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665, rue de Neudorf  
L-2220 LUXEMBOURG

## FIRST SECTION

ECHR-LE4.3aR  
SCP/rk

9 November 2010

**Application no. 25498108**  
**Kristiansen and Tyvik As v. Norway**

Dear Sir,

I enclose a copy of the Government's observations on the above application and a letter indicating their position regarding a friendly settlement of the case.

The President of the Section has instructed me to invite you to submit by **20 December 2010** at the latest any written observations which you may wish to make in reply on behalf of the applicants, together with any claims for just satisfaction. Before formulating your claims for just satisfaction please take note of the enclosed Practice Direction. You are requested to send me a copy of your observations by mail and, if possible, by fax. I would remind you that under Rule 34 § 3 all communications with and oral and written submissions by applicants or their representatives shall as a rule be in one of the Court's official languages.

I should be grateful if you would indicate **by the above-mentioned date** the applicants' position regarding a friendly settlement of the case, and any proposals they may wish to make. If the parties are interested in reaching a settlement, I would be prepared to make a suggestion for an appropriate arrangement. Having regard to the requirement of strict confidentiality under Rule 62 § 2 of the Rules of Court, any submissions or proposals in this respect should be set out in a **separate document**, the contents of which **must not** be referred to in any submissions made in the context of the contentious proceedings.

With regard to just satisfaction claims, I would draw your attention to Rule 60 and would remind you that failure to submit within the time allowed quantified claims, together with the required supporting documents, entails the consequence that the Chamber will either make no award of just satisfaction or else reject the claim in part. This applies even if the applicants have indicated their wishes concerning just satisfaction at an earlier stage of the proceedings.

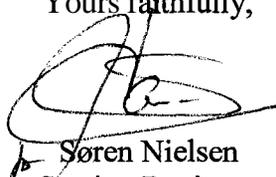
The criteria established by the Court's case-law when it rules on the question of just satisfaction (Article 41 of the Convention) are: (1) pecuniary damage, that is to say losses

actually sustained as a direct consequence of the alleged violation; (2) non-pecuniary damage, meaning compensation for suffering and distress occasioned by the violation; and (3) the costs and expenses incurred in order to prevent or obtain redress for the alleged violation of the Convention, both within the domestic legal system and through the **Strasbourg** proceedings. These costs must be **itemised**, and it must be established that they are reasonable and have been actually and necessarily incurred.

You must attach to your claims the necessary vouchers, such as bills of costs. The Government will then be invited to submit their comments on the matter.

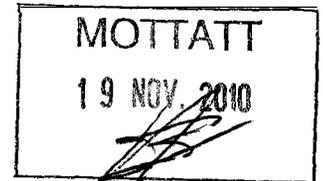
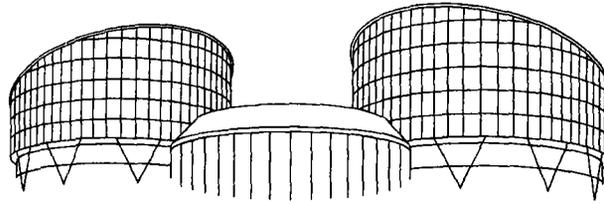
These time-limits will not normally be extended.

Yours faithfully,



Søren Nielsen  
Section Registrar

Encs: Government's observations  
Practice direction on just satisfaction claims



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

PRACTICE DIRECTION<sup>1</sup>

**JUST SATISFACTION CLAIMS**

**I. Introduction**

1. The award of just satisfaction is not an automatic consequence of a finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights or its Protocols. The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only "if necessary" (*s'il y a lieu* in the French text), makes this clear.

2. Furthermore, the Court will only award such satisfaction as is considered to be "just" (*kquitable* in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation in itself constitutes adequate just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant's own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting State as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances.

3. When it makes an award under Article 41, the Court may decide to take guidance from domestic standards. It is, however, never bound by them.

4. Claimants are warned that compliance with the formal and substantive requirements deriving from the Convention and the Rules of Court is a condition for the award of just satisfaction.

**II. Submitting claims for just satisfaction: formal requirements**

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<sup>1</sup> Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007.

5. Time-limits and other formal requirements for submitting claims for just satisfaction are laid down in Rule 60 of the Rules of Court, which, in relevant part, provides as follows:

1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.
3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.
- ...

Thus, the Court requires specific claims supported by appropriate documentary evidence, failing which it may make no award. The Court will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time.

### III. Submitting claims for just satisfaction: substantive requirements

6. Just satisfaction may be afforded under Article 41 of the Convention in respect of:
- a) pecuniary damage;
  - b) non-pecuniary damage; and
  - c) costs and expenses.

#### 1. Damage in general

7. A clear causal link must be established between the damage claimed and the violation alleged. The Court will not be satisfied by a merely tenuous connection between the alleged violation and the damage, nor by mere speculation as to what might have been.

8. Compensation for damage can be awarded in so far as the damage is the result of a violation found. No award can be made for damage caused by events or situations that have not been found to constitute a violation of the Convention, or for damage related to complaints declared inadmissible at an earlier stage of the proceedings.

9. The purpose of the Court's award in respect of damage is to compensate the applicant for the actual **harmful** consequences of a violation. It is not intended to punish the Contracting State responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as "punitive", "aggravated" or "exemplary".

#### 2. Pecuniary damage

10. The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place – in other words, *restitutio in integrum*. This can involve compensation for both loss **actually suffered** (*damnum emergens*) and **loss, or** diminished gain, to be expected in the future (*lucrum cessans*).

11. It is for the applicant to show that pecuniary damage has resulted from the violation or violations alleged. The applicant should submit relevant documents to prove, as far as possible, not only the existence but also the amount or value of the damage.

12. Normally, the Court's award will reflect the full calculated amount of the damage. However, if the actual damage cannot be precisely calculated, the Court will make an estimate based on the facts at its disposal. As pointed out in § 2 above, it is also possible that the Court may find reasons in equity to award less than the full amount of the loss.

