REPORT

ON

STUDY VISIT OF NORWEGIAN JUDGES AND PRESIDENTS OF POLISH COURTS

TO THE EUROPEAN COURT OF HUMAN RIGHTS AS WELL AS TO THE COUNCIL OF EUROPE

(9th-12th January 2017)

The Report was prepared by the Norwegian Courts Administration in cooperation with the Ministry of Justice of the Republic of Poland, published on 13th February 2017.

General information on study visit

The Ministry of Justice of the Republic of Poland organized in cooperation with the Norwegian Courts Administration and with the Council of Europe a study visit to the European Court of Human Rights and to the Council of Europe. The visit took place from 9th January till 12th January 2017. There were 26 participants from both partner States (14 judges of Polish regional courts, 2 representatives of the Ministry of Justice of the Republic of Poland, 2 interpreters, 7 judges from Norway and 1 employee of Norwegian Courts Administration).

It was a second visit to the European Court of Human Rights organized for Polish and Norwegian judges. The first one took place in November/December 2016 and it was highly appreciated by its participants. The report from the first visit was distributed among Polish and Norwegian judges and it mostly focused on examples of good practices in execution of ECtHR judgments and in disseminating knowledge on the European Convention on Human Rights among legal professionals.

During the second visit, similarly to the first one, the participants had the possibility to meet with representatives of the European Court of Human Rights and with the employees of the organizational units of the Council of Europe (such as e.g.: European Commission for the Efficiency of Justice and Office of the Commissioner for Human Rights). The program predicted also the meetings with Mr Eric Møse and Mr Krzysztof Wojtyczek– judges elected in respect of Norway and Poland. The participants had also an opportunity to participate in the hearing of the case *Harkins v. United Kingdom* (application no 71537/14) which took place before the Grand Chamber on 11th January 2017.



During plenary sessions the participants could share their experience in applying conventional standards. What particularly interested them was the methods of eliminating excessive length of judicial proceedings. It was an issue that raised vigorous and fruitful

discussions between Polish and Norwegian judges. For this reason the report focuses on the methods of ensuring the observance of the right to recognize a case within a reasonable time.

The structural problem of excessive length of proceedings

According to the statistics published by the European Court of Human Rights, a conventional right which is most often violated in CoE States is the right to recognize judicial case "within a reasonable time". From 1959 to 2015 ECtHR found 5 435 violations of this right. As regards Poland, the "Strasbourg Court" 434 times held that in applicants' cases the length of proceedings was excessive. Approximately 40 % of violations of the Convention for which Poland respond concern the problem of length of proceedings.

As for Norway, the European Court of Human Rights only in two single cases found that this State did not respect the rule to assure a rapid judicial trial. That is why, it seems justified to formulate a hypothesis that Poland has to strengthen its efforts to ensure the effectiveness of judicial proceedings, while Norway can serve as an example of good practices in this matter.

The existence of the problem of the length of judicial proceedings in Poland was also clearly stated in ECtHR judgment *Rutkowski and others v. Poland* (applications nos 72287/10, 13927/11 and 46187/11) in which the Court applied the Rule 61 of the Rules of the Court which allows to deliver so-called "pilot judgement". The adoption of this procedure is possible, when "the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications".

In *Rutkowski* case, the Court found that the allegations as regards to the length of proceedings and the lack of an effective remedy presented in 3 separate applications were well-found. The ECtHR also decided to give notice to the Polish Government of 591 similar applications. What, however, seems to be most significant is the fact that the Court identified the structural problem of "excessive length of proceedings in Poland, accompanied by the lack of sufficient redress for a breach of the reasonable-time requirement at domestic level"[1].

[1] See p. 206 of ECHR judgment *Rutkowski and others v. Poland* (applications nos 72287/10, 13927/11, 46187/11).

The challenge is then to implement proper legislative and organizational measures in order to ensure that Polish judicial proceedings would respect the standards resulting from the Article 6 of the Convention.

