EHRM 14 oktober 2021, AB 2022/71, m.nt. T. Barkhuysen & M.L. van Emmerik

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

Citation

Barkhuysen, T., & Emmerik, M. L. van. (2022). EHRM 14 oktober 2021, AB 2022/71, m.nt. T. Barkhuysen & M.L. van Emmerik. *Ab Rechtspraak Bestuursrecht*, *2022*(9), 691-698. Retrieved from https://hdl.handle.net/1887/3564912

Version:	Publisher's Version
License:	Leiden University Non-exclusive license
Downloaded from:	https://hdl.handle.net/1887/3564912

Note: To cite this publication please use the final published version (if applicable).

AB 2022/71

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
14 oktober 2021, nr. 75031/13
(K. Turković, P. Paczolay, K. Wojtyczek, A. Poláčková, G. Felici, E. Wennerström, I. Ktistakis)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 8 EVRM

ECLI:CE:ECHR:2021:1014JUD007503113

Artikel 8 EVRM. Werkzaamheden aan snelweg. Verkeer maakte om die reden tijdelijk gebruik van rijksweg. Leidde tot overlast voor de bewoners. Klagers dienen schadeclaim in. Vordering afgewezen door de rechtbank, omdat de overheid tijdig en adequaat heeft gehandeld om de overlast te verminderen. Schending artikel 8 EVRM. Ernstige overlast en geen adequate maatregelen om deze te voorkomen of op te lossen.

Klagers zijn Poolse onderdanen, genaamd Katarzyna Kapa, Jacek Juszczyk, Mateusz Juszczyk en Barbara Juszczyk. Deze klagers zijn familie van elkaar en wonen samen in een huis in Smolice. Dit huis is enkele meters van de rijksweg N14 vandaan en één kilometer verwijderd van de A2 snelweg. In 2006 werden werkzaamheden verricht aan de A2 snelweg. Het verkeer moest tijdelijk worden omgeleid via de N14. Als gevolg van deze omleiding nam de verkeersdruk erg toe bij de N14. Er ontstond overlast door de vele vrachtwagens die goederen vervoerden. Dit zou onder meer tot veel geluidsoverlast, trillingen en uitlaatgassen hebben geleid. Naar aanleiding van meerdere onderzoeken naar deze claims, is uiteindelijk een plan opgesteld om een ringweg te creëren. Deze ringweg zou de verkeersdrukte moeten helpen verminderen. Een van de onderzoeken toonde aan dat de overlast was toegenomen, in het bijzonder werden wettelijke normen overschreden door de geluidsoverlast. Een ander onderzoek toonde aan dat er mogelijk ernstige psychofysiologische aandoeningen en ziektes zouden kunnen optreden bij de bewoners. Mogelijk zou de levensverwachting van de bewoners zelfs afnemen. Aan het einde van 2008 is een deel van de A2 weer geopend, de verkeersdrukte is hierdoor gereduceerd naar een acceptabel niveau. Klagers hebben in 2009 een procedure aangespannen tegen de staat waarin zij schadevergoeding hebben gevorderd. De vordering is door de betrokken rechtbanken afgewezen. Op 30 november 2010 heeft een door de rechtbank aangestelde deskundige een rapport opgesteld waarin werd bezien of de autoriteiten het verkeer adequaat hebben beheerd. Volgens de deskundige zou de verkeerstoename op de N14 veel moeilijkheden teweeg hebben gebracht voor de bewoners. Een deel van de verkeerstoename zou zijn veroorzaakt door een toename van bedrijfsruimten langs de N14 en doordat het aangrenzende deel van de snelweg tolvrij bleef. Volgens de deskundige was de verkeerstoename niet te voorzien, maar was de handelwijze van de autoriteiten met betrekking tot de moeilijkheden goed genoeg. De ringweg bood een effectieve oplossing. De rechtbank kwam tot de conclusie dat ondanks de overmatige geluidsoverlast, de autoriteiten tijdig hebben gehandeld om de overlast voor de bewoners te verminderen. Om die reden wees de rechtbank de schadeclaim af. Klagers gingen tevergeefs in hoger beroep tegen dit oordeel. De zaak voor het Hof van Cassatie werd op grond van procedurele gebreken afgewezen.

