Grote Kamer. Rotterdamwet. Vrijheid om woonplaats te kiezen beperkt. Voldoende waarborgen. Geen schending van art. 2 Protocol 4 EVRM. Klacht art. 14 EVRM buiten beschouwing gelaten

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

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m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 2 Protocol 4 EVRM; art. 14 EVRM

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Grote Kamer. Rotterdamwet. Vrijheid om woonplaats te kiezen beperkt. Voldoende waarborgen. Geen schending van art. 2 Protocol 4 EVRM. Klacht art. 14 EVRM buiten beschouwing gelaten.

Klaagster, Garib, is een alleenstaande moeder van wie de enige bron van inkomsten is gebaseerd op de Wet werk en bijstand. Na ongeveer twee jaar in Rotterdam te hebben gewoond, wordt zij begin 2007 door de eigenaar van haar huis verzocht het pand te verlaten wegens een verbouwing voor eigen gebruik. Klaagster accepteert van hem alternatieve woonruimte in de buurt die zelfs geschikter voor haar en haar twee kinderen is.

De Tarwewijk was inmiddels echter onder de Wet bijzondere maatregelen grootstedelijke problematiek (de zogenaamde 'Rotterdamwet') aangewezen als gebied waar alleen huishoudens met een huisvestingsvergunning kunnen komen wonen. Omdat klaagster direct voorafgaand aan haar aanvraag korter dan zes jaren in de stadsregio Rotterdam had gewoond, wordt haar vergunningaanvraag afgewezen. Bovendien komt zij niet in aanmerking voor een bestaande uitzonderingsregeling, omdat zij afhankelijk is van de Wet Werk en Bijstand. Garibs klachten tegen de afwijzing falen in bezwaar en (hoger) beroep.

Op 28 juli 2009 dient Garib een klacht in bij het EHRM. De onmogelijkheid om een huisvestigingsvergunning te verkrijgen beperkt volgens klaagster haar recht om een woonplaats te kiezen en is daarmee in strijd met artikel 2 van het Vierde Protocol van het EVRM. Het Hof beslist in zijn Kameruitspraak dat geen schending van dit verdragsartikel heeft plaatsgevonden. De Grote Kamer accepteert daarop een verwijzingsverzoek van klaagster (intern appel).

De Grote Kamer stelt ten eerste de omvang van het geding vast. Klaagster en de interveniërende partijen drongen aan op het toepassen van artikel 14 EVRM. De wet zou bovenal gevolgen hebben voor mensen die in armoede leven of socio-economisch benadeeld waren. Op dit verdragsartikel was voor de Kamer geen beroep gedaan. De Grote Kamer overweegt dat het Hof zelf beslist hoe het recht moet worden geïnterpreteerd in het licht van de feiten. Hieruit volgt echter niet dat het Hof vrij is om een klacht los van diens procedurele context te behandelen. Tijdens de procedures in Straatsburg was geen discriminatieklacht geuit. De Grote Kamer overweegt dat de (ontvankelijkheids)beslissing van de Kamer in beginsel de omvang van het geding bepaalt. Een klager kan niet — in het bijzonder wanneer deze gedurende de gehele procedure vertegenwoordigd is — de kenschetsing van de feiten waartegen wordt opgekomen bij de Grote Kamer wijzigen ten opzichte daarvan. Het is volgens de Grote Kamer niet mogelijk nu voor het eerst een klacht op grond van artikel 14 EVRM te beoordelen.

Het Hof ziet geen reden de door partijen onbetwiste conclusie te herzien dat sprake is van een beperking van de vrijheid om vrijelijk woonplaats te kiezen in de zin van artikel 2 Vierde Protocol EVRM.

Met betrekking tot de vraag of de maatregel proportioneel is, recapituleert de Grote Kamer dat verdragsstaten een brede 'margin of appreciation' genieten om hun beleid te implementeren op het complexe gebied van grootstedelijke ontwikkeling. In deze zaak trachten nationale autoriteiten met de wet sociale problematiek in de binnenstad te bestrijden. Zij probeerden neerwaartse trends tegen te gaan door nieuwe bewoners te bevoordelen mede in het licht van de vraag of die hun inkomen putten uit eigen economische activiteiten. De Grote Kamer overweegt dat de wet niemand huisvesting ontzegt, noch personen dwingt hun huis te verlaten. De maatregel treft verder slechts relatief nieuwe bewoners: personen, ongeacht hun inkomen, die in de laatste zes jaar in Rotterdam zijn komen wonen. Deze wachttijd lijkt het Hof niet excessief.

Klaagsters belangrijkste argument dat de maatregelen niet het gewenste effect hebben gehad, wijst het Hof van de hand. Toetsing van sociaal-economische beleidskeuzes dient volgens de Grote Kamer te geschieden op grond van destijds voor autoriteiten beschikbare informatie en niet op grond van sindsdien beschikbaar geworden gegevens.

Het Hof beziet verder de wetsgeschiedenis en overweegt dat de Raad van State zich kon uitspreken waarop de regering aanpassingen deed. Ook zijn er na parlementaire interventies drie waarborgen in de wet opgenomen. Zo dient de gemeenteraad de minister ten eerste ervan te overtuigen dat voldoende huisvesting overblijft voor diegenen die niet aan de vergunningsvereisten voldoen. De aan-

wijzing van een gebied wordt ingetrokken wanneer lokaal onvoldoende huisvesting beschikbaar is voor betrokkenen. Ook is de maatregel qua tijd en plaats beperkt, de aangewezen gebieden worden voor periodes van maximaal vier jaar aangewezen. Ten tweede, moet de bevoegde minister iedere vijf jaar een effectiviteitsrapportage uitbrengen en bestaat een hardheidsclausule in de wet die lokale autoriteiten in individuele gevallen toestaat af te wijken van de regels voor huisvestingsvergunningen waar toepassing te schrijnend is. Ten derde, is het mogelijk om bezwaar en (hoger) beroep in te stellen tegen het weigeringsbesluit voor een huisvestingsvergunning. De Grote Kamer concludeert dat nationale autoriteiten zodoende voldoende gewicht hebben toegekend aan de rechten en belangen van personen in een positie zoals klaagster.

