

THE NETHERLANDS

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1. National court system

Dutch civil jurisdiction in first instance is attributed to the nineteen district courts. Five Courts of Appeal have jurisdiction to decide on appeals. The Supreme Court is competent to decide on appeal in cassation. Administrative jurisdiction is organized in a more loosely manner. First, before lodging an appeal before a court against a decision, every individual is obliged to make an objection before the public authority which made the decision in question. Subsequently, administrative sectors of the district courts may decide on appeals. Decisions of district courts may be challenge at one of the three appellate courts. The Central Appeals Tribunal is competent in cases concerning civil servants en social security. The Trade and Industry Appeals Tribunal is competent in economic matters. In all other administrative matters, the Council of State, judicial division is the competent court.

In civil procedure, the party whom the court ruled against and does not want to submit to this decision may in principle bring his action to a Court of Appeal (Art. 332-356 Code on Civil Procedures). However, some exceptions and restrictions to this principle apply. Firstly, the financial interest of the case the District Court had to judge has to be above € 1.750.

Otherwise the claimant has no right of appeal. Yet, on limited grounds an action may be brought to the Supreme Court. Additional limitations exist both in terms of exclusions to the right of appeal and the opportunity of access to the Supreme Court in specific circumstances. For instance, no right of appeal exists in the situation in which the court decides about the termination of an employment contract in specific (serious) circumstances (Article 7:685 paragraph 11 Civil Code). Such exclusions to the right of appeal are more common in case of procedural decisions such as the decision to a challenge request (Article 39 section 5 Code on Civil Procedures). Leave to appeal may still be granted such cases, e.g. if the manner in which the initial decision was made is contrary to principles of proper justice with the result the requirements of a fair and impartial trial are not met.

In principle, the appeal shall be lodged within three months after the date of the District Court's decision. The Court of Appeal does not decide on parts of the first decision which parties did not contest. On the other hand, if an objection is considered valid the Court of Appeal takes parties arguments and defends they have made in the procedure at the District Court process into account. The Court of Appeal may annul the lower court's judgement and replace it with its own. The highest court is the Supreme Court which mainly deals with cassation appeals. Cassation implies the possibility to assess the judged case on some (limited) aspects. The first aspect is the manner in which the lower court has conducted the process and reasoned its judgement. The second aspect is the way in which the court explained the law. The Supreme Court may annul the lower court's judgement and decide that another lower court has to make the final judgement.

According to Article 1050 paragraph 1 Code on Civil Procedures an appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have agreed thereto. Similar provisions apply to binding advice. Furthermore, binding advice decisions as well as the arbitral award are open to limited judicial review.

Appeal courts in administrative matters are the Council of State (general competence), the Central Appeals Tribunal (social security and civil servant cases), the Trade and Industry Appeals Tribunal (economic cases) and the Courts of Appeal (fiscal matters). In specific areas, exceptions are applicable to the general rule that individuals may challenge administrative decision in two instances. Examples are: environmental cases en cases concerning major infrastructural works, some economic matters (such as telecommunications law in which the Trade and Industry Appeals Tribunal decides in first and only instance) and a number of matters in the field of aliens' law (e.g. visas of a duration of less than three months, follow-up decisions on detention of aliens).

If appeal is possible, both questions of law and questions relating to the facts of the case may be reviewed. The Council of State has limited the scope of appeal by deciding that grounds that have not been raised in the initial procedure (even though that would have been possible) will not be open to review.¹ This is founded on the argument of an effective use of remedies and is applied in case of grounds derived from EC and ECHR law as well. New evidence relating to grounds mentioned in first instance is accepted. Other appellate courts do allow new grounds and evidence being put forward in appeal.

Procedural rules in appeal are almost identical to those applicable in first instance. Examples are the obligatory oral hearings, rules on equality of arms etc. If the appeal is considered justified, the appeal court will, in principle take an independent decision itself, without referring the case back to the court of first instance.

The division of jurisdiction between civil courts and administrative courts in the Netherlands necessitates an analysis of both for the purposes of this study. If issues of equal treatment are related to a relation between individuals, civil courts are competent. If such issues result from an administrative decision, the administrative court has jurisdiction. Access to justice is governed by general legislation and case-law that predominantly predates EU legislation in the field of the free movement of persons and equal treatment. Thus, the influence of these domains on Dutch access to justice provisions is limited. An exception is the requirement prescribed by article 13 Regulation 562/2006 (Schengen Borders Code) according to which a refusal of entry at the border must be written and substantiated, and must mention the relevant legal remedies. This has led to a change of the Dutch practice, according to which oral refusals were common.

The Constitution and various statutes include the necessary safeguards for the independence of the judiciary. Judges are appointed for life, specific employment protection guarantees apply as well as provisions relating to the legal position of judges in general. Moreover, rules for challenge and excusal guarantee judicial independence.

In equal treatment cases, the Dutch Equal Treatment Commission (CGB) is a relevant institution as well, albeit not a judicial one. The CGB is an independent institution founded by the Equal Treatment Act (ETA). Its objective is to safeguard equal treatment and to challenge discrimination and exclusion. The ETA is based on article 1 of the Dutch Constitution and also on European and international legislation. Based on its legal competence the CGB develops and enforces equal treatment law. The CGB's main tasks are: to deliver opinions, to

¹ Council of State 12 July 2006, AB 2006, 388 (ground derived from the ECHR); Council of State 21 June 2006, AB 2006, 339 (ground derived from EC law).

advise, to investigate, to educate and to mediate. The CGB advises and educates on equal treatment (the ETA prohibits direct as well as indirect discrimination) but it can also give an opinion in a specific case. Any person who thinks that he or she has been discriminated against can file a petition at the CGB. In order to ask for an opinion, one must be a direct victim of this unequal treatment. When a petition is received and the CGB is authorized it will investigate whether equal treatment has been violated. In some respects the CGB is similar to a court. However, an important difference is that the CGB searches for information itself. Other differences are that filing a complaint is free of charge and that legal aid by a lawyer is not needed. The opinions of the CGB are not legally enforceable. This means that the CGB cannot force the discriminating party to comply. However in practice the opinions are usually complied with. When parties decide to take their case to a court, the Court has to take the opinion of the CGB into account in their judgement. The CGB can investigate on its own initiative in specific areas where systematic or persistent patterns of discrimination are suspected. The CGB advises among others the government and organizes courses and public campaigns. The CGB can also refer parties on their request to an external mediator.

2. Restrictions regarding access to justice

In Dutch civil procedural law, the right of access to justice is not unrestricted, but the few remaining limitations that still exist do not undermine access to justice. In the following, a distinction will be made between formal and personal restrictions.

