

Resumen

En el caso KRISTIANSSEN y TYVIK AS contra NORUEGA, el TEDH considera que el procedimiento no cumple los requisitos necesarios para ser considerado equitativo en cuanto a la dificultad de acceso a los tribunales, por lo que estima la violación del art. 6,1 CEDH.

NORMATIVA ESTUDIADA

Conv. de 4 noviembre 1950. Convenio Europeo para la Protección Derechos Humanos y Libertades Fundamentales art.6.1 , art.41

CLASIFICACIÓN POR CONCEPTOS JURÍDICOS

DERECHO A UN PROCESO JUSTO
ACCESO A LA VÍA JUDICIAL
PROCEDIMIENTO CONTRADICTORIO Y EQUITATIVO

FICHA TÉCNICA

Procedimiento:Procedimiento ante el TEDH

Legislación

Aplica art.6.1, art.41 de Conv. de 4 noviembre 1950. Convenio Europeo para la Protección Derechos Humanos y Libertades Fundamentales

Sinópsis *Hechos*

En 1990 el interesado solicita una patente para un nuevo método de propulsión de aeroplanos, pero se desestima alegando que no apoya una solución para el desarrollo del proceso, cuestionando su utilidad.

Un año después, el interesado aporta información adicional en este sentido, de modo que se queja, además, de la tardanza en obtener una respuesta.

Ante esto, la autoridad responsable expone la dificultad de realizar las oportunas pruebas para comprobar el proceso.

En 2001 el interesado se dirige ante el defensor del pueblo, de modo que se realiza un nuevo análisis del invento objeto de la solicitud de patente, sin embargo en 2007 se desestima formalmente su acción ante la falta de novedad del mismo.

Finalmente esta denegación se confirma en 2008.

Sobre la vulneración del art. 6,1 CEDH

El demandante se queja de que no ha podido disponer de un procedimiento equitativo en cuanto a la ausencia de posibilidad de audiencia pública.

El Tribunal recuerda que, si el art. 6,1 obliga a los tribunales a motivar sus decisiones, esta obligación no se puede entender como exigencia de una respuesta detallada a cada argumento.

En consecuencia, el TEDH observa que las autoridades competentes deberían haber actuado con más diligencia para no perjudicar al interesado en cuanto al desarrollo del procedimiento.

En este caso, el Tribunal recuerda que ya ha juzgado en decisiones previas que la excesiva rigidez a la hora de aplicar las normas en relación al acceso a los tribunales, no puede suponer una privación del derecho según las exigencias del art. 6,1 CEDH, no encontrando ninguna razón para apartarse de esta conclusión, por lo que estima la vulneración de esta disposición.

VERSION OFICIAL EN INGLÉS

SENTENCIA

CASE OF KRISTIANSSEN AND TYVIK AS v. NORWAY

(Application no. 25498/08)

JUDGMENT

STRASBOURG

2 May 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kristiansen and Tyvik As v. Norway,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Isabelle Berro-Lefèvre, President,

Khanlar Hajiyev,

Mirjana Lazarova Trajkovska,

Julia Laffranque,

Linos-Alexandre Sicilianos,

Erik Møse,

Ksenija Turkovič, judges,

and Søren Nielsen, Section Registrar,

Having deliberated in private on 9 April 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 25498/08) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Arne Kristiansen, a Norwegian national who was born in 1931, and Tyvik A/S, a limited liability company established under Norwegian law.

2. The applicants were represented by Mr H. Berge, a jurist residing in Luxembourg. The Norwegian Government ("the Government") were represented by their Agent, Mrs F. Platou Amble, Attorney, Attorney-general's Office (Civil Matters), assisted by Mr E. Bratterud, Attorney.