### **3. Non-pecuniary damage**

13. The Court's award in respect of non-pecuniary damage is intended to provide financial compensation for non-material harm, for example mental or physical suffering.

14. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that an award in money is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law.

15. Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would be equitable. Applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation.

### **4. Costs and expenses**

16. The Court can order the reimbursement to the applicant of costs and expenses which he or she has incurred – first at the domestic level, and subsequently in the proceedings before the Court itself – in trying to prevent the violation from occurring, or in trying to obtain redress therefor. Such costs and expenses will typically include the cost of legal assistance, court registration fees and suchlike. They may also include travel and subsistence expenses, in particular if these have been incurred by attendance at a hearing of the Court.

17. The Court will uphold claims for costs and expenses only in so far as they are referable to the violations it has found. It will reject them in so far as they relate to complaints that have not led to the finding of a violation, or to complaints declared inadmissible. This being so, applicants may wish to link separate claim items to particular complaints.

18. Costs and expenses must have been actually incurred. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation. Any sums paid or payable by domestic authorities or by the Council of Europe by way of legal aid will be deducted.

19. Costs and expenses must have been necessarily incurred. That is, they must have become unavoidable in order to prevent the violation or obtain redress therefor.

20. They must be reasonable as to quantum. If the Court finds them to be excessive, it will award a sum which, on its own estimate, is reasonable.

21. The Court requires evidence, such as itemised bills and invoices. These must be sufficiently detailed to enable the Court to determine to what extent the above requirements have been met.

#### 5. Payment information

22. Applicants are invited to identify a bank account into which they wish any sums awarded to be paid. If they wish particular amounts, for example the sums awarded in respect of costs and expenses, to be paid separately, for example directly into the bank account of their representative, they should so **specify**.

### IV. The form of the **Court's** awards

23. The Court's awards, if any, will normally be in the form of a sum of money to be paid by the respondent Government to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention).

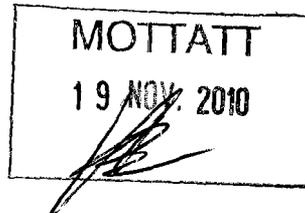
24. Any monetary award under Article 41 will normally be in euros (EUR, €) irrespective of the currency in which the applicant expresses his or her claims. If the applicant is to receive payment in a currency other than the **euro**, the Court will order the sums awarded to be converted into that other currency at the exchange rate applicable on the date of payment. When formulating their claims applicants should, where appropriate, consider the implications of this policy in light of the effects of converting **sums** expressed in a different currency into euros or contrariwise.

25. The Court will of its own motion set a time-limit for any payments that may need to be made, which will normally be three months from the date on which its judgment becomes final and binding. The Court will also order default interest to be paid in the event that that time-limit is exceeded, normally at a simple rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.



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European Court of Human Rights  
Council of Europe  
67075 Strasbourg Cedex  
France



Your reference  
ECHR-LE4.1aG SCP/rk

Our reference  
2010-0465 ERB/ERB

Date  
01.10.2010

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**OBSERVATIONS BY  
THE KINGDOM OF NORWAY  
WITH REGARD TO A FRIENDLY SETTLEMENT**

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**Kristiansen and Tyvik AS v. NORWAY**

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Reference is made to the Court's request in the letter of 14 June 2010 that the Government state its position with regard to a friendly settlement.

In the event that the Court decides not to determine separately the question of admissibility, the Norwegian Government is interested in reaching a friendly settlement of the case before the Court. In such event, the Government invites the applicants to make a proposal for a settlement.

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Oslo, 1 October 2010



Fanny Platou Amble  
Acting agent of the Norwegian Government

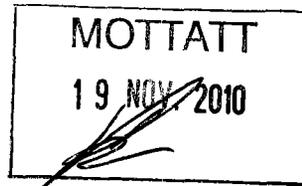


Erik Bratterud  
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European Court of Human Rights  
Council of Europe  
67075 Strasbourg Cedex  
France



**Your reference**  
ECHR-LE4.1aG SCP/rk

**Our reference**  
2010-0465 ERB/erb

**Date**  
01.10.2010

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**WRITTEN OBSERVATIONS ON ADMISSIBILITY AND MERITS  
BY  
THE KINGDOM OF NORWAY**

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**Application no. 25498/08  
Kristiansen and Tyvik AS v. NORWAY**

## **1 INTRODUCTION**

The Government of Norway refers to the Registrar's letter 14 June 2010 where notice of the above-mentioned application was given.

The Norwegian Government hereby submits its observations on the following issues:

- The facts of the case (see Section 2)
- Whether the applicant has exhausted domestic remedies (see Section 3)
- Whether the applicants could claim to have been victims of a breach of their right to a hearing by a tribunal within reasonable time or, in other words, their right of access to court under Article 6 § 1 of the Convention, on account of the duration of the proceedings before the Industrial Property Office (see Section 4)

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- Whether the above-mentioned matter also give rise to a violation of Article 13 of the Convention (see Section 5)

### 2 THE FACTS OF THE CASE

While endorsing in main the Court's Statement of Facts, the Government considers it important to expand on the factual background of the case.

#### 2.1 The First Instance and the Board of Appeals of the Norwegian Industrial Property Office

The Norwegian Industrial Property Office (NIPO) is a government authority organized under the Ministry of Trade and Industry. NIPO is responsible for processing and deciding on applications for patent protection in Norway.

NIPO is divided into two instances; the First Instance (hereinafter called NIPO) and the Board of Appeals. While the technical staff of NIPO (70 to 80 examiners covering all technical areas) are full-time employees, the technical and legal experts of the Board of Appeals are as a main rule not employed by NIPO, but appointed by the Ministry of Trade and Industry as independent members. In each individual case, the Board will be composed of those members considered best qualified to decide on it.

The legality of decisions of the Board of Appeals can be tried before the ordinary courts, Oslo City Court in the first instance.