Civil procedure: formal restrictions:

- Some formal requirements with regards to the introductory documents with which an individual initiates court proceedings are in force. Statute law distinguishes between the petition procedure and the summons procedure. In principle, claims relating to property rights must be initiated by petition and other claims by summons. Formal requirements of petitions are listed in articles 45 and 111 of the Act on Civil Procedure (Rv) and include requirements such as: mentioning name and domicile of both claimant and defendant, claim and motivation thereof, designated court or tribunal, and, if a court session takes place, date and time of that session, means of evidence etc. Petitions should be issued by a 'bailiff' in a way prescribed by law. Summonses are formalized to a lesser extent, especially since the 'deformalization' process in 2002. As a matter of principle, faults in compliance with the statutory rules will only be sanctioned if the interest of the rule which has been infringed has actually been violated. If that is not the case, statute law provides for ways to mend such infringements. Examples are laid down in articles 66 section 2 Rv, 69 ff. Rv; and 120 Rv.

- Various time limits exist in Dutch civil procedure law. Examples are the period that needs to be observed between serving a petition and the date of petitioning, terms for submitting evidence and invoking remedies.

- Time limits. In civil procedural law, general periods of limitation range from 1 to 30 years (but in general 5-20 years). Specific periods of limitation and periods of compliant restrict the possibility to enforce rights in time as well (art. 3:306 ff. Civil Code).

- In exceptional cases, civil procedural law provides for obligatory preliminary procedures. This may include obligations for deliberation with the defendant (e.g. art. 3:305a section 2 Civil Code). Such provisions, however, do not hamper access to justice and are in line with Council of Europe recommendation that encourages its Member States to provide for friendly settlement of disputes, either outside the judicial system, before or during judicial proceedings.²

- The general right of access to justice for interest groups is limited to legal associations and corporations which enjoy full legal personality. Moreover, such legal entities will only be declared admissible if they, according to their statutes, represent the interests that are at stake in the concrete legal action at hand. They must also prove (previous) activities in the field of representing those interests.³ By way of exception, e.g. in the case that for the protection of specific interests individual actions are no viable option, civil courts may declare legal entities admissible on the bases of their statutes alone.⁴ The verdict in case of interest groups is limited to making the court decision public, compensation in financial terms has been excluded. A separate arrangement for dealing with compensation has been created with the 'Act on the collective settlement of mass losses.' 2005. This act allows for compensation for the individual members of a given group with the possibility to opt out of the collective settlement. On the basis of article 3:305a of the Civil code individual access to justice remains fully intact in case of group actions. De court decision is only binding on the claimant and defendant.⁵

Civil procedure: personal restrictions:

- Rights of access to justice may also be restricted for specific categories of persons, according to European case law, especially for those not possessing full legal capacity, in particular under-aged and those under legal constraints. This is the case in the Netherlands as

² Smits 2008, p. 48.

³ Supreme Court decision: HR 27 juni 1986, NJ 1987, 743; Nieuwe Meer.

⁴ HR 18 december 1992, NJ 1994, 139, HR 2 april 1993, NJ 1993, 573.

⁵ Smits 2008, p.79 ff.

well.⁶ Minors need to be represented by their legal representatives, but some exceptions exist to guarantee access to justice in given circumstances. Some have argued minors should obtain full legal capacity, but that has not been realized.⁷ Those under legal constraints have individual access to justice with regard to the establishment and rising of legal constraints.⁸ Also in other areas, the procedural rights of persons under legal constraints have been extended within the perspective of access to justice.⁹

Administrative procedure:

To object to or lodge an appeal against a decision, claimant must be qualified as interested party in the sense of Article 1:2 General Administrative Law Act (GALA).¹⁰ This requires the interests of the person to be directly affected by the decision. This requirement is interpreted in a broad sense, to the extent that those concerned may always invoke EC rights before a national court. If a person fulfills the criterion of interested party, he may rely on all rules of law before the court, even though these rules are not specifically designed to protect its rights or interests. Access to justice for environmental groups and other non-governmental organizations (NGOs) is relatively generous as well. Article 1:2, section 3, GALA, prescribes that ‘the interests of NGOs are deemed to include the general and collective interests which they particularly represent in accordance with their object and as evidenced by their actual activities’. The object of an NGO may, however not be formulated in too broad terms but must be ‘either functionally or geographically limited’, and the actual activities must include more than merely initiating and pursuing judicial proceedings¹¹.

Before lodging an appeal before the court, the interested party is obliged to make objections before the authority which took the decision. The time limit for submitting a notice of objection or (higher) appeal shall be six weeks (Article 6:7 of GALA). In case the time limit has not been observed, claimant will be declared inadmissible - unless it cannot reasonably be held that the claimant was in default (Article 6:11 of GALA). This –fatal- effect is applied in case of the enforcement of EC rights as well. Dutch administrative courts consider this to be in line with the case law of the European Court of Justice (ECJ), in particular the Rewe-Comett case law. In their view, the practice complies with the principle of effectiveness,¹² as

⁶ Smits 2008, p. 84 ff.

⁷ Smits 2008, p. 89 referring to Brunning 2006, p. 143-146 and also some Supreme court decisions: HR 31 oktober 2003, NJ 2004, 315 en HR 4 februari 2005, LJV AR4850.

⁸ Conform Winterwerp decision by the ECtHR 24 oktober 1979.

⁹ See e.g. Supreme Court decisions: HR 28 maart 1980, NJ 1980, 378. HR 28 januari 1994, NJ 1994, 687.

¹⁰ The Dutch law on administrative procedure is codified in the General Administrative Law Act (GALA – Algemene wet bestuursrecht).

¹¹ Council Of State 1 October 2008, AB 2008, 348 (Stichting Openbare Ruimte).

¹² Case 33/76 Rewe [1976] ECR 1989; case 45/76 Comet [1976] ECR 2043.

fatal time limits are justified by legal certainty considerations and the six-week time limit is considered 'reasonable'.¹³

The notice of objection or (higher) appeal shall be signed and shall contain at least: the name and the address of the claimant; the date; a description of the decision against which the objection or appeal is addressed; the grounds for the objection or appeal (Article 6:5 of GALA). It is, however, possible for an individual to appeal and including grounds for appeal only in later instance (pro forma objections or appeal). Administrative authorities may set a deadline (depending on the complexity of the matter between two and four weeks) to complements the grounds for appeal. Furthermore, for higher appeal a registry fee is levied.¹⁴ A claimant that does not fulfill the requirements will be declared inadmissible.

