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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 22842/04
by Adul BAH
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 Mr S. QUESADA, *Section Registrar,*

Having regard to the above application lodged with the European Court of Human Rights on 15 June 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 Adul Bah, claims to be a Sierra Leonean national who was born in 1980. At the time when the application was lodged he was held in detention in Soesterberg. 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 entered the Netherlands approximately two years before the events complained of. He lodged a request for asylum and was met with a refusal. He remained in the Netherlands as an illegal alien.

On 3 March 2004 the applicant was apprehended. An officer of the Aliens Police (*Vreemdelingenpolitie*), acting on behalf of the Minister for Aliens Affairs and Integration (*Minister voor Vreemdelingenzaken en Integratie*) and in accordance with Article 59 of the 2000 Aliens Act (*Vreemdelingenwet*), placed the applicant in aliens' detention (*vreemdelingenbewaring*) for expulsion purposes on public order grounds, namely the suspicion that the applicant was seeking ways to evade expulsion as he had no identity papers, he had failed to leave the country within the time allowed him for that purpose, he had no fixed abode, was suspected of having committed a criminal act, had no adequate means of subsistence and was not lawfully staying in the Netherlands.

The Regional Court of The Hague was notified by the Minister of the detention order on 5 March 2004. In accordance with Article 94 of the 2000 Aliens Act, this counted as an automatic appeal.

This notification-appeal was heard before the Regional Court on 12 March 2004. On 18 March 2004 a single-judge Chamber of the Regional Court gave a decision dismissing the appeal. The decision noted that the applicant had relied on the European Court's judgment in the case of *Shamsa v. Poland* (nos. 45355/99 and 45357/99, 27 November 2003), but held that, given the provisions of Article 94 of the 2000 Aliens Act, there was an adequate guarantee that the judge would take a speedy decision about the lawfulness of the applicant's detention and order his release if his detention was found unlawful. Given the reasons on which it was based, the applicant's placement in aliens detention was found justified, and it was further found that the Netherlands authorities were pursuing the applicant's effective removal from the Netherlands with the required diligence, given that in the meantime the procedure for obtaining a laissez-passer from the Sierra Leonean authorities had been set in motion.

The applicant lodged an appeal against the decision of 18 March 2004 with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*) on 22 March 2004. Again relying on the Court's *Shamsa* judgment, he only raised one complaint, namely that the Regional Court had unjustly failed to acknowledge that persons placed in aliens' detention must – like persons

detained in the context of criminal proceedings – be heard promptly, that is no later than three days and fifteen hours, before an independent tribunal. As he had only been heard after ten days, the Regional Court should have found this delay too long and, consequently, should have ordered his release.

On 13 May 2004, following a hearing held on 14 April 2004, the Administrative Jurisdiction Division dismissed the further appeal and upheld the Regional Court's decision. This ruling, in so far as relevant, reads:

> "The appellant has been placed in aliens' detention for expulsion purposes, in accordance with Article 59 § 1 (a) of the 2000 Aliens Act. Therefore and on a statutory basis, an expulsion procedure within the meaning of Article 5 § 1 (f) of the Convention was pending against him. Pursuant to Article 94 §§ 1 and 2 of the 2000 Aliens Act, the placement in aliens' detention at issue has been submitted for examination before the Regional Court within a delay of ten days.
>
> 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.
>
> The Administrative Jurisdiction Division therefore agrees with the Regional Court that the applicant's reliance on [the Court's *Shamsa* judgment] fails..."

This ruling was published in the Immigration Law Reports (*Jurisprudentie Vreemdelingenrecht*; "JV") 2004/290.

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 1966 Aliens Decree (*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 indicated 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 2000 Aliens Act, the General Administrative Law Act continued to apply to proceedings on requests by aliens for admission and residence.

At the time of the events complained of, the 2000 Aliens Act, as relevant to the case, provided as follows:

Article 59

"1. If necessary in the interests of public order or national security so requires, [the competent Minister] may, for the purpose of expulsion (*uitzetting*), order the detention of an alien who:

(a) is not lawfully resident; ..."

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 59 of the 2000 Aliens Act] ..."

