Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Qualification of Hadana Compensation ("Rémunération de la Garde") and Comparison to Dutch Spouse Alimony in the Law on Surviving Family Members

Question(s) at stake:

Whether hadana compensation (rémunération de la garde) is equivalent to partner/spouse alimony in the context of the Dutch social benefit law on surviving family members.

Outcome of the ruling:

Moroccan hadana compensation is not equivalent to the Dutch form of partner/spouse alimony, and therefore the widow could not claim a widow(er)'s pension under the social benefit law on surviving family members.

Topic(s):

- Financing and Taxations
- Personal Status, Family and Inheritance

Keywords:

- Guardianship
- Indirect State support
- Social Benefits
- Social security
- Widow(er)'s pension

Tag(s):

- Hadana compensation
- Spouse alimony

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Country:

Netherlands

Official citation:

Central Appeals Tribunal, Judgment of 31 December 2010, nr. 09/3028 ANW (Centrale Raad van Beroep, 31 december 2010)

Link to the decision:

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2010:BO9659

ECLI:

ECLI:NL:CRVB:2010:BO9659

Date:

31 December 2010

Jurisdiction / Court / Chamber:

Central Appeals Tribunal, 'meervoudige kamer'

Remedy / Procedural stage:

Highest Appeal Stage

Previous stages:

- District Administrative Court of Amsterdam, Judgment of 7 May 2000, no. AWB 08-2937 ANW (Rb. Amsterdam, 7 mei 2009, nr. AWB 08-2937 ANW)

Subsequent stages:

None

Branches / Areas of law:

Public law, Social security law

Facts:

The initiative in this case was taken by the (female) widow of a deceased ex-husband who upon his death held both Moroccan and Dutch nationalities. In this administrative case the competent government body was the Dutch Social Benefit Institution (Sociale Verzekeringsbank, Svb).

The couple in question married in Morocco in 1999 and filed for a divorce in 2000. In November 2000, a Moroccan court ended the marriage. At that time the woman was three months pregnant and was due to deliver a child on 18 May 2001. After the birth of their child, a Moroccan court ordered the former husband to pay the woman a monthly child pension of 500 dirhams, as well as a monthly "*rémunération de la garde*" of 200 dirhams. The case, as outlined in the first stage as well in the second stage, focuses on the characteristics of the "*rémunération*". The ex-husband died on the second of August 2006. Upon his death, the woman requested a widow(er)'s benefit from the Svb. This specific benefit is a benefit for widow(er)s who received partner alimony from their deceased ex-partners under Article 4 of the law on surviving family members (Algemene nabestaanden wet, Anw). The Svb granted the benefit, although no final decision was reached at this stage on the amount. The Svb contacted the Dutch Embassy in Rabat, Morocco, to obtain more information about the "*rémunération*". An employee of the Embassy told the Svb that the "*rémunération*" was a payment for the upbringing of the child. After learning this information, the Svb repealed its former decision. The woman appealed the decision. The Svb, however, did not change its opinion on the matter and argued that the benefit should not be granted on the basis of the "*rémunération*" payment, as it was not equivalent to Dutch "partner/spouse alimony". The woman appealed the decision to the District Administrative Court with a request to annul the Svb's decision to deny her the widow(er)'s benefit. The District Court refused the request to annul the decision. Following this the woman appealed the ruling of the District Court to the Central Appeals Tribunal.

Ruling:

The Tribunal did not grant the appealing party's request to annul the decision. The Tribunal decided that the decision of the Svb to not grant the widow(er)'s benefit was rightfully made.

The Tribunal opened its ruling with a statement on the main legal question it needed to answer. This question was: *whether the compensation of 200 dirhams (rémunération de la garde) received monthly by the wife is equivalent to the Dutch form of partner/spouse alimony as regulated in the Dutch Civil Code (Article 157 Book 1).*

The Tribunal needed to answer the question whether, in accordance with provisions in the Anw, the "*rémunération de la garde*" is equivalent to Dutch partner/spouse alimony. This question is of importance because the Dutch social benefit law on surviving family members states in Article 4 (b) that a person who was entitled to alimony as defined in Book 1 Dutch Civil Code (DCC) is entitled to survivor benefits if they outlive the payer of said alimony. The Central Appeals Tribunal stated that in earlier cases it had been decided that only foreign forms of compensation that are equivalent to Dutch civil partner alimony would entitle the surviving ex-spouse to survivor benefits. The Svb had formulated a policy rule based on this case law. The rule stated that a benefit would only be granted if the requester, following the dissolution of his/her marriage, was entitled to a foreign law-based compensation that is equivalent to partner alimony in Dutch civil law (Art. 157 Book 1 DCC). The Tribunal looked at two specific characteristic elements of a foreign legal concept when the question arises whether it is equivalent to a Dutch legal concept. The Tribunal looked a) at the substantive requisites of Dutch civil partner/spouse alimony and b) at the legal effects of establishing the obligation. These aspects will be compared with the foreign legal concept.

