Zuiveringsprocedure ten aanzien van collaborateurs voormalig communistisch regime. Geen reële mogelijkheid beschuldiging tegen te spreken. Geen eerlijk proces. Schending art. 6 EVRM. Naming en shaming. Sanctiebesluit direct op website gepubliceerd, terwijl er nog rechtsbescherming tegen open stond. Reputatieschade. Schending art. 8 EVRM

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

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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
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Art. 6, 8 EVRM

NJB 2017/1464
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Zuiveringsprocedure ten aanzien van collaborateurs voormalig communistisch regime. Geen reële mogelijkheid beschuldiging tegen te spreken. Geen eerlijk proces. Schending art. 6 EVRM. Naming en shaming. Sanctiebesluit direct op website gepubliceerd, terwijl er nog rechtsbescherming tegen open stond. Reputatieschade. Schending art. 8 EVRM.

Tegen klager, Petar Karajanov, werden zuiveringsprocedures gevoerd vanwege vermeende betrokkenheid bij de inlichtingendienst van het voormalige communistische regime in Macedonië. In mei 2013 stelde een zuiveringscommissie vast dat de heer Karajanov, een voormalig topambtenaar, in 1962 en 1963 heeft samengewerkt met de veiligheidsdiensten ten tijde van het communistisch gezag door informatie over zijn familie en een collega door te spelen. Dit besluit werd onmiddellijk op de website van de commissie gepubliceerd met persoonlijke informatie over de klager.

De heer Karajanov vocht deze beslissing aan voor de administratieve gerechten en legde daarbij schriftelijk bewijs over teneinde aan te tonen dat sprake was van een identiteitsverwisseling en waarbij hij de authenticiteit van verschillende tegen hem ingebrachte documenten in het dossier ter discussie stelde. Tot in hoogste rechterlijke instantie werden zijn argumenten verworpen en werd er uitgegaan van de feiten, zoals vastgesteld door de zuiveringscommissie en de motivering van haar beslissing.

De heer Karajanov dient op 30 december 2014 zijn klacht in te Straatburg. Hij stelt dat de procedure tegen hem oneerlijk is geweest (en daarmee in strijd met art. 6 lid 1 EVRM), nu het door hem ingebrachte ontlastende bewijs niet in behandeling is genomen, hij op geen enkel moment een mondelinge behandeling van zijn zaak heeft gekregen en de autoriteiten geen voldoende motivering aan het besluit tegen hem ten grondslag hebben gelegd. Daarnaast stelt hij dat zijn door art. 8 EVRM beschermde recht op privé- en gezinsleven is geschonden door de onmiddellijke publicatie van het (nog niet onherroepelijke) sanctiebesluit op de website van de zuiveringscommissie en de daardoor ontstane reputatieschade.

Het Hof roept in herinnering dat art. 6 EVRM geen regels geeft hoe om te gaan met bewijs, dit is bij uitstek voorbehouden aan de nationale autoriteiten (wetgever en rechter). Desalniettemin, gezien het uitgangspunt dat de verdragsrechten niet alleen theoretisch maar ook praktisch en effectief moeten zijn, is voor de effectiviteit van het recht op een eerlijk proces vereist dat door partijen ingebrachte argumenten daadwerkelijk worden gehoord, dat wil zeggen op gepaste wijze door de rechter worden behandeld. Daarvan is volgens het Hof noch voor de zuiveringscommissie, noch voor de verschillende rechters sprake geweest. Daarnaast is er volgens het Hof ten onrechte geen mondelinge behandeling van de zaak geweest en zijn evenmin voldoende redenen gegeven voor de besluiten ten aanzien van de klager.