#### 2.2 Generally on the proceedings before NIPO in patent cases

According to standards set by the European Patent Convention (EPC), an invention (a practical solution to a technical problem) is only patentable if it is new (**globally**) at the filing date and differs significantly from the state of the art technology in the area (EPC Article 52). In addition, it must be susceptible of industrial application. Norway's patent law has been harmonized with the EPC since 1980.

The novelty search is carried out by an examiner who will scrutinize the most important technical data bases worldwide or other relevant literature, magazines etc. looking for similar technology. However, the search cannot start until the data bases have been updated with relevant material which has been made public prior to the filing date. This means that the search can only start around six months from the filing date at the earliest. Around 1990, NIPO aimed at carrying out a preliminary search for applications without priority within eight months from filing. Such preliminary search is done to give the applicant sufficient time within the one year priority period to prepare applications for other countries in which patent protection is desired.

European national patent offices will prioritize novelty searches concerning applications without priority in order to afford the applicants sufficient time for a preliminary assessment of the possibilities for patenting in other countries within the time limit of one year.

At NIPO, novelty search is carried out by an examiner who will have a master's degree or similar in the relevant technical area. The examiner will have a minimum of one and a half years of

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practical training in handling patent applications. Today, the average examiner will have eight to nine years of practical experience in handling patent applications. This situation was approximately the same around 1990. As the flow of applications within different technical fields varies over time, and as the access to new examiners specialized in the relevant field is limited and inflexible due to the training requirements, it is difficult for NIPO to maintain an optimal case handling capacity at all times.

The desired handling time in the European Patent Organisation (EPO) is three years from the filing date (the so-called Paris Accord). Today, the handling time in EPO is considerably longer.

At NIPO, the average handling time until final decision in the First Instance for applications without priority has been two to three years for several decades. The average handling time before the Board of Appeals is one to one and a half years. During the first years of the decade, the average handling time before the Board was considerably longer.

### **2.3 NIPO - 30 November 1990 to 10 February 2001**

On 30 November 1990, Mr. Arne Kristiansen (the applicant) filed a patent application with NIPO for a propulsion device for air and sea vessels. The application was allotted NO 19905214.

Appendix 1: Patent application filed 30 November 1990, page 1-8.

In a letter of 21 March 1991, NIPO presented its preliminary opinion on the subject-matter of the application. NIPO stated that the application in its present form was not patentable because it did not reveal a concrete solution to achieve the desired effect, and it was also questioned whether the invention had any effect at all. Therefore, the applicant was asked to perform a test at an independent research institute and to send in the necessary test documentation (see the former Section 28 of the Regulations to the Norwegian Patents Act, currently Section 32). The applicant was given a deadline to 21 November 1991 to respond.

Appendix 2: NIPO's letter to the applicant 21 March 1991, page 1.

In his letter of 30 September 1991, the applicant argued against the need for a test and also referred to the high costs of such tests. However, he informed NIPO that prototypes were under construction and offered to perform an open test to which representatives from NIPO were invited.

Appendix 3: The applicant's letter to NIPO 30 September 1991, page 1-3.

In the period from 6 May 1992 to 10 May 1994, there was correspondence between the applicant and NIPO concerning the confidentiality of the application. According to Section 22 of the Patents Act, the patent application shall be open for public inspection 18 months from the filing date at the latest. In a letter of 5 May 1992, the applicant requested NIPO to exclude one of the documents in the application from public inspection on the ground that "the area of exploitation and the patent claims covered by this part might have significance for activities which are normally not subject to publication". In a letter of 21 May 1992, NIPO informed the applicant that the request was refused as unfounded in Section 22.

Appendix 4: The applicant's letter to NIPO 5 May 1992, page 1.

## ATTORNEY GENERAL - CIVIL AFFAIRS

Appendix 5: NIPO's letter to the applicant 21 May 1992, page 1.

However, due to the risk of violating national security interests, NIPO also asked the Military Supreme Command to consider whether the document in question should be kept secret according to the Act of Inventions of Significance of the National Defence. In its letter of 23 March 1993, the Supreme Command responded that there was no reason to keep the application secret. A copy of the letter was sent from NIPO to the applicant 23 June 1993.

Appendix 6: NIPO's letter to the Military Supreme Command 5 February 1993, page 1.

Appendix 7: The Military Supreme Command's letter to NIPO 23 March 1993, page 1.

Appendix 8: NIPO's letter to the applicant 23 June 1993, page 1.

In a letter of 9 May 1994, the applicant provided NIPO with information about the subject-matter of the application.

Appendix 9: The applicant's letter to NIPO 9 May 1994, page 1-5.

So far, the application had been handled by Mr. Kaare Otterbeck as executive officer of NIPO. When he was appointed member of the Board of Appeals in the autumn 1994, the application was transferred to a new executive officer, Mr. Trygve S. Svendsen.

In a letter of 24 February 1995, the applicant was reminded of NIPO's letter of 21 March 1991 and asked again to present evidence of the technical effect and the concrete features of the invention. The deadline to respond was set to 24 May 1995.

Appendix 10: NIPO's letter to the applicant 24 February 1995, page 1-2.

The applicant responded in a letter of 23 May 1995. The reply contained theoretical views on the subject-matter of the application and a reference to the report "An Experimental Investigation into the Shape of Thrust Augmenting Surfaces in Conjunction with Coanda-Deflected Jet Sheets", published in 1965 by T. Mehus, Institute for Aerospace Studies, University of Toronto. According to the applicant, the report described tests and results which proved the technical effect of his invention, and the required tests were therefore superfluous.

Appendix 11: The applicant's letter to NIPO 23 May 1995, page 1-3.

On 27 November 1996, the applicant wrote to the Director General of NIPO, Mr. Jørgen Smith, and complained about the delays in the processing of the application.

Appendix 12: The applicant's letter to NIPO 27 November 1996, page 1-2.

In his reply 9 December 1996, the Director General gave his apologies for the delay. The delay was caused by an unfortunate combination of replacement of executive officers and an increasing number of applications and novelty searches in the period. He said that the application would be prioritized from now on.

