



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

THIRD SECTION

CASE OF EMIN v. THE NETHERLANDS

(Application no. 28260/07)

JUDGMENT

STRASBOURG

29 May 2012

FINAL

29/08/2012

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

In the case of Emin v. the Netherlands,

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Egbert Myjer,

Ján Šikuta,

Ineta Ziemeļe,

Nona Tsotsoria,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 10 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 28260/07) 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 Bulgarian national, Mr Galib Myumyum Emin (“the applicant”), on 4 July 2007.

2. The applicant was represented by Mr V. Senczuk, a lawyer practising in Utrecht. The Netherlands Government (“the Government”) were represented by their Agents, Mr R.A.A. Böcker and Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The Government of the Republic of Bulgaria declined to make use of their right under Article 36 § 1 to take part in the proceedings.

4. The applicant alleged that, although the competent domestic tribunal had ruled that he had undergone illegal detention, he had not had an “enforceable right to compensation” within the meaning of Article 5 § 5 of the Convention.

5. On 15 June 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Galib Myumyum Emin, is a Bulgarian national who was born in 1977 and as far as the Court is aware now lives in Bulgaria.

7. The applicant arrived in the Netherlands in November 2004. He never obtained legal residence. On 21 July 2006 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) decided to impose an exclusion order (*ongewenstverklaring*) on the applicant pursuant to the provisions of the Aliens Act 2000 (*Vreemdelingenwet 2000*) as he had been convicted of a serious criminal offence and sentenced to imprisonment for three years.

8. The applicant was released from prison on 5 April 2007. That same day the Deputy Minister of Justice (*Staatssecretaris van Justitie*; the successor to the Minister for Immigration and Integration) ordered the applicant to be taken into aliens' detention (*vreemdelingenbewaring*) with a view to his expulsion from the Netherlands.

9. Also on 5 April 2007, the applicant appealed the decision to take him into aliens' detention to the Regional Court (*rechtbank*) of The Hague, sitting in 's-Hertogenbosch.

10. The applicant was released from aliens' detention on 11 April 2007 but informed the Regional Court that he wanted to pursue his appeal in order to obtain compensation. In support of his appeal, the applicant argued *inter alia* that the exclusion order imposed on him had in the meantime become based on incorrect grounds as Bulgaria had since joined the European Union ("EU") and the criteria for imposing an exclusion order on EU citizens were more stringent.

11. On 23 April 2007 the Regional Court upheld the applicant's appeal. It held that the Deputy Minister had neglected to initiate activities to expel the applicant from the Netherlands while he was still in prison following his criminal conviction. Furthermore, the Regional Court considered that the Deputy Minister had not assessed, at the time the decision was taken to place the applicant in aliens' detention, whether the criteria in force for imposing an exclusion order applied to the applicant. For these reasons the Regional Court held that the applicant's aliens' detention had been unlawful from the outset. The Regional Court however declined to award compensation to the applicant as he had been convicted of a serious criminal offence and an exclusion order had also been imposed on him.

12. On 25 April 2007 the applicant filed a further appeal with the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) against the decision of the

Regional Court not to award him compensation even though his aliens' detention had been declared unlawful from the start.

13. On 10 May 2007 the Council declared the appeal inadmissible since, pursuant to article 84 sub d of the Aliens Act 2000, no further appeal lay against a refusal to award compensation.

II. RELEVANT DOMESTIC LAW

14. Section 106 of the 2000 Aliens Act (*Vreemdelingenwet 2000*) provides:

“1. If the Regional Court orders the lifting of a measure deprivative of liberty, or if the deprivation of liberty is lifted even before the request for the lifting of that measure is considered, it may grant the alien compensation at State expense. Damage shall include non-pecuniary damage. ...”

15. In so far as the above provision proves insufficient or inappropriate to the purpose, it is also possible for former detainees to seek compensation for a wrongful act, or tort, on the part of public authority (*onrechtmatige overheidsdaad*) by taking civil proceedings against the State and claiming compensation for damages based on the argument that the detention in question constituted a wrongful act within the meaning of Article 6:162 of the Civil Code. Article 6:162 of the Civil Code provides:

“1. A person who commits a wrongful act (*onrechtmatige daad*) against another which is attributable to him, must repair the damage suffered by the other in consequence.

2. Except where there is a ground of justification, the following acts are deemed to be wrongful: the violation of a right, and an act or omission violating a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.

