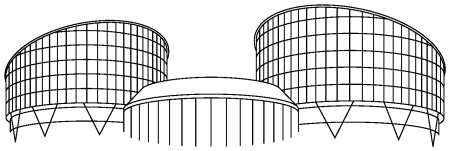

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 51016/11
Orde van Register Adviseurs Nederland OVRAN and others
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 21 April 2015 as a Chamber composed of:

Josep Casadevall, *President*,
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges*,
and Stephen Phillips, *Section Registrar*,

Having regard to the above application lodged on 12 August 2011,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, *Orde van Register Adviseurs Nederland* (Association of Chartered Advisers Netherlands, "OvRAN") is an association under Netherlands law based in Wassenaar. Mr Antonius Johannes Boer was born in 1946 and lives in Delft; Mr Nicolaas Plug was born in 1948 and lives in Noordwijk; Mr Cornelis Bernardus Antonius Spil was born in 1941 and lives in Deventer; and Mr Rein Wierdsma was born in 1965 and lives in Leeuwarden. All four individual applicants are Netherlands nationals and all state their occupation as "Accountant/Consultant". The applicants are represented by Mr A.W. Eikelboom, a lawyer practising in Amsterdam.

A. The circumstances of the case

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

1. Factual background

3. In the Netherlands, accountants are either chartered accountants (*registeraccountants*) or accountants-administrative consultants (*accountants-administratieconsulenten*) depending on their training and qualifications. Both chartered accountants and accountants-administrative consultants are required to be members of their respective professional organisations, the Netherlands Institute of Chartered Accountants (*Nederlands Instituut van Registeraccountants*, "NIvRA") and the Netherlands Association of Accountants-Administrative Consultants (*Nederlandse Orde van Accountants-Administratieconsulenten*, "NOvAA").

4. In 2009, a group of chartered accountants who were displeased by particular developments which they perceived within NIvRA, set up a separate professional organisation, which following a name change was called OvRAN by the time of the events complained of, intending it to be an alternative to NIvRA. Membership of OvRAN was open to members and former members of both NIvRA and NOvAA.

5. NIvRA and NOvAA brought actions against OvRAN in the civil courts, the result of which was that OvRAN and those of its members who were not also members of NIvRA or NOvAA were no longer permitted to use the title "accountant" or perform statutory audits. No details have been given of these proceedings.

2. Administrative proceedings

6. On 19 October 2009 OvRAN, represented by the applicant Mr Spil as its president, wrote to the Director of Financial Markets within the Ministry of Finance asking for:

(a) an interpretation of section 1(4) of the Chartered Accountants Act and section 2(4) of the Accountants-Administrative Consultants Act (see below) in order that its members be entered on the registers of chartered accountants or accountants-administrative consultants, as the case might be, and permitted to use the title "accountant", without having to be members of NIvRA and NOvAA; and

(b) the application of section 28 of the Organisations of Accountants (Supervision) Act (*Wet toezicht accountantsorganisaties*) in order that its members be permitted to carry out legal audits.

7. On 19 November 2009 the Director of Financial Markets sent a reply to the effect that only the courts could give a binding interpretation of

legislation and pointing to the status of NIvRA and NOvAA as public bodies invested with delegated legislative powers.

8. On 30 November 2009 OvRAN lodged objections (*bezwaarschriften*) against the letter of the Director of Financial Markets, invoking Article 11 of the Convention and denouncing certain actions of NIvRA and NOvAA as unethical.

9. On 18 December 2009 the Director of Financial Markets dismissed the objections. The refusal to give an interpretation of statutory provisions was not a "decision" in the sense of having an intended legal effect, which meant that an objection against it was inadmissible. Objections and appeals against a refusal to adopt statutory or delegated legislation were ruled out by the General Administrative Law Act (*Algemene wet bestuursrecht*; see below).

3. Proceedings before the Industrial Appeals Tribunal

10. On 21 January 2010 OvRAN lodged an appeal with the Industrial Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*), citing the Minister of Finance as the defendant. It relied on the same grounds as in the objection proceedings and additionally on Article 13 of the Convention. OvRAN asked for its appeal to be joined with related appeals lodged by the applicants Mr Boer, Mr Plug and Mr Spil.