Appendix 13: NIPO's letter to the applicant 9 December 1996, page 1.

## ATTORNEY GENERAL - CIVIL AFFAIRS

In a letter of 16 December 1996, NIPO maintained the earlier requirements regarding the necessity of an independent test. The deadline to respond was set to 16 March 1997.

Appendix 14: NIPO's letter to the applicant 16 December 1996, page 1.

In a letter of 31 December 1996, the applicant again complained about faults in the processing of the application and requested NIPO to withdraw its letter of 16 December 1996. He doubted the technical competence of NIPO's examiners and advised NIPO to seek advice from external experts.

Appendix 15: The applicant's letter to NIPO 31 December 1996, page 1-4.

The Director General responded 12 February 1997. Having looked into the processing of the application, he could find no faults made by NIPO.

Appendix 16: NIPO's letter to the applicant 12 February 1997, page 1.

In a letter of 14 March 1997, the applicant submitted a statement from Assistant Professor Arve Kvalheim, Institute of Mathematics, Division of Mechanics, University of Oslo. Assistant Professor Kvalheim confirmed that he had been present at a small-scale test of the invention at the Hydro-Dynamic Laboratory of the University of Oslo and concluded that, on the basis of a general hydro-dynamic assessment and the simplified demonstrations, the presentation showed, in principle, a possible propulsion method for vessels in water and air.

Appendix 17: The statement of 14 March 1997 from Assistant Professor Arve Kvalheim, page 1.

The applicant sent a further letter to NIPO on 1 April 1997 in which he claimed that the report attached to his letter of 23 May 1995 and the demonstration at the University of Oslo did provide sufficient evidence that the invention had the necessary technical effect. He therefore asked for an accelerated decision of the application.

Appendix 18: The applicant's letter to NIPO 1 April 1997, page 1.

In the autumn 1997, NIPO ordered an independent statement from Assistant Professor Olav Kjerland, Department of Marine Technology, Norwegian University of Science and Technology. In his statement of 18 December 1997, Mr. Kjerland stated that small-scale tests in this technical area are rather worthless, and that even if the system apparently had effect at low speed and through small-scale tests, the efficiency will remain low.

Appendix 19: The statement of 18 December 1997 from Assistant Professor Olav Kjerland, page, 1-2.

In the meantime, the handling of the application was transferred to a new executive officer, Stanko Bradvarevic, and later back to Trygve Svendsen due to internal reorganisation.

On the background of the statement from Mr. Kjerland and the unsatisfactory demonstration report from the applicants, NIPO maintained its position in a letter of 5 May 1999 and stated that the application might be refused if a controlled test was not carried out. The executive officer also apologized for the delay which was caused by the increased work-load in the area. The deadline for submitting a response was set to 5 November 1999.

## ATTORNEY GENERAL - CIVIL AFFAIRS

Appendix 20: NIPO's letter to the applicant 5 May 1999, page 1-2.

A letter dated 26 October 1999 was now sent by registered mail from the applicant to the Director General of NIPO. It was received on **11** November 1999. In this letter, the applicant again complained about NIPO's late processing of the application and the technical incompetence of its examiners. It did not contain new arguments concerning the requirements for granting a patent.

Appendix 21: The applicant's letter to NIPO dated 26 October 1999, page 1-5.

Since the letter dated 26 October 1999 was not received by NIPO prior to the deadline 5 November 1999, the application was now shelved (the Norwegian Patents Act Section 15), see NIPO's letter of 16 November 1999.

Appendix 22: NIPO's letter to the applicant 16 November 1999, page 1.

In his letter of 27 January 2000, the applicant claimed that the decision to shelve was incorrect because he had posted his letter by registered mail on 26 October 1999.

Appendix 23: The applicant's letter dated to NIPO 27 January 2000, page 1.

In a letter of 18 February 2000, NIPO stated that the letter dated 26 October 1999 was reconsidered to have been received in time. However, it was not regarded as an attempt to reply to the substantive content requested in NIPO's letter of 5 May 1999, such attempt being a requirement under the law. The decision to shelve was therefore upheld. The applicant was informed about his right to have the handling of his application resumed by submitting the demanded information and paying a fee of 850 NOK within 5 March 2000, subject to the Patents Act Article 15.

Appendix 24: NIPO's letter to the applicant 18 February 2000, page 1.

The applicant chose not to resume the handling of the application. Instead, he reiterated his earlier statements on the patentability of the application in a letter of 29 February 2000.

Appendix 25: The applicant's letter to NIPO 29 February 2000, page 1-2.

On 1 September 2000, the applicant also filed an appeal to the Board of Appeals against the decision to shelve the application. However and as explained below, NIPO's decision to shelve was later nullified, and therefore it was not necessary for the Board of Appeals to decide on the matter.

Appendix 26: The applicant's appeal the Board of Appeals 1 September 2000, page 1.

The applicant filed a complaint concerning NIPO's processing of the application to the Parliamentary Ombudsman in a letter dated 8 March 2001.

Appendix 27: The applicant's letter to the Parliamentary Ombudsman 8 March 2001, page 1-4.

He also filed a complaint to the Ministry of Trade and Industry in a letter 31 October 2001.

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On 28 March 2001 the Ministry of Trade and Industry concluded, after having looked into the case, that NIPO had processed the application in accordance with law, regulations, its own internal instructions and fair administrative practice.

Appendix 28: The Ministry of Trade's letter to the applicant 28 March 2001, page 1-2.

On 26 June 2001, the Parliamentary Ombudsman made an inquiry to NIPO concerning the processing of the application.

Appendix 29: The Parliamentary Ombudsman's letter to NIPO 26 June 2001, page 1-2.

NIPO responded to the Parliamentary Ombudsman in a letter of 8 August 2001. In that connection, NIPO stated that it had reconsidered the decision to shelve the application on the ground that the letter of 26 October 1999 did not contain any new material. Therefore, the applicant could have good reasons for not understanding that the contents of his letter would not be regarded as an attempt to respond to NIPO's letter of 5 May 1999.