As far as organizational solutions are concerned it is important to ensure efficient management of cases and sufficient level of employment in judiciary. The endeavors to achieve these goals are described in detail in action reports submitted by Polish government to the Committee of Ministers of the Council of Europe[2].

What should raise particular attention as regards Poland is the institution of so-called "complaint on excessive length of proceedings", which is considered as remedy for violation of conventional right to recognize a case "within a reasonable time" and which is a measure that disciplines courts to work in more efficient way. After the analysis of this institution the report would show examples of solutions adopted in Norway in order to reduce the length of judicial proceedings.

"Complaint on excessive length of proceedings" – Polish example of good practice

The Law on complaints about a breach of the right to an investigation conducted or supervised by a prosecutor and to a trial within a reasonable time (*ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*) is a fundamental act which deals with abovementioned problem of an excessive length of civil and criminal proceedings**.**

The act was adopted on 17 June 2004 as a consequence of the European Court of Human Rights judgment of 26 October 2000 delivered in the case of *Kudła v. Poland* (application no. 30210/96). In this case ECtHR noted that an effective remedy before a national authority is required for an alleged breach of right to hear a case within a reasonable time (the requirement under Article 6 § 1 of Convention).

Initially, the act concerned only one stage of proceedings – the trial. However, the amendment introduced on 20 February 2009 resulted in coverage by the act also an investigation stage (a pre-trail stage). Nowadays, provisions of the act are also respectively

[2] See e.g. action report in Kudla and Podbielski grop of cases - https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804abacd

applied to proceedings conducted by a bailiff. It is important to secure a possibility to lodge a complaint from the very beginning of the proceedings until an enforcement of the court's ruling. The amendment act of 2009 established also an upper and a lower limits of granted satisfaction.

A right to lodge a complaint is granted to each person whose right was breached. The act does not provide the definition of „a reasonable time" phrase. However, it stresses that a recognition of excessive length of proceeding requires an assessment of its promptness and regularity.

The supervisory court can adjudicate proper measures to remove the infringement. If the court finds a violation it is allowed to award satisfaction of 2000 – 20000 zlotys. Moreover, the amount awarded should not be smaller than 500 zlotys for each year of infringement. It should be noted that the rapidity of proceedings is not the objective of the regulation which is rather aimed at ensuring proper examination of the case in a necessary time.

The complaint is a legal measure which fulfills requirements of article 13 of ECHR. According to article 35 of the Convention *the Court may only deal with the matter after all domestic remedies have been exhausted*. That is why each person who claims that her/his right to proceedings conducted within a reasonable time was breached must bring an action on the basis of the abovementioned act before appealing to the ECtHR

It must be mentioned that proceedings concerning a complaint for a breach of the right to an administrative proceedings conducted within a reasonable time are regulated separately in a Law on Proceedings before administrative courts of 1 January 2004.

Norwegian examples of good practices in order to reduce the length of judicial proceedings[3]

Introduction

The ability of a court system to deliver judicial decisions in a timely manner depends on a multitude of factors. These factors can of course be found within the judiciary, but the

[3] This part of report was written by Audun Hognes Berg from Norwegian Courts Administration

efficiency of the courts depends also heavily on the societal context in which the judiciary works.

In the following chapters I will first present statistical data on length of proceedings in Norway with a side along glance to Poland. I will then present the main factors from which the length of proceedings is a result of.

In order to better understand the statistics and the following explanations it could be useful to point at the main characteristics of the Norwegian judiciary:

- The level of specialization is low both at National structural level as well as on court level. There are no administrative courts, no constitutional court, and very few specialized court otherwise,
- all cases start in the first instance courts (65 district courts). The 6 courts of appeal are with very few exceptions 100% appellate courts. The basis function of the Supreme Court is to clarify, unify and develop the law.
- Norwegian judges are to a large extent generalists,
- the judge is first and foremost a procedural expert – insight in the relevant material law of a case is basically achieved by the adversarial contribution from the attorneys of the parties,
- administrative tasks are to a large extent moved out of the court system (no registry functions)
- Judges are appointed based on work experience and the average age upon appointment is approximately 45 years.

