

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32775/07
by Jan BIJL
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 12 April 2011 as a Committee composed of:

Luis López Guerra,
Egbert Myjer,
Mihai Poalelungi, *judges,*

and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 18 October 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Jan Bijl, is a Netherlands national who was born in 1961. As far as the Court is aware, he is detained pursuant to an order for his confinement in a custodial clinic, having been placed at the disposal of the Government (*terbeschikkingstelling met bevel tot verpleging van overheidswege*; "TBS order"). He is unrepresented.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. In a judgment dated 2 November 2004, the Court of Appeal of Leeuwarden sentenced the applicant to thirty months' imprisonment, ten months of which were suspended, in combination with a TBS order for rape, attempted manslaughter, several counts of causing grievous bodily harm and some lesser offences. In deciding to impose a TBS order the Court of Appeal had regard to four expert reports, two by psychologists and two by psychiatrists. The Court of Appeal's judgment became final when the Supreme Court (*Hoge Raad*) dismissed the applicant's appeal on points of law.

4. The applicant's detention under the TBS order commenced on 18 May 2006.

5. The applicant lodged disciplinary complaints against the four experts, alleging that their reports did not meet the applicable requirements. In the ensuing proceedings, the Regional Health Care Disciplinary Tribunal (*regionaal Tuchtcollege voor de Gezondheidszorg*) gave decisions declaring complaints against two of the four experts well-founded. One of the two lodged an appeal that was largely unsuccessful. Both experts, a psychiatrist and a psychologist, received a reprimand.

6. On 5 July 2007 the applicant lodged a request for his immediate release on the basis of Article 5 of the Convention with the Leeuwarden Regional Court, the court that would normally be responsible for automatic periodic review of his TBS order. He argued that the TBS order was not lawful, since it was based on two flawed reports.

7. In a decision dated 2 October 2007, the Regional Court declared the request inadmissible, finding that Netherlands law provided for a system whereby the lawfulness of a TBS order was subject to automatic periodic review (at least once every two years), such a system being in accordance with Article 5 of the Convention. During the intervals the lawfulness of a TBS order could only be examined in exceptional circumstances; none, however, obtained in this case.

8. The applicant's subsequent appeal with the Leeuwarden Court of Appeal was likewise declared inadmissible in a decision dated 24 January 2008, since neither the Criminal Code nor the Code of Criminal Procedure provided for an appeal against the decision of the Regional Court. *Obiter dictum*, it was considered that criminal law did not recognise a right for the applicant to have the lawfulness of his TBS order examined during the intervals between one instance of automatic periodic review and the next; since therefore criminal law could not provide the relief which the applicant sought, review by the (civil) Provisional Measures Judge (*voorzieningenrechter*) would be the appropriate remedy required by Article 13 of the Convention in conjunction with Article 5 § 4.

9. Some nine months after the introduction of the present application, the applicant submitted a copy of a judgment given by the Provisional Measures Judge (*voorzieningenrechter*) of the Regional Court of The Hague

on 29 May 2008. It appears that the applicant had brought summary civil proceedings seeking, among other things, an order for his release on the ground that his detention under the TBS order had been wrongful *ab initio*.

10. The Provisional Measures Judge, following a hearing, declared himself competent to examine the case, but rejected the applicant's claim that the State had acted unlawfully towards him by imposing the TBS order. The judge considered that it could not be established that the trial court would have imposed a different measure or penalty had it been aware of the shortcomings in the reports. In this context the judge noted, *inter alia*, that the trial court had also used two other reports in its decision to impose a TBS order; the applicant's disciplinary complaints against the authors of those reports had been rejected. Moreover, the clinic where the applicant was being treated found it likely that the applicant would reoffend in the short-to-medium term if released prematurely.

11. It does not appear that the applicant lodged an appeal with the Court of Appeal against this judgment.

B. Relevant domestic law

1. *The Criminal Code* (Wetboek van Strafrecht)

12. 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 itself punitive, may be imposed instead of or together with a punitive 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 custodial clinic in the interests of public safety (Article 37b § 1).

13. 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).

2. *The Code of Criminal Procedure* (Wetboek van Strafvordering)

14. If the person placed at the Government's disposal is confined in a custodial clinic, the request of the public prosecutor for the prolongation of such placement shall be accompanied by a recent advisory opinion of the

head of the institution concerned, which shall be reasoned and signed, and a copy of the notes kept concerning the person's physical and mental health (Article 509o § 2).

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

16. The Court of Appeal's decision, which shall be reasoned, is final (Article 509x § 2).

17. There is no provision for review of a TBS order by the criminal courts during the interval between instances of periodic review under the above provisions.

3. The Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering)

18. The Provisional Measures Judge of the Regional Court has competence to order an immediate provisionally executable measure (*onmiddellijke voorziening bij voorraad*) in all cases where the interests of the parties so require (Article 254 § 1).

19. An appeal lies against the judgment of the Provisional Measures Judge (Article 332 § 1); it is not necessary to await the outcome of proceedings on the merits that may be pending (Article 337 § 1).

COMPLAINTS

20. The applicant complained initially that the refusal, first of the Regional Court, then of the Court of Appeal, to consider his request for release constituted a denial of access to a procedure by which the lawfulness of his detention could be decided by a court. After the decision of the Provisional Measures Judge, he complained in addition of the lack of any domestic remedy against the two earlier decisions. He relied on Articles 5 §§ 1 and 4, 6 and 13 of the Convention.

THE LAW

21. The Articles of the Convention relied on by the applicant, in their relevant parts, provide as follows:

Article 5

"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) the lawful detention of a person after conviction by a competent court;

...

(e) the lawful detention of ... persons of unsound mind, ...;"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

...

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. ..."

Article 6

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

22. Before it can turn to the merits of the applicant's complaints, the Court must determine their admissibility. The question arises whether the applicant has exhausted all domestic remedies, as required by Article 35 § 1 of the Convention.

23. The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Nevertheless, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, §§ 74-75, ECHR 1999-V; *Giacometti and Others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII; *Sejdovic v. Italy* [GC], no. 56581/00, §§ 43-45, ECHR 2006-II; *McFarlane v. Ireland* [GC], no. 31333/06, §§ 107-108, ECHR 2010-...; and recently, *Paksas v. Lithuania* [GC], no. 34932/04, § 75, 6 January 2011).

24. A request to the regional court responsible for automatic periodic review of a TBS order is not an effective remedy during the interval between two instances of review. Domestic law does not grant access to the regional court in such circumstances; it is for that reason that the Leeuwarden Regional Court had to decline jurisdiction in the applicant's case (see paragraph 7 above). *A fortiori*, an appeal against the Regional Court's decision could not be effective either (see paragraph 8 above).

25. In contrast, summary civil proceedings before the Provisional Measures Judge would appear to offer a reasonable prospect of success. The Court observes that the Provisional Measures Judge did not decline jurisdiction, but instead considered the applicant's claims on their merits before dismissing them as unfounded (see paragraph 10 above).

26. However, the applicant has not shown that he lodged an appeal against the judgment of the Provisional Measures Judge, although such a course was actually open to him (see paragraph 19 above).

27. It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli	Luis López Guerra
Deputy Registrar	President