

Unofficial Translation

LJN: BZ4871, The Hague Court of Appeal, 200.111.618/01

Decision date: 3/26/2013
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Area of law: Commercial Matter
Type of procedure: Appeal
Abstract: Exception to the smoking ban for small cafes conflicts with the World Health Organization Framework Convention on Tobacco Control.
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Judgment

The Hague Court of Appeal
Civil Law Division

Case number: 200.111.618/01

Case/court docket number: 406327/HA ZA 11-2623

ruling of March 26, 2013

in the matter of

the association with full legal capacity
NEDERLANDSE NIETROKERSVERENIGING CAN (Club Actieve Nietrokers),
[NETHERLANDS NON-SMOKERS ASSOCIATION CAN (Club of Active Nonsmokers)]
domiciled in Oss,
hereinafter: CAN,
appellant,
counsel: Mr. F.P. van Galen of Leiden,

versus

THE STATE OF THE NETHERLANDS (Ministry of Health, Welfare and Sport),
seated at The Hague,
respondent,
counsel: Mr. J.A.E. van der Jagt-Jobsen of The Hague.

The proceedings

By writ of August 6, 2012 CAN appealed from the judgment delivered by the District Court of The Hague between the parties on May 16, 2012. In its appellant's brief CAN raised six grounds for appeal against the challenged judgment, which the State disputed in its answer on appeal. On February 11, 2013 counsel for the parties argued the case through briefs filed with the Court of Appeal. Finally, the parties submitted their statements of case and other documents and applied for judgment.

Analysis

1.1 Inasmuch as no ground for appeal is directed against the facts and the legal framework as set out by the District Court under 2.1 through 2.9 of the challenged judgment, the Court of Appeal will also proceed from these. Insofar as important for the appeal, this case concerns the following.

1.2 CAN is an association whose object is to promote the refraining from the smoking of tobacco to the extent that this does or can constitute a nuisance or, as the case may be, injury to others.

1.3 The Tobacco Act, and more in particular its article 11a paragraph 4, allows for orders in council that define categories of buildings accessible to the public which oblige their managers to take such measures that the public can use the facilities offered without experiencing a nuisance or inconvenience from smoking. Pursuant to article 11a paragraph 5 Tobacco Act it is possible to impose restrictions on this obligation by order in council.

1.4 The Smoke-Free Workplace, Catering, and Other Establishments Implementation Decree (Bulletin of Acts and Decrees 2008, 123), hereinafter: the 2008 Decree, has applied as of July 1, 2008. In this decree the manager of a building in which a hotel, restaurant or cafe facility is operated by an entrepreneur without employees is obliged to impose, post notice of, and enforce the smoking ban therein. Therefore a smoking ban has also been in effect as of July 1, 2008 for hotel, restaurant, or cafe facility entrepreneurs without employees.

1.5 On July 6, 2011 the Decree amending the 2008 Decree (hereinafter: the 2011 Decree) came into force. Article I sub c of the 2011 Decree amending article 3 of the 2008 Decree made an exception to the smoking ban for hotel, restaurant, or cafe facility entrepreneurs without employees in those instances in which the operator of a hotel, restaurant, and/or cafe exploits a single hotel, restaurant, and/or cafe site with a floor area of less than 70m². The operator of a hotel, restaurant, and/or cafe must post notice at its entrance that it is making use of this exception. The hotel, restaurant, and/or cafe sites with a floor area of less than 70m² which are exploited by an entrepreneur without personnel will be referred to in what follows as: "small cafes". The exception to the smoking ban made in article I sub C of the 2011 Decree will also be referred to in what follows as: "the exception for small cafes".

1.6 CAN takes the position in these proceedings that the State acted unlawfully by making the exception for small cafes and that this exception has no binding force. Summarized, CAN claimed a declaratory decision enjoining the State to enforce article 11a paragraph 3 Tobacco Act in conjunction with article 4 paragraph 1 2008 Decree, as well as an order to publish the judgment by means of a letter from the minister addressed to hotel, restaurant, or cafe facilities without employees. CAN argues to that end that the exception for small cafes is contrary to the Tobacco Act, to article 8 paragraph 2 of the World Health Organization Framework Convention on Tobacco Control (hereinafter: the Convention), to the Recommendations of the Council of the European Union, as well as being contrary to the principles of proper administration (the prohibition of discrimination, the principle of equal treatment, the prohibition of arbitrariness, and the principle of legal certainty) and to the Constitution.

1.7 The District Court, ruling on the ground of reasons for judgment that will be discussed as necessary in what follows, found CAN's arguments to be groundless and dismissed the claims.

