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

THIRD SECTION

DECISION

Application no. 47595/08
Ernest WIREDU
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 10 September 2013 as a Chamber composed of:
Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco, *judges,*
and Santiago Quesada, *Section Registrar,*
Having regard to the above application lodged on 30 September 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 Ernest Wiredu, is a Netherlands national, who was born in 1962 and lives in Amsterdam. He was represented before the Court by Ms T. Spronken, a lawyer practising in Amsterdam.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.
3. On 7 September 1998 a single-judge Chamber (*politierechter*) of the Amsterdam Regional Court (*arrondissementsrechtbank*) convicted the applicant *in absentia* of several counts of forgery (*valsheid in geschrift*) in

that he had claimed unemployment benefits while actually in paid employment. It sentenced him to four weeks' imprisonment.

4. The applicant lodged an appeal with the Amsterdam Court of Appeal (*gerechtshof*) but did not appear at its hearings, which were held on 15 May and 25 September 2001. His lawyer, who was present at both hearings, declared that he had not been in touch with his client. At the latter hearing the Court of Appeal granted leave to proceed in default of the applicant's appearance (*verstek verlenen*). On 9 October 2001 it quashed the judgment of the Regional Court for technical reasons, convicted the applicant and imposed the same sentence as the Regional Court had done, i.e. four weeks' imprisonment.

5. Although a number of attempts were made to serve the Court of Appeal's judgment on the applicant (according to information given by the Government, on 22 February 2002, 18 March 2002 and 5 October 2005), the Public Prosecution Service (*openbaar ministerie*) did not succeed in doing so until 17 October 2006. Throughout this time, the applicant was registered as living at a fixed abode in Amsterdam. The passing of time had no consequences for the applicant as concerns the possibility to lodge an appeal on points of law, since the time-limit of fourteen days to do so remained suspended until the judgment was served on him.

6. The applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*), arguing *inter alia* that the reasonable time within the meaning of Article 6 of the Convention had been exceeded since the Public Prosecution Service had not been sufficiently diligent in trying to serve the judgment of the Court of Appeal on him.

7. On 1 April 2008 the Supreme Court rejected the appeal on points of law. As regards the applicant's complaint that Article 6 of the Convention had been violated, it held as follows:

> "Since it does not appear that the applicant – who was registered in the Amsterdam Municipal Personal Records Database (*gemeentelijke basisadministratie*) during that time – was notified ... of the judgment having been passed in default of appearance within one year from the decision of the Court of Appeal, the delay which occurred between 9 October 2002 and 17 October 2006 is attributable to the Public Prosecution Service, as a result of which the trial exceeded a reasonable time. Having regard to the sentence imposed on the accused ... and the extent to which the reasonable time has been exceeded, there is no reason to attach any legal consequences to the conclusion that the reasonable time has been exceeded and that finding therefore suffices."

8. The applicant has informed the Court that he was held in detention in Italy from 2001 until September 2006 for events unrelated to the present case.

B. The Code of Criminal Procedure

9. Until 1 November 2005, Article 588 of the Code of Criminal Procedure (*Wetboek van Strafvordering*), in its relevant part, provided as follows:

> "1. Delivery (*uitreiking*) [sc. lic. of a judicial notification, such as a default judgment] shall take place:
>
> a. to the person who has been lawfully deprived of his liberty in the Netherlands in connection with the criminal proceedings to which the judicial notification relates: in person;
>
> b. to all others: in person or, if service (*betekening*) otherwise than in person is allowed and the notification is presented in the Netherlands, at their permanent or temporary domicile; if they are not found there, to any person who is present in the dwelling and who declares that he is prepared to forward the document to the person for whom it is intended without delay. The expression 'permanent or temporary domicile' shall also include the address at which the person for whom the notification is intended was entered in the register of addresses (*bevolkingsregister*) on the day on which the notification was presented and for up to five days thereafter.
>
> 2. If, in the case referred to in the first paragraph under b., no one is found, the notification shall be presented to the person for whom it is intended, or another person authorised by them [to receive it], at the place stated in a message which shall be left at the address mentioned in the notification. This message shall also refer to the provisions of the fourth paragraph of this Article. The notification shall be deemed to have been served in person if it has been presented to another person who has been authorised in writing [to take delivery of it].
>
> 3. If it has proved impossible to effect the notification in accordance with the preceding paragraphs, the notification shall be returned to the authority that sent it.
>
> 4. If it appears that the person for whom the notification is intended was entered in the register of addresses on the day on which the notification was presented and up to five days thereafter, the document shall subsequently be presented to the Registrar of the Regional Court before which or within whose jurisdiction the case will be heard or was last heard. The Registrar shall then send the notification without delay by post as a normal letter to that address and make mention of that fact on the official record of notification ..."

