13 April 2012
First Division
10/04437
EV/AS

Supreme Court of the Netherlands

Judgment

in the case of:

1. MOTHERS OF SREBRENICA ASSOCIATION,
established in Amsterdam
2. [Appellant 2],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
3. [Appellant 3],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
4. [Appellant 4],
residing in Sarajevo, Bosnia and Herzegovina,
5. [Appellant 5],
residing in Sarajevo, Bosnia and Herzegovina,
6. [Appellant 6],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
7. [Appellant 7],
residing in Sarajevo, Bosnia and Herzegovina,
8. [Appellant 8],
residing in Sarajevo, Bosnia and Herzegovina,
9. [Appellant 9],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
10. [Appellant 10],
residing in Vogošca, municipality of Sarajevo, Bosnia and Herzegovina,
11. [Appellant 11],
residing in Sarajevo, Bosnia and Herzegovina,
APPELLANTS in the appeal in cassation, defendants in the cross-appeal in cassation,
attorney-at-law: Baron R.G. Snouckaert van Schauburg,

against

1. THE STATE OF THE NETHERLANDS (Ministry of General Affairs),
which has its seat in The Hague,
DEFENDANT in the cassation proceedings, appellant in the cross-appeal in cassation,
attorneys-at-law: K. Teuben and G.J.H. Houtzagers,

2. THE UNITED NATIONS, an organisation possessing legal personality,
which has its seat in New York City, New York, United States of America,
DEFENDANT in the cassation proceedings,
no appearance entered.

The parties will be referred to below as 'the Association et al.', 'the State' and 'the UN'.

1. Proceedings before the courts hearing the facts

For the course of the proceedings before the courts hearing the facts the Supreme Court refers to:
a. the judgment of The Hague district court of 10 July 2008 in case no. 295247/HA ZA 07-2973;
b. the judgment of The Hague court of appeal of 30 March 2010 in case no. 200.022.151/01.
The appeal court judgment is appended to this judgment.

2. Cassation proceedings

The Association et al. lodged an appeal in cassation against the judgment of the court of appeal. The State lodged a cross-appeal in cassation. The writ of summons in cassation and the statement of defence containing the cross-appeal in cassation are appended to this judgment and form part of it.
Leave was granted to proceed against the UN in default of appearance.
The Association et al. and the State moved that the respective appeals against them be dismissed.
Counsel presented the case on behalf of the parties. The State withdrew part 1 of its statement of grounds for the cross-appeal, which objected to the appeal court's ruling that the right of access to the courts is a rule of customary international law which may be invoked separately from article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and article 14 of the International Covenant on Civil and Political Rights (ICCPR). The advisory opinion issued by Advocate General Paul Vlas recommended that both appeals be dismissed.
Counsel for the State and counsel for the Association et al. responded to this submission by letter of 10 February 2012.

3. Basis for the cassation proceedings

3.1 The central question in this case is whether the appeal court was right to rule that the UN is entitled to immunity from jurisdiction, and consequently that the Dutch courts are not competent to hear the action brought by the Association et al. in so far as it is directed against the UN. The following applies in this case.

3.2.1 The Association et al. sued the State and the UN before The Hague district court. They held the State (and Dutchbat, the Dutch unit under UN command) and the UN partly responsible for the fall in 1995 of the Srebrenica enclave in Eastern Bosnia, where Dutchbat was based and which had been designated a 'Safe Area' under the protection of the UN peacekeeping force UNPROFOR by Security Council resolutions, and for the consequences of its fall, in particular the genocide committed subsequently which cost the lives of at least 8,000 people, including relatives of appellants 2-11 in the cassation proceedings. They sought, in brief, a declaratory judgment to the effect that the State and the UN acted wrongfully in failing to fulfil undertakings they had given before the fall of the enclave and other obligations, including treaty obligations, to which they were subject, in addition to (advances on) payments in compensation, to be determined by the court in follow-up proceedings.