2.1 In ground for appeal III, which the Court of Appeal will take up first, CAN challenges the opinion of the District Court that the standards set out in the Convention have no direct effect in Dutch law. The District Court based this opinion on the following considerations. Based on the wording of article 7 of the Convention and the content of article 8 paragraph 2 of the Convention it must be determined that the contracting party took as its point of departure that Member States must implement the obligations that are stated in the abstract in the Convention within their own legal sphere, which point, according to the District Court, is emphasized by the wording of article 5 paragraph 2 sub b, which obliges the Member States to take "effective legislative, executive, administrative and/or other measures". It is evident from the other content of the Convention that the Member States have a great deal of freedom in how they give form to these measures. Therefore, in the view of the District Court, there are no standards that are so formulated as to be able to function without objection as objective law in a national legal system. That the Guidelines (the Guidelines for implementation of the Framework Convention on Tobacco Control, Court of Appeal) give further specification of the obligations of the contracting States on the ground of article 8 of the Convention makes no difference to this, since the Guidelines do not form part of the Convention. Furthermore, according to the District Court, it is all the more evident from the purpose of the Guidelines ("to assist Parties in meeting their obligations under Article 8 of the Convention") that the Convention requires further elaboration. This means that the Convention cannot be deemed to have direct effect within the jurisdiction of the Netherlands and that its residents cannot invoke the content of the Convention pursuant to article 94 of the Constitution of the Netherlands. CAN therefore cannot be followed in its contention that the 2011

Decree is nonbinding due to its conflict with the Convention, according to the District Court.

2.2 CAN challenges this opinion with an argument that amounts to the following. The District Court correctly considered that there can be no direct effect if the standards are so formulated in the Convention that they cannot function without objection as objective law in a national legal system. However, the District Court wrongly considered provisions of the Convention other than article 8 paragraph 2 Convention. This is incorrect because the question whether a provision of a convention has direct effect need not be answered in the same way for each provision. The measure prescribed by article 8 paragraph 2, protection from exposure to tobacco smoke, is very concrete and contains protection from any form or degree of exposure to tobacco smoke since there is no safe level of exposure to tobacco smoke. The mere circumstance that a convention provision needs further elaboration in legislation does not lead to the conclusion that this convention provision does not have direct effect. Moreover, even if the text of the convention should leave room for other types of measures, the unconditional lifting of the smoking ban in small cafes is contrary to the standard of the convention.

2.3 The Court of Appeal first of all finds that on the ground of article 38 of the Convention among other things the English language text of the Convention is authentic and that the Dutch-language text is not. The Court of Appeal shall therefore take the English language text of the Convention as its point of departure. Article 8 Convention reads in its English version as follows:

Article 8

Protection from exposure to tobacco smoke

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

2.4 CAN rightly argues that the question whether the provision in article 8 paragraph 2 of the Convention has direct effect must be answered through close analysis of its wording and the scope of this provision. The fact that other provisions of the Convention may possibly not have direct effect does not also mean that this is the case with article 8 paragraph 2. The judgement of the District Court, which gave attention in forming its opinion on the direct effect of article 8 paragraph 2 also to other provisions of the Convention, as well as to the Guidelines, but without making the analysis just referred to, is to that extent incorrect. CAN also rightly argues that, other than evidently assumed by the District Court, the circumstance that the standard of article 8 paragraph 2 of the Convention must still be transposed into national legislation does not automatically mean that it has no direct effect. In such cases, too, there can be direct effect, for example if the convention standard prescribes in a clear and unconditional way the results to be achieved by the national legislation.

2.5 Article 8 paragraph 2 Convention provides, to the extent relevant here, in its English-language version: "Each Party shall adopt and implement in areas of existing national jurisdiction (...) the adoption and implementation of effective legislative (...) measures, providing for protection from exposure to tobacco smoke (...) in indoor public places and, as appropriate, other public places." The Court of Appeal is of the opinion that this provision is sufficiently clear and concrete with respect to the result to be achieved by means of national legislation, which is: effective protection from exposure to tobacco smoke in the places designated by the paragraph of the article. In light of the provision in paragraph 1 of article 8, which determines without any qualification or any reservation that exposure to tobacco smoke causes "death, disease and disability", the provision in article 8 paragraph 2, which provides that the statutory measures to be taken must be effective, but also viewed against the background that CAN argued with insufficiently substantiated challenge that there is no safe degree of exposure to tobacco smoke, it is sufficiently clear in practice what in a given case does and does not fall under the protection from exposure to tobacco smoke. To be in the same space with people who are smoking, as is permitted now in small cafes, is unreservedly in conflict with the regulation of article 8 paragraph 2 of the Convention.