The Svb stated in this case that, in line with the case law of the Central Appeals Tribunal, the "*rémunération*" would qualify as an equivalent to Dutch partner alimony if the "*rémunération*" was established on the same conditions and had the same consequences as the establishment of partner alimony according to the Dutch Civil Code. In this case the Svb would not grant the benefit, as the "*rémunération*" is a compensation for taking care of the child. Dutch partner

alimony was not established on the same conditions. The Tribunal did not elaborate on these conditions. The Tribunal stated that Dutch partner/spouse alimony is partly meant to compensate the ex-spouse for taking care of the upbringing and development of the child, as this ex-spouse is not able to generate enough resources for his/her own and his/her child(ren)'s maintenance. The Tribunal stated that the "*rémunération*" in Moroccan Family Law shares this characteristic goal. Despite this similarity, the Tribunal pointed out that Moroccan family law does not account for other basic aspects of partner/spouse alimony in Dutch family law. The "*rémunération*" is strictly tied to the existence of any child(ren) the woman takes care of; without any child there exists no ground for the establishment of a "*rémunération*". In Dutch partner/spouse alimony, this is not the case. Partner/spouse alimony can be established when there are no children, because maintenance of the ex-spouse is in itself a goal of Dutch partner/spouse alimony. Moreover, the Tribunal stated that in Dutch law important aspects such as the assessment of the need for resources as well as the financial capacities of the ex-spouse do not play a role in establishing "*rémunération*". In addition to this and in conclusion, the Tribunal mentioned that a "*rémunération*" is not exclusively granted to the ex-spouse. It is a compensation for whoever takes care of the upbringing and development of the child, e.g. a grandmother who takes care of her grandchildren. Following the reasoning concerning the main question, the Tribunal concluded that the decision of the Svb was rightfully made.

Main quotations on cultural or religious diversity:

- "The Tribunal had to address that there are some similarities between "*rémunération*" and Dutch partner/spouse alimony. These similarities are to be found in the fact that these are (partially) meant as a compensation for the woman for taking care of the child(ren), which leaves her unable to provide fully for her own maintenance. The Tribunal finds it of importance that Moroccan law does not include a form of partner/spouse alimony. Because of this substantive difference, the concepts are not equivalent. The appealing party would not have received any compensation from her

deceased ex-husband, including any remuneration, if no child had been born from the marriage. Moreover, for the "*remuneration*" to be granted in Moroccan law, certain aspects that are of importance in Dutch law are not part of the granting process, e.g. the needs of the creditor and the resources of the debtor. This combination of facts leads to the conclusion that the "*remuneration*" is primarily a compensation for the caretaker of the child; it is only a contribution to the maintenance of the ex-spouse in an indirect way." (para. 4.4)

Main legal texts quoted in the decision:

- Art. 1:157 BW (Dutch Civil Code before 1 January 2020)
- Art. 4 Anw (Law on surviving family members)

Cases cited in the decision:

None

Commentary

Qualification of Hadana Compensation ("Rémunération de la Garde") and Comparison to Dutch Spouse Alimony in the Law on Surviving Family Members

The decision of the Central Appeals Tribunal reflects the way Dutch courts and the Tribunal specifically have interpreted the compensation system for "*hadana*" in Islamic legal systems when comparing them to partner/spouse alimony based on the Dutch Civil Code. The Central Appeals Tribunal makes a more direct and extensive comparison between the Moroccan "*rémunération de la garde*" as a *hadana* compensation and Dutch spouse alimony based on Article 1:157 DCC than any other case found where this comparison was both relevant and had to be made (Amsterdam Appeal Court, 11 March 2004, NIPR 2004, 210; Supreme Court, 19 November 2004, ECLI:NL:HR:2004:AR2395; Supreme Court, 9 September 2016, ECLI:NL:HR:2016:2045).

Hadana is an important factor in distributing the rights and duties between parents in Islamic family law. During marriage, in Islamic law, the father has

(almost) full custody over all aspects of his underage children. The mother's position towards her children is best described as the obligation to take care of the upbringing and needs of the child, i.e. *hadana*. When an Islamic marriage is dissolved, the mother keeps the obligation to take care of the child. The mother receives compensation from the father of the child for the time she devotes to these tasks. This compensation is based on the time the mother spends on these tasks, seeing that during this time she is not able to obtain her own resources (Jordens-Cotran 2007: 492).

Dutch spouse alimony based on Book 1 DCC gives the ex-spouse the right to demand a payment for maintenance if this ex-spouse is not able to provide for his/her own maintenance.

Article 4 of the Dutch law on surviving family members (Algemene nabestaanden wet, Anw) is a provision that gives ex-spouses of deceased marital partners the right to a social benefit based on an earlier established spouse alimony. The application of this article is further regulated by policy rules.

A policy rule is a provision made by an administrative body according to Dutch administrative law, which defines the way the administrative body interprets or implements other legal provisions.

The approach the Central Appeals Tribunal adopted in this case was based on earlier case law of the Tribunal and the policy rule of the Svb. The Tribunal looked at the following two specific characteristic elements of a foreign legal concept to decide if it is an equivalent of a Dutch legal concept: a) the substantive requisites of Dutch civil partner/spouse alimony and b) the legal effects of establishing the duty. Concerning the two elements, the Tribunal did not list the (most) important aspects of Dutch spouse alimony first. It named only some differences, e.g. the fact that spouse alimony is not known to exist in Moroccan family law, that the compensation is based on the fact that the woman concerns herself with the caretaking of the child, and that important aspects of the needs of the creditor and the resources of the debtor do not play a role. These are indeed clear differences with Dutch spouse alimony.

