



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

THIRD SECTION

CASE OF VAN VELDEN v. THE NETHERLANDS

(Application no. 30666/08)

JUDGMENT

STRASBOURG

19 July 2011

FINAL

19/10/2011

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

In the case of van Velden v. the Netherlands,

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

Josep Casadevall, *President*,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Luis López Guerra,

Mihai Poalelungi,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 28 June 2011,

Delivers the following judgment which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 30666/08) 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 Robertus Gemma Maria van Velden (“the applicant”), on 20 June 2008.

2. The applicant was represented by Mr W.H. van Zundert, a lawyer practising in Rotterdam. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker, and Deputy Agent, Ms L. Egmond, of the Ministry for Foreign Affairs.

3. The applicant alleged failures by the competent domestic court to follow domestic procedure when extending an order for his detention on remand.

4. On 11 March 2010 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, as in force at the time).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Rotterdam.

6. On 14 November 2007 the applicant was caught in the act of trying to defraud a bank by withdrawing a sum of money from someone else’s bank

account using a forged identity document. He was arrested and placed in police custody (*inverzekeringstelling*) for three days.

7. On 16 November 2007 an investigating judge (*rechter-commissaris*) placed the applicant in initial detention on remand (*inbewaringstelling*) for a term of fourteen days.

8. On 28 November 2007 the Regional Court (*rechtbank*) of The Hague, following a hearing *in camera*, dismissed the applicant's request for suspension (*schorsing*) of his detention on remand (*voorlopige hechtenis*) and ordered the applicant's further detention on remand (*gevangenhouding*) for a further ninety days. The applicant was at that time detained in the remand centre (*huis van bewaring*) of The Hague (north wing of Scheveningen prison).

9. On 5 December 2007 the applicant's counsel lodged a single appeal against both the refusal to suspend the applicant's detention on remand and the order for the applicant's further detention on remand.

10. On 20 December 2007 the Court of Appeal (*gerechtshof*) of The Hague rejected the appeal under both heads as out of time.

11. On 14 January 2008 the unit manager of the north wing of Scheveningen Prison replied to a query from the applicant's counsel in the following terms:

"Dear Mr Van Zundert,

We have received your letter concerning the Regional Court's decision in good order.

In response to your request, I wish to inform you that the Regional Court took the decision in question on 28-11-2007. On 29-11-07 the document was posted from the Regional Court, on 30-11-2007 we received the document in the late Friday afternoon post, and on 03-12-07 the document was delivered to the prison inmates administration in the afternoon, and on 04-12-07 the document was handed to Mr Van Velden. (see the copy of the official delivery record (*akte van uitreiking*)) ..."

12. It appears that the Regional Court's decision refusing to order the suspension of the applicant's detention on remand was served on the applicant in writing on Tuesday 4 December 2007 at 3.40 p.m. A copy of the official delivery record was submitted by the applicant, annexed to the application.

13. After the case was communicated, the respondent Government submitted a copy of an official delivery record showing that the Regional Court's order for the applicant's further detention on remand was served on the applicant on 29 November 2007 at 11.39 a.m. The document bears the applicant's signature acknowledging receipt.

14. The Government have also submitted a copy of a written notice of appeal, which is in the following terms (emphasis in the original):

"Regional Court of The Hague

Legal remedy notice (*Akte rechtsmiddel*)

...

On **5 December 2007** there appeared at the Registry of this Regional Court

W.H. van Zundert

Advocate practising in **Rotterdam**

who declared that he had been specifically empowered by the person named hereafter to make the following statement, and stated, in the name of

name **van Velden**

first names **Robertus Gemma Maria**

...

that he appealed against the decision and against the rejection of his request for suspension taken by the Regional Court in camera on **28 November 2007.**"

The document is signed by Mr van Zundert and by the registrar of the Regional Court.

