EHRM 28 april 2022, AB 2023/33, m.nt. Barkhuysen & Van Emmerik

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

AB 2023/33

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
28 april 2022, nr. 78836/16
(M. Bošnjak, P. Paczolay, K. Wojtyczek, A. Poláčková, E. Wennerström, I. Ktistakis, D. Derenčinović)
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Art. 1 Protocol 1 EVRM

ECLI:CE:ECHR:2022:0428JUD007883616

Civiele schadeclaim wegens dood vader door Kroatische soldaten en ontoereikend onderzoek naar zijn dood. Kwestie is verjaard. Nabestaanden veroordeeld in proceskosten. Twee klachten. Er is geen sprake van ontoereikend onderzoek naar dood van de vader nu het onderzoek nog loopt. De excessief hoge proceskostenveroordeling is in strijd met het recht op eigendom van art. 1 EP EVRM.

Klagers Bosiljka Bursać, Đuka Damjanović, Nena Damjanović, Danica Dubajić en Milica Vasiljević zijn Kroatische onderdanen, allen geboren tussen 1940 en 1953. Klagers wonen in Apatin, Gračac, Srb en Zagreb. De vader van klagers was een Serviër. Hij zou in 1995 zijn gedood door Kroatische soldaten tijdens de Kroatische Onafhankelijkheidsoorlog, die volgde na het uiteenvallen van Joegoslavië. De vader zou zijn gedood gedurende de operatie Storm, wat een veldslag was om Krajina te overwinnen. Klagers hebben in 2005 tevergeefs een schadeclaim ingediend tegen de staat, waarbij zij het standpunt innamen dat hun vader gedood was door Kroatische soldaten. De rechter heeft geoordeeld dat de kwestie inmiddels verjaard was en veroordeelde de klagers in de kosten van het geding. Klagers zijn tevergeefs in beroep en hoger beroep gegaan tegen deze uitspraak.

Klagers stappen naar het Europees Hof voor de Rechten van de Mens en dienen daar twee klachten in. De eerste klacht ziet op het onvoldoende beschermen van het leven van hun vader en het ontoereikende onderzoek dat is gedaan naar zijn dood, dat in strijd zou zijn met artikel 2 EVRM. Het Hof maakt hier korte metten mee. Het onderzoek door de nationale autoriteiten naar de dood van de vader loopt immers nog. De tweede klacht ziet op de proceskostenveroordeling. Klagers stellen zich op het standpunt dat de proceskostenveroordeling in de civiele zaak strijdig is met artikel 1 EP EVRM, nu het om een excessief hoog bedrag ging. Hierbij wordt vooropgesteld dat het veroordelen van de verliezende partij in de proceskosten, ook in het geval van procedures over staatsaansprakelijkheid, niet per definitie strijdig is met artikel 1 EP. Het Hof oordeelt aan de hand van eerder geformuleerde criteria in Cindrić and Bešlić of de proceskostenveroordeling in dit geval in strijd is met artikel 1 EP EVRM. Het Hof beoordeelt ten eerste of het indienen van een schadeclaim kennelijk onredelijk was, omdat het dermate duidelijk was dat de schadeclaim geen enkele kans van slagen had. Het Hof acht van belang dat de nationale rechter heeft geoordeeld dat er een redelijke verdenking bestaat dat de vader het slachtoffer is geworden van een oorlogsmisdaad. Wel is van belang dat hierbij niet is geoordeeld over de toedracht. Ook waren vergelijkbare schadeclaims wel inhoudelijk behandeld. Het Hof oordeelt dat klagers dan ook terecht mochten hopen dat hun claim gezien de ernstige mensenrechtenschending ondanks de verjaring toch in behandeling zou worden genomen. Het indienen van de schadeclaim was dan ook niet kennelijk onredelijk. Het Hof benadrukt dat het internationale recht proceskostenveroordelingen bij schadeclaims als gevolg van mensenrechtenschendingen niet verbiedt. Het Hof benoemt dat het internationale recht de staat wel de verplichting oplegt om de kans op het 'hertraumatiseren' van slachtoffers van ernstige oorlogsmisdaden te minimaliseren. Een hoge proceskostenveroordeling bij schadeclaims als gevolg van ernstige oorlogsmisdaden is dan ook moeilijk te verenigen met deze verplichting. Daarbij komt dat een hoge proceskostenveroordeling in die gevallen ook niet goed te verenigen is met artikel 13 EVRM en artikel 2 EVRM. Artikel 13 EVRM verplicht immers het bieden van een effectief rechtsmiddel aan personen die een 'arguable claim' hebben op grond van artikel 2 EVRM. Het Hof oordeelt ten slotte dat de proceskostenveroordeling berust op een voor de klagers zeer nadelige berekening en hun financiële draagkracht niet is meegewogen. Het Hof komt tot het oordeel dat artikel 1 EP EVRM is geschonden.

