



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

THIRD SECTION

CASE OF NELISSEN v. THE NETHERLANDS

(Application no. 6051/07)

JUDGMENT

STRASBOURG

5 April 2011

FINAL

05/07/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nelissen v. the Netherlands,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,

Corneliu Bîrsan,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Mihai Poalelungi, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 8 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 6051/07) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Netherlands national, Mr Rafael Hubertus Simon Nelissen (“the applicant”), on 4 February 2007.

2. The applicant was represented initially by his parents, Mr J.H. Nelissen and Mrs A.G. Nelissen-Habets, who reside in Maastricht, and subsequently by Mr L.E.M. Hendriks, a lawyer practising in Maastricht. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker, and their Deputy Agent, Ms L. Egmond, both of the Netherlands Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that the lapse of time that passed before he was transferred from remand prison to a custodial clinic violated Article 5 § 1 of the Convention.

4. On 1 September 2009 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3).

THE FACTS

A. The circumstances of the case

5. The applicant is a Netherlands national who was born in 1968 and lives in Maastricht.

6. On 4 November 2003, the applicant went to the home of one Ms E. and demanded that she give him an obituary card of her sister who had recently died. On being met with a refusal, he forced his way into Ms E.'s home, causing her to fall, and hit her over the head several times. He then made his way over to the sideboard, where he had noticed a stack of documents; of these, he took several – a magazine and some giro form stubs – before leaving.

7. In the course of the subsequent criminal proceedings it emerged that the applicant was a pathological collector of devotional obituary cards for the recently deceased. Whenever possible – on the applicant's own admission, whenever he was not detained under civil or criminal law – the applicant would gatecrash funerals in the Maastricht area. He had met Ms E. at her sister's funeral, from which he had been turned away by the undertaker. At the time of his visit to Ms E.'s home, he had been under the mistaken impression that he had propitiated Ms E. by sending her a blessed candle beforehand.

8. The applicant was taken into police custody the same day on suspicion of having committed a criminal offence. He remained in pre-trial detention pending the criminal proceedings that were subsequently brought against him and the order for his pre-trial detention was duly prolonged.

9. Examinations of the applicant's mental state by two psychiatrists and a psychologist showed that the applicant was, at the time of the crime, suffering from a mental impairment. The report of the psychiatrists diagnosed it as “a paranoid form of schizophrenia in which autistiform characteristics are unusually prominent and ... an obsessive compulsive personality disorder”. Both the psychiatrists' report and that of the psychologist considered it very likely that the applicant would reoffend if given the chance. Both reports mentioned the applicant's lack of awareness of his condition, which made him difficult to treat. They concurred in recommending that the applicant undergo compulsory treatment in a closed setting. In addition, a psychologist attached to a mental hospital where the applicant had been held previously, under the Psychiatric Hospitals (Compulsory Admission) Act (*Wet bijzondere opnemingen in psychiatrische ziekenhuizen*; see paragraph 20 below), gave evidence in open court to the effect that the applicant had absconded before and would resist “all possible forms of interference in his personal life” if he could.

10. On 18 May 2004 the criminal law section of the Maastricht Regional Court (*rechtbank*), following adversarial proceedings, convicted the applicant of theft preceded by violence and sentenced him to seven months' imprisonment with deduction of the time spent in pre-trial detention. Having found that the applicant was able to understand the unlawful nature of his acts but that on account of the limited development of his mental faculties he could only be held responsible for this offence to a limited degree whereas there was considerable danger of his reoffending, it further imposed a TBS order with confinement in a custodial clinic (*terbeschikkingstelling met bevel tot verpleging van overheidswege*; "TBS order"). Referring to Article 72 § 4 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), it further ordered the termination of the applicant's pre-trial detention as from the moment on which the duration of the pre-trial detention would be equal to the prison sentence imposed. Both the prosecution and the applicant appealed to the Court of Appeal (*gerechtshof*).