15. It appears from the Government's submissions that the applicant was sentenced to a term of imprisonment from which the time which he had spent in detention on remand was deducted in its entirety (Article 27 of the Criminal Code (*Wetboek van Strafrecht*), see paragraph 18 below). The applicant does not deny this.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Criminal Procedure

16. The Code of Criminal procedure (*Wetboek van Strafvordering*), in relevant part, provides as follows:

Article 66

"1. An order for further detention on remand, or for the prolongation thereof, shall be in force for a period of up to ninety days, to be determined by the Regional Court, starting at the moment of its execution. ..."

Article 71

"1. The suspect can lodge an appeal with the Court of Appeal against the Regional Court's decision to order or extend his further detention on remand no later than three days after the execution thereof. ..."

2. Within the same time-limit, the suspect can appeal against an order to prolong his further detention on remand, but only if he did not appeal against the order for detention on remand, nor against an earlier prolongation order. ...”

Article 73

“...

2. An order for detention on remand shall enter into force as of the moment at which the suspect is detained for the purpose of the execution of that order or as of the time at which the execution of a different order for detention on remand, given in the same case, ends, as the case may be. ...”

Article 87

“...

2. The applicant who has sought the termination or suspension of his detention on remand may lodge an appeal against a refusal of that request with the Court of Appeal once, within three days of the service of that decision. The suspect who has appealed against a decision refusing a request for suspension of detention on remand cannot afterwards appeal against a decision refusing the lifting of detention on remand. The suspect who has appealed against a decision refusing a request for suspension of detention on remand cannot afterwards appeal against a decision refusing the suspension of detention on remand. ...”

Article 449

“1. Except as otherwise provided by law, an appeal or appeal on points of law shall be introduced by a declaration to be made by the person making use of the legal remedy at the registry of the court by which or within which the decision has been given. ...”

Article 450

“1. Legal remedies, as referred to in Article 449, can also be made use of through the offices of:

a. an advocate, if he or she declares that he has been specifically empowered for that purpose by the person making use of the legal remedy; ...”

Article 451a

“1. If the person who wishes to make use of a legal remedy is detained in a remand centre, prison or custodial clinic, ... then he can also make use of the legal remedies ... by means of a written declaration submitted to the person in charge of the institution.

2. The person in charge of the institution shall have this declaration entered in a register kept for that purpose without delay, and then forward it to the registry of the court by which, or within which, the decision has been given, stating the date of entry

in the register. The date on which the legal remedy is made use of shall be deemed to be the date of the entry in the register. ...”

B. The General Time Limits Act

17. The General Time Limits Act (*Algemene Termijnenwet*), in relevant part, provides as follows:

Section 2

“A time limit prescribed by law of at least three days shall, if necessary, be extended so that it shall comprise at least two days which are not a Saturday, a Sunday or a public holiday.”

C. The Criminal Code

18. Article 27 § 1 of the Criminal Code (*Wetboek van Strafrecht*) requires the courts when sentencing in all cases to deduct from the sentence the time which the convicted person has spent in police custody and detention on remand.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

19. The applicant complains under Article 6 of the Convention about the Court of Appeal’s dismissal of his appeal against the rejection of his request for the suspension of his detention on remand and against his extended detention on remand.

In relation to the rejection of his request for the suspension of his detention on remand, he submits that the decision was served on him only on 4 December 2007, that is after the three-day time-limit had expired, and that he was not aware of it at any earlier time; for that reason, it was not possible for him to lodge an appeal before 5 December 2007.

In relation to the dismissal of his appeal against the order for his further detention on remand, he submits that in view of the relevant law on time-limits the three-day time-limit for his appeal could not have started to run before Monday 3 December 2007; it follows that his appeal, which was lodged on Wednesday 5 December 2007, was lodged in good time.

20. The Court finds that these complaints are more appropriately considered under Article 5 § 4 of the Convention, which provides as follows:

“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.”