Article 94 (as in force until 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 ... 59 ... [of the 2000 Aliens Act] no later than the third 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 seventh 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. "

Article 94 was amended with effect from 1 September 2004. It now requires the Regional Court to be notified of the detention decision within twenty-eight days after its issuance unless the alien has lodged an appeal first, and the hearing of the appeal must take place no later than fourteen days after the Regional Court has received the written statement of appeal or the Minister's notification. This amendment meant in practice a revival of the legal situation that existed before 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 (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.

As there is no statutory fixed maximum duration of a placement in aliens' detention for expulsion purposes, an alien whose expulsion has been ordered can, in principle, remain in aliens' detention for an unlimited period of time provided there are reasonable prospects for 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, it is generally held that the alien's interest in being released is greater than the interest in keeping him in detention for the purposes of expulsion. Depending on the specific circumstances of each case, this point in time may also be reached before or after six months have passed. It may be later when an exclusion order (*ongewenstverklaring*) has been imposed or where the alien concerned frustrates the determination of his identity or nationality, and it may be earlier where the alien concerned is unable to obtain travel documents for reasons beyond his or her control (see, Legal Uniformity Division (*Rechtseenheidskamer*) of the Regional Court of the Hague, case no. AWB 97/4849, 21 August 1997; and the Regional Court of The Hague sitting in Groningen, case no. AWB 06/22632, 19 June 2006).

COMPLAINT

The applicant complained that he was not brought promptly before a tribunal empowered to determine the lawfulness of his detention. He relies on Article 5 §§ 1 (c) and 3 (by analogy) and Article 5 § 4 of the Convention and on the Court's above-mentioned *Shamsa* judgment, in particular § 59 thereof.

THE LAW

The applicant complained that his placement in aliens' detention was contrary to his rights under Article 5 §§ 1, 3 and 4 in that its lawfulness was not reviewed by a judge with the requisite promptness.

In its relevant part, Article 5 reads as follows:

> "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 59 of the 2000 Aliens Act, that is as an alien unlawfully present in the Netherlands and for the purpose of his removal from 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 involved 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 could at all times contest the lawfulness of his deprivation of liberty by lodging an appeal before the court, whereas fifteen days elapsed between the applicant's placement in aliens' detention and the Regional Court's

judgment on the lawfulness of that placement. In the Government's opinion, this delay complies with the requirement of speediness under Article 5 § 4.

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, in particular the prescribed time-limits as in force since 1 September 2004.

The Court notes that the applicant's placement in aliens' detention was ordered in accordance with the provisions of Article 59 of the 2000 Aliens Act for the purpose of his expulsion. 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.

As to the question whether the applicant's placement in aliens' detention can be examined under Article 5 § 3 of the Convention, 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 "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, 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 3 March 2004 and that, as from that moment, he could challenge his detention by lodging an appeal with the Regional Court. However, as he had not availed himself of that possibility, the Regional Court was notified on 5 March 2004 of the applicant's placement in aliens' detention, in accordance with Article 94 of the 2000 Aliens Act. In compliance with the mandatory time-limits under domestic law, the Regional Court heard the applicant's appeal on 12 March 2004 and determined it on 18 March 2004. The applicant's subsequent appeal of 22 March 2004 to the Administrative Jurisdiction Division was determined on 13 May 2004.

Although the Court accepts that the duration of the proceedings before the Administrative Jurisdiction Division is longer than generally desirable under Article 5 § 4 of the Convention, it does consider it of relevance that, at the material time, domestic law provides for an automatic judicial review of the lawfulness of a placement in aliens' detention by the Regional Court to be set in motion within three days, which review was furthermore subject to mandatory, short time-limits. Moreover, a person placed in aliens'

detention can challenge such a placement before the Regional Court as often as he sees fit.

The Court further considers it of relevance that the procedure of obtaining a laissez-passer for the applicant had already been set in motion pending the review proceedings before the Regional Court. It further takes into account that the applicant's placement in aliens' detention was based on, *inter alia*, the fact that he – having remained unlawfully in the Netherlands after his asylum request had been rejected two years previously – had no identity documents, no fixed abode and no adequate means of subsistence, whereas 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 reviewing the lawfulness of the applicant's placement in aliens' detention. In these circumstances, the Court is of the opinion that 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