Klagers stappen naar het Europese Hof voor de Rechten van de Mens en stellen zich op het standpunt dat artikel 8 EVRM is geschonden. Het omleiden van het verkeer van de A2 naar de N14 zou hen in hun ‘peaceful enjoyment of their home’ hebben gestoord. Het Hof herhaalt dat individuen het recht hebben op rustig genot van hun woning. Alhoewel er niet expliciet in het Verdrag een recht is opgenomen dat ziet op een schone en rustige omgeving, kan een individu dat ernstig wordt getroffen door schade aan het leefmilieu, zoals lawaai of andere verstoringen beschermd worden op grond van artikel 8 EVRM. Het Hof benadrukt dat de regionale rechtbank had vastgesteld dat de geluidsniveaus de wettelijke normen hadden overschreden. De klagers stelden dat de problemen hadden kunnen worden voorkomen als de autoriteiten meer aandacht hadden besteed aan hun plannen voor het beheer van het wegverkeer. In het bijzonder is er geen rekening gehouden met de bezwaren van de burgemeester van Stryków met betrekking tot het eindpunt van de snelweg. De rapporten die de autoriteiten hebben gebruikt voor hun plannen hebben uitsluitend oog gehad voor de aanleg van de snelweg. Er is geen rekening gehouden met de impact van de verkeerstoename op de omwonenden. Het Hof merkt op dat de toename met name het gevolg is van ‘transit traffic’ en niet van ‘local commercial traffic’. Het Hof overweegt dat de verkeerstoename voorzienbaar was en de overheid de problemen willens en wetens heeft genegeerd. De overheid heeft het project voortgezet zonder rekening te houden met het welzijn van de omwonenden. Alhoewel de overheid heeft gepoogd de problemen op te lossen, zijn de pogingen niet effectief geweest. De N14 bleef voor automobilisten de meest gekozen weg. Het Hof concludeert dat de omleiding van het verkeer en het ontbreken van adequate oplossingen van de overheid om de problemen op te lossen de ‘peaceful enjoyment of their home’ van klagers heeft geschaad. Artikel 8 EVRM is om die reden geschonden. Het Hof oordeelt dat Polen de kla-

gers ieder € 10.000 moet betalen voor immateriële schade en in totaal € 750 voor kosten en uitgaven.

Kapa e.a.,
tegen
Polen.

The Law

I. Joinder of the applications

118. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. Alleged violation of article 8 of the Convention

119. The applicants complained under Article 8 of the Convention that by routing heavy traffic from the A2 motorway *via* the N14 road, the authorities had breached their right to the peaceful enjoyment of their private and family life and their home, as their house was situated very near to the road.

120. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home ….
> 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

121. The Government raised a preliminary objection, arguing that the case was inadmissible for non-exhaustion of domestic remedies, as the applicants had not lodged a cassation appeal with the Supreme Court. In their view, the fact that B.W.'s cassation appeal had not been examined on the merits did not mean that the applicants' own cassation appeal would not have had any prospects of success.

122. The applicants submitted that a cassation appeal had not been available in their cases, because the value of each of their claims had been below the statutory threshold.

123. The Court observes that in the civil proceedings in question, each applicant sought compensation of PLN 15,000 (see paragraph 74 above). That amount was below the threshold of Article 398[2] of the Civil Code (see paragraph 104 above). It follows that a cassation appeal was clearly not available to any of these applicants. In these circumstances, the Government's argument relating to the cassation appeal lodged by B.W., who sought compensation in an amount higher than the statutory limit (see paragraph 75 above), has no relevance for the present case.

124. The Government's preliminary objection of non-exhaustion of domestic remedies must therefore be rejected.

125. The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

126. The applicants complained under Article 8 of the Convention that by routing heavy traffic from the A2 motorway *via* the N14 road, which was not equipped for that purpose, the authorities had breached their right to the peaceful enjoyment of their private and family life and their home, as their house was situated very near to the road.