In conclusion, the right of access to justice is neither in civil law nor in administrative law unlimited. The restrictions that are imposed, however, seem reasonable in the light of effectiveness judicial procedures and do not fundamentally impair or cut off individual's right of access to justice.

3. Length of judicial proceedings

Civil law cases are in first instance usually brought before the Canton-department of the District Courts. If claims are higher, Civil-departments of the District Courts may be the competent authority in first instance. Secondly, attention will be paid to administrative cases which include all free movement cases. It must be noted that specific data on the length of procedures in the the area of non-discrimination are not available.

In Civil Law there are no statutory provisions regarding to the length of proceedings as a whole or regarding to the different stages of the process. The judiciary strives to decide the majority of cases within six to twelve months from the initiation of proceedings by the individual.¹⁵

¹³ See Supreme Court 18 February 2005, AB 2005, 119; Central Appeals Tribunal 23 December 2002, AB 2003, 209; Trade and Industry Appeals Tribunal 19 July 2000, RAwb 2000, 158.

¹⁴ In first instance for natural persons the fee is 41 euro in sociale security cases and 150 euro in other cases: legal persons have to pay 297 in all cases. In appeal: euro 223 for natural persons, euro 447 for legal persons.

¹⁵ Statistical data in this and subsequent sections have been obtained from the Dutch Council for the Judiciary (Raad voor de rechtspraak). The Council issues annual reports (in Dutch only) which are accessible via internet: www.rechtspraak.nl. For this study we used the 2008 reports: <http://www.rechtspraak.nl/NR/rdonlyres/79E33236-D42C-464A-880C-1E332F006387/0/jaarverslagrechtspraak2008nieuw20090608.pdf> and http://www.rechtspraak.nl/NR/rdonlyres/E4D94FD0-01D0-49A4-97F6-F1824C261971/0/08668HRjaarverslag2008_clickablePDF.pdf

In 2008, at the Canton-department of the District Courts it took in average two weeks until a decision was reached in non-contradictory proceedings and nineteen weeks in contradictory proceedings. The average length of Family law cases in this respect was five weeks.¹⁶

At the Civil-department of the District Courts the period between the institution of proceedings by the individual and the moment a decision is reached is longer. The average length of contradictory proceedings was sixty-one weeks (in 2005 eighty-two weeks); of non-contradictory procedure six weeks (seventy percent of the cases were concluded within a month). Seventy-one percent of the appeals in summons procedures were concluded within two years, sixty-six percent of the appeals in application procedures within three months and eighty-eight percent of the family law application procedures within one year. Finally the average length of proceedings at the Supreme Court: application procedures two hundred ninety-nine calendar days and summons procedures five hundred forty calendar days.¹⁷

Administrative authorities must decide upon an objection within six weeks, or twelve weeks if it has entrusted the case to an external committee. The authority may defer the decision for a maximum of four weeks (Article 7:10 of the General Administrative Law Act (GALA)). In practice, these limits are often exceeded. Against the failure to decide on objections in due time, the interested party can lodge an appeal before the court (Article 6:2 GALA). If the court determines that the time limit has indeed been exceeded it will set a time limit for the administrative authority to decide on the objection (Article 8:72, section 5, GALA). The court may determine that, in case the authority does not comply with this new time limit, a penalty payment to be fixed in the judgment is payable to the interested party (Article 8:72, section 7, GALA).

The following figures are relevant for the average length of administrative procedure in 2008. Cases from the category 'Administrative law – General' take in first instance (Administrative departments of District courts) on average 46 weeks to be concluded. Individuals have neither in civil proceedings nor in administrative procedures a remedy at their disposal to challenge unreasonable delays which are attributable to the court.

Because arbitral proceedings shall be conducted in such a manner as agreed between the parties the time taken from the institution of proceedings by the individual until a decision is reached may vary considerably. The Netherlands Arbitration Institute (NAI) offers fast, effective arbitral proceedings. The average NAI arbitration takes approximately nine months

¹⁶ <http://www.rechtspraak.nl/NR/rdonlyres/79E33236-D42C-464A-880C-1E332F006387/0/jaarverslagrechtspraak2008nieuw20090608.pdf> at p. 38 and 39.

¹⁷ http://www.rechtspraak.nl/NR/rdonlyres/E4D94FD0-01D0-49A4-97F6-F1824C261971/0/08668HRjaarverslag2008_clickablePDF.pdf, at p. 161.

from request to final award. On the other hand, complex cases may a substantial longer period.

Binding advices are conducted in the way agreed upon by the parties as well, so this results in a mixed picture with regard to length of procedures as well. However, in 2008 the average binding advice of the *Committee that may issue binding advices in consumer affairs* took 5.2 months from hearing the parties to reaching a decision. In general, administrative procedures are not subject to statutory time limits either. Administrative courts strive to finish regular procedures within one year.

In conclusion, in the absence of statutory provisions, court proceedings may take several years to conclude. Administrative procedures are usually more quickly concluded than civil procedures, but there are also big differences between the two main civil procedures.

4. Are procedures concluded within a reasonable time?

According to Article 20 Code on Civil Procedures both the court and the parties themselves are obliged to prevent unreasonable delays. Since the review of 2002, the Code on Civil Procedures contains several efficiency provisions on the summons procedure. The length of the procedure principally depends on the circumstances surrounding the case; the complexity, the behaviour of the parties etc. Hardly any examples exist in civil procedural law of cases in which the civil court awarded compensation for excessively long procedures. An exception is a recent case of the Court of Appeal of The Hague of 24 February 2009, in which the court awarded compensation for non-material damages due to tension and anxiety which was the result of the unreasonably long wait for the arrival of the court decision.¹⁸ It applied a rate of 1250 per year. It is, as yet, unclear whether the Supreme Court will follow the decision of the Court of appeal. Up until now, the Supreme Court held that exceeding the reasonable time-limit by national courts is not so serious that it would justify compensation on the part of the State.

Also some other cases analyzed for the purposes of this study took an extremely long time to conclude. Other final court decisions were, however, concluded in a very reasonable period. Also on the basis of the analysis of the cases in the field of non-discrimination it must, therefore, be concluded that procedures are in general concluded within a reasonable period of time, but negative exceptions to this general rule do occur.

¹⁸ Court of Appeal The Hague 24 February 2009, LJN BH4212.

