CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 664/05
by John MERIE
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 20 September 2007 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE, *judges*,
and Mrs S. QUESADA , *Section Registrar,*

Having regard to the above application lodged with the European Court of Human Rights on 21 December 2004,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together,

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

The applicant, Mr John Merie, claims to be a Burundian national who was born in 1985. At the time of the events complained of he was staying in the holding centre for asylum seekers and illegal immigrants (*grenshospitum*) at Amsterdam (Schiphol) Airport. He is represented before

the Court by Mr P.A. Blaas, a lawyer practising in ‘s-Hertogenbosch. The respondent Government are represented by their Agent, Mr R.A.A. Böcker, of the Netherlands Ministry for Foreign Affairs.

A. The circumstances of the case

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

The applicant arrived at Amsterdam (Schiphol) Airport on 8 October 2004. An officer of the Royal Military Constabulary (*Koninklijke Marechaussee*) initially refused him admission to the country on the ground that he did not hold a valid passport, and that he had insufficient means either to provide for his own subsistence in the Netherlands or to cover the cost of his journey to a destination outside the Netherlands. When the applicant then asked for asylum, the same officer ordered that he be detained in the asylum application centre (*aanmeldcentrum*) at Schiphol for the purposes of prevention of unauthorised entry into the Netherlands, in accordance with Article 6 §§ 1 and 2 of the 2000 Aliens Act (*Vreemdelingenwet*).

In an asylum application centre and after a first intake interview with the asylum seeker, the Netherlands immigration authorities make a first selection between prima facie unfounded and possibly founded asylum requests. Petitioners falling within the latter category are transferred to a reception and investigation centre for asylum seekers (*opvang- en onderzoekscentrum*), whereas petitioners falling within the former category remain in detention in the asylum application centre pending the determination of their asylum request, which may be dealt with in an accelerated procedure if they do not require a time-consuming investigation, meaning that it can be processed with all due care within 48 working hours.

On 9 and 10 October 2004, the applicant was interviewed by an immigration official in relation to his asylum request. On 11 October 2004, on the basis of these interviews, the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*) rejected the applicant’s asylum application. Apart from the fact that he had not submitted any documents capable of demonstrating his identity, nationality or travel itinerary, the applicant was deemed to have insufficiently cooperated in the establishment of his travel itinerary as he had given hardly any concrete or verifiable statements about his journey (departure and arrival times of the airplanes, the name and/or logo of the airline company, and whether or not the airplane had made a stop-over). Given the applicant’s inability to answer a large number of elementary and basic questions about Burundi and his alleged area of origin, the Minister also disbelieved that the applicant would be a Burundian national or of Burundian origin. The Minister further maintained the aliens’ detention

order. On the same day the applicant appealed to the Regional Court (*rechtbank*) of The Hague against his placement in aliens' detention.

The Regional Court held a hearing on 25 October 2004. The applicant's counsel – praying in aid the European Court's judgment in the case of *Shamsa v. Poland* (nos. 45355/99 and 45357/99, 27 November 2003) – argued that a measure whereby a non-judicial authority issues a detention order can only justify detention for a couple of days and that, consequently, his detention after 13 October 2004 should be regarded as unlawful. The Minister submitted, *inter alia*, that an application for a laissez-passer had already been filed but that no date had yet been fixed to present the applicant to the Burundian authorities.

The Regional Court gave its decision on 29 October 2004. Referring to a precedent set by the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*) in a ruling of 13 May 2004 (see below under "Relevant domestic law"), it dismissed the appeal.

On 1 November 2004, the applicant lodged an appeal against the decision of 29 October 2004 with the Administrative Jurisdiction Division. He only raised one complaint, namely that the Regional Court had unjustly failed to acknowledge that, where a detention order has been issued by an administrative authority, the alien concerned must – pursuant to the Court's considerations in its *Shamsa* judgment – be brought before a judge within a couple of days.

On 24 November 2004 the Administrative Jurisdiction Division dismissed the further appeal, confining its reasoning to a reference to its earlier ruling of 13 May 2004. No further appeal lay against this ruling.

