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

# THIRD SECTION

# DECISION

Application no. 3869/08
Evert PRAK
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 24 September 2013 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Nona Tsotsoria,
Kristina Pardalos,
Johannes Silvis, *judges,*

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 21 January 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Evert Prak, is a Netherlands national who was born in 1957. He is detained under an order for confinement in a custodial clinic (*terbeschikkingstelling met bevel tot verpleging van overheidswege*; "TBS order") in an institution in Rhoon, the Netherlands. Initially represented before the Court by Ms T. Spronken, he is now represented by Mr Th.O.M. Dieben. Mr Dieben is a lawyer practising in Amsterdam, as was Ms Spronken at the relevant time.

## A. The circumstances of the case

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

3. On 25 January 1994 the applicant was convicted of various crimes of violence and robbery by the Amsterdam Regional Court (*arrondissementsrechtbank*). He was sentenced to three years' imprisonment and a TBS order was imposed on him. Compulsory psychiatric treatment was begun in 1995.

4. The applicant was given supervised leave on 21 June 2004. From then on he was treated on an out-patient basis.

5. The TBS order remained in force. It was extended periodically. The last such extension, prior to the events complained of, was ordered by the Amsterdam Regional Court on 7 October 2004.

6. In connection with a new extension request, a new report was drawn up by a psychiatrist, Dr L. This report, dated 28 June 2005, concluded that the applicant would repeat set behaviour patterns, thus again and again creating situations in which he was liable to reoffend.

7. The suspicion arose that the applicant had committed further crimes during the period of supervised leave. On 11 July 2005 the applicant was taken into detention on remand. The existing TBS order was thereby suspended. The Amsterdam public prosecutor (*officier van justitie*) was informed accordingly by the Minister of Justice (*Minister van Justitie*) by a letter dated 20 July 2005.

8. On 31 January 2006 the applicant was convicted of further crimes which he had committed while on leave from detention and sentenced to twelve months' imprisonment. He lodged an appeal, pending which his continued detention counted as detention on remand.

9. On 8 March 2006 the Advocate General (*advocaat-generaal*) to the Leeuwarden Court of Appeal (*gerechtshof*) ordered the applicant's release on the ground that his detention on remand had reached the length of the prison sentence imposed on him at first instance.

10. The applicant was not released: the TBS order was revived and became once more the title for the applicant's detention. On 9 March 2006 the applicant was listed in the files of the detention centre where he was held as a convicted prisoner subject to a TBS order awaiting transfer to a suitable institution (*TBS-passant*).

11. The applicant's TBS order expired on 26 April 2006 by lapse of time. The Public Prosecution Service had failed to seek an extension of the order within the prescribed time-limit, which had expired one month earlier (i.e. on 25 March 2006). Still the applicant was not released.

12. On 22 June 2006 the applicant withdrew his appeal against the judgment of 31 January 2006.

13. On 6 July 2006, a Thursday, the Amsterdam public prosecutor received a fax message from the Ministry of Justice from which it appeared that the applicant's TBS order had expired.

14. The following day, 7 July 2006, the applicant was interviewed by a psychiatrist, Dr C. The same day the public prosecutor received a fax from Dr C. stating that the applicant was refusing to assist in the preparation of a report assessing the chances of his reoffending.

15. The following Monday, 10 July 2006, the public prosecutor lodged a request for the extension of the applicant's TBS order with the Amsterdam Regional Court (now termed *rechtbank*). At the same time he lodged a request with the investigating judge (*rechter-commissaris*) for the provisional extension of the TBS order. Both requests contain the following passage:

> "Considering that the final date of the detention was unclear for the Ministry of Justice owing to the appeal lodged by Mr Prak and the poor intercommunication, as a result of which the request for an extension of Mr Prak's TBS order was not lodged with your Regional Court within the time-limit;"

16. The investigating judge heard the applicant on the same day. The applicant stated that he had no longer expected any request for an extension of the TBS order to be sought. The investigating judge gave an order for the provisional extension of the applicant's TBS order the same day.

17. The Amsterdam Regional Court held a hearing on 11 August 2006. It heard Dr C. as an expert witness. It found, however, that it could not proceed with the case without a supplementary report from the clinic to which Dr L. was attached. It adjourned until 12 September 2006 because the psychiatrist was on holiday.

