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

FOURTH SECTION

DECISION

Application no. 35751/20
Ibrahima BAH
against the Netherlands

The European Court of Human Rights (Fourth Section), sitting on 22 June 2021 as a Chamber composed of:

Yonko Grozev, *President,*
Tim Eicke,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*

and Andrea Tamietti, *Section Registrar,*

Having regard to the above application lodged on 12 August 2020,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ibrahima Bah, is a Guinean national, who was born in 1991. At the time when the application was lodged, on 12 August 2020, he was held in immigration detention in Rotterdam. He was represented before the Court by Mr J.G. Wiebes, a lawyer practising in Lelystad.

A. The circumstances of the case

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

3. The applicant, whose asylum application in the Netherlands had been rejected, was placed in immigration detention with a view to his deportation on 2 March 2020.

4. On 5 March 2020 the applicant lodged an appeal against the detention order with the Regional Court (*rechtbank*).

5. On 6 March 2020, the Regional Court informed the applicant that his hearing was scheduled to take place on 19 March 2020.

6. On 15 March 2020 the Council for the Judiciary (*Raad voor de rechtspraak*) published an announcement to the effect that as of 17 March 2020 all Dutch courts would be closed for all but the most urgent cases until 6 April 2020 because of the Covid-19 pandemic. In-person hearings were cancelled, and cases were processed in writing as much as possible.

7. On 18 March 2020 the Regional Court informed the applicant that his appeal could be heard on the scheduled date in writing or by teleconference, and that only his lawyer would be able to join. The court stated that because of the pandemic, it would not be possible for the applicant to attend the hearing in person or by tele- or videoconference and that the court would not be able to provide an interpreter.

8. The applicant submitted that he preferred to attend his hearing in person or by videoconference, but in the circumstances he consented to a hearing by telephone, during which he would be represented by his lawyer.

9. On 18 March 2020 the applicant, through his lawyer, submitted written grounds in advance of the hearing. He argued, *inter alia*, that he should be enabled to attend his hearing in person, based on section 94(4) of the Aliens Act 2000 (*Vreemdelingenwet 2000* – see paragraph 23 below) and Articles 5 and 6 of the Convention.

10. The applicant's lawyer attended the hearing of 19 March 2020 by telephone. The Regional Court decided to adjourn the hearing in order to explore ways for the applicant to attend.

11. On 24 March 2020, the Regional Court informed the applicant that it was not possible to hear him in person, despite the efforts made to enable his attendance.

12. The Regional Court considered that it had sufficient information to decide on the applicant's appeal and stated that it was unnecessary to schedule another hearing unless one of the parties wished to be heard by telephone.

13. On 25 March 2020, the applicant's representative informed the court that he had discussed the merits of the case with the applicant and requested the court to hear him by telephone.

14. On 26 March 2020 the applicant's representative submitted additional written grounds. He also reiterated the applicant's wish to be present at his hearing, however difficult this might be to realise because of the constraints of the Covid-19 lockdown.

15. On 26 March 2020 the Deputy Minister of Justice and Security (*Staatssecretaris van Justitie en Veiligheid*) submitted to the court observations in reply in which it was noted, as relevant to the case before the Court, that it was almost impossible to hear the applicant by video- or teleconference because of the lack of capacity in the detention centre, as well as undesirable given the rules of "social distancing". She also

considered that the right to be present at a hearing was not absolute and that it could be derogated from in certain situations. Additionally, the Deputy Minister stated that the rights of the applicant were sufficiently safeguarded as his lawyer had submitted written grounds on his behalf.

16. On 27 March 2020, the applicant's representative responded to the Deputy Minister's submissions and repeated his client's express wish to be present at the hearing. He referred to the Court's judgments in the cases of *Sanchez-Reisse v. Switzerland* (21 October 1986, Series A no. 107), and *Stanev v. Bulgaria* ([GC], no. 36760/06, ECHR 2012), arguing that his case did not qualify for any of the exceptions set out therein to the right to be present at a hearing.