B. Relevant domestic law

Until 1 April 2001, the admission, residence and expulsion of aliens were regulated by the 1965 Aliens Act (*Vreemdelingenwet*; "the 1965 Aliens Act"). Further rules were set out in the Aliens Decree 1966 (*Vreemdelingenbesluit*), the Regulation on Aliens (*Voorschrift Vreemdelingen*) and the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire*). The General Administrative Law Act (*Algemene Wet Bestuursrecht*) applied to proceedings under the 1965 Aliens Act, unless indicates otherwise in this Act.

On 1 April 2001, the 1965 Aliens Act and the pertaining regulations were replaced by the 2000 Aliens Act, the 2000 Aliens Decree, the 2000 Regulation on Aliens and the 2000 Aliens Act Implementation Guidelines. Unless indicated otherwise in the Aliens Act 2000, the General Administrative Law Act continued to apply to proceedings on requests by aliens for admission and residence.

The 2000 Aliens Act, in so far as relevant to the case, provides as follows:

Article 6

"1. An alien who has been refused permission to enter the Netherlands may be obliged to remain in a space or area indicated by an official charged with border control.

2. A space or area as referred to in the first paragraph may be secured against unauthorised departure. ..."

Article 84

"In deviation from Article 37 § 1 of the Act on the Council of State (*Wet op de Raad van State*), no appeal lies against a decision of the Regional Court ...:

a. about a decision or act based on Article 6 § 1[of the 2000 Aliens Act] ..."

Article 94 (as in force since 1 September 2004)

"1. Our [competent] Minister shall notify the Regional Court of a decision to impose deprivation of liberty as referred to in Article 6 ... [of the 2000 Aliens Act] no later than the twenty-eighth day after communication of the decision, unless the alien himself has lodged an appeal first. As soon as the Regional Court has received the notification, the alien shall be deemed to have lodged an appeal against the said decision imposing deprivation of liberty. The appeal shall also constitute a request for the award of damages.

2. The Regional Court shall immediately fix the time of a hearing. The hearing shall take place no later than the fourteenth day after the receipt of the written statement of appeal or the notification. ... In deviation from Article 8:42 § 2 of the General Administrative Law Act, the delay referred to in that Article cannot be prolonged.

3. The Regional Court shall give judgment orally or in writing. A written judgment shall be given within seven days of the conclusion of the hearing. In deviation from Article 8:66 § 2 of the General Administrative Law Act, the delay referred to in that Article cannot be prolonged.

4. If the Regional Court finds on appeal that the application or implementation of the decision [to impose deprivation of liberty] is contrary to this Act or is – on consideration of all the interests involved – not reasonably justified, it shall accept the appeal. In such a case the Regional Court shall order that the deprivation of liberty be terminated or the manner of its implementation altered."

Article 95

"1. In deviation from Article 84 under a., a ruling given by the Regional Court as referred to in Article 94 § 3 can be appealed before the Administrative Jurisdiction Division of the Council of State. ..."

Article 96

"1. In case the Regional Court has rejected as unfounded an appeal within the meaning of Article 94 and the deprivation of liberty continues, Our Minister shall notify the Regional Court of the continuation of the deprivation of liberty no later than four weeks after the ruling within the meaning of Article 94 has been given, unless the alien himself has lodged an appeal first. As soon as the Regional Court has received

> the notification, the alien shall be deemed to have lodged an appeal against the decision to prolong the decision imposing deprivation of liberty. ”

Pursuant to Article 94 §§ 1 and 2, as in force until 1 September 2004, the delay within which the Minister was to notify the Regional Court of a placement in aliens' detention was three days and the Regional Court was to hold a hearing no later than seven days after receipt of the appeal. On 1 September 2004, an amendment to Article 94 entered into force, prolonging these time-limits to twenty-eight and fourteen days, respectively. This meant in practice a revival of the legal situation that existed until 1 April 2001 in respect of these two time-limits under the former 1965 Aliens Act and pertaining regulations (for further details, see *Tekdemir v. the Netherlands* (dec.), nos. 46860/99 and 49823/99, 1 October 2002, under "Relevant domestic law and practice").

