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ECLI:NL:HR:2014:2928

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Department

Court of Appeal

Court Judgement Date

10-10-2014

Publication Date

10-10-2014

Case Number

13/02931

Formal relations

Conclusion: [ECLI:NL:PHR:2014:497](#), Contrary

Appealed on : [ECLI:NL:GHDHA:2013:BZ4871](#), Assent/Confirmation

Jurisdictions

Civil rights

Special characteristics

Appeal

Case contents

Smoking ban exemption for small cafes. Direct effect of treaty provisions (Art. 8 Sec. 2 of the WHO Framework Convention on Tobacco Control); Measure; HR 1 April 2011, ECLI:NL:HR:2011:BP3044, NJ 2011/354. Does freedom of choice or policy loosen the direct effect as seen in application to Treaty provisions? HR 9 April 2010, ECLI:NL:HR:2010:BK4549, NJ 2010/388 (SGP). Reasonable amount of time to comply with treaty provisions or to institute interim measures.

Locations

Rechtspraak.nl

Court Decision

10 October 2014

Senate

13/02931

EV/AS

Nederlands Supreme Court

Decree

Concerning the case of:

The State of the Netherlands (Department of Public Health, Welfare and Sport), located in Den Haag,

Appellant

lawyer: Mrs. M.W. Scheltema,

against

Dutch Non-Smokers Association CAN (Club of Active Non-Smokers), located in Oss,

Defendant in appeal

lawyer: Mrs. N.C. van Steijn.

From now on, parties shall be referred to as the State and CAN.

1 Legal proceedings in trial courts

For the course of legal proceedings in trial courts, the Court of Appeals refers to the following documents:

- a. the judgment in the case 406327/HA ZA 11-2623 issued by a court in The Hague, and dated 16 May 2012;
- b. the judgment in the case 200.111.618/01 issued by a court in The Hague, and dated March 26, 2013.

The judgment of the Court is attached to this decree.

2 The Case in Appeal

The State has appealed this decision. The appeal summons is attached to and forms a part of this judgment.

CAN made the decision to oppose this court case.

The case is made clear for all parties by their lawyers.

The conclusion of the Attorney General F.F. Langemeijer on this case is that the judgment under appeal should be ignored, and the case should be transferred to another court.

CAN provided a reaction to this conclusion with a letter dated June 5, 2014.

3 Assessment of the evidence

3.1

Appeal can be based on the following.

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

(ii) Holland has signed the WHO Framework Convention on Tobacco Control (Trb. 2004, 269, hereby referred to as: the WHO Framework Convention). The WHO Framework Convention strives to "offer a framework for measures discouraging tobacco smoking that have to be instituted on the national, regional and international levels to permanently and substantially reduce tobacco use and exposure to tobacco smoke" (Art. 3 WHO Framework Convention). Art. 8 of the WHO Framework Convention determines:

“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.”

(iii) The Tobacco Act allows for order in council to provide categorization reference for public buildings, where the supervisors are obliged to institute the necessary rules allowing the premises to be used without experiencing discomfort or health hazards caused by smoking. (art. 11a Sec. 4 tobacco Act). Catering businesses, operated by a single entrepreneur without additional personnel, were included in this categorization reference by the Decision made in 2008 concerning smoke-free work environment in catering and other businesses (Stb. 2008, 122, hereafter: the Decision 2008), effective as of July 1, 2008. Art. 3 par. 1 of the Decision 2008 opening sentences and points under (a) oblige supervisors of such businesses to create, maintain and show evidence of adhering to the smoking ban.

(iv) As of July 1, 2008, the Tobacco Act Art. 11a par. 1 became effective for catering businesses employing personnel, which determined that employers are obliged to institute such necessary measures as to provide the employees with smoke-free environment. Previously, the Decision, effective as of July 1, 2008, and based on Art. 11a par. 5 of the Tobacco Act, concerning exceptions to smoke-free work environment (Stb. 2003, 561), considered that this employer obligation is not applicable to catering businesses. (v) As of July 6, 2011, the Decision 2008 was amended by the Decision taken on June 14, 2011 (Stb. 2011, 337, hereafter: the Decision 2011). According to the new Art. 3 par. 2 written in 2011, and added to the Decision 2008, a smoking ban exception is valid for independent entrepreneurs without personnel in charge of a catering business with a floor area of less than 70m² (hereafter referred to as an exception for small cafes, in regard to small cafes). According to the new Art. 3 par. 4 added to the Decision 2008, there is an obligation for small cafes to place a sign by the entrance to show that "smoking is allowed" with understandable, clear letters or symbols.