Het Hof merkt op dat het besluit van de zuiveringscommissie dat klager heeft samengewerkt met de geheime dienst (en daarmee geen publieke functies meer mag vervullen) onmiddellijk op de website van de zuiveringscommissie is gepubliceerd, nog voordat dit bekend was gemaakt aan de klager en terwijl er nog rechtsmiddelen tegen open stonden. Partijen zijn het erover eens dat hiermee een inmenging heeft plaatsgevonden op het door art. 8 EVRM beschermde recht op privéleven van klager. Het Hof roept ook zijn vaste jurisprudentie in herinnering dat zuiveringsmaatregelen een inbreuk maken op de rechten uit art. 8 lid 1 EVRM.

Het Hof gaat vervolgens na of deze inbreuk kan worden gerechtvaardigd op grond van de in art. 8 lid 2 EVRM genoemde criteria. Het concludeert dat de relevante bepalingen uit de Zuiveringswet 2012 waarop het besluit gebaseerd was een voldoende toegankelijke en voorzienbare 'wettelijke basis' bieden voor deze beperking. Vervolgens toetst het Hof of een gerechtvaardigd belang wordt nagestreefd met het direct publiceren van het sanctiebesluit. Eerder maakte het Hof reeds uit dat zuiveringsmaatregelen de gerechtvaardigde doelen van het beschermen van de nationale veiligheid, de openbare veiligheid of het economisch welzijn van het land en de rechten en vrijheden van anderen dienen. In deze zaak is de vraag echter waarom het sanctiebesluit meteen openbaar moest worden gemaakt, voordat het in rechte onaantastbaar was geworden. De regering gaf aan dat dit nodig was in het kader van een grotere transparantie, publieke toegankelijkheid van de documenten in het dossier van de klager en voor de openbare verantwoording van de besluitvorming van de zuiveringscommissie. Het Hof overweegt dat geen van deze doelen kan worden geschaard onder de op grond van lid 2 van art. 8 EVRM gerechtvaardigde doelen. Evenmin ziet het Hof hoe het direct publiceren in overeenstemming kan worden gebracht met de hiervoor ge-

noemde gerechtvaardigde doelen van zuiveringsmaatregelen. Het Hof concludeert dan ook dat een gerechtvaardigd doel voor de inbreuk op art. 8 EVRM ontbreekt en daarmee dat deze bepaling geschonden is. Het is derhalve niet meer nodig om te bezien of deze maatregen noodzakelijk waren in een democratische samenleving.

Het Hof is unaniem van oordeel dat art. 6 lid 1 EVRM geschonden is vanwege de oneerlijkheid van de zuiveringsprocedure. Ook eenstemmig komt het Hof tot een schending van art. 8 EVRM om de hiervoor genoemde redenen.

Karajanov,
tegen
Voormalige Joegoslavische Republiek Macedonië (FYROM).

The law

I. Alleged violation of Article 6 of the Convention

42. The applicant alleged under Article 6 § 1 of the Convention that he had been deprived of the opportunity to effectively present his case. In that connection, he complained that the impugned proceedings had not been adversarial and had failed to comply with the principle of equality of arms given the authorities' refusal to consider evidence proposed by him; that there had been no oral hearing before any judicial instance and that the authorities had not provided sufficient reasons for their decisions. Lastly, he complained under Article 6 § 2 of the Convention about the publication of the Commission's decision on its website before it had become final. Article 6 §§ 1 and 2 of the Convention, in so far as relevant, read as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing …
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility

43. The Court notes that there was no dispute between the parties over the fact that Article 6 was applicable to the lustration proceedings complained of. However, they disagreed whether that Article was applicable under its civil or criminal head. The Government argued for the civil head, while the applicant, relying on the *Engel* criteria (*Engel and Others/the Netherlands*, 8 June 1976, Series A 22, §§ 82–83), stated that, in his view, the consequences of establishing collaboration within the meaning of the Lustration Act were 'deterrent and punitive' in nature, which suggested that the criminal head was relevant. He also referred to Article 33 and Article 38-b of the Criminal Code (see paragraphs 38 and 39 above).