3. On 7 June 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Patent application to NIPO

4. On 30 November 1990 the first applicant submitted a patent application for a particular method of propulsion of aircrafts and sea vessels to the Norwegian Industrial Property Office (Patentstyrets første avdeling - hereinafter referred to as "NIPO"). Ranging under the Ministry of Trade and Industry, NIPO is a government authority, responsible for processing and deciding on applications for patent protection in Norway. The application was allotted no. 19905214.

5. In a letter of 21 March 1991, NIPO presented a preliminary opinion stating that the application in its present form was not patentable because it did not reveal a concrete solution to achieve the desired effect. It also questioned whether the invention had any effect at all. Therefore, under former section 28 (currently section 32) of the Regulation (forskrift) to the Patents Act 1967 (patentloven), NIPO required the first applicant to perform a test ("praktiske forsøk") at an independent research institute and to submit the necessary test documentation. The first applicant replied on 30 September 1991 that he disputed the need for a test and referred to the high costs for such tests. However, he informed NIPO that prototypes were under construction and could be tested in the presence of representatives from NIPO.

6. In the period from 6 May 1992 to 10 May 1994, there was correspondence between the first applicant and NIPO as to the existence of any need to protect the confidentiality of the application. In February 1993 NIPO asked the Military Supreme Command whether the application should be kept secret on national security grounds, which the latter answered in the negative in March 1993. The first applicant was informed in June 1993.

7. On 9 May 1994 the first applicant provided NIPO with further information on the subject-matter of the application. On 24 February 1995, NIPO reiterated its request of 21 March 1991 that the first applicant provide evidence from tests showing the technical effect and concrete features of the invention. In his reply of 23 May 1995 the first applicant submitted theoretical views on the subject-matter of the application with reference to a research report of 1965 which, according to him, described tests and results that proved the technical effect of his invention. The required tests were therefore superfluous, in his view.

8. The first applicant on 27 November 1996 complained about the delays in the processing of his application. The NIPO's Director General on 9 December 1996 apologised for the delay and said the matter would be given priority.

9. On 16 December 1996 NIPO maintained its earlier requirement of independent tests, to which a series of exchanges ensued between the applicant and NIPO on the need for tests, including a protest by the applicant questioning NIPO's technical competence and the submission by him of statements by two academics, dated 14 March and 18 December 1997, respectively.

10. Whilst apologising for the delay, NIPO maintained its position on the need for testing in a communication to the first applicant of 5 May 1999 and gave him until 5 November 1999 to comply.

11. By a registered letter of 26 October 1999, received on 11 November 1999, the first applicant again characterised NIPO's processing as late and technically incompetent without making any new arguments concerning the requirements for granting a patent.

12. On the ground of the first applicant's failure to comply with the time-limit of 5 November 1999, NIPO decided to discontinue (henlegge) its examination of his application under section 15(2) of the Patents Act (according to which, in the event of an omission by a patent seeker to provide a statement or to take measures to rectify a notified deficiency, the application shall be shelved). Upon reconsideration of the matter, NIPO informed the first applicant on 18 February 2000 that, although the application had been received on time, it maintained its decision to shelve the application because he had not met the substantive requirements indicated to him on 5 May 1999.

13. The first applicant then lodged a petition with the Parliamentary Ombudsman for Civil Matters on 8 March 2001.

B. Resumption of examination by NIPO

14. Following an inquiry by the Parliamentary Ombudsman for Civil Matters, NIPO informed the first applicant on 30 August 2001 that it had annulled its decision to discontinue the matter and gave him until 28 February 2002 to respond to its letter of 5 May 1999. He replied on 24 September 2001 but without presenting any new arguments or material.

15. On 2 October 2001 NIPO refused the application on the ground that the applicant had not made it probable that the subject-matter of the application had the alleged technical effect.

16. On 23 January 2002 the Parliamentary Ombudsman informed NIPO that he found no grounds for continuing the investigation of the petition.

C. Appeal to NIPO's Board of Appeals

17. On 27 November 2001 the first applicant appealed to the Board of Appeals (Patentstyrets annen avdeling) against NIPO's decision of 2 October 2001.

