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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
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Medische deskundigen in dienst van bestuursorgaan. Nationale rechters baseren oordeel op hun bevindingen en wijzen verzoek om onafhankelijke medische deskundige te benoemen af. Beginsel van equality of arms. Verzoek tot benoeming onafhankelijke medische deskundige onvoldoende onderbouwd. Geen schending art. 6 lid 1 EVRM.

Klaagster is de Sloveense Verena Devinar en zij was werkzaam als schoonmaakster totdat zij ernstige problemen met haar linkerpols en rechterarm kreeg. In 2006 werden haar klachten erkend als een gedeeltelijke beperking. In december 2011 diende zij een aanvraag in voor een arbeidsongeschiktheidsuitkering bij het Sloveense Instituut voor Pensioenen en Arbeidsongeschiktheidsverzekering (verder 'het Instituut'). De arbeidsongeschiktheidscommissie van het Instituut stelde echter op basis van zowel eigen onderzoek als de door klaagster overgelegde medische documentatie vast dat zij geen fysieke beperking had. Het Instituut wees haar verzoek dan ook af.

Klaagster spande in 2012 zaken aan tegen het Instituut bij de nationale rechters van Slovenië, waar zij nul op haar rekest kreeg. Zowel in beroep als in hoger beroep wezen de rechters het verzoek van klaagster af op grond van de bevindingen van de deskundigen in de eerdere bestuursrechtelijke procedures bij het Instituut en op grond van hun eigen observatie van klaagster tijdens een hoorzitting over haar zaak. Beroepen in cassatie en voor het constitutionele hof mochten ook niet baten; in 2014 werd de grondwettelijke klacht van klaagster niet in overweging genomen door het constitutionele hof.

In Straatsburg klaagt Devinar dat de Sloveense rechters het beginsel van equality of arms, zoals gegarandeerd door art. 6 lid 1 EVRM, hebben geschonden door hun beslissingen te baseren op de adviezen van de arbeidsongeschiktheidscommissies van het Instituut, terwijl het Instituut haar tegenstander was in de gerechtelijke procedures. Bovendien is volgens klaagster ook geen gehoor gegeven aan haar verzoek om een onafhankelijke medische deskundige te benoemen.

Het Hof benoemt drie factoren die in acht moeten worden genomen bij de beoordeling of het beginsel van equality of arms al dan niet is geschonden: de positie zoals ingenomen door de deskundigen gedurende de procedures, de wijze waarop zij hun taken verrichten en de manier waarop de rechters hun bevindingen beoordelen. In dit verband heeft het Hof vastgesteld dat het EVRM nationale rechters niet belet te vertrouwen op bevindingen van deskundigen die tot stand zijn gekomen bij gespecialiseerde instanties. Wel is volgens het Hof vereist dat een aangewezen deskundige moet voldoen aan de eis van neutraliteit, dat de gerechtelijke procedure aan het beginsel van hoor en wederhoor voldoet en dat de verzoeker op gelijke voet wordt gesteld met zijn of haar tegenstander, de staat, in overeenstemming met het beginsel van equality of arms. Het Hof overweegt dat het inzetten van een deskundige die behoort tot hetzelfde bestuursorgaan als die welke in de zaak betrokken is, kan leiden tot een zekere vrees aan de kant van de verzoeker. Toch acht het Hof, met verwijzing naar onder meer Korošec/Slovenia, 77212/12, § 54, beslissend of de twijfels die objectief zijn gerezen, gerechtvaardigd kunnen worden geacht.

In casu acht het Hof begrijpelijk dat klaagster twijfels heeft ten aanzien van de onpartijdigheid van de deskundigen op wier adviezen de rechters hun oordeel hebben gebaseerd, aangezien zij door de tegenstander van klaagster zijn aangesteld. De vrees van klaagster is zeker van belang, maar niet doorslaggevend, aangezien objectief beschouwd niet is gebleken dat het professionele oordeel van de deskundigen aan neutraliteit ontbeert.