Furthermore, it may be concluded that objection procedures and procedures at administrative courts may be lengthy and the reasonable time limit from Article 6 of ECHR may be threatened. In response to ECtHR case *Kudla*,¹⁹ the highest administrative courts in the Netherlands have developed a system according to which fixed time limits have been introduced, as well as provisions on compensation in case of exceeding these limits. This system is applied as well to decisions to which article 6 of ECHR does not apply. In administrative procedures, the *dies a quo* of the reasonable time is the moment the claimant objected to the administrative decision as from this moment onwards a conflict on the determination of a civil right is at stake.²⁰ For administrative decisions that must be qualified as criminal charge (e.g. punitive fines), the point of departure is the moment at which the administrative authority has taken action from which the claimant could reasonably expect a punitive fine would be imposed.²¹ The *dies ad quem* of the reasonable time is the moment on which a definitive decision on the legality of the administrative decision has been made. To assess whether a specific length of procedure may be considered reasonable, the courts use the criteria of the ECtHR: the complexity of the case, actions on the part of the administrative and judicial authorities and the interest of the claimant.²² The highest administrative courts have developed the following guidelines for the application of the ‘reasonable time’-requirement:

- Council of State and Trade and Industry Appeals Tribunal: total length of the procedure (including appeal) should not exceed five years: objection procedure: max. one year; administrative court procedure: max. two years; appeal: two years.

- Central Appeals Tribunal and Supreme court: total length of the procedure should not exceed four years: objection procedure: max. ½ year; administrative court procedure: max. 1 ½ year; appeal: max. two years.

Exceeding the reasonable time limits in administrative procedures results in awarding compensation (or a lowering of the fine imposed by the administrative authority).²³ Non-material damages is compensated on the basis of the ‘tension and anxiety’- criterion (500 euro per six months).²⁴ Material damages are compensated on the basis of the regular criteria.

In conclusion, a positive aspect with regard to the length of procedures is the judicial guidelines which seek to limit the overall length of the procedures. Lengthy procedures do

¹⁹ ECHR 26 October 2000, appl.nr. 30210/96 (*Kudla*).

²⁰ Cf. ECHR 9 December 1994 (*Schouten-Meldrum*), ECtHR 9 December 1994, Appl. no 9005/91 and 9006/91.

²¹ Cf. Supreme Court 22 April 2005, JB 2005, 166.

²² Cf. ECHR 27 June 2000 (*Frydlander*), ECHR 29 March 2006 (*Scordino*); ECHR 29 March 2006 (*Pizatti II*).

²³ Cf. Council of State 4 June, AB 2008, 229; Central Appeals Tribunal 11 July 2008, AB 2008, 241.

²⁴ ECHR 29 March 2006 (*Scordino*), See also ECHR 29 March 2006 (*Pizatti II*).

occur, however, which runs the risk of not meeting the minimum requirements applicable in the ECHR framework. It is difficult to set concrete standards, as aspects such as the complexity of the case may require a longer duration on the procedure. Moreover, both on the basis of the general statistical data and on the analysis of the non-discrimination, it may be concluded that extremely lengthy procedures are exceptional.

5. Does provision exist for speedy resolution of particular cases?

In Civil Law provision does exist for speedy resolution of particular cases which reduce the length of legal process considerably. According to Article 254 of the Code on Civil Procedures, this is possible in all urgent cases in which, given the interests of the parties, an immediate provisional measure is required. Yet, a complex case in terms of factual or legal issues is not suitable to be settled in such a summary procedure.

In 2008, 90 percent of the Civil-department summary proceedings were concluded within three months; ninety-six percent of the Canton-department summary proceedings were concluded within this period of time. Some of these procedures were even concluded within a few days.

Also the number of cases in the field of non-discrimination analysed for the purposes of this study indicate that the possibilities for speedier resolution add up to a substantial time gain.

According to Article 1022 section 2 of the Code on Civil Procedures an arbitration agreement shall not preclude a party from requesting a summary proceedings judge to grant interim measures of protection or from applying for a decision in summary proceedings. Moreover, parties may agree to empower the arbitral tribunal or its chairman to render an award in summary proceedings, within the limits imposed by article 254 Code on Civil Procedures (see Article 1051 thereof). Whether a speedy resolution of particular binding advice cases is available depends on the parties' agreement in this respect.

In the case of administrative procedure, pending the decision on an objection or an appeal before the court, the interested party is entitled to request the president of the court to grant a provisional remedy (Article 8:81 of GALA). Possible remedies are the suspension of the contested decision or a positive interim measure. The criteria for assessing a request for interim relief are: urgency of the case; a provisional assessment of the legality of the decision; the scope of the requested order; the balancing of the interests involved. In a procedure for

provisional remedies the court normally decides within one or two month. However, if really necessary the procedure may even be finalized within a few days. The procedure results in a provisional judgement. However, if the president considers that further enquiry cannot reasonably be expected to contribute to an assessment of the case, he may give immediate judgement on the merits (Article 8:86 of GALA).

Furthermore, if a case is urgent the court may order that the proceeding be expedited (Article 8:52 of GALA). In that case, the relevant time limits will be shortened to enable the court to decide within 2 or three months. Criteria such as the urgency and sensitivity of the case are relevant in this respect.

Expedited procedures are, in conclusion, extremely effective in reducing the length of procedures. The time gain is, indeed, substantial.

6. Is it possible to waive the right of access to a judicial body?

Article 17 of the Dutch constitution provides that: “[N]o one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law”. This provision implicitly allows for private individuals to agree to subject possible conflicts to others than public courts. It is required, however, that such individuals enjoy the free possession of these rights and that statute law does not explicitly awards exclusive jurisdiction to public courts or tribunals. Examples are decisions on divorce, limitation of legal position etc. Individuals may, moreover, agree to subject possible property conflicts –in situations defined by statute – to arbitration (art. 1020 ff. Rv) or binding advice (art. 7:904 jo. 7:900 Civil Code). The same is true in employment relations: the decision to subject any possible conflicts relating to the employment relation to arbitration is, however, usually laid down in collective agreement rather than in individual employment contracts.

The Dutch arbitration provisions are based on the New York Convention.²⁵ On request of one of the parties the summary proceedings Judge of the District Court can grant a leave for enforcement of a final or partially final arbitral award which is not open to appeal to a second arbitral tribunal, or which is declared provisionally enforceable, or a final or partial final award rendered in arbitral appeal. Enforcement of an arbitral award may be refused by the summary proceedings Judge if the award or the manner in which it was made is manifestly

²⁵ 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention, internet: <http://www.uncitral.org/pdf/1958NYConvention.pdf>, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

contrary to public policy or good morals, or if a penalty for non-compliance is imposed in violation with the applicable provisions. When a leave of enforcement is granted, the arbitral award can be enforced the same way as a state court judgement.