Appendix 30: NIPO's letter to the Parliamentary Ombudsman 8 August 2001, page 1-2.

By NIPO's letter of 30 August 2001, the applicant was informed that NIPO had decided to nullify the decision to shelve the application (Protocol dated 27 August 2001). The applicant was given a new deadline to respond to NIPO's letter of 5 May 1999 within 28 February 2002.

Appendix 31: NIPO's protocol 27 August 2001, page 1-2.

Appendix 32: NIPO's letter to the applicant 30 August 2001, page 1- 3.

The applicant responded to NIPO in his letter of 24 September 2001 without presenting any new arguments or material.

Appendix 33: The applicant's letter to NIPO 24 September 2001, page 1-4.

NIPO refused the application on 2 October 2001 on the ground that the applicant had not been able to make probable that the subject-matter of the application has the alleged technical effect.

Appendix 34: NIPO's protocol of 2 October 2001, page 1-2.

In his letter 23 January 2002, the Parliamentary Ombudsman informed NIPO that he did not find any grounds to continue the investigation of the complaint, as NIPO had given the applicant a new deadline to respond NIPO's letter of 5 May 1999.

Appendix 35: The Parliamentary Ombudsman's letter to NIPO 23 January 2002, page 1.

### **2.4 Board of Appeals - 27 November 2001 to 21 November 2005**

The applicant filed an appeal (NO 7230) 27 November 2001 to the Board of Appeals against NIPO's decision of 2 October 2001.

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 and indicated a new formulation of the patent claims which might lead to a

## ATTORNEY GENERAL - CIVIL AFFAIRS

patent, but only for sea vessels. The applicant was informed correspondingly in a letter of 29 September 2004.

During the period 12 November 2004 to 13 January 2005, there was correspondence between the Board of Appeals and the applicant in order to arrange a meeting.

The meeting was held on 2 February 2005 in which the subject-matter of the appeal was discussed together with the further process.

On 14 February 2005, NIPO was informed that 50 % of the ownership to the application had been transferred to the private limited company Tyvik AS.

In the period 2 May 2005 to 17 October 2005, there was correspondence between the Board of Appeals and the applicant concerning the patentability of the original patent claims.

On 14 November 2005, the Board of Appeals made its decision. It 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 applicant had received information on how to change the claims into a patentable invention, but had not been willing to do so. Consequently, the Board did not find grounds to continue processing of the application. Accordingly, the First Instance's decision was set aside and the application referred for further handling by NIPO.

Appendix 36: The Board of Appeals' decision of 14 November 2005 in case 7230, page 1-21.

### **2.5 NIPO - 21 November 2005 to 20 June 2007**

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

The applicant, now represented by Mr. Herman Berge, filed a new complaint to the Parliamentary Ombudsman on 13 March 2006 concerning the proceedings before NIPO. In particular, the applicant claimed that the executive officer of NIPO was 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 the Ombudsman could not decide on complaints until the processing of the application was completed.

Appendix 37: Herman Berge's letter to the Parliamentary Ombudsman 13 March 2006, page 1-3.

Appendix 38: The Parliamentary Ombudsman's letter to the applicant 22 March 2006, page 1.

Appendix 39: The Parliamentary Ombudsman's letter to the applicant 29 June 2006, page 1.

In the period 31 May 2006 to 11 June 2006, there was further correspondence between NIPO and the applicant. NIPO gave guidance and suggested specific changes in the patent claims to make the subject-matter of the application patentable, but the applicant could still not agree.

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On 20 June 2007, the application was formally refused due to lack of novelty.

### 2.6 Board of Appeals - 20 August 2007 to 22 September 2008

On 20 August 2007, the applicant filed a new appeal against NIPO's decision of 20 June 2007 to the Board of Appeals.

The Board of Appeals met on 12 November 2007 to discuss the case. In a letter of 29 November 2007, the Board indicated a new set of claims that might lead to a patent, but now limited to sea vessels. The applicant was given a deadline till 28 January 2008 to respond.

The applicant replied on 28 January 2008, but did not accept the suggested patent claims.

On 22 September 2008, the Board of Appeals decided to uphold NIPO's decision to refuse the application. Contrary to NIPO, the Board found the invention novel with regard to sea vessels, but not to aviation. Since the applicant did not want to change the patent claims as indicated, the application did not fulfil the requirements for patentability, and the appeal was refused.

Appendix 40: The Board of Appeals's letter to the applicant 22 September 2008, page 1.

Appendix 41: The Board of Appeals's decision 22 September 2008, page 1-55.

A copy of the signed decision was enclosed in NIPO's letter 7 September 2010 to the applicant.

Appendix 42: NIPO's letter to the applicant 7 September 2010, page 1.

In a letter of 21 November 2008 to the Board of Appeals, the applicant contested the decision of 22 September 2008.

Appendix 43: The applicant's letter to the Board of Appeals 21 November 2008, page 1.

The Board of Appeals replied on 26 November 2008 and informed the applicant about his right to appeal to the courts of law.

Appendix 44: The Board of Appeals' letter to the applicant 26 November 2008, page 1.

### 2.7 Patents granted in USA, Russia, China, Singapore and by the EPO

The Court's Statement of Facts quote the applicants' claim that patent applications filed in 2003, in light of the Norwegian patent application of 30 November 1990 (NO 19905214), had been granted in EPO, USA, Russia, China and Singapore.

According to Espacenet (a database provided by EPO), priority from NO 19905214 has not been claimed by the applicant in any of the above mentioned countries or in EPO. The granted patent EP 1453726 claims priority from another and independent application, namely NO 20015844, which is based on knowledge from NO 19905214. When comparing the claims in EP 1453726 with NO 19905214, one will observe that the patent claims in EP 1453726 are based on **additional features. It is these additional claims that make the invention patentable.**

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### 3 DOMESTIC REMEDIES HAVE NOT BEEN EXHAUSTED

#### 3.1 The applicant has not satisfied the requirement in Article 35 § 1 of the Convention

The Government is of the opinion that the applicants have not satisfied the requirement of Article 35 § 1 of the Convention that *"all domestic remedies have been exhausted according to the generally recognised rules of international law"*. The Government therefore requests the Court to declare the application inadmissible under Article 35 §§ 1 and 4.