44. The Court reiterates that the applicability of Article 6 to lustration-related proceedings depends on the specific circumstances of each case. In *Ivanovski*, it found that the civil limb of Article 6 was applicable to the lustration proceedings in that case, which had been conducted under the 2008 Lustration Act (see *Ivanovski*, cited above, § 120). The Court notes that the main features of the lustration proceedings regulated under that Act (the administrative nature of the proceedings, the fact that judicial review was carried out by administrative courts on the basis of the rules of administrative and/or civil-law procedure, *ibid.*, § 121 and paragraphs 6 and 30 above) also apply to the impugned proceedings in the present case. The key difference between the 2008 and 2012 Lustration Acts is that the latter did not oblige holders of public office or candidates for such office to submit a written declaration that they had not worked with the security services, but vested the Lustration Commission with the power to scrutinise the past of such people and, on the basis of documentary evidence, to issue a decision confirming such collaboration. The fact that under the 2012 Lustration Act former collaborators with the communist-era security services were not punished for submitting a false declaration is a further element that militates against the applicability of Article 6 under its criminal head to the lustration proceedings (see, by contrast, *Matyjek/Poland* (dec.), 38184/03, §§ 52 and 53). Furthermore, the Court notes that criminal-law provisions concerning a 'prohibition on exercising a profession, activity or duty' referred to by the applicant (see paragraphs 38 and 39 above), were not applied by the domestic authorities. For those reasons, it considers that the civil limb of Article 6 is applicable in the present case.

45. Having regard to the above and the consequent conclusion that the Commission's decision in the applicant's case did not involve the determination of a criminal charge, the Court considers that publication of the decision before it became final cannot give rise to the application of Article 6 § 2 of the Convention. It follows that that part of the complaint is incompatible *ratione materiae* with that provision within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

46. The Government did not raise any objections as to the admissibility of the remaining

complaints under this head. The Court notes that they are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

47. The applicant reiterated that the lustration proceedings had been unfair and at variance with the PACE Resolution and the Guidelines cited above (see *Ivanovski*, cited above, §§ 106 and 107).

48. The Government submitted that the lustration proceedings in the applicant's case had been in line with the requirements of Article 6 of the Convention. The applicant had used all available means in the administrative proceedings to contest the initial findings of the Commission. That the courts had not given weight to his evidence did not mean that the proceedings had not been adversarial or had violated the principle of equality of arms. Any concerns as to the authenticity of the information in his file should have been decided, as stated by the Administrative Court, in separate proceedings before a competent court and 'before the impugned decision had been delivered'. The Government also argued that the applicant had not requested an oral hearing. Furthermore, it had been possible to decide all the issues of fact and law on the basis of documentary evidence and so holding an oral hearing would have been in conflict with the principles of economy and efficiency. Lastly, they maintained that the courts had provided sufficient reasons for their decisions. The courts had accepted the documentary evidence on which the Commission had based its decision as authentic and had regarded it as 'facts'.

2. The court's assessment

(a) General principles

49. The Court considers that in cases such as the present one, where the applicant complains of unfairness in the proceedings and supports his allegations by several mutually reinforcing arguments touching on various aspects of Article 6 § 1 of the Convention, the appropriate approach is to examine the fairness of the proceedings complained of taken as a whole (see *Kinský/the Czech Republic*, 42856/06, §§ 81–84, 9 February 2012).

50. In that regard, the Court notes that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz/Spain* [GC], 30544/96, § 28, ECHR 1999-I, and *Perić/Croatia*, 34499/06, § 17, 27 March 2008).

51. However, in view of the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Cudak/Lithuania* [GC], 15896/02, § 58, ECHR 2010), the right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly 'heard', that is to say, properly examined by the tribunal (see *Saliba/Malta,* 24221/13, § 64, 29 November 2016 and *Donadze/Georgia*, 74644/01, §§ 32 and 35, 7 March 2006).