Het Hof concludeert dat de afwijzing van klaagsters huisvestingsvergunningaanvraag geen consequenties had die zo disproportioneel belastend waren, dat haar belang zwaarder moet wegen dan het algemeen belang dat wordt gediend door de consistente toepassing van de onderhavige maatregelen. De Grote Kamer is met twaalf stemmen tegen vijf van oordeel dat geen schending heeft plaatsgevonden van het recht op vrijheid om een woonplaats te kiezen, zoals gegarandeerd in artikel 2 van het Vierde Protocol van het EVRM.

Garib,
tegen
Nederland.

The law

I. Scope of the case before the court

95. Before the Grand Chamber, the applicant submitted that since the measure in issue was obviously linked to the source of income of the persons affected, and thus implicitly connected to their 'gender, social origin and/or race', the case should be examined under Article 14 of the Convention which prohibits discrimination.

96. The intervening third parties, the Human Rights Centre of Ghent University and the Equality Law Clinic of the Université libre de Bruxelles, also urged the Court to consider the case under Article 14 of the Convention taken together with Article 2 of Protocol 4. They stated that the Inner City Problems (Special Measures) Act had a particular impact on 'persons living in poverty or who [were] socioeconomically disadvantaged, such as people with a non-European background and single parents living on social security, like the applicant'; this, in their submission, contributed to the stigmatisation of those who could not meet the income requirement and accordingly constituted discrimination based on poverty or 'social position'. Although recognising that the Chamber had examined the applicant's complaint under Article 2 of Protocol 4 taken alone, they suggested that the Grand Chamber could in addition examine the case under Article 14 of the Convention in reliance on the case-law principle that the Court was 'master of the characterisation to be given in law to the facts of the case' and the principle *jura novit curia*.

97. The Government pointed out that no complaint under Article 14 had been submitted to the Chamber or communicated to them.

98. It is correct that the Court is master of the characterisation to be given in law to the facts of the case and therefore need not consider itself bound by the characterisation given by an applicant or a government (see, among many other authorities, *Scoppola/Italy* (2) [GC], 10249/03, § 54, 17 September 2009 and *Gherghina/Romania* (dec.) [GC], 42219/07, § 59, 9 July 2015). It does not follow, however, that the Court is free to entertain a complaint regardless of the procedural context in which it is made.

99. The applicant, through her lawyer, advanced an argument based on Article 26 of the International Covenant on Civil and Political Rights (though not Article 14 of the Convention or Article 1 of Protocol 12) before the domestic courts, which argument was expressly addressed (and rejected) at both levels of jurisdiction. In contrast, and although assisted by the same lawyer before this Court (see paragraphs 2, 15 and 17 above), she did not complain of discrimination either in her original application to the Court or at any later stage in the proceedings before the Chamber. The Chamber accordingly considered the case within the limits defined by the applicant herself (compare *Mathew/the Netherlands*, 24919/03, § 130, ECHR 2005 IX).

100. It is the Court's standing case-law that the scope of a case referred to the Grand Chamber under Article 43 of the Convention is determined by the Chamber's decision on admissibility (see, among many other authorities, *K. and T./Finland* [GC], 25702/94, §§ 140–141, ECHR 2001-VII; *Sommerfeld/Germany* [GC], 31871/96, § 41, ECHR 2003-VIII (extracts); *D.H. and Others/the Czech Republic* [GC], 57325/00, § 109, ECHR 2007-IV; *Kovačić and Others/Slovenia* [GC], 44574/98, and 2 others, § 194, 3 October 2008; *Sanoma Uitgevers B.V./the Netherlands* [GC], 38224/03, § 47, 14 September 2010; *Murray/the Netherlands* [GC], 10511/10, § 86, ECHR 2016; and *Al-Dulimi and Montana Management Inc./Switzerland* [GC], 5809/08, § 78, ECHR 2016).

101. Consequently, while it is true that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on, this does not mean that it is open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber and by reference to which the Chamber declared the complaint admissible and, where applicable, reached its judgment on the merits.
102. From the Court's perspective, the complaint under Article 14 is a new one, made for the first time before the Grand Chamber. It follows that the Court cannot now consider it (see, *mutatis mutandis,* among others, *Kovačić and Others*, cited above, § 195, and *Sanoma Uitgevers B.V.,* cited above, § 48).

II. Alleged violation of article 2 of protocol 4 to the convention

103. The applicant complained that the Inner City Problems (Special Measures) Act and the 2003 Housing By-law of the municipality of Rotterdam, and in particular section 2.6 of the latter (as in force at the time), violated her rights under Article 2 of Protocol 4, which provides as follows:

> '1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.'

The Government disputed this.

A. Applicability

1. Whether there has been a restriction

104. The Chamber held as follows (see paragraph 105 of its judgment):

> "The Court notes at the outset that the applicant — who, as a Netherlands national, was lawfully within the territory of the State — was refused a housing permit that would have allowed her to take up residence with her family in a property of her choice. It is implicit that this property was actually available to her on conditions she was willing and able to meet. There has therefore undoubtedly been a 'restriction' on her 'freedom to choose her residence', within the meaning of Article 2 of Protocol 4. …"

105. Neither the applicant nor the respondent Government has challenged this finding. The Court sees no reason to reconsider it of its own motion and accordingly endorses it.

2. Whether the third or the fourth paragraph of Article 2 of Protocol 4 should be applied

106. The Chamber held as follows (see paragraph 106 of its judgment):

> "The restriction complained of affects only the applicant's right to choose her residence, not her right to liberty of movement or her right to leave the country. It does not target any particular individual or individuals but is of general application in discrete areas (namely, circumscribed areas within the city of Rotterdam). The Court will therefore consider it under the fourth paragraph of Article 2 of Protocol 4, which relates directly to the first paragraph, rather than the third."