Length of proceedings in the Norwegian judiciary

Based on norms set by the Norwegian Parliament, the 1. and 2. instance courts shall not exceed an *average* case processing time of 6 months in civil cases, 3 months in criminal composite court cases, and 1 month in single judge cases based on guilty plea, with subsequent simplified procedure.

Table 1 below shows that the first instance courts comply with these norms.

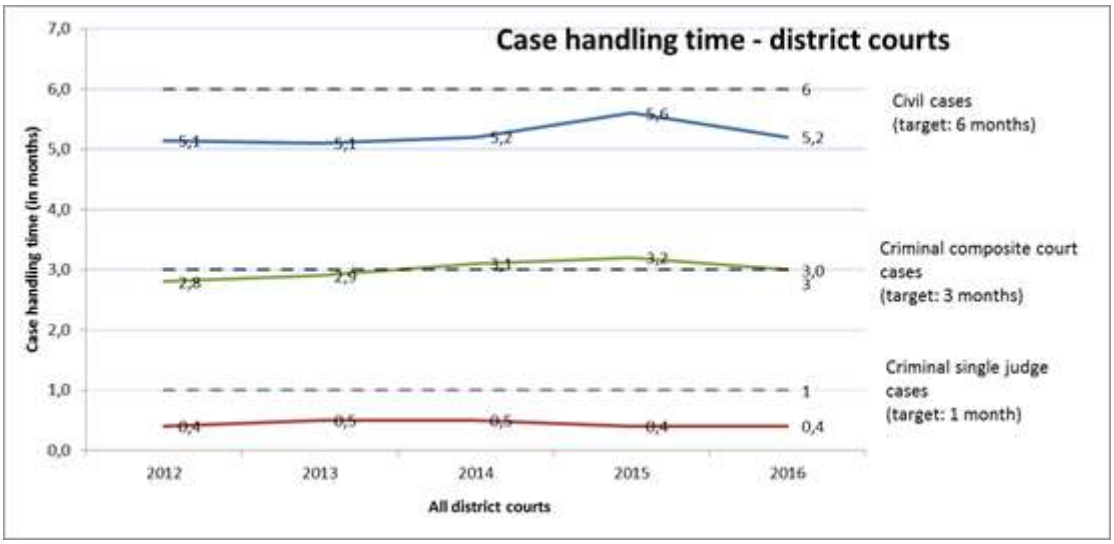


Table 1: Case handling time first instance courts.

Table 2 shows the influx of *small claim cases*[4] and average case handling time. According to the Dispute Act section 10-4 the case handling time should not exceed 3 months from case filing until judgment.

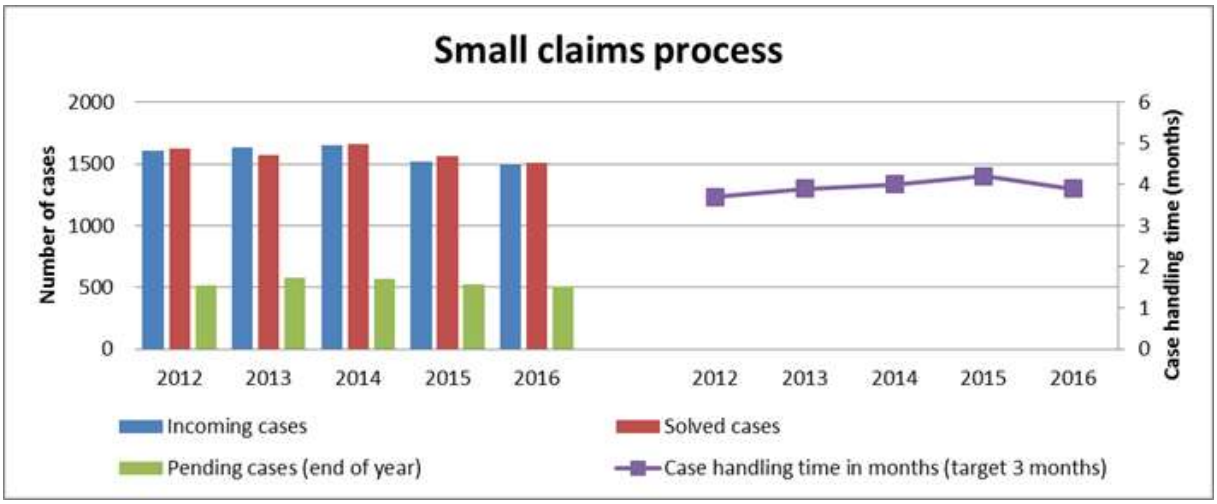


Table 2: Small claims process, case handling time.