52. The Court also emphasises that in proceedings before a court of first and only instance, the right to a 'public hearing' entails an entitlement to an 'oral hearing' under Article 6 § 1 unless there are exceptional circumstances that justify dispensing with such a hearing (see *Göç/Turkey* [GC], 36590/97, § 47, ECHR 2002-V).

53. Lastly, according to the court's 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 *Garcia Ruiz*, cited above, § 26; *Bochan/Ukraine*, 7577/02, § 78, 3 May 2007; and *Ajdarić/Croatia*, 20883/09, § 34, 13 December 2011).

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

54. The Court will examine different aspects relevant to the present case in turn in order to determine whether the impugned proceedings, seen as a whole, met the requirements of fairness within the meaning of Article 6 of the Convention.

(i) Right of the applicant to effectively present his case

55. Turning to the circumstances of the instant case, the Court notes that the Commission's decision was based on documentary evidence about the applicant from the former security services. That evidence formed part of two files, 6825 and 2599. The first file concerned the applicant's alleged involvement in informing the security services about events related to a visit to Sweden in 1963 and the second was about a colleague of the

applicant's when he was editor-in-chief of a newspaper and afterwards. Relying on that evidence, the Commission found that the alleged collaboration had satisfied the qualitative criteria specified in sections 4(1) and 18(4) of the 2012 Lustration Act, namely that it had been 'conscious, secret, organised and continuous' (see paragraph 6 above). It is to be noted that the applicant was not involved in the proceedings before the Commission and accordingly could not present arguments in his defence (see, in contrast, *Ivanovski*, cited above, §§ 35 and 36). In its decision of 12 June 2014 the Higher Administrative Court held that 'there are no adversarial proceedings [before the Commission]' (see paragraph 16 above).

56. In the ensuing administrative-dispute proceedings before the administrative courts the applicant advanced two main arguments. Firstly, that file 6825 had not concerned him and that the Commission's findings had been the result of mistaken identity. In support he submitted written evidence to refute the Commission's findings that file 6825 had been about him, stating that they had been about another person with the same name (see paragraph 10 above). Secondly, he challenged the authenticity of the evidence in file 2599. He also denied that the alleged collaboration had fulfilled the qualitative criteria mentioned above.

57. The administrative courts accepted the facts as established by the Commission and the reasons given in its decision. They rejected the applicant's first argument (about mistaken identity), holding that the Commission had identified him by referring in its decision to his personal identification number, his place of birth and the positions he had held under the former regime. The Court observes that from the administrative courts' reasoning it cannot be readily inferred to what extent the courts substantively examined either the actual records about the applicant allegedly held by the security bodies or, importantly, the evidence adduced by the applicant himself. In these circumstances, Article 6 of the Convention required the domestic courts to provide a more substantial statement of their reasons rather than simply saying that 'the applicant had not submitted any evidence that led to different facts' (see paragraph 14 above).

58. The applicant's second argument, about the unreliability of the evidence in file 2599, was rejected on the grounds that he 'could have initiated proceedings before the competent court in order to prove their inaccuracy …' (see paragraph 13 above). The Court notes that the Administrative Court did not specify what kind of proceedings the applicant should have initiated. Furthermore, it finds it difficult to accept that he was supposed to institute those proceedings 'before the impugned decision [of the Commission] had been delivered'. In that connection, there was nothing to suggest that the applicant had been aware before the Commission's decision was served on him on 4 June 2013 that the former regime's security services had held any information on him. In any event, the Court rejected a similar argument raised by the Government in *Ivanovski* (cited above, §§ 157–162), finding it decisive that the courts at two levels that had examined the applicant's action for judicial review had exercised full jurisdiction over the facts and law and had examined the case on the merits. It considers that the same reasons apply to the present case.

59. The Court considers that such a state of affairs was detrimental to the exercise of the applicant's right to effectively present his case, within the meaning of Article 6 § 1 of the Convention.