18. On 4 September 2006 Dr L. wrote to the Regional Court stating that she was unable to report within the time-limit set.

19. On 12 September 2006 the hearing was resumed. The applicant, through his counsel, asked for the prosecution's request to be declared inadmissible because of the failure to comply with the applicable time-limit. The public prosecutor blamed the lapse of time on miscommunication within the Ministry of Justice.

20. On 15 September 2006 the Amsterdam Regional Court gave an interlocutory decision. It declared the public prosecutor's request admissible and asked for an updated psychiatric report to be submitted. It adjourned the hearing *sine die*, but for no more than 90 days.

21. On 10 October 2006 Dr L. informed the public prosecutor that she had visited the applicant a day earlier but that he had refused to speak to her.

22. The hearing was resumed on 13 December 2006. The applicant again refused to co-operate in the preparation of a psychiatric report. The Regional Court then gave a decision refusing to declare the public prosecutor's request time-barred, since the interest of maintaining public safety was paramount, and adjourned the hearing until 17 January 2007 to

enable Dr L. to prepare a report on available information that did not require the applicant's co-operation.

23. Dr L. submitted her report on 12 January 2007. It was based primarily on the records kept by the institutions where the applicant had been held and on the applicant's previous history and recommended prolonging the TBS order for a further two years.

24. Following a hearing on 17 January 2007, the Regional Court gave a decision on 31 January 2007 extending the TBS order by two more years.

25. The applicant appealed to the Arnhem Court of Appeal. On 23 July 2007 the Court of Appeal quashed the decision of the Regional Court on the grounds that it had not been given within two months from the day on which the extension request was submitted and that it had based its decision partly on different information. However, it went on to extend the TBS order by a further two years.

## B. Relevant domestic law

### *1. The Code of Criminal Procedure*

26. Provisions of the Code of Criminal Procedure (*Wetboek van Strafvordering*) relevant to the case include the following:

**Article 509o**

"1. No sooner than two months and no later than one month before the time at which the TBS order is due to expire, the Public Prosecution Service may submit a request for an extension of the order. ...

4. If the Public Prosecution Service seeks an extension of the TBS order which will increase the total duration of the TBS measure to more than six years or a multiple of six years, it shall submit, along with the request, a recently prepared, reasoned, dated and signed advisory opinion of two behavioural experts of different disciplines, one of whom shall be a psychiatrist, jointly, or else advisory opinions as described hereinbefore of each separately. These behavioural experts shall not, at the time when they submit their advisory opinion and at the time of the examination carried out for it, be attached to the institution in which the person subject to the TBS order is confined. The foregoing shall not apply if the person subject to the TBS order refuses to co-operate in the examination that must be carried out for the purpose of the advisory opinion. In that case, the behavioural experts together or each of them shall prepare a report about the reasons for the refusal as best they can. The Public Prosecution Service shall, if possible, submit a different advisory opinion or report concerning the desirability or need of an extension of the TBS order, in the preparation of which the person subject to the TBS order is willing to co-operate. ..."

**Article 509oa**

"1. A request as referred to in Article 509o § 1 which has been submitted later than one month before the time at which the TBS order is due to expire but within a reasonable time, shall nevertheless be admissible if there are special circumstances owing to which the safety of others or the general safety of persons and goods

requires the TBS order to be extended notwithstanding the interests of the person subject to the TBS order.

2. In the case referred to in the first paragraph, the public prosecutor shall, if the lapse (*verzuim*) has been noted after the time at which the TBS order expired, submit without delay, in addition to the request for the extension of the TBS order, a request for the provisional extension of the TBS order to the investigating judge. ... Pending the decision on the request for provisional extension of the TBS order the person subject to the TBS order shall not be released.

3. The investigating judge shall decide within three times twenty-four hours from the submission of the request for the provisional extension of the TBS order. The person subject to the TBS order shall be heard by the investigating judge if possible.

4. An order of the investigating judge for the provisional extension of the TBS order shall be executable immediately. ..."

**Article 509q**

"1. As long as no final decision on the request [for the extension of the TBS order] has been given, the TBS order shall remain in force. If the request is granted after the day on which the TBS order would have ended if no request for its extension had been submitted, the new term shall nonetheless enter into force on that day. ..."