18. Following a period of circulation of the case files among the members of the Board of Appeals, the first meeting on the case was held on 13 September 2004. The Board of Appeals took a different view than NIPO and indicated a new formulation of the patent claims which might lead to a patent, but only for sea vessels. The applicant was informed correspondingly in a letter of 29 September 2004.

19. During the period from 12 November 2004 to 13 January 2005, there was correspondence between the Board of Appeals and the first applicant in order to arrange a meeting, which was held on 2 February 2005. The subject-matter of the appeal was discussed together with the further process.

20. On 14 February 2005, NIPO was informed that 50% of the ownership to the application had been transferred to the second applicant Tyvik AS. Thereafter, mostly both applicants, occasionally only the first applicant, acted as claimants in the relevant proceedings (to simplify "applicants" is used in the following).

21. In the period from 2 May 2005 to 17 October 2005, the Board of Appeals and the applicants exchanged various communications regarding the patentability of the original patent claims.

By a decision of 14 November 2005, the Board of Appeals concluded that the invention in application no. 19905214 had a technical effect, but the Board did not consider whether other patent requirements had been fulfilled. The applicants had received information on how to change the claims into a patentable invention but had been unwilling to do so. Consequently, the Board did not find any grounds to continue processing of the application. Accordingly, NIPO's decision was set aside and the application was referred back to NIPO for further consideration.

D. Reconsideration by NIPO

22. Following the return of the application to NIPO, it concluded in its letter of 29 November 2005 that the subject-matter of NO 19905214 could not be considered novel.

23. The applicants, represented by Mr. H. Berge, filed a new complaint to the Parliamentary Ombudsman on 13 March 2006 concerning the proceedings before NIPO. In particular they claimed that the executive officer of NIPO had been prejudiced as he was responsible for considerable parts of the previous processing and the refusal of the application prior to the appeal to the Board of Appeals. The Parliamentary Ombudsman replied on 22 March 2006 and 29 June 2006 that he could not decide on complaints until the processing of the application had been completed, but assumed that the case would now be examined with due diligence ("tilbørilig hurtighet").

24. Exchanges of correspondence between NIPO and the applicants continued between 31 May 2006 and 11 June 2006. NIPO provided guidance and suggested that specific changes be made to the patent claims in order to render the subject-matter of the application patentable. The applicants disagreed.

25. On 20 June 2007, the application was formally refused due to lack of novelty (see paragraph 35 below).

E. Second appeal to Board of Appeals

26. On 20 August 2007 the applicants appealed to the Board of Appeals. On 29 November 2007, they were informed that the Board, after having examined the case (on 12 November 2007) had found it clear that the conditions for granting a patent had not been fulfilled in so far as concerned aircrafts. However, the application might succeed in respect of a more limited field of sea vessels. It was proposed

that the patent requirements be formulated in a similar manner as proposed in the Board of Appeals' letter of 29 September 2004 (see paragraph 18 above).

27. The communication of 29 November 2007 further warned the applicants that if the patent requirements were not defined in accordance with the indications given, the Office's rejection might be confirmed. In the alternative, the part of the application that related to air transport might be disjoined from that which related to sea transport, in which case it might be expected that the former part would be rejected. As an alternative to delimiting against the requirements to aircrafts, dividing the application into two parts, one concerning aircrafts, another concerning sea vessels, could be considered, in accordance with section 11 of the Patents Act. In that case, a rejection of the separate part relating to air crafts ought to be expected.

28. The applicants were given until 29 January 2008 to comment and were warned that the case might be determined on the basis of the case-file as it stood as at that date.

29. In a letter to the Board of Appeals of 28 January 2008, the applicants submitted their observations to the communication of 29 November 2007 and altered the definition of patent requirements.

