits by two judicial instances (the Regional Court and the Court of Appeal) which had full jurisdiction as to the facts and the law. But it is worth noting that the appeal to the Supreme Court included assessment of the evidence, that its competence included both facts and law, and that the Court, as always, based its conclusion on the individual circumstances of the case.

11. The third case mentioned in paragraph 80 of the present judgment is *E.M. v. Norway* (no. 20087/92, Commission decision of 26 October 1995, Decisions and Reports (DR) no. 83-A). The applicant had been convicted of fraud in the City Court. Under the previous system of review in criminal cases he applied to the Appeals Leave Committee of the Supreme Court for a new trial in the High Court or, in the alternative, for leave to appeal to the Supreme Court. In support of the request for a new trial in the High Court, he maintained his innocence and contested the City Court's evaluation of the evidence. In the alternative request for leave to appeal to the Supreme Court he submitted that there had been certain procedural errors, in that the City Court's reasoning was incomplete, the law had been wrongfully applied, and the sentence was disproportionate. The Appeals Leave Committee rejected both requests.

Before the European Commission of Human Rights *E.M.* argued that Article 2 of Protocol No. 7 to the Convention and Article 6 § 1 of the Convention had been violated. His application was declared inadmissible as manifestly ill-founded. The Commission did not find it necessary to decide whether the Appeals Leave Committee's decision amounted to a 'determination' of the criminal charge against the applicant (see para. 6 above).

With respect to *E.M.*'s complaint that no reason was given by the Appeals Leave Committee for its refusal to grant leave to appeal, the Commission considered that if the domestic law, as in that case, subjects the acceptance of the appeal to a decision by the competent court as to whether it considers that the appeal raises a legal issue of fundamental importance and whether it has any chances of success, it may be sufficient for that court simply to reject or accept such a petition.

The *E.M.* case is relevant in our context. The Commission did accept that the Appeals Leave Committee of the Supreme Court — acting as a second instance in leave-to-appeal-proceedings — had rejected by a unanimous decision an ap-

peal which included assessment of evidence (bearing on the innocence of the accused) using standard reasoning ('unanimously finds it clear that the appeal will not succeed' which was equivalent to the formulation in the present case, see paragraph 15 of the judgment).

Admittedly, the *E.M.* case dates from 1995 and was decided by the former Commission. But subsequent case-law developing the principles in this field has not set aside or expressed reservations about the reasoning in *E.M.* As regards the fact that the *E.M.* case was a criminal one, it is my view that if a standard rejection formula is acceptable in respect of an appeal which includes the factual basis of the guilt or innocence of an accused, it is difficult to see why such brief reasoning should not be allowed in a civil case, perhaps of a trivial character. According to our case-law, the Contracting States have greater latitude when dealing with civil cases, concerning civil rights and obligations, than when dealing with criminal cases (see *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 19, Series A no. 274).

12. Based on this recapitulation (paras. 5 to 11 above), I cannot see that a filtering decision by a second instance based on no prospect of success is, as such, a violation of Article 6 § 1 if matters of evidence are involved. In my opinion, it does not follow from the case-law that there is any clear distinction between factual and legal issues or between second and third instance. Consequently, the finding of a violation in the present case amounts to a development in the Court's case-law. In my view, *Hansen* is not the right case for such a step to be taken (III), and I doubt whether the time is ripe to do so (IV).

III. *The Hansen Case*

13. The majority observes that the High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of facts, and places emphasis on the City Court's decision to shorten the hearing and substantially reduce the applicant's opportunity to adduce witness- and documentary evidence (see paragraph 82).

14. In my opinion, it should be noted, firstly, that when the applicant instituted proceedings in 2007, he was in fact rearguing a final judgment in a case he had lost in 2001 — that is, six years earlier. Without expressing any view on the City Court's interpretation and application of national law, it seems to follow from the reading of the City Court's 2008 judgment that his submissions had no solid basis: the main issue in the case — the ownership of the estate — had been decided in 2001; the manner in which the applicant described the crucial issue in the 2001 proceedings

was incorrect; and his reference to legal doctrine was irrelevant and based on a misunderstanding. 15. Furthermore, in its decision on the admissibility of evidence the City Court noted that all the witnesses whom the applicant wished to call, with one exception, had been heard in 2001. It further stated that the only new witness, an art historian, could not shed light on the issues of property rights. Under these circumstances I certainly agree with the judgment (see paragraph 76) that the City Court did not transgress the normal discretion enjoyed by national courts in assessing the admissibility and relevance of evidence. In view of the fact that the applicant had received the City Court's inadmissibility decision and judgment, both of which explained the legal situation and that his evidence challenging the 2001 judgment was irrelevant, I do not agree that the High Court needed to elaborate its reasons in order for him to exercise his right to appeal efficiently. The extent to which reasons should be given varies according to the nature of the decision and must be determined in the light of the circumstances of the case (see paragraph 71 of the judgment).

