



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

THIRD SECTION

CASE OF NAKACH v. THE NETHERLANDS

(Application no. 5379/02)

JUDGMENT

STRASBOURG

30 June 2005

FINAL

30/09/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision

In the case of Nakach v. the Netherlands,

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

Mr B.M. ZUPANČIČ, *President*,

Mr L. CAFLISCH,

Mr C. BÎRSAN,

Mrs M. TSATSA-NIKOLOVSKA,

Ms R. JAEGER,

Mr E. MYJER,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 6 January and 9 June 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 5379/02) 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 Moroccan national, Mr Bensaid Nakach (“the applicant”), on 19 October 2001.

2. The applicant, who had been granted legal aid, was represented by Mr G.P. Hamer, a lawyer practising in Amsterdam. The Netherlands Government (“the Government”) were represented by their Agents, Mr R.A.A. Böcker and Mrs J. Schukking of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that there had been a violation of Article 5 § 1 of the Convention in that there had been a failure to follow a procedure prescribed by law, no official record having drawn up of a hearing held in relation to a request by the competent authority to prolong his detention on mental health grounds.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 6 January 2005, the Court declared the application partly admissible.

6. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, Mr Bensaid Nakach, is a Moroccan national, who was born in 1944. At the time of the events complained of, he was detained in a secure institution, the Forensic Psychiatric Centre “Veldzicht” in Balkbrug, Netherlands; in July 2002 he was transferred to the secure institution “De Kijvelanden” in Poortugaal, near Rotterdam, Netherlands.

8. On 7 February 1994 the applicant hit his wife, Mrs K., on the head, the shoulders and the back with the blunt edge of a meat cleaver, choked her and kicked her in the face. Mrs K. was injured but survived.

9. On 10 October 1994 the Breda Regional Court convicted the applicant of attempted manslaughter. In the light of a psychiatric report which found the applicant's mental powers to be deficient and the chance of his re-offending to be high, it sentenced him to one year's imprisonment and ordered his placement at the Government's disposal (*terbeschikkingstelling van de regering*) with confinement in a secure institution.

10. On 10 October 1995 the 's-Hertogenbosch Court of Appeal upheld the judgment of the Regional Court.

11. The applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*), which was dismissed on 1 October 1996.

12. The time which the applicant had spent in detention on remand counting towards the sentence, the order placing the applicant at the Government's disposal therefore went into force on that date.

13. The placement order was prolonged for an additional two years in September 1998.

14. On 29 September 2000 the Breda Regional Court extended the applicant's placement order for a further two years.

15. The applicant appealed to the Arnhem Court of Appeal (*gerechtshof*).

16. A hearing was held on 9 April 2001. The Government state that the registrar (*griffier*) took notes and that these were kept in the case file.

17. The Court of Appeal gave its decision on 23 April 2001; it found that the applicant's continued placement at the Government's disposal remained necessary in the interest of public safety and accordingly upheld the decision of the Breda Regional Court. Summaries of an expert report and of statements made at the hearing by an expert and by the applicant's counsel are contained in this decision; they cover approximately a page and a half.

18. On 28 June 2001 the applicant's counsel wrote to the Court of Appeal asking for a copy of the official record of the hearing of 9 April.

19. A reply dated 11 July 2001, on stationery bearing the letterhead of the vice-president of the Court of Appeal in charge of criminal cases (the signature is illegible), contains the following passage:

“In reply to your request of 28 June last I must inform you that no official records are usually made of hearings of the criminal division concerning prolongations of placements at the Government's disposal. The reason is that no ordinary remedy lies against the decisions concerned and the workload of the Court of Appeal does not admit of structural activities 'just to fill the archives' (*voor het archief*). For that reason, also, the decisions in question tend to render the statements made more extensively than would be the case if in fact an official record were prepared (in addition).”

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

20. A person who has been found guilty of certain serious crimes and who, at the time of committing the offence, suffered from a mental deficiency or derangement may be placed at the Government's disposal if required in the interests of the safety of others or, more generally, in the interests of the safety of persons or goods. Such a measure, which is not considered a punishment, may be imposed instead of or together with a prison sentence (Article 37a §§ 1 and 2 of the Criminal Code). The sentencing court may further decide that the person concerned shall be confined in a secure institution in the interests of public safety (Article 37b § 1).

21. According to Article 38d of the Criminal Code, the person concerned shall be placed at the disposal of the Government for an initial period of two years which may be prolonged, 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).