30. On 22 September 2008 the Board of Appeals confirmed NIPO's refusal of the patent requested (see paragraph 25 above), albeit on a different reasoning. Whilst NIPO had been sceptical about whether the patent requested could serve according to its purpose, the Board of Appeals had no doubt that the results could be achieved with the invention that could be exploited industrially and that the application could not be rejected on this ground. Both NIPO and the Board of Appeals found that the application did not involve any novelty in respect of aviation, though the reasoning differed. Unlike NIPO, the Board of Appeals found that the application could have succeeded in a limited area of sea transport. The applicants had been advised that in order to succeed, the patent requirements would have to be defined so as to exclude aviation but had not been willing to do so. The application as presented did therefore not fulfil the conditions for grant of patent.

31. The applicants have apparently not challenged the Board of Appeals' decision of 22 September 2008 before the Norwegian courts.

F. Subsequent developments

32. According to the applicants, the patent applications they had filed in 2003, made in light of the patent application of 30 November 1990 (no. 19905214), had been granted in the United States of America, Russia, China and Singapore and "through the EPO (European Patent Office) as well".

33. The Government submitted that according to Espacenet (a database provided by EPO), the applicants had not claimed priority with respect to no. 19905214 in any of the above mentioned countries or in EPO. The granted EPO patent had claimed priority in relation to another and separate application by the applicants, namely no. 20015844, which had been based on knowledge from no. 19905214. When comparing the EPO patent claims with no. 19905214, one would observe that the former had been based on additional features that had made the invention patentable.

II. RELEVANT DOMESTIC LAW

34. Section 1 (1) of the Patent Act 1967 (patentloven), provides:

"Within any technical field, any person who has made an invention which is susceptible of industrial application, or his successor in title, shall, in accordance with this Act, have the right on application to be granted a patent for the invention and thereby obtain the exclusive right to exploit the invention commercially or operationally."

The expression "industrial application" requires that the innovation has "technical effect".

35. Pursuant to section 2, patents shall be granted only for inventions which are new in relation to what was known before the filing date of the patent application, and which also differ essentially therefrom.

36. Section 15 provides:

"If the applicant has not complied with the prescribed requirements with respect to the application, or if NIPO finds other obstacles to the acceptance of the application, the applicant shall be notified to that effect and be invited to submit observations or to correct the application within a specified time limit. However, NIPO may make such amendments in the abstract as found necessary without consulting the applicant.

If the applicant fails, within the time limit, to submit observations or to take steps to correct a defect which has been pointed out, the application shall be shelved. Information to that effect shall be given in the notification from NIPO referred to in the first paragraph."

37. Section 27 (1) to (3) of the Patents Act reads:

"An appeal must be received by NIPO within two months from the date on which notification of the decision was sent to the party concerned. ... If these provisions are not complied with, the appeal shall not be submitted for consideration.

Even if the opponent withdraws his appeal, it may be examined if special circumstances make it desirable.

A decision by the Board of Appeals refusing a patent application, revoking a patent, or maintaining a decision by NIPO to revoke a patent may not be brought before the courts of law later than two months from the date on which the applicant or patent holder was notified of the decision. Information with respect to the time limit for instituting proceedings shall be given in the notification."

38. According to section 40 of the Patents Act, a granted patent may be maintained for up to twenty years from the date of filing of the patent application. It is undisputed in this case that, had a patent been granted in Norway, this would have meant that the patent protection would have expired on 30 November 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

39. The applicants maintained that, as a result of the excessive length of the proceedings before the national patent authorities and the twenty years' limitation on patent protection under section 40 of the Patents Act, their right of access to a court had become illusory. This entailed a violation of Article 6 § 1, which in so far as relevant reads:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by (a) ... tribunal ..."

40. The applicants also invoked the right to an effective remedy under Article 13 but the Court finds it more appropriate to deal with the matter under Article 6 § 1.