Article 69 § 3 of the 2000 Aliens Act stipulates that there is no time-limit for filing an appeal within the meaning of Articles 94 and 96 of the 2000 Aliens Act and that an appeal referred to in Article 95 must be filed within one week. Accordingly, a person placed in aliens' detention can in principle file as many appeals against this placement as he or she sees fit. When the lawfulness of a decision of placement in aliens' detention has been determined for a first time, the examination of any subsequent appeal in this respect will be limited to the lawfulness of the continuation of the placement in aliens' detention. Pursuant to Article 84 of the 2000 Aliens Act, no appeal to the Administrative Jurisdiction Division lies against a decision by the Regional Court on such a subsequent appeal (Administrative Jurisdiction Division, 1 November 2006, case no. 200607626/1). The hearing and determination of such a subsequent appeal are subject to the same mandatory time-limits as those for a first appeal (Regional Court of The Hague sitting in Groningen, 19 June 2006, case no. AWB 06/22632).

According to a ruling given by the Administrative Jurisdiction Division on 11 February 2005 (*Jurisprudentie Vreemdelingenrecht* (Immigration Law Reports – "JV") 2005/172), the time-limit set out in Article 94 § 2 of the 2000 Act is of a strict mandatory nature. In the event that this time-limit has not been respected, the placement in aliens' detention becomes unlawful on the day following the day on which this time-limit expired.

In a ruling handed down on 13 May 2004 (JV 2004/290), the Administrative Jurisdiction Division held, in so far as relevant for the present case:

> "The judgment of the European Court of Human Rights [in the case of *Shamsa v. Poland*] of 27 November 2003, invoked by the [appellant], concerns the continued detention of aliens against whom an expulsion or extradition procedure was no longer pending, for which continued detention there was no legal basis. Consequently, the detention had lost its lawful character and thus did not fall within the scope of one of the permissible grounds of deprivation of liberty as listed in an exhaustive manner in Article 5 § 1 of the Convention. In this light, the Administrative Jurisdiction Division understands the judgment and in particular the reasoning set out in paragraph 59 in the

> sense that the Court – in assessing such detention – incorporates the rationale of Article 5 taken as a whole and, in that context, also considers relevant the guarantees for legal protection and legal certainty as incorporated in the third paragraph of [Article 5 of the Convention]. Noting this as well as the [decisions on admissibility taken by] the Court in the case *Leaf v. Italy* [no. 72794/01, 27 November 2003] and *Vikulov and Others v. Latvia* [16870/03, 25 March 2004], the Administrative Jurisdiction Division is of the opinion that the Court did not have the intention to consider Article 5 § 3 applicable by analogy to the detention of aliens in accordance with [Article 5 § 1 (f) of the Convention], which would also be at variance with the wording of [Article 5 § 3 of the Convention]. In this connection the Administrative Jurisdiction Division also finds of relevance that the Court, in its [decision on admissibility] in the case of *Tekdemir v. the Netherlands* (no. 46860/99, 1 October 2002) found that there was no reason for holding that there was a violation of Article 5 § 4 of the Convention, as the alien concerned who had been placed in aliens' detention under the Aliens Act [as in force until 1 April 2001] could at any point in time challenge the lawfulness of [that] detention before the judge who should determine [this issue] speedily. The Court did not conduct an additional examination of the matter under [Article 5 § 3 of the Convention]. In accordance with Article 94 § 1 (and Article 96 §§ 1 and 5) of the 2000 Aliens Act an alien can also at present file an appeal at any point in time against a decision imposing deprivation of liberty."

