LJN: AZ2923, Rechtbank 's-Gravenhage , zittingsplaats Amsterdam , AWB 06/36572

Date of ruling: 25-08-2006

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Field of Law: Immigration

Type Procedure: First instance- single chamber

Contents indication: reception/ no asylum-seeker/ Article 23 Convention on the Rights of the Child/ direct applicability. The Applicant is a multiply-handicapped child of very young age, who is receiving intensive medical treatment. The Applicant and his mother will be evicted within a short period of time. When evicted from their residence, it will be very hard to retain access to the medical care the Applicant currently receives and needs. The second paragraph of Article 23 of the Convention on the Rights of the Child (hereinafter referred to as CRC), dictates that States shall encourage and ensure the extension of special care to the eligible child and those responsible for his or her care. The third paragraph of the concerned Article dictates that the assistance offered in accordance with paragraph 2 of the present Article shall be provided free of charge, whenever possible (…) and shall be designed to ensure that the disabled child has effective access to (inter alia) medical care. Both the second and third paragraph are "binding on all persons treaty regulations" {eeniederverbindendeverdragsbepalingen} in the sense of Article 94 of the Dutch constitution. The nature, content and meaning of the exemplified parts of the second, and respectively third paragraph of Article 23 CRC, when regarded in combination with the mentioned special set of circumstances in which Applicant resides (that can hardly be considered anything short of pressing), incite the court to conclude that the Applicant can indeed directly apply to the previously mentioned stipulations of Article 23 CRC. As the Applicant in his application did in fact bring forth the relevant facts and circumstances for his case, which can hardly be considered anything short of extraordinary and pressing, the court agrees with the Applicant. It was indeed within the obligations of the Defendant to, after determining that the Applicant did not enjoy any right to reception under national legislation, consider whether the Applicant, bearing the pressing circumstances in mind, did not qualify to a right of reception out of international treaty regulations. Moreover the Defendant should have considered whether or not the national legislation in this particular case would find application. Reasserting the circumstances of the case at hand, it should have been obvious for the Defendant to consider Article 23 CRC, finding special application to handicapped children, in his decision.

Judgment

District Court 's-Gravenhage

Located at Amsterdam

Single chamber Immigration affairs

Judgement

Article 8:70 of the General Administrative Law Act {Algemene Wet Bestuursrecht hereinafter reffered to as GALA}

Juncto Article 71 of the *Aliens Act* 2000 { Vreemdelingenwet 2000}

Reg. nr. AWB 06/36572

V-nr. 270.298.4910

Parties to the main proceedings: [Applicant], born [date of birth] 2005, of Nigerian nationality, residing in [city of residence], plaintiff,

Procedural representative: mr. F. Kiliç, attorney-at-law located in Amsterdam

Against: the Central Agency for the Reception of Asylum Seekers {CentraalOrgaanopvangAsielzoeker}, Defendant,

Procedural representative: Mr. M. Kouskoussouzi, employee of the Section judicial affairs of Defendant.

I.PROCEDURE

1. By letter of the 9th of June 2006 the Applicant requested an extension of reception.

2. By appeal to the court of the 28th of July 2006 the Applicant on the basis of Article 3a of the Act Central Agency for the Reception of Asylum Seekers {Wet CentraalOrgaanopvangAsielzoekers} instigated proceedings against the unjustifiable delay of a decision on the previous request of the 9th of June 2006. By decision of 8th of August 2006, the Defendant denied the request for reception. The appeal to the court on the 28th of August 2006 is, on grounds of Article 6:20, fourth paragraph, of the GALA, held to be aimed against the decision on the 8th of August 2006. The claims for appeal were submitted on the 16th of August 2006.

3: The investigation in session occurred on the 18th of August 2006. The Applicant has at that place made an appearance in person - legally represented by his mother –, and assisted by Mr. I.M. Hagg, a fellow partner of the procedural representative. The Defendant has been represented by previously mentioned procedural representative of his own.