A. The Government’s preliminary objections

1. Victim status

21. The Government submitted that the applicant could no longer be considered a “victim” of any supposed violation of the Convention, within the meaning of Article 34 of the Convention, since the entire period of pre-trial detention had been deducted from his prison sentence (paragraphs 15 and 18 above).

22. The applicant argued that this objection was in contradiction with the Government’s preliminary objection of non-exhaustion, to be discussed below: in his view, to recognise that a legal remedy existed was to recognise that the possibility of victimhood existed.

23. According to the Court’s well-established case-law, the word “victim” in Article 34 denotes the person directly affected by the act or omission in issue, the existence of a violation being conceivable even in the absence of detriment; detriment is relevant only in the context of Article 41. Consequently, the relevant deduction from sentence does not in principle deprive the applicant of his status as an alleged “victim”, within the meaning of Article 34, of a breach of Article 5; it is a matter to be taken into consideration solely for the purpose of assessing the extent of any prejudice he may have suffered. The position might be otherwise if the deduction from sentence had been based upon an acknowledgement by the national courts of a violation of the Convention (see, among other authorities and *mutatis mutandis*, *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 41, Series A no. 77, and *Pavletić v. Slovakia*, no. 39359/98, § 61, 22 June 2004; see also *Lebedev v. Russia*, no. 4493/04, § 47, 25 October 2007). Such, however, is not the case here; in fact, inclusion of the time spent in custody in the overall time to be served by the applicant was not in any way connected to the alleged violation of Article 6 § 1 (or Article 5 § 4) of the Convention but followed directly from the operation of Article 27 § 1 of the Criminal Code (see paragraph 18 above; compare *Lebedev v. Russia*, *loc. cit.*). It follows that this objection must be dismissed.

2. *Non-exhaustion*

24. The Government argued in the alternative that the applicant had failed to exhaust the available domestic remedies.

a. **Separate appeals**

25. In the first place, the Government stated that the applicant ought not to have introduced one single appeal against the refusal to suspend his detention on remand and the order for his further detention on remand (see paragraph 9 above). At the very least, he ought to have mentioned when lodging his appeal that he was acting on the assumption that different time limits applied.

26. The applicant dismissed this objection as “nonsense”.

27. The Court observes that, whatever the truth of the Government’s contention that separate appeals should have been brought, the fact remains that the appeal brought was considered separately on both points by the Court of Appeal. It is precisely the Court of Appeal’s decision to reject the appeal under both heads as out of time (paragraph 10 above) which led the applicant to lodge the present application. It cannot be seen, therefore, what the applicant would have gained by lodging separate appeals and arguing about time-limits which he believed had not yet been transgressed. This objection must therefore be dismissed.

b. **A new request for suspension**

28. In the second place, the Government suggested that the applicant ought to have lodged a new request for suspension of his detention on remand. Should it have proved unsuccessful, the resulting decision could have been the object of a new appeal.

29. The applicant pointed out that a suspect could appeal only once against an order refusing the lifting or suspension of detention on remand.

30. Like the applicant, the Court observes that in the system of the Code of Criminal Procedure an accused has only one chance to lodge an appeal against the refusal to lift or suspend detention on remand (Articles 71 § 2 and 87 § 2; see paragraph 16 above). At all events, had the applicant lodged a new request with the Regional Court for the suspension of his detention on remand, then whatever the outcome it would not have affected the validity of the Court of Appeal’s decisions. This objection too must therefore be dismissed.

3. *No significant disadvantage*

31. In the further alternative, the Government argued that the applicant had not suffered any significant disadvantage. They asked the Court to declare the application inadmissible on the ground set out, since the entry

into force of Protocol No. 14 on 1 June 2010, in Article 35 § 3 (b) of the Convention, the “safeguard clauses” contained therein not being applicable.

32. The applicant argued that the consequences which he had suffered could not be dismissed in such cavalier terms. He submitted in addition that the Court was prevented from applying a Convention provision that had entered into force only on 1 June 2010, that is long after the introduction of the application.