As there is no statutory fixed maximum duration of a placement in aliens' detention for the purpose of preventing unauthorised entry into the country or expulsion, an alien refused admission or whose expulsion has been ordered can, in principle, remain in aliens' detention for an unlimited period of time provided there are reasonable prospects for departure or expulsion within the foreseeable future. However, it has been established in domestic case-law that the interest of an alien to be released from aliens' detention increases with the passage of time. Where a placement in aliens' detention exceeds a period of six months, the alien's interest in being released may – but not necessarily – be accepted as having become greater than the interest in keeping him in detention for the purposes of preventing unauthorised entry. Depending on the specific circumstances of each case, this turning point may be attained later than six months when, for instance, the alien concerned insufficiently cooperates in the determination of his/her identity and nationality and in making documents available. However, once an alien has spent six months in aliens detention for the purpose of preventing unauthorised entry, the judge is to verify more thoroughly whether the authorities have complied with their obligation to do whatever they can do to facilitate the alien's departure to a destination outside of the Netherlands (see, Regional Court of The Hague sitting in Amsterdam, 10 January 2006, *Landelijk Jurisprudentienummer* (National Case-law (database) number) – "LJN") AU9605 with further references).

COMPLAINT

Relying on Article 5 of the Convention and the Court's considerations in the case of *Shamsa v. Poland* (nos. 45355/99 and 45357/99, § 59, 27 November 2003), the applicant complained that he was not brought promptly before a tribunal empowered to determine the lawfulness of his detention speedily.

THE LAW

The applicant complained that his placement in aliens' detention was contrary to his rights under Article 5 in that it was not ordered by a judge, whereas it lasted longer than a couple of days. In so far as relevant for the present case, this provision reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him 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; ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 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 submitted that the applicant was deprived of his liberty in accordance with Article 6 of the 2000 Aliens Act in order to prevent his unlawful entry to the Netherlands, which is the situation referred to in Article 5 § 1 (f) of the Convention. As Article 5 § 3 of the Convention exclusively refers to persons detained in accordance with the provisions of Article 5 § 1 (c) of the Convention, the applicant's deprivation of liberty cannot be examined under Article 5 § 3 of the Convention.

The Government argued that it cannot be inferred from the Court's judgment in the case of *Shamsa v. Poland* (cited above) that Article 5 § 3 always applies to aliens detained under the provisions of Article 5 § 1 (f). The *Shamsa* case concerned continued aliens' detention in a situation where

there was no longer a legal basis in domestic law for that detention. Consequently, the deprivation of liberty at issue in that case did not fall into one of the categories listed exhaustively in Article 5 § 1. The Government understood the Court's reasoning set out in paragraph 59 of the *Shamsa* judgment to mean that, when assessing detention not falling into one of the categories defined in Article 5 § 1, the Court takes account of the rationale of Article 5 as a whole and, in that context, attaches importance to the guarantees of legal protection and legal certainty set out in Article 5 § 3. This approach cannot, according to the Government, be interpreted as entailing that Article 5 § 3 automatically applies *mutatis mutandis* to aliens' detention.

Referring to the provisions of Articles 94 and 96 of the 2000 Aliens Act and the Court's findings under Article 5 § 4 of the Convention in the case of *Tekdemir v. the Netherlands* ((dec.), nos. 46860/99 and 49823/99, 1 October 2002), the Government lastly submitted that the applicant's rights under Article 5 § 4 of the Convention were respected in that he was able at all times to contest the lawfulness of his deprivation of liberty by lodging an appeal before the courts whereas the hearing and determination of such an appeal are subject to strict statutory time-limits which are sufficiently short for complying with the requirement of ensuring a speedy judicial decision.

The applicant submitted that it follows from the Court's considerations in its judgments of *Brogan and Others v. the United Kingdom*, (judgment of 29 November 1988, Series A no. 145-B) and *Shamsa v. Poland* (cited above) that a deprivation of liberty lasting longer than a couple of days is unlawful if it has not been ordered by a judicial authority, and argued that for the purposes of Article 5 this principle must be regarded as applicable to all forms of deprivation of liberty.

The applicant further maintained that he did not obtain a speedy judicial determination of the lawfulness of his placement in aliens' detention, considering that the statutory time-limits for hearing and determining an appeal against a placement in aliens' detention fall short of the requirement of speed under Article 5 § 4.

The Court notes that it is not in dispute between the parties that the applicant's placement in aliens' detention was ordered on the basis of and in accordance with the provisions of Article 6 of the 2000 Aliens Act for the purpose of preventing his unauthorised entry to the Netherlands. Having found no reasons to hold otherwise, the Court is satisfied that the applicant's detention falls within the scope of and complied with Article 5 § 1 (f) of the Convention.