A. Admissibility

41. The Government requested the Court to declare the applicants' complaints inadmissible under Article 35 §§ 1 and 4 of the Convention on the ground that the applicants had failed to exhaust domestic remedies. The applicants had not raised or taken any step to raise before the Norwegian courts (or any other domestic instance) the complaints or the substance of the complaints made before the Court. The Norwegian courts had full jurisdiction to review the lawfulness of the decisions and procedure of administrative authorities such as NIPO, for example.

42. Whilst it was true that judicial review of the lawfulness of NIPO's decisions could be sought only after an appeal to the Board of Appeals (section 27 of the Patents Act), no such limitation applied to disputes regarding the lawfulness of the procedure under national law or its compatibility with the requirements of the Convention. Such complaints could be raised as soon as the applicants had an arguable claim that their Convention rights were violated. No particular time-limits applied. Reference was made to the judgment of the Norwegian Supreme Court, cited in *Norsk Rettsidende* 2003 page 301.

43. In any event, the Government argued that the applicants' complaints were manifestly ill-founded and had to be declared inadmissible under Article 35 § 3 of the Convention.

44. The Court observes that the Supreme Court ruling on which the Government relied appears to be the one related to and cited by the Court in *K.T. v. Norway*, no. 26664/03, §§ 36 and 37, 25 September 2008. However, the afore-mentioned ruling related to an issue of access to a court (in respect of a complaint of investigations carried out by the child welfare services) that does not appear in any way comparable to the one at issue in the case at hand. The Court considers that, in the absence of any domestic case-law or particulars on how a remedy as that invoked by the Government would operate in practice with respect to a complaint such as here, they have not established that an effective remedy existed. Their plea of non-exhaustion must therefore be rejected (see *A. and E. Riis v. Norway*, no. 9042/04, §§ 41 and 43, 31 May 2007; *Rotaru v. Romania* [GC], no. 28341/95, § 70, ECHR 2000-V).

45. Against this background, the Court finds that the applicants' complaint under Article 6 § 1 cannot be declared inadmissible under Article 35 §§ 1 and 4 on the grounds of failure to exhaust domestic remedies. Nor is the complaint manifestly ill-founded within the meaning Article 35 § 3 or inadmissible on any other grounds. The application must therefore be declared admissible.

B. Merits

1. The applicants' arguments

46. The applicants complained that, as a result of the NIPO's protraction of the administrative proceedings relating to their patent application, they had been denied the right to the determination of their civil rights by an impartial tribunal within a reasonable time, in breach of Article 6 § 1 of the Convention. The case-officer handling their application to the NIPO had displayed bias and hence a lack of impartiality. The applicants further complained that pending a final decision by the Board of Appeals it would have served no purpose for them to exercise a remedy in respect of the above. In a situation of administrative delay such as that in the present instance, the rule whereby patent rights were protected for twenty years from the date of the filing of the patent application had the effect of undermining the possibility of having such rights established through the use of legal remedies.

47. Contrary to what the Government suggested, NIPO had not carried out either a novelty search or an examination of the merits of the application during the first fifteen years of the proceedings that lapsed from 1990 to 29 November 2005. Nor had there, as alleged by the Government, been any process of negotiation. At best, only during the three years after November 2005 had such search been carried out and such communications taken place. The Government's contention that the applicants were responsible for most of the time that had elapsed was therefore erroneous and misleading, as was their suggestion that the applicants had been passive.

2. The Government's arguments

48. The Government pointed out that, in any patent office that performed pre-grant novelty research and patentability examination, the processing of a patent application was comprehensive and time-consuming. While NIPO's average processing time was two to three years for applications without priority, the general complexity of the search and patentability examination had accounted for a significant part of the total period in question. The case had been made complex by the applicants' repeated contestation of NIPO's demand for evidence and their refusals to change the claims as suggested by NIPO. Although given ample opportunity and advice, first at producing the requested evidence, then at changing the claims in order to make them patentable, they had repeatedly failed to produce the required evidence and had refused to change the claims. The applicants are themselves responsible for the greater part of the total period to be taken into consideration.