127. The applicants did not call into question the policy of expanding the road network in Poland. They argued, however, that any such development should be balanced, in that it should not put an excessive burden on the residents concerned. The increased traffic on the N14 road, especially at night, had, for a number of years, hampered the applicants' quiet enjoyment of their homes and disturbed their sleep. The vibrations from the road traffic had also caused cracks to appear in the walls of many Stryków buildings.

128. The applicants argued that the infringement of their Article 8 rights had been caused, firstly, by the authorities' negligent planning of the construction of the motorway, which had disregarded the obligation to ensure the protection of nearby residential areas.

129. In that regard, the applicants submitted that the authorities had already faced a similar situation when they had opened another section of the A2 motorway. They also argued that the lack of adequate planning had been deliberate, with the authorities wishing to curb expenditure. That said, the initial savings as regards investment had not been justified, because the State had not been facing any financial crisis, and because the State had ultimately incurred higher costs as a result of the subsequent *ex post facto* studies and reorganisation of the traffic.

130. In the applicants' opinion, the fact that the problem had resulted from the shortcomings

in the original planning of the project was proven by the authorities' ultimate success in greatly reducing truck traffic on the N14 road.

131. Secondly, the applicants argued that the infringement of their rights had been caused by the inadequate response to the resulting situation. The applicants essentially complained that the authorities had failed to take timely, adequate and sufficient traffic mitigation measures. In particular, they had not created good-quality alternative roads, and they had not effectively eliminated the heavy night-time traffic on the N14 road.

(b) The Government

132. The Government acknowledged that, in the circumstances of the case, the nuisance caused to the applicants by the operation of the motorway had reached the minimum level of seriousness and thus fell within the ambit of Article 8 of the Convention.

133. That said, the domestic authorities had complied with their positive obligations stemming from that provision.

134. In respect of the planning of the motorway, the Government submitted that the authorities had struck a fair balance between the competing interests of the individual applicants and the community as a whole.

135. The operation of the A2 motorway was legal and pursued an important public interest, namely the facilitation and acceleration of domestic road transport, as well as the bringing of economic and social development to the country.

136. Long before the opening of the A2 motorway, the N14 had been a public national road connecting major cities. Its so-called design speed limits, which in built-up areas had been 60 and 70 km, had remained the same when the motorway traffic had been redirected down it.

137. The traffic on the N14 after the motorway had been linked to it had been largely unpredictable. The authorities had only been able to monitor the situation and react to it *ex post facto*, which was what they had done.

138. The nuisance which the applicants had had to endure had only been temporary, lasting only two and a half years. In addition, the levels of noise disturbance had been reduced six months into the operation of the motorway, when the road traffic to Warsaw had been reorganised. As a result of those measures, the inconvenience caused by the traffic had been alleviated by December 2008. The authorities had thus reacted promptly and adequately to the situation in Stryków, of which they had become aware not only through the complaints of the population concerned, but also through their own monitoring. The authorities' reaction to the traffic problem had been positively assessed by the expert appointed by the court in the course of the applicants' civil proceedings.

139. In respect of the response to the traffic nuisance, the Government argued that the local authorities had taken all necessary measures aimed at eliminating the inconvenience caused by heavy traffic in Stryków.

140. As early as August 2006, the authorities had come up with a plan to connect the A2 and A1 motorways outside of Stryków. The connecting road (the 1.7-km extension) had become operational on 22 December 2008 and the traffic made up of heavy vehicles had dropped significantly.

141. Also in August 2006, the roads and motorways authority had drawn up a plan aimed at encouraging motorway users to make a detour around Stryków by taking alternative roads to Warsaw. That measure had been put in place in stages and had become fully operational in December 2006. The measure had reduced traffic levels through Stryków almost to those which had existed before the opening of the A2 motorway.

142. In October 2006 the surface of part of the N14 (namely Warszawska Street) in Stryków had been renovated.

143. The Government also submitted that the residents in the area concerned, who had been regularly informed of the mitigation measures in question, had been free to lodge complaints and applications in respect of the operation of the motorway or the initial investment. The applicants had not made use of that opportunity.