Desalniettemin acht het Hof van belang dat eisers in geschillen zoals in casu in staat zijn om de aanstelling van een onafhankelijke deskundige te verkrijgen, omdat van de arbeidsongeschiktheidscommissies niet kan worden gesteld dat zij dezelfde mate van neutraliteit hebben als de door de rechter benoemde deskundigen. In dat kader overweegt het Hof dat klaagster de gelegenheid heeft gehad om de relevante beslissingen van het Instituut voor nationale rechters aan te vechten, zowel schriftelijk als mondeling tijdens een hoorzitting waar klaagster haar argumenten met betrekking tot, onder andere, de bevindingen van de adviezen van de arbeidsongeschiktheidscommissies heeft kunnen voorleggen. Tevens had zij daar haar standpunt kunnen staven door een advies in te dienen van haar huisarts of een andere behandelend arts.

Klaagster heeft echter de bevindingen van de arbeidsongeschiktheidscommissies betwist zonder argumenten aan te voeren. Derhalve heeft zij haar verzoek aangaande de benoeming van een onafhankelijke deskundige niet voldoende onderbouwd. In dit opzicht verschilt de onderhavige zaak van de zaak Korošec/Slovenia waarbij een verzoek tot benoeming van een onafhankelijke deskundige werd gestaafd door verwijzing naar medische documenten en de bevindingen van de arts van de klager.

Daarnaast zijn door klaagster geen andere tekortkomingen gesteld. Zodoende concludeert het Hof dat geen sprake is van een schending van het recht op een eerlijk proces, zoals gegarandeerd door art. 6 lid 1 EVRM

Devinar,
tegen
Slovenia.

The law

I. Alleged violation of article 6 § 1 of the convention

35. The applicant complained that in basing their decisions on the opinions of the disability commissions and refusing to appoint an independent expert the domestic courts had violated her right to a fair trial. She relied on Article 6 § 1 of the Convention, which in its relevant part reads as follows:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing … by [a] … tribunal …"

A. Admissibility

36. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

37. The applicant complained that in basing their decisions on the opinions of the disability commissions of the Institute the courts had violated the principle of equality of arms.

38. She observed in this connection that the opinions of the disability commissions had been on several occasions found to be erroneous by court-appointed experts. Furthermore, the only way to challenge the opinions was by obtaining an opinion from an independent court-appointed expert, but she had been denied such an opportunity during the proceedings.

39. The applicant alleged that although they were composed of physicians, the disability commissions were not independent bodies but were appointed by the opposing party. Therefore, there were reasonable grounds to suggest that the disability commissions had not acted impartially. She relied on the position of the Supreme Court on the nature of the opinions delivered by the disability commissions (see paragraph 32 above).

40. She further argued that the courts could not have had the necessary medical knowledge to decide on the matters at hand without ordering an independent expert opinion.

(b) The Government

41. The Government submitted that the first-instance court had based its decision that the applicant suffered from no physical impairment pursuant to the List on the concurring opinions of the disability commissions given during the pre-judicial procedure and the main hearing, at which the court had been able at first hand to observe the flexibility of the applicant's right shoulder joint and left wrist. They pointed out that the applicant's personal physician in 2006, when initiating the procedure regarding the rights from disability insurance, stated in the proposal that the applicant had not had any of the physical impairments. The applicant had signed that proposal and then at the main hearing in 2013 had stated that her state of health was the same as it had been in 2006.

42. The Government argued that it was for the national courts to assess the evidence before them and to decide which evidence would be produced for the establishment of facts. They referred to the domestic rules on civil procedure (see paragraph 25 above) and stressed that the adducing of evidence had been conducted in accordance with those rules.

43. They further considered that the domestic courts had given adequate and clear reasons for the refusal of the applicant's request that an expert opinion be sought. They observed in this connection that the applicant had not submitted any allegations that would have justified the appointment of an independent medical expert. Having made a comprehensive assessment of all the evidence, and not having found any divergence between the medical documentation and opinions of the disability commissions, the court had been justified in dismissing as irrelevant the applicant's application for an expert to be appointed by the court. In any case, the applicant had had an opportunity to declare her view regarding the opposing party's allegations and to present her evidence.

44. Lastly, the Government argued that the fact that the disability commissions had been linked to the opposing party in the proceedings had not in itself meant that they had been biased, since their opinions had been issued in accordance with the rules of medical science and of their profession. According to domestic jurisprudence the disability commissions were

not considered to constitute 'court experts', but that did not mean that their opinions could not have been used as documentary evidence in court proceedings.