Binding advice can be defined as follows. In a contract of settlement, the parties bind themselves towards each other in order to end or avoid any uncertainty or dispute in respect of what, in law, shall apply between them, to a settlement which shall also apply to the extent that it derogates from the previously existing juridical situation. Although unusual in Dutch Law, a settlement to terminate such an uncertainty or dispute in the field of the law of property, property rights and interests is valid, notwithstanding that it proves to be in breach of mandatory law, unless it would also, as a content or necessary implication, be in breach of good morals and public policy. The settlement can be reached pursuant to a joint decision of the parties or to a decision entrusted to one of them or to a third person.

The legislator has entrusted arbitrators with the same powers as ordinary courts, such as imposing penalty payments. In case of conviction, the claimant may seek permission of the ordinary court to execute the verdict, which is called the *exequatur*. This may be denied if the content of the arbitral decision conflicts with e.g. public order demands. The *exequatur* enables execution of the arbitral verdict with the necessary help of public authorities (the verdict, thus, has the status of executorial writ). In case of binding advice, claimant may claim enforcement of the advice at a civil court. The civil court will marginally review the contents of the advice and the way it has been adopted. Sometimes parties will contractually guarantee enforcement of binding advices. In conclusion, parties may waive their access to justice rights, but a limited review by civil courts remains to exist, thus protecting the right to redress as well.

According to the case law of most administrative courts, the right of access to justice is a right of public policy, and may thus not be waved by individuals.²⁶ An agreement between an individual and public authorities waving access to justice rights will therefore not be enforceable. The administrative court will declare the individual admissible and consider the case on its merits.

It must be noted that with regard to equal treatment, the Equal Treatment Act provides that conditions made in contracts which are contrary to the substantive rights laid down in that act are void.

²⁶ Council of State 27 February 1990, AB 1990, 597 (zomerwoning Tubbergen); Central Appeals Tribunal 17 May 1984, AB 1985, 347.

In conclusion, the right of access to justice may be waived, especially by contractually deciding that possible conflicts will be subjected to arbitration or binding advice. Courts retain the possibility for a limited review, which may be seen as guarantee of the right of access to justice for individuals.

7. Access to non-judicial procedures

In case of non-discrimination law, any person who feels that he or she is treated unequally can file a petition at the Equal Treatment Commission (CGB). The Equal Treatment Commission²⁷ was established in its present form in 1994 as a statutory body. It derives its existence from Chapter 2 of the Equal Treatment Act (ETA), which came into force on 1 September 1994.²⁸ The ETA refers to discrimination on the ground of religion, belief, political conviction, race, sex, nationality, hetero- or homosexual orientation or civil status. The powers of the CGB on all of these grounds are described in the Act. With the coming into force of the Equal Treatment (Disability or Chronic Illness) Act in 2003 and the Equal Treatment in Employment (Age Discrimination) Act in 2004, the powers of the CGB have been expanded to these areas as well.

According to section 12 of the ETA, the Commission is empowered to investigate, on the basis of a written request, whether a distinction in the sense of the Act has been made. It can publish its opinion about the case. The CGB can also investigate on its own initiative if a distinction is made systematically and publish its opinion. The opinion may be sent to the plaintiff and to the referring party and the opinion may include recommendations or advice. In cases when the Commission deems it necessary, it may send the opinion to the relevant ministers, to employers' organisations, trade unions, organisations in the public and private sector and consumers' organisations. The Commission also has the power to demand relevant information and materials from anyone. After the collection of information the CGB organizes a hearing. The hearing is open to public. Both parties can testify and bring an expert along (article 21 of ETA). After the hearing the CGB gives its opinion within eight weeks. The CGB cannot force the discriminating party to comply. It actively follows up on its opinion to strengthen the impact of its opinions. In 2008 the CGB received 432 requests for an opinion.

²⁷ For the purposes of this study, the Equal Treatment Commission will be referred to with its Dutch acronym, CGB.

²⁸ The Netherlands/Equal Treatment Act, Section 11. For the English translation of the Act, see: <http://www.cgb.nl/cgb170.php>.

Specific mention deserves Article 15 of the ETA. This section gives the CGB the power to bring a legal action with a view to obtaining a ruling that conduct contrary to the ETA, is unlawful. The Commission may request the court to prohibit such conduct or request that the court order the consequences of such conduct to be rectified. Since the establishment of the ETA in 1994, the Commission has never used its powers under this section. According to the CGB, this type of legal action could create unwanted tension with the task of the Commission in its judging task. To act as a prosecutor could jeopardize the CGB's role as a semi-judicial body.²⁹

Because of its position as an independent, semi-judicial body, the CGB is not in a position to support victims of discrimination.

As the practice of equal treatment cases in the Netherlands since the adoption of the Equal Treatment Act in 1994 has shown, persons confronted with discrimination hardly ever walk the road to the civil court. Most cases are being dealt with by the Equal Treatment Commission, which is not in a position to apply sanctions. Although complainants may ask for a court order for compensation or other forms of sanctions, after an opinion of the CGB, most of them rest their cases and do not go through the trouble of initiating a court case. It is assumed that this has to do with a number of factors:

Mediation has been a standard legal practice in the Netherlands to resolve various conflicts.³⁰ In response to the need to find alternative ways to address discrimination cases, the CGB started a project to test the possibilities for mediation in equal treatment conflicts in 2005. The project lasted 18 months. The mediation procedures were carried out by qualified mediators, who had followed a legal training by the CGB. The results of the project showed that almost three quarters of the cases where mediation was applied, had a positive outcome for all parties. The time required to reach a solution was shorter than the time needed for an opinion and the costs were lower than a procedure leading up to an opinion. It has been noted that mediation and the statutory task of the CGB to enforce the equal treatment legislation are not always compatible. The objective of mediation is to reach a solution in a conflict, whereas an opinion of the CGB is meant to create clarity about an incident, a practice or a measure in relation to equal treatment norms. However, the immediate cause for some requests for an opinion is the existence of a conflict. These cases are suitable for a mediation route.³¹

²⁹ Commissie gelijke behandeling (2005), *Het verschil gemaakt: evaluatie AWGB en werkzaamheden CGB 1999-2004*. Utrecht: CGB, p.83.

³⁰ <http://www.ejcl.org/64/art64-8.html>

³¹ D. Allewijn (2008) *Soms een voordeel: mediation naast oordeel [Occasionally an advantage: mediation next to an opinion.]* in: *Gelijke behandeling: oordelen en commentaar 2007*, Utrecht: CGB, p. 279-294.

As a result of the pilot, the CGB decided to establish a permanent mediation programme. The available mediators belong to a pool of ADR-qualified persons, who received training in non-discrimination law and policies. After a request for an opinion has been received, the CGB assesses whether the case is suitable for a solution through mediation and then offers the parties the opportunity to follow a mediation procedure. If one of the parties refuses, the regular opinion procedure will be followed. Parties themselves may also ask for mediation.