### *2. Relevant domestic case-law*

27. In a decision of 3 July 2006, *Landelijk Jurisprudentienummer* (National Jurisprudence Number, "LJN") AY6435, the Arnhem Court of Appeal declared admissible a request for the extension of a TBS order lodged by the Public Prosecution Service one day before the TBS order itself was due to expire. In so doing it had regard to the fact that the extension request had been lodged before the expiry of the order itself, the nature of the crimes committed by the person subject to the order (which included crimes of violence), and that person's psychological state which required him to be kept in a structured environment for the time being.

28. In a decision of 30 October 2006, LJN AZ1454, the Arnhem Court of Appeal had to consider a request to extend a TBS order which the Public Prosecution Service had submitted a week after the expiry of the time-limit laid down in Article 509o of the Code of Criminal Procedure and which had inexplicably been received at the registry of the competent Regional Court a month after the TBS order itself had expired. In applying Article 509oa, the Court of Appeal recognised that the person concerned had been kept in detention without any legal basis and in violation of the Convention but noted, in addition to the danger of his reoffending if the TBS order were to be terminated, his consent to the extension, his need for continued treatment and the improvements in his condition to be expected therefrom.

29. In a decision of 17 September 2008, LJN BF3276, the Rotterdam Regional Court declared inadmissible a request for an extension of a TBS order which the Public Prosecution Service had lodged five weeks after the expiry of the time-limit and one week after the measure itself had expired

owing to an administrative error. In so doing the Regional Court had regard to the lapse of time, which it considered unreasonable; the lack of any immediate prospect of treating the person concerned; and the absence of indications that the person concerned posed an immediate danger to the safety of others.

## COMPLAINTS

30. The applicant complains under Article 5 § 1 of the Convention that the extension of his TBS order did not accord with the standards set out in Articles 509o and 509oa of the Code of Criminal Procedure. He further complains under Article 5 § 4 of the Convention that the proceedings were not pursued with the necessary speed.

## THE LAW

### A. Alleged violation of Article 5 § 1 of the Convention

31. The applicant complains that the extension of his TBS order was not in accordance with a "procedure prescribed by law", as required by Article 5 § 1, which, in its 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 accordance with a procedure prescribed by law ..."

The Government dispute this.

#### *1. Argument before the Court*

##### (a) The Government

32. In the Government's submission, the applicant's detention was at all times in accordance with domestic law. On 8 March 2006 the applicant's detention on remand ended, as it had reached the length of time the applicant had to serve under his prison sentence; on the following day, the suspension of the TBS order ended and its enforcement was resumed.

33. The TBS order was due to expire on 26 April 2006. Under the terms of Article 509o § 1 of the Code of Criminal Procedure, its extension should therefore have been sought no later than one month before that date, that is 25 March 2006 at the latest. The delay in so doing, although regrettable, did not mean that the applicant's detention had become unlawful after 26 April 2006: under the terms of Article 509q of the Code of Criminal Procedure, the original TBS order remained in force until a final decision was taken on

the request for its extension.

34. Article 509oa now makes provision for cases in which the time-limit for seeking an extension of the TBS order has not been met. In this respect the present case differs from *Erkalo v. the Netherlands*, 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, in which the Court found a violation.

35. Such an extension can now be sought belatedly, provided that it is submitted within a "reasonable time" after the expiry of the time-limit applicable and special circumstances obtain which require the extension of the TBS order in the interests of the safety of others or the general safety of persons and property, notwithstanding the interests of the person subject to the TBS order. This proviso, which in each case requires the courts to weigh the public interest against the individual interest of the person concerned, constitute an adequate safeguard against arbitrariness. A further safeguard is constituted by the requirement that a provisional extension of the TBS order be sought from the Investigating Judge (Article 509oa § 2 of the Code of Criminal Procedure).