17. On 27 March 2020 the Regional Court notified the parties through its online messaging system that it did not intend to hold a further hearing by teleconference as it had sufficient information to reach a decision. Should either of the parties wish to be heard in person, they were required to inform the Regional Court accordingly that same day. Neither party made such a request.

18. On 30 March 2020 the Regional Court dismissed the applicant's appeal. As to the applicant's right to attend the hearing, it found that, despite considerable efforts, it had been impossible to hear the applicant in person. The Regional Court observed that a detained person's right to attend his or her hearing was not absolute and inferred from the Court's judgments in the cases of *Winterwerp v. the Netherlands* (24 October 1979, Series A no. 33), *Sanchez-Reisse* (cited above), and *Stanev* (cited above) that in certain special circumstances exceptions were justified, as long as the detainee's rights under Article 5 of the Convention were adequately safeguarded.

19. The Regional Court held that the situation caused by the Covid-19 pandemic could be considered to constitute such a special circumstance justifying an exception to a detained person's right to attend his or her hearing. It noted that capacity issues had prevented the court from hearing the applicant by teleconference from his place of detention. It also considered that the rights of the applicant had been adequately safeguarded as his lawyer had submitted written arguments on the applicant's behalf (see paragraphs 9, 14 and 16 above) and had attended the hearing of 19 March 2020 by telephone (see paragraph 10 above).

20. On 3 April 2020 the applicant lodged an appeal against this judgment with the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State* – hereinafter "the Administrative Jurisdiction Division").

21. On 15 April 2020 the Administrative Jurisdiction Division upheld the decision of the Regional Court. For the underlying reasoning it referred to its recent judgment of 7 April 2020 (ECLI:NL:RVS:2020:991) (see paragraphs 29 below) in a similar case, in which a person in immigration

detention had not been heard in person by the Regional Court owing to the restrictions necessitated by the Covid-19 crisis.

22. No further appeal lay against this ruling.

B. Relevant domestic law and practice

1. The Aliens Act 2000

23. The admission, residence and expulsion of aliens, as well as the applicable legal procedures relating to the domestic proceedings, is regulated by the Aliens Act 2000.

The relevant part of section 94(4) of the Aliens Act reads as follows:

> "The Regional Court shall immediately determine the time of the hearing. The hearing shall take place within fourteen days after filing the grounds of appeal or the notification of appeal. The Regional Court shall summon the alien to appear in person or to appear in person with a representative, as well as the Minister's representative, in order to be heard. (...)"

2. Temporary legislation and current practice relating to the crisis caused by the Covid-19 pandemic

24. The bill for the COVID-19 Justice and Security (Temporary Measures) Act (*Tijdelijke wet COVID-19 Justitie en Veiligheid*; "the Act") was submitted to Parliament on 8 April 2020 and was adopted by both Houses on 16 April and 21 April 2020, respectively. Section 2(1) of the Act provides that, in the event that a physical hearing in administrative proceedings is impossible because of the Covid-19 crisis, a hearing may take place through an electronic communication device. According to Section 35(1-2), the Act would enter into force on a date to be determined by royal decree (*koninklijk besluit*), which decree could provide for the entry force of some provisions of the Act with retroactive effect to 16 March 2020.

25. The Royal Decree of 22 April 2020 determining the date of entry into force of the Act (*Besluit van 22 april 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Tijdelijke wet COVID-19 Justitie en Veiligheid*) stated that the Act would enter into force on the day of publication of the Decree in the Official Gazette (*Staatscourant*) and that parts of the Act (including section 2(1)) would have retroactive effect to 16 March 2020. The Royal Decree was published in the Official Gazette on 24 April 2020.

26. On 2 April 2020, the Deputy Minister for Legal Protection (*Staatssecretaris voor Rechtsbescherming*) stated in a letter to the Lower House (*Tweede Kamer*) of Parliament that all detention centres, including immigration detention centres, would have functioning facilities for videoconferences available starting on 3 April 2020 (Parliamentary

Documents, Lower House of Parliament (*Kamerstukken* II) 2019/2020, 24 587/25 295, no. 765).

