EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 43768/17
HAN AARTS B.V. and others
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 10 October 2017 as a Committee composed of:

Luis López Guerra, *President,*
Dmitry Dedov,
Jolien Schukking, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 14 June 2017,

Having deliberated, decides as follows:

THE FACTS

1. The 409 applicants, comprising both natural and legal persons, are all involved in professional fur farming in the Netherlands. A list of them is set out in the appendix. They were represented before the Court by the Netherlands Federation of Fur Farmers (*Nederlandse Federatie van Edelpelsdierenhouders*; "NFE") of which all the applicants are members. The registered office of the NFE is located in Nederasselt.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

3. On 14 February 1995 the Van der Vlies motion was adopted in the Lower House of Parliament (*Tweede Kamer*) calling on the fur farming sector and the Government to present a plan for improving the well-being of minks held in captivity. This resulted in the Mink Farming Action Plan (*Plan van Aanpak Nertsenhouderij*), established jointly by the NFE and the

Ministry of Agriculture, Fisheries and Nature Management (*Minister van Landbouw, Visserij en Natuurbeheer*). On 1 July 1999 the Lower House adopted the Swildens-Rozendaal c.s. motion requesting that the Government prepare measures aimed at ending commercial mink farming. On 18 October 2001 the Government submitted a bill on the prohibition of fur farming (*wetsvoorstel verbod op de pelsdierhouderij*) to the Lower House. This bill was withdrawn on 14 February 2003 after a change of government.

4. On 11 December 2003 the Product Board for Poultry and Eggs (*Productschap Pluimvee en Eieren*) issued the Regulation on Norms for the Well-being of Minks 2003 (*Verordening Welzijnsnormen Nertsen 2003*; "the Regulation"), allowing fur farmers until 1 January 2014 to comply with the standards laid down in this regulation.

5. On 4 October 2006, Ms Van Velsen, a member of the Lower House, submitted a private member's bill (*initiatiefwetsvoorstel*) seeking a complete prohibition of fur farming. The bill was based on the notion that it was ethically unacceptable to keep furred animals and kill them solely for the purpose of fur production. This resulted in the Act on the Prohibition of Fur Farming (*Wet Verbod Pelsdierhouderij*; "the Act") which entered into force on 15 January 2013.

6. The Act prohibits the keeping and/or killing of furred animals for the sole or main purpose of fur production. Under section 4 of the Act, this prohibition is not applicable – during a transitional period lasting until 1 January 2024 – to mink farmers who comply with certain conditions. This transitional period was included in the Act in order to enable fur farmers to recoup investments made and/or investment commitments undertaken, in particular those made or undertaken in order to meet the stricter well-being norms introduced under the Regulation. The Act includes three accompanying measures (*flankerende maatregelen*) whereby compensation can be obtained for financial losses caused by the Act. The first fixes the rules to be laid down by or pursuant to an order in council (*algemene maatregel van bestuur*) governing contributions to the cost of demolishing or converting buildings where minks were formerly kept (section 7), the second amends fiscal rules in order to allow tax-free reinvestment in a new business activity (section 10), and a third defines a hardship clause for individuals whose pension arrangements are adversely affected (section 11).

7. On 16 May 2013, the NFE and about twenty other (legal or natural) persons involved in fur farming ("the plaintiffs") who believed that the Act was not binding since it was contrary to Article 1 of Protocol No. 1 and Article 14 of the Convention, challenged the Act in civil proceedings against the State before the Regional Court (*rechtbank*) of The Hague, demanding that it be declared inoperative. They also demanded a declaratory judgment (*verklaring voor recht*) to the effect that the Netherlands had committed a wrongful act *vis-à-vis* the plaintiffs and was

thus liable to offer compensation to the plaintiffs in respect of the resulting damage.

8. In its judgment of 21 May 2014, the Regional Court found in favour of the plaintiffs, holding – with reference to Article 1 of Protocol No. 1 – that a fair balance had not been struck between the public interest considerations and the plaintiffs' property rights. The State filed an appeal (*principaal appel*) and the plaintiffs a conditional cross-appeal (*voorwaardelijk incidenteel appel*).