In November 2007, around 45 mediations were brought to an end. Of these, three quarters were successful. Ten of the successful procedures were done in the year 2007.³² Due to the nature of mediation and due to data protection regulations, the outcomes of individual mediation procedures are not published.

The available information and the number of mediations are insufficient to conclude whether the rights of victims in these procedures are protected or whether they are informed and aware of their rights for alternative possibilities.

In order to bring together persons involved in mediation and to assess the possibilities to apply mediation also outside the CGB procedures, the national expertise centre of the association against discrimination, Art.1, organised a symposium on mediation in November 2007.³³ The participants of the seminar entitled 'Mediation in discrimination cases: opportunities and dilemmas', discussed mediation in education, in the neighbourhood, in employment and they were introduced to mediation methods. The seminar was co-funded by the European Commission under the EU Year for equal chances.

8. Legal aid

According to Article 79 section 2 of the Code on Civil Procedures mandatory legal representation is the norm. However, according to Article 79 section 1 Code on Civil Procedures in Canton-department cases such as: cases concerning claims up to €5.000,- (per January 1st 2011 €25.000,-), labour law cases and cases concerning agency and (farming) lease, legal representation is not mandatory.

Furthermore, in summary proceedings legal representation is only mandatory to the claimant. Although in principle legal representation is mandatory in application procedures, both parties are allowed to appear before the court at the oral hearing(s) without legal representation.

³² Commissie Gelijke Behandeling (2008), Annual report 2007, Utrecht: CGB, p.35.

³³ http://www.art1.nl/artikel/7177-Symposium_Art1_over_mediation_bij_discriminatie .

The Act on Legal Aid is based on Article 18 section 2 of the Constitution. According to Article 34 section 1 anyone in a single household whose annual income is €23.800, - or less, or anyone in a joint household with an annual income of €33.600, - or less is entitled to legal aid. However, legal aid will not be granted if the assets of the person seeking justice are at least €20.315 (single Household) or €40.630 (joint household).

Moreover, the interest/importance of the case is taken into consideration. Legal aid will, for instance, not be granted if the request is obviously devoid of any foundation, if the costs of legal aid are disproportionate to the interest/importance of the case or the case can be reasonably represented by the person who is seeking justice himself (see Article 12 of the Act on Legal Aid).

Those who qualify for legal aid may be granted a so-called assignment. The person seeking access to justice must however pay for some of the costs himself but the Dutch state settles a substantial part of the costs. The contribution that the person involved has to pay is means-tested so access to justice is in principle open to everyone.

According to Article 1038 Code on Civil Procedures the parties may appear before the arbitral tribunal in person and may be assisted in these proceedings by any persons they may choose. In these proceedings no legal aid is available.

The same applies for binding advice; these proceedings are meant to be accessible so parties may appear in person. No legal aid is available but the costs to proceed before the committees as referred to above are at most € 100,- which amount is refundable when the complaint is valid.

In administrative procedures, no legal representation obligation exists. Parties are, naturally, allowed to be assisted by a lawyer or legal representative (Article 2:1 of the General Administrative Law Act (GALA)). The Act on Legal Aid is applicable in administrative procedures as well.

In conclusion, in civil procedure legal representation is in principle mandatory. In administrative procedure that is not so. The rules on legal aid are applicable both in civil procedures as well as in administrative procedures. Legal aid is available for those with low incomes.

It should be noted that because of its position as an independent, semi-judicial body, the Equal Treatment Commission (CGB) is not in a position to support a victim of discrimination. However, the CGB operates a telephone helpline, including e-mail services. This helpline,

available on working days between 2 and 4 pm, provides information to all callers about the rights and duties under the equal treatment legislation in the Netherlands. In 2007, the CGB received 1981 of these requests for information.³⁴

The assistance to victims is a task of the local and regional anti-discrimination agencies, which are being financed by the national and local governments. These agencies create a network of locally operating anti-discrimination agencies (ADAs). The first of these agencies were established in the 1980s, primarily as a reaction to the rise of extreme right tendencies. They collected information about discrimination at the local level, developed awareness raising material and organised meetings against racism and discrimination. They also provided victim support.

A specific NGO in this area is the Meldpunt Discriminatie Internet (MDI). This hotline registers complaints about hate speech and discrimination on the Dutch part of the internet. If a violation of the (usually criminal) law is assumed, the staff asks the website moderator to remove the punishable content. If that does not happen, a report is made and a request for investigation and prosecution is sent to the police.

ADAs were primarily locally funded by municipalities, for activities related to support of victims and awareness raising. The amount of funds that municipalities spent on these facilities varied largely. Some municipalities provided sufficient subsidy to establish a professionally run agency, while others contributed very little.

Over the years, the ADAs developed into professional agencies, trained in counselling victims of discrimination on all grounds and supporting them in finding a solution with the issue they have to deal with. In all conflictual cases, the agency applies the principle of hearing both sides. The complaint is registered and then the facts are presented to the other party (employer, service provider) and their view is requested. If the situation requires and depending on the reply of the other party, ADA staff will assist a victim in a complaint procedure at the CGB or accompany a victim to report a criminal offence to the police. Over the years it turned out that only in a small number of complaints a legal proceeding is followed. The complaints are registered in a national database and processed by the national expertise centre on discrimination. To make reporting of a complaint easier, a national telephone line has been developed. From anywhere in the country, the number 0900 2345345 can be dialled and the caller is directly connected with the nearest ADA.³⁵ In 2006, an

³⁴ Commissie gelijke behandeling (2008) Jaarverslag 2007. Utrecht: CGB, p.29.

³⁵ www.belgisch.nl.

advertising campaign to promote the hotline was organised with funding from the European Commission.

The role played by ADAs in assisting victims of discrimination is significant. As specialised organisations in supporting victims, ADAs help victims to choose the right remedy for their specific problem. Because of the number of requests they receive, their central role in the municipality and their experience, ADAs may detect structural forms of discrimination. In those cases, an ADA may start a legal or administrative procedure on its own behalf to remedy such forms of discrimination. Dutch law allows foundations and associations to start legal proceedings³⁶ on behalf of a general interest. This includes the right to start a procedure in an individual case, even without the written approval of the victim. This is an important issue for those situations where a victim is not in a position to initiate proceedings, e.g. because of fear for victimisation or if the interest of a victim can not be established. An example is the request of the ADA in The Hague about the door policy of a local discotheque. The request was triggered by a complaint of a man who was refused entrance because he did not meet the requirements of the door policy. The ADA filed the request at the CGB in order to have the legitimacy of the door policy checked. The ADA was allowed legal standing and the CGB investigated the case and gave an opinion.³⁷ The power to bring a case on behalf of unknown victims, attributed by the Civil Code to civil organisations in general, indicates that the procedural role of the ADAs goes beyond the minimum requirements of Article 7/2 of the Racial Equality Directive.

