



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

COURT (CHAMBER)

CASE OF WASSINK v. THE NETHERLANDS

(Application no. 12535/86)

JUDGMENT

STRASBOURG

27 September 1990

In the Wassink case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court**, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr J. DE MEYER,
Mr H.L.J. ROELVINK, *ad hoc judge*,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 April and 27 August 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 September 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12535/86) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by Mr Jan Wassink, a Netherlands national, on 17 October 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 §§ 1, 4 and 5 and Article 6 § 1 (art. 5-1, art. 5-4, art. 5-5, art. 6-1).

* Note by the Registrar: The case is numbered 21/1989/181/239. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** Note by the Registrar: The amendments to the Rules of Court which came into force on 1 April 1989 apply to this case.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 20 October 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr L.-E. Pettiti and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

On 14 September 1989 Mr Martens had withdrawn from the Chamber pursuant to Rule 24 § 2 because he had sat as a member of the Netherlands Supreme Court (Hoge Raad) in the case. On 2 November the Netherlands Government ("the Government") notified the Registrar of the appointment of Mr H.L.J. Roelvink, a member of the Supreme Court, as an ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43). Subsequently, Mr B. Walsh and Mr J. De Meyer, substitute judges, replaced Mrs Bindschedler-Robert and Mr Valticos who were unable to take part in the consideration of the case (Rule 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Deputy Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1).

In accordance with the orders made in consequence, the Registrar received the Government's memorial on 28 February 1990.

5. On 13 March the Commission produced various documents, as requested by the Registrar on the instructions of the Court.

6. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 17 January 1990 that the oral proceedings should open on 23 April 1990 (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Miss D.S. VAN HEUKELOM, Assistant Legal Adviser,

Ministry of Foreign Affairs,

Agent,

Mr J.C. DE WIJKERSLOOTH DE WEERDESTEIJN, Landsadvokaat, *Counsel*

- for the Commission

Mr H. DANIELIUS,

Delegate;

- for the applicant

Mrs G.E.M. LATER, advokate en procureur,

Counsel,

Mr H.C.A. JONGENELEN,

Adviser.

The Court heard addresses by Miss van Heukelom and Mr De Wijkerslooth de Weerdesteijn for the Government, by Mr Danelius for the Commission and by Mrs Later for the applicant.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Jan Wassink, a Netherlands national, currently resides at Klazienaveen in the Netherlands.

9. On 15 November 1985 the Burgomaster of Emmen ordered Mr Wassink's emergency confinement in a psychiatric hospital pursuant to section 35 (b) of the Mentally Ill Persons Act 1884 (*Krankzinnigenwet*, see paragraph 16 below). His decision was based on a medical report drawn up the same day by a psychiatrist, Dr S., according to which there were serious grounds for believing that the applicant suffered from a mental disorder representing an immediate danger to himself, to others and to public order. Mr Wassink had already threatened members of his family and attacked a neighbour in her house.

10. On 19 November 1985 the Crown Prosecutor (*Officier van Justitie*) requested the President of the District Court (*Arrondissementsrechtbank*) of Assen to extend the applicant's confinement. In addition to the file attached to this application, the President received a police report dated 18 November 1985 containing the statements of various witnesses and of Mr Wassink's wife, and a memorandum, of the same date, setting out the opinion of the applicant's doctor, Dr R.

11. On 20 November, in the presence of Mr Jongeneelen, Mr Wassink's "confidential counsellor" (*patientenvertrouwenspersoon*), the District Court President interviewed the applicant together with a psychiatrist, Dr V. He then consulted three other persons by telephone - Dr R., Mr Wassink's wife and another doctor, Dr H. - and made a brief note of their statements. Again by telephone, he gave a summary of the resulting information to Mr Jongeneelen.

In a letter of 9 January 1986, Mr Jongeneelen told the applicant's lawyer that this conversation, which had lasted some ten minutes, had taken place at his request and had given him (Mr Jongeneelen) an opportunity to put forward his views; a few days after the conversation, the President had communicated the whole file to him.