11. The Industrial Appeals Tribunal gave its decision on 15 February 2011. It held that the Minister of Finance had rightly taken the view that the letter of 19 November 2009 did not comprise a decision within the meaning of section 1:3 of the General Administrative Law Act. Nor could the applicants rely on Article 13, since legal remedies were available through NIvRA and NOvAA. The appeal was therefore inadmissible.

B. Relevant domestic law

1. The Civil Code

12. As relevant to the case, the Civil Code at the relevant time provided as follows:

Article 2:393

"1. The legal person shall commission a chartered accountant or an accountant-administrative consultant in relation to whom a note as referred to in section 36(3) of the Accountants-Administrative Consultants Act has been added to the entry in the register referred to in section 36(1) of that Act to audit its annual accounts. An organisation in which eligible accountants cooperate may be commissioned. ..."

2. The Chartered Accountants Act

13. Provisions of the Chartered Accountants Act (*Wet op de Registeraccountants*) relevant to the case were the following:

Section 1

"1. There shall be an association of chartered accountants, by the name of Netherlands Institute of Chartered Accountants [i.e. NIvRA], hereinafter the Association. Its members shall be those entered in the register of accountants referred to in section 55.

2. The Association shall be based in Amsterdam. It shall be a public body within the meaning of Article 134 of the Constitution.

3. The task of the Association shall be the promotion of the proper exercise by chartered accountants of their profession and the protection of their common interest. ... Its task shall also include caring for the honour and position of chartered accountants and organising, or causing to be organised, the [obligatory three-year] traineeship ...

4. In derogation from the first paragraph, those entered in the register of chartered accountants under section 58(b) in conjunction with section 59(2) [i.e. chartered accountants with a license to audit delivered by another Member State of the European Union or European Economic Area] shall be members of the Association only if they have expressed such a wish in writing to the governing body of the Association."

Section 19

"1. The general meeting shall make the bye-laws which it considers necessary to fulfil the task set out in section 1.

2. For the proper exercise of chartered accountants' professional activities, the general meeting shall set professional rules and rules of conduct in a bye-law, which shall be binding on all those who are entered in the register referred to in section 55.

..."

Section 55

"1. There shall be a register of accountants, in which those who meet the standards set by this Act shall be entered at their request. ..."

Section 58a

"A person who is entered in the register referred to in section 55 has the right to use the title chartered accountant and its abbreviation (*registeraccountant, afgekort RA*).

Section 58b

"It is forbidden a person who is not entered in the register of accountants referred to in section 55 to use the title chartered accountant without any addition or in any composite or abbreviated form, or to behave in such a way that the public must reasonably be under the impression that he is entitled to use that title."

3. The Accountants-Administrative Consultants Act

14. Provisions of the Accountants-Administrative Consultants Act (*Wet op de Accountants-Administratieconsulenten*) relevant to the case were the following:

Section 2

"1. There shall be an Association of Accountants-Administrative Consultants [i.e. NOvAA], whose members shall be those entered in the register of accountants referred to in section 36.

2. The Association shall be based in The Hague. It shall be a public body within the meaning of Article 134 of the Constitution.

3. The task of the Association shall be the promotion of the proper exercise by accountants-administrative consultants of their profession and the protection of their common interest. ... Its task shall also include caring for the honour and position of Accountants-Administrative Consultants and organising, or causing to be organised, the [obligatory three-year] traineeship ...

4. In derogation from the first paragraph, those entered in the register of chartered accountants under section 58(b) in conjunction with section 59(2) [i.e. chartered accountants with a license to audit delivered by another Member State of the European Union or European Economic Area] shall be members of the Association only if they have expressed such a wish in writing to the governing body of the Association."

Section 24

"1. The general meeting shall make the bye-laws which it considers necessary to fulfil the task set out in section 2(3).

2. For the proper exercise of accountants-administrative consultants' professional activities, the general meeting shall set professional rules and rules of conduct in a bye-law, which shall be binding on accountants-administrative consultants.

..."

Section 25

"1. The rules prescribed in the bye-law referred to in section 24(2) relating to the exercise of professional activities concerning the carrying out of legal audits by accountants-administrative consultants within the meaning of section 1(j) of the Organisations of Accountants (Supervision) Act shall have the same content as the rules thereto pertaining set out in the bye-law referred to in section 24(2) of the Chartered Accountants Act.

2. For the purpose of implementing the first paragraph a draft of the provisions thereto pertaining shall be drawn up by a committee consisting of an equal number of members of the Netherlands Institute of Chartered Accountants and the Netherlands Association of Accountants-Administrative Consultants. ..."