49. On the other hand, the Government acknowledged that NIPO were responsible for certain delays during the eighteen years' processing of the application, in particular the periods from May 1995 to December 1996 and from December 1997 to May 1999. Periodic delays were unavoidable due to the varying flow of applications within the different technical fields, the limited access to examiners specialized in the relevant field. The applicants had also remained passive during these periods.

50. The Government further conceded that NIPO had been responsible for a certain delay during the period from November 2001 to September 2004. For organisational reasons, case files had circulated between the Board of Appeals' five members for approximately thirty months before the case had been deemed sufficiently prepared. Such a long preparation had not been strictly necessary.

3. The Court's assessment

51. The Court sees no reason to doubt that the dispute before the Board of Appeals which the applicants would have wished to pursue thereafter before the domestic courts was one that concerned an arguable claim pertaining to a right that was recognised under Norwegian law and that the right in question was civil in character (see, *mutatis mutandis*, *Vrabel and #urica v. the Czech Republic*, no. 65291/01, §§ 5 and 38-40, 13 September 2005, and *Zorc v. Slovenia*, no. 2792/02, §§ 6 and 22-24, 2 November 2006, both cases relating to patent proceedings). The dispute therefore concerned a subject-matter to which the guarantees of Article 6 § 1 would apply, including the right of access to a court and the right to a fair hearing within a reasonable time.

52. As to the right of access to a court, the Court held as follows in *Stanev v. Bulgaria* [GC] (no. 36760/06, §§ 229-231, ECHR 2012):

"229. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This 'right to a court', of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 132, 13 October 2009).

230. The right of access to the courts 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, regulation which may vary in time and in place according to the needs and resources of the community and of individuals' (see *Ashingdane*, cited above, § 57). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict 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 of proportionality between the means employed and the aim sought to be achieved (*ibid.*; see also, among many other authorities, *Cordova v. Italy* (no. 1), no. 40877/98, § 54, ECHR 2003-I, and the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

231. Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under that Article (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII)."

53. In the present case, only on 22 September 2008, when the Board of Appeals had given its final decision rejecting the application (see paragraph 30 above), were the applicants in a position to institute proceedings to have the patent matter reviewed by the courts. Two years later, the twenty years' protection under section 40 of the Patents Act that would have applied had the patent been granted, expired. Against this background the Court accepts the applicants' argument that in practical terms the length of the administrative proceedings before the patent authorities in effect rendered meaningless any exercise by them of their right of access to a court. In considering whether this situation entailed a limitation on the applicants' right of access to a court that was disproportionate or otherwise arbitrary, the Court cannot but note that the relevant patent application had been submitted as far back as in November 1990.

54. The Court sees no reason to question the Government's argument that by reason of the very nature of the subject-matter, administrative patent proceedings could be time-consuming and delays might be inevitable when, for instance, there was a need to test patentability and to search and assess the novelty of an idea. However, whilst average processing time was two to three years, in the present case it took eighteen years to have the matter processed by the competent bodies. This exceptionally long period was largely attributable to a dispute between NIPO and the first applicant as to the need to carry out testing, to which he objected. Although the first applicant contributed to the length of the proceedings, this was for the reasons stated below not solely his responsibility.

55. The Board of Appeals acknowledged on 29 November 2007 that the applicants' idea was patentable with respect to certain sea vessels albeit not for aircrafts and could be examined separately from the latter (see paragraph 26 above). Without pronouncing any view on the merits of the applicants' patent claim, the Court is not convinced that the patent authorities could not have finally determined the patent application earlier (see for instance paragraph 18 above).

56. The Government admitted that the patent authorities were responsible for delays from May 1995 to December 1996, from December 1997 to May 1999 and then between November 2001 and September 2004, in respect of periods totalling nearly six years. The Court also considers that NIPO had a certain responsibility for the duration of the proceedings up until May 1995, even though the applicant showed an intransigent attitude by persistently refusing to perform the tests required by NIPO and disregarding alternative options to have his inventions registered (see for instance paragraph 6 above).

