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

FOURTH SECTION

DECISION

Application no. 585/19
Rafael Hubertus Simon NELISSEN
against the Netherlands

The European Court of Human Rights (Fourth Section), sitting on 19 October 2021 as a Committee composed of:

Armen Harutyunyan, *President,*
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to the above application lodged on 18 December 2018,

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 Rafael Hubertus Simon Nelissen, is a Dutch national, who was born in 1968 and lives in Maastricht. He was represented before the Court by Mr S. Van Berge Henegouwen, a lawyer practising in Maastricht.

2. The Dutch Government ("the Government") were represented by their Agent, Ms B. Koopman, and their Deputy Agent, Ms K. Adhin, both of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

4. On 27 July 2015 the Limburg Regional Court (*rechtbank*) convicted the applicant of five counts of stalking (*belaging*), of the threat of any serious offence against the life of a person (*bedreiging met enig misdrijf tegen het leven gericht*), assault (*mishandeling*), and damage to property

(*beschadiging*), and sentenced him to 600 days' imprisonment, of which 141 were to be suspended and with deduction of any time spent in pre-trial detention. The applicant appealed.

5. On 7 February 2017 the 's-Hertogenbosch Court of Appeal (*gerechtshof*) quashed the Regional Court's judgment, acquitted the applicant of the threat of any serious offence against the life of a person, convicted him of five counts of stalking, and of assault and damage to property, and sentenced him to 600 days' imprisonment, of which 141 were to be suspended and with deduction of any time spent in pre-trial detention. The appellate court gave judgment in abbreviated form (*verkort arrest*) – that is to say without a detailed enumeration of the items of evidence relied on (see paragraph 9 below). Such a judgment contains, *inter alia*, the reasons why it follows from the available evidence that the person concerned was guilty of the offences of which he had been convicted.

6. On 8 February 2017 the applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*). This required the Court of Appeal to prepare a completed version of its judgment, thus to supplement the abbreviated judgment with the detailed enumeration of the items of evidence relied on (see paragraph 9 below). It submitted the completed version on 4 January 2018. The Procurator General (*procureur-generaal*) at the Supreme Court (*Hoge Raad*) notified the applicant accordingly, thus starting the time-limit within which the applicant had to submit a written statement of the grounds of appeal on points of law (*cassatieschriftuur).*

7. On 26 April 2018 the applicant submitted this written statement. He argued that the reasoning employed by the Court of Appeal concerning the evidence that had been relied on to find him guilty of the offence of stalking in relation to three of the five counts was incomprehensible (*onbegrijpelijk*). He further complained that the Court of Appeal's failure to supplement its abbreviated judgment within four months constituted a violation of the Code of Criminal Procedure (*Wetboek van Strafvordering*) and Article 6 of the Convention, and that redress ought to be provided in the form of a reduction of his sentence.

8. On 28 August 2018 the Supreme Court declared the appeal inadmissible on summary reasoning, applying section 80a of the Judiciary (Organisation) Act (*Wet op de Rechterlijke Organisatie*; see paragraph 12 below).

B. Relevant domestic law and practice

1. The Code of Criminal Procedure

(a) Relevant provisions

9. Pursuant to Article 345 § 3 of the Code of Criminal Procedure ("CCP"), taken together with Article 415 § 1 of the CCP, the Court of

Appeal has to deliver judgment within fourteen days following the closure of the trial. Article 365a § 1 taken together with Article 415 § 1 of the CCP provides that the Court of Appeal need only deliver an abbreviated judgment, as long as no appeal on points of law has been lodged. The abbreviated judgment will be supplemented with an enumeration of the items of evidence relied on, within four months from the lodging of the appeal, or within three months if the defendant is in pre-trial detention (Article 365a §§ 2-3 of the CCP).

10. The Explanatory Memorandum (*Memorie van Toelichting*) to the Bill introducing Article 365a to the CCP (Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 1994/95, 23 989, no. 3) includes the following:

> "The issue of whether the Act should contain a sanction for non-compliance with the time-limits has been contemplated. The current practice is that the arrangements made between the Regional Courts and Courts of Appeal function well. The courts apply the rule that as long as an abbreviated judgment has not been supplemented, no date for the hearing will be set. In extreme cases this may lead to 'undue delay' and the attendant sanctions. As a general rule, the appeal court, when confronted with a judgment that does not comply with the statutory requirements, will quash that judgment and proceed to a retrial of the case. A rule could be envisaged whereby, when it quashes a judgment for this reason, the Court of Appeal refers the case back to the Regional Court, unless the parties agree to forego that option. However, referral leads to a significant delay of the proceedings. It is for this reason that the Act does not contain an explicit sanction."