3. Judgment of the Administrative Jurisdiction Division of the Council of State of 7April 2020

27. In its judgment of 7 April 2020 (ECLI:NL:RVS:2020:991), the Administrative Jurisdiction Division considered that the right to be present at a hearing might be limited provided that (1) the limitations were foreseeable, (2) the impugned measures served a public interest, and (3) the limitations were proportionate and did not impinge on the essence of the right in question. It found that the special measures taken shortly after the Covid-19 pandemic lockdown started, had been publicly announced, served a clear public interest and were proportionate. Because of capacity issues, and since not all detention centres were equipped with videoconference rooms that were compliant with the restrictions imposed because of the Covid-19 crisis, it was not possible to hear every detainee in person.

28. In reaching that conclusion, the Administrative Jurisdiction Division examined those special measures and weighed the importance of hearing an alien against other fundamental rights, such as the alien's right to a speedy decision on the legality of the detention order; the right to privacy, which might be endangered by unsafe forms of videoconference; and the right to an adversarial procedure. The right to health, including the health of the alien and the people involved in the hearing, as well as the general interest of public health, was also taken into consideration. The Administrative Jurisdiction Division concluded that, in the circumstances, a court might decide not to hear an alien even if the alien or his representative did not waive the alien's right to be heard.

29. In its relevant part, this ruling reads:

> "5. Exceptional measures have been taken in the Netherlands to combat the outbreak of Covid-19. Because it would be unacceptable if detained aliens could not have their detention order reviewed speedily by a court, the Regional Court has rightly searched for temporary alternatives to process immigration detention cases. In its decision, the Regional Court considered that it was impossible to hold hearings by videoconference in all cases. There is not sufficient capacity to do so. The Administrative Jurisdiction Division has no reason to doubt the correctness of this decision. Furthermore, the pandemic does not allow for different persons to be present in a detention centre room whose dimensions are such that the prescribed distance of 1.5 meters cannot be observed. Many hearing rooms are therefore currently unsuitable for use. In addition, the videoconference facilities currently do not allow videoconferencing to take place from other locations, such as the home or office address of the interpreter and the lawyer. After all, this way of hearing must meet the strict requirements of the Video Conference Decree (*Besluit videoconferentie*). This means that neither of the possibilities provided by law for hearing the alien on appeal, namely a physical hearing and a hearing by videoconference, is currently a realistic option.
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> ...

7. In cases where either the alien or his representative do not waive the right of the alien to be heard by the Regional Court, the Regional Court must make every effort to offer the alien the opportunity to address the court. Firstly, the Regional Court must investigate whether a hearing by videoconference is a possibility. The circumstances and availability of the facilities in the detention centre play a role in this. If it turns out that a videoconference is not possible, the Regional Court must investigate, secondly, whether the alien can be heard by video call. If that is not possible either, then the court must investigate, thirdly, whether hearing the alien by telephone is possible. In this situation, it is up to the Deputy Minister to provide the necessary facilities in the detention centre. The Regional Court should ascertain what efforts have been made by both the Deputy Minister and the alien's representative to hear the alien; why this would not have led to the desired result; and whether any consequences attach to this, and if so, which. The Regional Court has evidently done so in its decision.

7.1. The Regional Court may conclude that there are no possibilities to hear the alien in person. The Regional Court is then confronted with the question what consequences it should attach to this very exceptional circumstance. It should not only take into account the practical (im)possibilities to hear the alien, but also the other applicable fundamental rights. In addition to the right to be heard, this is first and foremost the alien's right to a speedy decision on the legality of the detention order. This interest is also protected by, *inter alia*, Article 5 of the Convention and Article 47 of the Charter of Fundamental Rights of the European Union. This weighs heavily in the balance in the view of the Administrative Jurisdiction Division, because postponing a decision if the alien has not been heard is also disadvantageous for the alien. In addition, the Regional Court must take into account the alien's right to privacy, which may be endangered by unsafe video calling. Information security is even more important for (former) asylum-seekers because information about the alien falling into the wrong hands can have consequences for the safety of the alien. Even if aliens declare that they consider their privacy less important than their right to be heard, this does not dispense the Government or the Regional Court from taking these risks into account. The Regional Court cannot therefore be required to make use of telecommunication facilities the security of which is not guaranteed. The right to health also plays a role. This concerns primarily the health of the alien, but also the health of the people who have to take part in a hearing in the exercise of their profession and the general interest of public health. After all, the measures taken by the government to prevent the spread of the coronavirus are primarily aimed at protecting the health of citizens.