The ADAs serve as a front portal for legal procedures relating to discrimination. Through their role as information suppliers and low-threshold problem solvers, they often prevent cases which stand no chance or which are not related to discrimination in the legal sense, to be initiated at a court or at the CGB. Their role as intermediaries between a complainant and the other party often results in an amicable settlement, without legal proceedings being necessary.

Moreover, in individual complaints concerning discrimination, trade union members can be supported by their union representative in a procedure before the CGB or before a court of law, because the Dutch equal treatment laws allow individuals to be represented by anyone in a case based on this legislation. Dutch civil law also allows for group action. Any foundation or association with a justified interest may bring a case before a court of law or before the

³⁶ The Netherlands/Article 3:305a and 3:305b Civil Code.

³⁷ The Netherlands/CGB (08.03.2007), no. 2007-36.

Equal Treatment Commission.³⁸ Trade unions qualify for this type of procedure and may institute a case on their own behalf or on behalf of their members.

Trade unions are only in exceptional cases involved in discrimination cases on behalf of their members. Cases where a trade union representative instituted a racial equality case before the CGB could not be found.

9. Forms of satisfaction available to a vindicated party

According to Article 6:162 of the Civil Code a person who commits an unlawful act (tort) toward another which can be attributed to him – an unlawful act can be attributed to its author if it results from his fault or from a cause for which he is accountable by law or pursuant to generally accepted principles – must repair the damage suffered by the other in consequence thereof. Except in case of a ground for justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. However, no obligation to repair damage exists when the violated norm does not have as its purpose the protection from damage such as that suffered by the vindicated party (Art. 6:163 of the Civil Code: the *Schutznorm*-theory).

In accordance with Article 6:103 of the Civil Code compensation of damages is normally due in money. Nevertheless, upon the demand of the victim or vindicated party, the court may award reparation in a form other than the payment of a sum of money. Other forms of “satisfaction” are, thus, available as well. However, if such a judgement is not complied with within a reasonable period of time, the victim regains the right to demand reparation in money.

Furthermore, according to Article 6:104-106 of the Civil Code, derived profit, future damages and intangible damages can be compensated in certain circumstances.

In a case of future damages the following applies: the court may wholly or partially postpone the evaluation of damage which has not yet occurred; he may also immediately evaluate future damage after an assessment of probabilities. In the latter case, the court may order the debtor either to pay a lump sum or to make installment payments.

³⁸ The Netherlands/Article 3:305a and 3:305b Civil Code.

Finally, the victim has the right to an equitably determined reparation of harm other than patrimonial damage: if the person liable had the intention to inflict such harm; if the victim has suffered physical injury, injury to the honor or reputation or if his person has been otherwise affected; if the harm consists of injury to the memory of a deceased person inflicted upon the non-separated spouse or upon a blood relative up to the second degree, provided that the injury took place in a manner which would have given the deceased, had he still been alive, the right to reparation of injury to honour or reputation.

According to Article 6:109 of the Civil Code the court may reduce a legal obligation to repair damage if awarding full reparation would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the legal relationship between the parties and their financial capacity. But the reduction may not exceed the amount for which the debtor has covered his liability by insurance or was obligated to do so. Further, maximum liability amounts can be set by regulation.

In principle the same rules apply in arbitration and binding advice proceedings, except if parties in accordance with the law have agreed otherwise. Moreover, according to Article 1020 section 4 b Code on Civil Procedures parties may also agree to submit the determination of the quantum of damage or a monetary debt to arbitration.

If an administrative court rules that the contested decision conflicts with the law (including the law of the EU and the ECHR), it annuls the decision. The administrative court may adopt an alternative decision to replace the annulled administrative decision (Article 8:72, section 4, the General Administrative Law Act (GALA)). It may also refer the matter to the administrative authority that shall take a new decision in accordance with the judgment.

Compensation for damages as a result of wrongful administrative decisions is governed by the civil law rules discussed above. An individual may address both civil and administrative courts to obtain compensations. Liability of public authorities is governed by two additional rules:

- Firstly, it is impossible to obtain compensation for damages as a result of administrative decision that have not been appropriately and timely challenged in administrative procedures, even if it would be beyond reasonable doubt that an administrative court would have annulled the decision in question.³⁹ This rule is applied in the context of the enforcement of EU rights as well.⁴⁰ The Supreme Court

³⁹ Supreme Court 16 May 1986 (Heesch van Akker), AB 1986, 573.

⁴⁰ Supreme Court 24 January 2003 (Maple Tree), AB 2003, 120.

views this to be in line with the European principles of equivalence and effectiveness, as the rule is applied in pure national matters as well.

- Secondly, if the administrative court has annulled an administrative decision, this is a sufficient ground for compensation under civil tort law. It is, moreover, not necessary for the individual to prove that the breach of law has been sufficiently serious, the simple breach of law suffices.

The Equal Treatment Committee lacks the power to award damages. In case of a positive decision for the claimant, addressing a civil court is thus necessary to be awarded compensation.

In conclusion, the several statutory provisions exist to guarantee the right to be compensated. This possibility is, however, not often used in practice.

10. Adequacy of compensation

Compensation was rarely awarded in the cases analysed for this study. Moreover, since punitive damages may not be awarded by Dutch courts, the total amount of compensation awarded is usually not so high and limited to the compensation of actual financial damages.

11. Rules relating to the payment of legal costs

In principle, the party who has lost the case must pay the expenses of the other party in summons procedures. However, Article 237 paragraph 1 of the Code on Civil Procedures provides that the costs of a party against whom the court has rendered judgment, can entirely or partly be borne by spouses, registered partners or other life companions, blood relatives in a direct line of decent, brothers and sisters, or in-laws. The court may come to a division of costs if it ruled against both parties on different issues. The court can also decide that parties who have made unnecessary expenses or caused them have to pay these expenses themselves. In practice, the so-called Liquidation Rate applies. This is an arrangement between the Dutch Bar Association and the judiciary based on fixed rates subject to, on the one hand, the interest involved in the case and, on the other hand, the number and nature of activities. This means that the costs cannot rise too high in case of a party employing a too expensive barrister or a not very experienced one who charges too many hours. Moreover, according to Article 240 Code on Civil Procedures the costs for official acts performed by bailiffs will be charged

according to the Decision on Rates of Official Acts and the court has the discretion to moderate claims for the payment of costs by virtue of Article 242 paragraph 1 Code on Civil Procedures. According to paragraph 2, this moderation principle does not apply to agreements aimed at settlement of a dispute that already exists. The Supreme Court assumes that parties may conclude an agreement with respect to the compensation of all legal costs. In practice, it happens regularly that the party who has won the case in all respects has still to bear part of these legal costs as the order to pay costs is based on the Liquidation Rate. On the other hand, the actual costs of Registry, witnesses' taxes, expert costs and travel costs due to the process may be part of the order to pay. Expert costs and witness taxes are legally regulated.