33. Article 20 of Protocol No. 14 to the Convention provides as follows:

“1. From the date of the entry into force of this Protocol, its provisions shall apply to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers.

2. The new admissibility criterion inserted by Article 12 of this Protocol in Article 35, paragraph 3.b of the Convention, shall not apply to applications declared admissible before the entry into force of the Protocol. In the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.”

34. The present application is not one of those declared admissible before 1 June 2010. It follows that, under the terms of Article 20 of Protocol No. 14, the Court is not prevented from considering it under the new admissibility criterion.

35. Article 35 § 3 (b) provides as follows:

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

36. The Court has clarified its understanding of the new criterion in *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010-..., in the following terms:

“Inspired by the ... general principle *de minimis non curat praetor*, the new criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case (see, *mutatis mutandis*, *Soering v. the United Kingdom*, 7 July 1989, § 100, Series A no. 161). The severity of a violation should be assessed, taking account of both the applicant’s subjective perceptions and what is objectively at stake in a particular case.”

37. The Government have not explained why they consider that the applicant has suffered no “significant disadvantage”. The two “safeguard clauses” contained in Article 35 § 3 (b) they dismiss as irrelevant.

38. As the Court understands the Government's reliance on this provision, the Government wish to imply that the deduction of the applicant's detention on remand from his prison sentence in itself negates any detriment which the applicant may have suffered on this account. The Court has already rejected a similar argument under the head of "victim status" for purposes of Article 34 (paragraph 23 above).

39. The Court cannot accept such a suggestion under Article 35 § 2 (b) either. It is a feature of the criminal procedure of many contracting Parties, if not most, to set periods of detention prior to final conviction and sentencing off against the eventual sentence; for the Court to hold generally that any harm resulting from pre-trial detention was thereby *ipso facto* nugatory for Convention purposes would remove a large proportion of potential complaints under Article 5 from the scope of its scrutiny. This objection is therefore likewise dismissed.

B. The order for further detention on remand

40. The applicant and respondent parties differ as to whether the Regional Court's order for further detention on remand was in fact served on the applicant before the expiry of the time-limit within which he could have lodged an appeal.

41. The Government have submitted an official record showing that the Regional Court's decision was served on the applicant in person on 29 November 2007.

42. The applicant does not deny that this document is a correct statement of fact, but dismisses it as unimportant since it has no bearing on the appeal against the refusal of suspension of his detention on remand.

43. The order for extended detention on remand was given by the Regional Court on 28 November 2007 (paragraph 8 above).

44. The execution of the order for extended detention on remand (Article 73 of the Code of Criminal Procedure) began after the end of the fourteen-day term of initial detention on remand, that is on 1 December 2007 (paragraph 7 above), which was also the day on which the three-day time-limit started to run (Article 71 of the Code of Criminal Procedure). That being a Saturday, in accordance with domestic law the time-limit was counted so as to include two full working days – that is, the following Monday and Tuesday (section 2 of the General Time Limits Act).

45. The Government having submitted a copy of the official delivery record (paragraph 13 above), the Court finds that the applicant was officially made aware of the order for extended detention on remand on 29 November 2007. Mr van Zundert appealed against this order on the applicant's behalf only on 5 December 2007, that is one day too late. It cannot be seen that the applicant could not have given his counsel appropriate instructions in proper time – or indeed, that he could not have

lodged the appeal himself, by making the appropriate declaration to be entered on the remand centre's register (Article 451a of the Code of Criminal Procedure; paragraph 16 above).

46. It follows that in so far as the applicant complains about the decision to declare his appeal against the order for further detention on remand inadmissible as out of time, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. The appeal against the refusal to suspend the applicant's detention on remand

1. Admissibility

47. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

48. The Government submitted that the order for the applicant's detention on remand had been reviewed with sufficient frequency by a court which satisfied the appropriate requirements.

49. The applicant dismissed the Government's arguments as irrelevant to his complaint, since the Court of Appeal had wrongly rejected his appeals as out of time.