7.2. Finally, when considering whether the decision not to hear the alien can be justified, the Regional Court must also examine whether the essence of the alien's right to an adversarial procedure remains intact. Although the alien cannot always communicate directly with the judge, his representative can. The alien's representative has the option of explaining the grounds of appeal and the alien's response to the submissions of the Deputy Minister, both in writing and orally. In so doing, the Regional Court may also take into account the content of the grounds of appeal and ask the representative to explain on which points it is necessary for the alien to be heard. If the grounds of appeal concern the interpretation of the law, it is obvious that the relevance of hearing the alien is less important than, for example, in the case of appeal on factual grounds of which the alien has personal knowledge.

...

10. The Administrative Jurisdiction Division is therefore of the opinion that, as long as it is not possible to hold in-person hearings because the courts are closed, in situations in which it is not possible to hold a hearing by videoconference and as long

> as the practical difficulties in making video or telephone calls continue, the Regional Court can reach a decision not to hear the alien, even without the permission of the alien's representative. The decision not to hear an alien may not be automatic and can only be justified in the decision as the result of an individual assessment of all the relevant factors. It is emphasised once again that the framework given above must be temporary in nature. Hearing the alien remains an essential part of the appeal procedure."

COMPLAINTS

30. The applicant, referring to Article 5 §§ 1 (f), 3 and 5 and Article 6 § 1 of the Convention, complained that his rights under those provisions had been violated because he had not been heard in person by the Regional Court about his immigration detention order.

THE LAW

31. Referring to Article 5 §§ 1 (f), 3 and 5 and Article 6 § 1 of the Convention, the applicant complained that there were no special circumstances in his case justifying that he had not been heard in person on the lawfulness of his immigration detention.

32. As to whether the applicant's placement in immigration detention can be examined under Article 5 § 3 of the Convention, the Court points out that this provision speaks of only one specific form of deprivation of liberty, which is referred to in paragraph 1 (c) of Article 5 and which has been "effected for the purpose of bringing [a person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". However, the Netherlands authorities detained the applicant not for the reasons mentioned in that provision but "with a view to deportation" which is a ground set out in paragraph 1 (f) of Article 5 and renders Article 5 § 3 inapplicable in the present case (see *Bah v. the Netherlands* (dec.), no. 22842/04, 20 September 2007, and the authorities cited therein).

33. The Court reiterates that it is master of the characterisation to be given in law to the facts of the case and that it is not bound by the characterisation given by an applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018, and *X and Others v. Bulgaria* [GC], no. 22457/16, § 149, 2 February 2021).

34. Having regard to the nature of the applicant's submissions and the manner in which his complaints were formulated, the Court considers that they are to be examined solely by reference to Article 5 § 4, which is the *lex specialis* in relation to the more general requirements of Article 13 of the Convention and of Article 6 under its civil head (see *Reinprecht v. Austria*, no. 67175/01, §§ 47-55, ECHR 2005-XII; *Fodale v. Italy*, no. 70148/01,

§ 27, ECHR 2006-VII; and *Amie and Others v. Bulgaria*, no. 58149/08, § 109, 12 February 2013). It reiterates in this context that Article 6 under its criminal head does not apply to proceedings in which detainees try to challenge their deprivation of liberty.

35. Article 5 § 4 reads as follows:

> "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."

36. The applicant submitted that the special measures that were implemented because of the Covid-19 crisis did not justify his not having been heard in person on the lawfulness of his immigration detention. He argued that the exceptions in the Court's cases of *Winterwerp v. the Netherlands* (24 October 1979, Series A no. 33), *Sanchez-Reisse v. Switzerland* (21 October 1986, Series A no. 107), and *Stanev v. Bulgaria* ([GC], no. 36760/06, ECHR 2012), were based on issues relating to the detainee himself, such as a mental illness. His situation was different: he was able to be heard in person, he was not sick, and technical facilities were available to enable him to present his arguments in person. He further submitted that he should have been immediately released from immigration detention when it turned out that he could not be heard in person by the Regional Court.