2. The Court's assessment

(a) General principles

45. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Elsholz/Germany* [GC], 25735/94, § 66, *ECHR* 2000-VIII).

46. As regards the expert evidence, the Court has recently, in *Letinčić/Croatia*, 7183/11, 3 May 2016, summarised the relevant principles as follows:

> "48. Article 6 § 1 of the Convention places the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see, for instance, *Perez/France* [GC], 47287/99, § 80, *ECHR* 2004; and *Van Kück*, cited above, § 48). It thereby embodies the principle of equality of arms which, with respect to litigation involving opposing private interests, implies that each party must be afforded a reasonable opportunity to present his case — including his evidence — under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, for example, *Andrejeva/Latvia* [GC], 55707/00, § 96, *ECHR* 2009; and *Dombo Beheer*, cited above, § 33).
>
> (…)
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> 50. In the context of expert evidence, the rules on the admissibility thereof must not deprive the party in question of the opportunity of challenging it effectively. In certain circumstances the refusal to allow further or an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (see *Van Kück*, cited above, § 55; and, *mutatis mutandis, Matytsina/Russia*, 58428/10, § 169, 27 March 2014). In particular, where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the 'tribunal' (see *Mantovanelli/France*, 18 March 1997, § 33, *Reports of Judgments and Decisions* 1997-II).
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> 51. It should be also noted that Article 6 § 1 of the Convention guarantees a right to a fair hearing by an independent and impartial 'tribunal' and does not expressly require that an expert heard by that tribunal fulfil the same requirements (see *Sara Lind Eggertsdóttir/Iceland*, 31930/04, § 47, 5 July 2007). However, the opinion of an expert who has been appointed by the relevant court to address issues arising in the case is likely to carry significant weight in that court's assessment of those issues. In its case-law the Court has recognised that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial (see *Bönisch/Austria*, 6 May 1985, §§ 30–35, Series A 92)."

47. The Court further notes that the position occupied by the experts throughout the proceedings, the manner in which they perform their functions, and the way the judges assess their opinions are relevant factors to be taken into account in assessing whether the principle of equality of arms has been complied with (see *Zarb/Malta* (dec.), 16631/04, 27 September 2005; *Lasmane/Latvia* (dec.), 43293/98, 6 June 2002; and *Sara Lind Eggertsdóttir/Iceland*, 31930/04, § 47, 5 July 2007). In this connection, the Court has found that the Convention does not bar the national courts from relying on expert opinions drawn up by specialised bodies to resolve the disputes before them when this is required by the nature of the contentious issues under consideration. What it does require, however, is that the requirement of neutrality on the part of an appointed expert be observed, that the court proceedings comply with the adversarial principle and that the applicant be placed on a par with his or her adversary, namely the State, in accordance with the principle of equality of arms (see *Letinčić*, cited above, § 61).

48. In particular, the Court has previously found that while the fact that an expert charged with giving an opinion on a matter in dispute is employed by the same administrative authority as that involved in the case might give rise to a certain apprehension on the part of the applicant, what is decisive is whether the doubts raised by appearances can be held to be objectively justified (see *Korošec/Slovenia,* 77212/12, § 54, 8 October 2015; *Sara Lind Eggertsdóttir*, cited above § 48; *Brandstetter/Austria*, 28 August 1991, § 44, Series A 211; and *Galea and Pavia/Malta* (dec.), 77209/16 and 77225/16, § 46, 4 July 2017).

(b) Application of these principles to the present case

49. The Court notes at the outset that the present case concerns the reliance by the Ljubljana Labour and Social Court on the opinions of the opposing party's in-house expert bodies — that is to say the Institute's disability commissions. These bodies were not appointed as experts by the court, but had provided the expert opinions for the purpose of the administrative decisions which had subsequently been challenged in the judicial proceedings. The opinions concurred that the applicant did not suffer from a physical impairment within the meaning of the List and was therefore not entitled to a disability allowance (see paragraphs 8 and 10 above).

