EMD-bulletin

– nytt fra menneskerettsdomstolen i Strasbourg

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Kategori 1-avgjørelser fra EMD: Oktober

§ Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not a sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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JEUNESSE v. THE NETHERLANDS

Date: 03/10/2014 **Application no.:** 12738/10

Articles: 8; 8-1; 41

Conclusion: Violation of Article 8 - Right to respect for private and family life (Article 8-1 - Respect for family life); Pecuniary damage – claim dismissed; Non-pecuniary damage - award

The case concerned the refusal by the authorities to allow a Surinamese woman married to a Netherlands national, with whom she had three children, to reside in the Netherlands on the basis of her family life in the country.

The Court took into consideration that, apart from Ms Jeunesse, all members of her family were Dutch nationals entitled to enjoy family life with each other in the Netherlands, that Ms Jeunesse had been living in the Netherlands for more than 16 years (and the Netherlands authorities had been aware of this), that she had no criminal record and that settling in Suriname would entail a degree of hardship for the family. The Court further considered that the Netherlands authorities had not paid enough attention to the impact on Ms Jeunesse's children of the authorities' decision to refuse her request for a residence permit. Indeed, the authorities had failed to take account of and assess evidence on the practicality, feasibility and proportionality of the refusal at issue in order to give effective protection and sufficient weight to the best interests of the children.

The Court concluded that a fair balance had not been struck between the personal interests of Ms Jeunesse and her family in maintaining their family life in the Netherlands and the public order interests of the Government in controlling immigration.

Norsk sammendrag på Lovdata.no

Avgjørelser mot Norge: Oktober

HANSEN v. NORWAY

Date: 02/10/2014 **Application no.:** 15319/09

Articles: 6; 6-1; 41

Conclusion: Violation of Article 6 - Right to a fair trial (Article 6 - Civil proceedings; Article 6-1 – Fair hearing); Non-pecuniary damage - finding of violation sufficient

The case concerns the filtering procedure in appeal proceedings in civil cases brought before the Norwegian High Court. The mechanism was introduced by the new Norwegian Code of Civil Procedure in 2005 in order to stop clearly unmeritorious appeals to the High Court. The applicant, Hroar Anton Hansen, is a Norwegian national who was born in 1947 and lives in Nesoddtangen (Norway). He complains about the Norwegian High Court's refusal of his application to appeal in a property dispute between him and his ex-wife.

On 3 November 1995 Mr Hansen and his then wife concluded an agreement that they each owned

50% of a property, the Ekheim estate. After their divorce, in 2005 Mr Hansen's ex-wife sold the property to a company, *Ekheim Invest AS*. Mr Hansen then brought civil proceedings before the City Court claiming that he was entitled to 50% of the property owned by *Ekheim Invest AS*. The City Court found in favour of *Ekheim Invest AS* and Mr Hansen appealed that decision to the Borgarting High Court. Mr Hansen's appeal was unanimously dismissed by the High Court on 12 June 2008. The High Court reasoned that it was clear that the appeal would not succeed and that its admission should therefore be refused pursuant to the Norwegian Code of Civil Procedure. An application to appeal to the Supreme Court was rejected on 19 September 2008.

The Court observed that the High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of fact. The Court was not convinced in the concrete circumstances that the High Court's reasoning in its decision of 12 June 2008 did address the essence of the issue to be decided by it in a manner that adequately reflected its role at the relevant procedural stage as an appellate court entrusted with full jurisdiction and that it did so with due regard to the applicant's interests.

Furthermore, the Court noted that when refusing to admit the applicant's appeal, the High Court did not act as the final instance in so far as its procedure could form the subject of an appeal to the Appeals Leave Committee of the Supreme Court. The Court was not persuaded that the reasons stated by the High Court for refusing to admit his appeal made it possible for the applicant to exercise effectively his right to appeal against the High Court's procedure to the Supreme Court. The Court found that there had been a violation Article 6 § 1 of the Convention.

Norsk sammendrag på Lovdata.no

B and OTHERS v. NORWAY

Date: 07/10/2014 **Application no.:** 48932/13; 48940/13; 48950/13; 50005/13; 51184/13; 51192/13; 51219/13; 51480/13; 51652/13; 61156/13

Articles: 3; 8; 13; 13+3; 13+8; 13+P4-4; 35; P4-4

Conclusion: Inadmissible

The case concerned ten Ethiopian nationals whose asylum applications were rejected by the Norwegian immigration authorities. Ms. A (application no. 61156/13) initiated judicial proceedings before the Oslo City Court, and she was afforded pro bono legal assistance. The City Court found against her. The applicant lodged an appeal against that decision to the Borgarting High Court, but she withdrew the appeal on the ground that she no longer benefitted from pro bono legal assistance. In 2014 the Government informed the Court that the applicants in applications nos. 48932/13, 48940/13, 48950/13, 50005/13, 51184/13, 51192/13, 51219/13, 51480/13 and 51652/13 had been granted legal aid in Norway and had all initiated judicial proceedings before the Oslo City Court. Before filing the above-mentioned applications with the Court, the applicants' legal representative in Norway had lodged a class action before the Oslo City Court on behalf of a large number of Ethiopian nationals, including the applicants in the present application. The action was dismissed by a decision of the City Court on 15 June 2012 on procedural grounds.