144. The Government also commented that the increase in traffic in Stryków might well have been caused by factors other than the A2 motorway. In particular, the Stryków Municipality, which was conveniently situated in Central Poland, had been developing rapidly. A number of warehouses and logistics centres had been erected in the area of Stryków and nearby Smolice. In 2017 Stryków had been ranked as the third-best developing district in a local sustainable development programme. In that regard, the Government relied on the observations made by the expert who had been appointed by the court in the course of the applicants' civil proceedings.

145. The Government noted that all the mitigation measures taken by the authorities had been assessed as adequate, reasonable and prompt. The applicants had not shown that the authorities had at some point refused to put in place any particular measures which might have been suggested by the population concerned.

146. The Government observed that the applicants had not documented the consequences

of the impugned nuisance by medical certificates or independent reports. The psychological opinion submitted to the Court had been commissioned by the applicants, and as such was not impartial and credible.

147. Lastly, the Government submitted that the decision-making process had complied with the Convention requirements. In particular, the applicants had received a fair and fully adversarial examination of their civil case.

2. The Court's assessment

(a) General principles

148. The Court reiterates that Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be a place, a physically defined area, where private and family life goes on. 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's 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's 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).

149. The Court further reiterates that although there is no explicit right in the Convention to a clean and quiet environment, where an individual is directly and seriously affected by severe environmental harm such as noise or other pollution, an issue may arise under Article 8 of the Convention (see *Hatton and Others*, cited above, § 96; *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C; *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, p. 18, § 40; and *Furlepa v. Poland* (dec.), no. 62101/00, 18 March 2008).

150. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, this may involve those authorities adopting measures designed to secure respect for private life even in the sphere of relations between individuals (see, among other authorities, *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 62, *Reports of Judgments and Decisions* 1996-IV, and *Surugiu v. Romania*, no. 48995/99, § 59, 20 April 2004). 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. 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 *Hatton and Others*, cited above, § 98).

151. Where noise disturbances or other nuisances go beyond the ordinary difficulties of living with neighbours, they may affect the peaceful enjoyment of one's home, whether they be caused by private individuals, business activities or public agencies (see *Apanasewicz v. Poland*, no. 6854/07, § 98, 3 May 2011; *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 97, 25 November 2010; and *Udovičić v. Croatia*, no. 27310/09, § 148–149, 159, 24 April 2014).

152. Lastly, the Court reiterates that the Convention has a fundamentally subsidiary role and the national authorities are in principle better placed than an international court to evaluate local needs and conditions (see *Hatton and Others*, cited above, § 97). While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court (see *Fadeyeva*, cited above, § 102, with further references).

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

153. The Court notes the finding of the domestic courts that the applicants' right to health and the peaceful enjoyment of their home had been infringed because the noise in their places of residence caused by traffic had gone beyond the statutory norms (see paragraph 88). In the light of the circumstances of the case, the adverse effects of the pollution (the noise, vibrations and exhaust fumes) emitted by the heavy traffic on Warszawska Street which affected the applicants' home have attained the necessary minimum level to bring the applicants' grievances within the scope of Article 8 of the Convention, taking into account their intensity, duration, physical and mental effects (see *Fadeyeva*, cited above, § 69).

154. The Court observes that although the applicants complained that the heavy road traffic which had followed the opening of the Konin-Stryków section of the A2 motorway had caused a nuisance, they did not argue against the

national policy of road development or the local policy of commercial development of the area (see paragraphs 163 and 178 above). Incidentally, the implementation of these policies, as transposed into the local master plan, was to be accompanied by the construction of a ring road around Stryków (see paragraph 12 above).

155. The applicants complained instead that the problem in question could have been avoided if the authorities had been diligent in planning that section of the motorway (see paragraph 164 above). Moreover, the consequent nuisance could have been minimised if the authorities had employed timely, adequate and sufficient mitigation and adaptation measures (see paragraph 165 above).

