Annotation: EHRM

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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS (DERDE KAMER)
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m.nt. T. Barkhuysen en M.L. van Emmerik NOOT *

EVRM art. 8

[Essentie] **Milieurecht; ernstige milieuverontreiniging door afvalverwerkingsfabriek; bescherming van omwonenden door art. 8 EVRM; materiële en procedurele verplichtingen; MER; schending art. 8 EVRM.**
De klaagster in deze zaak, mevr. Giacomelli, heeft de Italiaanse nationaliteit en woont sinds 1950 aan de rand van de Italiaanse stad Brescia. Sinds 1982 staat op 30 meter afstand van haar woning een fabriek voor de opslag en verwerking van gewoon en gevaarlijk afval. De lokale autoriteiten verleenden steeds voor een periode van vijf jaar een (milieu)vergunning voor de activiteiten van de fabriek. In 1989 heeft het bedrijf toestemming gekregen om schadelijk en giftig afval te verwerken door middel van "ontgifting", een proces waarbij chemicaliën worden gebruikt. Mevr. Giacomelli heeft verschillende bestuursrechtelijke procedures gevoerd tegen de besluiten tot vergunningverlening terzake. Een van deze procedures leidde in hoogste rechterlijke instantie tot vernietiging van de vergunning, aangezien de vereiste milieueffectrapportage (MER) niet was uitgevoerd. Deze rechterlijke beslissing is echter nooit ten uitvoer gelegd.
Het Hof stelt voorop dat artikel 8 EVRM het recht van een individu op eerbiediging van zijn privé- en familieleven, zijn woning en zijn correspondentie beschermt. De woning zal gewoonlijk de plaats zijn waar het privé- en familieleven zich afspeelt. Bij het recht op eerbiediging van de woning gaat het niet alleen om de fysieke ruimte, maar ook om het rustig genot daarvan. Onder inbreuken op het recht op eerbiediging van de woning worden niet alleen concrete, fysieke inbreuken op de woning verstaan, zoals het binnentreden van de woning zonder toestemming van de bewoner, maar ook inbreuken die niet concreet of fysiek zijn, zoals geluidsoverlast, stank of uitstoot van stoffen. Een ernstige inbreuk kan resulteren in een schending van het recht op eerbiediging van de woning, indien de inbreuk in de weg staat aan het genot van de woning.
Het Hof overweegt dat noch het besluit om een milieuvergunning voor de activiteiten van de fabriek te verlenen noch het besluit om industrieel afval te verwerken door middel van ontgifting, was voorafgegaan door de op grond van het nationale recht vereiste MER. Het Hof merkt verder op dat in het kader van de wel uitgevoerde MER-procedure het ministerie voor milieuzaken tweemaal had vastgesteld dat de activiteiten van de fabriek onverenigbaar waren met de geldende milieunormen vanwege zijn ongeschikte geografische lokatie en dat er een specifiek gezondheidsrisico was voor de omwonenden.
Het Hof overweegt dat de Italiaanse rechters in een van de bestuursrechtelijke procedures hebben geoordeeld dat er geen wettelijke basis was voor de activiteiten van de fabriek en dat deze daarom onmiddellijk moesten worden opgeschort. Volgens het geldende Italiaanse recht hadden de activiteiten toen daadwerkelijk moeten worden opgeschort, zodat het bedrijf maatregelen had kunnen nemen om te voldoen aan de milieunormen en alsnog een positieve verklaring van het ministerie te verkrijgen. De Italiaanse autoriteiten hebben echter nooit de sluiting van de fabriek bevolen. Bovendien hebben de omwonenden hierdoor niet op effectieve wijze hun procedurele rechten kunnen benutten.
Het Hof stelt dat, zelfs indien na de MER in 2004 de noodzakelijke maatregelen zijn genomen om de rechten van de klaagster te beschermen, het feit blijft staan dat gedurende verscheidene jaren haar recht op eerbiediging van de woning ernstig is geschaad door de gevaarlijke activiteiten van de fabriek op 30 meter afstand van haar huis. Gelet daarop is Italië er niet in geslaagd een goede balans te vinden tussen enerzijds de belangen van de gemeenschap om een fabriek te hebben voor het verwerken van giftig industrieel afval en anderzijds het recht van klaagster op een effectieve uitoefening van het recht op eerbiediging van haar woning en privé- en familieleven.
Op grond van het vorenstaande concludeert het Hof dat sprake is van schending van art. 8

EVRM.