107. The applicant argued that the third paragraph of Article 2 of Protocol 4 was applicable. In her submission, the drafting history of the Article and the Court's case-law — in particular *Olivieira/the Netherlands*, 33129/96, ECHR 2002-IV and *Landvreugd/the Netherlands*, 37331/97, 4 June 2002 — suggested that the fourth paragraph could only apply in 'exceptional situations', an expression which she understood to mean 'an acute (and temporary) emergency situation'.
108. The Government took the view that the fourth paragraph should be applied. They pointed out that the fourth paragraph referred only to the first paragraph of the Article, unlike the third paragraph which referred also to the second paragraph. They also submitted that the fourth paragraph was more appropriate to the facts of the case by dint of the ordinary meaning of the words used; moreover, it had been added with a view to enabling policies that tackled overcrowding and fostered adequate distribution of certain groups for socioeconomic reasons.
109. The Court finds nothing in the drafting history of the Article to suggest that the fourth paragraph was intended only to be used in case of an acute and temporary emergency. Rather, it is reflected in the drafting history that the fourth paragraph was added to provide for restrictions

of the right to liberty of movement and freedom to choose one's residence for reasons of 'economic welfare', whereas economic reasons could never justify restrictions on the right to leave one's country (see the report of the Committee of Experts to the Committee of Ministers, Report H (65) 16, 18 October 1965, §§ 15 and 18, paragraph 85 above). Nor is the applicant's position supported by the Court's *Olivieira* and *Landvreugd* judgments, neither of which limits the applicability of the fourth paragraph to 'emergency situations' or describes the problems caused by drug abuse in central and south-eastern Amsterdam as 'acute and temporary'.

110. In light of the facts before it, the Court finds it more appropriate to consider the present case under the fourth paragraph of Article 2 of Protocol 4. The third and fourth paragraph of that Article being of equal rank in that both provide for free-standing restrictions on the exercise of the rights set out in the first paragraph and both being different in scope (paragraph 3 providing for restrictions for specified purposes but without limiting their geographical scope and paragraph 4 providing broadly for restrictions 'justified by the public interest' but limited in their geographical scope), there is no need also to consider it under the third paragraph.

B. Merits

1. Whether the restriction was 'in accordance with law'

111. The Chamber held as follows (paragraph 108 of its judgment):

> "There is no doubt that the imposition of a housing permit requirement in the areas concerned was in accordance with domestic law, to wit, the Inner City Problems (Special Measures) Act and the 2003 Housing By-law of the municipality of Rotterdam (2006 version, as in force at the time)."

112. The applicant's representative, speaking at the hearing of the Grand Chamber, argued that the restriction in issue had not been foreseeable for the applicant already at the time when she moved to Tarwewijk in 2005. He submitted that the legislative bill that was later to become the Inner City Problems (Special Measures) Act had not yet been presented in Parliament at the time when she moved to the Tarwewijk district of Rotterdam in May 2005; this had happened only later. Furthermore, the applicant could not have foreseen that Tarwewijk would be designated under that Act; that no transitional regime would be provided for persons already resident in a designated district at the time of its designation; or that the hardship clause would be applied as restrictively as it was.

113. The Government submitted that the restriction was based on an Act of Parliament, the Inner City Problems (Special Measures) Act, and the 2003 Rotterdam Housing By-law, the latter supplemented with provisions on processing housing permit applications. All had been made public. The Minister's designation of Tarwewijk had been published as a parliamentary document and was likewise accessible to the public. The requirements of accessibility and foreseeability had therefore been complied with.

114. The Court notes that the applicant does not dispute that the Inner City Problems (Special Measures) Act and the delegated legislation based thereon were accessible to her while they were in force. It therefore accepts that the applicant was in a position to regulate her conduct and foresee with complete clarity, if need be with appropriate advice, the consequences which her actions might entail. The 'foreseeability' requirement that the Court has recognised as an element of the more general requirement that an interference with a Convention right, if permitted at all, must be 'in accordance with law' (an expression synonymous with 'in accordance with the law' and 'prescribed by law', in French: *prévue(s) par la loi*; see *The Sunday Times/the United Kingdom (1)*, 26 April 1979, §§ 49–50, Series A 30) cannot be interpreted as requiring the modalities of application of a law to be predictable even before its application in a given case becomes relevant.

2. Whether the restriction served the 'public interest'

115. The Chamber held as follows (paragraph 110 of its judgment):

> "The restriction here in issue was intended to reverse the decline of impoverished inner-city areas and to improve quality of life generally. There can be no doubt that this is an aim which it is legitimate for legislatures and city planners to pursue. Indeed, the applicant does not suggest otherwise."

116. Neither the applicant nor the respondent Government has challenged this finding. The Court sees no reason to reconsider it of its own motion and accordingly agrees with the Chamber that the restriction in issue served the 'public interest'.

3. Whether the restriction was 'justified in a democratic society'

(a) The Chamber judgment

117. Basing its reasoning on the premise that there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised', the Chamber proceeded to consider whether the restriction had been justified based on principles which it deduced from the Court's case-law developed under Articles 8 of the Convention and 1 of Protocol 1 concerning housing and social and economic policy considerations.

118. The Chamber held that the respondent party was, in principle, entitled to adopt the legislation and policy in issue. It was observed that the Inner City Problems (Special Measures) Act aimed to address increasing social problems in particular inner-city areas of Rotterdam. The Act required the competent Minister to report to Parliament every five years on the effectiveness of the restriction in issue which was subject to temporal and geographical limitation. Moreover, the Act provided for safeguard clauses by, firstly, requiring the local council to satisfy the Minister that sufficient alternative housing remains available (section 6(2)); secondly, by providing that the designation of an area under the Act should be revoked if insufficient alternative housing was available for those affected (section 7(1)(b)); and thirdly, the individual hardship clause provided for in section 8(2). In the Chamber's view, neither the criticism of the Act which had been expressed during the legislative process nor the availability of alternative solutions to reach the result sought could justify a finding that the domestic authorities' policy decisions were manifestly without reasonable foundation.

119. Turning to the individual circumstances of the case in hand, i.e. the application of the general measure in the applicant's case, the Chamber noted that the refusal of a housing permit to the applicant was consonant with the applicable law and policy. The applicant stated that the dwelling in B. Street was more spacious, had a garden and was apparently in a better state of repair; however, she had not submitted any reason for wishing to live in Tarwewijk, whereas she could take up residence in other areas of the Rotterdam metropolitan region outside the designated areas under the Act.

120. Further taking into account the fact that the applicant had qualified for a housing permit under the Act since May 2011 — by which time she had lived in the Rotterdam metropolitan region for six consecutive years — but nevertheless had elected to reside in a dwelling in Vlaardingen (rather than in one of the designated areas of the municipality of Rotterdam), the Chamber found no violation of Article 2 of Protocol 4.

