

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 50869/08
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 21 April 2008 the Public Prosecutor lodged a request with the Leeuwarden Regional Court for the applicant's TBS order to be extended for a further two years. The Regional Court held a hearing on 22 April 2008 at which the case was adjourned until a date in September 2008 in order for the applicant to be examined in a different institution from that in which he was then being held, namely a specialised observation clinic.

7. On 29 May 2008 the Provisional Measures Judge (*voorzieningenrechter*) of the Regional Court of The Hague gave a judgment. 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*.

8. 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.

9. On 26 August 2008 the Court of Appeal (*gerechtshof*) of Arnhem declared inadmissible an appeal which the applicant had apparently lodged against the Leeuwarden Regional Court's decision to adjourn the case for an

examination of the applicant himself (paragraph 6 above), only final decisions being appealable not interlocutory ones.

10. It appears that the applicant brought new summary civil proceedings before the Provisional Measures Judge of the Regional Court of The Hague.

11. On 16 September 2008 the Provisional Measures Judge gave judgment. As relevant to the complaints before the Court, it was found that the main thrust of the applicant's claims was the same as that of the claims already dismissed in the judgment of 29 May 2008 (see paragraph 8 above), against which the applicant had moreover lodged an appeal which was still pending; the applicant had however yet to submit his grounds of appeal (*grieven*). To that extent the applicant was abusing the procedure and his claim was inadmissible. An alternative claim for the applicant's transfer from the observation clinic back to the institution where he had been held at the time of the Regional Court's decision of 22 April 208 (paragraph 6 above) was dismissed, since only the court with jurisdiction concerning the TBS order imposed on the applicant, that is the Leeuwarden Regional Court could give an order to that effect.

12. On 23 September 2008, having resumed the proceedings adjourned in April, the Regional Court of Leeuwarden rejected the applicant's argument that the TBS order had been wrongfully imposed in view of alleged illicit dealings between the public prosecution service and one of the experts who had examined the applicant. It remitted the case to the investigating judge (*rechter-commissaris*) pending the outcome of the examination in the observation clinic and again adjourned the case until a date in November 2008.

13. The applicant has submitted an interlocutory decision of the Arnhem Court of Appeal in which it is found, among other things, that the applicant has failed to co-operate in his examination by the observation clinic.

B. Relevant domestic law

14. The relevant domestic law is set out in *Bijl v. the Netherlands* ((dec.), no. 32775/07).

COMPLAINTS

15. The applicant invoked under Articles 5 §§ 1 and 4, 6 and 13 of the Convention. As the Court understands his complaints, he alleged a violation of those provisions in that the various domestic courts failed to consider his claims that the TBS order had been wrongfully imposed. He was also understood to complain, under Article 5 § 4, that the proceedings were not conducted "speedily".

THE LAW

16. 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 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."

17. 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.

18. 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).

19. 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. *A fortiori*, an appeal against the Regional Court's decision could not be effective either.

20. 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 8 above).

21. However, although it would appear that the applicant lodged an appeal an appeal against the judgment of the Provisional Measures Judge, it has not been shown that he pursued it expeditiously, nor that he pursued it to a conclusion (see paragraph 19 above).

22. Moreover, the applicant has not shown that he made his complaint of lack of speed to any domestic authority, nor that he undertook any effort to obtain a speedy decision. In fact, the opposite appears to be the case; it is apparent that major delays were caused by the applicant's lack of co-operation.

23. 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