The Government observes that the applicants in the present case have not raised or taken any step to raise before Norwegian courts (or any other domestic instance) the complaints or the substance of the complaints made before the Court.

The Government observes that domestic judicial remedies are readily available to individuals and entities in the applicants' situation. Reference is made to the 2005 Civil Disputes Act. Norwegian courts are fully authorized to determine the legality of the decisions and the case procedure of administrative bodies, **NIPO** included.

Norwegian courts are also fully authorized, by virtue of the incorporation of the Convention into Norwegian law through the 1999 Human Rights Act, to consider and determine complaints that the Convention has been violated.

The 1999 Human Rights Act provides the following in sections 2 and 3 (unofficial translation):

*§ 2. The following conventions shall have the force of Norwegian law insofar as they are binding for Norway:*

*1. The Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 of 11 May 1994 to the Convention*

...

*§ 3. The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.*

Accordingly, domestic legislation unequivocally states that Norwegian public authorities' obligations pursuant to the Convention take precedence over other legislative and administrative acts. Consequently, **NIPO** decisions not in conformity with Norway's obligations under the Convention are therefore to be declared null and void by Norwegian courts when such cases are brought before them. Correspondingly, Norwegian courts may also declare **NIPO** case procedure to be in violation of the Convention and award compensation.

The Government considers the available domestic judicial remedies in the applicants' case to be fully "effective" and "adequate" within the meaning of Article 35 § 1 of the Convention as interpreted by the Court.

Indeed, Norwegian courts may under no circumstance award the applicants patent protection for a period extending beyond 30 November 2010, 20 years after the filing of the patent application. Reference is made to the 1967 Patent Act Section 40. However, patent protection is

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not the issue of the applicants' complaints before the Court. The issue is whether the proceedings before **NIPO** are in conformity with the Convention.

While it is a requirement that the applicants exhaust their right to appeal to the Board of Appeals before raising before the courts the issue of the legality of **NIPO decisions**, no such requirement applies when raising the issue of the legality of the *proceedings* before **NIPO**, including complaints that the proceedings constitute violations of the Convention. Reference is made to the Patents Act Article 27. Such complaints may be raised as soon as the applicants have an arguable claim that their Convention rights are violated. No particular time-limits apply. Reference is made to the judgment of the Supreme Court of Norway, cited in Retstidende 2003 page 301.

The Government contests the applicant's claim that legal proceedings before Norwegian courts would last until sometime between 2020 and 2030. According to the statistics of the National Courts Administration, average consumption of time in civil cases before the District Courts is well under 6 months, and the same is the case with the Courts of Appeal.

Appendix 44: National Courts Administration statistics, first half of 2010

The Government is of the opinion that the applicants should have sought recourse to domestic courts prior to their institution of proceedings before the Court. The Government observes that the applicants have followed the **NIPO** proceedings closely over more than 19 years, without taking any steps in order to involve domestic courts. Access to domestic courts has been open to the applicants for a long time, and is still open.

The applicants have not afforded the domestic courts the opportunity provided for in Article 35 § 1 of the Convention to consider a redress against the applicants' claims of violation of the Convention. The applicants have thereby failed to satisfy one of the mandatory conditions for admissibility set out in Article 35 § 1 of the Convention, and their application should therefore be declared inadmissible.

### 3.2 The Court should explicitly determine whether the applicant has failed to exhaust domestic remedies

The Government makes reference to the Court's decision 2 July 2009 in *Khoa Rahim v. Norway*, application no. 4356/08. In that case, too, the applicant in question had made no attempt to avail himself of judicial remedies available to him under Norwegian statutory law, nor had the applicant furnished reasons why domestic legal proceedings had not been instituted.

The Government has taken note of the fact that the Court in its *Khoa Rahim* decision

*[did] not find it necessary to determine the Government's [request] ... to declare the application inadmissible for failure to exhaust domestic remedies since it at any event, for the reasons set out below, finds the application manifestly ill-founded (First paragraph of section B. Assessment by the Court).*

The Government questions the advisability of this approach in cases where an applicant clearly has made no attempt to seek recourse to domestic remedies or to explain why domestic remedies have not been considered an effective means of redress.

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In his Memorandum 3 July 2009 to the States with a view to preparing the Interlaken Conference, the President of the Court stated, *inter alia*, the following:

*The basic principle is that it is for the States to guarantee the Convention rights at national level and for the Court to ensure, through the examination of individual applications (or exceptionally inter-State cases), that States do indeed respect their engagements. This means that it is in the first place for the national authorities and courts to prevent or, when they fail to do so, examine and put right any violation of the Convention. It also means that States must comply with the Court's case-law and make sure that judgments of the Court are adequately executed, notably by adopting the appropriate general measures and by taking remedial action in respect of cases which could give rise to similar issues. As regards the Court's role in this context, it must reject applications where the applicants have not properly exhausted domestic remedies and it should apply Article 13 of the Convention so as to ensure that States establish adequate remedies. The Court must pursue a proactive interpretation of Article 13 so as to encourage the introduction of domestic remedies. The high number of repetitive applications before the Court is an indication that the subsidiarity principle does not operate adequately. (cf. chapter 8.1.2 in the Memorandum, page 4).*

Furthermore, reference is made to the Interlaken Declaration, in which the Court is invited to "apply uniformly and rigorously the criteria concerning admissibility and jurisdiction and take fully into account its subsidiary role in the interpretation and application of the Convention" (cf. para. 9.b in the Action Plan).

The Government respectfully submits that the approach taken in *Khoa Rahim* does not contribute to enhancing the subsidiary role of the Strasbourg supervisory system.