156. As to the first part of the complaint, the Court rejects the applicants' argument that there was a pattern of bad planning as regards the sections of the A2 motorway, as there is no evidence to support that allegation.

157. The Court nevertheless observes that the administrative authorities, which were in charge of choosing the location and the technical specifications of the motorway, did not examine the objection about the location of the motorway's temporary end point which had been lodged in 1996 by the mayor of Stryków (see paragraphs 16 and 22 above). The mayor had formulated a clear and detailed prediction as to the risk that ending the motorway at the point later known as the Stryków II junction without any alternative road connection would cause traffic on Warszawska Street which was too heavy and too burdensome (see paragraph 17 above).

158. The Court also takes note of the fact that all the environmental impact assessment reports and administrative decisions which were produced in the course of the impugned administrative proceedings, and which are in the Court's possession, were only concerned with the motorway *per se*, and were completely silent as to the traffic rerouting *via* the N14 road (see paragraphs 23, 26, 28 and 30 above).

159. Another important element in this context is that the authorities opted for that section of the motorway to be toll-free (see paragraph 9 above), even though that was clearly going to prompt the greater circulation of traffic on that road and on the N14, which was shorter and technically better than any alternative national or regional road in the vicinity (see paragraphs 79 and 80 above).

160. Lastly, the Court accepts that Stryków residents were affected by not only the transit traffic, but also the movement of vehicles serving various warehouses and logistics centres (see paragraphs 82, 83 and 178 above). However, no data are available to distinguish between these two types of traffic. The Court thus considers it reasonable to assume that the transit traffic constituted a significantly larger portion of the traffic in question, especially the traffic which circulated at night, that is, outside of the opening hours of the commercial establishments which developed in the Stryków area.

161. In the light of all these considerations, the Court cannot agree with the Government that the traffic on Warszawska Street was unpredictable (see paragraph 172 above). The Court thus concludes that the authorities, who had been alerted to the potential problem in 1996, knowingly ignored it and continued developing the motorway project with total disregard for the well-being of Stryków residents.

162. The Court stresses that, for the purpose of this case, the peaceful enjoyment of Stryków residents' homes was threatened and ultimately affected not by the development of the motorway as such, but rather the project rerouting the motorway's traffic through the middle of their town. In that regard, the general interest in having the motorway developed or constructed in sections (see paragraphs 22 and 170 above) must be distinguished from the general interest in having that particular section of the motorway end at the Stryków II junction, with the only option being to divert the motorway's uncontrolled traffic down the unadapted Warszawska Street.

163. The Court accepts that minimising investment expenses is a valid general interest for any State budget. It also takes note of the information indicating that the ring road around Stryków could not be constructed owing to the shortage of funds (see paragraph 86 above). However, the Court has serious doubts as to whether this is a sufficient counterbalancing factor.

164. The Court will now move on to the second part of the applicants' complaint and examine whether the authorities reacted promptly and adequately to the problem of heavy traffic which started affecting Stryków residents after the opening of the section of the motorway on 26 July 2006.

165. The authorities, who, on the one hand, carried out their own monitoring, and other the other hand, were alerted to the problem by the population concerned (see paragraphs 34, 35 and 38 above), did not adopt a passive attitude.

166. The very first plan to mitigate the situation was presented in August 2006. The plan featured two options: the ring road, and the 1.7-km extension to what later became known as the Stryków I junction (see paragraph 37 above).