9. In an extensive judgment of 10 November 2015, the Court of Appeal (*gerechtshof*) of The Hague quashed the impugned judgment of 21 May 2014 and found against the plaintiffs. In respect of Article 1 of Protocol No. 1 it held *inter alia* that future income could not be regarded as a "possession" for the purposes of this provision and that, taking into account the transitional period together with the accompanying measures provided for in the Act, a fair balance had been struck between the competing interests. It also rejected the plaintiffs' argument that the difference in the treatment of fur farmers and farmers keeping animals for human consumption was discriminatory and contrary to Article 14 of the Convention. The Court of Appeal held that the prohibition set out in the Act was based on an ethical norm according to which killing for food is accepted as justified, whereas killing for (other) ends was not justified. Given the prevailing view in present-day Dutch society that meat is a primary necessity (*een eerste levensbehoefte*) and fur a luxury product, the legislator could conclude that there are differences between the production of fur and the production of meat for human consumption which justify a difference in treatment. This was not altered by the fact that use could be made of the skins of animals slaughtered for their meat, as such skins were a by-product of animals kept for human consumption. These two situations were different in the Court of Appeal's view.

10. The plaintiffs subsequently lodged a cassation appeal – statutorily limited to questions of procedural conformity and points of law – but this was rejected by the Supreme Court (*Hoge Raad*) on 16 December 2016.

11. On the basis of an elaborate reasoning referring to Article 1 of Protocol No. 1, and with reference to the Court's established case-law under this provision (*Van Marle and Others v. the Netherlands*, 26 June 1986, Series A no. 101; *Tre Traktörer AB v. Sweden*, 7 July 1989, Series A no. 159; *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192; *Ian Edgar* (*Liverpool*) *Ltd v. the United Kingdom* (dec.), no. 37683/97, ECHR 2000-I; *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II (extracts); *Malik v. the United Kingdom*, no. 23780/08, 13 March 2012; *Vékony v. Hungary*, no. 65681/13, 13 January 2015; and *Topallaj v. Albania*, no. 32913/03, 21 April 2016), the Supreme Court agreed with the Court of Appeal that the case did not concern a *de facto* deprivation of possessions but should rather be regarded as a form of

control over the use of property, since the fur farmers remained in possession of their assets and could continue to operate in a profitable manner during the transitional period. It also agreed with the Court of Appeal that, under the Court's settled case-law, future earnings – unlike existing assets, goodwill (such as customer lists), and legally enforceable claims – fall outside the scope of this provision. Moreover, in the light of the transitional period, it agreed with the Court of Appeal that a fair balance had been struck between the plaintiffs' individual interests and the public interest served by the Act. The Supreme Court also found that the difference between business assets accepted as falling within the scope of Article 1 of Protocol No. 1 and future income which was not accepted as falling within the scope of Article 1 of Protocol No. 1 was not arbitrary and did not raise a discrimination issue under Article 14 of the Convention. It also rejected the arguments put forward by the plaintiffs – which the latter claimed were based on prevailing views and current practice in international investment law – with respect to assessing the value of commercial enterprises. On this point it held *inter alia* that the reference in Article 1 of Protocol No. 1 to the general principles of international law relates only to the measure of deprivation of property, which was not the case here. Moreover, and with reference to the judgment in the case of *James and Others v. the United Kingdom* (21 February 1986, Series A no. 98), those principles can be relied on only by those who do not hold the nationality of the Contracting State which has taken the measure. None of the plaintiffs had argued that they could rely on those principles on the basis of not holding Netherlands nationality. No further appeal lay against this judgment.

B. Relevant domestic law

12. Pursuant to Article 93 of the Netherlands Constitution (*Grondwet*), the Convention forms part of domestic law. Pursuant to Article 94 of the Constitution, the provisions of the Convention take precedence over domestic statutory rules in case of conflict.