12. On 25 November 1985 the President ordered the continuation of the applicant's confinement pursuant to sections 35 (i) and 35 (j) of the Mentally Ill Persons Act. Referring to the medical report by Dr S. (see

paragraph 9 above) and the statements of Mr Wassink, Dr. V. and the three persons whom he had questioned by telephone (see paragraph 11 above), he considered that, because of his mental illness, the applicant was an immediate danger to himself, to others and to public order. The President added that it was clear from the statements which he himself had obtained and those contained in the police report of 18 November 1985 that Mr Wassink had already caused considerable disturbance to his neighbours. It was therefore to be feared that, as he was unaware of the effect of his actions on others, he would continue his unacceptable behaviour if he were to return home.

13. Mr Wassink left the hospital on 20 December 1985. On 31 December the President of the District Court sent to the applicant's lawyer, at the latter's request, various documents from the file, including the note that he had made after interviewing Mr Wassink and hearing the views of the persons whom he had questioned by telephone. He explained that circumstances relating to the organisation of the court made it impossible to arrange for a registrar to be present in every case of emergency confinement. There were three large psychiatric hospitals within the court's jurisdiction and it was a small court.

14. On 24 January 1986 the applicant filed an appeal on points of law with the Supreme Court (Hoge Raad) against the order of 25 November 1985. He complained that the President of the District Court had not specified sufficiently the nature of the danger which his mental illness represented for himself and for public order, that the President had held a hearing without a registrar's being present to draw up a record and, finally, that, before making the order, the President had failed to communicate to him the text of the statements of the persons whom he had telephoned, thereby depriving the applicant of any opportunity to react thereto.

15. In his submissions of 11 March 1986, the Attorney General at the Supreme Court (Procureur-Generaal bij de Hoge Raad) expressed the view that the second of these grounds (and only the second) was well-founded. However, on 18 April 1986 the Supreme Court declared the appeal inadmissible, finding that Mr Wassink no longer had any interest in having the contested order quashed since the maximum period for an emergency confinement had already expired.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legislation on confinement

16. In the Netherlands the confinement of mentally ill persons is governed by an Act of 27 April 1884 on State Supervision of Mentally Ill

Persons, commonly known as the Mentally Ill Persons Act (Krankzinnigenwet, "the 1884 Act").

17. Sections 35 (b) to 35 (j) make provision for the emergency committal procedure which was followed in the present case.

Where there are serious grounds for believing that a person represents an immediate danger to himself, to others or to public order on account of mental illness, the burgomaster of the municipality in which he resides is empowered to order his compulsory committal (inbewaringstelling) to a psychiatric hospital (section 35 (b)).

In so doing, the Burgomaster is required first to seek the opinion of a psychiatrist or, if that proves impossible, of another medical practitioner (section 35 (c)). As soon as he has ordered a confinement, he must inform the Crown Prosecutor and transmit to him the medical certificate on which he based his decision (section 35 (e)). The Crown Prosecutor has then, in his turn, to forward the certificate to the President of the District Court, not later than the following day, requesting, where appropriate, the continuation of the confinement (section 35 (i)). The President must give his decision within three days. An order to continue the confinement is valid for three weeks, but the President may renew it for a second period of the same length if, before the expiry of the first period, an application for judicial authorisation for confinement (rechterlijke machtiging, sections 12 and 13) is made (section 35 (j)).

18. By virtue of Article 72 of Regulation I (Reglement I) made in pursuance of the Judiciary (Organisation) Act (Wet op de Rechterlijke Organisatie), "hearings and examinations" ("terechtzingtingen en verhooren") must be conducted in the presence of a registrar whose duty it is to draw up a record of the proceedings.

B. Case-law concerning confinement

19. The Netherlands Supreme Court has held that, in view of the importance of having up-to-date information as a basis for a confinement decision, the judge may be justified in using information obtained by telephone. He must, however, communicate any such information to the person concerned or his counsel in order to enable them to comment on it. The Supreme Court has quashed a number of decisions on account of a failure to comply with this requirement (see, for example, the judgments of 4 January, 10 May and 7 June 1985, Nederlandse Jurisprudentie (NJ), nos. 336, 665 and 718).

