Seminar on human rights and access to justice in the EU

14-15 May 2015, Vilnius Lithuania

National Courts Administration (NCA) & European Judicial Training Network

LENGTHY PROCEEDINGS V. REASONABLE TIME OF A TRIAL

by Martin KUIJER ▪

Introduction

Every year hundreds of applicants complain before the European Court of Human Rights that judicial proceedings before their domestic courts have taken too much time and thereby violate Article 6 of the ECHR. This single issue still accounts for more judgments of the Court than any other. It is clear why speedy judicial proceedings are deemed essential from a human rights perspective. '*Justice delayed is justice denied'* is a maxim that is often used in this regard. If society sees that judicial settlement of disputes functions too slow, it will lose its confidence in the judicial institutions. Even more importantly, slow administration of justice will undermine the confidence society has in the *peaceful* settlement of disputes. In corporate litigation, parties to proceedings need to receive legal certainty within a reasonable period of time or it will affect economic activities and the willingness of corporations to make financial investments. In civil litigation, such as custody issues, there is a great personal interest to have a speedy outcome of the proceedings, also because lapse of time may strengthen *de facto* situations which may not be in conformity with *de jure* entitlements. In administrative law, one may refer to the undesirability of prolonged uncertainty for asylum seekers. The deterrence provided by the criminal law will only be effective if society sees that perpetrators are sentenced within a reasonable time, whereas innocent suspects undeniably have a huge interest in the speedy determination of their innocence.

▪ Professor of human rights law at the VU University Amsterdam and head of the human rights unit of the Netherlands Ministry of Security and Justice.

Cases concerning excessively lengthy proceedings became common in the 1990s. On 30 April 1993, a television programme was shown on Italian television which informed the public about several deficiencies in the Italian administration of justice, including the lengthy duration of judicial proceedings. The journalists also informed the public that financial compensation could be obtained in Strasbourg when cases had taken too long. The broadcast triggered a very substantial inflow of complaints to the then European Commission of Human Rights. The complaints were so numerous that the Commission created a special sub-chamber for handling these cases. Initially, only a relatively small number of cases relating to the length of proceedings was brought before the Court. Once the Court had established appropriate principles in its case-law, most cases were factually dealt with by the Commission. However, the Commission was not competent to adopt a *final* decision (only judgments of the Court being binding). The Commission could merely adopt a so-called 'Article 31-report' and transmit its opinion on the merits of the case to the Committee of Ministers. The Commission would not use its power to transmit the case to the Court since the legal issues under Convention law were pretty straightforward. In practice, the Committee of Ministers would ask the Commission to make a concrete proposal as to the appropriate amount of compensation, and adopt the Commission's proposal as its own. Originally, this was done by a 'recommendation' to the State by the Committee of Ministers. However, the Italian Minister of Finance then declared that he did not consider himself competent to pay such compensation on the basis of non-binding recommendations. This in turn led to a referral of all these cases to the Court. As the Court was inundated with 'Italian length of proceedings' cases (at one stage, the Italian length of proceedings cases were responsible for 25% of the total workload of the Court), the Committee of Ministers changed its policy and started to issue binding decisions. Following that decision, the Commission resumed its old routine and dealt with the overwhelming majority of these cases itself until the Convention mechanism was changed in 1998 following the entry into force of the 11th Protocol.

With the entry into force of that Protocol, the Commission ceased to exist and the Court became a full time institution which now had to deal with all the Italian cases itself. The new Court took a revolutionary step; it held that the systemic delays in the Italian judicial system constituted an administrative practice that was incompatible with the Convention. This systemic tardiness was pronounced in a case called *Ferrari*.[1] The consequence of this finding

[1] *Ferrari a.o. v. Italy*, Judgment of 28 July 1999, appl. no. 33440/96.

was that the burden of proof was reversed: the Court would work on the assumption that the Convention had been breached unless the State in a given case challenged that presumption. The Italians introduced a new law that would enable victims of these violations of the Convention to obtain compensation domestically for undue length of proceedings. Unfortunately, this did not mean the end of the Italian cases before the Court. New legal issues were brought before the Court concerning the amount of compensation offered domestically and the fact that the compensation proceedings themselves were taking too long.