10. With effect from 1 November 2005, Article 588 of the Code of Criminal Procedure, in its relevant part, was amended to provide as follows:

> "1. Delivery shall take place:
>
> a. to the person who has been lawfully deprived of his liberty in the Netherlands in connection with the criminal proceedings to which the judicial notification relates and to the person who has been otherwise lawfully deprived of his liberty in the Netherlands in other cases determined by or pursuant to delegated legislation: in person;
>
> b. to all others: in person or, if service otherwise than in person is allowed and the notification is presented in the Netherlands,

i. at the address where the addressee (*geadresseerde*) is registered as resident in the Personal Records Database (*basisadministratie persoonsgegevens*), or as the case may be,

ii. if the addressee is not registered as a resident in the Personal Records Database, at the permanent or temporary domicile (*woon- of verblijfplaats*) of the addressee, or as the case may be,

iii. if the addressee is not registered as a resident, to the Registrar of the Regional Court before which or within whose jurisdiction the case will be heard or was last heard.

2. ...

3. If, in the situation referred to in paragraph 1, sub-paragraph b, under i or ii,

a. the addressee is not found, delivery shall be to any person present at that address who declares that he is prepared to forward the document to the addressee without delay;

b. no one is found, delivery shall be to the addressee or a person authorised by the addressee [to take delivery of it] at the place mentioned in a written message that shall be left at the address mentioned in the notification. Delivery to a person so authorised by the addressee shall count as service in person;

c. no delivery has proved possible, the notification shall be returned to the authority that sent it. If it is found that the addressee was, on the day of attempted delivery and at least five days thereafter, registered in the Personal Records Database as resident at the address mentioned in the notification, the notification shall then be delivered to the Registrar of the Regional Court before which or within whose jurisdiction the case will be heard or was last heard. The Public Prosecution Service shall then send a copy of the notification to that address without delay, which act shall be noted in the official record of delivery ..."

11. Pursuant to Article 432 and Article 415 taken together with Article 366 of the Code of Criminal Procedure the right to file an appeal on points of law remained open for the applicant until fourteen days after the notification in person of the default judgment or after any other circumstance from which it would follow that he was aware of it.

C. Relevant domestic case-law

12. The judgment of the Supreme Court in the case of the applicant was delivered on 1 April 2008. That date lies between the delivery dates of two guiding judgments of the Supreme Court on criteria to establish undue delay and to compensate violations of the "reasonable time" requirement. The general features of these judgments, as far as relevant here, are as follows.

1. The Supreme Court's judgment of 3 October 2000

13. In its judgment of 3 October 2000, LJN (*Landelijk Jurisprudentie Nummer*, National Case-Law Database Number) AA7309, Netherlands Law Reports (*Nederlandse Jurisprudentie*, "NJ") 2000, no. 721, the Supreme

Court held that it was for the Netherlands criminal courts to rule, *sua sponte* if necessary, whenever the length of the proceedings went beyond the "reasonable time" requirement contained in Article 6 of the Convention. As relevant to the present case, it further held that there would be no such violation if an appealable judgment delivered by default had been served on the defendant within one year of its delivery to the defendant in person or in accordance with Article 588 §§ 2 or 3 of the Code of Criminal Procedure (as in force at that time). As a rule, any finding that there had been such a violation should lead to a reduction of sentence.

2. The Supreme Court's judgment of 17 June 2008

14. In its judgment of 17 June 2008, LJN BD2578, NJ 2008, no. 358, the Supreme Court held that there would be no violation of the "reasonable time" requirement if an appealable judgment delivered by default had been served on the defendant within one year of its delivery, either on the defendant in person or in accordance with Article 588 §§ 2 or 3 of the Code of Criminal Procedure (as in force by then).

15. If it was appropriate to reduce the sentence, whether it be a custodial sentence, a community service order (*taakstraf*) or a fine, the remission was to be:

(a) 5% if the delay had been no longer than six months beyond the "reasonable time" for the particular case;

(b) 10% if the delay had been longer than six months but less than twelve months beyond what was "reasonable";

(c) a reduction to be determined on a case-to-case basis if the delay had been longer than that.

However, in the case of a custodial sentence, the reduction should be no greater than the length of the delay, with a maximum of six months. Nor should there be any remission of a custodial sentence of which the unconditional part was less than one month. In those cases the Supreme Court would reason that the finding of a violation of Article 6 § 1 of the Convention constituted sufficient compensation for any damage suffered.

COMPLAINTS

16. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had exceeded a reasonable time. Invoking Article 13, he further complained that since the Supreme Court had failed to award him any compensation, he had not had an effective remedy for his Article 6 complaint.

