SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
1949 - 2024
CONSEIL DE L'EUROPE

Contact: Zoe Bryanston-Cross
Tel: 03.90.21.59.62

Date: 24/06/2024

DH-DD(2024)707

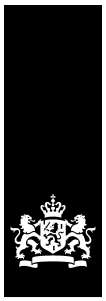
Meeting:	1507th meeting (September 2024) (DH)
Item reference:	Action Report (20/06/2024)

Communication from the Netherlands concerning the case of Maassen v. the Netherlands (Application No. 10982/15)

* * * * * * * * * * * *

Réunion :	1507e réunion (septembre 2024) (DH)
Référence du point :	Bilan d'action (20/06/2024)

Communication du Pays-Bas concernant l'affaire Maassen c. Pays-Bas (requête n° 10982/15) ***(anglais uniquement)***



Action Report
of the Government of the Kingdom of the Netherlands
on the implementation of the judgment of the Court
concerning application no. 10982/15

MAASSEN

v.

The Netherlands

Judgment of 9 February 2021
Final on 9 May 2021

Introduction

1. On 9 November 2021 the Government of the Netherlands ('the Government') submitted three action reports in the cases of MAASSEN, ZOHLANDT and HASSELBAINK ('the applicants'). Having regard to the fact that all three cases concern the issue of insufficiently reasoned decisions regarding the applicant's pre-trial detention, the Committee of Ministers has classified them as one group under the leading case of *Maassen v. the Netherlands* (application no. 10982/15).

2. On 24 February 2015 Mr Marlon MAASSEN submitted an application the European Court of Human Rights ('the Court') under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). On 9 February 2021 the Court found a violation of Article 5 § 3 of the Convention. Furthermore, the Court held that the Government was to pay the applicant €1,600 (one thousand six hundred euros) within three months in respect of non-pecuniary damage.

3. On 16 November 2016 Mr Ferdinand Gerardus ZOHLANDT submitted an application to the Court under Article 34 of the Convention. On 9 February 2021 the Court found a violation of Article 5 § 3 of the Convention.

4. On 29 November 2016 Mr Frederik Egbert HASSELBAINK submitted an application to the Court under Article 34 of the Convention. On 9 February 2021 the Court found a violation of Article 5 § 3 and § 4 of the Convention. Furthermore, the Court held that the Government was to pay the applicant within three months €1,300 (one thousand three hundred euros) in respect of non-pecuniary damage; and €196 (one hundred and sixty-nine euros) in respect of costs and expenses.

5. Given that the individual measures were resolved, the Committee of Ministers closed the supervision of the *Zohlandt* and *Hasselbaink* cases in 2022 (Final Resolution CM/ResDH(2022)404), and the general measures required continue to be supervised under the leading *Maassen* case. With reference to the standard classification procedure[1], the Government therefore wishes to present its action report for the remaining *Maassen* case, with a view to informing the Committee of Ministers about the measures taken, and to respectfully request the Committee of Ministers, after examination of the information, to consider closure of its supervision of the case.

Case description

6. These cases concern the domestic courts' insufficiently reasoned decisions (2014-2017) regarding the applicants' continued pre-trial detention (violations of Article 5 § 3). *Hasselbaink*

[1] As set out in CM/Inf/DH(2010)45 and CM/Inf/DH(2010)37E.

furthermore concerns a violation of the applicant's right to a speedy judicial review of his pre-trial detention (violation of Article 5 § 4).

7. Regarding the Article 5 § 3 violations, the Court held that the domestic courts' decisions prolonging all applicants' pre-trial detention failed to address the applicants' arguments contesting the persistence of the grounds that had justified their initial placement in pre-trial detention. Those subsequent decisions merely referred back to the reasons set out in the decisions taken at the early stages of the proceedings and confirmed, in a relatively stereotyped way and without any further explanation, the validity of the assessments previously made. They thus constituted little more than a chain of references leading back to these early orders concerning the applicants' pre-trail detention (*Maassen*, § 64; *Zohlandt*, § 57; *Hasselbaink*, § 76). The Court furthermore held that the depth of the courtroom discussions, reflected in the official records of the hearings concerned, could not compensate for the lack of detail in the court decisions (*Maassen*, § 65; *Zohlandt*, § 58; *Hasselbaink*, § 77).