Looking at the 2012 Annual Report of the Court, however, it is clear that length of proceedings cases are not solely an Italian problem.[2] In 2012 most judgments on this issue are now against Turkey (51) followed by Greece (35), Ukraine (31), Bulgaria (17), Portugal (17), Russia (16) and Italy (16). Another notable statistic is that 25% of the total number of Court judgment still relate to length of proceedings cases.

What to do?

In the Grand Chamber judgment in the case of *McFarlane v Ireland* the Court gave some guidance:

> Article 13 […] allows a State to choose between a remedy which can expedite pending proceedings or a remedy post factum in damages for delay that has already occurred. While the former is preferred as it is preventative of delay, a compensatory remedy may be regarded as effective when the proceedings have already been excessively long and a preventative remedy did not exist.[3]

We should therefore look at two types of remedies: the 'preventive' remedy and the 'compensatory' remedy. There is very little in the Court's case-law to shed light on how such a preventive remedy could look like. As for the compensatory remedy, the Court's case-law can be summarised as follows:

- If there has been a violation of the reasonable time requirement as set out in Article 6, there should be a finding of such a violation by the domestic authority which is binding;

---

2 Table of violations by Article and by country; to be found on the court's website www.echr.coe.int.

3 *McFarlane v. Ireland*, Judgment of 10 September 2010, appl. no. 31333/06, para 108.

- The remedy needs to be 'effective, adequate and accessible', i.e. excessive delays in an action for compensation will affect whether the remedy can be considered 'adequate'.[4] Likewise, the 'accessibility' of the remedy could be affected by the rules regarding legal costs.[5]
- There should be 'appropriate and sufficient' redress, which means *inter alia* that the compensation should be paid without undue delay (i.e. six months from the date on which the decision awarding compensation became enforceable).[6] In addition, the amount of compensation paid by the domestic authority should not vary too much from the standards concerning financial compensation developed by the European Court.[7] However, in some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all. The domestic courts will then have to justify their decision by giving sufficient reasons.[8]
- Basic principles of 'fairness' guaranteed by Article 6 of the ECHR should be respected by the domestic authority in the compensatory proceedings.[9]

Good practices

In general, state practice in various European countries distinguishes between remedies in criminal proceedings and remedies in civil and administrative proceedings.[10] Certain of those remedies have been developed in domestic case-law, whilst some were introduced by legislative measures. Most remedies are compensatory in nature, but there are some that can be considered more preventive.

Regarding preventive remedies, one may refer to Estonia, where a 2011 amendment to the Code on Criminal Procedure and other procedural acts established new preventive remedies

---

4 see *Scordino*, § 195.
5 see *Scordino*, § 201.
6 *Scordino*, § 198. Certain countries, such as Slovakia and Croatia, have stipulated a time-limit in which payment should me made, namely two and three months respectively.
7 see *Scordino*, § 206.
8 see *Scordino*, § 204.
9 see *Scordino*, § 200.
10 see the CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations (see doc. GT-GDR-A(2012)R2 Addendum I, which in turn is based on questionnaires sent to member States by the Chairmanship of the Committee of Ministers (see esp. doc. GT-GDR-A(2012)008REV_1). The document can be found on internet: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT_GDR_A/R2%20ADDI_e.pdf.

against excessive length of proceedings.[11] These legislative measures made it possible for domestic courts to be asked to perform a specific procedural act, with any refusal subject to appeal, and introduced new time-limits for guaranteeing an accused's fundamental rights. In Lithuania, a 2010 reform of the Code of Criminal Procedure fixed the maximum period for pre-trial investigation[12] and a 2011 reform of the Code of Civil Procedure allows applications to the Court of Appeals to fix the time within which a lower court must take certain procedural actions.[13] In Romania, legislative reforms and provisions in the new criminal and civil procedure codes were introduced in 2010, with measures to ensure a trial within a reasonable time and to expedite delayed proceedings. In addition, the Superior Judicial Council has sought to sanction disciplinary faults contributing to delays.[14] There are examples in Europe where a party may request the court president to prioritise his or her case or to re-locate the case to another court. Equally interesting is the practice adopted by Swedish judges in civil cases to make a time plan in consultation with the parties at the outset of the proceedings. One could also refer to the increasing use of managerial agreements between the ministry of Justice and the judiciary concerning the expected productivity of the courts in general.