(ii) Right to an oral hearing

60. The Court further notes that there was no oral hearing in the presence of the applicant at any stage of the impugned proceedings. While it is true that he did not request such a hearing before the Administrative Court, it is also to be noted that the Administrative Disputes Act, as valid at the relevant time, no longer provided for such an opportunity (see paragraph 34 above). Furthermore, it appears that such a request would have been useless given the findings of the Administrative Court that no such hearing was necessary 'since the Commission had correctly established the relevant facts on the basis of [written material]' (see paragraph 14 above). The Higher Administrative Court did not reply to the applicant's complaint on that point (see paragraph 15 above). The Court is not convinced that the disputed issues of fact and law (see paragraph 56 above) could be dealt with better in writing than in oral argument. Those issues were neither technical (see, conversely, *Siegl/Austria (dec.)*, 36075/97, 8 February 2000) nor purely legal (see, *conversely, Zippel/Germany* (dec.), 30470/96, 23 October 1997).

61. In view of the foregoing, the Court is not persuaded that there were any exceptional circumstances that justified dispensing with an oral hearing.

(iii) Reasoned judgment

62. Lastly, the Court considers that the applicant's arguments that the alleged collaboration did not meet the qualitative criteria

specified in the Lustration Act were decisive for the outcome of the case and therefore required a specific reply. That was the case because collaboration which had not been 'conscious, secret, organised and continuous' could not serve for lustration purposes (see section 4(3) of the 2012 Lustration Act, paragraph 21 above). Another element was that the collaborator or informant should have obtained 'in return [for such collaboration] a material benefit or favours during employment or in getting promotion' (see section 4(1) and 18(4) of the 2012 Lustration Act, paragraphs 21 and 24 above). The Court cannot accept that a mere restatement of those criteria, without pointing to any concrete issue of fact to confirm that the alleged collaboration complied with them, was a sufficient response to the applicant's submissions.

63. In those circumstances, the Court considers that the domestic courts fell short of their obligation under Article 6 § 1 to give adequate reasons for their decisions.

(iv) Conclusion

64. Having regard to the above issues, taken together and cumulatively, the Court finds that the applicant's right to a fair hearing within the meaning of Article 6 § 1 of the Convention was infringed. Accordingly, there has been a violation of that provision.

II. Alleged violation of article 8 of the convention

65. The applicant complained that the Commission's publication of the decision of 27 May 2013 on its website before it had become final had had serious adverse effects on his reputation, dignity and moral integrity and had violated his right to respect for his private and family life under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

66. The Government did not submit any objection as to the admissibility of this complaint.

67. The Court notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

68. The applicant maintained that the publication of the Commission's decision on its website before it had become final had been unlawful and not necessary in a democratic society. The removal of such a decision from the Commission's website if the administrative courts had set it aside would not have offset the adverse effects it had caused. In that connection, he submitted articles from newspapers and online portals after the Commission had posted its decision on its website and before it had been served on him. Lastly, he argued that the impugned publication had not pursued any legitimate aim.

69. The Government maintained that the impugned publication of the Commission's decision had not violated the applicant's Article 8 rights as he had not been prevented from challenging the decision before the administrative courts. They referred to cases in which such decisions had been removed from the Commission's website after being quashed by the administrative courts. Lastly, they argued that the impugned publication of the decision had aimed to ensure increased transparency, enabling those directly concerned and the wider public to have access to the relevant evidence. That improved the possibilities for alleged collaborators to contest the Commission's decisions in court. It also aimed to prevent any arbitrariness in the Commission's decision-making.

2. The court's assessment

(a) Whether there was an interference with the applicant's right to respect for his private life

70. The Court notes that the Commission's decision finding that the applicant collaborated with the former regime's security services and that he consequently fulfilled the criteria for restricting his candidature to public office or the exercise of such office (see paragraph 6 above) was published on the Commission's website on 30 May 2013. At that time, the decision was not final as it had not been yet served on the applicant (4 June 2013) and was accordingly the subject of an administrative action before the administrative courts.