3. A wrongdoer is responsible for the commission of a wrongful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles (*de in het verkeer geldende opvatting*).”

THE LAW

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

16. The applicant complained that he had been denied an “enforceable right to compensation” following a period of detention acknowledged by the competent domestic tribunal to have been unlawful. He relied on Article 5 § 5 of the Convention, which reads as follows:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

17. The Government disputed this.

A. Admissibility

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

B. Merits

19. The Government submitted that the applicant enjoyed an enforceable right to compensation guaranteed by section 106 of the 2000 Aliens Act. In addition, the applicant had the option of bringing a civil action in tort under Article 6:162 of the Civil Code. However, the domestic courts had a certain discretion in the matter of the amount to be awarded.

20. In fact, so far from actually denying the applicant a right to compensation, the Regional Court had found that there was sufficient reason to reduce the compensation award to nil. Justification for this decision was constituted by the applicant’s own conduct in failing to report to the police as he had been ordered to, remaining in the Netherlands illegally and committing serious crimes. Illegal though his detention had been, the applicant had therefore brought it upon himself.

21. The applicant questioned the usefulness of civil proceedings in a case such as the present, given that the Administrative Jurisdiction Division of the Council of State had declined jurisdiction even though it was the proper appellate court in cases of this nature. He further argued that the circumstances mentioned by the Government could neither justify his detention nor diminish the respondent’s liability for the consequences of its unlawfulness.

22. The Court has stated the applicable principles as follows (see, as a recent authority, *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, 17 January 2012, with further references):

(a) Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4.

(b) The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions.

(c) In this connection, the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty.

23. In the present case it is beyond doubt that domestic law (section 106 of the 2000 Aliens Act; see paragraph 14 above) granted a right to monetary compensation for unlawful detention to persons in the applicant's position, as well as a procedure before an administrative tribunal to claim it. The Court is therefore unconvinced that proceedings in tort under Article 6:162 of the Civil Code (see paragraph 15 above), relied on by the Government, would have been of any greater avail to the applicant.

24. The Court is faced with the fact that the domestic administrative tribunal, while recognising the unlawfulness of the applicant's detention and the existence in principle of a right to compensation, declined to make any award.

25. The principles set out in § 22 above admit of no other conclusion than that Article 5 § 5 of the Convention creates a direct right to compensation once the national courts or the Convention institutions have found that an applicant has been deprived of his or her liberty contrary to Article 5 §§ 1-4 of the Convention (see *Storck v. Germany*, no. 61603/00, § 122, ECHR 2005-V). This has led the Court to find violations of Article 5 § 5 when domestic courts, while recognising the unlawfulness of applicants' detention, nonetheless denied the applicant compensation on grounds that facts justifying the deprivation of liberty, albeit unrelated to the actual detention order, could be found (see *Storck*, §§ 121-22; *Houtman and Meeus v. Belgium*, no. 22945/07, §§ 45-46, 17 March 2009; *Shulgin v. Ukraine*, no. 29912/05, §§ 64-65, 8 December 2011).

26. The present case is another such. There has accordingly been a violation of Article 5 § 5 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. 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."

28. Rule 60 § 2 of the Rules of Court provides that the applicant must submit itemised particulars of all claims for just satisfaction, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.

29. The applicant on his application form stated his intention to lodge a claim for just satisfaction, including for non-pecuniary damage and costs and expenses. However, he failed to submit any such claim within the time-limit fixed for the submission of his observations on the merits, merely stating in his observations that the Court "should not reject his request for just compensation".

30. The Court cannot but note the absence of a valid claim for just satisfaction. There is no call for the Court to consider this matter of its own motion (see, as recent authorities, *Brezovec v. Croatia*, no. 13488/07, § 80, 29 March 2011 and *G.R. v. the Netherlands*, no. 22251/07, § 61, 10 January 2012).

31. The Court instead refers to the possibilities open to the applicant to obtain compensation under domestic law (see paragraphs 14 and 15 above) and the duty of the respondent Party to abide by the judgment of the Court once it is final (Article 46 § 1 of the Convention; see also, as a recent authority, *Stanev v. Bulgaria* [GC], no. 36760/06, § 254, 17 January 2012; and against the specific background of Netherlands domestic law, *Salah v. the Netherlands*, no. 8196/02, §§ 71 and 80, ECHR 2006-IX (extracts)).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 5 of the Convention.

Done in English, and notified in writing on 29 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President