As for compensatory remedies, it should be noted from the outset that the compensation does not necessarily need to be financial. In Dutch criminal proceedings, the Supreme Court gave two standard judgments in 2000 and 2008 providing guidelines for time limits in criminal proceedings and for the consequences of breaching the reasonable time requirement.[15] The courts are to assess *ex proprio motu* whether the right to be heard within a reasonable time has been violated. If a breach is found, the individual is compensated for by means of a reduction in the penalty that would otherwise have been imposed.[16] The degree to which the penalty is reduced depends on the degree to which the reasonable time limit has been overrun and the severity of the penalty imposed. Equally, compensation may take the form of a formal

---

11 GT-GDR-A(2012)R2 Addendum I, p. 30. See also the introductory statement to the UN Committee Against Torture by Mr Margus Sarapuu, Secretary General of the Ministry of Justice of the Republic of Estonia (http://www2.ohchr.org/english/bodies/cat/docs/statements/StatementEstonia50.doc).

12 As a rule, the investigating authority needs to perform its duties within 6 months. In particularly complex or voluminous cases, this period may be extended to 18 months (12 months for juveniles). See also the website of the Lithuanian Human Rights Monitoring Institute (http://www.hrmi.lt/en/).

13 GT-GDR-A(2012)R2 Addendum I, pp. 30-31.

14 GT-GDR-A(2012)R2 Addendum I, p. 31.

15 Supreme Court 3 October 2000 (LJN AA7309) and Supreme Court 17 June 2008 (LJN BD2578).

16 If criminal proceedings have breached the reasonable time requirement and a defendant is acquitted, he or she may request financial compensation.

apology, a declaratory statement that the reasonable time requirement has been breached or the forfeit of the right to prosecute.

Interestingly, in the Czech Republic a compensatory remedy with retrospective effect was introduced in 2006 to 'repatriate' applications already made to the Strasbourg Court.[17] In Germany, the general constitutional remedy had been found by the Strasbourg Court to be deficient with respect to excessive length of proceedings. In response, the Act on Legal Protection in the Event of Excessive Length of Court Proceedings and Criminal Investigative Proceedings entered into force in December 2011, allowing for a compensation claim in relation to proceedings before any domestic court up to and including the Constitutional Court.[18]

In civil proceedings, compensation proceedings may on occasion be based on the general provisions concerning tort. For instance, according to established case law of the Dutch Supreme Court[19] a judicial decision may be qualified as unlawful under certain circumstances, notably when fundamental legal principles have been disregarded to the extent that the process has not been fair and impartial and no remedy against the decision is or was available.

Lastly, attention can be drawn to the potential role of a Council for the Judiciary in respect of claims for compensation as a result of excessively lengthy proceedings. For example, in the Netherlands, the *Raad voor de Rechtspraak* assumes a growing role in this respect. The Council has been mandated by the Minister of Security and Justice to decide on claims for damages due to exceeding the reasonable time requirement by Dutch courts.[20]

Concluding comments

The development of compensatory mechanisms, either as a result of legislative amendments or as a result of judicial interpretation, has evolved in many European countries satisfactorily. In a sense, the compensatory mechanism is also the most easiest to realise. The case-law of

---

17 GT-GDR-A(2012)R2 Addendum I, p. 31.
18 GT-GDR-A(2012)R2 Addendum I, p. 32.
19 HR 3 December 1971, NJ 1972, 137; HR 8 January 1993, NJ 1993, 558; HR 29 April 1994, NJ 1995, 727.
20 See the 'Regeling mandaat, volmacht en machtiging Raad voor de rechtspraak (verzoeken tot schadevergoeding i.v.m. rechtspraak waarvoor de Staat aansprakelijk kan worden gehouden)' of 26 January 2012, to be found on: http://wetten.overheid.nl/BWBR0031203/geldigheidsdatum_19-08-2013.