16. It is true, as stated by the majority (see paragraph 82), that the High Court's general jurisdiction was not limited to law and procedure but also extended to questions of facts. However, in the present case this is of little significance. The applicant's appeal mainly raised questions of law, and his complaint about the shortening of the hearing was linked to the inadmissibility decision, which in turn depended on what was legally relevant in the case. In my view, it is difficult to discern elements in the applicant's appeal which would require that the High Court provide detailed reasons when refusing admission of the appeal on the ground that it was clear that it would not succeed.

17. The majority refers to *Helle v. Finland*, 19 December 1997, § 60, *Reports of Judgments and Decisions* 1997-VIII, where the Court stated that the notion of a fair procedure requires that a national court which has given sparse reasons for its decision does in fact 'address the essential issues' which were submitted to its jurisdiction and does 'not merely endorse without further ado the findings reached by the lower court'. I am in total agreement with this statement of principle. At the same time, it should be borne in mind that *Helle* did not concern a filtering process but ordinary appeal proceedings before the Supreme Administrative Court which – without an oral hearing – simply appended the reasons of the first-instance court without commenting on them. As correctly stated in the present judgment (see paragraphs 73 and 74) the manner of appli-

cation of Article 6 depends on the special features of the proceedings in the domestic legal order and of the role of the appellate court therein, and the provision does not require that the rejection of leave to appeal be subject itself to a requirement to give detailed reasons. Finally, it should be recalled that the Court found no violation in *Helle*, even though the Supreme Administrative Court could review both facts and law.

18. Paragraph 83 of the judgment also addresses the fact that the High Court did not act as the final instance, in so far as its procedure could form the subject of an appeal to the Appeals Leave Committee of the Supreme Court. The majority is not persuaded that the reasons given by the High Court for refusing to admit his appeal enabled the applicant to exercise effectively his right to appeal. I respectfully disagree. The effect of the High Court's refusal to admit the appeal was that the City Court's judgment, with the latter's reasoning, gained legal force (see paragraphs 28 and 79 of the present judgment). The contested issues in the domestic proceedings were straightforward and the applicant mainly insisted on arguments which had already been discussed and rejected at previous instances (and in 2001). The Appeals Leave Committee, which had available the same case-material as the High Court, was empowered to fully examine the application of the law and the assessment of the evidence in relation to questions of procedure; and to review whether the procedure, seen as a whole, had been justifiable and in conformity with, *inter alia*, Article 6 § 1, which is incorporated into Norwegian law and has precedence in the event of conflict (see paragraph 32 of the judgment).

19. It is difficult to avoid the impression that the applicant's appeal was clearly unmeritorious, and I cannot see that any injustice was done when it was stopped at the filtering stage (see paragraph 25 of the judgment). Mechanisms serving as a deterrent against such appeals pursue a legitimate aim, which has been accepted by the Court (see, for instance, *Monnell and Morris v. the United Kingdom*, 2 March 1987, §§ 59, 63 and 67, Series A no. 115). Taking into consideration that the applicant was afforded a fair hearing in the City Court; that he was warned that his appeal could be refused and nonetheless presented further submissions; the nature of his appeal submissions to the High Court and the latter's role in the proceedings at issue, and the nature of its decision refusing admission of the appeal, I do not find, in the concrete circumstances of the present case, that the High Court's use of the 'no-prospect-of-success' formula was incompatible with Article 6 § 1 of the Convention.

IV. Final Remarks

20. The finding of a violation in the *Hansen* case may seem trivial. At the domestic level the matter was solved by the Norwegian Supreme Court, which relied on domestic systemic considerations without finding it necessary to enter into the requirements of Article 6 of the Convention (see paragraphs 40 to 43 of the judgment).

21. In my view this judgment may have more general repercussions which require careful consideration. It is clear (see paragraph 71) that the Convention does not compel the Contracting States to set up courts of appeal or of cassation, and it does not guarantee a right to appeal as such in civil cases, but persons are to enjoy the fundamental guarantees of Article 6 before such appellate courts. The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6.

22. It seems to me that the approach adopted at the national level differs considerably between the Contracting States. Specific reasoning may be required in some systems and more stereotyped reasoning may be permissible in others. I am not aware that there is any consensus about the extent to which reasons ought to be given when an appellate court refuses leave to appeal or performs other kinds of filtering. More generally, it is established case-law that the manner of regulation of the right to access to a court, including access to a court of appeal, is a matter in respect of which the Contracting States enjoy a certain margin of appreciation (see *Berger v. France*, no. 48221/99, § 30, ECHR 2002-X (extracts), with further references).