[Tekst] Giacomelli
tegen
Italië
EHRM:
(...)
The law
The Government' preliminary objection
65. The Government submitted that the application was premature in that the latest proceedings instituted by the applicant were still pending in the Regional Administrative Court. Asserting that an application to the administrative courts for judicial review was an effective and accessible remedy, the Government submitted that the applicant should be required to await the outcome of those proceedings.
66. The applicant disputed the Government' reasoning. She submitted that since 1994 she had asked the administrative courts on several occasions to halt the plant' operation. However, although her requests for stays of execution had been granted and the environmental-impact assessment concerning the plant had been negative, its activities had never been stopped.
67. The Court observes that in its decision of 15 March 2005 on the admissibility of the application it held that the Government' objection that the application was premature should be joined to the examination of the merits of the case. Having regard to the substance of the applicant' complaint, it can only confirm that conclusion.
Alleged violation of Article 8 of the Convention
68. The applicant complained that the persistent noise and harmful emissions from the plant, which was only 30 metres away from her house, entailed severe disturbance to her environment and a permanent risk to her health and home, in breach of Article 8 of the Convention, which provides:
Article 8

> 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. The parties' submissions
1. The applicant
69. The applicant submitted that the plant operated by Ecoservizi had considerably expanded since being opened in 1982, having spread to barely 30 metres from the house where she had already been living for several years before that date, and having reached an annual production capacity of some 200,000 cubic metres of harmful waste.
70.
Since 1991 in particular, the plant' operations had increasingly been characterised by the continuous emission of noise and odours, preventing the applicant from being able to rest and live in adequate conditions, and had entailed a constant danger to the health and well-being of all those living in the vicinity. The applicant submitted that such a state of affairs was wholly incompatible with her right to respect for her private life and home and her right to health, and contended that the measures taken by the company were not sufficient to eliminate the disturbance produced by the plant and the risk resulting from its operation.
71.
The applicant further submitted that the environmental-impact assessment procedure, which according to the law should have been an essential prerequisite for the plant' operation, had not been initiated until several years after Ecoservizi had begun its activities. Furthermore, the company and the authorities had never complied with the decrees in which the plant' operation had been deemed incompatible with environmental regulations, and had disregarded the instructions issued by the Ministry of the Environment. The treatment of toxic and harmful waste

could not be said to be in the public interest in such conditions.
2.
The Government
72.
The Government did not dispute that there had been interference with the applicant' right to respect for her home and private life. They contended, however, that the interference had been justified under the second paragraph of Article 8 of the Convention.
The Government asserted that the administrative decisions in which Ecoservizi had been granted operating licences had been taken in accordance with the law and had pursued the aims of protecting public health and preserving the region' economic well-being. The company, they pointed out, processed almost all of the region' industrial waste, thereby ensuring the development of the region' industry and protecting the community' health.
73.
In the Government' submission, the instant case differed from that of *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 227, § 57) for two reasons. Firstly, Ecoservizi' operations respected the fundamental right to public health, and secondly, it had not been proved that the facility in the instant case was dangerous, whereas in *Guerra and Others* it had not been disputed that the emissions from the chemical factory entailed risks for the inhabitants of the town of Manfredonia. The Government also pointed out the difference between the instant case and *López Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C), in which the operation of the waste-treatment plant had not been indispensable to the local community. Emphasising the public-interest value of Ecoservizi' activities, they observed that regard had to be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole, and that there was a clear body of case-law in which the Court had allowed States a wide margin of appreciation in environmental matters.
74.
The Government also drew the Court' attention to the latest decisions by the domestic authorities. They pointed out, firstly, that on 23 July 2004 the Lombardy Regional Administrative Court, after considering all the relevant evidence in the case, had dismissed an application by the applicant for a stay of execution of the most recent decision to grant Ecoservizi an operating licence. They further noted that the most recent EIA procedure had ended on 28 April 2004 with a positive assessment by the Ministry of the Environment.
This proved that the relevant authorities had assessed the plant' operations as a whole and, while ordering the company to comply with certain requirements, had found that they were compatible with environmental regulations and did not entail a danger to human health.
75.
The Government further pointed out that Ecoservizi, a company that was very familiar to the public, not least because of the judicial proceedings and complaints brought by Ms Giacomelli, had frequently undergone inspections by the relevant authorities, so that any risk to the applicant' health could be ruled out. The applicant, whose sole purpose was to secure the closure or relocation of the plant, had simply alleged a violation of her right to health, without taking into account the efforts made by the appropriate authorities to improve the situation and without giving details or proof of any adverse effects on her health.
B.
The Court' assessment
76.
Article 8 of the Convention protects the individual' right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area.
Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person' home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person' right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton and Others v. the United Kingdom*[GC], no. 36022/97, § 96,