50. The Ljubljana Labour and Social Court reviewed all aspects of facts and law on which the aforementioned administrative decisions had been based and likewise dismissed the applicant's application for a disability allowance without, however, appointing an independent expert to assess the applicant's condition (see paragraphs 13, 14 and 16 above). It is true that in its decision the court made certain references to its own observations regarding the applicant's condition (see paragraph 13 above). However, since the medical question of whether the applicant had suffered a physical impairment fell, as a matter of principle, outside the area of expertise of judges (see paragraph 33 above; see also *Korošec*, cited above, § 47, and, *mutatis mutandis, Mantovanelli/ France*, 18 March 1997, § 36, *Reports of Judgments and Decisions* 1997-II) and since no other expert evidence was produced in the proceedings before the court, it must be considered that the expert opinions provided by the disability commissions had a decisive role in the court's assessment of the merits of the case.

51. In the present case the Court finds it understandable that doubts could have arisen in the mind of the applicant as to the impartiality of the medical experts whose opinions were relied on by the courts, given that they were appointed and employed or contracted by the Institute — her opponent in the proceedings. However, while the applicant's apprehensions concerning the impartiality of the experts may be of a certain importance, they cannot be considered decisive as there is nothing objectively justifying any fear that the disability commissions' experts lacked neutrality in their professional judgment (see *Letinčić*, cited above, § 62, and *Krunoslava Zovko/ Croatia*, 56935/13, § 44, 23 May 2017). In this connection, the Court observes that neither the contents of the case file nor the applicant's submissions disclose any evidence that the relevant medical experts lacked the requisite objectivity, and nor did the applicant argue that this might have been so (see, *mutatis mutandis, Galea and Pavia*, cited above, § 47, and *Krunoslava Zovko*, cited above, § 45).

52. That being said, the Court observes that, pursuant to the views of the Supreme Court and Constitutional Court, the disability commissions cannot be considered to have the same degree of neutrality as the court-appointed experts, the latter constituting auxiliaries of the court in question, not of the parties (see paragraphs 32–34, and 44 above). Therefore, the Court finds it important that the claimants in disputes such as the one at stake in the present case are able to obtain the appointment of an independent expert — which indeed was a possibility under the domestic rules and practice of which the applicant availed herself (see paragraphs 12, 33, 34 and 38 above).

53. The Court further notes that it is primarily for the domestic courts to judge whether the requested expert opinion would serve any useful purpose (see, *mutatis mutandis, H./France*, 24 October 1989, §§ 60 and 61, Series A 162–A). The Court's role is limited to ascertaining whether the proceedings as a whole were fair (see *Elsholz*, cited above, § 66).

54. The Court notes in this respect that in order to decide on the applicant's entitlement to receive a disability allowance, the regional unit of the Institute sought the opinion of medical experts of the first-instance disability commission, who examined both the applicant's medical records and the applicant in person (see paragraph 8 above). Following the applicant's appeal, the applicant's medical file was reviewed by the medical experts of the second-instance disability commission. On the basis of the latter's findings, the Central Office of the Institute dismissed the applicant's appeal, thereby upholding the dismissal of her application for a disability allowance (see paragraph 10 above).

55. The Court furthermore observes that the applicant had an opportunity to challenge the relevant decisions of the Institute before the Labour and Social Court. The role of that court was to check whether the impugned administrative decisions had been issued in a procedure that had complied with the relevant procedural rules and had been based on a proper establishment of the facts and a proper application of the law (see paragraph 13 above). The Labour and Social Court held an oral hearing at which the applicant was in a position to put forward her arguments related to, *inter alia,* the findings of the disability commissions' opinions.

56. In view of the above, the Court notes that while the disability commissions' opinions had,

as the Court has already found above, an important influence on the outcome of the proceedings (see paragraph 50 above), the applicant was made aware of them and did have an opportunity to challenge them in writing, as well as at an oral hearing before the Labour and Social Court. She could have submitted specific objections concerning the disability commissions' objectivity and its findings and supported her view by submitting an opinion from her general practitioner (see, by contrast, *Korošec*, cited above, § 8) or any other physician treating her — or any other evidence for that matter (see paragraph 12 above).

57. However, the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them. The applicant hence failed to substantiate to the minimum necessary degree her request for the appointment of an independent expert. In this regard the present case differs from a case recently decided by the Slovenian Constitutional Court, where a request for the appointment of an independent expert was substantiated by reference to medical documents and the opinion of the complainant's doctor (see paragraphs 33 and 34 above).