11. The applicant's lawyer further applied to the Court of Appeal for the applicant's immediate release from pre-trial detention on the ground that – as the applicant had already served the sentence imposed with deduction of the time spent in pre-trial detention – there was no legal basis for his further detention. The prosecution opposed this application, arguing that Article 72 § 2 of the Code of Criminal Procedure ruled out the termination of pre-trial detention in a case like the applicant's where a prison sentence is combined with a TBS order.

12. On 3 June 2004, the 's-Hertogenbosch Court of Appeal held a hearing *in camera* and ordered the applicant's immediate release. On the same day, at the request of the public prosecutor, the civil law section of the Maastricht Regional Court issued an interim admission order (*voorlopige machtiging*) within the meaning of Article 2 of the Psychiatric Hospitals (Compulsory Admission) Act under the procedure set out in this Act. Consequently, after the applicant was released from pre-trial detention on 3 June 2004, he was compulsorily admitted to a psychiatric hospital in Vijverdal under the judicial interim admission order. He stayed there until 13 December 2004.

13. On 1 December 2004 the applicant's appeal against the judgment of 18 May 2004 was heard by the 's-Hertogenbosch Court of Appeal, which on the same day issued a warrant for the applicant to be taken into pre-trial detention (*gevangenneming*) within the meaning of Article 75 § 3 of the Code of Criminal Procedure. Pursuant to Article 75 § 5 of the Code of Criminal Procedure, this order remained in force pending the total further duration of the criminal proceedings against the applicant.

14. By judgment of 15 December 2004, the 's-Hertogenbosch Court of Appeal quashed the judgment of 18 May 2004 on technical grounds, convicted the applicant of theft preceded by violence, sentenced him to

seven months' imprisonment with deduction of the time spent in pre-trial detention and imposed a TBS order with confinement in a custodial clinic.

15. The applicant lodged an appeal on points of law (cassation) with the Supreme Court (*Hoge Raad*), which was dismissed on summary reasoning on 14 February 2006. Accordingly, the applicant's TBS order took effect on this date, replacing the pre-trial detention order of 1 December 2004 as the legal basis for the applicant's detention. However, the applicant was not directly transferred to a custodial clinic but was held in pre-placement detention until a suitable place would become available for him.

16. By letter of 16 August 2006, the Minister of Justice informed the applicant that, given the Court's conclusion in the case of *Brand v. the Netherlands*, no. 49902/99, 11 May 2004, the Appeals Board (*beroepscommissie*) of the Council for the Administration of Criminal Justice and Juvenile Protection (*Raad voor Strafrechtstoepassing en Jeugdbescherming*) had found that financial compensation was appropriate in all cases where pre-placement detention after the end of a prison sentence had exceeded six months. Starting on the seventh month, this compensation amounted to 350 euros (EUR) per month and this amount was to be increased by EUR 125 every further trimester. The applicant was further informed that the total amount of compensation would be calculated and paid once he had been admitted to a custodial clinic. The applicant was invited to confirm within seven days whether he wished to avail himself of this compensation offer. This letter has remained unanswered by the applicant.

17. On 20 March 2007 the applicant was admitted to a custodial clinic. On 30 August 2007, he was informed by the Deputy Minister of Justice (*Staatssecretaris van Justitie*) that, as his pre-placement detention had exceeded six months on 13 August 2006, he was offered compensation in a total amount of EUR 3,075 for the time spent in pre-placement detention between 13 August 2006 and 20 March 2007.

18. On 5 September 2007, the applicant's parents informed the Minister of Justice – in reply to the letter of 30 August 2007 – that they disagreed with the manner of calculation and the amount of compensation. On 19 September 2007, the Deputy Minister of Justice replied that there were no reasons for her to reconsider her position in the matter.

19. On 21 April 2008, the applicant's representatives informed the Court that the applicant's TBS order had been extended by two years.