The Government also notes that an approach such as that taken in *Khoa Rahim* may aggravate the Court's heavy workload.

In the view of the Government, the Court in the present case should determine separately the question of inadmissibility due to failure to exhaust domestic legal remedies.

#### 4 THE APPLICATION DISCLOSES NO VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

Reference is made to question 1 of the Questions to the Parties 14 June 2010, whereby the Court invites the Government to submit its views as to whether the applicants could "claim to have been victims of a breach of their right to a hearing by a tribunal within reasonable time or, in other words, their right of access to court under Article 6 § 1 of the Convention, on account of the duration of the proceedings before the *Industrial Property Office*".

##### 4.1 The Court's case-law with regard to length of proceedings

###### 4.1.1 Period to be taken into consideration

Where an applicant under the national legislation is required to exhaust a preliminary administrative procedure before having recourse to a court, the proceedings before the administrative body are included when calculating the length of the proceedings for the

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purposes of Article 6, see, e.g. the Court's judgment 24 March 2005 in the case of *Kiurkchian v. Bulgaria*, application no. 44626/98, para. 51.

### 4.1.2 Reasonableness of the length of the proceedings

In the Court's judgment 31 August 2007 in the case of A. and E. Riis v. Norway, the Court states the following on the assessment of the reasonableness of the length of proceedings:

***The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (...)" (para. 53).***

Only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement, see the Court's judgment 16 December 1997 in the case of *Proszak v. Poland*, no. 2/1997/786/987, para. 40.

### 4.2 On the particular circumstances of the application

Turning now to the particulars of the present application, the Government is of the view that the proceedings before NIPO does not amount to a violation of Article 6 § 1 of the Convention. While acknowledging that NIPO is responsible for some delay, the Government submits that NIPO does not bear the primary responsibility. Regard being had to all the circumstances of the case and, more particularly, to the part played by the applicant in the conduct of the proceedings, the length of time complained of cannot be regarded as unreasonable.

The Government of Norway therefore submits that the application must be dismissed as manifestly ill-founded with regard to this part of the complaint.

#### 4.2.1 Period to be taken into consideration

The Government submits that the period to be taken into consideration commenced 30 November 1990, when the applicants filed the patent application with NIPO (Appendix 1). The proceedings ended 22 September 2008, with the final rejection of the application by the Board of Appeals (Appendix 40). The applicants failed to institute legal proceedings against the Board of Appeals decision within the closing date, two months after the decision had been sent to the applicants. At this, the Board of Appeals decision became final. Reference is made to the Patents Act Article 27 and Article 72. Accordingly, the total period to be taken into consideration is close to 18 years.

#### 4.2.2 Complexity of the case

In any patent office that performs pre-grant novelty search and patentability examination, the processing of a patent application is comprehensive and time consuming. Reference is made to section 2.2 above. As mentioned, the average handling time until final decision in the First Instance of NIPO is two to three years for applications without priority. The average was the same at the time when the present application was filed with NIPO in 1990.

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The Government submits that the general complexity of the search and patentability examination account for a significant part of the total period to be taken into consideration.

In addition, the case was made complex by the applicants' repeated contestation of NIPO's demand for evidence and the refusals of the applicants to change the claims as suggested by NIPO. The Government will expand on this below.

### **4.2.3 Conduct of the applicants**

In a number of cases the initial search and examination of the application is followed by a "negotiation" process. NIPO may for instance hold that (parts of) the claims are not patentable, while the applicant may respond by giving counter-arguments, presenting new evidence, limiting or altering the claims etc. NIPO will guide the applicants and suggest changes in order to make the claims patentable. The facts of the present case show that such a process has indeed been going on between the applicants and NIPO, and that this process accounts for the greater part of the total period to be taken into consideration.

The Government submits that the process has been continuously fueled by new submissions from the applicants, and that the applicants have contested and stalled NIPO's attempts at ending the proceedings. Thereby, the applicants are responsible for prolonging the proceedings before NIPO and postponing a possible legal proceeding on the legality of NIPO's decision.

There has been comprehensive correspondence between NIPO and the applicant. From the time of the application 30 November 1990 to the first shelving of the case 16 November 1999, a total of 17 letters and 2 statements were sent between the applicants and NIPO. In addition, there was case-initiated correspondence between NIPO and the Military Supreme Command.

Following the annulment of the decision to shelve the case, a further two letters passed between the applicants and NIPO before NIPO's First Instance refused the application 2 October 2001.

During all of the period from NIPO's first letter 21 March 1991 to the refusal of the application 2 October 2001, NIPO maintained the same view; that the applicants had not made probable the alleged technical effect of the invention, and that they had to produce further evidence, in the form of a controlled test.

Following the applicants' appeal to the Board of Appeals on 27 November 2001, the applicants were advised to change the claims of the application, limiting the claims to sea vessels. The applicants declined. As the Board of Appeals disagreed with NIPO on the issue of technical effect, the case was returned to NIPO on 14 November 2005.

NIPO now concluded that the subject-matter of the application could not be considered novel and advised the applicants to change the claims. Specific changes were suggested. The applicants refused to change the claims, and the application was refused 20 June 2007.

The applicants appealed again to the Board of Appeals. The Board of Appeals found that the invention was patentable for sea vessels, but not for air vessels. A new set of claims was suggested to the applicants, but they declined. As the applicants refused to change the claims on this point, the decision of the First Instance was upheld 22 September 2008.

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The Government submits that the applicants have been given ample opportunity and advice, first at producing the requested evidence, then at changing the claims in order to make them patentable. Having repeatedly failed to produce the required evidence and refusing to change the claims, the applicants are themselves responsible for the greater part of the total period to be taken into consideration.