58. Therefore, and having regard to the above-mentioned conclusion that no specific arguments were adduced by the applicant to place in doubt the requisite objectivity of the respective disability commissions or the accuracy of their findings (see paragraphs 51 and 57 above) — and noting that no other shortcomings (such as a lack of effective participation in the proceedings before the disability commissions; see, by contrast, *Letinčić*, cited above, §§ 65-67) were alleged by the applicant — the proceedings considered as a whole were not contrary to the requirements of a fair trial.

59. There has accordingly been no violation of Article 6 § 1 of the Convention.

For these reasons, the court

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention.

Dissenting opinion of judge Pinto de Albuquerque

1. This case is about the equality of arms in judicial proceedings, and specifically the different treatment of litigants in the acquisition of evidence. In itself, the topic is evidently of the utmost importance. The importance of this case is further enhanced by the fact that the majority departed, without good reason, from the recent and consistent case-law of the Slovenian Supreme Court and Constitutional Court. Even worse, the majority overruled the Court's own solid case-law with regard to the respondent State (see *Korošec/Slovenia*, 77212/12, 8 October 2015) and to another State (see *Letinčić/Croatia*, 7183/11, 3 May 2016, and *Krunoslava Zovko/Croatia*, 56935/13, 23 May 2017), thereby disregarding Article 30 of the Convention. These reasons alone would have led me to vote against the majority. There is however an additional reason, of a more general nature, which warrants my dissent, namely the distortion of the technique of distinguishing in the present case. This evidently triggers the burning issue of the consistency, or lack of it, of the Court's case-law.

2. The applicant complained about the objective impartiality of the disability commissions of the Pensions and Disability Insurance Institute ('the Institute'), which was the respondent in the judicial proceedings. According to her, her case had been decided on the basis of expert opinions prepared by the disability commissions, the domestic courts having refused her request for the appointment of an independent expert. The majority did not dispute these facts and even found it understandable that doubts could have arisen in the mind of the applicant as to the experts' impartiality (see paragraph 51 of the judgment). Nevertheless, they concluded that there had been no violation, because 'the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them' (see paragraph 57 of the judgment).

3. To my mind, the objective impartiality of the disability commissions is highly questionable, in view of the fact that their members are either employed or appointed for a period of four years by the same Institute that is the respondent in the judicial proceedings (see paragraph 29 of the judgment). The possibility of renewal of the experts' appointment leaves them even more susceptible to the interests of the Institute (see paragraph 29). Furthermore, these experts are embedded in the organisational structure of the Institute and are bound by, *inter alia*, its acts, recommendations and practice (see paragraph 30 of the judgment). Their neutrality can be seriously called into question for these reasons even in the absence of any concrete evidence of actual bias on their part. The majority simply disregarded these facts. They also disregarded the judgments delivered by the Slovenian Supreme Court and Constitutional Court in cases similar to the present one (see paragraphs 32 and 33 of the judgment), in which both courts found that the experts of the disability commissions were not

impartial, in the light of their legal and factual position within the Institute.

4. The majority missed the point when they argued that 'the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them' (see paragraph 57 of the judgment). The applicant did not raise an issue regarding the subjective impartiality of the individual experts, but clearly raised an issue about the lack of objective impartiality of the disability commissions or, to put it differently, about the lack of institutional impartiality of the experts working in these commissions, which had impacted on their assessment of her physical disability. Throughout the domestic proceedings the applicant disputed the findings of the disability commissions and alleged that her condition amounted to a physical impairment, an assertion which she intended to prove by way of the appointment of an independent expert (see paragraphs 9, 12, 15 and 18 of the judgment). Her request that the domestic court appoint an independent expert was therefore not frivolous. The Labour and Social Court's refusal on the grounds that the appointment of an independent expert would be unnecessary (see paragraph 14 of the judgment) meant that the applicant, herself lacking the necessary medical knowledge, was left with no opportunity to substantiate her application for a disability allowance. The Higher Labour and Social Court's confirmation of that refusal on the grounds that the decision on disability would have been the same had an expert been appointed (see paragraph 16 of the judgment) assumed, to the detriment of the applicant, what had to be demonstrated. This is precisely the type of presumption in favour of the disability commissions' opinions that the Constitutional Court criticised (see paragraph 33 of the judgment).