B. Relevant domestic law and practice

1. Pre-trial detention

20. The statutory rules governing pre-trial detention are set out in Articles 63 to 88 of the Code of Criminal Procedure. An order for pre-trial

detention can only be issued against persons suspected of an offence carrying a maximum prison sentence of four years or more or certain other specific criminal acts (Article 67 § 1 of the Code of Criminal Procedure).

21. A pre-trial detention order issued by the Regional Court remains in force for 60 days after the final judgment (*einduitspraak*) at that instance has been given (Article 66 § 2 of the Code of Criminal Procedure). The public prosecutor may file, within 60 days after the date of the final judgment of the first-instance court, a request for the prolongation of the pre-trial detention order by 60 days with the appeal court, which will determine that request. Pre-trial detention between a final judgment of a first-instance court against which an appeal has been filed, and the first hearing on that appeal, is limited to a maximum of 180 days (Article 75 § 3 of the Code of Criminal Procedure). If, however, the total duration of the detention on remand becomes equal to the prison sentence imposed, the highest competent trial court shall lift the remand order (Article 75 § 6 of the Code of Criminal Procedure) unless – in addition to a prison sentence – a measure entailing deprivation of liberty (such as, for instance, a TBS order) has been imposed (Article 72 § 4 of the Code of Criminal Procedure). A more detailed overview of the relevant domestic law and practice on pre-trial detention is given in *Saez v. the Netherlands* (dec.), no. 51197/99, 25 May 2004.

2. Judicial interim orders under the Psychiatric Hospitals (Compulsory Admission) Act

22. At the request of the public prosecutor or relatives of the person concerned (Article 2 § 1 and Article 4 § 1 of the Psychiatric Hospitals (Compulsory Admission) Act), the Regional Court can – after having heard the person concerned (Article 8) and after having considered a report by a psychiatrist who has examined the person concerned shortly before (Article 5) – issue an interim order for compulsory admission to a mental hospital. This order can only be issued where the judge finds that the person concerned is suffering from a mental disorder which gives rise to danger which cannot be averted by the intervention of persons or institutions outside a mental hospital (Article 2 § 2). An interim order is immediately enforceable (*bij voorraad uitvoerbaar*) and valid for a maximum period of six months, which period starts to run on the day the order is given (Article 10). At the request of the public prosecutor, the Regional Court can prolong the validity of an interim order.

3. TBS orders and pre-placement detention

23. Article 37a of the Netherlands Criminal Code (*Wetboek van Strafrecht*) enables courts, when dealing with certain serious crimes, to impose a TBS order on a defendant whose mental faculties were

inadequately developed or pathologically disturbed at the time of the commission of the offence. If the safety of others or the general safety of persons or goods so requires, the court may further direct that such a person be confined to a custodial clinic in accordance with Article 37b of the Criminal Code. A TBS order with confinement to a custodial clinic can be imposed in conjunction with a prison sentence if the convicted person's responsibility was merely diminished at the time of the commission of the offence. In such a situation, the TBS order will take effect after the convicted person has served the prison sentence imposed. A TBS order cannot take effect before the judgment concerned has become final (Article 38d § 1 of the Criminal Code). Pending admission to a custodial clinic, the person concerned is not released but held in pre-placement detention.

24. A TBS order with confinement to a custodial clinic is not intended to have a punitive effect, but to protect society from any risk posed by the person concerned and enable the latter's re-socialisation. Custodial clinics, of which there were twelve in the Netherlands at the material time, are top-security institutions as the persons placed there have been found to pose a great danger to society as well as to themselves. The treatment provided in a custodial clinic is geared to individual disorders and personalities. It is aimed at helping persons subject to a TBS order to gain insight into and control over their disorders, to make them aware of their responsibilities and to adjust their behaviour accordingly so that they no longer pose a threat to society.

25. According to Article 38d of the Criminal Code, the TBS order is valid for an initial period of two years which may be prolonged by the court, at the request of the public prosecutor, for a further period of one or two years. The period of placement cannot be extended beyond a total of four years unless the crime committed by the person concerned was a crime of violence committed against, or causing danger to, one or more persons, or such further extension is necessary for the protection of other persons (Article 38e).