3.2.2 The State forwarded to the district court a copy of a letter of 17 August 2007 from the UN to the Dutch Permanent Representative to the UN, in which the UN drew attention to its immunity from jurisdiction and stated that it would not waive this immunity. The Public Prosecution Service moved accordingly, and the district court granted leave to proceed against the UN in default of appearance and subsequently declared itself not competent to hear the action in so far as it was directed against the UN. In the appeal proceedings instituted by the Association et al., the appeal court allowed the State to join the UN (which did not enter an appearance) as a party in the proceedings and upheld the judgment of the district court.

3.3.1 The relevant provisions of articles 103 and 105 of the Charter of the United Nations ('the UN Charter') are as follows:

'Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Art. 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. (...)

3. The General Assembly may make recommendations with a view to determining the

details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.'

3.3.2 Article II, § 2 of the Convention on the Privileges and Immunities of the United Nations ('the Convention'), which is based on articles 104 and 105 of the UN Charter (Dutch Treaty Series 1948, no. I 224), reads as follows:
'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.'

3.3.3 Contrary to the provisions of article VIII, § 29, opening words and (a) of the Convention, the UN has not made provision for any modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.

3.3.4 Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (Dutch Treaty Series 1960, no. 32) states:
'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

4. Assessment of the grounds for the appeal and the cross-appeal

4.1.1 The thinking (considerations 4.2 to 5.14) underlying the appeal court's finding that the UN is entitled to immunity from jurisdiction, such that the Dutch courts are not competent to hear the action in so far it is directed against the UN, can be summarised as follows.
Article II, § 2 of the Convention implements inter alia article 105, paragraph 3 of the UN Charter. Taking into consideration the provisions of article 31 of the Vienna Convention on the Law of Treaties, the only possible interpretation of the immunity defined in article II, § 2 is that the UN is entitled to the most far-reaching immunity, in the sense that the UN cannot be summoned to appear before any domestic court in the countries that are party to the Convention. However, the question is whether, as the Association et al. argue, the right of access to an independent court enshrined in article 6 ECHR and article 14 ICCPR prevails over that immunity. On the basis of the criteria set out by the European Court of Human Rights (ECtHR) in Beer and Regan v. Germany and Waite and Kennedy v. Germany the appeal court examined the question of whether the State's invocation of the UN's immunity is compatible with article 6 ECHR. In that connection, the first thing that could be established is that the immunity serves a legitimate aim,

namely ensuring the proper functioning of international organisations. In answering the question of whether in this case immunity is proportional to the purpose to be served, it must be noted from the outset that the UN occupies a special position among international organisations.

Under article 42 of the UN Charter the Security Council may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. The immunity granted to the UN is directly connected to the general interest served by the maintenance of peace and security in the world. That is why it is essential for the immunity enjoyed by the UN to be as unconditional as possible and for it to be subject to as little debate as possible. Accordingly, only compelling reasons can lead to the conclusion that UN immunity is not proportional to the purpose it is intended to serve.

The Association et al. take the view that compelling reasons of this kind exist in this case, citing in the first place the fact that it is a case of genocide. Essentially, however, they accuse the UN of being negligent in failing to prevent genocide. That is a serious accusation but not so compelling as to prevail over immunity. Secondly, the Association et al. claims that there can be no question of proportionality in the absence of a procedure offering sufficient guarantees of access to a court of law. In this connection they point to the fact that the UN has not, as prescribed by article VIII, § 29, opening words and (a) of the Convention, made provision for any modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a Party.

However, the appeal court argues that it has not been established that the Association et al. are completely without access to a court of law where the events in Srebrenica could be addressed. Firstly, it is not clear why they would not be able to take the perpetrators and those responsible for them to court. Secondly, they brought the State before the Dutch courts, on accusations similar to those levelled at the UN. The State cannot plead immunity in these proceedings. Given both these circumstances, it cannot be said that the right of the Association et al. to access to the courts would be undermined if the plea of UN immunity was accepted.