(b) The parties' submissions

121. The applicant took issue with the view taken by the Chamber that the more convincing general justifications for a general measure are, the less importance attached to its impact in a particular case. In her view, the drafting history of Article 2 of Protocol 4 justified the finding that the rights enshrined in that Article were 'near absolute', not to be restricted on economic grounds.

122. It might well be that a measure was of a general nature, but that in itself did not justify or necessitate its application on the level of the individual. However wide the State's margin of appreciation, relevant and sufficient reasons were required to impose restrictions on individuals.

123. The applicant agreed that the policy decisions in general taken by the domestic authorities were not manifestly without reasonable foundation, but their effect was doubtful: the problems were too wide to be addressed solely by limiting the influx of new residents whose income consisted only of social-security benefits. The Amsterdam University report of November 2015 (see paragraph 74 above) had found that the quality of life had not been verifiably improved as a result of the restrictions on the freedom to choose one's residence. The low refusal rate of housing permits also suggested that the measure was ineffective, as did the decision of the authorities no longer to apply the Inner City Problems (Special Measures) Act as a free-standing instrument but as part of a twenty-year programme. Moreover, the individual hardship clause was too rarely applied.

124. With regard to her own situation, the applicant submitted that she and her children had already been resident in Tarwewijk when the housing requirement was introduced for that district. She herself was an exemplary citizen without a criminal record and constituted no threat to public order.

125. As a final point, the applicant stated that she was under no obligation to justify her choice of residence.

126. The Government explained that they saw themselves faced, in certain inner-city areas, with selective migration. More affluent households were moving out of those neighbourhoods, while those left behind and new arrivals often belonged to low-income

groups and were dependent on social-security benefits. The resulting concentration of benefit claimants placed a correspondingly greater demand on social-security structures. At the same time, support for *bona fide* economic activity and services was significantly reduced, which caused the local economy to stagnate. The Government's assessment was that living in such a neighbourhood represented an obstacle to integration and might lead to social isolation.

127. To reverse this trend, the Government had identified the need to impose temporary restrictions on the inflow of socioeconomically disadvantaged groups into certain areas. That would give these areas 'room to breathe', so that other measures that were already being implemented to make sustainable improvements could bear fruit.

128. Measures under sections 8 and 9 of the Inner City Problems (Special Measures) Act could be considered only once other measures — such as tackling illegal overcrowding and rogue landlords, joint initiatives involving youth workers and the police, educational measures and public investment in improving substandard housing — had been attempted and found insufficient. They were thus the final part of an integrated approach to tackling an inner-city area's problems.

129. The local council was required to establish to the Minister's satisfaction that designation under the Inner City Problems (Special Measures) Act was necessary. In the event, the Minister had been satisfied that the areas concerned were faced with a cumulation of social, economic and spatial problems, unemployment, dependence on social benefits, economic decline and impoverishment, and that the efforts being made by conventional means were not sufficient.

130. Measures under sections 8 and 9 of the Inner City Problems (Special Measures) Act were temporary: designations were valid for a maximum of four years. Although admittedly they could be extended, this implied a detailed reassessment of the situation every four years.

131. It had been established, in accordance with the Act, that enough suitable housing remained in the region for those seeking housing to whom a housing permit could not be delivered as a result of designation of a particular area.

132. As to the applicant herself, the Government commented that she had not, at the time of the events complained of, qualified for a housing permit since she had no income from employment and had not completed six years' residence in the Rotterdam Metropolitan Region. It was reflected in the evaluation reports of 2009 and 2011 that the hardship clause had been applied in some 3% of all cases in which a housing permit had been granted with respect to privately-let housing (see paragraphs 61 and 69 above). Application of the individual hardship clause had to remain the exception for the measures under the Inner City Problems (Special Measures) Act to be effective: this was considered, for example, if moving into a dwelling in a designated area was the only way to relieve an acute emergency — medical or otherwise — or if the building and housing inspectorate had declared a dwelling uninhabitable and the person concerned would be left without housing as a result. No such compelling circumstances obtained in the applicant's case.

133. It could not be decisive that the applicant had been living in Tarwewijk before the Inner City Problems (Special Measures) Act entered into force. Persons living in designated areas who wished to move but did not meet the requirements for a housing permit were free to move to a dwelling available to them outside the designated areas; in so doing they contributed to achieving the aims of the Act.

134. It could not be established that the dwelling which the applicant rented in A. Street was in such a state of disrepair that it posed a health risk. Contrary to the suggestion inherent in the applicant's case, her landlord had not requested a building permit, as he would have needed to do before undertaking any serious renovation work. Alternatively, the applicant herself could have approached the building and housing inspectorate (*Dienst Bouw- en Woningtoezicht*) of the municipality of Rotterdam, which had the power to compel her landlord to bring the dwelling into line with standard requirements; however, she had not done so. Nor had the domestic courts found such a risk to exist. The Administrative Jurisdiction Division had observed that it was the policy of the Burgomaster and Aldermen to apply the hardship clause only in intolerable situations, such as cases of violence, and that the Burgomaster and Aldermen had been entitled not to do so in the applicant's case.

135. The applicant had never indicated what steps she had undertaken to find alternative housing in the Rotterdam Metropolitan Region. The chance of finding affordable rented housing varied with the search area and waiting times varied widely. Moreover, if the dwelling in A. Street genuinely posed a health risk, the applicant could have applied for priority treatment; as it was, she had failed to show that she had done so.

(c) The Court's assessment

(i) General principles

136. The Court reiterates at the outset that the Convention does not provide for the institution of an actio popularis. Under the Court's well-established case-law, in proceedings originating in an individual application under Article 34 of the Convention its task is not to review domestic law in abstracto, but to determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see, among other authorities, *Golder/the United Kingdom*, 21 February 1975, § 39 in fine, Series A 18; *Minelli/Switzerland*, 25 March 1983, § 35, Series A 62; *N.C./Italy* [GC], 24952/94, § 56, ECHR 2002-X; *Krone Verlag GmbH & Co. KG/Austria* (4), 72331/01, § 26, 9 November 2006; *Burden/the United Kingdom* [GC], 13378/05, § 33, ECHR 2008; *Von Hannover/Germany* (2) [GC], 40660/08 and 60641/08, § 116, ECHR 2012; *Centre for Legal Resources on behalf of Valentin Câmpeanu/Romania* [GC], 47848/08, § 101, ECHR 2014; *Perinçek/Switzerland* [GC], 27510/08, § 136, ECHR 2015 (extracts); and *Roman Zakharov/Russia* [GC], 47143/06, § 164, ECHR 2015).