50. The Court must examine the facts on which the applicant bases his complaints and determine whether in fact the domestic authorities failed to meet any time-limits prescribed them before it can decide whether any failing on their part deprived the applicant of access to proceedings by which the lawfulness of his detention could be decided.

51. Like the order for extended detention on remand, the decision refusing suspension of the applicant's detention on remand was given by the Regional Court on 28 November 2007 (paragraph 8 above).

52. The Government observed that the applicant had attended the hearing on 28 November 2007, assisted by counsel. The request for suspension of the detention on remand had been a contingency measure in the event the court decided to order the applicant's further detention on remand. The applicant, having been informed of the order for his extended detention on remand and finding himself still in detention on 1 December 2007, ought to have realised that his request for suspension had been rejected and could have been expected to act of his own accord.

53. The applicant dismissed this argument as “nonsense” and contrary to usual practice in the Netherlands. He maintained that the Court of Appeal had simply made a mistake.

54. The Court has held, in the context of Article 5 § 3 of the Convention (*McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-X):

“The presumption is in favour of release. As established in *Neumeister v. Austria* (27 June 1968, p. 37, § 4, Series A no. 8), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.”

55. In the Court’s view the corollary is that where a procedure enabling a suspect in pre-trial detention to seek his provisional release exists in domestic law, Article 5 § 4 requires that the suspect enjoy whatever guarantees are offered to the full.

56. The Court cannot ignore the clear terms of Article 87 § 2 of the Code of Criminal Procedure, which provides that a suspect has three days after such a decision is served to lodge an appeal. In the present case, service took place on 4 December 2007. The applicant’s counsel lodged the appeal the following day. Consequently the appeal ought not to have been rejected as out of time.

57. The applicant has therefore been deprived of access to a procedure to obtain his release, albeit only provisionally, from pre-trial detention which under domestic law ought to have been open to him. In this respect, there has therefore been a violation of Article 5 § 4.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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. Non-pecuniary damage

59. The applicant claimed EUR 10,080, which is EUR 70 for each day that he had spent “too long in custody”. He submitted that given his poor health, he might well have received an entirely suspended sentence but for the mistakes made by the Court of Appeal.

60. The Government contested this claim.

61. The Court notes that it has declared inadmissible the complaint relating to the Court of Appeal’s rejection of the applicant’s appeal against

the order for his further detention on remand (paragraph 46 above). For the remainder, the Court cannot speculate on the possible outcome of the proceedings had the Court of Appeal decided otherwise.

62. The Court considers nonetheless that the applicant has suffered non-pecuniary damage that cannot be made good by the finding of a violation alone. Deciding on an equitable basis, the Court awards the applicant EUR 1,000 under this head.

B. Pecuniary damage

63. The applicant claimed reimbursement of certain domestic expenses which had continued while he remained in detention.

64. The Government contested this claim.

65. In view of the circumstances of the case, the Court does not discern any causal link between the violation found and the damage claimed. It therefore rejects the applicant's claims under this head.

C. Costs and expenses

66. The applicant sought reimbursement of the costs and expenses incurred before the Court but left the amount to the discretion of the Court. He stated that although he had received legal aid from the domestic authorities for the proceedings in Strasbourg, this did not cover certain out-of-pocket expenses which he set at EUR 81.05.

67. The Government contested this claim.

68. The Court observes that the application has been declared inadmissible in part. It considers the amount made payable by way of domestic legal aid, EUR 1,350.80, quite adequate in the circumstances. It declines to award any further sum.

D. Default interest

69. 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 UNANIMOUSLY

1. *Declares* the applicant's complaint that the Court of Appeal wrongly rejected his appeal against the order for his further detention on remand as out of time inadmissible and the applicant's complaint that the Court of Appeal wrongly rejected his appeal against the refusal to suspend his further detention on remand admissible;
2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds*
 - (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 1,000 (one thousand 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Section Registrar

Josep Casadevall
President