4. Relevant domestic case-law

26. In a judgment of 23 September 2005 (*Landelijk Jurisprudentie Nummer* [National Jurisprudence Number], "LJN") AU9742, the Provisional Measures Judge (*voorzieningenrechter*) of the Regional Court of Breda held the following:

"Section 12 of the Act on confinement to a custodial clinic of persons subject to a TBS order (*Beginselenwet verpleging ter beschikking gestelden*) provides that a person in pre-placement detention shall be placed [in an appropriate institution] before the TBS order has run for six months. ... In view of the judgments of the European Court of Human Rights in the cases of Brand (no. 49902/99) and Morsink (no. 48865/99) and the decisions of the Council for the Application of Criminal Law

and the Protection of Juveniles it may be assumed that a time lapse of six months or more for persons subject to a TBS order is, in principle, wrongful in the light of Article 5 § 1 of the Convention.

...

3.7 The structural capacity shortage that has existed since more than twenty years is not a special circumstance in the above-mentioned sense which would justify (further) delay in placing [the plaintiff] in a TBS clinic. This shortage must remain the responsibility of the Government. The fact that there are visible causes for the lack of capacity and that measures are being taken to reduce or alleviate this shortage does not make any difference in this regard.

...”

The Provisional Measures Judge went on to order the plaintiff placed in a TBS clinic no later than nine months after 1 February 2005 (the date on which the waiting period had started), that is to say by 1 October 2005, after which, if the order was not carried out, the plaintiff was to be released immediately.

27. In its judgment of 30 August 2005, LJN AU1686, the Court of Appeal of Arnhem held that it was reasonable in principle that the order in which persons subject to a TBS order were placed in a custodial clinic should depend on their place on a waiting list unless, owing to special circumstances, they were unsuited to detention elsewhere. However, in the particular case the period of pre-placement detention was no longer in proportion to the length of time spent by the person concerned in the execution of his prison sentence. The State was therefore ordered to place the person concerned (the defendant in appeal) in a custodial clinic within three months, which time-limit was considered long enough for all practical objections (including the lack of adequate facilities) to have lost their force.

28. In a judgment given on 13 December 2005, the Provisional Measures Judge of the Regional Court of 's-Hertogenbosch on similar reasoning, the State was ordered to place the plaintiff in a custodial clinic by 1 April 2006, that is a time-limit of just over three and a half months.

29. In a judgment given on 21 June 2006, the Provisional Measures Judge of the Arnhem Regional Court found that special circumstances obtained which justified ordering the plaintiff to be given priority placement in a custodial institution. The special circumstances consisted of his having been given a TBS order without a prior prison sentence and his being considered unsuited to detention in a penal rather than a clinical setting.

30. In a judgment given on 22 June 2006, the Court of Appeal of The Hague found that the mental condition of the person concerned (the appellant) was serious, but not more so than that of others on the waiting list for placement in a custodial clinic, so that there was no justification for giving this person priority over others.

31. In a judgment given on 21 September 2006, the Regional Court of Alkmaar declined to order the plaintiff given priority over others on the waiting list absent special circumstances. In so doing the Regional Court had regard to the efforts being made to create more places for persons subject to a TBS order with confinement in a custodial clinic and the fact, as stated by the defendant, that the plaintiff could expect to be placed in such an institution by the end of the year.

32. In a judgment given on 21 September 2007, the Regional Court of The Hague found special circumstances justifying priority placement to exist in that the plaintiff had spent twenty months in detention after serving a one-month prison sentence and in that only two custodial clinics existed that were capable of treating him. The defendant was ordered to place the plaintiff in one of the two clinics no later than 1 December 2007.