3.2.1

CAN declares in this appeal, that the State has acted unlawfully against CAN and the persons whose interests it is supposed to uphold by introducing the above mentioned amendment to the Decision 2008 in point 3.1 under (v), and that the new Art. 3 par. 2 added to the Decision 2008 is not binding due to a conflict with universal rights. Furthermore, CAN issues a request for the State to take concrete measures to maintain the smoking ban, including the publication of the mentioned judgment. To support these claims CAN, at least in this particular case, has demonstratively proven that the exceptions made for small cafes, as documented in the Decision 2011, are in conflict with the mentioned Art. 8 par. 2 of the WHO Framework Convention (ii).

3.2.2

In defense, the State has stated that the regulations of the WHO Framework Convention should not have direct effect.

3.3.1

The court has refuted the considerations of the CAN Association. The Court of Appeal has annulled the court's judgment, and ruled anew that the exception made for small cafes is not binding and is wrongful towards CAN. The Court of Appeal annulled the earlier made judgment.

3.3.2

The Court of Appeal made use of the following considerations.

The question whether Art. 8 par. 2 of the WHO Framework Convention should or should not have a direct effect, has to be answered taking the phrasing and the intention of that provision into consideration. The condition that the standard suggested by Art. 8 par. 2 of the WHO Framework Convention has to be incorporated into national regulations does not necessarily mean that it should not exercise direct effect on its own. Direct effect can be implemented in this case too, for instance should the treaty standards require national regulations to achieve results in a clear and unconditional way. (Legal Finding 2.4)

Art. 8 par. 2 is sufficiently clear and concrete in regard to realizing results by instituting rules on the national level, namely requiring to place effective protection against exposure to smoke in the prescribed by the regulation places. In practice, it is sufficiently clear what constitutes protection against exposure to smoke: being in the same space with other people who smoke, such as in a small cafe, is in conflict with the provisions of Art. 8 par. 2. For this purpose, the Court of Appeal refers to the fact (i) that in Art. 8 par. 1 of the WHO Framework Convention, it is stated without any qualification or any reservation that exposure to smoke causes “death, disease and disability”, (ii) that the proposed measures put forward by Art. 8 par. 2 WHO Framework Convention should be effective, as well as (iii) that CAN has not proven to a sufficient degree that there are no established safe levels of exposure to smoke. (Legal Finding 2.5)

All catering businesses housed in a building fall into the category ‘indoor public places’ as stated in Art. 8 par. 2 of the WHO Framework Convention (ii). Small cafes fall into that category, too. (Legal Finding 2.6 en 2.7)

The Art. 8 par. 2 of the WHO Framework Convention then initiates direct effect, as far as it concerns the obligation to take measures against exposure to tobacco smoke in ‘indoor public places’ (Legal Finding 2.8)

The exception made for small cafes is in conflict with this treaty obligation. Therefore, the exception for small cafes, due to its conflicting nature in regard to Art. 8 par. 2 of the WHO Framework Convention, is considered not binding and unlawful. Hereby, the Court of Appeal remarks that this policy does not constitute a temporary exception, for instance by introducing an interim measure as part of a partial implementation of the treaty obligations, but that it is more about reversing to a protective measure instituted back in 2008. (Legal Finding 2.9)

3.4

According to section 1.1 of the evidence, it is not relevant to see if Art. 8 of the WHO Framework Convention is written using clear and unconditional terms, to answer the question of direct effect as applicable to the Art. 8 of the WHO Framework Convention. What stays relevant is that the Art. 8 of the WHO Framework Convention is sufficiently defined and suitable for direct application within the national legal system. The Court of Appeal has repudiated this in Legal Findings 2.4 en 2.5.