The parties are, however, divided on the question whether the applicant's placement in aliens' detention can be examined under Article 5 § 3 of the Convention. On this point, the Court notes 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 is "effected for the purpose of

bringing [a person] before the competent legal authority on reasonable suspicion of having committed an offence or fleeing after having done so".

However, the Netherlands authorities detained the applicant not for the reasons mentioned in that provision but "to prevent his effecting an unauthorised entry into the country", which is a ground set out in paragraph 1 (f) of Article 5 and renders Article 5 § 3 inapplicable in the present case (see, for instance, *Leaf v. Italy* (dec.), no. 72794/01, 27 November 2003; *Vikulov and Others v. Latvia* (dec.), no. 16870/03, 25 March 2004; *Gordyeyev v. Poland* (dec.), nos. 43369/98 and 51777/99, 3 May 2005; and *Garabayev v. Russia* (dec.), no. 38411/02, 8 September 2005).

Concurring with the reasons given by the Administrative Jurisdiction Division in its ruling of 13 May 2004, the Court further finds that the applicant's reliance on the Court's considerations set out in paragraph 59 of its judgment in the case of *Shamsa v. Poland* (cited above) is based on an erroneous interpretation of the latter judgment. Unlike the situation in the *Shamsa* case, the applicant's detention at issue had a legal basis under domestic law and fell within one of the permissible grounds of deprivation of liberty listed exhaustively in the first paragraph of Article 5 § 1 of the Convention.

Accordingly, to the extent that the applicant relies on Article 5 § 3, the Court concludes that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

As regards the applicant's complaint that he was unable to obtain a speedy judicial determination of the lawfulness of his detention, the Court reiterates that Article 5 § 4 of the Convention – in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty – also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII, with further references; and *Samy v. the Netherlands* (dec.), no. 36499/97, 4 December 2001). Although the number of days such proceedings take is obviously an important element, it is not necessarily in itself decisive for the question whether a decision has been given with the requisite speed under this provision.

Although Article 5 § 4 of the Convention does not guarantee a right of appeal against an unsuccessful review, it follows from the aim and purpose of this provision that its requirements must still be respected if an appeal procedure is available (see *Rutten v. the Netherlands*, no. 32605/96, § 53, 24 July 2001). In such cases an overall assessment is required in order to

determine whether a decision was given "speedily" (see *Navarra v. France*, judgment of 23 November 1993, Series A no. 273-B, p. 28, § 28).

The Court notes that the applicant was placed in aliens' detention on 8 October 2004 and that, as from that moment, he could challenge his detention by lodging an appeal with the Regional Court. It was only on 11 October 2004 that the applicant availed himself of that possibility. In compliance with the mandatory time-limits under domestic law, the Regional Court heard the applicant's appeal on 25 October 2004 and determined it on 29 October 2004. The applicant's subsequent appeal of 1 November 2004 to the Administrative Jurisdiction Division was determined on 24 November 2004.

The Court finds it of relevance that domestic law provides for a mandatory time-limit for hearing an appeal filed with the Regional Court against a placement in aliens' detention and that a person placed in aliens' detention can file as many appeals as he sees fit. The Court further cannot ignore the reasons for the initial decision to place the applicant in aliens' detention for the purposes of preventing his unauthorised entry into the Netherlands, namely the fact that he did not hold a valid passport and did not have sufficient means either to provide for his own subsistence in the Netherlands or to cover the cost of his journey to a destination outside the Netherlands. It has not been argued and it has not appeared that, pending the proceedings on the applicant's appeal before the Regional Court and the Administrative Jurisdiction Division, these circumstances had undergone any change warranting a higher degree of diligence on the part of the domestic judicial authorities in examining the applicant's appeal than was prescribed in domestic law. The Court is therefore satisfied that, in the particular circumstances of the present case, the facts of the case do not disclose a violation of the applicant's rights under Article 5 § 4.

It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

In view of the above, it is appropriate to discontinue the application of Article 29 § 3 of the Convention and to reject the application.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President