(b) Relevant case-law

11. In a leading judgment of 3 October 2000 (ECLI:NL:HR:2000:AA7309), the Supreme Court formulated general principles to be applied in criminal law cases in determining whether the reasonable time requirement had been exceeded in a particular case, and set out compensation guidelines for situations in which the "reasonable time" was exceeded. In a leading judgment of 17 June 2008 (ECLI:NL:HR:2008:BD2578), the Supreme Court reiterated and nuanced those principles and guidelines. In so far as relevant for the present case, the Supreme Court considered the following:

> "3.2. The Supreme Court will conduct a full review of the question whether the reasonable time has been exceeded (partly) as a result of the lapse of time after the judgment against which an appeal on points of law has been lodged.
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> 3.3. First of all, exceeding the reasonable time includes exceeding the time-limit for transmitting the case file to the Supreme Court after an appeal on points of law has been lodged. The time-limit for transmission is eight months. The time-limit for transmission is set at six months in cases where an appeal on points of law is lodged on or after 1 September 2008 and the suspect is in pre-trial detention in connection with the case and/or juvenile criminal law has been applied.
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> ...

3.5.1. If the Supreme Court finds that the reasonable time has been exceeded – which also includes the time-limit for transmission – this will not lead to inadmissibility of the prosecution ... not even in exceptional cases. In this regard it should be noted that also the rules on the statute of limitations offer the suspect protection against inactivity by the police and/or the prosecution, which protection has been strengthened by the amendment of Article 72 of the Criminal Code by the law of November 16, 2005, Official Gazette 595, as a result of which the statute of limitations is subject to a maximum also after it has been interrupted.

3.5.2. As a rule, exceeding the reasonable time is compensated by a reduction of the penalty imposed by the last court to have established the facts. If the time-limit for transmission is exceeded, no reduction will be applied if it is compensated by particularly expeditious processing (*bijzonder voortvarende behandeling*) of the appeal on points of law."

2. The Judiciary (Organisation) Act

12. The text of section 80a of the Judiciary (Organisation) Act and a description of the Supreme Court's practice of dismissing cases on summary reasoning pursuant to that provision are set out in *El Khalloufi v. the Netherlands* ((dec.), no. 37164/17, §§ 21-26, 26 November 2019). That description contains, *inter alia*, the following citation of a paragraph from the Supreme Court's judgment of 11 September 2012 (ECLI:NL:HR:2012:BX7004; see *El Khalloufi*, cited above, § 22):

"2.2.4. In this connection it is worth paying attention to the example mentioned on page 19 of the explanatory memorandum, that an appeal in cassation can henceforth be disposed of under section 80a of the Judiciary (Organisation) Act if it purports to complain only that as a result of the introduction of the appeal in cassation, the reasonable time requirement within the meaning of Article 6 § 1 of the Convention has been violated. In such a case, in which the person concerned appears not to have any complaints (on points of law) about the judgment appealed against, nor about the way the lower court has handled the case, and the accused has to a certain extent himself ... chosen to live under the threat of (further) prosecution for longer than is reasonable, reliance on the reasonable time requirement laid down in the aforementioned Convention provision is not a complaint that expresses a sufficient interest in the appeal in cassation. After all, it cannot be said that there has been an omission that has had a bearing on the impugned judgment. It does not make any difference if, in addition to the point of appeal concerning the reasonable time requirement, no other grounds of appeal are submitted than those that do not stand in the way of the application of section 80a of the Judiciary (Organisation) Act."

COMPLAINTS

13. The applicant complained under Article 6 § 1 of the Convention about the length of the proceedings and under Article 13 of the Convention about the lack of an appropriate effective remedy.

THE LAW

A. Complaint under Article 6

14. The applicant complained that, owing to the time taken by the Court of Appeal to complete its abbreviated judgment, he had not been tried within a reasonable time. He relied on Article 6 § 1 of the Convention, which reads as follows:

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

1. The parties' submissions

15. The Government argued, with reference to the Court's decisions in *Van der Putten v. the Netherlands* ((dec.), no. 15909/13, 21 February 2013) and *Çelik v. the Netherlands* ((dec.), no. 12810/13, 27 August 2013), that the application should be declared inadmissible because the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. In addition, the Government noted that the applicant's case was heard before the Supreme Court within a reasonable time period – 18 months in total – and that therefore no grounds existed for reducing the sentence.

16. The applicant insisted that he had suffered a significant disadvantage. The time it had taken the Court of Appeal to supplement its abbreviated judgment had caused a long period of uncertainty for him, as well as the temporary impossibility of him and his counsel being able to formulate grounds for the appeal. Moreover, his case was not comparable to those cited by the Government. He further insisted that the reasonable time requirement had not been complied with, stating that the only reason the Supreme Court had been quick was because it had dismissed the grounds of appeal on points of law providing summary reasoning.