ECHR 2003-VIII).
77.
Thus in *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, p. 18, § 40) the Court declared Article 8 applicable because "[i]n each case, albeit to greatly differing degrees, the quality of the applicant' private life and the scope for enjoying the amenities of his home ha[d] been adversely affected by the noise generated by aircraft using Heathrow Airport". In *López Ostra* (cited above, pp. 54-55, § 51), which concerned the pollution caused by the noise and odours generated by a waste-treatment plant, the Court stated that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". In *Guerra and Others* (cited above, p. 227, § 57), the Court observed: "The direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable." Lastly, in *Surugiu v. Romania* (no. 48995/99, 20 April 2004), which concerned various acts of harassment by third parties who entered the applicant' yard and dumped several cartloads of manure in front of the door and under the windows of the house, the Court found that the acts constituted repeated interference with the applicant' right to respect for his home and that Article 8 of the Convention was applicable.
78.
Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private-sector activities properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see *Powell and Rayner*, p. 18, § 41, and *López Ostra*, pp. 54-55, § 51, both cited above).
79.
The Court considers that in a case such as the present one, which involves government decisions affecting environmental issues, there are two aspects to the examination which it may carry out. Firstly, it may assess the substantive merits of the government' decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual (see *Taskin and Others v. Turkey*, no. 46117/99, § 115, ECHR 2004-X).
80.
In relation to the substantive aspect, the Court has held on a number of occasions that in cases involving environmental issues the State must be allowed a wide margin of appreciation (see *Hatton and Others*, cited above, § 100; *Buckley v. the United Kingdom*, judgment of 25 September 1996, Reports 1996-IV, pp. 1291-93, §§ 74-77; and *Taskin and Others*, cited above, § 116).
It is for the national authorities to make the initial assessment of the "necessity" for an interference. They are in principle better placed than an international court to assess the requirements relating to the treatment of industrial waste in a particular local context and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community.
81.
To justify the award of the operating licence for the plant to Ecoservizi and the subsequent decisions to renew it, the Government referred to the economic interests of the region and the country as a whole and the need to protect the citizens' health.
82.
However, the Court must ensure that the interests of the community are balanced against the individual' right to respect for his or her home and private life. It reiterates that it has consistently

held that although Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by Article 8 (see, *mutatis mutandis, McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 55, § 87).
It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available (see *Hatton and Others*, cited above, § 104). However, this does not mean that the authorities can take decisions only if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.
83.
A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake (see *Hatton and Others*, cited above, § 128). The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, *mutatis mutandis, Guerra and Others*, cited above, p. 223, § 60, and *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, Reports 1998-III, p. 1362, § 97). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis, Hatton and Others*, cited above, § 128, and *Taskin and Others*, cited above, §§ 118-19).
84.
In determining the scope of the margin of appreciation allowed to the respondent State, the Court must therefore examine whether due weight was given to the applicant' interests and whether sufficient procedural safeguards were available to her.
85.
The Lombardy Regional Council first granted Ecoservizi an operating licence for the plant in question in 1982. The facility was initially designed for the storage and treatment of hazardous and non-hazardous waste. In 1989 the company was authorised to treat harmful and toxic waste by means of "detoxification", a process involving the use of chemicals potentially entailing significant risks to the environment and human health. Subsequently, in 1991, authorisation was given for an increase in the quantity of waste being treated at the plant, and the facility was consequently adapted to meet the new production requirements until it reached its current size.
86.
The Court notes at the outset that neither the decision to grant Ecoservizi an operating licence for the plant nor the decision to authorise it to treat industrial waste by means of detoxification was preceded by an appropriate investigation or study conducted in accordance with the statutory provisions applicable in such matters.
87.
The Court observes that section 6 of Law no. 349/1986 provides that the Ministry of the Environment must carry out a prior environmental-impact assessment (EIA) for any facility whose operation might have an adverse effect on the environment; among such facilities are those designed for the treatment of toxic and harmful waste using chemicals (see paragraphs 60 and 61 above).
88.
However, it should be noted that Ecoservizi was not asked to undertake such a study until 1996, seven years after commencing its activities involving the detoxification of industrial waste.
89.
The Court further notes that during the EIA procedure, which was not concluded until a final opinion was given on 28 April 2004, the Ministry of the Environment found on two occasions, in decrees of 24 May 2000 and 30 April 2001 (see paragraphs 38 and 41 above), that the plant' operation was incompatible with environmental regulations on account of its unsuitable geographical location and that there was a specific risk to the health of the local residents.