33. In a judgment given on 21 December 2007 in civil proceedings on a compensation claim arising from a wrongful act on the part of the government (*onrechtmatige overheidsdaad*), the Supreme Court (*Hoge Raad*) held that pre-placement detention lasting longer than four months was unlawful. In reaching this finding, the Supreme Court referred, *inter alia*, to the Court's judgments in the cases of *Morsink v. the Netherlands* (no. 48865/99, §§ 26-37, 11 May 2004) and *Brand v. the Netherlands* (cited above, §§ 23-33).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

A. Article 5 § 1 of the Convention

34. The applicant alleged a violation of his rights under Article 5 in that he continued to be detained after having served the seven-month prison sentence imposed on him. Article 5 of the Convention, in its relevant part, reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) he lawful detention of a person after conviction by a competent court; ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having

committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. ...”

1. The Government's unilateral declaration

35. On 14 May 2008 the Government *sua sponte* submitted a letter containing the following formal unilateral declaration:

“1. As the efforts with a view to securing a friendly settlement of the case have been unsuccessful, the Government wishes to express – by way of a unilateral declaration – its acknowledgement that the duration of the applicant's detention while awaiting placement in a custodial clinic ('pre-placement detention') was not in conformity with the requirements of Article 5 of the Convention.

2. Consequently, the Government is prepared to pay the applicant, represented by his father, in compensation for non-pecuniary damage EUR 3,525 (three thousand five hundred and twenty-five euros), plus any tax that may be chargeable. In the Government's view, this amount would constitute adequate redress and sufficient compensation for the impugned duration of the applicant's pre-placement detention.

3. This amount will be payable within three months from the date of notification of the decision pursuant to Article 37 § 1 (c) of the Convention. In the event of the failure to pay this sum within the said three-month period, the Government undertake to pay statutory interest.

4. In the light of above, the Government would suggest that the circumstances of the present case allow the Court to reach the conclusion that there exists 'any other reason', as referred to in Article 37 § 1 (c) of the Convention, justifying the Court to discontinue the examination of this part of the application, and that, moreover, there are no reasons of a general character, as defined in Article 37 § 1 in fine, which would require the further examination of the case by virtue of that provision. Accordingly, the Government invites the Court to strike the application out of its list of pending cases.”

36. The Court understands from the applicant's subsequent submissions that he opposed the Government's request.

37. On 16 June 2009 the Court decided to adjourn its examination of the case. This entailed the provisional decision not to accede to the Government's request to strike the case out of the list. On 23 June 2009 the application was formally communicated to the Government as respondent Party (Rule 54 § 2 (b) of the Rules of Court).

2. The Court's decision on the Government's unilateral declaration

38. In their observations on the admissibility and merits of the application, the Government reiterated their unilateral declaration and asked the Court to strike the application out of its list of cases in so far as it related to the period of pre-placement detention.

39. The Court now observes that although the Government acknowledged in their unilateral declaration that the duration of the pre-placement detention was not in conformity with the requirements of Article 5 of the Convention, it remains unclear whether this incompatibility commenced four months after the TBS order had taken effect or at an earlier or later stage. The Court further notes that the unilateral declaration only addresses part of the applicant's complaint under Article 5 of the Convention, namely the duration of the applicant's pre-placement detention, and not the remaining aspects of this complaint, namely the lawfulness under Article 5 of the Convention of his detention after he had served the prison sentence imposed on him.

40. The Court therefore rejects the Government's request to strike the application out of its list of cases under Article 37 of the Convention and will accordingly pursue its examination of the case.

3. Admissibility

41. In case the Court should not accept their unilateral declaration, the Government submitted observations on the admissibility and merits of the case. The Court will turn first to the Government's preliminary objections.

a. Exhaustion of domestic remedies

42. The Government argued that the applicant could have sought an injunction against the State in proceedings before the provisional measures judge. They pointed to a judgment of the Provisional Measures Judge of the Regional Court of Breda of 23 September 2005 (see paragraph 25 above), in which a person subject to a TBS order had successfully obtained an order for her transfer to a custodial clinic by a certain date or her release otherwise.

43. The applicant submitted that the judgment cited by the Government was an exceptional one. He cited several other judgments from which it appeared, in his contention, that an order for accelerated placement could be given only if "special circumstances" obtained (see paragraphs 26-31 above).