36. In the instant case, the Court of Appeal struck the appropriate balance and found that public safety should prevail. It considered, among other things, the fact that the time-limit had been exceeded following misunderstandings caused by the suspension of the TBS order owing to the applicant's term in provisional detention followed by the imposition of a 12-month prison sentence for the new offences which the applicant had committed and the appeal against that judgment lodged and subsequently withdrawn by the applicant; the fact that although the Ministry of Justice had been late in informing the Public Prosecution Service of the presumed expiry date of the TBS order, this had been done shortly after the applicant had withdrawn his appeal against the judgment of 31 January 2006; the fact that the applicant had asked the prison authorities several times about assignment to a clinic, which reflected his expectation in March 2006 that the TBS order would be extended; the nature and seriousness of the offences for which the TBS order had originally been imposed; the fact that the applicant had reoffended during his supervised leave and the nature and seriousness of these offences; and the conclusion in the psychiatrist's report that there was a direct risk that the applicant would commit another violent offence or an offence of another kind.

37. An individual weighing of the applicant's interest against the public interest was absent in the above-mentioned *Erkalo* case. Moreover, in *Erkalo* the Public Prosecution Service and the institution where the applicant was being held had been aware that the expiry of the TBS order was imminent but had failed to check whether an extension request had been registered and a hearing date set; in contrast, in the instant case the authorities acted as soon as they became aware that the TBS order had

expired. These are further features that distinguish the two cases from each other.

38. The applicant could not realistically have expected to be released in any event. His TBS order had already been extended several times; while out of detention on supervised leave, he had committed – and been convicted of – serious offences, which had resulted in his licence and his social rehabilitation being cut short; and finally, as he was well aware, the psychiatrist's report of June 2005 had recommended a further extension.

**(b) The applicant**

39. For the applicant, it is not decisive that the Public Prosecution Service acted speedily after the failure to seek an extension of the TBS order was discovered. Rather, the applicant was detained without title from 27 April 2006, the day following the expiry of the TBS order, until 10 July 2006, the day on which the provisional extension of the TBS order was given by the investigating judge. In these circumstances it cannot be said that the provisional extension was requested "within a reasonable time".

40. Moreover, Article 509oa itself is incompatible with Article 5 § 1 of the Convention in that it makes possible the retroactive legalisation of periods of detention lacking a statutory basis, as happened in the applicant's case. This, in his submission, is in itself arbitrary.

41. It is no excuse for the Government to state that the Ministry of Justice failed to notice the fact that the applicant's TBS order had been revived on 8 March 2006 and would shortly expire. As the Court held in *Erkalo*, the onus to comply with time-limits for prolonging his detention properly belongs on the Government and not on him. In the circumstances, characterised as they are by the failure to meet the applicable time-limits, the applicant – who, aware of the situation, had previously asked about the institution to which he would be sent – had believed that no such prolongation would be sought.

*2. The Court's decision*

42. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

## B. Article 5 § 4 of the Convention

43. The applicant complains in addition that the proceedings for the prolongation of his TBS order were not speedy. He relies on Article 5 § 4 of the Convention, which provides as follows:

> "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."

The Government dispute this.

### *1. Argument before the Court*

#### (a) The Government

44. The Government observe that the Court of Appeal took note of the excessive length of the proceedings at first instance and quashed the Regional Court's decision on that ground.

45. They then refer to the Court of Appeal's finding that the applicant himself had contributed to the length of the proceedings at first instance by refusing to lend his co-operation to the preparation of a psychiatric report intended to enable an assessment to be made of the risk of his re-offending. Moreover, it would appear that although the applicant appealed against the decision of the Regional Court already on 1 February 2007, he did not object when the Court of Appeal set the case down for a hearing only on 9 July 2007. The Court of Appeal moreover gaveits decision a mere two weeks after the hearing, on 23 July 2007.

#### (b) The applicant

46. The applicant argues that the Court of Appeal, while noting the Regional Court's overrun of the time-limit for reaching a decision, did not attach any consequences to that finding beyond the purely formal decision to quash.

47. He compares his case to that of *Rutten v. the Netherlands*, no. 32605/96, 24 July 2001, in which the Court had found a violation of Article 5 § 4.

### *2. The Court's decision*

48. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

For these reasons, the Court unanimously

*Decides* to discontinue the joint consideration of the admissibility and merits of the application in accordance with former Article 29 § 3 of the Convention;

*Declares* the application admissible, without prejudging the merits.

Santiago Quesada
Registrar

Josep Casadevall
President