137. The Court next draws attention to its fundamentally subsidiary role. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see, among other authorities, *Hatton and Others/the United Kingdom* [GC], 36022/97, § 97, ECHR 2003-VIII; *Gorraiz Lizarraga and Others/Spain*, 62543/00, § 70, ECHR 2004-III; *Stec and Others/the United Kingdom* [GC], 65731/01 and 65900/01, § 52, ECHR 2006-VI; and *Vistiņš and Perepjolkins/Latvia* [GC], 71243/01, § 98, 25 October 2012). The margin of appreciation available to the legislature in implementing social and economic policies should be a wide one: the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the 'public' or 'general' interest unless that judgment is manifestly without reasonable foundation (see, among other authorities and *mutatis mutandis, Hutten-Czapska/Poland* [GC], 35014/97, § 166, ECHR 2006-VIII; *Andrejeva/Latvia* [GC], 55707/00, § 83, ECHR 2009; *Carson and Others/the United Kingdom* [GC], 42184/05, § 61, ECHR 2010; *Khoroshenko/Russia* [GC], 41418/04, § 120, ECHR 2015; and *Dubská and Krejzová/the Czech Republic* [GC], 28859/11 and 28473/12, § 179, ECHR 2016).

138. The legislature's margin in principle extends both to its decision to intervene in the subject area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests. However, this does not mean that the solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices (see, *inter alia* and *mutatis mutandis, Animal Defenders International/the United Kingdom* [GC], 48876/08, § 108, ECHR 2013 (extracts); *S.H. and Others/Austria* [GC], 57813/00, § 97, ECHR 2011, and *Parrillo/Italy* [GC], 46470/11, § 170, ECHR 2015).

139. The Court has held, in the context of Article 1 of Protocol 1, that spheres such as housing, which modern societies consider a prime social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the State. In that sphere decisions as to whether, and if so when, it may fully be left to free-market forces or whether it should be subject to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues. More specifically, the Court has recognised that in an area as complex and difficult as that of the development of large cities, the State enjoys a wide margin of appreciation in order to implement their town-planning policy (see *Ayangil and Others/Turkey*, 33294/03, § 50, 6 December 2011).

140. Turning to the questions posed by the present case, the Court first notes the apparent interplay between the freedom to choose one's residence and the right to respect for one's 'home' and one's 'private life' (Article 8 of the Convention). Indeed, the Court has on a previous occasion directly applied reasoning concerning the right to respect for one's home to a complaint under Article 2 of Protocol 4 (see *Noack and Others/Germany* (dec.), 46346/99, ECHR 2000-VI).

141. However, it is not possible to apply the same test under Article 2 § 4 of Protocol 4 as under Article 8 § 2, the interrelation between the two provisions notwithstanding. The Court has held that Article 8 cannot be construed as conferring a right to live in a particular location (see *Ward/the United Kingdom*, (dec.) 31888/03, 9 November 2004, and *Codona/United Kingdom* (dec.), 485/05, 7 February 2006). In contrast, freedom to choose one's residence is at the heart of Article 2 § 1 of Protocol 4, which provision would be voided of all significance if it did not in principle require Contracting States to accommodate individual preferences in the matter. Accordingly, any exceptions to this principle must be dictated by the public interest in a democratic society.

(ii) Application of the above principles

(α) Legislative and policy framework

142. Turning to the legislative and policy background of the case, the Court first observes that the domestic authorities found themselves called upon to address increasing social problems in particular inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere (see paragraph 26 above). They sought to reverse these trends by favouring new residents whose income was related to gainful economic activity of their own (see paragraphs 28 and 29 above). Their intention was to foster diversity and counter the stigmatisation of particular inner-city areas as fit only for the most deprived social groups. It is for this purpose that the Inner City Problems (Special Measures) Act was called into existence.

143. The applicant does not deny that a need existed for public authority to act: the Court understands the applicant's admission that the legislation in issue is not 'manifestly without reasonable foundation' in this sense. Rather, her criticism concerns the legislative choices made, which in her submission place an unfair burden on those whose only source of income is social-security benefits.

144. The Court observes that the system of the Inner City Problems (Special Measures) Act does not deprive any person of housing or force any person to leave their dwelling. Moreover, the measure under the Inner City Problems (Special Measures) Act affects only relatively new settlers: residents of the Rotterdam Metropolitan Region of at least six years' standing are eligible for a housing permit whatever their source of income. In the circumstances, this waiting time would not appear to be excessive. The Court considers these considerations material to its assessment of the proportionality of the measure here in issue.

145. The main thrust of the applicant's argument is that the measures introduced in Rotterdam by application of the Inner City Problems (Special Measures) Act have not had the desired effect. She points to the Amsterdam University report of November 2015 (see paragraph 74 above), according to which, in her interpretation, there has been no verifiable improvement in quality of life in the affected districts as a result of the impugned restrictions on the freedom to choose one's residence.

146. While the findings of the Amsterdam University report are relied on by both parties, the Court observes that it post-dates the decisions relevant to the complaint before the Court and covers the period from 2006 until 2013, thus assessing the effects of the Inner City Problems (Special Measures) Act *ex post facto*.

147. The Court considers that to the extent that it is called upon to assess socioeconomic policy choices, it should, in principle, do so in the light of the situation as it presents itself to the authorities at the material time and not after the event and with the benefit of hindsight (see, *mutatis mutandis, Lithgow and Others/the United Kingdom*, 8 July 1986, § 132, Series A 102). The Court sees no reason to adopt a different approach in the present case.

148. As a result, the report of the Amsterdam University is not relevant to the proportionality assessment to be carried out by the Court. In any event, the Court notes that it cannot in the present case interpret the facts as established in the Amsterdam University report as proof that the policy choices here in issue, at the time they were made, were plainly wrong or produced disproportionate negative effects at the level of the individual affected. The Court also notes, in particular, that the said report finds that the socioeconomic composition of the districts to which the Act is applied has begun to change — more new settlers being in work than before — and that data concerning the effects of other measures on security and quality of life are not available.