II. AS TO THE FACTS AND CIRCUMSTANCES OF THE CASE

The court will assume in the assessment of this case the following by parties' left undisputed facts and circumstances.

1: According to a report of the Bureau of Medical Advisement { BureauMedischeAdvisering} dated the 19th of July 2006 and filed in the procedural documents; the Applicant suffers from Down syndrome, moreover has a congenital heart defect, and a delayed thyroid disorder and muscle weakness, which is causing him occasional impaired breathing. The Applicant is being treated by a pediatrician for the delayed thyroid disorder. In the treatment by a pediatrician an accurate monitoring takes place by way of blood analysis. Thyraxmedication also takes place. For the heart defect currently no treatment is taking place, although the Applicant has been put under supervision by a child cardiologist. In the absence of treatment of the thyroid disorder the Applicant's metabolism will gradually decline and cause a deterioration of physical and mental development. This is a gradual process of which the harmful effects will be mostly apparent in the long term.

2: By letter of the 28th of June 2006 from Dr. Bosman, pediatrician/gastroenterologist, it has been reported that considering the Applicants' medical condition, extra care will be required.

3: Applicant has on the 16th of March 2006 issued an application for the grant of a residence permit to conform to the restriction "Medical Treatment" {MedischeBehandeling}. This application for a residence permit has been denied due to a failure to pay the required fees. Protest has been raised against this denial, but the decision-making on this protest has yet to take place. On the 12th of June 2006 the Applicant again issued an application for the grant of a residence permit to conform to the medical restriction.

4: By letter of the 20th of April 2006 the Applicant requesed the Immigration and Naturalization Service {Immigratie- en Naturalisatiedienst} to grant him reception while making reference to the Interim Report Aliens Act implementation guidelines {TussentijdsBerichtVreemdelingencirculaire} 2001/31 (The court infers WBV 2005/60) with an analogue application of Article 64 of the Aliens Act 2000. On the 22nd of May 2006 the Applicant filed a protest against the unjustified delay of taking a decision. By a letter of the same date a request was made for a provisional judgment. By judgment of the 14th of June 2006 (AWB 06/2287) the summary trial judge of this court and division allowed the request and ordered the Defendant to forward the application to the Central Agency for the Reception of Asylum Seekers within 4 working days after the ruling of concerned judgment, together with the recommendation from the Bureau of Medical Advisement. By a decision of the 2nd of August 2006 the Defendant denied the request for analogue application of Article 64 of the Aliens Act 2000. By a letter of the 2nd of August 2006 the Applicant's procedural representative reported that the protest henceforth will be directed against the decision of the 2nd of August 2006 (AWB 06/36573). Moreover the summary trial judge asked the Applicant to change the initial claim of the Applicant's request for a provisional judgment in the sense that it now concerns a claim for the grant of reception within a three day timeframe instead. By current judgment, on the 25th of August 2006, the request for a provisional judgment is denied.

5. Applicant and his mother are currently residing in an emergency reception that has been arranged by a church. This emergency reception is meant as a (highly) temporary solution. The Applicant and his mother will be left to live on the streets soon.

III. CONSIDERATIONS

The Defendant argues that the Applicant does not belong toany of the categories of asylum seekers to whom reception is offered as stipulated in Article 3, second and third paragraph, of the Regulation Provisions Asylum Seekers and other categories of immigrants { Regelingverstrekkingenasielzoekers en anderecategorieënvreemdelingen } 2005 (hereinafter referred to as Regulation Provisions Asylum Seekers). The Applicant never issued an application for asylum and is therefore no asylum seeker, whereas the Central Agency for the Reception of Asylum Seekers only receives asylum seekers. The Aapplicant's residence permit for the purpose of "medical treatment" concerns a regular application and does not create a (new) right to reception. If the Applicants' appeal on his medical conditions is to be interpreted as an appeal on the inherent margin of appreciation aslaid down in Article 4:84 of the GALA; then the Defendant argues that the Regulation Provisions Asylum Seekers is a generally binding regulation and that deviation from said regulation is not possible by virtue of Article 4:84 of the GALA. The Defendant reported in session that the Applicant in his application did not appeal to the CRC. The Defendant did henceforth not act carelessly in the appealed decision by not showing that it had deliberated upon the question of whether or not the Applicant on account of this treaty possibly enjoyed a right to reception.