The Court observed that the class action lodged by one of applicants' representatives was dismissed from the courts on the ground of their failure to comply with domestic rules of procedure. This procedural step could not in the Court's view be deemed to meet the requirement of exhaustion of domestic remedies set out in Article 35 § 1 of the Convention.

The Court further noted that Ms A (the applicant in application no. 61156/13), when pursuing individual proceedings, first unsuccessfully before the City Court and then on appeal to the High Court, withdrew her appeal to the latter. Her Article 3 complaint should therefore in principle be declared inadmissible on the ground of failure to exhaust domestic remedies. Moreover, Ms A did not apply for legal aid with a view to exhaust domestic remedies. There appears to be no special circumstances which could absolve her from her normal obligation to do so.

The Court found that the remaining applications, because of the fact that these applicants all had been granted legal aid and had initiated judicial proceedings which were pending, they should be declared inadmissible as being premature.

Norsk sammendrag på Lovdata.no

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Månedens utvalgte: Hansen v. Norway

Fakta:

Klagerens kone kjøpte i 1989 en eiendom fra klageren, og ekteparet opprettet ektepakt. Ekteparet inngikk senere en avtale om at de eide halvparten hver av eiendommen. Etter at de ble skilt, gikk klageren til sak for å få dom om at ektepakten var ugyldig, og at avtalen om eiendommen var gyldig. I 2001 kom tingretten til at ektepakten var gyldig, og avtalen om eiendommen ugyldig.

I 2005 solgte klagerens ekskone eiendommen til et selskap. Klageren anla sak mot selskapet, hvor han anførte at han hatt rett på halvparten av eiendommen. I januar 2008 dømte tingretten i favør av selskapet, og klageren anket til lagmannsretten. I en enstemmig beslutning av 12. juni 2008 nektet lagmannsretten anken fremmet, på bakgrunn av at det ble funnet klart at anken ikke ville føre fram, jfr. tvisteloven § 29-13 andre ledd. Klageren anket til Høyesterett, hvor anken ble avvist.

Rettstilstanden ble endret i 2010, slik at nektelse etter tvisteloven § 29-13 andre ledd skal være begrunnet, jfr. femte ledd.

Anførsler:

Klageren anførte at lagmannsretten ikke hadde begrunnet nektelsen i å fremme anken tilstrekkelig, og dermed krenket hans rett til forsvarlig behandling etter artikkel 6(1).

Staten imøtegikk klagerens anførsler, og anførte videre at artikkel 6 ikke kunne anvendes, og at saken måtte avvises etter artikkel 35(3)(a) og (4).

Domstolens vurderinger:

Domstolen behandlet først om saken skulle avvises. Domstolen slo fast at klagerens sak for nasjonale domstoler gjaldt borgerlige rettigheter, og at resultatet av prosessen som helhet var direkte avgjørende for tvisten. Domstolen fant derfor at artikkel 6 kunne anvendes i en slik sak. Domstolen konkluderte med at klagen ikke var uforenlig med bestemmelsene i konvensjonen eller åpenbart grunnløs etter artikkel 35(3), og heller ikke kunne avvises av andre grunner.

? Har du kommentarer eller spørsmål? Send mail til: info@nchr.uio.no

Domstolen behandlet videre om det forelå krenkelse av artikkel 6. Domstolen bemerket at selv om Konvensjonen ikke pålegger statene å opprette ankedomstoler, må stater som har slike domstoler sørge for at rettighetene etter artikkel 6 blir sikret. Domstolen fant ingenting som indikerte at tingrettens begrunnelse var utilstrekkelig etter artikkel 6(1), eller at retten på noen måter ikke oppfylte kravene etter artikkelen. Domstolen vurderte så om lagmannsrettens begrunnelse for å nekte anken fremmet var utilstrekkelig til å sikre klagerens rettigheter. Domstolen la vekt på at lagmannsretten ikke bare kunne prøve rettsanvendelse og saksbehandling, men også bedømmelse av faktiske forhold. Sett i lys av dette uttalte Domstolen at den ikke var overbevist om at lagmannsrettens resonnement hadde tatt hensyn til alle relevante sider av saken. Domstolen bemerket også at lagmannsrettens behandling ikke var endelig, ettersom det var mulig å anke til Høyesterett. Den var ikke overbevist om at begrunnelsen lagmannsretten ga for å nekte anken fremmet, gjorde det mulig for klageren å effektivt utøve sin rett til å anke til Høyesterett. Domstolen konkluderte med seks stemmer mot en med at det forelå krenkelse av artikkel 6(1).

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