COMPLAINTS

13. The applicants complained under Article 1 of Protocol No. 1 that the interference with their property rights under this provision as a consequence of the entry into force of the prohibition under the Act was disproportionate in that no fair balance had been struck between the general interest and their individual rights, in particular because future earnings were not taken into account.

14. The applicants further complained that to exclude future earnings from the protection of Article 1 of Protocol No. 1, unlike goodwill such as customers lists, was not only at variance with social and economic views about valuating a business but was also arbitrary, resulting in a violation of Article 14 of the Convention.

15. The applicants lastly complained under Article 13 that to exclude future earnings from the protection of Article 1 of Protocol No. 1 rendered the rights guaranteed by this provision theoretical and illusory and not effective and practical.

THE LAW

A. Article 1 of Protocol No. 1

16. The applicants complained that the provisions of the Act were contrary to their rights under Article 1 of Protocol No. 1, which reads:

> "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."

17. The Court would first confirm its well-established case-law that any complaint of a loss of "goodwill" in the form of future income falls outside the scope of Article 1 of Protocol No. 1 (see, for instance, *Malik v. the United Kingdom*, no. 23780/08, §§ 88-93, 13 March 2012, and *Tipp 24 AG v. Germany* (dec.), no. 21252/09, §§ 25-26 with further references, 27 November 2012) and it has found no reasons in the present case to reach a different finding. Further noting that both the Court of Appeal and the Supreme Court have extensively examined the arguments raised by the parties in the domestic proceedings in respect of Article 1 of Protocol No. 1 and have determined the issues raised under this provision in accordance with the principles defined in the Court's case-law under Article 1 of Protocol No. 1, the Court sees no reason to substitute its own assessment for that of the domestic courts.

18. It follows that this complaint is inadmissible under Article 35 § 3 (a) of the Convention as manifestly ill-founded and must therefore be rejected pursuant to Article 35 § 4 thereof.

B. Article 14 taken together with Article 1 of Protocol No. 1

19. The applicants further complained that to exclude future earnings from the protection of Article 1 of Protocol No. 1, unlike goodwill, was contrary to Article 14 of the Convention. This provision reads:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

20. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 and that, moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010).

21. The Court notes that the applicants complained of a difference in treatment between assets accepted under the Court's established case-law as "possessions" for the purposes of Article 1 of Protocol No. 1 and future earnings which, in its settled case-law, the Court regards as falling outside the scope of Article 1 of Protocol No. 1. The difference complained of is thus based on an established principle in the Court's case-law under Article 1 of Protocol No. 1 and not on any aspect of the applicants' personal status. Consequently, no issue of discrimination arises under Article 14 of the Convention.

22. It follows that this part of the application must also be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

C. Article 13 taken together with Article 1 of Protocol No. 1

23. The applicants lastly complained under Article 13 that to exclude future earnings from the protection of Article 1 of Protocol No. 1 rendered the rights guaranteed by this provision theoretical and illusory and not effective and practical. Article 13 reads:

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

24. The Court reiterates that this provision guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many

other authorities, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 288, ECHR 2011).

25. Even assuming that the applicants could be said to have an arguable claim under Article 1 of Protocol No. 1, the Court notes that the applicants did not dispute the existence of domestic remedies for their grievances under the Convention but wished to complain of judicial findings made in the domestic proceedings at issue. The Court reiterates that the expression "effective remedy" used in Article 13 cannot be interpreted as a remedy that is bound to succeed; it simply means an accessible remedy before an authority competent to examine the merits of a complaint (see, for instance, *M.R.A. and Others v. the Netherlands*, no. 46856/07, § 114, 12 January 2016).

26. The Court notes that the Convention complaints at issue have been considered before three successive domestic courts and that at all stages of the domestic proceedings the parties to these proceedings have been given ample opportunity to state their case, to challenge the submissions by the adversary party, and to submit whatever they found relevant for the outcome. The fact that the applicants' arguments under the Convention were not accepted by the Court of Appeal and the Supreme Court does not render these remedies ineffective.

27. It follows that also this part of the application must be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 November 2017.

Fatoş Aracı
Deputy Registrar

Luis López Guerra
President