This is the average case handling time. The actual duration of cases depends on the complexity of the case, the behaviour of the judge and the behaviour of the parties concerned. Table 3 below shows the age distribution of pending cases per 31. December 2016 in the first instance courts.

[4] Basically cases with a value less than 125 000 NOK (14 125 EUR). Small claims procedure is restricted to the first instance courts (the district courts).

Age distribution of pending cases (end of 2016)				
	Civil disputes		Criminal composite court cases	
	Number of pending cases	% of pending cases	Number of pending cases	% of pending cases
All pending cases	7636	100 %	4207	100 %
cases older than 3 months	4062	53 %	1139	27 %
cases older than 6 months	2471	32 %	380	9 %
cases older than 12 months	957	13 %	38	1 %
cases older than 24 months	277	4 %	13	0 %

Table 3: Age distribution of pending cases in 1. Instance courts, Norway.

Do these figures make out what should be regarded as *back logs?* Nothwithstanding other definitions of *back log*[5] - If we with *back log* mean cases that are put on hold or on a waiting list due to capacity problems in the courts, the answer is negative. However, Borgarting Court of Appeal, located in Oslo, is for the current being fixing dates for the main hearing 13 months ahead *due to capacity problems* in the court. A few other courts are in the same situation. These courts have a back log problem.

Finally it can be said that the Supreme Court in Norway does not have back logs. The fixing of date for hearings depends on the availability of the parties.

Understanding the case handling time 1: Societal, cultural and economic factors

The Norwegian society is built upon egalitarian values, and this approach formed the basis for the dissemination of the State income resulting from the Oil industry boom in the late 1960s and onwards.

A society based on egalitarian values will naturally have a high level of tranparency, which also is the case for Norway.

The high level of egality and transparency are one of the reasons for the *high level of trust* found in the Norwegian society, both between individuals as well as between individuals and the authorities.

The judiciary is among the top state institutions when it comes to the level of trust, which also indicates that the judiciary itself attracts particular trust; the independence of the judicial power has been allowed to be strengthened with very few disruptions throughout the

[5] Back logs are by the CEPEJ defined as the difference between number of unresolved cases at the beginning of a period and resolved cases during the same period.

last decade, and the judiciary is believed to deliver judgments of high quality and in a timely manner. The legal methodology, with the doctrine of precedent from mainly Supreme Court decisions, enables the first instance courts to reach decisions with authority derived from preceding Supreme Court rulings.

This forms the needed backdrop needed to get a clear understanding of the efficiency measures presented in the following paragraphs. It can be said that the these measures would not be possible or at least they would be seriously limited were it not for the high level of trust.

It should also be said that at some points the judiciary should reach a higher level of transparency than what is the current situation. I may be debated whether the level of trust actually form an obstacle for increased transparency as such reforms, and the subsequent need for financial and human resources, are not perceived as *needed* in society today.

Understanding the case handling time 2: Influx of cases and appeals screening mechanisms

One of the distinct features of the Norwegian judiciary is **a *low influx of cases***, both civil/commercial and criminal cases, compared with European standards.

As for civil commercial litigious cases the 2016 CEPEJ report (2014 data) shows that Norway ranks with the second lowest number of incoming civil and commercial litigious cases in Europe, with 0,3 cases per 100 inhabitants. Poland ranks as an average country to that end with 3,2 cases.[6]

As for criminal cases a clear distinction between Norway and Poland is a substantial higher number of cases settled by the police and the public prosecutor in Norway compared to Poland, and an accordingly much lower influx of criminal cases to the first instance courts (0,3 cases per 100 inhabitants in Norway as opposed to 1,4 cases in Poland according to CEPEJ data).