90.
As to whether the applicant had the opportunity to apply to the judicial authorities and to submit comments, the Court observes that between 1994 and 2004 she lodged five applications with the Regional Administrative Court for judicial review of decisions by the Regional Council authorising the company' activities; three sets of judicial proceedings ensued, the last of which is still pending. In accordance with domestic law, she also had the opportunity to request the suspension of the plant' activities by applying for a stay of execution of the decisions in issue.
91.
The first set of proceedings instituted by the applicant ended in 1998 when the administrative courts dismissed her complaints, finding among other things that she had failed to challenge the decisions in which the Regional Council had authorised an increase in Ecoservizi' volume of activity (see paragraph 20 above).
92.
However, in the second set of contentious proceedings the Lombardy Regional Administrative Court and the *Consiglio di Stato*, in decisions of 29 April 2003 and 25 May 2004 respectively, held that the plant' operation had no legal basis and should therefore be suspended with immediate effect (see paragraphs 27 and 29 above).
In accordance with the legislation in force, the plant' operation should have been suspended so that the company could bring it into line with environmental-protection regulations and hence obtain a positive assessment from the Ministry of the Environment.
However, the administrative authorities did not at any time order the closure of the facility.
93.
The Court considers that the State authorities failed to comply with domestic legislation on environmental matters and subsequently refused, in the context of the second set of administrative proceedings, to enforce judicial decisions in which the activities in issue had been found to be unlawful, thereby rendering inoperative the procedural safeguards previously available to the applicant and breaching the principle of the rule of law (see, *mutatis mutandis, Immobiliare Saffi v. Italy*[GC], no. 22774/93, § 63, ECHR 1999-V).
94.
It considers that the procedural machinery provided for in domestic law for the protection of individual rights, in particular the obligation to conduct an environmental-impact assessment prior to any project with potentially harmful environmental consequences and the possibility for any citizens concerned to participate in the licensing procedure and to submit their own observations to the judicial authorities and, where appropriate, obtain an order for the suspension of a dangerous activity, were deprived of useful effect in the instant case for a very long period.
95.
Nor can the Court accept the Government' argument that the decree of 28 April 2004, in which the Ministry of the Environment authorised the continuation of the plant' operation, and the decision of 23 July 2004, in which the Lombardy Regional Administrative Court refused the most recent request by the applicant for a stay of execution, serve as proof of the lack of danger entailed by the activities carried out at the site and of the efforts made by the domestic authorities to strike a fair balance between her interests and those of the community.
96.
In the Court' opinion, even supposing that, following the EIA decree of 28 April 2004, the measures and requirements indicated in the decree have been implemented by the relevant authorities and the necessary steps
have been taken to protect the applicant' rights, the fact remains that for several years her right to respect for her home was seriously impaired by the dangerous activities carried out at the plant built thirty metres away from her house.
97.
Having regard to the foregoing, and notwithstanding the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant' effective enjoyment of her right to respect for her home and her private and family life.
98.

The Court therefore dismisses the Government' preliminary objection and finds that there has been a violation of Article 8 of the Convention.

Application of Article 41 of the Convention

99. 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

100. The applicant claimed the sum of 1,500,000 euros (EUR) for pecuniary damage and sought a similar award for non-pecuniary damage.

She added that she was prepared to forgo part of the sums claimed if Ecoservizi' operations were immediately stopped or if the facility was moved to another site.