### *4.2.4 Conduct of the authorities*

The Government acknowledges that **NIPO** are responsible for certain delays during the 18-year processing of the application. This applies to the following periods:

1. From May 1995 to December 1996 (see Appendices 11 to 14)
2. From December 1997 to May 1999 (see Appendices 19 and 20)

The Government submits that the delays are an unavoidable consequence of the prolonged proceedings. As mentioned, due to the varying flow of applications within the different technical fields, the limited access to examiners specialized in the relevant field and the need to prioritize preliminary searches for applications without priority, it is impossible to avoid periodical delays. Reference is made to section 2.2 above. It should also be noted that the applicants remained passive during the periods of delay.

The Government acknowledges that NIPO is also responsible for a certain delay during the period from November 2001 to September 2004 (see appendix 36). Due to the organization of the Second Chamber at that time, the case files circulated between the five members of the Second Chamber for approximately 30 months before the case was deemed to be sufficiently prepared. Even if the case files were elaborate at that time, the Government acknowledges that such a long period for preparations was not strictly necessary.

The Government does not acknowledge that NIPO is responsible for the period from October 1999 to August 2001, when the decision to shelve the case was reversed. The greater part of this period must be attributed to the failure of the applicants in complying with NIPO's demand for evidence.

The Government does not accept that NIPO was negligent in not putting an earlier end to case. Having due regard to the principle of securing proper administration of justice, NIPO made repeated efforts at guiding the applicants and thoroughly assessing the applicants' many submissions. NIPO's efforts were all aimed at reaching patentable claims for the applicants. It is difficult to see at what earlier time than the actual, that NIPO should have refused the application. The refusal was made as soon as it became clear that the applicants would not change the claims and would not provide additional evidence.

### *4.2.5 What was at stake for the applicants?*

The interests at stake for the applicants are mainly of economic nature. Potential breaches of the applicants' rights may to a large extent be redressed.

In addition, both Norwegian and European patent law contains provisions on so-called preliminary patent protection. Once a patent application has been made public (18 months from the filing date), a third party who infringes the subject-matter of the application may be liable to

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damages and penalties *ex tunc* if patent is granted, see Section 60 and 22 of the Norwegian Patents Act and EPC Article 67.

These provisions significantly reduce the importance of a rapid patent decision. They also imply that a patent decision is of importance even if it is made after the expiration of the 20 year protection period.

In this particular case, it turned out that the patent claims of the applicants were in fact not patentable.

### **4.3 The application should be declared inadmissible pursuant to Article 35 § 3 of the Convention; alternatively the Court should declare that no violation exists**

In the event that the Court does not declare the application inadmissible due to failure to exhaust domestic remedies, the Government of Norway respectfully submit that the Court declares the application inadmissible as it is manifestly ill-founded pursuant to Article 35 § 3 of the Convention, or, alternatively, hold that the facts of the case do not disclose any violation of Articles 6 § 1 of the Convention.

## **5 THE APPLICATION DISCLOSES NO VIOLATIONS OF ARTICLE 13 OF THE CONVENTION**

Reference is made to question 2 of the Questions to the Parties 14 June 2010, whereby the Court invites the Government to submit its views as to whether "*the above matter also give rise to a violation of Article 13 of the Convention*".

### **5.1 Generally on the assessment to be taken under Article 13 of the Convention**

Article 13 of the Convention requires a remedy for everyone whose rights under the Convention has been violated. Accordingly, the provision is linked to violations of substantive rights, and no violation of Article 13 is possible in isolation.

According to settled case law, a remedy must be secured to any person with an "arguable claim" that his rights have been violated.

Where an individual has an arguable claim that he is the victim of a violation of Convention rights, he should have a remedy before a national authority which has the power both to decide his claim and, if appropriate, to give redress, see the Court's judgment 25 March 1983 in the case of *Silver and others v. the United Kingdom*, application no. 5947/72, para. 113.

In the present case the question seems to be whether the applicants have a remedy before a national authority which has the power to decide upon the alleged violation of Article 6 § 1 and, if appropriate, to give redress.

### **5.2 On the particular circumstances of the application**

Turning now to the particulars of the present application, the Government is of the view that the applicants have an effective remedy for the alleged violation, and that the application does not disclose a violation of Article 13 of the Convention. The Government of Norway therefore

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submits that the application must be dismissed as manifestly ill-founded with regard to this part of the complaint.

As mentioned under Section 3, Norwegian courts are fully authorized, by virtue of the incorporation of the Convention into Norwegian law through the 1999 Human Rights Act, to consider and determine complaints that the Convention has been violated. Such legal proceedings may be instituted by the applicants as soon as they have an arguable claim. Reference is made to the 2005 Civil Disputes Act Sections 1-2 and 1-3.

The applicants may alternatively institute legal proceedings on the legality of the 22 September 2008 NIPO decision, and thereby have the Convention claim and claims for redress decided.

Again, the Government contests the applicants' claim that that legal proceedings before Norwegian courts would be delayed. Reference is made to Section 3 and Appendix 44.

### **5.3 The application should be declared inadmissible pursuant to Article 35 § 3 of the Convention; alternatively the Court should declare that no violation exists**

In the event that the Court does not declare the application inadmissible due to failure to exhaust domestic remedies, the Government of Norway respectfully submit that the Court declares the application inadmissible as it is manifestly ill-founded pursuant to Article 35 § 3 of the Convention, or, alternatively, hold that the facts of the case do not disclose any violation of Article 13 of the Convention.

## **6 CONCLUDING OBSERVATIONS**

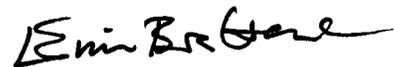
In conclusion, the Government of Norway respectfully requests the European Court of Human Rights to declare application no. 25498/08 inadmissible without delay due to non-exhaustion of domestic remedies and/or because it is manifestly ill-founded, or, in the alternative, to hold that the facts of the case do not disclose any violations of the Convention.

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Oslo, 1 October 2010



Fanny Platou Amble, advocate  
Acting agent of the Norwegian Government



Erik Bratterud  
advocate

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- Appendix 20: NIPO's letter to the applicant 5 May 1999, page 1-2.
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- Appendix 25: The applicant's letter to NIPO 29 February 2000, page 1-2.
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