44. As the Court has held many times, in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was

capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV; and *Mooren v. Germany* [GC], no. 11364/03, § 118, ECHR 2009-...).

45. It should be added that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see, among many other authorities, *Sejdovic v. Italy* [GC], no. 56581/00, § 45, ECHR 2006-II, and *Milošević v. the Netherlands* (dec.), no. 77631/01, 19 March 2002).

46. It is true that the remedy alluded to by the Government has proved successful on at least one occasion in that it resulted in an order for the speedy transfer of the person concerned to an appropriate clinic within a very short time or, alternatively, his release (see paragraph 25 above). From the plain wording of the judgment in question, it is clear that special circumstances warranting preferential treatment were not considered a requirement for the provisional measures judge to order either placement in a TBS clinic or release within a set time-limit.

47. Conversely, in other judgments (paragraphs 26-31 above), many of which post-date the judgment cited by the Government, the courts have been prepared to set a time-limit for the end of pre-placement detention only if the person concerned could claim "special circumstances" such as a disproportion between the length of pre-placement detention and a prison sentence already served or unfitness for detention in a non-clinical setting. Even then, the time-limits set were three months or more.

48. The Supreme Court, in its judgment of 21 December 2007 (see paragraph 32 above), recognised as unlawful *per se* any pre-placement detention lasting more than four months. The time-limits ordered for the expiry of pre-placement detention in each of the cases cited in paragraphs 26-31 were nearly as long again, and moreover were granted only if the detainee could argue that they should exceptionally be given priority over others.

49. Given the weight of the domestic case-law pointing in a direction away from the single precedent cited by the Government, the Court cannot find it established that an effective remedy existed. It follows that the Government's preliminary objection of non-exhaustion of domestic remedies must be rejected.

b. Loss of victim status

50. The Government argued in addition that the application was manifestly ill-founded; and in particular that the applicant had lost the status of “victim” within the meaning of Article 34 of the Convention as a result of the Government's offer in friendly settlement negotiations and their above-quoted unilateral declaration.

51. It follows from the reasoning contained in paragraph 38 above that this preliminary objection of loss of victim status cannot be accepted.

c. Manifestly ill-founded

52. The Government argued, finally, that the application was manifestly ill-founded.

53. The reasons given by the Government for so arguing will be addressed below as the Court examines the merits of the case.

d. Conclusion as to admissibility

54. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. Merits

a. Argument before the Court

55. The Government argued that the application was manifestly ill-founded. In his application the applicant had complained merely that the imposition and extension of the TBS order were in themselves unlawful. That, however, was a matter within the reserved domain of the domestic courts. The TBS order had been imposed by the Regional Court, confirmed by the Court of Appeal and left intact by the Supreme Court; for the applicant to argue that it was unlawful was to approach the Court as a “court of fourth instance”.

56. In his observations, the applicant stated that after serving his seven-month prison sentence he was kept in prison for an excessive length of time before being transferred to a custodial clinic. He relied on *Brand v. the Netherlands*, cited above.

57. The applicant pointed out that he had completed his prison sentence while the proceedings were still pending. This meant that by the time his conviction and sentence became final, that is to say on 14 February 2006 when the Supreme Court dismissed his appeal on points of law, he had been in detention on remand for over a year under an order first issued by the

's-Hertogenbosch Court of Appeal on 1 December 2004. Yet he was not transferred to a custodial clinic until 20 March 2007.

58. In the applicant's submission, the period of pre-placement detention for which he was entitled to compensation therefore started on the day on which the TBS order became final, not six months or even four months later.

b. The Court's assessment

59. In *Brand v. the Netherlands*, cited above, §§ 58-65, the Court held as follows (case-law and paragraph references omitted):

“58. The Court reiterates that Article 5 § 1 of the Convention contains a list of permissible grounds of deprivation of liberty that is exhaustive. However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph (...).

