Netherlands - Raad van State (Council of State) - 202001949/1/V3 – 7 April 2020 - ECLI:NL:RVS:2020:991

Exceptional measures regarding the COVID-19 crisis – Fundamental rights - Right to be heard in Court – Right of defence - Right to an effective remedy - Article 5(4), 6, and 13 of the ECHR - Article 6 and Article 47 EU Charter of fundamental rights

(Appellant against the State Secretary of Foreign Affairs)

The coronavirus outbreak has led to exceptional measures in the Netherlands. The buildings of the (District) Courts have been closed as of 17 March 2020 to prevent the spread of the coronavirus. Due to this closure, no Court hearings can be held in these buildings that are usually open to the public.

In the Netherlands, foreign nationals who appeal against a detention measure are always heard by a Court. Hearings often take place physically at Court buildings, but the facilities in detention centres are also used regularly to hear foreign nationals from a distance by means of a videoconference. The 'Video conference decision' of 2006 allows for and regulates this latter method.

Due to the closure of the buildings of the Courts, however, physical hearings can no longer be held. A video conference is not possible in all instances, because of the limited capacity and the fact that facilities available at the detention centres are too small to comply with the measures related to the corona crisis. The question is whether this violates an foreign national's right to be heard.

In this judgment, the Administrative Jurisdiction Division of the Council of State (Division) rules on this matter. The Division underlines that this judgment explicitly applies only during this exceptional period and not in the period before or after the COVID-19 measures of 17 March 2020.

Complaints

The appellant complains that the Court did not hear him and therefore Article 94, fourth paragraph, of the Netherlands Aliens Act 2000 (Vw 2000) and Article 5, first paragraph, of the ECHR have been violated. According to the appellant, there are facilities in detention centres available to hear from a distance and the Court wrongly did not use them. The appellant has been detained, awaiting expulsion to Morocco, because he has no lawful residence in the Netherlands. His appeal against the detention measure was scheduled to be heard on 18 March 2020. Because of the measures related to the corona crisis, it is temporarily impossible to hold physical hearings in court in the presence of the appellant, his lawyer, interpreter and an employee of the Immigration and Naturalisation Service (IND). A video connection or conference call is not possible in all instances, because of the limited capacity and facilities at the detention centres are not suitable. The Court subsequently settled the case in writing, without hearing the appellant.

Legal background

Article 94(4) of the Netherlands Aliens Act 2000 (Vw 2000) provides that the Court always calls on a foreign national to appear 'in person or represented by a counsel' to be heard in Court. This rule is based on Article 15(2) of the Dutch Constitution, Article 5(4) of the ECHR, and Article 6 of the EU Charter of fundamental rights. Anyone whose imprisonment is not based on an order of a judge can ask the judge to be released. The right to be heard is also part of the 'right of defence' enshrined in the EU Charter and the ECHR. Another important aspect of the defence rights is the right to an effective remedy (Articles 5, 6 and 13 of the ECHR, as well as Article 47 of the EU Charter). It is settled case law of the Division that a detention measure is in principle unlawful from the moment a foreign national has not been heard on time.

However, the fundamental right to be heard is not absolute. Fundamental rights, including the right to be heard, may be limited if those restrictions are (1) foreseeable, (2) genuinely meet the public interest

objectives pursued by the measure and, (3) are proportionate and do not affect the core of the fundamental right. This can be concluded from, inter alia, the judgment of the ECtHR 9862/82, of 21 October 1986, Sanchez-Reisse v Switzerland, ECLI:CE:ECHR:1986:1021JUD000986282, point 51, and the judgment of the Court of Justice C-383/13 PPU of 10 September 2013, G. and R. against the Secretary of State for Security and Justice, ECLI:EU:C:2013:533, points 33-34.

Judgment of the Division

The Division rules that it is an acceptable temporary solution to settle a case in writing, if the Court has received permission from both the appellant and the State Secretary thereto. It is important in this respect that the fundamental right of the foreign national to be heard is not fundamentally compromised. In case the appellant and/or State Secretary do not consent to a written procedure, but both parties agree that only the authorized representatives are heard by telephone, the Division rules on the same ground that this is also a temporarily acceptable hearing method.

In case either one of the authorized representatives or the foreign national states that he does not waive the right to be heard by the Court, the Court must make every effort to offer the alien the opportunity to hear him in person. The Court may, however, conclude that that a hearing is not possible in a particular case. The Court is then faced with the question what the consequence is of this decision is, given the current exceptional circumstances. According to the Division, the Court must assess the practical (im)possibilities to hear the foreign national, in close connection to other fundamental rights at stake (such as the right to an early decision on the lawfulness of the detention measure, the right to privacy, and the right to health of both the foreign national and the general importance of public health).

The Division concludes that refraining from hearing a foreign national is possible given the special circumstances of the corona crisis, but this cannot happen automatically. The Court must make a recognizable and individual assessment of all the interests involved.

The appellant lost his case.