It appears from a judgment of 1 December 1989 (NJ 1990, no. 438) that the case-law on the subject may be summarised as follows:

1. if a judge obtains information by telephone, he must ensure that it is taken down in writing;

2. (a) in principle, the judge must not make use of such information unless he has advised the person concerned or his counsel of its substance and has given them sufficient opportunity to comment on it;

(b) this may also be done by telephone;

3. the decision or the documents of the court proceedings must show that the requirements referred to under 2 (a) have been met;

4. only under special circumstances may the judge decide not to observe the rule referred to under 2 (a);

5. in such cases the reasons must be stated so as to enable the Supreme Court to assess whether rule 4 has been complied with;

6. if a statement taken by telephone contains information concerning points that are essential for the decision and the judge has not unequivocally discounted that statement in his decision, it must be assumed that the judge made use of that information when reaching his decision.

20. On the question of the presence and the role of the registrar during hearings held pursuant to the 1884 Act, the Supreme Court has stated as follows:

"Having regard to the serious nature of decisions taken under the Mentally Ill Persons Act, to the requirements which have accordingly to be complied with in respect of the statement of the reasons on which they are based and to the importance of its being possible to review, in cassation proceedings, their conformity with those requirements, a record, signed by the registrar, must be made of any interviews effected and any questioning at the hearing. A copy of the record must be given to the person concerned if he so requests." (judgment of 18 May 1984, NJ 1984, no. 514)

In a judgment of 14 February 1986 (NJ 1986, no. 400), the Supreme Court held that, if these conditions were not complied with, the decision ordering the confinement was to be set aside, even though the person concerned had not indicated what consequences the failure to observe these requirements actually had in relation to him.

PROCEEDINGS BEFORE THE COMMISSION

21. In his application (no. 12535/86) lodged with the Commission on 17 October 1986, Mr Wassink alleged that his confinement in a psychiatric hospital had not been ordered "in accordance with a procedure prescribed by law" and had not been "lawful", within the meaning of Article 5 § 1 (art. 5-1) of the Convention. He also complained of a breach of paragraphs 4 and 5 of Article 5 (art. 5-4, art. 5-5), alleging that he had not been given the possibility of having the lawfulness of the order of 25 November 1985 reviewed "speedily" by a court, nor obtained compensation in respect of this breach. Finally, he claimed that, in violation of Article 6 § 1 (art. 6-1), he had not received a fair trial in proceedings to obtain a decision on "contestations" (disputes) relating to his civil rights and obligations.

22. The Commission declared the application admissible on 9 December 1987. In its report of 12 July 1989 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 5 § 1 (art. 5-1) (unanimously), and of Article 5 §§ 4 and 5 (art. 5-4, art. 5-5) (by 17 votes to 1), but not of Article 6 § 1 (art. 6-1) (unanimously). The full text of its opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to this judgment*.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (art. 5-1)

23. The applicant claimed to be the victim of a violation of Article 5 § 1 (art. 5-1) which, in so far as he relied on it, provides 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:

...

(e) the lawful detention ... of persons of unsound mind ...;

..."

He alleged that the order extending his confinement in a psychiatric hospital had not been made in accordance with a procedure prescribed by law, which rendered his detention unlawful.

In the first place the President of the Assen District Court had not established that the applicant was, on account of mental illness, an immediate danger to himself, to others or to public order.

Moreover, as he had failed to read to Mr Wassink or to the latter's "confidential counsellor" the notes which he had drawn up following his telephone conversations, he had not complied with the conditions which the Supreme Court had laid down for the use of information obtained in this way (see paragraphs 11 and 19 above).

Finally, the fact that no registrar had been present at the hearing had, he claimed, infringed Article 72 of Regulation I made in pursuance of the Judiciary (Organisation) Act (see paragraphs 18 and 20 above).

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 185-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

24. On the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law", the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness (see, as the most recent authority, the *van der Leer* judgment of 21 February 1990, Series A no. 170, p. 12, § 22).

25. As regards the assessment of whether there is a "danger" for the purposes of section 35 (b) of the 1884 Act, it is in the first place for the national authorities to evaluate the evidence adduced before them in deciding whether an individual should be detained as a "person of unsound mind"; the Court's task is to review under the Convention the decisions of those authorities (see the *Winterwerp* judgment of 24 October 1979, Series A no. 33, p. 18, § 40, and the *Luberti* judgment of 23 February 1984, Series A no. 74, p. 12, § 27).