Bursać e.a.
tegen
Kroatië

(…)

The law

I. Alleged violation of Article 2 of the Convention

55. The applicants complained that the authorities had not taken appropriate and adequate steps to investigate the killing of their father and to bring the perpetrators to justice. They relied on the procedural aspect of Article 2 of the Convention, the relevant part of which reads as follows:

"1. Everyone's right to life shall be protected by law. …"

A. The parties' submissions

56. In their observations submitted on 8 February 2018 on the admissibility and merits of the application, the Government contended that the complaint fell outside the Court's temporal jurisdiction and that it had been lodged out of time. In their submissions of 7 November 2019, they raised the objection that a constitutional complaint had become an effective domestic remedy for the applicants' complaint and that they should be required to use that remedy.

57. The applicants submitted in reply that a constitutional complaint did not constitute an effective remedy for their complaint, relying on the Constitutional Court's decisions quoted in *J. and Others v. Croatia* (Committee, nos. 32343/16 and 750/17, §§ 8–11, 26 May 2020).

B. The Court's assessment

58. The Court does not have to examine all the objections raised but will focus on the Government's plea of non-exhaustion of domestic remedies.

59. For the same reasons as outlined in the decision in *J. and Others v. Croatia* (cited above, §§ 20–23), the Court is of the view that in the present case the Government raised the objection of non-exhaustion of domestic remedies in a timely manner.

60. Likewise, in *J. and Others v. Croatia* the Court dismissed as unfounded a similar objection by the applicants that a constitutional complaint was not an effective remedy for their complaint (ibid., §§ 24–26).

61. The Court therefore confirms the conclusion it reached in *Kušić and Others v. Croatia* ((dec.), no. 71667/17, 10 December 2019) to the effect that in 2019 a constitutional complaint became an effective domestic remedy for complaints under Articles 2 and 3 of the Convention concerning ineffective investigations (ibid., §§ 93 and 99).

62. The Court notes that in 2017 the applicants lodged a constitutional complaint in which they complained that the investigation into the killing of their father had been ineffective, but the Constitutional Court did not examine that complaint (see paragraphs 24 and 25 above). However, the Constitutional Court's decision in question was delivered in 2017, two years before a constitutional complaint became an effective remedy for such complaints (see paragraph 61 above and compare, for factual circumstances, *J. and Others v. Croatia*, cited above, and *Marić and Others v. Croatia* (dec.), no. 37333/17, 10 November 2020).

63. In that connection, since the investigation into the killing of the applicants' father is still ongoing (see paragraph 15 above), the Court holds, as in *Kušić and Others, J. and Others v. Croatia* and *Marić and Others* (all cited above), that the applicants in the present case are required to lodge a constitutional complaint, it being understood that the period during which the proceedings were pending before the Court should not be held against them.

64. Indeed, in accordance with the principle of subsidiarity, one of the fundamental principles on which the Convention system is based, the respondent State should be afforded the opportunity to put matters right through its own legal system before answering before an international body for its acts or omissions.

65. The Court would stress that it remains open to the applicants, following the termination of the proceedings before the Constitutional Court or if those proceedings become unreasonably protracted, to bring their complaints before the Court if they still consider themselves to be victims of a violation of the Convention.