101.

The Government submitted that the sums claimed were excessive and that the finding of a violation would constitute sufficient just satisfaction.

102.

As to the specific measures requested by the applicant, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Öcalan v. Turkey*[GC], no. 46221/99, § 210, ECHR 2005-IV).

103.

As regards pecuniary damage, the Court observes that the applicant failed to substantiate her claim and did not indicate any causal link between the violation found and the pecuniary damage she had allegedly sustained.

104.

The Court considers, however, that the violation of the Convention has indisputably caused the applicant substantial non-pecuniary damage. She felt distress and anxiety as she saw the situation persisting for years. In addition, she had to institute several sets of judicial proceedings in respect of the unlawful decisions authorising the plant' operation. Such damage does not lend itself to precise quantification. Making its assessment on an equitable basis, the Court awards the applicant the sum of EUR 12,000.

B.

Costs and expenses

105.

The applicant sought the reimbursement of the costs and expenses incurred before the domestic authorities and the Court. In her bills of costs she quantified her domestic costs at EUR 19,365 and the costs incurred before the Court at EUR 3,598.

106.

The Government left the matter to the Court' discretion.

107.

According to the Court' settled case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum (see, among many other authorities, *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 573, § 49, and *Sardinas Albo v. Italy*, no. 56271/00, § 110, 17 February 2005).

108.

The Court considers that part of the applicant' costs in the domestic courts were incurred in order to remedy the violation it has found and should be reimbursed (contrast *Serre v. France*, no. 29718/96, § 29, 29 September 1999). It is therefore appropriate to award her EUR 5,000 under that head. The Court also considers it reasonable to award her the sum claimed in respect of the proceedings before it. Accordingly, making its assessment on an equitable basis, it decides to award the applicant the sum of EUR 8,598.

C.

Default interest

109.

The Court considers it appropriate that the default interest 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. *Joins to the merits* the Government' preliminary objection and dismisses it after considering the merits;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *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:
(i) EUR 12,000 (twelve thousand euros) in respect of non-pecuniary damage;
(ii) EUR 8,598 (eight thousand five hundred and ninety-eight euros) in respect of costs and expenses;
(iii) any tax that may be chargeable on the above amounts;
(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;
4. *Dismisses* the remainder of the applicant' claim for just satisfaction.

Noot
1.
De reden om de hiervoor opgenomen uitspraak te publiceren, ligt in het feit dat zij nog eens goed illustreert welke potentiële bescherming aan artikel 8 EVRM in milieurechtelijke zaken kan worden ontleend. Het Hof geeft namelijk een mooie samenvatting van de hoofdlijnen van zijn jurisprudentie in r.o. 76-83 (zie daarover ook het VAR-preadvies van J. Verschuuren, 'Invloed van het EVRM op het materiële omgevingsrecht in Nederland', Den Haag 2004 alsmede T. Barkhuysen & M.L. van Emmerik, 'Het EVRM en het Nederlandse milieurecht', *JB-plus* 2004, p. 234-244). Verder onderstreept de uitspraak dat de bescherming van art. 8 EVRM zowel een materiële als een procedurele kant heeft, waarbij opvalt dat het Hof ten aanzien van deze laatste component relatief strenger is.
2.
Art. 8 EVRM biedt bescherming tegen ernstige milieuvervuiling of -overlast die het persoonlijke leven (in casu in het kader van de bescherming van de woning) van burgers ernstig negatief beïnvloedt. Daarbij kan het gaan om bescherming tegen vervuiling of overlast direct veroorzaakt door de staat, maar - via het concept van de positieve verplichtingen - ook tegen door private partijen veroorzaakte milieuoverlast. De staat is wat die laatste categorie betreft gehouden de nodige regelgevende en handhavingsmaatregelen te treffen. Voor beide categorieën geldt dat er een "fair balance" moet worden gevonden tussen enerzijds het belang van het betrokken individu om zoveel mogelijk van overlast en gevaren gevrijwaard te blijven en anderzijds het (economische) belang van de hele gemeenschap bij de betwiste activiteiten.
3.
Uit eerdere Straatsburgse jurisprudentie was al gebleken dat de staat als het gaat om materiële afwegingen bij deze afweging een ruime beoordelingsvrijheid heeft, met name waar het betreft de noodzaak van de overlast veroorzakende activiteiten. Op dat punt zal het Hof dus niet snel ingrijpen (vgl. EHRM 30 november 2004, *Hatton t. Verenigd Koninkrijk*, *AB* 2005, 43, m.nt. Woltjer, ten aanzien van vliegtuiglawaai). Worden er echter op nationaal niveau materiële regels gesteld ter beperking van milieuoverlast maar worden deze niet gehandhaafd, dan is het Hof streng en neemt in beginsel een schending aan van art. 8 EVRM (vgl. EHRM 16 november 2004, *Moreno Goméz t. Spanje*, *AB* 2004, 453, m.nt. TB, ten aanzien van horeca-geluidsoverlast).
4.
De hier opgenomen uitspraak maakt duidelijk dat het Hof (ook) streng is als het gaat om procedurele waarborgen: worden deze onvoldoende in acht genomen, dan is de beoordelingsvrijheid van de staat in het kader van art. 8 EVRM heel klein. Vereist is dat de betrokken belangen en effecten van een voorgenomen milieugevaarlijke activiteit op degelijke wijze in kaart worden gebracht, zodat daadwerkelijk een belangenafweging kan worden gemaakt. Betrokkenen moeten in dat kader in de gelegenheid worden gesteld hun zienswijze te geven. De

