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

THIRD SECTION

DECISION

Application no. 67590/12
Wigbertus Johannes Frank Maria HAALMEIJER
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 22 October 2013 as a Committee composed of:
Luis López Guerra, *President,*
Nona Tsotsoria,
Valeriu Griţco, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*
Having regard to the above application lodged on 10 October 2012,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Wigbertus Johannes Frank Maria Haalmeijer, is a Netherlands national born in 1979. He is currently serving a prison sentence in The Hague. He was represented before the Court by Mr N.A. Heidanus, a lawyer practising in Groningen.

A. The circumstances of the case

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

1. The judgment of the Regional Court

3. On 27 April 2005, after proceedings involving reports by a psychologist and a psychiatrist, the Rotterdam Regional Court (*rechtbank*) found the applicant guilty of attempting sexual assault under threat of strangulation on a young woman; two counts of robbery; sexually assaulting another young woman and attempting manslaughter of her by stabbing her with a knife; and sexually assaulting two children (an eleven-year-old boy

and a ten-year-old girl), committing manslaughter of the girl by strangling her to death and attempting manslaughter of the boy by strangulation and by cutting his throat. With respect to the assault on the children, the Regional Court found that the applicant had wished to kill them so as to secure for himself impunity and commit further crimes.

4. As relevant to the case before the Court, the Regional Court sentenced the applicant to twenty years' imprisonment and ordered him placed at the disposal of the Government (*terbeschikkingstelling*, hereafter "TBS order") with confinement in a custodial clinic (*bevel tot verpleging van overheidswege*), while advising the Minister of Justice (*Minister van Justitie*, hereafter "the Minister") to commence the implementation of the TBS order only after the applicant had served two-thirds of his prison sentence.

5. The applicant appealed to the Court of Appeal (*gerechtshof*) of The Hague.

2. The judgment of the Court of Appeal

6. On 22 November 2005 the Court of Appeal quashed the judgment of the Regional Court. Substituting its own judgment, it found that in stabbing the second young woman the applicant had attempted not to commit manslaughter but to cause grievous bodily harm; in addition, it was not convinced that the applicant had wished to kill the children in order to ensure impunity and commit further crimes.

7. As relevant to the case before the Court, the Court of Appeal reduced the prison sentence from twenty to eighteen years; for the remainder, deciding as the Regional Court had done, it imposed a TBS order with confinement to a custodial clinic and advised the Minister not to commence the implementation of the TBS order until after the applicant had served two-thirds of his prison sentence. In so doing the Court of Appeal had regard to the psychiatric treatment available in prison and the likelihood that psychiatric treatment in a therapeutic setting would involve the grant of leave from detention; the Court of Appeal's intention in giving such advice was to ensure that the applicant not be given such leave for as long as that could be avoided.

8. This judgment became final on 7 December 2005.

3. The applicant's attempts to secure his transfer to a therapeutic setting

(a) First round of proceedings

9. On 8 February 2006 the Minister wrote to the applicant informing him that the TBS order would take effect on 22 July 2016; on that date he would become eligible for transfer from a punitive to a therapeutic setting and would be placed on the corresponding waiting list.

10. On 7 August 2007 the applicant appealed against the Minister's decision of 8 February 2006 to the Appeals Board (*beroepscommissie*) of the Council for the Application of Criminal Law and the Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*) (hereafter "the Appeals Board"). On 27 November 2007 the Appeals Board gave a decision rejecting the applicant's appeal as out of time.

(b) Second round of proceedings

11. On 23 September 2010 the applicant wrote to the Minister drawing attention to the fact that he had discharged one-third of his prison sentence in the meantime. Relying on the so-called "Fokkens rules", he asked to be transferred to a therapeutic setting forthwith.

12. On 29 September 2010 the Minister gave a decision to the effect that, in accordance with the advice of the Court of Appeal, the transfer requested would be effected only after the applicant had served two-thirds of his sentence.