66. Against the above background, the Court upholds the Government's objection. The applicants' complaint under Article 2 of the Convention must therefore be rejected under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

II. Alleged violation of Article 1 of Protocol No. 1 to the Convention

67. The applicants further complained that the excessive sum of the costs of proceedings they had been ordered to pay to the State had been in breach of their right to peaceful enjoyment of their possessions. They relied on Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. The parties' submissions

68. The Government argued that the applicants had failed to properly exhaust the domestic remedies in respect of their complaint. Before the domestic courts the applicants had complained only that the order to reimburse the State for the

costs of the proceedings had been contrary to the Government's decision of 28 May 2009, which was inapplicable to their situation. As of 2017, the Constitutional Court had conducted an effective examination of complaints concerning costs of proceedings in the light of the criteria established in *Klauz v. Croatia* (no. 28963/10, § 31, 18 July 2013) and *Cindrić and Bešlić v. Croatia* (no. 72152/13, 6 September 2016). However, the applicants had failed to bring any relevant argument before that court.

69. The applicants disagreed.

2. The Court's assessment

70. The Court notes that in their appeal against the first-instance judgment and in their appeal on points of law and constitutional complaint the applicants challenged the decision ordering them to reimburse the State for the costs of the proceedings (see paragraphs 20, 22 and 24 above). In their constitutional complaint lodged in October 2017, they also relied on *Cindrić and Bešlić* (cited above), adopted one year earlier, and explained why they considered the decision on costs to be in breach of their rights of access to a court and peaceful enjoyment of possessions (see paragraph 24 above). Their arguments before the Constitutional Court correspond to those submitted to the Court (see paragraphs 74 and 75 below).

71. The Constitutional Court decided on the applicants' case on 29 November 2017. It did not, however, examine their complaint in the light of the *Cindrić and Bešlić* criteria, but held that the Supreme Court's decision declaring inadmissible the applicants' appeal on points of law in respect of the decision on costs could not be deemed arbitrary (see paragraph 25 above). In that connection, the Court notes that at the time the applicants lodged their appeal on points of law it was still possible to challenge final decisions on costs before the Supreme Court (see paragraphs 22 and 23 above), and therefore the applicants had been required to use that remedy.

72. The Court thus concludes that the applicants provided the domestic courts with a sufficient opportunity to remedy the alleged violation of their rights in respect of the decision on costs of proceedings. It follows that the Government's objection regarding the exhaustion of domestic remedies must be dismissed.

73. The Court notes that the complaint 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

74. The applicants contended that they had lodged their civil claim against the State in 2005, shortly after the Liability Act had come into force. At the time, they could not have known how the domestic courts would apply the statutory limitation period to civil claims for compensation for damage caused by unprosecuted war crimes. Their civil claim could not have been regarded as manifestly unreasonable. They had legitimately expected that civil courts would apply section 377 of the Obligations Act in favour of victims of gross human rights violations, in order to allow them to obtain compensation as at least one form of redress, having regard to the fact that the authorities had never properly investigated their father's killing and that the perpetrators had remained unpunished.

75. Additionally, the amount of HRK 60,000 in costs that the applicants had been required to reimburse the State was an excessive burden on them, bearing in mind that they had been exempted from paying the court fees on account of their poor financial status and that the maximum amount awarded by the national courts in respect of non-pecuniary damage in connection with the death of a parent was HRK 220,000. The unjustifiable length of the proceedings before the first-instance court had led to a further increase in their costs.

(b) The Government

76. The Government submitted that the applicants' case should be distinguished from that of *Cindrić and Bešlić* (cited above). In particular, at the time the applicants had lodged their civil claim for damages, the domestic courts' practice regarding the statutory limitation period for lodging a civil claim had been entirely clear. The practice in question had consistently been applied in cases like that of the applicants, as proven by the Supreme Court's decision cited in paragraph 36 above. The applicants had not explained why they had not brought their claim within the general statutory limitation period under section 376 of the Civil Obligations Act. Accordingly, the applicants' civil claim against the State, lodged in September 2005, had been obviously time-barred and therefore manifestly unreasonable.