2. The Applicant brought the following statements forward in appeal –summarily-. The Defendant challenged the appealed decisiononly in relation to Article 1, first paragraph, *chapeau*, and under D, of the Regulation Provisions Asylum Seekers and neglected the stipulation of the 3rd Article, third paragraph, of the Regulation Provisions Asylum Seekers. The immigrant's expulsion is omitted on grounds of Article 64 of the *Aliens Act* 2000, is repeated in Article 3, third paragraph, sub f of the Asylum Seeker's Regulation Provisions with the categories mentioned in the first paragraph of Article 3. The Applicant appealed henceforth to the Convention on the Rights of the Child (CRC). In session this appeal has been further elaborated upon and brought forward as the appeal on abovementioned treaty especially focuses on Article 23, the Article that specifically relates to handicapped children. In the Applicant's understanding, in the appealed decision an unjustified lack of consideration has been given to his interest and incorrectly not regarded whether the Applicant on basis of this Article should have been, bypassing national legislation, offered reception or not.

3.1 The court holds the opinion that the first complaint of the Applicant fails.

To the Applicant it can notwithstanding be acceded that the Defendants' motivation in the appealed decision involving the challenge of the categories mentioned in Article 3 of the Regulation Provisions Asylum Seekers is very brief.

However, the fact remains that the Defendant in his last consideration of the appealed decision decided that the Applicant could not derive a right from the second nor third paragraph of Article 3 of the Regulation Provisions Asylum Seekers to reception, and thus that the Defendant indeed considered whether or not the Applicant could be classified under

the categories of persons described in the third paragraph of Article 3 of the Asylum seeker's Regulation Provisions. That the Defendant neglected the stipulations of Article 3 of the Regulation Provisions Asylum Seekers, cannot be acknowledged. Therefore the court is of the opinion that the Defendant decided on valid arguments that the Applicant does not derive a right to reception from the abovementioned stipulations of the Regulation Provisions Asylum Seekers. The Applicant is not nor has ever been an asylum seeker. At the time of formation of the appealed decision, the Immigration and Naturalization Service decided that it was out of the question that there was a situation analogous to Article 64 of the *Aliens Act* 2000. Moreover it was not claimed nor proven to be the case that the Applicant belongs to one of those other categories as mentioned in Article 3 Regulation Provision Asylum Seekers.

4.1 With regards to the Applicant's appeal to Article 23 of the CRC the court considers the following.

4.2. Article 23 of the CRC stipulates –insofar as applies here- :

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present Article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4.3 As the court understands it, the stipulations of the second paragraph of Article 23 of the CRC, which dictates that States should guarantee and encourage that the handicapped child and those responsible for his care will receive special care, together with the third paragraph which dictates that the offered care (mentioned in the second paragraph) - whenever possible – shall be provided free of charge and, that said care shall be designed to ensure that the disabled child has effective access to *inter alia* health care; are both binding on all persons treaty regulations in the sense of Article 94 of the Dutch Constitution. It here concerns an unconditional, concrete, imperative and results-orientated formulation of an obligation for the State to make sure that handicapped children in cases in which a request for assistance is made, effectively receive that assistance they require, which befits the situation, regarding the capabilities and condition of the child. Moreover this assistance – whenever possible- should be provided free of charge, and furthermore be designed to ensure that there is effective access to health care.

4.4 The court considers, referring to the above mentioned in Section 2 admitted facts and circumstances (as to the facts and circumstances of the case), that it is not disputed that the Applicant is a multiply-handicapped very young child who receives intensive medical treatment. The Applicant and his mother are bound to end up on the streets soon. From that situation it will be difficult to maintain access to the medical care that the Applicant currently receives and requires.