71. It is common ground between the parties that the publication of such information constituted an interference with the applicant's right to respect for his private life. The Court finds no reasons to hold otherwise. In that connection it observes that it has already held that lustration measures directly affect the Article 8 rights of the persons concerned (see *Rotaru/Romania* [GC], 28341/95, § 46, ECHR 2000-V; *Leander/Sweden*, 26 March 1987, § 48, Series A 116; *Rainys and Gasparavičius/Lithuania*, 70665/01 and 74345/01, § 35, 7 April 2005; *Turek/Slovakia*, 57986/00, § 110, ECHR 2006-II; and *Sidabras and Others/Lithuania*, 50421/08 and 56213/08, § 49, 23 June 2015). In the present case, the publicity given to the Commission's decision further added to its effects on the enjoyment of the applicant's right to respect for his private life within the meaning of Article 8.

72. If it is not to contravene Article 8, such interference must be 'in accordance with the law' and pursue a legitimate aim under paragraph 2 of that provision. It must also be necessary in a democratic society.

(b) Lawfulness

73. The Court notes that sections 29(2) and 31(1) of the Lustration Act provided that a Lustration Commission decision was to be published on its website immediately, but no later than three days after the completion of proceedings or its delivery to the person concerned. In those circumstances, the publication of the Commission's decision on 30 May 2013 was based on the relevant provisions of the Lustration Act, which met the qualitative requirements of accessibility and foreseeability (see *Rotaru*, cited above, §§ 52, 54 and 55). The Court is therefore satisfied that the interference with the applicant's private life was in accordance with the law, as required by Article 8 § 2 of the Convention.

(c) Legitimate aim

74. The Court has already held that lustration measures are to be regarded as pursuing the legitimate aims of protecting national security, public safety, the economic well-being of the country and the rights and freedoms of others (see *Ivanovski*, cited above, § 179). However, its examination under this head must be confined to the applicant's complaint, which did not concern the results of the lustration proceedings against him, but the fact that the Commission's decision on his collaboration with the former regime's security services had been published before it had become final.

75. The Government submitted that the publication of such information ensured greater transparency, public access to documents in the applicant's file and public scrutiny of the Commission's decision-making. The Court does not consider that either purpose can be subsumed under any of the aims listed in Article 8 § 2 of the Convention. Furthermore, it does not see how making a non-final Commission decision publicly accessible can be reconciled with the general aims of lustration that the Court has accepted as legitimate (see paragraph 74 above). In that connection, it is to be noted that the applicant was seventy-seven years old when the Commission delivered its decision and held no public office. Furthermore, it was not alleged, in the domestic proceedings or before the Court, that he was a candidate for any such office at the time. The Court finds noteworthy that the Venice Commission in its *amicus curiae* brief on the 2012 Lustration Act also expressed the view that the publication of Lustration Commission findings prior to their review by a court was irreconcilable with Article 8 of the Convention (see paragraph 41 above). The Constitutional Court extended such an approach, albeit regarding necessity, to the publication of lustration results after they had become final (see paragraph 40 above).

76. The Court considers that the lack of a legitimate aim suffices to constitute a violation of Article 8. Furthermore, that fact means it does not need to determine whether the impugned measure was 'necessary in a democratic society'.

77. There has consequently been a violation of Article 8 of the Convention.

III. Alleged violation of Article 13 of the Convention

78. The applicant also complained of a lack of an effective remedy with respect to his grievances under Articles 6 and 8 of the Convention. He relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

79. The applicant reiterated that the impugned proceedings had been an ineffective remedy for his complaints under Articles 6 and 8.

80. The Government contested the applicant's arguments.

81. Having regard to its findings under Article 6 § 1 and Article 8 (see paragraphs 64 and 77 above), the Court declares the complaint under this head admissible, but considers that it

is not necessary to examine whether there has also been a violation of Article 13 (see *Ivanovski*, cited above, § 191).