4.1.2 In so far as grounds 3 to 7 of the appeal allege a lack of reasonableness, they overlook the fact that the answer to the question of whether the UN is entitled to immunity is a decision on a question of law. They also advance a series of complaints against all the major elements of the reasoning that led the appeal court to accept the plea of immunity. Grounds 2 and 3 of the cross-appeal allege that the UN's immunity cannot be reviewed in the light of the right of access to the courts, in any event not in a

case such as the present one relating to action taken by the UN under Chapter VII of the UN Charter.

Basis for and scope of the UN's immunity

4.2 The basis for the UN's immunity (to be distinguished from the immunity granted to its officials and to experts performing missions for the UN) is article 105 of the UN Charter and article II, § 2 of the Convention. The court of appeal was correct to interpret the latter provision – which is an elaboration of article 105, paragraph 1 – in the light of article 31 of the Vienna Convention on the Law of Treaties, to mean that the UN enjoys the most far-reaching immunity from jurisdiction, in the sense that the UN cannot be summoned to appear before any domestic court in the countries that are party to the Convention.

Both the basis for and the scope of this immunity, which is aimed at ensuring that the UN can function completely independently and thus serves a legitimate purpose, are therefore different from those underlying the immunity from jurisdiction enjoyed by foreign states. As stated in section 13a of the General Legislative Provisions Act, the latter, after all, stems from international law (par in parem non habet imperium), and applies exclusively to acts of a foreign state performed in a governmental capacity (acta iure imperii).

UN immunity and access to the courts

4.3.1 As stated in 4.1.1, the appeal court examined, on the basis of the criteria set out by the ECtHR in Beer and Regan v. Germany (ECtHR 18 February 1999, no. 28934/95) and Waite and Kennedy v. Germany (ECtHR 18 February 1999, no. 26083/94), whether the invocation of UN immunity is compatible with the right of access to the courts enshrined in article 6 ECHR and article 14 ICCPR. In the cassation proceedings the State is no longer contesting the argument that this right – which is not an absolute right – also constitutes a rule of customary international law.

4.3.2 Both the cases cited above involved proceedings before the German courts against the European Space Agency (ESA) in which the claimants wanted the court to establish that they had become employees of ESA under German law. ESA, an international organisation, pled immunity from jurisdiction under article XV, §2 of the Convention for the establishment of a European Space Agency of 30 May 1975 in conjunction with Annex I to the same Convention (Dutch Treaty Series 123). The German court had accepted that plea. The ECtHR held that this did not constitute a violation of article 6 ECHR. This conclusion was preceded by the following considerations (the numbering is from the judgment in Waite and Kennedy):

‘59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship between the means employed and the aim sought to be achieved (...).
67. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (...).
68. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.
69. The ESA Convention, together with its Annex I, expressly provides for various modes of settlement of private-law disputes, in staff matters as well as in other litigation (...).’

4.3.3 According to paragraphs 67-69 [of the above judgment], the fact that the Convention for the establishment of a European Space Agency expressly provides for alternative modes of settlement of private-law disputes, which were available to the applicants, was particularly relevant in relation to the ECtHR’s ruling that respecting the immunity of international organisations like ESA does not constitute a violation of article 6 ECHR. It should be noted here that paragraph 67 of the judgment refers to ‘international organisations’ without any qualification but that – in the absence of any consideration concerning the relationship between article 6 ECHR on the one hand and articles 103 and 105 of the UN Charter plus article II, § 2 of the Convention on the other – there are no grounds for assuming that the ECtHR’s reference to ‘international organisations’ also included the UN, in any event not in relation to the UN’s activities in

the context of Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression).