13. On 5 October 2010 the applicant lodged an appeal against the Minister's decision with the Appeals Board.

14. The Appeals Board gave its decision on 10 May 2011. As relevant to the present case, it held that the applicant's appeal was well-founded and ordered the Minister to decide afresh within one month.

(c) Third round of proceedings

15. On 29 June 2011 the applicant wrote to the Minister pointing out that the one-month time-limit set by the Appeals Board had passed and demanding his immediate transfer to a therapeutic setting.

16. On 9 August 2011 the Deputy Minister of Security and Justice (*Staatssecretaris van Veiligheid en Justitie*, hereafter "the Deputy Minister") wrote to the Appeals Board pointing to the advice given by the Court of Appeal in its sentencing judgment and announcing that in reconsidering his position he would take account of other relevant factors, including the "retributive component" (*vergeldingscomponent*) of the sentence and the interests of society in general and the victims in particular.

17. On 29 September 2011 the Deputy Minister gave a decision refusing the applicant early transfer to a therapeutic setting. In so doing he pointed to the widespread public disquiet caused by the applicant's crimes, especially the crimes against the two children which had become a *cause célèbre* and for which someone else had been sent to prison by mistake. He also pointed to the particular interests of the victims including the surviving kin of the child whom the applicant had killed. Finally, he observed that the applicant was already receiving treatment in prison; the added value of transfer to a therapeutic setting would be little more than the possibility of leave.

18. On 12 October 2011 the applicant lodged an appeal against this decision with the Appeals Board. He complained that the Deputy Minister

had allowed five months to pass before deciding afresh instead of deciding within one month as the Appeals Board had ordered (see paragraph 14 above) and had failed to transfer the applicant to a therapeutic setting.

19. The Appeals Board gave its decision on 3 May 2012 after having held a hearing. It criticised the Deputy Minister for allowing the one-month time-limit to pass without warning the interested parties about it but declined to declare the appeal well-founded on that ground. It also noted that, in accordance with the "Fokkens rules" as in force until August 2010, the applicant was in principle eligible for early transfer to a therapeutic setting after serving only one-third of his sentence. However, the "Fokkens rules" did not prevent the Deputy Minister from taking into account the interests of the surviving victims and the surviving relatives of the deceased child. In the circumstances of the case, which further included the fact that the applicant was already receiving treatment in prison and the fact, as apparent, that the applicant's condition did not make him unsuitable for detention in a prison setting, the latter interests prevailed over his.

B. Relevant domestic law

20. The relevant domestic law is set out in *D.B. v. the Netherlands* (dec.), no. 53764/07, §§ 20-30, 5 March 2013.

21. It appears from the drafting history of the current redaction of Article 13 of the Criminal Code (*Wetboek van Strafrecht*) (parliamentary dossier no. 24 256) and the 1999 Prisons Act (*Penitentiaire beginselenwet*) (parliamentary dossier no. 23 445) that the legislature intended transfer from a penal to a therapeutic setting to take place after the appointed proportion of the prison sentence had been served, but wished to retain the necessary flexibility to advance or delay such transfer depending on circumstances pertaining to the individual convict. Transfer could be delayed if there were "contraindications" (*contra-indicaties*) such as, for example, a serious danger of absconding (Lower House of Parliament (*Tweede Kamer der Staten-Generaal*), parliamentary year 1994-95, 24 256, B, Advisory opinion of the Council of State and follow-up report (*Advies van de Raad van State en nader rapport*), paragraph 1), or the advice of the sentencing court (Upper House of Parliament (*Eerste Kamer der Staten-Generaal*), parliamentary year 1996-97, 23 445 and 24 256, no. 33e, Additional memorandum in reply (*Nadere memorie van antwoord*), page 3).

22. In an oral debate in the Upper House of Parliament, the then Minister of Justice said (Upper House of Parliament, 23 445 and 24 256, 24 June 1997, EK 34-1585):

> "Capacity problems should not be a criterion to delay transfer to a custodial clinic, because this has, of course, nothing to do with considering the individual convict. After one-third of the sentence you will get the problem of what to do about time-expired convict prisoners awaiting placement (*passantenproblematiek*), but that is not

the same thing as considering whether someone is ready – I will put this in my own words – to be placed in a custodial clinic."