8. Regarding the Article 5 § 4 violation in *Hasselbaink*, the Court noted that it took the Rotterdam District Court 22 days to examine the applicant's request of 13 July 2016 for release from pre-trial detention. The Court considered that this period fell short of the requirement of a speedy judicial decision within the meaning of Article 5 § 4 of the Convention (*Hasselbaink*, § 86).

Just Satisfaction

9. In its *Maassen* judgment the Court held that the Government must pay the applicant, within three months from the date on which the judgment became final in accordance with Article 44 § 2 of the Convention, €1,600 in respect of non-pecuniary damage, plus any tax that may be chargeable. The Government paid said amount and informed the Execution Department of this by submitting the payment registration form by email of 23 July 2021.

Individual Measures

10. The Government is of the opinion that, having paid the just satisfaction, it has taken adequate individual measures concerning the violation of article 5 § 3 of the Convention found in *Maassen*.

11. Additional individual measures following the Court's judgments are not necessary, since no consequences of the violation for the applicant persist.

12. The applicant was convicted on 15 September 2015 by final judgment of the Central Netherlands District Court and sentenced to 18 months imprisonment, including six months suspended, with an operational period of two years. The time that the applicant spent in pre-trial detention was

subtracted. The applicant was released on 30 September 2015, time spent in pre-trial detention having been subtracted from the imprisonment imposed by the District Court.

General Measures

13. The Government notes that the violations in the present cases do not stem from national legislation.

14. In general, the reasons given for ordering and extending pre-trial detention have been the subject of debate for some time in the Netherlands, both within and beyond the judiciary. In early 2017 the Netherlands Institute for Human Rights ('NIHR') carried out a study into the reasons given by courts for ordering pre-trial detention. This study showed that courts often gave insufficient reasons (in writing) for decisions to impose pre-trial detention.[2]

15. In recent years the judiciary has implemented considerable improvements. On 15 May 2017 the then Minister of Security and Justice informed the House of Representatives, in response to parliamentary questions, that the judiciary was taking steps to ensure that decisions on pre-trial detention are better substantiated, for instance by introducing professional standards, drawn up by the judiciary itself, in which the importance of giving sound reasons for decisions is emphasised.[3] These standards are quality norms developed by the courts and show how courts jointly fulfil their responsibility for judicial practice. They are intended to complement legislation and other instruments which aim to improve the quality of the work of the criminal courts. In this connection the Minister referred specifically to standard no. 2.8, which reads as follows: 'the criminal court issues a judgment that is clear, substantiated and appropriate to the case.' The standards specify that substantive reasons must be given for decisions ordering pre-trial detention. Previously, the judiciary used a form with tick boxed and standards text blocks; judges were required to tick one applicable ground from the Code of Criminal Procedure (for example, 'risk of absconding).[4] These forms have been replaced by court orders which allow scope for giving reasons for decisions regarding pre-trial detention.

16. The Government notes in this connection that the *Maassen* application was submitted to the Court on 24 February 2015 and that the *Zohlandt* and *Hasselbaink* applications were submitted to the Court on 16 and 29 November 2016 respectively. It was not until 2016 that all Dutch courts began implementing the professional standards mentioned above.[5] Since then, the issue has been receiving extensive attention within the courts.

---

[2] Netherlands Institute for Human Rights, "Tekst en uitleg', study into the reasons given for ordering pre-trial detention', March 2017.
[3] See https://www.rechtspraak.nl/SiteCollectionDocuments/professionele-standaarden-strafrecht.pdf
[4] See Detail 2017D12881, House of Representatives of the States General.
[5] *Ibid*.

17. Partly in view of the fact that improvement measures have been taken in the past few years and the fact that the applications date from around five to six years ago, the National Committee on Criminal Law Matters (*Landelijk Overleg Vakinhoud Strafrecht*; LOVS)[6] requested district courts and appeal courts for information on their approach to giving reasons in writing in pre-trial detention cases. From their reactions it follow that the courts do not use the simplistic forms with tick boxes anymore. The picture further emerged from the responses nationwide that in recent years more attention has been paid to substantiating decisions in the context of pre-trial detention. In addition, the LOVS regularly highlights the Court's case law on the subject.