the European Court is fairly detailed and it is clear to domestic authorities what needs to be done. First, it should be remembered that 'compensation' does not necessarily mean 'financial compensation'. Second, in the absence of a specific legislative remedy, judicial authorities could make greater use of more general provisions such as tort. Third, domestic authorities could examine whether Councils for the Judiciary could not play a greater role in this field.

With regard to the preventative mechanism there is a lot more uncertainty. The development of various types of preventive mechanisms needs to be proceeded by a sound analysis of the problem. In various countries, reliable statistical data is not always available which makes it difficult to analyse in what stages of judicial proceedings delays occur and what the reasons for those delays are. Greater use could be made of the very useful work of CEPEJ and the SATURN Centre. Without a proper analysis of this kind of data, it is largely impossible to develop effective mechanisms. To date, it is possible to discern roughly two types of preventative mechanisms: (a) greater use of set time limits for various procedural steps in judicial proceedings; and (b) mechanisms that allow a party to the judicial proceedings to request a higher court to order the lower trial court to take a particular procedural step or to set a time limit.

What is clear from the foregoing is that solving the issue of excessively lengthy proceedings is not merely a question of allocating increased budgetary resources to the judiciary, although judiciaries throughout Europe (like other branches in public service and professions in a commercial setting) are faced with daunting challenges in this regard. However, even in the absence of additional budgetary resources many efficiency measures can still be taken. Legislators need to eliminate procedural rules that unnecessarily delay the proceedings or provide for overly complex procedures. Furthermore, greater flexibility in case assignment mechanisms could help courts to better adapt to unforeseen changes in the caseload. Likewise, greater use could be made of IT facilities to streamline judicial proceedings or improved assistance by appropriate court personnel (clerks). Equally, rules with regard to the observance of time-limits by experts could be reviewed. Some countries have introduced a system whereby the delivery of an expert opinion is accompanied by strict time limits. If the expert fails to observe the time-limit, his/her fee is reduced or he/she could be removed from the list of experts. With regard to appellate proceedings, mention could be made of the Swedish practice to video record first instance proceedings to avoid the need to hear all witnesses again. Likewise, CEPEJ has noted that appeal options can be limited. In certain

cases (eg small claims) the appeal could be excluded, or a leave to appeal system could be introduced.[21]

Judicial attitudes will be equally important. Judges have the right to actively monitor that judicial proceedings before them comply with the reasonable time requirement. One could even say on the basis of the Strasbourg case-law that they have a *duty* to do so.[22] This has already led various national authorities to make greater use of disciplinary sanctions in case the excessively lengthy proceedings are due to the personal conduct of the judge handling the case. Although one should be extremely cautious using these disciplinary measures, it is submitted that there are no principled objections against the use of disciplinary sanctions from a viewpoint of judicial independence. Judicial independence does not imply a lack of accountability. However, there are risks of a practical nature: they could easily be abused. Only if disciplinary sanctions are surrounded by adequate procedural safeguards (such as the imposition by a judicial body) and if the delay is indeed the result of the personal behaviour of a judge (and not due to more systemic problems in the judiciary), could they be justified.

Despite the fact that many European countries have by now acknowledged the seriousness of the phenomenon and have taken (legislative) measures in recent years, the problems surrounding excessively lengthy proceedings have not been resolved. Statistics show that one in four cases before the European Court still relate to length of proceedings cases. In light of the principle of subsidiarity and the demands of Article 13 of the Convention, domestic (legislative and judicial) authorities clearly need to act with a greater sense of urgency.

---

21 See the SATURN guidelines for judicial time management adopted by CEPEJ in December 2008 (CEPEJ (2008)8Rev).

22 See ECtHR *Cuscani v. the United Kingdom*, Judgment of 24 September 2002, appl. no. 32771/96.