THE LAW

17. The applicant's complaint relates to the refusal of the Supreme Court to grant him any kind of satisfaction for the violation of the reasonable time requirement other than the finding of the violation. He relies on Articles 6 § 1 and 13 of the Convention, which, as relevant to the case, provide as follows:

Article 6 § 1

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time 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 ..."

A. Argument before the Court

18. The Government admitted that the Supreme Court had found a violation of Article 6 of the Convention, but denied that there had been a breach of Article 13.

19. The Government argued that the Supreme Court's acknowledgment of the violation of Article 6 had been sufficient to deprive the applicant of his "victim" status for the purpose of Article 34 of the Convention, and in the alternative, that the applicant had suffered "no significant disadvantage" within the meaning of Article 35 § 3 (b). In the further alternative, they submitted that the application should be declared inadmissible since it was manifestly ill-founded. Finally, the Government claimed non-exhaustion because the applicant had instituted no civil proceedings to obtain further redress.

20. The Government noted that the applicant had twice failed to appear at hearings of the Court of Appeal, and that no fewer than four attempts had been made over the years to serve the judgment on him. This strongly suggested that the applicant had deliberately sought to evade service. Furthermore, the applicant had not been in detention on remand during this time and the sentence was brief.

21. The applicant submitted that there was nothing to support the suggestion that he was to blame for the repeated failure on the part of competent authority to serve the judgment on him. Moreover, he had suffered considerable non-pecuniary damage. Finally, there was an issue of principle at stake, namely whether the mere finding by a domestic court that a violation had occurred constituted sufficient redress.

B. Article 6 of the Convention

22. The Court does not find it necessary to examine the applicant's "victim" status, whether he has exhausted the domestic remedies or whether he has suffered a "significant disadvantage" by the alleged violation since the application is, in any event, manifestly ill-founded for the following reasons.

23. The Court notes that the Supreme Court admitted that it took longer than was reasonable to serve on the applicant the judgment by which the Court of Appeal had, by default, sentenced him to imprisonment for forgery. The Court notes that the Supreme Court – rightly – did not find that the examination of the applicant's case by the first or second-instance court had taken too long. The applicant's complaint relates to the Supreme Court's refusal to grant him compensation for the length of time it had taken to serve the appeal judgment on him.

24. In this connection, the Court observes that the applicant was aware that criminal proceedings against him were pending before the Amsterdam Court of Appeal; indeed, he had lodged the appeal. He does not allege that he was ignorant of the dates of that court's hearings. He could therefore reasonably have expected judgment to be given; indeed, had he kept in touch with his counsel, he would have been aware of the date of the judgment.

25. In addition, the Court notes that the applicant has admitted that he was held in detention by the Italian authorities between 2001 and September 2006. In the light of this information – which does not seem to have been known to the Supreme Court – it does not seem very probable that had the Government undertaken more attempts to serve the judgment on the applicant, other than those on 22 February 2002, 18 March 2002 and 5 October 2005, those attempts would have been successful, especially considering that the first attempt to serve the judgment on the applicant after his return, i.e. on 17 October 2006, did have immediate success.

26. Despite the Supreme Court placing the responsibility for the delay to serve the judgment of the Court of Appeal on the applicant, for domestic legal reasons, on the Public Prosecution Service (see paragraph 7 above), the Court considers, in view of the circumstances set out in the preceding paragraphs, that the applicant's conduct constitutes an objective fact not capable of being attributed to the respondent State (*Eckle v. Germany*, 15 July 1982, § 82, Series A no. 51; *Pretto and Others v. Italy*, 8 December 1983, § 34, Series A no. 71). The applicant must therefore be held primarily responsible for the prolongation of the proceedings caused by the situation that it was impossible for the authorities to serve the appeal judgment on him.

27. It is in these particular circumstances that the Court takes the view that the justification given by the Supreme Court, when it held that

"[h]aving regard to the sentence imposed on the accused ... and the extent to which the reasonable time has been exceeded, there is no reason to attach any legal consequences to the conclusion that the reasonable time has been exceeded" (see paragraph 7 above), can suffice.

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

C. Article 13 of the Convention

29. The applicant complained that since the Supreme Court failed to award him any compensation, he had not had an effective remedy for his Article 6 complaint. The Government disputed this.

30. The complaint under this head, namely the denial of compensation, is in substance identical to that already examined and rejected in the context of Article 6 § 1 of the Convention (see paragraphs 22-28 above). The Court considers that no separate issue arises under Article 13 in relation to the matter complained of.

31. It follows that this part of the application too 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.

Santiago Quesada
Registrar

Josep Casadevall
President