2. The Court's assessment

17. Article 35 § 3 of the Convention[1], as far as relevant, reads as follows:

> "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
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> ...
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."

[1] As amended by Article 5 of Protocol No. 15, which entered into force on 1 August 2021.

18. The Court must examine whether: (1) the applicant has suffered a significant disadvantage as a result of the alleged violation; and (2) whether respect for human rights as defined in the Convention and the Protocols attached thereto requires an examination of the application on the merits (see, *mutatis mutandis*, *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010, and *Zwinkels v. the Netherlands* (dec.), no. 16593/10, § 24, 9 October 2012, relating to Article 35 § 3 (b) in the version before the entry into force of Protocol No. 15).

(a) Whether the applicant has suffered a "significant disadvantage"

19. Inspired by the principle *de minimis non curat praetor*, the admissibility criterion contained in Article 35 § 3 (b) of the Convention hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of the alleged violation should be assessed, taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case (see, for example, *Korolev*, cited above).

20. In its decisions in *Van der Putten* (cited above, §§ 31-32) and *Çelik* (cited above, §§ 36-37), the Court, taking into account the circumstances of those cases, found that the delay complained of, caused by the court of appeal to supplement its abbreviated judgment, was not of sufficient severity. In this context it noted that the applicants' appeals on points of law were limited to a complaint about non-compliance with the reasonable time requirement in the proceedings before the Supreme Court.

21. It is not in dispute between the parties that the present case is different, to the extent that the applicant's complaints to the Supreme Court did not only concern the length of proceedings. Thus, the question to be addressed is whether the applicant, in the circumstances of the present case (see paragraphs 7 and 8 above), has suffered a significant disadvantage as a result of the alleged violation.

22. The Court notes that all grounds of appeal on points of law were dismissed by the Supreme Court with reference to section 80a of the Judiciary (Organisation) Act (see paragraph 8 above). From the nature of that provision and the Supreme Court's case-law concerning its application (see paragraph 12 above), it can be inferred that the Supreme Court considered that the complaints raised by the applicant (including his complaint concerning Article 6 of the Convention) did not justify an examination in cassation proceedings because either he had obviously insufficient interest in the appeal (*klaarblijkelijk onvoldoende belang bij het cassatieberoep*) or because the complaints obviously could not succeed (*klaarblijkelijk niet tot cassatie konden leiden*). The Court has held on

several occasions that the application of this provision raises no issue of principle under Article 6 or Article 13 (see, for example, *El Khalloufi v. the Netherlands* ((dec.), no. 37164/17, §§ 52-59*,* 26 November 2019), and the applicant has not explained why section 80a of the Judiciary (Organisation) Act was inapplicable to his grounds of appeal. In so far as the applicant has suggested that the Supreme Court applied this provision solely to remedy the delay in the proceedings, this has remained unexplained and unsubstantiated.

23. The applicant's insistence on bringing the case before this Court may have been prompted by his subjective perception that he had not been treated fairly and disagreed with well-established domestic case-law (see paragraphs 11 and 12 above). Although the applicant's subjective perception is relevant, this element does not suffice for the Court to conclude that the applicant suffered a significant disadvantage. The applicant's subjective perception has to be justifiable on objective grounds. Observing that he has not put forward any convincing arguments (see paragraph 22 above, *in fine*) and considering that the case file does not contain any concrete indications suggesting that the applicant had suffered important adverse consequences as a result of the violation complained of, the Court does not see such justification in the instant case.

24. In the light of the foregoing, the Court concludes that the applicant has not suffered a significant disadvantage as a result of the alleged violation of the Convention.

(b) Whether respect for human rights as defined in the Convention and the Protocols attached thereto requires an examination of the application on the merits

25. The Court pointed out in *Van der Putten* (cited above, § 33) and *Çelik* (cited above, § 38) that it has handed down a plethora of judgments and decisions on the length of criminal proceedings, and held that an examination on the merits of the complaints would add nothing of significance to the existing body of case-law. There is no reason for the Court to hold otherwise in the present case.

(c) Conclusion

26. It follows that this complaint must be declared inadmissible in accordance with Article 35 §§ 3 (b) and 4 of the Convention.

B. Complaint under Article 13

27. The applicant alleged that he had no effective domestic remedy for his complaint about the length of the proceedings because the Supreme Court had declined to rule on that grievance. He 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 ..."

28. A remedy is required only against a claimed breach of the Convention that is arguable (see *Leander v. Sweden*, 26 March 1987, § 77, Series A no. 116). If a significant disadvantage is absent, so is the arguable claim (see *Vasilchenko v. Russia*, no. 34784/02, § 54, 23 September 2010).

29. Accordingly, 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.

Done in English and notified in writing on 18 November 2021.

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Ilse Freiwirth Deputy Registrar	Armen Harutyunyan President