4.5 Nature, content and meaning of the in Section 4.3 described stipulations of the second and third paragraph of Article 23 of the CRC, considered in context within the Section 4.4 mentioned special conditions wherein the Applicant resides; (which can hardly be defined anything short of pressing) bring the Court to the conclusion that Applicant can directly appeal to the mentioned stipulations of Article 23 of the CRC.

5. The Applicant complained that the Defendant in the appealed decision unrightfully neglected to consider the question of whether the Applicant should not after all, in spite of national legislation, in the light of Article 23 of the CRC, be granted reception. It must be conceded to the Defendant that the Applicant in his application of the 9th of June 2006 did not explicitly bring forward Article 23 of the CRC per se. However the Applicant pointed out in his application that he was multiply-handicapped and the subsequent consequences of being such, and also brought forward that he is of the opinion that on grounds thereof his case renders a necessity to reception. Because the Applicant in fact brought forward the relevant facts and circumstances for his appeal on this (which can hardly be defined anything short of pressing), the court agrees with the Applicant. Therefore it was indeed an obligation of the Defendant to consider, after assessing that the Applicant did not enjoy a right to reception according to national legislation, whether or not the Applicant, looking at the pressing circumstances, on the grounds of international treaty regulations could derive a right to reception. An acknowledgement that national legislation in this particular instance should be left out of application should have been subsequent to this consideration. Bearing in mind the circumstances of the case at hand it should have been evident to include Article 23 of the CRC, which applies specifically to handicapped children, into the decision-making. Because the Defendant neglected to do so, the court agrees with the Applicant that the appealed decision is not based on a thorough preparation and is lacking a decent motivation.

6. The previous statements lead to the conclusion that the appealed decision was formed contrary to the Articles 3:2 and 3:46 of the GALA. Henceforth the appeal will be declared as well-founded, the appealed decision terminated and ruled that Defendant should take a new decision with due regard to this judgment. Bearing in mind the medical situation of the Applicant, the court determines that the Defendant is to take a new decision within a week.

7. Considering the aforementioned, there is moreover cause to condemn the Defendant as a wronged party so costs and expenses that the Applicant was reasonably incurred as a necessary consequence of the processing of his appeal are ordered. These costs are on basis of what is decided in the Act procedural costs public law { Besluitproceskostenbestuursrecht} determined to be € 644,-- as costs of issued legal council (1 point for the appeal, 1point for apparition in court; value per point € 322,--, multiplying factor 1).

III. FOR THESE REASONS THE COURT,

1. declares the appeal well-founded;

2. terminates the appealed decision;

3. decides that the Defendant is to take a new decision within a week after the sending of this ruling with due regard to this judgment;

4. condemns the Defendant to pay the procedural costs and expenses, estimated at €644,-- (in words: six hundred and forty four euro), to be paid by the State of the Netherlands to the court registrar.

Ruled by mr.drs. H.J.M. Baldinger, chairman, in presence of mr. G. Panday, registrar, and made public on the 25th of August 2006.

The registrar The chairman

Copy of instrument sent on:

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This judgment can be made subject to further appeal at the Administrative Section of the Council of State { Afdelingbestuursrechtspraak van de Raad van State} (address: Raad van State, AfdelingBestuursrechtspraak, Hogerberoepvreemdelingenzaken, postbus 16113, 2500 BC ‘s-Gravenhage). As a result of Article 69 first paragraph of the *Aliens Act* 2000, the timeframe for the appliance of further appeal is four weeks. Besides the requirements the appeal must fulfill on the basis of Article 6:5 of the GALA (such as the issuing of a copy of instrument), the appeal should contain one or more complaints in relation to Article 85, first paragraph, of the *Aliens Act* 2000. Article 6:6 of the GALA (failure to make an apparition recovery) is inapplicable.