IV. Application of Article 41 of the Convention

82. 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

83. The applicant claimed € 10,000 in respect of non-pecuniary damage for the embarrassment he had suffered as a result of his file still being accessible on the Commission's website and for his mental suffering because he had had the status of a 'snitch' (*кодоши*) attached to him as an alleged collaborator with the former regime's security services.

84. The Government contested the claim as unsubstantiated.

85. Ruling on an equitable basis, the Court awards the applicant € 4,500 under that head, plus any tax that may be chargeable.

B. Costs and expenses

86. The applicant also claimed € 3,350 for the costs and expenses incurred before the Court. That figure included fees for 100 hours of legal work, plus mailing and copying expenses. The applicant submitted an itemised list of costs and other particulars and requested that any award under this head be paid directly to his legal representative.

87. The Government contested the claim as unsubstantiated and excessive.

88. 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 (see *Editions Plon/France*, 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of € 1,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant. This amount is to be paid into the bank account of the applicant's representative.

C. Default interest

89. 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, unanimously,

1. *Declares* the complaints under Articles 6 § 1, 8 and 13 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the overall unfairness of the lustration proceedings;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
5. *Holds*

(a) 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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) € 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) € 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of the applicant's representative;

(b) 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;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Noot

1. Deze uitspraak laat zien dat de in het Nederlandse bestuursrecht explosief gegroeide praktijk van 'naming and shaming' in algemene zin door de beugel kan van art. 6 (recht op een eerlijk proces) en 8 (recht op bescherming van het privéleven) EVRM, hoewel deze bepalingen hieraan wel grenzen stellen. Daaraan kan worden toegevoegd dat als het om de publicatie van bestraffende sancties gaat ook de onschuldpresumptie van art. 6 lid 2 EVRM een normerende rol speelt terzake. Daaruit volgt immers dat een publicatie indien er nog rechtsmiddelen openstaan tegen een opgelegde en te publiceren sanctie, dit moet vermelden (vgl. EHRM 27 september 2011 (*Hrdalo/Kroatië*), *AB* 2012/294, m.nt. Barkhuysen en Van Emmerik). Aan dit aspect komt het Hof in deze uitspraak — hoewel daarover wel was geklaagd — niet meer toe omdat het anders dan de

klager de bevindingen van de zuiveringscommissie niet als bestraffend kwalificeert.

2. Bijzonder in casu is dat het Hof tot een schending van art. 8 EVRM concludeert, omdat er geen in lid 2 voorzien doel is gediend met het direct publiceren van de bevindingen zonder de uitkomst van een rechterlijke toetsing af te wachten. Het Hof neemt meestal namelijk vrij gemakkelijk aan dat een legitiem doel wordt gediend met een maatregel. Staten moeten het heel bont maken wil dat niet het geval zijn, zoals bij de onrechtmatige ingebruikname van een pand ten behoeve van een politiebureau terwijl er legio andere panden beschikbaar waren (EHRM 19 juni 2001, *Zwierzynski/Polen*, in casu betrof het een inmenging in het eigendomsrecht die geen enkel legitiem doel in het algemeen belang diende). Overigens is er ook wel kritiek mogelijk op het feit dat de legitiem-doel toets door het Hof zo terughoudend wordt toegepast. In feite wordt daarmee het belang van de proportionaliteitstoets namelijk wel heel erg groot gemaakt.