149. The Court further notes that within the municipality of Rotterdam, the domestic authorities have extended the measures under the Inner City Problems (Special Measures) Act, actually linking them to a twenty-year programme which involves considerable public investment (see paragraphs 75 and 76 above). In addition, similar measures under that Act have in recent years been adopted in other municipalities, two of them in the Rotterdam Metropolitan

Region (see paragraph 84 above). It therefore appears that, unlike the applicant, the domestic authorities consider the measures adopted to have been effective.

150. The legislative history of the Inner City Problems (Special Measures) Act shows that the legislative proposals were scrutinised by the Council of State, whose concerns were addressed by the Government (see paragraphs 23 and 24 above), and that Parliament itself was concerned to limit any detrimental effects. In fact, the three safeguard clauses included in the Inner City Problems (Special Measures) Act and identified by the Chamber (see paragraph 118 above) owe much to direct Parliamentary intervention (see paragraph 32 above). It is to these safeguard clauses, included in the Act itself (see paragraph 21 above), that the Court now turns.

151. To begin with, the entitlement of individuals unable to find suitable housing has been recognised by the Inner City Problems (Special Measures) Act itself: firstly, in section 6(2), which requires the local council to satisfy the Minister that sufficient housing remains available locally for those who do not qualify for a housing permit; and secondly, in section 7(1)(b), which provides that the designation of an area under that Act shall be revoked if insufficient alternative housing is available locally for those affected.

152. The restriction in issue remains subject to temporal as well as geographical limitation, the designation of particular areas being valid for no more than four years at a time (see section 5(2) of the Inner City Problems (Special Measures) Act).

153. The competent Minister is required by section 17 of that Act to report to Parliament every five years on the effectiveness of the Act and its effects in practice, as was in fact done on 18 July 2012 (see paragraph 72 above).

154. The individual hardship clause prescribed by section 8(2) of the Act (see paragraph 21 above) and adopted by the Municipality in the applicable by-law (see paragraph 38 above) allows the Burgomaster and Aldermen to derogate from the length-of-residence requirement in cases where strict application of it would be excessively harsh. It is reflected in the evaluation reports of 2009 and 2011 that at the time of the events complained of it was applied in some 3% of all cases in which a housing permit was granted in respect of housing let by private landlords (see paragraphs 61 and 69 above). Given that the hardship clause is intended to meet medical and social emergencies including situations of violence (see paragraphs 18, 61 and 69 above), the existence of which in her personal circumstances the applicant has not asserted, the Court cannot find that the Burgomaster and Aldermen fail to make appropriate use of it.

155. A final, procedural, safeguard is comprised by the availability of administrative objection proceedings and of judicial review before two levels of jurisdiction, both of them before tribunals invested with full competence to review the facts and the law which meet the requirements of Article 6 of the Convention.

156. In these circumstances, the Court cannot find that the policy decisions taken by the domestic authorities fail to make adequate provision for the rights and interests of persons in the applicant's position, that is, persons who have not been resident in the municipality for six years and whose only income is from social-security benefits.

157. The Court is prepared to accept that it would have been possible for Parliament to regulate the situation differently. However, the central question under Article 2 § 4 of Protocol 4 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article (see, *mutatis mutandis, James and Others/the United Kingdom*, 21 February 1986, § 51, Series A 98; *Mellacher and Others/Austria*, 19 December 1989, § 53, Series A 169; *Blečić/Croatia* [GC], 59532/00, § 67, ECHR 2006-III; and *Evans/the United Kingdom* [GC], 6339/05, § 91, ECHR 2007-I).

(β) The applicant's individual case

158. Turning now to the circumstances of the applicant herself, it is undisputed that the applicant was of good behaviour and constituted no threat to public order. Nonetheless, the applicant's personal conduct, however virtuous, cannot be decisive on its own when weighed in the balance against the public interest which is served by the consistent application of legitimate public policy.

159. Nor is it *per se* sufficient to point to the fact that the applicant was already resident in Tarwewijk when the housing permit requirement entered into force. As set out above, the purpose of the scheme was to encourage new settlement in distressed inner-city areas by households with an income from sources other than social benefits. The system of the Inner City Problems (Special Measures) Act is not as such called into question by the mere fact that it did not make an exception in respect of persons already residing in a designated area. While the specific modalities of the system are a matter falling within the margin of appreciation of the domestic

authorities in this field, it can indeed be assumed that applying it to Tarwewijk residents could have the effect of prompting some of them, as in the present case, to leave the area, thereby making more dwellings available to households meeting the requirements and assisting the furtherance of the policy aim of broadening the social mix.

160. It remains in dispute whether the A Street dwelling was in as dire a state as the applicant alleges. She has not submitted any specific information from which such a conclusion could be drawn. In addition, the Court — agreeing on this point with the Government (see paragraph 134 above) — does not find it established that the health of the applicant or her family actually suffered as a result of remaining in that dwelling for as long as 5 years and 4 months, nor has she even restated before the Grand Chamber her allegation before the Chamber that her health or that of her children was at risk. At all events, in the absence of any request for a building permit at all relevant times (see paragraph 83 above) or other evidence of any description, the Court cannot find that the A. Street dwelling was considered by its owner to need serious renovation work. Moreover, the applicant has stated no other reason (apart from her personal preference for the apartment in B. Street) why residence in the A. Street dwelling constituted actual hardship for her and her children.

161. It remains for the Court to balance the applicant's interests against those of society as a whole. *Mutatis mutandis*, for purposes of Article 2 § 4 of Protocol 4, the Court takes a similar view of the 'general interest' in relation to the freedom to choose one's residence as it does in relation to environmental protection. In the latter context, the Court has held, from an Article 8 perspective, that the evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned — his or her family requirements and financial resources — and, on the other hand, the interests of the local community. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment (see, *mutatis mutandis, Chapman/the United Kingdom* [GC], 27238/95, § 104, ECHR 2001-I).

