Air Quality Litigation in the Netherlands

Phon van den Biesen

Attorney at Law

Amsterdam

Amsterdam, 3 June 2019

overview

- Variety of procedures
  - Administrative courts
  - Civil courts
  - European Union courts
- Variety of bodies of law
  - Administrative law
  - Civil tort law
  - EU Law
  - International Human Rights Law
- Unvariably: Milieudefensie the Lead-plaintiff

Directive 1996/62/EC

- Janecek – case 25 July 2008 - ECLI:EU:C:2008:447
  - Right to an Action Plan
  - Entitled to recourse, especially now that this is a matter of public health (para. 37)

- Milieudefensie v. The Hague, Request to close down certain streets, given air quality values that exceeded the limit values by far
  - Court: improving air quality to levels under the limit values is *not* an obligation of result (WRONG!!);
  - The city has a large margin of appreciation;
  - Sustained by the Council of State on appeal; this Decision made any litigation almost impossible, 18 april 2007, ECLI:NL:RVS:2007:BA3217

Directive 2008/50/EC

Strong lobbying effort of the Dutch Government before the Directive was adopted:

- ‘Raise the limit values’ – not successful
- ‘Postpone the limit values-dates – not successful
- Introduce a derogation-mechanism – successful
- The Netherlands was the first Member State that applied the derogation mechanism

Derogation

- The Dutch applied **Article 22 of the Directive** asked the EC permission for postponement
  - for PM_{10} to 11 June 2011
  - for NO_2 to 1 January 2015;
- Commission honored the request (partly conditional) (2009);
- Milieudefensie formally objected in an effort to test Regulation 1367/2006 (internal review);
- Commission: Request is not-admissible;
- General Court: sustained Appeal (based on art 9, para. 3 Aarhus) and annulled the Commission's Decision;
- the Court annulled the judgment of the General Court and left Milieudefensie empty-handed (13 January 2015, ECLI:EU:C:2015:4)

Derogation

- So, the Dutch Government got the derogation and “enjoyed” higher limit values (60 µg/m³ NO_2 instead of 40 µg/m³) for a prolonged period of time:
- The Minister of Infrastructure and Environment used the derogation to raise speed limits on major Ring-highways from 80 to 100 km/hrs, while the 40 µg/m³ was violated already at 80 km/hrs;
- District Court Rotterdam honored Milieudefensie’s arguments referring to health damage, Human Rights Law, precautionary principle and the “stand-still”-principle of the Directive (21 November 2013, ECLI:NL:RBROT:2013:9074)
- District Court Amsterdam similarly, but adding that the authorities cannot at liberty use up the ‘pollution-room’ up to 60 µg/m³, given the health-repercussions (17 January 2014, ECLI:NL:RBAMS:2014:136
- 100 became 80 km/hrs again (also in The Hague!!)

Civil litigation

- Choice for Civil Law Courts not Administrative Law
  - ➢ The NSL (Dutch invention "replacing" the Air Quality Plan of Art. 23 of Dir.)

    is not a 'Decision' that can be attacked through administrative proceedings;
  - ➢ The case is to go beyond requesting a true Air Quality Plan and requesting enforcement of limit values

- Tort-case against the State of the Netherlands
- Requesting Declaratory – Judgments
- Including requests for injunctions

Civil Litigation - Demands

A. Request Declaratory Judgment – Tort committed by the State:

I. violation of Articles 2, 3 and 8 ECHR, Article 6 UN-CCPR and Article 12 UN-Ecosoc treaty by not working towards WHO-advisory Limit Values

II. In the alternative: lowered by 10 µg/m³ for preventive/precautionary reasons

III. More in the alternative: violation of limit values of Dir. 2008/50/EC

Civil Litigation - Demands

B. Request Orders:

IV. To end the violation of the WHO values within half a year or a time-limit to be set by the Court, including – if need be – the presentation of an Air Quality Plan in conformity with Art. 23 Dir.

V. To end the violation of the Directive Limit Values lowered by 10% (or a percentage to be set by the Court)within half a year or a time-limit to be set by the Court , including – if need be – the presentation of an Air Quality Plan in conformity with Art. 23 Dir.

VI. To end the violation of the Directive Limit Values within half a year or a time-limit to be set by the Court , including – if need be – the presentation of an Air Quality Plan in conformity with Art. 23 Dir.

Civil Litigation – Demands – Injunction case

Request to order the State:

I. to immediately start producing an Air Quality Plan in conformity with Art 23 Dir;

II. to

a) identify within 2 weeks the hotspots where Limit values are not met;

b) immediately after that: to take measures that effectively will end limit value-violations;

III. to immediately refrain from any activities that will - upon advise of RIVM – lead to continued or renewed violations of the Dir. Limit values

Civil Litigation – Judgment – Injunction case

Judgment of 7 September 2017, ECLI:NL:RBDHA:2017:10171

I. In conformity with the demand

II. In conformity with the demand, however without II b;

III. In conformity with the demand

Appeal against III, no appeal against I and II

Civil Litigation – Judgment – Main case

Judgment of 27 December 2017

- Nightmare: the Court made a mess of the issues involved;
- Declared that most of the claims were not-admissible since these would be claims for the Administrative Courts;
- In spite of the above, the Court does provide a negative Judgment on each of the demands

Civil Litigation – Judgment – Main case

I. Violation of Human Rights since no effort is made to effectively respect WHO advisory limit values:

the Court accepts that the ECHR-provisions provide for a legal basis for the demands; however: State has declared the WHO-values to be official policy, but the “how” and “when” questions fall within the margin of appreciation, while the fair balance test needs to be applied;

conclusion: no HR violations, demand rejected

Civil Litigation – Judgment – Main case

II. The prevention- and precautionary approach

The Court has changed this demand into a request to apply a correction on the Limit values due to possible technical aberrations in the methods used to measure Air Quality and concludes that such correction is already incorporated in the limit values themselves;

conclusion: no basis for demand, demand rejected

Civil Litigation – Judgment – Main case

III violation of limit values

the Court agrees that the limit values are still violated, but concludes that the plaintiffs have not suffered any damages;

the Court, then, continues to look into the art 23 Dir. Rule: if violation, then, the obligation is to bring the quality beneath the limit values within the shortest possible period in time and continues here with accepting a wide margin of appreciation;

conclusion: demands rejected

IV– VI since these claims –in the eyes of the Court - depend on the fate of I – III all of these demands are rejected as well.

Civil Litigation – Judgment – Appeal Injunction case

Judgment of the Court of Appeal of 22 May 2018

The appeal was restricted to item III in the injunction case

("to immediately refrain from any activities that will - upon advise of RIVM – lead to continued or renewed violations of the Dir. Limit values"), which was, indeed, sustained by the Injunction-Judge, like the rest of the demands.

Court of Appeal sustains the appeal and sets aside part III of the Judgment of the Injunction Judge, since "upon advise of the RIVM" does not have a basis in law.

Civil Litigation – Appeal – Main case

Judgment 7 May 2019, ECLI:NL:GHDHA:2019:915

- End of nightmare, end of mess;
- Declared that the claims were admissible since these are *not* claims for the Administrative Courts;
- Judgment: demands, based on HR and precautionary principle rejected; Injunction-Judgment confirmed

Air Quality Litigation in the Netherlands

Phon van den Biesen

Attorney at Law

Amsterdam

Amsterdam, 3 June 2019