In the practice of application procedures an order to pay legal costs is exceptional.

In principle the binding advice and arbitral proceedings shall be conducted in such a manner as agreed between the parties, including rules relating to the payment of legal costs. However, if these rules as agreed between parties are manifestly contrary to public policy or good morals the summary proceedings Judge of the District Court may refuse a leave of enforcement of an arbitral award. In case of binding advice the civil court will review the content of the binding decision and the manner of its establishment when a compliance action is brought before it. If it would be unacceptable to hold a party to the order to pay legal costs according to standards of reasonableness and fairness the state court will not confirm (this part of) the binding advice.

For initiating administrative court proceedings, a registry fee is demanded (see section 2.1). If the court rules the appeal well-founded, the judgment shall order the public authority to reimburse the applicant the registry fee. No fee is due for the processing of an objection. If the claimant wins the procedure, the administrative authority is ordered to pay the costs which the other party has reasonable incurred (Article 8:75 of the General Administrative Law Act (GALA)). On the other hand, if the public authority is the winning party, the individual will only have to reimburse the costs in case of a manifestly unreasonable use of the right to appeal. In practice, it hardly ever happens.

The true costs are not taken into account in an order to pay the costs of the proceedings. Instead, a system of fixed reimbursements applies. Administrative courts may deviate from the system if special circumstances require this. Sometimes, only 10-20% of the true costs are reimbursed. The Supreme court has decided – by referring to the European Court of Justice (ECJ) case *Clean Car*⁴¹ – that the system does not infringe the EC principle of effectiveness.⁴²

⁴¹ Case C-472/99 *Clean Car Service* [2001] ECR I-9687.

In conclusion, the most striking aspect of the arrangement on legal costs is that not the true costs are taken into account; instead tariffs are fixed. They may actually diverge substantially from the actual costs.

12. Rules on burden of proof

With the transposition of the Article 13 Directives in April 2004, the shift of the burden of proof was introduced in the Equal Treatment Act (ETA). The text of Article 10 ETA states: “if a person who considers that he has been wronged through discrimination as referred to in this Act, establishes before a court facts from which it may be presumed that discrimination has taken place, it shall be for the respondent to prove that the action in question was not in breach of this Act.”

The provision applies to group actions before a civil court as well as in relevant administrative procedures, e.g. in cases relating to social protection. It must be noted that the provision only applies to court procedures and not necessarily to procedures before the Equal Treatment Commission (CGB). The Dutch government has not used the opportunity given by article 8 of the Racial Equality Directive to extend the shift of the burden of proof to another “competent authority”. However, the CGB has applied the shift of the burden of proof in its procedures.

During the parliamentary debate on the transposition of the Directive, the government made clear that the facts that the victim needs to establish in order to bring a presumption of discrimination, need to fulfil the criteria laid down in sections 149 and 150 of the Civil Procedures Act. These articles concern the standards of evidence. According to the government, statements made by the complainant need to be sufficiently motivated before the burden of proof is transferred to the respondent.⁴³

In Dutch civil law, a shift of the burden of proof has been applicable in other legal fields, outside the areas covered by the equality directives. In general, section 150 of the Civil Procedures Act maintains that the burden of proof of facts and rights lies on the person who invokes the legal consequences of these facts before a court. However, another division of the burden of proof ‘may ensue from specific regulations or from reasons of fairness or reasonableness’. For example, in cases of medical liability, courts have applied the shift of the burden of proof to the hospital, because hospitals generally dispose of more information than

⁴² Supreme Court 17 December 2004, AB 2005, 111.

⁴³ The Netherlands/Parliamentary Documents II, 2002 – 2003, 28 770, no. 5, p. 33.

an individual patient.⁴⁴ An important decision was the judgement of the Supreme Court in the Binderen/Kaya case.⁴⁵

Mr. Kaya, a Dutchman of Turkish origin, had been waiting years for a suitable house. Because of his income, he relied on a social housing scheme. This housing scheme was the responsibility of, amongst others, the social housing corporation Binderen. Before the court, Kaya could establish the fact that over a number of years, Binderen had allocated 157 houses, of which only one had been given to an immigrant family. The proportion of immigrant families in the town was 4.6 per cent and of the persons registered for social housing, 10.2 per cent was of immigrant background. Other corporations had allocated 7.2 per cent of their housing stock to immigrant families. With these statistics in hand, the Supreme Court decided that a reasonable and fair application of the principle of the burden of proof, as found in the Civil Procedures Act, made it necessary to shift the burden of proof to the housing corporation in order to justify its policy was not discriminatory against immigrants. The evidence failed and the court judged that discrimination had taken place.

No recent court judgements could be found in which the EC provision of the shift of the burden of proof has been applied.

The shift of the burden of proof has been applied by the CGB, even before the transposition of the Racial Equality Directive. In particular with regards to cases of sex discrimination in employment, which are based on the Equal Opportunities Act men/women, the Commission has applied the provision.⁴⁶ In racial equality cases, the CGB anticipated the burden of proof provision before the coming into force of the revised Equal Treatment Act in 2004. In a number of opinions, the Commission considered: “consistent with the division of proof in cases relating to unequal treatment on the ground of sex (Article 6a Equal Opportunities Act men/women) and anticipating the implementation of the Directive no. 2000/43/EC (...), the following standard with regards to the burden of proof is applied. It is on the applicant to establish facts and circumstances that presume discrimination. A presumption thus raised may be refuted by the respondent by proving that there has been no violation of the non-discrimination legislation.”⁴⁷

⁴⁴ The Netherlands/Supreme Court, 18 February 1994, NJ 1994, 368.

1.1.1.1. ⁴⁵ The Netherlands,/Supreme Court, 10 December 1982, NJ 1983, 687 (Binderen v. Kaya).

⁴⁶ The Netherlands/Article 6A Equal Opportunities Act men/women. This Act was amended with the implementation of the Burden of Proof Directive 1997/80/EC.

⁴⁷ E.g. CGB (09.07.2002) no. 2002-84 and CGB (14.10.2003) no. 2003-127.