2. The Court's assessment

(a) Whether there was an interference with the applicants' right to peaceful enjoyment of their possessions

77. The Court accepts that the order to pay the costs of the State's representation amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions. It finds it appropriate to examine the case in the light of the general rule under the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see *Cindrić and Bešlić*, cited above, § 92).

(b) Whether the interference was lawful

78. The Court notes that even though in the domestic proceedings the applicants challenged the lawfulness of the national courts' decisions ordering them to reimburse the costs of the State's representation by referring to the Government's decision of 28 May 2009 (see paragraphs 20 and 22 above), they did not reiterate that argument before this Court. Accordingly, the Court holds that the interference was lawful since the decision ordering the applicants to reimburse the costs of the State's representation was based on section 154(1) of the Civil Procedure Act (compare *Cindrić and Bešlić*, cited above, § 93).

(c) Whether the interference pursued a legitimate aim

79. The Court accepts that the costs order in the present case pursued the legitimate aim of ensuring the proper administration of justice and protecting the rights of others by discouraging ill-founded litigation and excessive costs (ibid., §§ 94–97). It will proceed to examine the key issue, namely whether a 'fair balance' was struck between the general interest and the applicants' rights under Article 1 of Protocol No. 1.

(d) Whether the interference was proportionate to the legitimate aim pursued

80. The Court would state at the outset that Article 1 of Protocol No. 1 does not create any legitimate expectation to commence and pursue litigation against the State cost-free, even in a situation where the plaintiff is in a financially precarious situation.

81. The Court further reiterates that the 'loser pays' rule contained in section 154(1) of the Civil Procedure Act cannot in itself be regarded as contrary to Article 1 of Protocol No. 1, even when applied to civil proceedings to which the State is a party (see *Cindrić and Bešlić*, cited above, § 96). Rather, the Court must examine whether the manner in which that rule was applied in the particular circumstances of the case placed an excessive individual burden on the applicants (ibid., § 100).

82. In *Cindrić and Bešlić*, which concerned a similar issue as the one arising in the present case, the Court took into account the following criteria when examining whether an interference in the form of the costs order had imposed an excessive individual burden on the applicants (ibid., §§ 107–109):

(i) the applicants' claim before the national courts was not devoid of any substance or manifestly unreasonable;

(ii) the State was represented by the State Attorney's Office and the costs of the State's representation were calculated in an amount equal to an advocate's fee;

(iii) in the light of the applicants' individual financial situation, paying the costs in issue appeared burdensome for the applicants.

83. In the present case the applicants were ordered to reimburse the costs of the State's representation by the State Attorney's Office because their claim for damages in connection with the killing of their father had been dismissed in its entirety on the grounds that it was time-barred. In particular, the domestic courts held that the claim had been lodged outside the general statutory limitation period under section 376 of the Civil Obligations Act, and that the longer statutory limitation period under section 377 of the Civil Obligations Act did not apply in their case (see paragraphs 19 and 23 above).

84. In previous cases where the applicants complained that the domestic courts had dismissed their claims for compensation for wartime damage as time-barred, the Court has found no breach of their right of access to a court (see *Bogdanović v. Croatia* (dec.), no. 72254/11, 18 March 2014; *Orić v. Croatia* (dec.), no. 50203/12, 13 May 2014; *B. and Others v. Croatia*, no. 71593/11, § 84, 18 June 2015; and *Zdjelar and Others v. Croatia*, no. 80960/12, § 103, 6 July 2017). However, the present case is the first case in which the Court has been called upon to examine whether the domestic authorities violated the applicants' rights by ordering them to reimburse the costs of the State's representation in such proceedings.

85. The central issue is thus whether the applicants ought to have known in 2005, when they lodged their civil claim, that their claim was obviously time-barred and without any prospect of success (compare *Cindrić and Bešlić*, cited above, § 107).