Section 36

"1. There shall be a register of accountants, in which those who meet the standards set by this Act shall be entered at their request as accountants-administrative consultants.

...

3. When entering a person who [meets the necessary standards of training and professional competence] a note shall be added indicating that he may be commissioned to audit annual accounts as referred to in Article 2:393 § 1 of the Civil Code. ..."

Section 39

"A person who is entered in the register referred to in section 36 has the right to use the title accountant-administrative consultant and its abbreviation (*accountant-admministratieconsulent, afgekort AA*).

Section 40

"It is forbidden a person who is not entered in the register referred to in section 36 to use the title accountant-administrative consultant without any addition or in any composite or abbreviated form, or to behave in such a way that the public must reasonably be under the impression that he is entitled to use that title."

4. The Organisations of Accountants (Supervision) Act

15. As relevant to the case before the Court, the Organisations of Accountants (Supervision) Act provided as follows:

Section 27

"An external accountant shall be a chartered accountant or an accountant-administrative consultant in relation to whom a note has been added in the register as referred to in section 36(3) and who complies with the rules set by or under the Chartered Accountants Act or the Accountants-Administrative Consultants Act in so far as these relate to the commissioning or carrying out of a legal audit."

Section 28

"Section 27 may be declared ineffective by statutory instrument (*algemene maatregel van bestuur*) with a view to securing the public function of the audit statement."

5. The General Administrative Law Act

16. As relevant to the case, the General Administrative Law Act provides as follows:

Section 1:3

"1. The expression 'decision' shall be understood to mean: a written decision of an administrative organ comprising a legal act under public law. ..."

Section 6:2

"For the purpose of applying legal provisions on objection and appeal proceedings, the following shall be equated with a decision:

(a) a refusal to take a decision;..."

Section 8:2

No appeal can be lodged against:

(a) a decision comprising a generally binding prescription or a policy rule; ..."

COMPLAINTS

17. The applicants complained under Article 11 of the Convention that they were compelled to accept membership of the professional organisations NIvRA and NOvAA against their will and principles.

18. They complained under Article 1 of Protocol No. 1 that refusing to be members of NIvRA and NOvAA would result in their being deprived of the use of their professional title.

19. They complained under Article 14 of the Convention in conjunction with both Article 11 and Article 1 of Protocol No. 1 that membership of NIvRA and NOvAA was compulsory for them as Netherlands accountants but not for foreign accountants licensed to perform audits in the Netherlands.

THE LAW

20. The applicants alleged violations of Articles 11 of the Convention and 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention. These Articles read as follows:

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 14

"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."

Article 1 of Protocol No. 1

"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."

21. The Court must first decide whether the requirements of Article 35 § 1 of the Convention have been met.

22. The rule of exhaustion of domestic remedies referred to in Article 35 § 1 obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention - with which it has close affinity -, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see, among many other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV; and more recently, *Sejdovic v. Italy* [GC], no. 56581/00, § 43-46, ECHR 2006-II; and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, §§ 51-52, ECHR 2013 (extracts)).

23. Turning to the facts of the case, the Court notes that the applicants petitioned the Minister of Finance, firstly, to give an interpretation of the law in accordance with their views; and secondly, to adopt a statutory instrument favourable to their interests (see paragraph 6 above). Their appeal to the Industrial Appeals Tribunal was declared inadmissible on the ground that the Minister's refusal was not an appealable decision (see paragraph 11 above). It does not appear that the decision of the Industrial Appeals Tribunal contravened the relevant provisions of the General Administrative Law Act (see paragraph 16 above).

24. It thus appears that the applicants sought, in administrative proceedings, to effect a change of the law. However, Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 36, Series A no. 172; *Gustafsson v. Sweden*, 25 April 1996, § 70, *Reports of Judgments and Decisions* 1996-II; *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X; *Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011; and *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12,

41463/12, 41553/12, 54977/12 and 56581/12, § 124, ECHR 2014 (extracts)).

25. The Court must therefore find that the remedy chosen by the applicants was an ineffective one. Absent any detailed information about the civil proceedings that pitted OvRAN against NIvRA and NOvAA (see paragraph 5 above) – or any other relevant proceedings, for that matter – the Court cannot find that no effective domestic remedy was available.

26. It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Registrar

Josep Casadevall
President