162. In this connection, it has emerged that the applicant has been resident in a dwelling in Vlaardingen let to her by a Government-funded social housing body since 27 September 2010 (see paragraph 80 above). The applicant has not explained her reasons for choosing to move to Vlaardingen instead of remaining in the dwelling in A. Street for the final eight months needed to complete six years' residence in the Rotterdam Metropolitan Region, i.e. until 25 May 2011 (see paragraph 82 above), even though no later than early 2007 her landlord asked her to move out. Nor has she suggested that her present dwelling is inadequate to her needs or in any way less congenial or convenient to her than the one she had hoped to occupy in Tarwewijk.

163. In addition, it has not been stated, or even suggested, that the applicant has at any time since 2011 expressed the wish to move back to Tarwewijk.

164. It appears moreover that the applicant has found work (see paragraph 81 above), although she does not state when this happened. Should she have been in work prior to 25 May 2011, she would have been free already then to move to any dwelling of her choice in Rotterdam, including a different dwelling within Tarwewijk.

165. The information submitted therefore does not allow the Court to find that the consequences for the applicant of the refusal to her of a housing permit that would have allowed her to move to the B. Street dwelling amounted to such disproportionate hardship that her interest should outweigh the general interest served by the consistent application of the measure in issue.

166. The corollary of the applicant's position that she is not required to justify her preference for a particular residential area, if accepted, would be that both the Court itself and the domestic authorities — legislative, executive and judicial — would be deprived of the possibility of weighing the interest of the individual against the public interest generally and against the rights and freedoms of others. However, an unspecified personal preference for which no justification is offered cannot override public decision-making, in effect reducing the State's margin of appreciation to nought.

4. Conclusion

167. For all the above reasons, there has been no violation of Article 2 of Protocol 4.

For these reasons, the court

Holds, by twelve votes to five, that there has been no violation of Article 2 of Protocol 4 to the Convention

Noot

1. Een principiële richtinggevende uitspraak van de Grote Kamer van het EHRM over de vraag of iemands inkomenspositie en sociale status een gerechtvaardigde grond vormen voor het

maken van onderscheid bij toelating van personen tot bepaalde wijken blijft uit, hoewel het nationale debat daarvan wel had kunnen profiteren. De hier opgenomen uitspraak dient vooral te worden gezien als een aansporing voor de nationale autoriteiten ingrijpende maatregelen als hier aan de orde met de grootst mogelijke zorgvuldigheid te nemen, regelmatig te evalueren en zo nodig aan te passen zodra blijkt dat ze ineffectief zijn of anderszins tot onevenredige effecten leiden. Dat er door de Grote Kamer van het EHRM geen schending van het recht op bewegingsvrijheid wordt aangenomen, is immers het gevolg van de zeer terughoudende opstelling die het Hof kiest als het gaat om de toetsing van de inhoud van de maatregel in combinatie met de wel door het Hof gecontroleerde en gebleken zorgvuldigheid op nationaal niveau bij de invoering van de maatregel en de toetsing in het concrete geval van mevrouw Garib door de betrokken nationale autoriteiten.

2. De wijze van toetsing door het EHRM houdt volgens vaste jurisprudentie met name verband met diens bijzondere positie als Europese rechter die verder af staat van de nationale rechtsordes en daarnaast niet in het leven is geroepen als vierde (of voor het bestuursrecht: derde) instantie. Het Hof neemt een subsidiaire rol in. Daarnaast varieert de intensiteit van diens toetsing afhankelijk van het onderwerp dat aan de orde is. De toetsing in zaken waarin het recht op leven of het verbod op discriminatie vanwege afkomst centraal staat, is indringender dan die op het terrein van sociaaleconomische maatregelen. Daarmee is de kwalificatie van een feitencomplex van belang voor de toetsingsintensiteit. De Grote Kamer formuleert op dit punt een vrij strikte stelregel: de omvang van het geding zoals die geldt bij het oordeel van de Kamer (EHRM 23 februari 2016, *EHRC* 2016/115, m.nt. Gerards) is bepalend. Nu de klager bij de Kamer kennelijk — ondanks de bijstand van een advocaat — niet direct had geklaagd over schending van art. 14 EVRM en/of Protocol 12, zegt de Grote Kamer de kwestie dan ook niet onder deze bepalingen te kunnen behandelen. Hier valt wel het een en ander op af te dingen, nu het Hof ook met enige regelmaat over dergelijke procedurele obstakels heen stapt als het zich blijkbaar wel over een bepaalde kwestie wenst uit te spreken. Rechter Pinto de Albuquerque is — in zijn als altijd niet mis te verstane krachtige stijl — van oordeel dat het Hof zich ten onrechte niet over deze principiele kwestie uitlaat. De Grote Kamer heeft hiermee volgens hem de kans gemist een oordeel te geven over discriminatie van een bevolkingsgroep op basis van sociale en economische status en daarmee de vraag of armoede ook moet worden gezien als een van de criteria op basis waarvan geen onderscheid mag worden gemaakt op grond van art. 14 EVRM, c.q. Protocol 12. In dit verband kan ook worden verwezen naar de vóór de totstandkoming van de Rotterdamwet geuite kritiek, door onder meer de toenmalige Commissie Gelijke Behandeling, dat met de maatregelen indirect onderscheid naar etnische afkomst zou worden gemaakt (zie nader de eerder genoemde noot van Gerards). In dat geval had het Hof — als gezegd — een veel intensievere toets moeten verrichten naar de gerechtvaardigdheid van de betrokken maatregelen (bij onderscheid op grond van afkomst). Aan deze principiële kwestie brandt de Grote Kamer jammer genoeg blijkbaar liever niet haar vingers. Hoe dit ook zij, deze wijze van toetsing kan niet één op één model staan voor de toetsing door de nationale rechter van vergelijkbare kwesties. Zij houdt immers verband met de bijzondere positie van het EHRM. Daar komt bij dat als het om de kwalificatie van de feiten gaat de Nederlandse rechter is gebonden aan de verplichting tot ambtshalve aanvulling van de rechtsgronden gelet op art. 8:69 lid 2 Awb, terwijl er aanwijzingen in het dossier zijn dat er wel feitelijk en impliciet is geklaagd over discriminatie.