4.3.4 The UN occupies a special place in the international legal community, as expressed by the ECtHR in its decision in the cases of Behrami and Behrami v. France and Saramati v. France, Germany and Norway, ECtHR 2 May 2007, no. 71412/01 and 78166/01. In this decision, which concerns acts and omissions of the United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO Kosovo Force (KFOR) operating in Kosovo pursuant to a UN Security Council resolution, the ECtHR held inter alia as follows:

'146. The question arises in the present case whether the Court is competent ratione personae to review the acts of the respondent States carried out on behalf of the UN, and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

147. (...) More generally, it is further recalled, as noted in paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

148. Of even greater significance is the imperative nature of the principal aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. (...) The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraph 18-20 above).

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. (...)"

In paragraph 27, as referred to above, the ECtHR states inter alia that the ICJ considers Article 103 to mean that the Charter obligations of UN member states prevail over

conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement. And in paragraph 149 the ECtHR holds that since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions to the scrutiny of the Court.

4.3.5 The interim conclusion must be that the appeal court erred in examining, on the basis of the criteria formulated in Beer and Regan and Waite and Kennedy, whether the right of access to the courts as referred to in article 6 ECHR prevailed over the immunity invoked on behalf of the UN.

4.3.6 That immunity is absolute. Moreover, respecting it is among the obligations on UN member states which, as the ECtHR took into consideration in Behrami, Behrami and Saramati, under article 103 of the UN Charter, prevail over conflicting obligations from another international treaty.

4.3.7 However, this does not answer the question of whether, as argued by the Association et al. with reference to the dissenting opinions in the ECtHR's judgment of 21 November 2001 in the case of Al-Adsani v. the United Kingdom no. 35763/97 concerning state immunity, the right of access to the courts should prevail in the present case over UN immunity because the claims are based on the accusation of involvement in – notably in the form of failing to prevent – genocide and other grave breaches of fundamental human rights (torture, murder and rape). On this matter, the Association et al. argue in 5.13 of their writ of summons in cassation:
'There is no higher norm in international law than the prohibition of genocide. This norm in any event takes precedence over the other norms at issue in this legal dispute. The enforcement of this norm is one of the main reasons for the existence of international law and for the most important international organisation, the UN. This means that in cases of failure to prevent genocide, international organisations are not entitled to immunity, or in any event the prohibition should prevail over such immunity. The view that the UN's immunity weighs more heavily in this instance would mean de facto that the UN has absolute power. For its power would not be subject to restrictions and this would also mean that the UN would not be accountable to anyone because it would not be subject to the rule of law: the principle that no-one is above the law and that power is curbed and regulated by the law. Immunity of so far-reaching a kind as envisaged by

the appeal court is incompatible with the rule of law and furthermore undermines the credibility of the UN as the champion of human rights'.

4.3.8 The case of Al-Adsani v. the United Kingdom concerned a claim for damages brought in the English courts against the State of Kuwait. Mr Al-Adsani held Kuwait liable for the damage he suffered as a result of undergoing torture in Kuwait after the Gulf War in 1991. After the English courts accepted Kuwait's plea of immunity, Mr Al-Adsani applied to the ECtHR, arguing, where relevant to the case at hand, that this decision constituted a violation of article 6 ECHR. He took the position that because of the ius cogens nature of the ban on torture the right of access to the courts enshrined in article 6 should prevail over the immunity invoked by Kuwait.
The application was dismissed by the ECtHR by nine votes to eight on the basis, inter alia, of the following considerations:
'61. While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in Furundzija and Pinochet, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity.
62. It is true that in its Report on Jurisdictional Immunities of States and their Property (...) the working group of the International Law Commission noted, as a recent development in State practice and legislation on the subject of immunities of States, the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of ius cogens, particularly the prohibition on torture. However, as the working group itself acknowledged, while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human right norms with the character of ius cogens, in most cases (...) the plea of sovereign immunity had succeeded.
(...)
66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet

acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.'