The Tribunal did not use the history and meaning of the relevant provisions of the relevant legislation, i.e. the Anw, in relation to the specifics of this case. When reading the Anw explanatory memorandum, a few findings stand out. During the debate on the future legislation, the parliament and government explicitly acknowledged the importance of providing surviving ex-spouses who had a financial relationship with the deceased ex-spouse a benefit to compensate for the loss of this financial relationship. According to the Anw, a surviving ex-spouse has a right to a benefit if he/she had the right to alimony according to Book 1 DCC. The right to a benefit only exists if the right to alimony is established by a court ruling or by a certain legal document named in the Anw, such as a notarial deed. According to the parliamentary discussion, the primary goal of Article 4 Anw is to provide ex-spouses who rely on alimony for maintenance with a benefit to compensate for the loss of the alimony as a consequence of the death of the paying ex-spouse. Thus, only financially affected ex-alimony receivers are entitled to the social benefits. The goal of Article 4 Awn is based on the idea that an ex-spouse should not be affected negatively in his or her income after the loss of the other ex-spouse. Ex-spouses who did not have any financial relationship with their deceased ex-spouse are not entitled to a benefit.

The question remains how cross-border elements in a case influence the meaning and scope of Article 4 Anw. The parliamentary discussion does not explain how to apply the article when a marriage is dissolved according to a foreign law that does not protect alimony rights. What to do with compensations based on foreign law, like the *hadana* compensation, when discussing the right to a benefit? An argument could be made that financial relationships between ex-spouses should entitle them to a benefit if these financial relationships are a source of income for the ex-spouse’s maintenance. If the ex-spouse loses this income due to the death of his/her ex-spouse, he/she is affected negatively in his/her financial situation. Does the Tribunal take this factual consequence into account in its assessment of cases? The Tribunal does not find any evidence in the parliamentary discussion that addresses the question of the scope of Article 4 Anw. In another case where alimony had not been paid for many years, the Tribunal decided that the factual

payment and implications of the alimony for the financial situation of the ex-spouse do not play a role for the entitlement to a benefit (Central Appeals Tribunal, Judgment of 11 July 2001, ECLI:NL:CRVB:2001:AD4989). Other financial relationships than alimony between ex-spouses have not been considered so far as qualifying factors for the entitlement to a benefit (Central Appeals Tribunal, Judgment of 4 April 2000, ECLI:NL:CRVB:2000:AA9300). The Tribunal does not take into account whether a foreign payment or compensation is of factual importance for the maintenance of the ex-spouse; it strictly looks at whether it can be considered an equivalent of Dutch spouse alimony. It seems that Dutch law is applied strictly at this point and that ex-spouses entitled to *hadana* compensations after their dissolved Islamic marriages are not entitled to surviving family member benefits.

The strict classification seems to be in line with a number of other Dutch court decisions. In another case concerning Egyptian nationals, a Dutch court decided that Islamic family law in Egypt does not have a form of spouse alimony. In that case a party requested the court to establish a right to spouse alimony and to adjust a *hadana* compensation as established in a contract after their marriage was dissolved (Appeal Court of Amsterdam, Judgment of 11 March 2004, NIPR 2004, 210). The conclusion of the court in this case was that the financial obligations after divorce under Egyptian law did not have the same characteristics and effects as Dutch spouse alimony, and therefore could not be classified as spouse alimony.

In a case before the Supreme Court, it was discussed whether yet another form of compensation in Islamic family law in Morocco, "*mout'aa*", had to be qualified as Dutch spouse alimony. The Advocate-General and the Court of Appeal concluded that Moroccan law does not explicitly include spouse alimony. While acknowledging that arguments could be made that some Islamic legal concepts could qualify as equivalent to spouse alimony, the Advocate-General found that the current legal opinion – that Islamic family law does not include a concept equivalent to spouse alimony – was not unreasonable (Supreme Court, 9 September 2016, ECLI:NL:HR:2016:2045).

Literature related to the main issue(s) at stake:

- Feller, D.C. 1996. *La gard (Hadana) en droit musulman et dans les droits égyptien, syrien et tunisien*. Genève: Librairie Droz.
- Jordens-Cotran, L. 2007. *Nieuw Marokkaans Familierecht en Nederlands IPR*. Den Haag: Sdu.
- Rutten, S. 2012. "Financiële aanspraken na scheiding in het islamitisch recht, en wat hiervan overblijft in Nederland". In K. Boele-Woelki et al. (eds), *Actuele ontwikkelingen in het familierecht*, 31–44. UCERF Reeks 6, Nijmegen: Ars Aequi Libri.
- Yassari, Nadjma, L.-M. Möller, and I. Gallala-Arndt (eds). 2016. *Parental Care and the Best Interests of the Child in Muslim Countries*. Den Haag: Springer.

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