5. The majority sought to distinguish this case from *Korošec* by pointing out that the applicant had not supported her view by submitting an opinion from her general practitioner or any other physician treating her, or any other evidence for that matter (see paragraph 56 of the judgment). The practice of distinguishing is a rather subtle technique which does not allow for boundless judicial discretion. In law, to distinguish a case means that a rule or principle set out in a similar precedent case will not apply due to significantly different facts between the two cases.

According to *Korošec*, the case should be decided by 'taking into account three factors: (1) the nature of the task entrusted to the experts; (2) the experts' position within the hierarchy of the opposing party; and (3) their role in the proceedings, in particular the weight attached by the court to their opinions' (see *Korošec*, cited above, § 52). Hence, the fact that the applicant had or had not submitted a medical opinion or any other evidence was irrelevant for the decision of the Court. Let me put this even more clearly. In *Korošec*, the Court was crystal-clear about the unacceptable role of the experts of the disability commissions, and in particular the decisive nature of their opinions. On this basis alone the Court found a violation of Article 6 of the Convention. The fact that in *Korošec* the applicant had submitted an opinion by a general practitioner was not a decisive, important, significant fact. It was not even mentioned, let alone evaluated, in the reasoning of the 'Court's assessment' part of the judgment (see *Korošec*, cited above, §§ 49–57).

6. Distinguishing one case from another involves showing the relevant dissimilarities between the two, not that the cases are different on the basis of an unimportant, peripheral, marginal, incidental fact. That is exactly what the majority failed to do, and by failing to do so they delivered a serious blow to the consistency and coherence of the Court's case-law. Worse still, they overruled valid case-law delivered by this Court against the respondent State and later confirmed against another State (see *Letincic*, cited above, and *Krunoslava Zovko*, cited above), without any regard for Article 30 of the Convention. This blunt inconsistency in the case-law warrants the intervention of the Grand Chamber. If this case is not referred to the Grand Chamber and accepted by its panel under Article 43 (3) of the Convention, the domestic authorities will find themselves lost in the middle of confusing and contradictory case-law of the Court, and even worse, the authority of the Grand Chamber and ultimately of the Court will be seriously damaged (on the respect due to the precedential force of the Court's judgments see my separate opinion in *Herrmann/Germany* [GC], 9300/07, 26 June 2012).

7. Moreover, the majority failed to see that the applicant was raising the issue of the lack of objective impartiality of the disability commissions *per se* and its impact on her own case. The argument as to the lack of impartiality of in-house experts working in these commissions is even more compelling when the extra-judicial evidence they produce is accorded decisive weight by the courts. In the present case the majority conceded that the expert opinions provided by the disability commissions had had a decisive role in the domestic courts' assessment of the merits of the applicant's case (see paragraph 50 of the

judgment). Having no medical qualifications, the domestic judges were bound to attach significant weight to the disability commissions' opinions on a medical issue decisive for the outcome of a case (see *Korošec*, cited above, § 56).

Furthermore, I observe that the Ljubljana Labour and Social Court based its decision on the opinions of the disability commissions and the judge's own observation of the applicant at the hearing. Given the lack of any explanation as to the judge's medical expertise regarding the disability issue at stake, it is rather odd that the domestic court was ready to replace the opinion of an independent expert with the judge's own observations (see paragraph 13 of the judgment; see also the Constitutional Court's opinion in the similar case referred to in paragraph 33 of the judgment). The Ljubljana Labour and Social Court furthermore referred to certain findings in proceedings that had taken place more than five years prior to the applicant's request for a disability allowance. However, as the applicant highlighted in her appeal, those proceedings concerned a different issue. Unfortunately, this point remained unaddressed by the Higher Labour and Social Court.

8. Having regard to the foregoing, I cannot but conclude that the refusal by the Ljubljana Labour and Social Court to appoint an independent expert, which was upheld on appeal, meant that the applicant's procedural position was not put on a par with that of her adversary, the Institute, as it was required to be by the principle of equality of arms. What is more, the fairness of the judicial proceedings was itself compromised by the domestic courts' reliance on the disability commissions' opinions as decisive evidence in the case, given the Institute's role in the judicial proceedings (see, *mutatis mutandis, Sara Lind Eggertsdóttir/Iceland*, 31930/04, § 54, 5 July 2007).