B. The Code of Criminal Procedure

1. Prolongation of placement at the Government's disposal

22. A hearing shall be held in public by the review chamber (*raadkamer*) of the Regional Court (Article 509m § 1).

23. An appeal against the decision of the Regional Court lies to the Arnhem Court of Appeal (Article 509v § 1).

24. The Court of Appeal's decision, which shall contain the specific reasons underlying it, is final; no ordinary legal remedy is available to challenge it (Article 509x § 2).

2. The decision and the official record of the hearing

25. The provisions of the Code of Criminal Procedure prescribing the content of the review chamber's decisions and the official record of its hearings are the following:

Article 24

“1. The decision taken by the review chamber shall be reasoned. If it is laid down that the hearing shall be public, the decision shall be pronounced publicly.

2. The decision shall state the names of the judges of the chamber (*college*) which gave it and the date on which it was given. It shall be signed by the president and the registrar who attended the hearing.

3. If the president is prevented from signing, another judge of the review chamber shall sign. If the registrar is prevented from signing, this shall be mentioned in the decision.

4. Unless otherwise provided, the decision shall be transmitted to the suspect and other participants in the proceedings without delay.

...”

Article 25

“1. The registrar shall prepare an official record of the hearing by the review chamber, which shall contain the summary content (*den zakelijken inhoud*) of the statements made and of any further events that have occurred at that hearing.

2. If a suspect, a witness or expert, or a suspect's counsel or a lawyer desires any statement to be recorded in his own words, that shall be done as far as possible in so far as the statement does not exceed reasonable limits.

3. The official record shall be finalised (*vastgesteld*) by the president or one of the other judges of the review chamber and the registrar [together] and signed as soon as possible after the end of the hearing. Should the registrar be prevented, this shall be done without his co-operation and the fact of his having been thus prevented shall be mentioned at the end of the official record.

4. The official record shall be added to the case file together with the decision and any other documents submitted during the hearing.”

C. Case-law

26. In a judgment of 28 February 1962, *Nederlandse Jurisprudentie* (Netherlands Law Reports) 1964, no. 291, the Supreme Court declared null and void a decision of a trial court because the official record of the hearing at which it was delivered was not contained in the case file, so that it could not be established that delivery had taken place in accordance with the prescribed formal requirements, including that of publicity. The Supreme Court accepted that the judgment's delivery in public was noted in the judgment itself, but that was not sufficient since, with regard to formalities to be observed at hearings, the law had attributed evidentiary value only to the official record.

27. In two other judgments, delivered by the Supreme Court on 6 June 1998 (*Nederlandse Jurisprudentie* 1998, no. 838) and on 22 March 1998 (*Nederlandse Jurisprudentie* 1998, no. 438) respectively, decisions were declared null and void on the ground that, there being no official record in each case of the hearing *in camera*, it had to be assumed that no such hearing meeting the appropriate formal requirements had in fact been held.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

28. Article 5 § 1 of the Convention, in relevant part, provides 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:

...

(e) the lawful detention ... of persons of unsound mind ...”

The applicant complained under this provision of a failure to follow a procedure prescribed by law in that no official record was drawn up of the Arnhem Court of Appeal's hearing of 9 April 2001. The Government disputed this.

A. The parties' submissions

29. The applicant alleged that Article 25 of the Code of Criminal Procedure, which requires an official record to be drawn up of hearings *in*

camera, had been disregarded by the Court of Appeal. From this it followed, in his submission, that the prolongation of his placement at the Government's disposal with confinement to a secure institution had not been ordered "in accordance with a procedure prescribed by law", as required by Article 5 § 1 of the Convention.

30. The applicant pointed to the terms of Article 25 of the Code of Criminal Procedure, paraphrased above. An official record of a hearing was, in his submission, a record of what was said and done *during* a hearing, and was therefore entirely different in nature from a judicial decision which followed a hearing in time.

31. In the applicant's submission, the Code of Criminal Procedure also recognised the difference in principle between decisions and official records of hearings. He quoted a large number of domestic legal provisions in support of this argument, as well as a number of comments by learned authors, the drafting history of the legal provision concerned and case-law of the Supreme Court.

32. Finally, the applicant argued that the importance of a separate official record of the hearing was its character as a public record of everything that was actually discussed at the hearing, perhaps including matters which did not make their way into the eventual decision.