18. In a recent pre-trial detention case, the 's-Hertogenbosch Court of Appeal referred to the cases of *Maassen*, *Zohlandt* and *Hasselbaink*, and emphasised that the obligation to adopt reasoned decisions already existed on the basis of the Dutch Code of Criminal Procedure but had been expressly confirmed by the Court.[7]

19. On 9 November 2021 the Supreme Court handed down judgment in a complaint concerning decisions on pre-trial detention taken by the appeal court, with explicit reference to the Court's judgments in the cases *Maassen*, *Zohlandt* and *Hasselbaink*, in which it held that decisions relating to pre-trial detention must always contain a statement of reasons tailored to the case at hand.[8] Although the Supreme Court concluded that the defendant did not have the required interest in a review of the complaint, the Supreme Court saw reason to note the following:

> 2.6.2
> The complaints presented in the ground of appeal in cassation concerning the appeal court's decisions on pre-trial detention are based on a number of recent judgments by the European Court on Human Rights ('ECtHR') in which a violation of Article 5 of the European Convention on Human Rights ('ECHR') was found (ECtHR 9 February 2021, appl. 10982/15 (*Maassen v. the Netherlands*); ECtHR 9 February 2021, appl. 73329/166 (*Hasselbaink v. the Netherlands*) and ECtHR 9 February 2021, appl. 69491/16 (*Zohlandt v. the Netherlands*)).
>
> 2.6.3
> These ECtHR judgments concern a situation in which the suspect is deprived of their liberty on reasonable suspicion of having committed an offence. This is a situation as referred to in Article 5, paragraph 1 (c), ECHR. In its case law, the ECtHR considers *inter alia* that 'justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities' and that 'the domestic courts' arguments for and against release must not be "general and abstract", but contain references to specific facts and the personal circumstances justifying an applicant's detention' (see e.g. ECtHR 9 February 2021, appl. 73329/16 (*Hasselbaink v. the Netherlands*), § 69 and § 72).
>
> 2.6.4
> In the present case the appeal court – as is apparent from the course of proceedings set out in section 2.4 of the Advocate General's conclusion – based its decision to extend the suspect's detention in part on the

[6] This Committee consists of the presiding judges and team chairs of the criminal law chambers/divisions of district courts and appeal courts respectively.
[7] Judgment 's-Hertogenbosch Court of Appeal, 18 March 2021, ECLI:NL:GHSHE:2021:910.
[8] Judgment Supreme Court, 9 November 2021, ECLI:NL:HR:2021:1662.

fact that in the judgment at first instance a custodial sentence was imposed on the suspect of at least the same length of time that the suspect had already spent in pre-trial detention, including the extension ordered by the appeal court. In doing so the appeal court applied article 75, paragraph 1, third sentence of the Code of Criminal Procedure. The situation therefore does not fall under Article 5, paragraph 1 (c), ECHR, but under Article 5, paragraph 1 (a), ECHR. The latter provision relates to the detention of a person after conviction by a competent court. This follows *inter alia* from the ECtHR's judgment in *Saez . the Netherlands* (25 May 2004, 51197/99, in which it ruled:

'The Court recalls its constant case-law that, for the purposes of the Convention, detention while an appeal against a conviction by a first-instance court is pending is to be considered as detention "after conviction" within the meaning of Article 5 § 1 (a) of the Convention, even if the detention continues to be considered as detention on remand under domestic law (see, *Wemhoff v Germany*, judgment of 27 June 1968, Series A no. 7, pp, 23-24, § 9; *B. v. Austria*, judgment of 28 March 1990, Series A no, 175, pp. 14-15, §§ 35-40; and *Hristov v Bulgaria* (dec.), no. 35436/97, 19 September 2000).'

This means that the EctHR judgments invoked in the grounds for appeal relate to a different situation than the situation in the present case.

2.6.5

Irrespective of the above – even if after the judgment in the criminal proceedings at first instance the pre-trial detention comes to be based in part or in whole on the reason given in article 75, paragraph 1, third sentence of the Code of Criminal Procedure – decisions on pre-trial detention must always give reasons relating specifically to the case at hand. This general requirement to give specific reasons is reflected in article 24, paragraph 1 of the Code of Criminal Procedure and also arises in part from the conditions set in article 78, paragraph 2 of the Code of Criminal Procedure for the pre-trial detention orders and orders for the extension thereof.