9. Hence, I conclude that there has been a breach of Article 6 § 1 of the Convention. This was an opportunity for the Court to state *urbi et orbi* that precedents mean something in Strasbourg; however, it missed that opportunity. If referred to the Grand Chamber under Article 43 of the Convention, this case should indeed be accepted by the Grand Chamber panel in order to reinstate the relevant precedent of *Korošec*. Judicial consistency *oblige*.

Noot

1. Deze uitspraak is met *dissenting opinion* opgenomen omdat zij illustreert dat de meerderheid van het Hof niet heel streng is bij het bewaken van de in de *Korošec*-uitspraak (EHRM 8 oktober 2015, *Korošec/Slovenië*, *AB* 2016/167, m.nt. Barkhuysen en Van Emmerik) geïntroduceerde neutraliteitseisen voor deskundigen waarop rechters varen, maar dat deze benadering binnen het Hof tegelijkertijd niet geheel onomstreden is. Het contrast tussen de benadering van de meerderheid en dat van de *dissenter* biedt daarbij ook meer inzicht in de principiële vragen die aan de orde zijn bij de omgang met dergelijke deskundigen.

2. De benadering van de meerderheid sluit in ieder geval goed aan bij het besliskader zoals de Afdeling en de Centrale Raad dat hebben opgesteld ter implementatie van de genoemde *Korošec*-uitspraak (ABRvS 30 juni 2017, CRvB 30 juni 2017, *AB* 2017/365, 366, 367, met dubbelnoot Koenraad en Jansen). Datzelfde geldt voor de uitspraak waarin de Afdeling oordeelt dat de Stichting Advisering Bestuursrechtspraak zodanig neutraal is ingebed dat de inzet daarvan in beginsel geen problemen met art. 6 EVRM oplevert (ABRvS 17 oktober 2018, ECLI:NL:RVS:2018:3389). Het verdient in dat verband wel aanbeveling niet te zuinig om te gaan met de inzet van door de rechter benoemde deskundigen nu partijen vaak geen middelen hebben voor een eigen deskundige. Verder herhalen wij het in onze noot onder de *Korošec*-uitspraak geopperde idee (in navolging van Schuurmans & Vermaat) om ook voor het sociaal-zekerheidsrecht een STAB-achtige inbedding van deskundigen te voorzien.

3. Duidelijk is dat er eisen worden gesteld aan de objectieve onpartijdigheid van een deskundige. Daarover zijn de meerderheid en de *dissenter* het eens. Een verschil tussen beiden ontstaat daar waar er weliswaar twijfels kunnen bestaan over de objectieve onpartijdigheid van de deskundige (bijvoorbeeld omdat deze zoals in casu is aangesteld bij de wederpartij en daarvoor ook regelmatig als deskundige wordt ingeschakeld), maar dat er geen twijfel is gezaaid over de juistheid van de inhoud van diens rapport en daarmee over de subjectieve onpartijdigheid. De meerderheid is van mening dat in een dergelijk geval de rechter toch kan varen op het oordeel van de deskundige zonder dat daarmee een probleem ontstaat met art. 6 EVRM. De *dissenter* ziet dat anders. Hij is van mening dat een probleem met de objectieve partijdigheid al voldoende reden zou moeten zijn voor de rechter om niet zonder meer op een rapport van een deskundige te varen gelet op de eisen van een eerlijk proces (*equality of arms*) en onafhankelijke en onpartijdige rechtspraak van art. 6 EVRM. In dat verband verwijt hij de meerderheid zelfs dat zij afwijkt van het *Korošec*-precedent zonder dat expliciet en gemotiveerd te doen. Daarom doet hij een oproep de zaak aan de Grote Kamer voor te leggen. Een oproep die in ieder geval in deze zaak niet is

gevolgd, nu de onderhavige uitspraak inmiddels kracht van gewijsde heeft gekregen.

4. Of een dergelijke verwijzing nodig is, kan worden betwijfeld. Naar onze mening volgt uit de eerdere rechtspraak over dit onderwerp dat er steeds ook enige vorm van twijfel aan de orde moet zijn over de juistheid van het voorliggende deskundigenrapport. De *dissenter* laat dat ten onrechte buiten beeld. Daarmee wordt overigens de drempel om aanspraak te kunnen maken op het mogen inbrengen van een eigen deskundigenrapport of dat van een door de rechter benoemde deskundige ook niet te hoog. Voldoende is immers dat er enige twijfel wordt gezaaid in welk verband al voldoende lijkt dat de juistheid van de rapportage in twijfel wordt getrokken. Immers de betrokkene is meestal zelf niet in staat om voldoende onderbouwde twijfel te zaaien, nu daarvoor juist deskundigheid is vereist. Tegelijk is de materie belangrijk genoeg om de Grote Kamer er nog eens naar te laten kijken. Deze zou dan mogelijk ook de inmiddels ontstane implementatiepraktijk in verschillende verdragsstaten in ogenschouw kunnen nemen en eventueel daaruit blijkende onduidelijkheden kunnen verhelderen.