In this instance the President of the District Court had available to him four different medical opinions: the report of Dr S., the opinion of Dr V., whose views he had heard at the hearing, and those of the two doctors whom he had consulted by telephone (see paragraphs 9 and 11 above); he was also in a position to base his decision on the statements of the applicant's wife and on the police report of 18 November 1985 (see paragraph 10 above).

Like the Commission, the Court sees no grounds for questioning the weight of the evidence on which the President relied to reach his decision that it was necessary to extend Mr Wassink's confinement.

26. Secondly, the President did not read to Mr Jongeneelen the notes which he had drawn up following his telephone conversations, but informed him of the substance of the statements which he had thereby obtained; the applicant's "confidential counsellor" did not fail to comment on them. In his submissions of 11 March 1986 the Attorney General at the Supreme Court, referring to the case-law of the Supreme Court, expressed the view that the relevant rules of procedure had been complied with (see paragraph 15 above).

Accordingly, no breach of Article 5 § 1 (art. 5-1) of the Convention has been established under this head.

27. On the other hand, the fact that no registrar was present at the hearing infringed Article 72 of Regulation I made in pursuance of the Judiciary (Organisation) Act (see paragraph 18 above) and this was also the opinion of the Attorney General.

Consequently, there was in this respect a failure to comply with a "procedure prescribed by law", which amounted to a breach of Article 5 § 1 (art. 5-1) of the Convention. Indeed the Government conceded this.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 (art. 5-4)

28. The applicant also relied on Article 5 § 4 (art. 5-4), which is worded as follows:

"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."

According to the applicant, by failing to read to him or to his "confidential counsellor" the statements which he had obtained by telephone and on which he was proposing to base his decision, the President of the District Court prevented him from contesting them. Mr Wassink alleged further that the Supreme Court had deprived him of his sole remedy against the contested order by finding his appeal on points of law inadmissible because he lacked the requisite interest (see paragraph 15 above).

29. In the Government's opinion, the review required by Article 5 § 4 (art. 5-4) was in this case incorporated in the decision depriving the applicant of his liberty because that decision was taken by a judicial body (see, among other authorities, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 40, § 76, and the Bouamar judgment of 29 February 1988, Series A no. 129, pp. 22-23, § 56).

30. The President of the District Court is undoubtedly a "court" from the organisational point of view, but the European Court has consistently held that the intervention of a single body of this kind will satisfy Article 5 § 4 (art. 5-4) only on condition that "the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question"; in order to determine "whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceedings take place" (see, *inter alia*, the Bouamar judgment, cited above, p. 23, § 57).

31. Mr Wassink maintained that he had not had the benefit of such guarantees. By providing the applicant's "confidential counsellor" only with a verbal summary of the statements obtained by telephone, the President of the Assen District Court had deprived him of an appropriate opportunity to comment on them. Such a method of proceeding moreover gave rise to the danger that certain information might be ignored or misinterpreted. Finally, it prevented the person concerned from putting additional questions to the persons heard in this way. The wording of the order of 25 November 1985 showed clearly that it was based on the statements in question (see paragraph 12 above).

32. The Commission shared this view in substance. The Government, on the other hand, stressed how important it was for a judge having to take a decision concerning confinement to have the possibility of obtaining up-to-date information by telephone. This was, in their opinion, particularly true

because the order had to be made within three days and, furthermore, was valid only for three weeks.

33. The Court is fully aware of the risks inherent in the questioning by telephone of Mr Wassink's wife and two doctors. It notes nevertheless that it took place on the initiative and under the responsibility of an independent judicial officer acting under an emergency procedure whose effects were moreover limited as to their duration. The President clearly did not read out the text of his notes to the applicant's "confidential counsellor", but he gave to him a summary of his conversations and told him that they had not produced any new information. In so doing, he gave him an opportunity to comment on them. Indeed Mr Jongeneelen did so, as is shown by his correspondence with Mr Wassink's lawyer.

34. It follows that, even though the "procedure prescribed by law" within the meaning of Article 5 § 1 (art. 5-1) was not strictly followed as regards one aspect (see paragraph 27 above) - albeit not an essential one in this instance -, the judge nevertheless reviewed at the outset the lawfulness of the detention as such to an extent consistent with the requirements of paragraph 4 (art. 5-4).