2.6 The question then is whether it is sufficiently clear what is meant by "indoor public places" and whether there is room for the national legislator to impede the direct effect of article 8 paragraph 2 of the

Convention in the designated places. The Court of Appeal is of the opinion that the convention text is sufficiently clear in this respect also. On the ground of article 31 paragraph 1 of the Vienna Convention on the Law of Treaties, a convention must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Convention. Against this background there can be no misunderstanding that "indoor public places" refers to buildings accessible to the public. In the opinion of the Court of Appeal all hotel, restaurant, or cafe facilities that are located in a building fall under that definition. The small cafes which are ordinarily accessible to the public, notwithstanding their designation by the State as "living room cafes", therefore also fall under that definition.

2.7 The position of the State that the small cafes fall under the definition of "other public places", for which category contracting Member States allegedly have a (greater) degree of discretion, cannot be accepted. It is not clear why hotel, restaurant, or cafe facilities located in a building should fall under different categories of "public place". Placing small cafes under the category of "other public place" should mean that other hotel, restaurant, or cafe facilities would also have to be designated as "other public place". This would mean that the contracting Member States would have the obligation with respect to all hotel, restaurant, or cafe facilities accessible to the public, whatever their size, only to take measures "as appropriate" against exposure to tobacco smoke, which would then come down to there being an exceptional position for the entire hotel, restaurant, and cafe sector relative to other "indoor public places". Nothing in the Convention points to such an exception. That would also be difficult to reconcile with the purpose of the Convention, which is, among other things, to eradicate health risks due to exposure to tobacco smoke. Rather, in light of the ordinary meaning of the words used in this provision, "other public places" does not refer to "public places" that are not "indoor", which is to say public places that are in the (public) open air. It is also quite obvious with respect to places in the (public) open air, in light of the nature and variety of these sorts of locations, that the contracting Member States have a certain margin of discretion to take measures "as appropriate" against exposure to tobacco smoke. This margin of discretion does not apply in respect of the "indoor public places" by virtue of the clear wording of the Convention.

2.8 The Court of Appeal therefore also finds that article 8 paragraph 2 Convention has direct effect to the extent that it concerns the obligation to take effective statutory measures against exposure to tobacco smoke in "indoor public places".

2.9 The Court of Appeal is also of the opinion that the exception for small cafes was laid down contrary to this obligation under the convention. As found above, small cafes fall under the definition of "indoor public places". It also cannot be denied that there is no protection from exposure to tobacco smoke in the small cafes because of this exception. This means that the exception for small cafes is nonbinding due to its conflict with article 8 paragraph 2 Convention and therefore unlawful. The Court of Appeal hereby also takes into consideration that this is not a case of a temporary exception which was made by way of a transitional measure, for example as part of a gradual implementation of the obligations under the convention, but in order to reverse a protective measure that had been in force since 2008.

2.10 The conclusion is that ground for appeal III is well founded. The claim for declaratory judgment is therefore also admissible in accordance with the provisions.

2.11 The foregoing means that the Court of Appeal will still have to ascertain whether the claims for enforcement and for publication of the judgment (the Court of Appeal understands this to mean: this judgment) by means of a letter to hotel, restaurant, or cafe facilities are admissible. This is not the case. The Court of Appeal has no cause to assume that the State will not proceed to enforce the smoking ban. Along with this, the State has broad discretionary power for enforcement. It is not now plausible that the State should step outside its discretionary power in this case. There is insufficient ground for an order to the State to publish this ruling by means of a letter to hotel, restaurant, or cafe facilities. It is in principle left to the discretionary power of the State whether and in what other way it wishes to disseminate knowledge of this judgment, which moreover is public and to be published on rechtspraak.nl.

3.1 The other grounds for appeal need not be taken up.

3.2 As the party found against, the State shall be ordered to pay costs of proceedings in both instances.

Decision

The Court of Appeal:

- sets aside the appealed judgment, and, rendering a new judgment:
- declares that the exception for small cafes is nonbinding and unlawful towards CAN;
- dismisses all other applications;
- orders the State to pay costs of proceedings in both instances, set in first instance until May 16th at € 650.81 in disbursements and € 904.00 for attorney fees, and in the appeal until this day at € 756.64 in disbursements and € 2,682.00 for attorney fees.

This ruling was rendered by messrs. A. Dupain, S.A. Boele, and B.M.P. Smulders, and pronounced in open court on March 26, 2013, in the presence of the clerk.

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