6

http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf

This is basically a result of on the one hand *conflict resolution mechanisms* outside courts in civil cases, namely the municipal conciliation boards[7], and on the other hand extensive powers to the police and the public prosecutor to settle criminal cases through pactual fines.

It can furthermore be mentioned that the Norwegian legal enforcement procedure accepts a wide range of basis for enforcement in addition to enforceable court judgments, compared to other European countries.

Another distinctive procedural feature of the Norwegian courts is **comprehensive appeals screening mechanisms** both between first and second instance and between second instance and the Supreme court. With the exception of cases with a sentencing limit exceeding 6 years, all criminal appeals must be accepted by the appeals screening committees in the courts of appeals. In 2016 only 38,6 % of 3254 cases were allowed to enter the courts of appeal.

With minor annual fluctations the Supreme Court allows approximately 10-15 % of appeals in civil cases[8].

Understanding the case handling time 3: Case preparation phase and principle of concentration of trial

The current Dispute Act (i.e. civil procedure code) entered into force on 1 January 2008. The main objectives of the new code was to speed up the proceedings and to reduce the cost of litigation for indivuals. One of the main tools of the code was to increase the level of activeness of the judge during the preparation phase of the case.

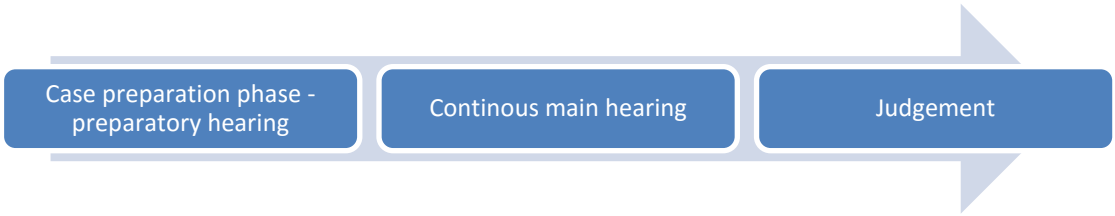
Chapter 9.2 of the Dispute Act regulates the case preparation phase. According to section 9-4 the judge shall, after having received the defence pleading immediately summon the attorneys to a **case preparation meeting.** This is usually done by phone, and without the parties present. During this meeting the preparation of the case is tailored and date for the main hearing fixed. The judge plays a highly decisive role in this meeting and during the

[7] These boards settle approximately 140 000 cases annually through mediation and judgements.

[8] http://www.domstol.no/globalassets/upload/hret/internett/virksomhetsrapportforretningsstatistikk/forretningsstatistikk-2016.pdf

subsequent case preparation, and the activerole of the judge is opposed to the preceding more recumbent role of judges during case preparation, where the attorneys where conductive.

Together with several procedural deadlines set for submitting evidence before the main hearing, this tight preparation form part of a procedural principle applicable both in civil and criminal cases – **the principle of case concentration.** The principle appears in several sections of the Dispute Act and the Criminal Procedure Act, and expresses both an obligation to keep the total case handling time at a minimum, but also to concentrate the case to what is the core of the dispute. With the exception of small claims procedure, common civil disputes are dealt with in the following manner:



Finally it can be mentioned that the draft new criminal procedure act introduces the case preparation meetings as a tool in criminal cases too.

Conclusion

The Dispute Act also introduced other tools for parties to speed up the proceedings such as the right for parties to submit claim to the court president of reallocation of a case to a new judge and subsequent right to appeal if the claim is rejected.[9] This measure was intended to provide parties with remedies according to article 13 of the European Convention on Human Rights.

Although some of the efficiency measures found in Norway reflect Norwegian realities such as the level of trust, we do believe that several of these measures can be inspirational and even feasible to implement in other judiciaries, although in modified versions. Several of these measures found in Norway were inspired from best practices found in other judiciaries.

[9] Dispute Act section 11-7.