86. The Court observes that section 377 of the Civil Obligations Act provides for a longer statutory limitation period if the damage was caused by a criminal offence. This longer statuto-

ry limitation period thus operates in favour of the victims of crime, allowing them to claim compensation within the longer statutory time-limit prescribed for the criminal offence at issue. The Court notes that the prosecution of war crimes is not susceptible to becoming time-barred (see paragraph 27 above).

87. According to the domestic case-law, developed outside the war context (see paragraph 33 above), the civil courts were allowed to examine as a preliminary issue whether the damage was caused by a criminal offence only if there existed some circumstances barring the criminal prosecution, with the result that no criminal proceedings could be conducted against the perpetrator (see *Baničević v. Croatia* ((dec.), no. 44252/10, §§ 18, 19, 33 and 36, 2 October 2012). On the other hand, many investigations into grave crimes committed during the war did not lead to any results for different reasons, and the perpetrators frequently remained unknown (see paragraphs 28 and 51 above).

88. In the present case, the investigating judge held that there was a reasonable suspicion that the applicants' father had been a victim of a war crime against the civilian population (see paragraph 10 above). However, the perpetrators have to date not been identified and there have been no criminal convictions (see paragraph 15 above).

89. The Government cited one Supreme Court decision adopted in 2010 in a case comparable to that of the applicants, upholding the lower courts' decisions given in 2006 and 2008 (see paragraph 36above). However, the applicants lodged their civil claim in 2005 (see paragraph 16 above). The Government did not submit any domestic judgments from before 2005 concerning the interpretation of section 377 of the Civil Obligations Act in relation to unprosecuted grave crimes allegedly perpetrated by Croatian soldiers during the war.

90. According to further case-law available to the Court, in a comparable set of civil proceedings, in 2004 the first-instance court ruled in favour of the plaintiffs (see paragraph 34 above). In another comparable case, in December 2005 the first-instance court applied the longer statutory limitation period under section 377 of the Civil Obligations Act, holding that it could examine whether the damage had been caused by a criminal offence because the perpetrator had been unknown. The Supreme Court disagreed with that conclusion in 2008 (see paragraph 35 above).

91. The Court is thus not convinced that, at the time the applicants lodged their civil claim for damages in 2005, the position of the domestic courts as regards the application of section 377 of the Civil Obligations Act to civil claims concerning unprosecuted grave crimes allegedly perpetrated by Croatian soldiers during the war was entirely clear and consistent (compare *Cindrić and Bešlić*, cited above, § 106).

92. Even if the applicants should have been aware of the existing (pre-war) case-law concerning the interpretation of section 377 of the Civil Obligations Act, as the Government suggested, the Court does not find it unreasonable, in the light of the significant social changes brought by the war and its aftermath, as well as the developments in international human rights law at the material time (see paragraphs 47 and 48 above), that the applicants hoped that the domestic courts would apply the provisions concerning statutory limitation in a manner favourable to victims of gross human rights violations (see also the opinion of four Croatian Constitutional Court judges cited in paragraphs 38 and 39 above). By lodging their civil claim in 2005, the applicants afforded the civil courts an opportunity to do so, providing arguments emerging from key international instruments militating against employing statutory limitation in the case of civil remedies used by victims seeking reparations for gross human rights violations (see paragraphs 20, 24 and 47–50 above and compare, *mutatis mutandis, Vrtar v. Croatia*, no. 39380/13, §§ 76, 7 January 2016).

93. Indeed, the allegations in the civil proceedings instituted by the applicants involved the killing of an elderly civilian by Croatian soldiers and thus involved the right to life protected under Article 2 of the Convention and, arguably, the applicants' right under Article 3 of the Convention. In this connection the Court reiterates that Articles 2 and 3 rank as the most fundamental provisions in the Convention. They enshrine some of the basic values of the democratic societies making up the Council of Europe (see, among many other authorities, *Marguš v. Croatia* [GC], no. 4455/10, § 124, ECHR 2014 (extracts)).