4.3.9 This majority view was opposed inter alia by the dissenting opinion endorsed by six judges of the Grand Chamber and cited by the Association et al. in support of their case. Part of the dissenting opinion – which agrees with no small proportion of the literature, both Dutch and foreign, on the subject of State immunity – reads as follows:
'3. The acceptance therefore of the ius cogens nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it ex officio, to refuse an applicant adjudication of a torture case. Due to the interplay of the ius rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of ius cogens.'

4.3.10 Even more important than the fact that this opinion does not reflect even the current status of the view accepted by the ECtHR, is the ruling by the International Court of Justice (ICJ), cited by the State in its response to the Advocate-General's advisory opinion, in its judgment of 3 February 2012 in the case Jurisdictional Immunities of the State (Germany vs. Italy: Greece intervening). At issue in this case was inter alia the question of whether the Italian courts should have respected Germany's immunity in cases in which compensation was claimed from Germany for violations of international humanitarian law committed by German forces during the Second World War. The ICJ concluded that they should have.

4.3.11 In so far as relevant here, the ICJ rejected Italy's contention that to deprive Germany of its immunity would be justified by the gravity of the offences on which the claims were based:
'91.The Court concludes that, under customary international law as it presently stands, a

State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. (...)'

4.3.12 Nor did the ICJ accept the argument that, since the rules that were breached by the German forces had the character of ius cogens, they should prevail over Germany's immunity.

'93. (...) Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the Courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.

(...)

96. In addition, this argument about the effect of jus cogens displacing the law of State immunity has been rejected by the national courts of the United Kingdom, [Canada, Poland, Slovenia, New Zealand and Greece], as well as by the European Court of Human Rights in Al-Adsani v. United Kingdom and Kalogeropoulou and others v. Greece and Germany (...).

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of jus cogens, the applicability of the customary international law on State immunity was not affected.'

4.3.13 And finally, in paragraph 101 of its judgment the ICJ held that it could find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.

4.3.14 Although UN immunity should be distinguished from State immunity, the difference is not such as to justify ruling on the relationship between the former and the right of access to the courts in a way that differs from the ICJ's decision on the relationship between State immunity and the right of access to the courts. The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the Association et al. base their claims.

Concluding considerations

4.4.1 The foregoing considerations lead to the conclusion that the complaints on grounds of law in grounds of appeal 3 to 7 in the appeal in cassation are untenable. Nor can the

complaints in grounds of appeal 1, 2, 8 and 9 – the Supreme Court sees no reason to request a preliminary ruling from the Court of Justice of the European Union on ground of appeal 8 – result in cassation. Under section 81 of the Judiciary (Organisation) Act no further reasons for this decision need be given, since the complaints do not warrant the answering of questions of law in the interests of the uniform application or development of the law.

4.4.2 According to the considerations set out in 4.3.1 to 4.3.13 above, the complaints in grounds of appeal 2 and 3 in the cross-appeal are largely well-founded, but this does not result in cassation. Nor do the remaining grounds of appeal result in cassation. Under section 81 of the Judiciary (Organisation) Act no further reasons for this decision need be given, since the complaints do not warrant the answering of questions of law in the interests of the uniform application or development of the law.

5. Decision

The Supreme Court:
in the appeal in cassation:
dismisses the appeal;
orders the Association et al. to pay costs in respect of the cassation proceedings, estimated up to this judgment at €385.34 in disbursements and €2,200 in fees for the State;

in the cross-appeal:
dismisses the appeal;
orders the State to pay costs in respect of the cassation proceedings, estimated up to this judgment at €68.07 in disbursements and €2,200 in fees for the Association et al..

This judgment was given by Vice-President J.B. Fleers as the president of the Division, and Justices A.M.J. van Buchem-Spapens, F.B. Bakels, C.A. Streefkerk and W.D.H. Asser, and was pronounced in open court by Justice J.C. van Oven on 13 April 2012.