167. The implementation of that plan, however, was marked by serious complications and de-

lays. As already explained, the ring road option was abandoned (see paragraph 200 above). The second-best solution, that is, the opening of an extension to the motorway up to the new junction, took place only two and a half years later, on 22 December 2008 (see para 65 above).
168. It appears that the delay in question was not attributable to the administrative proceedings (the environmental impact assessment having been delivered in 2003, and the permits having been granted in 2006), but rather the works (see paragraph 64 above).
169. Extending the motorway to the Stryków I junction offered a direct connection to the A1 motorway and effectively reduced the traffic on the N14 road to an acceptable level (see paragraph 66, above)
170. While awaiting the above-described long-term solution, the authorities made serious, albeit hasty, attempts to reorganise the traffic by installing custom-made signs indicating that drivers should make possible detours *via* nearby national and regional roads (see paragraphs 44 and 46 above). To judge the effects of that measure, the Court can only rely on the expert report of 30 November 2010, which appears to contradict itself, as well as on the parties' submissions. It is thus the Court's understanding that the measure which was implemented in December 2006, even though it had some positive effect, did not eliminate the heavy and continuous traffic from a significant number of trucks (see paragraphs 45, 84 and 165 above).
171. In October 2006 the authorities also took the adaptation measure of renovating the surface of Warszawska Street (see paragraph 43 above). That apparently did not bring about any positive change (see paragraphs 44, 59 and 70 above). It appears that no other adaptation measures (like anti-noise screens) could be taken in Stryków.
172. The Court observes that the authorities faced a difficult task of mitigating the problem of very heavy traffic resulting from the rerouting of the A2 motorway down Warszawska Street. They also had a very limited choice of possible adaptation measures. The Court therefore accepts that the authorities made considerable efforts to respond to the problem. This, however, does not change the fact that these efforts remained largely inconsequential, because the combination of the A2 motorway and the N14 road was, for many reasons, the preferred route for drivers. As a result, the State put vehicle users in a privileged position compared with the residents affected by the traffic.
173. Even though the civil proceedings through which the applicants tried to seek *ex post facto* compensation for the nuisance suffered cannot be said to have been marked by unfairness, all the foregoing considerations are sufficient to enable the Court to conclude that a fair balance was not struck in the present case.
174. In sum, the rerouting of heavy traffic *via* the N14 road, a road which was unequipped for that purpose and very near to the applicants' homes, and the lack of a timely and adequate response by the domestic authorities to the problem affecting the inhabitants of Warszawska Street, enables the Court to conclude that the applicants' right to the peaceful enjoyment of their homes was breached in a way which affected their rights protected by Article 8.
175. There has accordingly been a violation of Article 8 of the Convention.

III. Application of article 41 of the Convention
176. 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
177. Each applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.
178. The Government considered that amount excessive.
179. Regard being had to the reasons why the Court has found a violation of Article 8 of the Convention in the present case, it considers that the applicants must have suffered non-pecuniary damage which cannot be redressed by the mere finding of a violation. Ruling on an equitable basis, it awards each applicant EUR 10,000 in respect of non-pecuniary damage and dismisses the remainder of their claim.

B. Costs and expenses
180. The applicants also claimed EUR 5,000 for the costs and expenses incurred before the Court. No invoice to that effect was provided.
181. The Government argued that the applicants had not complied with the conditions required by the Court's case-law.
182. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and the lack of any documents proving that the applicants incurred expenses, the Court considers it reasonable to award the sum of EUR 750 for the

proceedings before the Court, plus any tax that may be chargeable.

C. Default interest

183. 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. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds*

(a) that the respondent State is to pay the applicants, 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 Polish zlotys (PLN) at the rate applicable at the date of settlement:

(i) EUR 10,000 (ten thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 750 (seven hundred and fifty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(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;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Noot

1. Na het geweld van de grote klimaatuitspraken waarin het EVRM een belangrijke rol speelde (vgl. Nijenhuis, *JB-plus* 2021/14), nu kort aandacht voor een huis-tuin-en-keukenmilieuzaak. Een zaak waarin de milieuoverlast voor de betrokkenen overigens vaak veel tastbaarder is dan doorgaans in de grote klimaatzaken. Hier gaat het om ernstige overlast als gevolg van een wegomlegging die nodig was vanwege de aanleg van een snelweg. Klagers verzetten zich niet tegen de aanleg van de weg maar tegen het niet voorkomen en oplossen van de overlast die het gevolg daarvan was.