3. Ook geen les voor de nationale rechter vloeit voort uit de wijze waarop het EHRM omgaat met evaluatieonderzoek van de Universiteit van Amsterdam uit 2015 waaruit blijkt dat de maatregelen mede vanwege het waterbedeffect niet effectief zijn. Volgens het Hof moet dat rapport buiten beschouwing worden gelaten bij de proportionaliteitstoets omdat de betrokken nationale autoriteiten daarmee ook geen rekening konden houden toen zij de maatregel voorbereidden en later de toepassing daarvan in rechte toetsten. Op het terrein van sociaaleconomische maatregelen mag het Hof zelf zich in beginsel niet baseren op later materiaal dat kan profiteren van de wijsheid achteraf (dat is volgens vaste jurisprudentie overigens anders als er meer fundamentele rechten in het geding zijn zoals in het asielrecht). Naar ons oordeel is op deze 'wijsheid achteraf' redenering kritiek mogelijk en is het in ieder geval niet zo dat de nationale rechter een vergelijkbare benadering zou kunnen kiezen. Het rapport van de UvA zag immers op de periode 2006–2013 en dat is juist de periode waarin mevrouw Garib met de maatregel werd geconfronteerd. In het kader van de vraag of deze maatregel in haar geval al dan niet proportioneel uitpakt zou dan juist wel een rapport meegenomen moeten worden dat ziet op de effectiviteit in die periode. Natuurlijk kon de wetgever dat rapport niet kennen, maar zodra de autoriteiten die wet toepassen en de rechter (waaronder ook het EHRM)

die deze toepassing toetst de beschikking zouden krijgen over een dergelijk rapport zouden zij daaraan wel gevolgen kunnen verbinden. Het gaat immers om bewijs van de feitelijke situatie op het moment dat de maatregel werd genomen en niet van daarna, zodat er niet in strijd met de voorgeschreven *ex tunc*-toetsing zou worden gehandeld.

4. Ten slotte valt op dat het Hof de zorgvuldige voorbereiding van de maatregel en de procedurele waarborgen bij de toepassing en toetsing daarvan wel zwaar laat meewegen in zijn oordeel. Het is in de jurisprudentie van het EHRM inmiddels een vaste lijn om in zaken waarin er inhoudelijk terughoudend wordt getoetst het accent op een dergelijke procedurele toetsing te leggen. Zwaar weegt daarbij het feit dat een kritisch advies van de Raad van State aanleiding gaf het wetsvoorstel serieus aan te passen en meer waarborgen in te bouwen. Ook de aanwezigheid van een hardheidsclausule en het regelmatige gebruik daarvan zoals dat blijkt uit het rapport van de UvA (sic!) is daarbij van belang. Het Hof wijst er daarbij wel op dat het voor de beoordeling van de zorgvuldigheid niet uitmaakt of er ook andere maatregelen denkbaar waren geweest om de problemen aan te pakken, nu dat in de sfeer van de beoordelingsvrijheid van de nationale autoriteiten ligt.

T. Barkhuysen en M.L. van Emmerik

AB 2018/12

HOGE RAAD (CIVIELE KAMER)
16 december 2016, nr. 16/00921
(Mrs. E.J. Numann, C.A. Streefkerk, M.V. Polak, T.H. Tanja-van den Broek, mr. C.E. du Perron)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 14, 53 EVRM; art. 1 Protocol 1 EVRM; art. 93, 94, 120 Gw; art. 1 onder e, art. 2, 3, 4 Wet verbod pelsdierhouderij

RvdW 2017/3
Gst. 2017/176
NJB 2017/21
O&A 2017/18
NJ 2017/132
RAV 2017/22
JWB 2016/464
ECLI:NL:HR:2016:2888
ECLI:NL:PHR:2016:898

Verbod nertsenhouderij. Recht op eigendom. Geen onrechtmatige overheidsdaad wegens invoering van de Wet verbod pelsdierhouderij. Geen strijd met art. 1 Protocol 1 EVRM wegens verlies van toekomstige inkomsten.

De Hoge Raad beziet in deze zaak of de staat met invoering van de Wet verbod pelsdierhouderij zich schuldig maakt aan een onrechtmatige daad en aansprakelijk is voor door de nertsenhouders geleden schade in het licht van het in art. 1 EP gewaarborgde recht op eigendom. De Hoge Raad overweegt dat het hof, in het licht van relevante EHRM-rechtspraak, juist heeft overwogen dat NFE c.s. de waarde of goodwill van hun ondernemingen vrijwel volledig, zo niet uitsluitend, baseren op de toekomstige inkomsten die zij hopen te genereren, en niet op bestaande eigenschappen of verworvenheden ('assets') van hun ondernemingen, hetgeen niet binnen de reikwijdte van art. 1 EP valt. Verder overweegt de Hoge Raad dat de Nederlandse rechter zich op grond van art. 93 Gw bij zijn uitleg van de bepalingen van het EVRM dient te richten naar de gevestigde rechtspraak van het EHRM. Het geven van een ruimere uitleg van EVRM-artikelen is op grond van art. 94 en 120 Gw beperkt tot buiten toepassing laten van wetten die niet verenigbaar zijn met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties. Zodanige onverenigbaarheid kan niet worden aangenomen op grond van een uitleg door de nationale rechter van het begrip eigendom in art. 1 EP in afwijking van gevestigde EHRM-rechtspraak. Daarnaast faalt ook de klacht dat, in tegenstelling tot wat het hof overwoog, sprake is van (de facto) ontneming van eigendom. In het licht van de vaststelling door het hof dat de fysieke bedrijfsmiddelen waarover de nertsenhouders beschikken hun waarde behouden, geeft het oordeel van het hof dat geen sprake is van een de facto onteigening, geen blijk van een onjuiste rechtsopvatting. Verder concludeert de Hoge Raad dat sprake was van een fair balance van betrokken belangen. De overgangsperiode die de door een maatregel getroffen eigenaar in staat stelt om zijn schade te beperken, is een omstandigheid die kan bijdragen aan het oordeel dat een redelijk evenwicht is getroffen tussen de eisen van het algemeen belang enerzijds en de bescherming van individuele rechten anderzijds.

De klachten van NFE c.s. treffen geen doel en de Hoge Raad verwerpt het beroep.

Arrest in de zaak van:
De Staat der Nederlanden (Ministerie van Economische Zaken),
tegen
Nederlandse Federatie Van Edelpelsdierenhouders c.s.