94. While the present complaint does not concern alleged violations of Articles 2 and 3 of the Convention, but of Article 1 of Protocol No. 1 in relation to the costs of civil proceedings which the applicants were ordered to pay to the State, the Court reiterates that the Convention and its Protocols must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between their various provisions (see *Austin and Others v. the United Kingdom* GC, nos. 39692/09, 40713/09 and 41008/09, § 54, ECHR 2012).

95. In these circumstances it cannot be said that the applicants' civil claim for damages, lodged in September 2005, was from the outset

manifestly unreasonable, or devoid of any substance (compare *Cindrić and Bešlić*, cited above, § 107, and the Supreme Court's decision cited in paragraph 42 above, and contrast *Marić and Others*, cited above, § 58). Where the official investigation into a possible war crime did not lead to any results, the Court finds it understandable that victims believed that this would be treated as 'other circumstances preventing criminal responsibility from being established', leading the civil courts to examine as a preliminary issue whether the damage had been caused by a criminal offence and, consequently, whether the longer statutory limitation period should apply to their civil claims for damages (see the Supreme Court's decision rendered in 1993, cited in paragraph 33 above).

96. As to the Government's argument that there was nothing preventing the applicants from lodging their civil claim within the general statutory limitation period under section 376 of the Civil Obligations Act, the Court notes that it is true that the applicants had such a possibility, as even before the Liability Act, the State had been liable for the damage caused by Croatian soldiers (see paragraphs 30–32 above). However, the civil court in the applicants' case held that, even if it had been competent to examine the matter as a preliminary issue, there was insufficient evidence to conclude that their father's killing had amounted to a crime because the applicants' aunt had not directly seen his killing, but had only heard gunshots (see paragraph 19 above). In several cases against Croatia the Court has criticised the unattainable burden of proof which the civil courts imposed on plaintiffs seeking compensation for wartime damage (see *Trivkanović v. Croatia (no. 2)*, no. 54916/16, § 81, 21 January 2021, and *Baljak and Others v. Croatia*, no. 41295/19, § 41, 25 November 2021). Such criticism was also voiced by the United Nations Human Rights Council following its mission to Croatia (see paragraph 51 above). Furthermore, the Court notes that between November 1999 and July 2003 the applicants could not have lodged their civil claim because of changes in the legal provisions regulating the State's liability for wartime damage (see paragraphs 31 and 32 above).

97. It follows that the success of civil claims, even those lodged during the general statutory limitation period under section 376 of the Civil Obligations Act, depended on the efficient work of the investigative authorities, whereas investigations into grave crimes committed during the war were burdened by numerous challenges, often not leading to any concrete results even more than twenty years later (see paragraphs 15, 28 and 51 above). The latter cannot be attributed to the applicants, as it is the duty of the State authorities to conduct an effective official investigation (see *Kušić and Others*, cited above, §§ 72–74).

98. The Court observes that no international instrument explicitly prohibits ordering victims of grave breaches of fundamental human rights to bear the costs of related civil proceedings for damages in which they have been unsuccessful. However, such decisions appear to be at odds with the obligation of States to minimise the risk of re-traumatising victims of grave breaches of fundamental human rights, as set forth in key international instruments, including the United Nations Basic Principles and Guidelines on the Right to a Remedy and General Comment No. 3 on Article 14 of the Convention against Torture (see paragraphs 47–50 above).

99. The Court has held, with respect to Article 2 of the Convention, that where the applicants have an arguable claim that their family members have been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to a thorough and effective investigation capable of leading to the identification and punishment of those responsible, the payment of compensation where appropriate (see *Kaya v. Turkey*, 19 February 1998, § 107, *Reports of Judgments and Decisions* 1998-I).

100. In the Court's view, in circumstances where the investigation into the killing of the applicants' father, an elderly civilian, never led to the identification or punishment of the perpetrators, and the applicants were unable to obtain compensation in civil proceedings as there had been no criminal conviction (see paragraphs 19, 21 and 23), requiring the applicants to pay the costs of the State's representation in the civil proceedings further exacerbated their traumatisation, contrary to the spirit of the Convention and its Protocols.