20. In the literature it has been stated that following this judgment by the Supreme Court there appears to be a cautiously positive development.[9] It has also been stated recently in the literature that shortly after the ECHR handed down these judgments, a change appeared to start happening in the way in which pre-trial detention is applied and that more courts have begun providing better explanations for the reasons of their decisions.[10]

21. The judgments of the Court have been brought to the attention of district courts and courts of appeal, the Council for the Judiciary, the Supreme Court and the Public Prosecution Service. The Council for the Judiciary has circulated the judgments throughout the court system. The Dutch courts and the Public Prosecution Service have therefore been sufficiently informed of the Court's judgments.

22. Furthermore, the Government notes that under Article 93 of the Constitution, the rights and freedoms set forth in the Convention have direct effect in the domestic jurisdiction. Pursuant to Article 94 of the Constitution, statutory regulations in force within the Kingdom of the Netherlands are not applicable of their application conflicts with rights under the Convention. Given the direct effect of the Court's judgments in the Netherlands (see Article 93 of the Constitution), all

[9] See G.H. Meijer, *Elementair Formeel Strafrecht (PWS Nr. 9)*, Deventer: Wolters Kluwer 2022, para. 4.6.
[10] See C. Sam-Sin & B. de Jonge, ' Vrijheid, blijheid. Of: Nederland vogelvrij?', NJB 2021/288, en G. Mols, 'Vrij en blij?', NJB 2022/237.

authorities concerned are expected to align their practice with the present judgments. In the Government's view the publication/circulation of the judgments should therefore prevent similar violations in the future.

23. With regard to the violation of Article 5 § 4 ECHR in *Hasselbaink*, and with specific reference to the fact that the Court took note of the President of the Rotterdam Regional Court having admitted that the examination of the applicant's application had not been scheduled with the habitual diligence, offering her apologies (§ 86), the Government notes that this is an isolated case and given the direct effect of the Convention and the Court's case-law (see above) no further general measures are necessary in addition to publication and dissemination already reported in the previous action report of 25 November 2022 (DH-DD(2022)1321), which led to the closure of *Zohlandt* and *Hasselbaink* (see above).

24. The Government attaches seven recent decisions on pre-trial detention that show the positive development in national practice in line with the judgment in the *Maassen* case. Three by the Rotterdam district Court, two by The Hague Court of Appeal, one by the 's-Hertogenbosch Court of Appeal, and one by the Amsterdam Court of Appeal (Annexes I-VII). A summary of these decisions can be found below. In the seven decisions, the courts gave a tailored reasoning for the order for pre-trial detention or the continuation of pre-trial detention, referring to the specific circumstances of the case and/or weighing personal interests:

The Hague Court of Appeal, ECLI:NL:GHDHA:2022:872, 24-03-2022
The defendant appealed against the 90-day pre-trial detention ordered by the District Court. However, the Court of Appeal ruled that serious objections were present to impose the pre-trial detention which could not lead to suspension, given the gravity of the alleged offences of cocaine trafficking and large-scale trafficking in soft drugs.

District Court of Rotterdam, ECLI:NL:RBROT: 2022:911, 01-02-2022
The defense requested the suspension of the pre-trial detention, but the Court concluded that the suspicion and serious objections that led to the detention order are still present. The facts of the case involved the illegal entry into port area, which can be dealt with more severely under national criminal law since the implementation of the new article 138aa Dutch Criminal Code (DCC). This framework makes it possible to deal differently and (much) more severely with suspects against whom serious objections exist in relation to art. 138aa DCC than prior to the introduction of this new legal provision. The Court ordered the pre-trail detention for 30 days.

District Court of Rotterdam, ECLI:NL:RBROT:2023:1052, 14-02-2023
The examining magistrate rejected the public prosecutor's request for the accused's detention. The public prosecutor appealed this order, insofar as it rejected the claim. The facts of the case involved the illegal entry into the port area criminalized under article 138aa Dutch Criminal Code (DCC). Instead of a fine, which in practice often amounted to a €95 fine, the maximum penalty for this newly implemented offence is a maximum of one year's imprisonment for the

mere presence on one of the premises described in the law. As these are offences which may endanger the health or safety of persons, and as the accused is not a first offender, the Court ordered the pre-trial detention of the accused for 14 days.