23. The emphasis of the majority in this case on whether the filtering mechanism was competent to review factual issues may well – if applied generally – come as a surprise to States which have perceived the Court's case-law differently. One should not underestimate the need for foreseeability in connection with the organisation of national judicial systems. Furthermore, the specific requirement to give reasons at the appeal levels may also be linked to the allocation of resources and prioritisation of the most important substantive stages of the judicial process, the aim being to ensure that proceedings are conducted fairly and are concluded within a reasonable time.

Noot

1. De hier opgenomen uitspraak illustreert dat vanuit het recht op een eerlijk proces van artikel 6 EVRM ook eisen aan de rechterlijke motivering worden gesteld. Zo overwoog het Hof

in het arrest *Van de Hurk* al dat artikel 6 EVRM de rechter verplicht zijn uitspraak te motiveren, alhoewel dit niet betekent dat hij op ieder argument een gedetailleerd antwoord moet geven. Het Hof was het echter in deze zaak niet eens met de stelling van de klager dat het College van Beroep voor het bedrijfsleven niet of onvoldoende op zijn argumenten was ingegaan. Daarbij gaf het Hof verder vaak aan dat een dergelijke motivering ook nodig kan zijn voor een partij om te kunnen beoordelen of hoger beroep zinvol is en, zo ja, op welke gronden (EHRM 19 april 1994, *Van de Hurk t. Nederland*, NJ 1995/462, m.nt. E.A. Alkema; zie ook EHRM 9 december 1994, *Ruiz Torija t. Spanje*, Series A vol. 303-A; EHRM 9 december 1994, *Hiro Balani t. Spanje*, NJ 1997/20, m.nt. E.A. Alkema onder NJ 1997/21 en EHRM 27 september 2001, *Hirvisaari t. Finland*, EHRC 2001/77, m.nt. A.W. Heringa; EHRM 27 februari 2007, *Tatishvilli t. Rusland*, AB 2007/324, m.nt. T. Barkhuysen en Y.E. Schuurmans).

2. Wat interessant is in de hier opgenomen zaak is dat het Hof deze plicht uitdrukkelijk in verband brengt met rechterlijke filteringsystemen, zoals die in veel lidstaten van de Raad van Europa bestaan, waarmee omwille van de efficiency beroepen verkort kunnen worden afgedaan meestal met een standaardmotivering. Dat laatste is temeer van belang nu ook Nederland dergelijke afdoeningsmodaliteiten kent. Hierbij valt te denken aan het vreemdelingenrecht waarin voor de Afdeling bestuursrechtspraak van de Raad van State in het hoger beroep geldt dat wanneer zij oordeelt dat een aangevoerde grief niet tot vernietiging kan leiden, zij zich bij de vermelding van de gronden van haar uitspraak kan beperken tot dit oordeel (artikel 91 lid 2 Vreemdelingenwet 2000). Achtergrond hiervan is dat de wetgever omwille van de efficiency alleen die zaken uitgebreid in hoger beroep behandeld wenst te zien waarin dat nodig is omwille van de rechtseenheid, rechtsontwikkeling of algemene rechtsbeschermingsvragen die spelen. Een vergelijkbare regeling geldt voor de Hoge Raad op grond van artikel 81 lid 1 RO: "Indien de Hoge Raad oordeelt dat een aangevoerde klacht niet tot cassatie kan leiden en niet noopt tot beantwoording van rechtsvragen in het belang van de rechtseenheid of de rechtsontwikkeling, kan hij zich bij de vermelding van de gronden van zijn beslissing beperken tot dit oordeel." Welke motiveringseisen gelden nu in dat verband op grond van artikel 6 EVRM is de vraag die de hier opgenomen uitspraak opwerpt. Of anders geformuleerd: kunnen de hiervoor aangeduide verkorte afdoeningsmogelijkheden van de Afdeling en de Hoge Raad door de EVRM-beugel?

3. Het Hof herhaalt nog eens zijn vaste jurisprudentie dat het EVRM niet verplicht tot het openstellen van hoger beroep dan wel cassatie, maar als een verdragsstaat dit wel doet dan dient hij in deze procedure de eisen van artikel 6 EVRM te garanderen. Eén van deze eisen is dus de genoemde motiveringsplicht, die overigens ook rust op lagere rechters, om betrokken partijen aldus in staat te stellen op effectieve wijze gebruik te kunnen maken van hun recht op hoger beroep. Het Hof roept ook — en dat is met name van belang als het gaat om rechterlijke filtersystemen — zijn jurisprudentie in herinnering dat een hoger beroepsrechter niet verplicht is een meer gedetailleerde motivering te geven in geval hij simpelweg de specifieke wettelijke bepaling toepast om het beroep niet in behandeling te nemen nu dit, zoals het criterium in Noorwegen was, geen kans van slagen heeft. Dit algemene principe heeft het Hof in die context ook toegepast als het gaat om een beroep op feitelijke gronden. Het Hof wijst er op dat het in deze rechtspraak geen nader onderscheid heeft gemaakt naar de vorm van rechterlijke filtersystemen (zoals het weigeren van toegang tot hoger beroep dan wel een verlofstelsel) en evenmin naar het niveau (in tweede of derde instantie) waarop deze beslissing wordt genomen. Geen vuiltje aan de lucht voor artikel 91 Vw 2000 en artikel 81 RO dus.