COMPLAINT

23. The applicant complained under Article 5 of the Convention that he was not transferred from a penal setting to a therapeutic one after serving only one-third of his sentence. He also complained under Article 6, or in the alternative Article 13, of the length of the proceedings.

THE LAW

A. Alleged violation of Article 5 of the Convention

24. The applicant complained that he was not transferred from a penal setting to a therapeutic one after serving only one-third of his sentence in accordance with domestic law as he interpreted it. He relied on Article 5 of the Convention, which, as relevant to the present case, 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:

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

...

(e) the lawful detention ... of persons of unsound mind ...;"

25. The applicant relied on the fact that he had served one-third of his prison sentence on 26 July 2010, when the "Fokkens rules" were still in force. In his submission, he ought to have been transferred to a therapeutic setting already then. Referring to the drafting history of the pertinent legislation (paragraphs 21 and 22 above), he argued that no other questions ought to have been considered than whether he was amenable to psychiatric treatment. The Deputy Minister, and by extension the Appeals Board, ought therefore not to have based their decisions on the feelings of the surviving victims and relatives of the deceased victims of his crimes, the less so since these had not been mentioned by the Court of Appeal in its sentencing judgment.

26. The question before the Court is whether the applicant's detention at the relevant time was "in accordance with a procedure prescribed by law" and "lawful" within the meaning of Article 5 § 1 of the Convention. The Convention here essentially refers back to national law and states the

obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, the *D.B.* decision, § 54).

27. Rule 42(1) of the 1999 Prison Rules, as in force at the relevant time, provided that convict prisoners on whom a TBS order had been imposed in addition to their sentence should in principle be transferred to a custodial clinic after having served one-third of their prison sentence. However, as the Court noted in its *D.B.* decision, the use of the expression "in principle" in Rule 42(1) admits of possible exceptions and thus creates a certain flexibility. One such exception, set out in Rule 43(2)(a) of the 1999 Prison Rules, is precisely the advice of the sentencing court.

28. The Court sees no need to go into the reasoning of the decisions given by the Minister and the Appeals Board, which in any case it does not consider incompatible with the Court of Appeal's advice.

29. Furthermore, the Court is of the view that the drafting history of the legislation in question, cited by the applicant and quoted above (see paragraph 22), does not support the applicant's position that the Netherlands legislature wished to exclude from consideration any question other than whether the convict was amenable to treatment.

30. In view of the above it cannot be seen that as a matter of domestic law the Deputy Minister was not entitled to decide as he did.

31. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 6 of the Convention

32. The applicant complained of the time taken by the proceedings from the Minister's decision of 29 September 2010 until the Appeals Board gave its decision on 3 May 2012. He relied on Article 6 of the Convention, which provides, in its relevant part:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a hearing within a reasonable time ..."

33. The Court finds that Article 6 does not apply under its criminal head since the proceedings in issue did not concern the determination of a "criminal charge" (see *Enea v. Italy* [GC], no. 74912/01, § 97, ECHR 2009).

34. For Article 6 § 1 of the Convention under its "civil" head to be applicable, there must be a "dispute" (*contestation*) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, whether or not that right is also protected by the Convention. In the instant case, the Court finds that the "right" to be granted early transfer to a therapeutic setting is not so recognised and moreover could not in any case properly be called "civil" (compare and contrast *Enea*, cited above, § 103).

35. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

C. Alleged violation of Article 13 of the Convention

36. In relation to the length of the proceedings, the applicant also relied on Article 13 of the Convention, which reads as follows:

> "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."

37. Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, among many other authorities, *Nada v. Switzerland* [GC], no. 10593/08, § 208, ECHR 2012). In the present case, no arguable claim of a violation of any Convention provision has been made out.

38. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli Deputy Registrar	Luis López Guerra President