37. The Court reiterates its case-law according to which Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. The judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see, *mutatis mutandis*, *Magalhães Pereira v. Portugal*, no. 44872/98, § 56, ECHR 2002-I, and *Stanev*, cited above, § 171; see also, in the context of detention under Article 5 § 1 (f) of the Convention, albeit concerning detention with a view to extradition, *Yefimova v. Russia*, no. 39786/09, § 283, 19 February 2013).

38. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court's task to inquire into what would be the most appropriate system in the sphere under examination (see *Stanev*, cited above, 169, and *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 129, 15 December 2016). However, the scope of the review required under Article 5 § 4 of the lawfulness of a detention with a view to deportation or extradition is limited, since it does not extend, for

example, to the questions whether the detention was "necessary" for the prevention of crime or fleeing (see *Khlaifia and Others*, cited above, § 90, and *Abdulkhakov v. Russia*, no. 14743/11, § 214, 2 October 2012).

39. Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided "speedily" by a court and to have their release ordered if the detention is not lawful (see *Khlaifia and Others*, cited above, § 131).

40. In the present case, the Court observes that the applicant benefitted from adversarial proceedings during which he was assisted by a lawyer, who made submissions in writings on his behalf and attended the hearing of 19 March 2020 by telephone (see paragraphs 9, 10, 14 and 16 above).

41. The Court notes that the applicant's hearing took place in the first weeks of the Covid-19 pandemic lockdown, at which time the immigration detention centres were largely unprepared to observe the required 1.5-meter distance in tele- and videoconference rooms. On 24 April 2020 the COVID-19 Justice and Security (Temporary Measures) Act entered into force with retroactive effect from 16 March 2020 as regards, *inter alia*, its section 2(1) (see paragraph 25 above). This Act provided a legal framework for the exceptional situation caused by Covid-19 and section 2(1) of the Act allowed for a hearing through a communication device rather than in person (see paragraph**s** 24 above). Nonetheless, the applicant, whose hearing took place on 19 March 2020, was not offered such a hearing owing to a lack of adequately equipped tele- and videoconference rooms in his immigration detention centre at that date (see paragraphs 15 and 19 above).

42. However, the Court takes into account that the Regional Court made concrete efforts to enable the applicant's presence at his hearing and explained in detail why it had not been possible to hear the applicant in person or by videoconference (see paragraphs 18 and 19 above).

43. The Administrative Jurisdiction Division found that in the circumstances of this particular case, limitations of the applicant's right under domestic law to be present at the hearing were foreseeable, the impugned measures served the interest of public health and the limitations were proportionate and did not impinge on the essence of the right in question (see paragraphs 21 and 29 above).

44. Given the difficult and unforeseen practical problems with which the State was confronted during the first weeks of the Covid-19 pandemic, the fact that the applicant was represented by and heard through his lawyer with whom he had regular contact and who presented his views on his behalf, the importance of the applicant's other applicable fundamental rights and the general interest of public health – referred to in the Administrative Jurisdiction Division's judgment of 7 April 2020 (see paragraph 29 above) –, it was not incompatible with Article 5 § 4 to assess the applicant's detention order without securing his attendance at the hearing in person or by videoconference. In this context it should be borne

in mind that Article 5 § 4 does not impose the same stringent requirements on hearings as Article 6 under its civil or criminal head (see the case-law quoted in paragraph 37 above).

45. In conclusion, the Court finds that the applicant was entitled "to take proceedings" within the meaning of Article 5 § 4 of the Convention and that in the circumstances of the present case those proceedings met the requirements of that provision.

46. As there is thus no appearance of a breach of Article 5 § 4, paragraph 5 of the same provision does not enter into play (see *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X).

47. Accordingly, the application 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.

Done in English and notified in writing on 15 July 2021.

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Andrea Tamietti	Yonko Grozev
Section Registrar	President