relevante informatie moet vervolgens ook publiek toegankelijk zijn. Het Hof benadrukt echter dat art. 8 EVRM niet vereist dat er met betrekking tot elk denkbaar deelaspect van de besluitvorming betrouwbare feitelijke informatie beschikbaar is. Wel moeten betrokken individuen besluiten kunnen aanvechten bij de rechter wanneer zij van mening zijn dat aan hun belangen onvoldoende gewicht is toegekend. Deze rechtsbescherming moet ook effectief zijn, in die zin dat uitspraken moeten worden nageleefd en zo nodig afgedwongen. Binnen deze marges heeft de staat bij de inrichting van procedures een zekere vrijheid. Indien de staat echter een bepaalde procedure in de wet vastlegt, moet deze (net zoals geldt voor de hiervoor besproken materiële normen blijkens de zaak *Moreno Goméz*) ook worden nageleefd, op straffe van een schending van art. 8 EVRM. In casu brengt een combinatie van procedurele gebreken (zoals het negeren van rechterlijke uitspraken) en het niet-naleven van nationale procedurele regels (zoals de plicht tot het uitvoeren van een MER) het Hof er toe een schending van art. 8 EVRM aan te nemen.

5.

Deze uitspraak biedt met dat laatste, net als EHRM 16 april 2002, *Dangeville t. Frankrijk*, *AB* 2004, 75, m.nt. NV (betreffende een belastingrichtlijn), een voorbeeld van de mogelijkheid om op grond van het EVRM een al dan niet in nationale wetgeving omgezette EG-rechtelijke verplichting - in casu de MER-plicht - af te dwingen. Wat betreft de MER-plicht is dat eerder aangenomen in EHRM 19 februari 1998, *Guerra t. Italië*, *NJ* 1999, 690, m.nt. EJD.

6.

Een belangrijke vraag waarop deze uitspraak, ten slotte, geen duidelijk antwoord biedt is over hoeveel informatie een bestuursorgaan moet beschikken om een in het licht van art. 8 EVRM voldoende breed dossier te hebben. Zoals reeds aangegeven, benadrukt het Hof de verplichting passend onderzoek te verrichten om effecten te kunnen voorspellen en de betrokken belangen te kunnen bepalen. Het voegt daar in r.o. 82 echter meteen aan toe dat: "...this does not mean that the authorities can take decisions only if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided." Gelet daarop moet aangenomen worden dat bestuursorganen bij het onderzoek en de selectie van informatie, net als in het nationale recht, een zekere vrijheid hebben en dat het Hof pas zal ingrijpen wanneer het gaat om een duidelijk gebrekkig dossier en/of het niet respecteren van nationale (zorgvuldigheids)vereisten ten aanzien van de informatieverzameling.

7.

Deze uitspraak is ook gepubliceerd in *EHRC* 2007, 7, m.nt. M. Peeters, *JB* 2007, 1, *JOM* 2007, 69, *M en R* 2007/2, nr. 12

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Voetnoot verwijzingen

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