59. The Court observes that in the instant case the applicant's deprivation of liberty was based on the judgment of the 's-Hertogenbosch Regional Court of 23 June 1994 whereby the applicant was convicted of robbery resulting in grievous bodily harm, and was given a prison sentence as well as a TBS order. This order, being initially valid for two years and comprising confinement in a custodial clinic, took effect on 10 October 1994. Although the applicant had served his prison sentence on that date, the subsequent period of his deprivation of liberty remained covered by the judgment of 23 June 1994. Accordingly, the applicant's detention between 10 October 1994 and 10 October 1996 falls within the scope of both sub-paragraphs (a) and (e) of Article 5 § 1 of the Convention.

60. It must therefore be established whether the applicant's pre-placement detention between 10 October 1994 and 10 April 1995 was 'in accordance with a procedure prescribed by law' and 'lawful' within the meaning of Article 5 § 1 of the Convention. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof. Reiterating that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (...), the Court accepts, in the light of the Supreme Court's judgment of 5 June 1998 and the judgment of the Amsterdam Court of Appeal of 25 February 1999, that the applicant's pre-placement detention during the period under consideration was lawful under domestic law.

61. However, for the purposes of Article 5 of the Convention, the lawfulness under domestic law of the applicant's pre-placement detention is not in itself decisive. It must also be established that his pre-placement detention during the relevant period was in conformity with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (...).

62. Although it is true that the Court has held in the past that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention, and that, in principle, the 'detention' of a person as a mental health patient will only be 'lawful' for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (...), the Court, in the circumstances of the present case, cannot accept the applicant's argument

that the failure to admit him to a custodial clinic on 10 October 1994 rendered his detention after that date automatically unlawful under Article 5 § 1 of the Convention.

63. In this connection, the Court considers in the first place that – given the difference between a prison sentence, which has a punitive character, and a TBS order, which is of a non-punitive nature – it cannot, as such, be regarded as contrary to Article 5 § 1 of the Convention to commence the procedure for selecting the most appropriate custodial clinic (...) only after the TBS order has taken effect.

64. The Court further considers that, once this selection procedure has been completed, it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It agrees with the domestic courts that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable.

65. Consequently, a reasonable balance must be struck between the competing interests involved. On this point, reiterating the importance of Article 5 in the Convention system, the Court is of the opinion that in striking this balance particular weight should be given to the applicant's right to liberty. A significant delay in admission to a custodial clinic and thus the beginning of the treatment of the person concerned will obviously affect the prospects of the treatment's success within the statutory two-year time-frame for the initial validity of a TBS order. Moreover, the chances of having to prolong the validity of the TBS order will, correspondingly, be increased.

66. The Court cannot find that, in the circumstances of the present case, a reasonable balance was struck. Bearing in mind that the problem of a structural lack of capacity in custodial clinics had been identified by the Netherlands authorities as early as 1986, and having found no indication in the instant case that, at the material time, the authorities were faced with an exceptional and unforeseen situation, the Court is of the opinion that even a delay of six months in the admission of a person to a custodial clinic cannot be regarded as acceptable. To hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the person concerned and thus impair the very essence of the right protected by Article 5 of the Convention.”

60. The Court finds no material difference between the present case and *Brand*. It therefore notes that the TBS order imposed on the applicant became final and enforceable on 14 February 2006. The applicant was admitted to a custodial clinic on 20 March 2007, that is one year, one month and six days later. Such a time lapse cannot be considered acceptable.

61. There has therefore been a violation of Article 5 § 1.

B. Article 5 § 4 of the Convention

62. The Court would first reiterate that it is master of the characterisation to be given in law to the facts of the case. It is not bound by the characterisation given by the applicant or the Government. By virtue of the *iura novit curia* principle, it has, for example, considered of its own

motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the European Commission of Human Rights had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 41, Series A no. 24; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172; *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; and as a recent authority, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, ECHR 2009-...).