District Court of Rotterdam, ECLI: NL:RBROT:2022:3195, 22-03-2022

The Court found that there were sufficiently serious objections for pre-trial detention in the case at hand, as that the suspect used unencrypted messaging services and engaged in chats conversation about batches of narcotics over the period of several years. Additionally, 400,000 euros, a phone with the Sky-ECC app and a firearm were found in the suspect's home. These facts suggested that accused is involved in drug trafficking which serves as sufficient grounds to continue the pre-trial detention. However, the Court did ask the prosecutor to ensure that the probation service investigates the possibility of a suspension with electronic monitoring and a location order.

Hertogenbosch Court of Appeal, ECLI:NL:GHSHE:2022:826, 10-03-2022

The defendant appealed his case regarding the suspension of his pre-trial detention, after the District Court ruled that the accused is under serious suspicion of involvement in the production and trafficking of synthetic drugs and there there is a risk of recidivism. The defendant argued that this danger could be overcome by imposing conditions on the suspension of provisional detention. The Court of Appeal considered that with no prospect of a substantive hearing, lesser demands could be made on the defendant's personal interests to suspend pre-trial detention. In the present the Court stated that although there was no prospect of a substantive hearing as yet, in view of, amongst others, the defense’s investigative wishes, these factors are not yet of such importance that a suspension would be justified at this stage. The Court dismisses the appeal.

Amsterdam Court of Appeal, ECLI:GHAMS:2022:1236, 02-03-2022

The prosecution appealed the District Court's decision to dismiss the defendant's pre-trial detention order. Unlike the District Court, the Appeals Court considers the risk of recidivism was present, due to the involvement of the defendant in large-scale cocaine trafficking and money laundering. He also made use of crypto-phones, leading to a serious risk of the continuation of criminal activities. The Court upheld the appeal and ordered defendant's detention for 90 days.

The Hague Court of Appeal, ECLI:NL:GHDHA:2023:26, 12-01-2023

The defendant requested the Court of Appeal to suspend his pre-trial detention in view of the personal circumstance that he wishes to serve his already imposed sentence by the French Court. The court considers that the enforcement of the pre-trial detention takes precedence over the enforcement of a custodial sentence abroad. No personal interests of the accused which necessitate deviation from the order of execution became apparent and the request for suspension of pre-trial detention was rejected.

25. In addition, the Government is aware of an ongoing dialogue between the NIHR and the Council of the Judiciary regarding the training of magistrates and legal support staff on the requirements which the Convention imposes in respect of proper reasoning for ordering and extending pre-trail detention. The NIHR will conduct a study into reasoning of decisions ordering or extending pre-trial detention. In addition, the NIHR and the Council for the Judiciary are in regular contact.

Additional information

26. The judgments and their consequences have been discussed in:
    - *Nederlandse Jurisprudentie* (NJ), 2021/94
    - *Nederlands Juristenblad* (NJB), 2021/1397
    - *Nederlands Juristenblad* (NJB), 2021/905
    - *Nederlands Juristenblad* (NJB), 2021/2888
    - *Nederlands Juristenblad* (NJB), 2022/237
    - *Delikt & Delinkwent*, OM en rechter, 2021/33
    - G.J.M. Corstens, *Het Nederlands strafprocesrecht*, onder redactie van M.J. Borgers en T. Kooijmans, Deventer: Wolters Kluwer 2021, XI.7 Voorlopige hechtenis: voorwaarden

27. As with all judgments of the Court, a summary of these judgments and the measures taken have been included in the Government's annual report (*Rapportage Internationale Mensenrechtenprocedures*) to parliament, which was sent to parliament on 7 June 2022. The annual reports are publicly available and widely disseminated to interested parties. Summaries of the judgments have also been included on the website of the Centre for International Law (www.centruminternationaalrecht.nl), the Kingdom of the Netherlands' centre of expertise for awareness, interpretation, application and enforcement of international law.

Conclusion

28. The Government believes that the measures taken fulfil the requirements that arise from the Court's *Maassen* judgment and that taking these measures will prevent similar violations from occurring in the future.

29. Since there are no measures or further developments outstanding, the Government respectfully requests the Committee of Ministers to consider closure of its supervision of the case.

The Hague, 20 June 2024

Vincent de Graaf
Deputy Agent of the Government of the Kingdom of the Netherlands