101. Furthermore, in the civil proceedings complained of the State was represented by the State Attorney's Office and the costs of the State's representation were calculated in an amount equal to an advocate's fee. However, that office, since it is financed from the State budget, is not in the same position as an advocate (see *Cindrić and Bešlić*, cited above, § 108).

102. The Court also notes that it was not until July 2010 that the State first raised the objection that the applicants' claim of September 2005 had been time-barred (see paragraph 18 above). This, having regard to the fact that the civil courts are not allowed to consider statutory limitations of their own motion, undoubtedly caused unnecessary costs for the applicants (see paragraphs 19 and 75 above).

103. Another factor of importance is the applicants' individual financial situation (ibid., § 109). Given their arguments in that regard (see paragraph 75 above), the Court accepts that having to pay the amount ordered by the national courts in respect of the costs of the proceedings at issue appears to have been burdensome for the applicants. This burden appears even greater in a situation where the applicants were possibly also required to cover the costs of their own legal representation in the civil proceedings. In this connection, the Court observes that the applicants' claim was not unjustifiably inflated but that it was in line with the Supreme Court's guidelines concerning amounts to be awarded for various types of non-pecuniary damage (see paragraphs 16 and 45 above and, *a fortiori, Klauz*, cited above, § 90).

(e) Conclusion

104. In the particular circumstances of the present case, the Court considers that ordering the applicants to bear the full costs of the State's representation in the civil proceedings amounted to a disproportionate burden on them.

105. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

106. The Court notes that, although in the present case the domestic courts failed to consider whether in the particular circumstances applying the 'loser pays' rule without any flexibility placed an excessive individual burden on the applicants (see paragraphs 19–25 and 70–71 above), in 2021 the Supreme Court, in a case which concerned a similar issue, conducted such an assessment and ultimately ordered that each party should bear their own costs of proceedings (see paragraph 42 above). By way of observation the Court notes that in cases such as the present one the State has a number of additional possibilities to achieve the necessary flexibility. The Court first refers to the Government of Croatia's decision and decree of 2009 and 2013 respectively, mentioned in paragraphs 43 and 44 above. Moreover, precisely because the State is a party to the civil proceedings in such cases, the State Attorney's Office may opt not to claim costs or, if the costs order is issued, not to seek payment of those costs or enforcement of the costs order (see *Kresović and Others v. Croatia* (dec.), no. 5864/12, § 19, 12 September 2017).

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

107. The applicants brought the same complaint under Article 6 § 1 of the Convention.

108. Having regard to its findings under Article 1 of Protocol No. 1 above, the Court considers that it is not necessary to give a separate ruling on the complaint under Article 6 § 1 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* GC, no. 47848/08, § 156, ECHR 2014).

IV. Application of Article 41 of the Convention

109. 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

110. The applicants claimed 143,790 euros (EUR) in respect of non-pecuniary damage. The Government deemed this sum excessive.

111. The Court considers it reasonable to award the applicants jointly EUR 5,000 on account of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

112. The applicants also claimed EUR 2,000 for the costs and expenses incurred.

113. The Government objected to the amount claimed.

114. 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 documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads, plus any tax that may be chargeable to the applicants.

For these reasons, the Court, unanimously,

1. *Declares* the complaint concerning the procedural aspect of Article 2 of the Convention inadmissible and the complaint under Article 1 of Protocol No. 1 to the Convention admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 6 § 1 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 the currency of

the respondent State at the rate applicable at the date of settlement:
(i) EUR 5,000 (five thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 2,000 (two thousand 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.