33. The Government admitted that it was the normal practice of the Arnhem Court of Appeal not to draw up separate official records in cases of this nature, thus saving time and money. Instead, a summary of what was said by the person concerned or his counsel was incorporated in the document containing the decision. The Government submitted that this was sufficient to satisfy domestic law. In any event, they argued, an official record in the form of a separate document would have had no added value whatsoever for the applicant.

B. The Court's assessment

34. It is no longer in dispute that the applicant's continued detention was "lawful" in the sense that the authorities of the respondent Party found sufficient substantive grounds for their decision. The sole question remaining is whether the absence of a separate document containing an official hearing of the Arnhem Court of Appeal's hearing of 9 April 2001 violated Article 5 § 1 of the Convention.

35. The Court would acknowledge in general the usefulness of keeping detailed records of what happens at hearings. It points out that the importance of such a record may transcend national proceedings; indeed, such a record may enable relevant facts to be established by an international body called upon to investigate complaints arising from domestic proceedings (compare *Pardo v. France*, judgment of 20 September 1993, Series A no. 261-B).

36. Nonetheless, neither Article 5 nor any other provision of the Convention or its Protocols contains a requirement that an official record of a hearing be kept, whether verbatim or in summary form. It follows *a fortiori* that incorporating a record of events occurring and words spoken at a hearing in the resulting court decision is not in itself contrary to the Convention. The absence of an official record as a separate document can therefore only raise questions under the Convention in so far as the Convention refers back to domestic law.

37. Precisely on the question whether detention is “lawful”, including whether it complies with “a procedure prescribed by law”, the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p. 11, § 24; *Öcalan v. Turkey* [GC], no. 46221/99, § 83, 12 May 2005).

38. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see, as a recent authority, *Öcalan*, cited above, § 84).

39. Domestic case-law specifically finding fault with the Arnhem Court of Appeal's practice of not drawing up separate official records of its hearings in cases concerning the prolongation of placements at the Government's disposal does not exist. Nor could it: the Arnhem Court of Appeal's decisions in the matter are final and not subject to any appeal (see paragraph 24 above).

40. Two different provisions of the Code of Criminal Procedure set out the formal requirements to which the review chamber's decisions and its official records must conform, namely Articles 24 and 25 respectively. There is a certain overlap in that both must be signed by the president of the review chamber and the registrar who attended the hearing and both are added to the case file.

41. Responsibility for the two documents, however, is attributed separately. It is implicit in the nature of a decision that its content is the collective responsibility of the judges who constitute the review chamber. In contrast, the official record is primarily the responsibility of the registrar; it is he who prepares it, and he who finalises it together with the president of the review chamber or one other judge.

42. More importantly, the case-law of the Netherlands Supreme Court sets out the purpose of the official record in domestic law, which is to record the observance of the applicable formal requirements. The Supreme Court has consistently held that this function cannot be fulfilled by the decision (see paragraphs 26 and 27 above).

43. There is no reason to doubt that, had it had jurisdiction to do so, the Supreme Court would have found the practice of the review chamber of the Arnhem Court of Appeal in violation of domestic procedure. The Court is thus led to conclude that the procedure prescribed by domestic law was not followed.

44. There has accordingly been a breach of Article 5 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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

46. The applicant claimed 1,000 euros (EUR) in respect of non-pecuniary damage. He did not claim compensation for pecuniary damage.

47. The Government were prepared to acquit the applicant of a debt which he owed to the State.

48. The Court finds that, in the circumstances, the finding of a violation constitutes sufficient just satisfaction in respect of any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

49. Having received State-financed legal aid in the domestic proceedings, the applicant claimed reimbursement only of the costs and expenses which he had incurred in the proceedings before the Court. He submitted that he was liable to pay his representative EUR 130 per hour for 15.5 hours' work referable to the complaint declared admissible, plus EUR 99.96 for translation costs and EUR 120.90 for office expenses; value-added tax came to EUR 405.82. The legal aid payable by the Court, EUR 701, had to be deducted from this sum. The final amount claimed was thus EUR 1,840.72.

50. The Government accepted these amounts.

51. The Court allows the applicant's claim in respect of costs and expenses in its entirety, that is EUR 1,840.72 including value-added tax and after deduction of the legal aid amount paid by the Court.

C. Default interest

52. 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. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,840.72 (one thousand eight hundred and forty euros and seventy-two cents) in respect of costs and expenses;
 - (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 30 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President