4. Toch concludeert het Hof in de concrete omstandigheden van het geval om een aantal — niet altijd goed te volgen — redenen juist wel tot een schending van de rechterlijke motiveringsplicht bij het niet toelaten tot hoger beroep op grond van 'het geen kans van slagen-criterium'. Het gerechtshof had namelijk ook rechtsmacht over feitelijke kwesties. Dit terwijl het beroep van de klager zich ook richtte op de plotselinge beslissing van de lagere rechter om de duur van de hoorzitting fors te beperken. Daardoor werd zijn mogelijkheid om via getuigen en documenten bewijs ten aanzien van juist die feiten te leveren sterk beperkt. Uit de beslissing van het gerechtshof kan het Straatsburgse Hof daarom niet opmaken dat het gerechtshof op deze kern van de zaak is ingegaan. Verder wijst het Hof op het feit dat de procedure bij het gerechtshof nog kan worden gevolgd door cassatieberoep waarin zijn oordeel over de rechtsvragen en de bewijswaardering, voor zover dat met de gevolgde procedure samenhangt, aan de orde kan komen. Dit alles samen brengt het Hof tot de conclusie dat er (toch) sprake is van een schending van artikel 6 EVRM. Klager zou namelijk als gevolg van de gebrekkige motivering niet effectief zijn recht op cassatieberoep kunnen uitoefenen. Bij dit oordeel heeft mogelijk ook een rol gespeeld dat de Noorse

wetgeving op dit punt reeds was gewijzigd en een uitgebreidere motivering voorschreef.

5. Voor Nederland lijkt (het is een moeilijk te volgen casuïstische redenering van het Hof) dit dus geen lastig precedent nu bij ons de verkorte afdoeningsmogelijkheden alleen in hoogste instantie bestaan. Wat daarvan ook zij, dissenter Møse is kritisch en benadrukt de absolute vrijheid van staten om dit soort afdoeningsmogelijkheden in te richten en het gebrek aan eenduidige regelingen terzake in de verschillende verdragsstaten. Daarbij speelt een rol het feit dat het EVRM geen recht op hoger beroep kent (buiten het niet voor Nederland geldende Zevende Protocol). Hij waarschuwt dat het Hof met deze uitspraak mogelijk toch een meer algemeen geldend precedent heeft geschapen, juist ook door het belang dat het Hof lijkt te hechten aan de motivering ten aanzien van meer feitelijke kwesties. Of hij daarin gelijk heeft betwijfelen wij, hoewel wij het eens zijn met zijn uitgangspunt dat staten de nodige vrijheid moeten hebben bij de inrichting van verkorte afdoeningsmechanismen.

T. Barkhuysen en M.L. van Emmerik

AB 2015/55

AFDELING BESTUURSRECHTSPRAAK VAN DE RAAD VAN STATE

12 november 2014, nr. 201406757/1/A3

(Mrs. D.A.C. Slump, H.G. Lubberdink, B.P. Vermeulen)

m.nt. J.G. Brouwer en A.E. Schilder

Art. 8 EVRM; art. 1, 94 Gw; art. 172 lid 1, 174 lid 1 Gemw; art. 2.40, 2:43 Apv Amsterdam

BA 2014/257

NJB 2014/2173

Omgevingsvergunning in de praktijk 2015/6489
ECLI:NL:RVS:2014:4117

Intocht Sinterklaas.

Gelet op hetgeen onder 6.3 is gesteld en in navolging van de uitspraak van de Afdeling van 6 augustus 2014, wordt overwogen dat de gestelde schending van artikel 8 van het EVRM in dit geval niet rechtstreeks voortvloeit uit de verlening van de evenementenvergunning door de burgemeester. Zoals appellant 3A en anderen ter zitting uiteen hebben gezet, hebben zij voornamelijk bezwaar tegen de bij de Sinterklaasintocht betrokken figuur van 'Zwarte Piet', nu die figuur volgens hen inbreuk maakt op hun uit artikel 8 van het EVRM voortvloeiende recht op respect voor hun privéleven. De evenementenvergunning heeft betrekking op de in de aanvraag