2. Het is inmiddels genoegzaam bekend dat het vaste jurisprudentie is dat artikel 8 EVRM (het recht op rustig woongenot) ook beschermt tegen milieuoverlast. Als deze wordt veroorzaakt door derden rusten op de staat ook positieve verplichtingen deze te voorkomen dan wel te beëindigen (vgl. Barkhuysen & Van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht*, Deventer 2017, par. 4.7.1). Het moet dan wel gaan om ernstige overlast die duidelijk uitstijgt boven hetgeen in het normale maatschappelijk verkeer moet worden geaccepteerd. Daarbij speelt een rol of het gaat om overlast die in strijd is met nationale milieuvoorschriften. In die zin dat als dat aan de orde is, het Hof eerder tot de conclusie komt dat sprake is van voldoende ernstige overlast om de toepasselijkheid van artikel 8 EVRM aan te nemen. Om te bepalen of er een schending is van artikel 8 EVRM gaat het Hof vervolgens na of er al dan niet een fair balance bestaat tussen het algemeen belang dat met de overlast gevende activiteit wordt gediend en het belang van het daardoor geschade individu. Deze afweging en de toetsing daarvan is in de eerste plaats aan de nationale autoriteiten en rechters, maar het EHRM kan wel de eindafweging controleren.

3. Wat opvalt, is dat het EHRM in de onderhavige zaak vrij uitvoerig alle relevante omstandigheden naloopt en op basis van een weging van het geheel daarvan een schending van artikel 8 EVRM aanneemt. Zwaar weegt daarbij dat het gaat om een wegomlegging die ook voor zwaar verkeer gold, dat de betreffende alternatieve route vlak langs de huizen van klagers liep en dat door de autoriteiten toen er door klagers een punt werd gemaakt van de overlast niet tijdig en effectief maatregelen zijn getroffen om deze te mitigeren. Bijkomende factoren zijn het negeren van waarschuwingen vooraf dat de wegomlegging te veel overlast zou veroorzaken, het niet meenemen van de effecten van de omlegging in de milieueffectenrapportages, het tolvrij maken van een aanvoerweg en het niet meenemen van de cumulatie met ander vrachtverkeer vanwege aanwezige distributiecentra.

4. Dit alles resulteert voor klagers in een vergoeding voor elk van hen van € 10.000 vanwege immateriële schade. Tegelijk is deze uitspraak een duidelijke vingerwijzing om problemen door (mogelijke) overlast van op zichzelf noodzakelijke projecten serieus te nemen. Overheden zullen al het redelijkerwijs mogelijke moeten doen om overlast te voorkomen dan wel te mitigeren, waarbij natuurlijk ook financiële overwegingen een rol mogen spelen. Aandacht voor mogelijke overlast in milieueffectenrapportages is daarbij belangrijk. Waar overlast niet voldoende kan

worden voorkomen of gemitigeerd, ligt compensatie in de rede.
T. Barkhuysen en M.L. van Emmerik

AB 2022/72

HOF VAN JUSTITIE VAN DE EUROPESE UNIE
15 juli 2021, nr. C-584/20 P
(K. Lenaerts, R. Silva de Lapuerta, J.-C. Bonichot, M. Vilaras, E. Regan, M. Ilešič, L. Bay Larsen, A. Kumin, N. Wahl, T. von Danwitz, M. Safjan, C. Lycourgos, I. Jarukaitis, N. Jääskinen, I. Ziemele)
m.nt. R. Stijnen

Art. 3 BRRD-richtlijn; art. 70 SRM-Verordening; Bijlage I Gedelegeerde verordening (EU) 2015/63; art. 41, 47 Handvest Grondrechten EU; art. 339 VWEU

RF 2022/2
ECLI:EU:C:2021:601

Gemeenschappelijk afwikkelingsmechanisme. Het Gerecht heeft bij haar ambtshalve toetsing het beginsel van hoor en wederhoor geschonden. De opgelegde bijdrage aan het Gemeenschappelijk afwikkelingsfonds is onvoldoende gemotiveerd. In stand laten rechtsgevolgen.