35. Accordingly, it is not necessary to determine whether the remedies available against the order of the President of the Assen District Court satisfied the conditions required.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 (art. 5-5)

36. The applicant alleged a violation of Article 5 § 5 (art. 5-5), according to which:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

In his opinion, the sole provision of Netherlands law which he could have relied on in order to obtain compensation, Article 1401 of the Civil Code, only applied where damage could be shown. In this case, the existence of damage would have been almost impossible to prove because it could not be affirmed with absolute certainty that proceedings conducted in conformity with Article 5 (art. 5) of the Convention would have led to the desired result.

37. Unlike the Commission, the Government did not subscribe to this view. They considered that the right to compensation guaranteed in paragraph 5 of Article 5 (art. 5-5) was restricted to persons who had sustained damage, whether pecuniary or non-pecuniary, on account of the violation of another of the paragraphs of the Article; this was clear, in particular, from the use of the word "victim". Article 1401 of the Civil Code was therefore fully consistent with the Convention.

38. In the Court's view, paragraph 5 of Article 5 (art. 5-5) is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (art. 5-1, art. 5-2, art. 5-3, art. 5-4). It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 § 5 (art. 5-5), as for that of Article 25 (art. 25) (see, *inter alia*, the *Huvig* judgment of 24 April 1990, Series A no. 176-B, pp. 56-57, § 35), the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate.

More generally, the evidence provided to the Court does not lead to the conclusion that an action based on Article 1401 of the Netherlands Civil Code would have failed to satisfy the requirements of Article 5 § 5 (art. 5-5) of the Convention. This finding is without prejudice to the Court's competence under Article 50 (art. 50) in the matter of awarding compensation by way of just satisfaction (see the *Brogan and Others* judgment of 29 November 1988, Series A no. 145-B, p. 35, § 67).

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

39. Before the Commission the applicant also relied on Article 6 § 1 (art. 6-1), but at the hearing of 23 April 1990 he withdrew this complaint. The Court does not consider it necessary to examine the question of its own motion.

V. APPLICATION OF ARTICLE 50 (art. 50)

40. According to Article 50 (art. 50) of the Convention:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

41. Mr Wassink claimed in the first place 15,000 guilders for damage. He had, he maintained, especially suffered from having his appeal on points of law declared inadmissible and, as a result, being deprived of any judicial review of the lawfulness of the order which had extended his confinement. In the Government's contention, the damage claimed was not derived from any of the alleged violations of Article 5 (art. 5) and could not therefore give rise to just satisfaction.

The sole breach found by the Court in this case lay in the absence of a registrar at the hearing before the President of the District Court. It may

have left the applicant with a certain feeling of frustration, but not to the extent of justifying the award of compensation; the finding of a violation of Article 5 (art. 5) constitutes in itself just satisfaction in this respect.

42. The applicant also sought an amount of 11,897.40 guilders for the expenses and fees of the lawyer who represented him before the Commission and the Court.

The Government argued that Mr Wassink, who had received legal aid in Strasbourg, had not shown that he had to pay his lawyer additional fees whose reimbursement he was entitled to request.

In the Court's view, the mere fact that the applicant was granted legal aid does not mean that he was not under an obligation to pay the fee note drawn up by his counsel and attached to the claim submitted under Article 50 (art. 50). In the absence of proof to the contrary, the Court must accept that Mr Wassink is required to pay his lawyer the amount set out in the fee note, from which the sums received from the Council of Europe are to be deducted. The amount in question is consistent with the criteria laid down in the Court's case-law (see, *inter alia*, the *Belilos* judgment of 29 April 1988, Series A no. 132, p. 33, § 79). The applicant should therefore be awarded 11,897.40 guilders, less the 8,657.50 French francs already paid as legal aid.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been a violation of paragraph 1 of Article 5 (art. 5-1);
2. Holds by six votes to one that there has been no violation of paragraph 4 of Article 5 (art. 5-4);
3. Holds unanimously that there has been no violation of paragraph 5 of Article 5 (art. 5-5);
4. Holds unanimously that it is not necessary also to examine the case under Article 6 § 1 (art. 6-1);
5. Holds unanimously that the Netherlands is to pay to the applicant 11,897.40 guilders (eleven thousand eight hundred and ninety-seven guilders and forty cents) less 8,657.50 French francs (eight thousand six hundred and fifty-seven francs and fifty centimes) under Article 50 (art. 50);
6. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of Court the following dissenting opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Ryssdal;
- (b) dissenting opinion of Mr Walsh.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE RYSSDAL

With regret I find that I am unable to agree with the majority as regards the violation of paragraph 4 of Article 5 (art. 5-4).