3. In de Nederlandse praktijk worden sancties regelmatig openbaar gemaakt terwijl daartegen nog rechtsmiddelen openstaan. Inmiddels is echter de praktijk (neergelegd in diverse wettelijke bepalingen of volgend uit jurisprudentie) dat wel de kans moet worden geboden een voorlopige voorziening procedure aanhangig te maken en het resultaat daarvan af te wachten (vgl. Michiels/Blomberg/Jurgens, *Handhavingsrecht*, Deventer 2016, p. 153–154). Dat is terecht. In dat kader komt de vraag aan de orde welk belang is gediend met onmiddellijke publicatie hangende de bodemprocedure versus de belangenaantasting aan de zijde van de persoon waarvan de sanctie wordt gepubliceerd. De hier gepubliceerde uitspraak maakt duidelijk dat deze toetsing daadwerkelijk inhoud moet hebben en er ook toe moet kunnen leiden dat vanwege een ontbrekend concreet belang de publicatie wordt opgeschort. Daarbij is van belang dat in de hier opgenomen uitspraak het privéleven als beschermd door art. 8 EVRM in het geding is, temeer omdat deze bepaling een gelimiteerde lijst van beperkingsdoelen kent. Meer ruimte lijkt er, daarbij te bestaan als er 'alleen' door art. 1 Protocol 1 EVRM beschermde eigendomsrechten in het geding zijn, zoals bij rechtspersonen — die immers onder de vlag van art. 8 EVRM niet in aanmerking komen voor de bescherming van reputatieschade —, nu deze bepaling niet een dergelijke beperkte lijst kent maar alleen het algemeen belang noemt.

4. Vanzelfsprekend — zij het helaas niet in de FYROM — is dat het moet gaan om effectieve rechtsbescherming waarbij een eerlijk proces wordt geboden. Op argumenten van partijen tegen publicatie moet serieus worden ingegaan en betrokkene moet de kans krijgen de beschuldiging tegen te spreken. In de Nederlandse voorlopige voorzieningsprocedure vindt deze toets plaats in het kader van de voorlopige rechtmatigheidstoets van de publicatiebeslissing en daarmee het onderliggende sanctiebesluit en kan ook een rol spelen bij de belangenafweging door de voorzieningenrechter. Deze uitspraak is een extra aansporing ook deze toets serieus te nemen, waar de nationale praktijk laat zien dat vanwege het feit dat wordt gepubliceerd met vermelding van het feit dat er nog rechtsmiddelen openstaan en het sanctiebesluit nog niet definitief is van deze voorlopige rechtmatigheidstoets onder omstandigheden (te) weinig werk wordt gemaakt.

T. Barkhuysen en M.L. van Emmerik

AB 2018/37

HOGE RAAD (CIVIELE KAMER)
13 oktober 2017, nr. 16/04026
(Mrs. C.A. Streefkerk, A.H.T. Heisterkamp, G. de Groot, M.V. Polak, M.J. Kroeze)
m.nt. G.A. van der Veen

Art. 6:258 BW

O&A 2017/101
RVR 2017/118
BR 2018/7
RvdW 2017/1099
NJB 2017/2039
RN 2017/104
ECLI:NL:PHR:2017:484
ECLI:NL:HR:2017:2615

Bevolkingskrimp en noodzaak tot bijstelling van nieuwbouwplannen zijn geen onvoorziene omstandigheden. Indien nieuwe, niet in de overeenkomst verdisconteerde inzichten tot een beleidswijziging hebben genoopt, leveren zij in dit geval onvoldoende rechtvaardiging voor niet-nakoming op.

Het hof heeft zijn oordeel dat geen sprake is van een toekomstige omstandigheid, daarop gebaseerd dat tijdens het bestuurlijk overleg op 20 mei 2009 naar voren is gekomen dat KWP3 met 5.900 woningen een aanzienlijk lagere behoefte in de regio Achterhoek liet zien dan KWP2 met 10.000 woningen voor de periode 2005–2014, en dat met een woningbouwprogramma van de gezamenlijke gemeenten van 15.000 nieuwbouwwoningen voor de hele regio voor de periode 2010-2019 sprake is van een forse overprogrammering aan nieuwbouw. De conclusie dat toen voor de Gemeente duidelijk was, althans duidelijk moest zijn, dat (ook) zij haar