Noot

1. Het voor de *AB* interessante aspect van deze uitspraak betreft hetgeen wordt overwogen over de proceskostenveroordeling. Conform vaste jurisprudentie wordt deze in dit soort zaken gezien als een inmenging in het eigendomsrecht en is het de vraag of deze proportioneel is. Daarbij wordt uiteindelijk een schending van artikel 1 EP EVRM vastgesteld vanwege een proceskostenveroordeling van omgerekend € 8000 die ongeveer 25% bedraagt van het bedrag dat bij toewijzing van de vordering had kunnen worden verkregen.
2. Hoofdvraag daarbij is of het indienen van de schadeclaim kennelijk onredelijk is omdat duidelijk is dat deze (ondanks de verjaring) geen enkele kans van slagen had. Daarvan is geen sprake. Daarnaast wijst het Hof erop dat proceskostenveroordelingen in dit soort zaken niet zijn verboden maar dat het hertraumatiseren van slachtoffers moet worden voorkomen, waarmee een hoge proceskostenveroordeling moeilijk te verenigen is. Verder overweegt het Hof dat er voor betrokkenen op grond van artikel 13 EVRM juncto artikel 2 EVRM (recht op leven) effectieve rechtsbescherming open moet staan als sprake is van een verdedigbare claim, waarmee een hoge proceskostenveroordeling ook schuurt. Ten slotte is van belang dat geen rekening is gehouden met de draagkracht van betrokkenen.
3. In het Nederlandse bestuursrecht is een proceskostenveroordeling van natuurlijke personen (waaronder ook particuliere rechtspersonen worden begrepen) op grond van artikel 8:75 Awb in beginsel uitgesloten tenzij betrokkene kennelijk onredelijk gebruikmaakt van het procesrecht. Van kennelijk onredelijk gebruik is sprake als ten tijde van het instellen van (hoger)beroep voor betrokkene evident was dat het om een kansloze zaak ging (vgl. ABRvS 20 juli 2011, ECLI:NL:RVS:2011:BR2299). Een regeling met een vergelijkbare inhoud als de EHRM-benadering, zodat het onwaarschijnlijk is dat de toepassing van de Awb-regeling in strijd komt met het EVRM.
4. In het burgerlijk procesrecht is de hoofdregel op grond van artikel 237 Rv dat de in het ongelijk gestelde partij wordt veroordeeld in de proceskosten. Dat geldt dus ook voor natuurlijke personen. Daarbij gaat het wel om grotendeels forfaitaire, voorspelbare bedragen die van geheel andere relatieve orde zijn dan in de hier opgenomen uitspraak (*Asser Procesrecht/Van Schaick 2* 2022/125). Ook deze regel is daarom in beginsel in overeenstemming met artikel 1 EP, zoals de hier opgenomen uitspraak laat zien. Tegelijk is het belangrijk om onder omstandigheden — in Nederland waarschijnlijk vooral verband houdend met draagkracht — daarvan (deels) af te kunnen zien.
5. Overigens pakt het EHRM het probleem van te hoge proceskostenveroordelingen ook wel aan over de band van artikel 6 EVRM als een te grote drempel voor daadwerkelijke toegang tot de rechter (vgl. EHRM 6 april 2006, Stankiewicz t. Polen, *EHRC* 2006/68, m.nt. Fernhout). In de hier opgenomen uitspraak weegt dat aspect mee in de proportionaliteitstoets met de overweging over het belang van effectieve rechtsbescherming als bedoeld in artikel 13 EVRM.
T. Barkhuysen en M.L. van Emmerik

AB 2023/34

AFDELING BESTUURSRECHTSPRAAK VAN DE RAAD VAN STATE
28 december 2022, nr. 202101238/1/R1
(Mrs. A. ten Veen, J. Gundelach, G.O. van Veldhuizen)
m.nt. A.G.A. Nijmeijer

Art. 8:58, 8:69a, 8:75 Awb; art. 3.1 Wro

ECLI:NL:RVS:2022:3970

Vaststellen bestemmingsplan. Bescherming UNESCO-werelderfgoed. Goede procesorde. Reikwijdte recht op proceskostenvergoeding in omgevingsrechtelijke zaken.

De Afdeling overweegt dat de ingediende stukken inhoudelijk in het verlengde liggen van de eerder door de werkgroep en anderen aangevoerde beroepsgronden over de HIA, waarover de raad een schriftelijke uiteenzetting heeft kunnen geven. Het rapport en de overige documenten bestaan echter uit een omvangrijk aantal pagina's. Daarnaast heeft het college van gedeputeerde staten van