There can be no doubt whatsoever that the President of the District Court constituted a "court" from the organisational point of view; as such he was qualified to carry out the review, required by Article 5 § 4 (art. 5-4), of the decision of the Burgomaster of Emmen.

However, in the course of the proceedings conducted before him a breach of paragraph 1 of Article 5 (art. 5-1) occurred (see paragraph 27 of the judgment). The notion of "lawfulness" under paragraph 1 (art. 5-1) has the same meaning as in paragraph 4 (art. 5-4) (see notably the Brogan and Others judgment of 29 November 1988, Series A no. 145, pp. 34-35, § 65) and the review provided for in the latter provision must be sufficiently broad to cover each of the conditions which are indispensable for the lawfulness of the detention of an individual under paragraph 1 (art. 5-1) (see, *inter alia*, the Ashingdane judgment of 28 May 1985, Series A no. 93, p. 23, § 52). Accordingly, it should have been possible to appeal against the decision of the President of the District Court in order to have the violation established and redressed (see the van der Leer judgment of 21 February 1990, Series A no. 170, p. 14, § 33), notwithstanding the non-essential nature of that violation. As there is no evidence that such a possibility existed, I conclude that, in addition to the violation of paragraph 1 (art. 5-1), there has also been a violation of paragraph 4 of Article 5 (art. 5-4). This being so, I do not consider it necessary to express a view on the question dealt with in paragraphs 31 to 33 of the judgment.

DISSENTING OPINION OF JUDGE WALSH

As the facts of the case are set out in the judgment of the Court it is not necessary for me to repeat them at any length.

The Court has decided that there has been a breach of Article 5 § 1 (art. 5-1) on the ground that the applicant was deprived of his liberty other than "in accordance with a procedure prescribed by law", ("sauf ... selon les voies légales").

The procedural violation in question was the absence of a registrar from the hearing of the matter before the President of the District Court. Article 72 of Regulation I made pursuant to the Judiciary (Organisation) Act prescribes that "hearings and examinations" must be conducted in the presence of a registrar whose duty it is to draw up a record of the proceedings. This record is not, nor is it intended to be, a verbatim record of the proceedings.

The Netherlands Supreme Court has held in another case that for the proper carrying out of judicial review "a record, signed by the registrar, must be made of any interviews effected and any questioning at the hearing" and "a copy of the record must be given to the person if he so requests".

In fact the record must also be signed by the President of the Court.

In the present case a record was made by the President of the Court himself because of the absence of the registrar. Apparently this absence would be regarded by the Supreme Court as a sufficient ground for setting aside the order of the District Court. The present applicant's appeal to the Supreme Court was not in fact decided. The applicant had already been released from confinement before he instituted proceedings in the Supreme Court. While one can understand the concern of the Supreme Court for certainty in the record to be reviewed it does not follow that the non-observance of the requirement of the presence and signature of the registrar is necessarily a breach of Article 5 § 1 (art. 5-1).

The procedure followed in the present case was the one prescribed by the law in every respect save that of the presence of the registrar. The registrar had no part to play in the making of the judicial decision.

The judicial decision of the President of the District Court in the matter before him, which was in effect a recourse from the order of the Burgomaster, was in accordance with Article 5 § 4 (art. 5-4) and was one made by a properly constituted tribunal within the meaning of Article 6 (art. 6) and the decision made by the tribunal cannot be said to be in any way in breach of the Convention.

The registrar is a recording agent which is a function totally different from that of adjudication. There has been no evidence to support any suggestion that there was not "a fair trial". There was a record of the proceedings made by the President of the Court. I cannot agree that simply because this would not be regarded as a sufficient record for the purposes of

cassation in the Netherlands Supreme Court it must follow that the procedure leading to the adjudication in the District Court was necessarily, or in the events which have happened, in violation of Article 5 § 1 (art. 5-1). The procedural omission in question did not go to the substance of the matter and did not touch upon any matter fundamental to the adjudication of the President of the District Court.

In my opinion there was no breach of Article 5 § 1 (art. 5-1).