63. Taking its own view of the facts of the case, the Court inferred from the application the complaint that the applicant did not have access to a procedure by which the lawfulness of his detention could be decided speedily by a court and his release ordered if the detention was not lawful. Of its own motion, the Court raised the question whether there had been a violation of Article 5 § 4 of the Convention.

64. The Government, in their observations, submitted that the lawfulness of the applicant's detention had been reviewed on a number of occasions by independent and impartial tribunals that could properly be called "courts" for the purposes of Article 5 § 4 of the Convention. They had examined the applicant on numerous occasions and his counsel had plenty of opportunities further to substantiate his arguments.

65. Furthermore, the Government submitted that the applicant suffered from Asperger's syndrome and obsessive compulsive disorder. Although Asperger's syndrome was a congenital condition and incurable, the reports on the applicant's mental state suggested that his behavioural problems could be made manageable. This was important, since, as was commonly the case with Asperger's syndrome, any loss of structure in the applicant's life could lead to aggression. This in turn could lead to a heightened risk of the applicant's reoffending. Given the nature of the applicant's disorders, the applicant's detention had been reviewed with sufficient frequency. In view of the applicant's diagnosis, further assessments in the intervening period would have served no purpose.

66. The applicant did not contest the above statement by the Government.

67. Article 5 § 4 requires that the procedures followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place (see *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22; and *Nakach v. the Netherlands* (dec), cited above).

68. The Court takes note of the Government's observations.

69. In so far, therefore, as the application comprises a complaint under Article 5 § 4 of the Convention, it is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

70. The applicant complained that his continued detention, i.e. after he had served the prison sentence imposed on him, amounted to treatment prohibited by Article 3 of the Convention which reads:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

71. It does not appear that this grievance was ever aired before any competent domestic authority. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

72. The applicant further complained under Article 6 of the Convention that, in the criminal proceedings taken against him, he did not have a fair hearing in that the TBS order had been unjustly imposed on him. In so far as relevant, Article 6 provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

73. The Court notes that the final domestic decision within the meaning of Article 35 § 1 of the Convention has been given by the Supreme Court on 14 February 2006, which is more than six months before the date on which this complaint was submitted to the Court.

74. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicant asked the Court to make an award in respect of non-pecuniary damage. He left the amount to the Court's discretion.

77. The Government, referring to the decision striking out *Rompa v. the Netherlands* (no. 9028/05, 1 July 2008), asked the Court to base its award on the domestic rate.

78. The Court considers the sum offered by the Government in their unilateral declaration appropriate to the violation found. Ruling on an equitable basis, it awards the applicant EUR 3,525 under this head, plus any tax that may be chargeable.

B. Default interest

79. The Court considers it appropriate that the default interest 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

1. *Declares*, unanimously, the application admissible in so far as it relates to Article 5 § 1 of the Convention and, by a majority, inadmissible for the remainder;
2. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,525 (three thousand five hundred and twenty-five euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(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.

Done in English, and notified in writing on 5 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Gyulumyan is annexed to this judgment.

J.C.M.
S.Q.

PARTLY DISSENTING OPINION OF JUDGE GYULUMYAN

I agree with the majority that there has been a violation of Article 5 § 1 of the Convention, but I regret that I am not able to fully share its decision on the just satisfaction in respect of non-pecuniary damage.

I consider that the sum awarded in the present case for non-pecuniary damage is not appropriate to the violation found and does not take into account the circumstances of the case.

The Court has awarded the applicant the same amount that was proposed by the Government in their unilateral declaration. However, in rejecting the Government's request to strike the application out of its list of cases under Article 37, the Court in paragraph 39 acknowledges that “the unilateral declaration only addresses part of the applicant's complaint under Article 5 of the Convention, namely the duration of the applicant's pre-placement detention, and not the remaining aspects of his complaint, namely the lawfulness under Article 5 of the Convention of his detention after he had served the prison sentence imposed on him.”

In the light of the decision adopted by the majority, I have difficulty understanding why the Chamber did not accept the Government's unilateral declaration.