T. Barkhuysen en M.L. van Emmerik

AB 2019/72

HOF VAN JUSTITIE VAN DE EUROPESE UNIE
4 oktober 2018, nr. C-652/16
(M. Ilešič, A. Rosas, C. Toader, A. Prechal, E. Jarašiūnas)
m.nt. A.M. Reneman

Art. 40 lid 1, art. 46 lid 3 Richtlijn 2013/32/EU

ECLI:EU:C:2018:514
ECLI:EU:C:2018:801

In het beroep tegen de afwijzing van het asielverzoek dient de rechter in eerste instantie nieuwe asielmotieven mee te nemen, tenzij deze te laat of op onvoldoende concrete wijze zijn ingediend.

Art. 46 lid 3 Richtlijn 2013/32/EU, gelezen in samenhang met de verwijzing in art. 40 lid 1 van deze richtlijn naar de beroepsprocedure, moet aldus worden uitgelegd dat de rechterlijke instantie waarbij beroep is ingesteld tegen een beslissing tot weigering van internationale bescherming, gronden voor de verlening van internationale bescherming of feitelijke gegevens die weliswaar betrekking hebben op gebeurtenissen of bedreigingen die zich zouden hebben voorgedaan vóór de vaststelling van die weigeringsbeslissing of zelfs vóór de indiening van het verzoek om internationale bescherming, maar die voor het eerst zijn aangevoerd tijdens de beroepsprocedure, als zijnde 'nadere verklaringen' en na de beslissingsautoriteit te hebben verzocht deze te onderzoeken, in beginsel dient te beoordelen. Deze rechterlijke instantie is daartoe echter niet gehouden indien zij constateert dat deze gronden of gegevens in een te late fase van de beroepsprocedure zijn aangevoerd of niet op een voldoende concrete wijze zijn ingediend om naar behoren te worden onderzocht, of ook, wanneer het gaat om feitelijke gegevens, indien zij constateert dat deze niet van betekenis zijn of zich niet voldoende onderscheiden van de gegevens waarmee de beslissingsautoriteit reeds rekening heeft kunnen houden.

1. Nigyar Rauf Kaza Ahmedbekova,
2. Rauf Emin Ogla Ahmedbekov,
tegen
Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite.

Arrest

1 Het verzoek om een prejudiciële beslissing betreft de uitlegging van richtlijn 2011/95/EU van het Europees Parlement en de Raad van 13 december 2011 inzake normen voor de erkenning van onderdanen van derde landen of staatlozen als personen die internationale bescherming genieten, voor een uniforme status voor vluchtelingen of voor personen die in aanmerking komen voor subsidiaire bescherming, en voor de inhoud van de verleende bescherming (*PB* 2011, L 337, blz. 9), en van richtlijn 2013/32/EU van het Europees Parlement en de Raad van 26 juni 2013 betreffende gemeenschappelijke procedures voor de toekenning en intrekking van de internationale bescherming (*PB* 2013, L 180, blz. 60).

2 Dit verzoek is ingediend in het kader van een geding van Nigyar Rauf KazaAhmedbekova en haar zoon, Rauf Emin OglaAhmedbekov, tegen de Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (adjunct-directeur van de nationale vluchtelingeninstantie, Bulgarije) over de afwijzing door laatstgenoemde van de door Nigyar Ahmedbekova ingediende verzoeken om internationale bescherming.

Toepasselijke bepalingen

Internationaal recht

3 Het Verdrag betreffende de status van vluchtelingen, ondertekend te Genève op 28 juli 1951 [*Recueil des traités des Nations unies*, vol. 189, blz. 150, 2545 (1954)], is in werking getreden op 22 april 1954 en is aangevuld en gewijzigd bij het