57. In this connection, the Court reiterates that in civil length cases examined under Article 6 § 1, the period to be taken into consideration does not necessarily start when the competent tribunal was seized but may also encompass the prior administrative phase (see, for instance, *Rambauske v. Austria*, no. 45369/07, § 16, 28 January 2010; *Wurzer v. Austria*, no. 5335/07, § 45, 6 March 2012; *Schouten and Meldrum v. the Netherlands*, 9 December 1994, § 62, Series A no. 304; and *Paulsen-Medalen and Svensson v. Sweden*, 19 February 1998, § 42, Reports of Judgments and Decisions 1998-I). Having regard to its case-law on the subject (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII), there can be little doubt that the length of the administrative proceedings could be viewed as excessive. As already indicated above, due to the considerable lapse of time and the twenty years' limitation on the protection offered by section 40 of the Patents Act, the applicants' exercise of their right of access to a court had become illusory. In the Court's view, this state of affairs resulted in a limitation on their right of access to a court that was not only arbitrary for the purposes of the Article 6 § 1 guarantee but was also impairing the very essence of that right. There has accordingly been a breach of Article 6 § 1 EDL 1979/3822 .

58. Having reached this conclusion, the Court does not find that any separate issue arises in relation to the requirement under Article 6 § 1 of the Convention that national proceedings be concluded "within a reasonable time".

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION EDL 1979/3822

59. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

60. The applicants requested the Court to order the respondent Government to pay by way of just satisfaction various sums: (a) The Government should set up a world wide funds of EUR 150,000,000 each for the development methods for respectively ships- and aeroplane propulsion leading to energy saving. (b) Until the said funds were established, the second applicant should be funded by a recompense of EUR 3 million per annum. (c) The Government should further be ordered to compensate NOK 20,000,000 (approximately EUR 2,700,000) in regards to unpaid work invested into the company. (d) Finally, the applicants sought punitive damages in the amount of NOK 700,000,000 (approximately EUR 94,430,000).

61. The Government disputed the above-mentioned claims. Item (a) fell outside the scope of Article 41. Items (b) and (c) were unsubstantiated and, in any event, unfounded. Since, as it turned out in the end, the patent claim in question had not been found patentable, no loss could be demonstrated. Item (d) was clearly unreasonable and out of line with the Court's case-law.

62. The Court observes that an award of just satisfaction can only be based on the fact that the applicants did not have the benefit of all the guarantees of Article 6 § 1. It cannot speculate as to the outcome of any judicial review proceedings that they could have pursued had the position been otherwise. On the other hand, the first applicant must have suffered anguish and distress from the violation which this finding cannot adequately compensate. Deciding on an equitable basis, the Court awards the first applicant a total amount of EUR 15,000 under this head.

B. Costs and expenses

63. The applicants also claimed EUR 12,000 for the costs and expenses incurred before the Court.

64. The Government contested the claim pointing out that it had not been itemised nor supported by documents. Moreover, considerable time appeared to have been spent on issues unrelated to the alleged violation.

65. According to the Court's case-law, an applicant is entitled to the reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court has received no vouchers or particulars regarding the costs claimed. It is therefore unable to make any award under this heading.

C. Default interest

66. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Declares the application admissible;
2. Holds that there has been a violation of the right of access to a court under Article 6 § 1 of the Convention;
3. Holds that no separate issue arises as to whether there has been a violation of the "entitlement to a ... hearing within a reasonable time" under Article 6 § 1 of the Convention and that it is not necessary to examine this matter under this provision;
4. Holds that it is not necessary to examine the case under Article 13 of the Convention;
5. Holds
 - (a) that the respondent State is to pay the first applicant, within three months, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 2 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Isabelle Berro-Lefèvre

Registrar President

Fuente: <http://www.echr.coe.int>