At any rate, section 1.2 claims that the Court of Appeal refuses to acknowledge the fact that Art. 8 of the WHO Framework Convention is insufficiently defined and is unsuitable for direct application within the national legal system. This standard allows enough time for the treaty participants to determine which measures are to be taken to combat exposure to tobacco smoke. The State can also implement other measures (lawful, enforcement, related to civil management or other types) ensuring the success of the Art. 8 of the WHO Framework Convention. According to sec. 1.3, the court refuses to see that if the earlier smoke ban is mitigated for small cafes, it will in no way ensure anything like this.

The following points are considered in regard to these claims.

3.5.1

The question of how far a treaty provision bears direct effect in application to Art. 93 and 94 Gw, is to be addressed by clarifying the two articles. That clarification makes use of the standards put down in the Art. 31-33 of the Vienna Convention on the Law of Treaties, dated Mei 23, 1969 (Trb. 1972, 51, and 1985, 79). There is no evidence that the court in its explanation of the Art. 8 par. 2 of the WHO Framework Convention has repudiated these standards.

3.5.2

If either the text or the history of its development shows that a direct effect of the treaty provision was intended, then the contents of that Decision become final. The important question is whether the text is implicit enough and is sufficiently precise to apply it unconditionally as an objective right within the judicial legal system (see: HR 1 April 2010, ECLI:NL:HR:2011:BP3044, NJ 2011/354).

3.5.3

If the resulting change to be achieved in the national judicial system on the grounds of the treaty provision is implicit and described in sufficiently precise terms, the mere fact that the regulator or the government is free to decide on matters of policy concerning the proposed measures in regard to the result realization, does not prevent the provision from having a direct effect. If such an impact is to be made, depends on the answer to the question if the provision can function as an objective right in the context, whereby it is invoked. Other than what the State argues, the mere existence of freedom to determine one's choice or policy does not mean that there is no direct effect produced. (See HR 9 April 2010, ECLI:NL:HR:2010:BK4549, NJ 2010/388 (SGP))

3.6.1

The Court of Appeal has decided that Art. 8 par. 2 of the WHO Framework Convention imposes an obligation to offer accessible effective protection against exposure to tobacco smoke and make it visible in places indicated in the article paragraph, whereby public buildings ('indoor public places') include small cafes. The text of this provision, as well as the objective of the Treaty, implies that this protection - i.e.: prevention of health hazards and death resulting from being exposed to tobacco smoke - is valid for everyone who enters or wants to enter such places.

3.6.2

Also, the Court of Appeal has rightly judged that, in any case in this context, the obligation arising out of Art. 8 par. 2 of the WHO Framework Convention is implicit enough and is described in sufficiently precise terms. Therefore, the Court opposes the exception for small cafes introduced only later, which results in a situation that for these cafes, there is no other valid obligation than to put a sign on the door that smoking is allowed. (the new Art. 3 par. 4 Decision 2008).

3.6.3

To be sure, the State needs time to implement treaty obligations, such as for instance Art. 8 par. 2 of the WHO Framework Convention, and in principle, there is a possibility provided for the State to institute interim measures for the implementation of such an obligation in connection with other interests. A reference is made to the text of the original Art. 3 par. 1 of Decision 2008 initial sentences and under 'a', whereby supervisors of small cafes were obliged to institute a smoking ban; that disqualifies the question of time needed for the realization of regulations or any other measures as relevant, nor is the exception of small cafes justified as an interim measure.

3.6.4

Consequently, the Court of Appeal has justly ruled that the exception for small cafes is not binding.

3.7

The sections 1.1-1.3 are therefore seen as unfounded. The abovementioned deliberations nullify the other claims of the case, too.

4 Decision

The Court of Appeal:

rejects the case;

imposes the costs of the legal proceedings upon the State, which on the CAN side total to €818,34 for expenses and € 2.200,-- for salaries.

This decree is signed by vice-president F.B. Bakels as chairman and councillors A.M.J. van Buchem- Spapens, A.H.T. Heisterkamp, G. Snijders en T.H. Tanja-van den Broek, and declared in public by the councillor G. de Groot on October 10, 2014.