Teneinde de daadwerkelijke eerbiediging van het beginsel van hoor en wederhoor te waarborgen, moeten partijen vooraf in de gelegenheid worden gesteld om hun opmerkingen in te dienen over het middel dat de Unierechter voornemens is ambtshalve op te werpen, en wel onder voorwaarden waaronder zij in staat zijn op zinvolle en effectieve wijze een standpunt over dit middel in te nemen. Dit houdt ook in dat zij in voorkomend geval de gelegenheid krijgen om aan die rechterlijke instantie de bewijselementen te verstrekken waarmee deze volledig geïnformeerd uitspraak kan doen over dat middel (…).

Het Gerecht heeft integendeel geoordeeld dat de GAR ter terechtzitting in eerste aanleg geen argumenten of bewijzen met betrekking tot de authenticatie van het litigieuze besluit mocht aanvoeren.

Indien ervan wordt uitgegaan, zoals het Gerecht heeft gedaan, dat Landesbank Baden-Württemberg uit de motivering van het litigieuze besluit noodzakelijkerwijs moet kunnen opmaken of de berekening van haar vooraf aan het GAF te betalen bijdrage voor 2017 juist is, zou dit noodgedwongen betekenen dat het de Uniewetgever verboden is om voor die bijdragen een berekeningsmethode in te voeren waarbij gebruik wordt gemaakt van gegevens waarvan het vertrouwelijke karakter door het Unierecht wordt beschermd en dus dat de ruime beoordelingsmarge waarover deze wetgever daartoe dient te beschikken, buitensporig wordt beperkt doordat de Uniewetgever met name wordt verhinderd te kiezen voor een methode waarmee is gewaarborgd dat de financiering van het GAF kan worden aangepast aan de ontwikkeling van de financiële sector door in het bijzonder vergelijkenderwijs rekening te houden met de financiële situatie van elke instelling waaraan op het grondgebied van een aan het GAF deelnemende lidstaat vergunning is verleend.

Niettemin moet worden benadrukt dat in artikel 88, lid 1, eerste alinea, van Verordening nr. 806/2014 is bepaald dat vertrouwelijke informatie die de GAR in het kader van zijn activiteit heeft verkregen, openbaar mag worden gemaakt wanneer de openbaarmaking van die informatie in een zodanig samengevatte of geaggregeerde vorm plaatsvindt dat de betrokken instellingen niet kunnen worden geïdentificeerd.

Indien het litigieuze besluit nietig zou worden verklaard zonder te bepalen dat de gevolgen ervan gehandhaafd blijven totdat er een nieuwe handeling voor in de plaats komt, zou afbreuk worden gedaan aan de tenuitvoerlegging van Richtlijn 2014/59, Verordening nr. 806/2014 en gedelegeerde Verordening 2015/63, die een essentieel onderdeel vormen van de aan de stabiliteit van de eurozone bijdragende bankenunie.

In de gevoegde zaken C-584/20 P en C-621/20 P,* betreffende twee hogere voorzieningen krachtens artikel 56 van het Statuut van het Hof van Justitie van de Europese Unie, ingesteld op respectievelijk 6 en 20 november 2020,
Europese Commissie, vertegenwoordigd door D. Triantafyllou, A. Nijenhuis, V. Di Bucci en A. Steiblytė als gemachtigden, rekwirante in zaak C-584/20 P,
ondersteund door:
Koninkrijk Spanje, vertegenwoordigd door J. Rodríguez de la Rúa Puig als gemachtigde, interveniënt in hogere voorziening,
andere partijen in de procedure:
Landesbank Baden-Württemberg, te Stuttgart (Duitsland), vertegenwoordigd door H. Berger en M. Weber, Rechtsanwälte, verzoekster in eerste aanleg,
ondersteund door:
1. Fédération bancaire française, te Parijs (Frankrijk), vertegenwoordigd door A. Gosset-Grainville, M. Trabucchi en M. Dalon, avocats, interveniënte in hogere voorziening,
2. Gemeenschappelijke Afwikkelingsraad (GAR), vertegenwoordigd door K.-P. Wojcik, P. A. Messina, J. Kerlin en H. Ehlers als gemachtigden, bijge-

* Procestaal: Duits.