



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

COURT (CHAMBER)

CASE OF NORTIER v. THE NETHERLANDS

(Application no. 13924/88)

JUDGMENT

STRASBOURG

24 August 1993

In the case of Nortier v. the Netherlands*,

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 B. WALSH,

Mr J. DE MEYER,

Mr N. VALTICOS,

Mr S.K. MARTENS,

Mr I. FOIGHEL,

Mr J.M. MORENILLA,

Sir John FREELAND,

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

Having deliberated in private on 25 February and 23 June 1993,

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 11 September 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13924/88) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) on 28 April 1988 by a Netherlands national, Mr Erik Hans Nortier.

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 6 para. 1 (art. 6-1) of the Convention.

* The case is numbered 31/1992/376/450. 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.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 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) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 September 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr J. De Meyer, Mr N. Valticos, Mr I. Foighel, Mr J.M. Morenilla and Sir John Freeland (Article 43 in fine and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 14 December 1992. By letter of 30 November 1992, the Government indicated that they would not be filing any memorial. On 6 January 1993 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 11 January 1993 the Commission produced certain documents which the Registrar had sought from it at the Government's request.

6. In accordance with the decision of the President, who had given the applicant's lawyer leave to use the Dutch language (Rule 27 para. 3), the hearing took place in public in the Human Rights Building, Strasbourg, on 23 February 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr K. de VEY MESTDAGH, Ministry of Foreign Affairs,

Agent,

Mr A. PATIJN, Ministry of Justice,

Adviser;

- for the Commission

Mr M.P. PELLONPÄÄ,

Delegate;

- for the applicant

Mr J. SAP, advocaat en procureur,

Counsel.

The Court heard addresses by Mr de Vey Mestdagh for the Government, Mr Pellonpää for the Commission and Mr Sap for the applicant, as well as replies to a question put by the Court and questions put by several of its members individually.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a Netherlands national born on 13 May 1972. At the time of the events now under examination, he was fifteen years old.

8. On 19 September 1987 the applicant was released from a youth custody centre after serving a custodial sentence for rape.

Eleven days later, on 30 September 1987, the applicant was again arrested on suspicion of attempted rape. Following his arrest, he admitted the crime to the police.

9. On 2 October 1987 the applicant was brought before Judge Meulenbroek, juvenile judge (*kinderrechter*) at the Middelburg Regional Court (*arrondissementsrechtbank*), who sat in the capacity of investigating judge (*rechter-commissaris*). The applicant was assisted by his lawyer. The private association which was the applicant's legal guardian was represented by two social workers.

The applicant again confessed.

On an application by the Public Prosecutor (*officier van justitie*), Juvenile Judge Meulenbroek ordered the applicant to be placed in initial detention on remand (*bewaring*). He also ordered a preliminary investigation (*gerechtelijk vooronderzoek*) with a view to having a psychiatric report drawn up. Neither the applicant nor his lawyer objected.

10. Again on an application by the Public Prosecutor, Juvenile Judge Meulenbroek, sitting in the capacity of review chamber (*raadkamer*), made an order for the applicant's extended detention on remand (*gevangenhouding*) on 8 October 1987. He prolonged this order twice on the occasion of periodic reviews, on 10 November and 10 December 1987. At no time did either the applicant or his lawyer raise any objection.

11. In the course of the preliminary investigation, the applicant underwent a psychiatric examination. The resultant psychiatric report recommended that, if the charge were to be proven, the applicant should be sent to an institution for psychiatric treatment (*inrichting voor buitengewone behandeling*), pursuant to Article 77k of the Criminal Code (*Wetboek van Strafrecht*), but not punished.

The defence, fearing that the applicant's initial confession had been obtained under duress, requested that the two police officers who had taken down his initial statement following his arrest be questioned as witnesses. Juvenile Judge Meulenbroek referred the matter to Judge Witziers, Vice-President of the Middelburg Regional Court and substitute juvenile judge. Judge Witziers questioned the two police officers on 22 and 23 December 1987. The results were such that the defence did not ask for them to be heard again at the trial.

The preliminary investigation in the present case consisted only of the questioning of the said witnesses and the above-mentioned psychiatric examination.

12. The applicant received a summons in December 1987 to appear before Juvenile Judge Meulenbroek on 6 January 1988 for trial.

13. By letter of 5 January 1988, the day before the trial was to take place, the applicant's lawyer challenged Juvenile Judge Meulenbroek on the ground that he was not impartial, since he had taken pre-trial decisions concerning the applicant's detention on remand.

Juvenile Judge Meulenbroek rejected the challenge as ill-founded on 6 January 1988.

14. The applicant appealed against this decision to the Middelburg Regional Court, which rejected the challenge on 22 January 1988. In its decision the Regional Court considered in detail the relevance of the judgment of the European Court in the case of *De Cubber v. Belgium* (judgment of 26 October 1984, Series A no. 86). The Regional Court was of the opinion that there was a fundamental difference between the position of a Belgian investigating judge and that of a Netherlands juvenile judge, particularly as far as their independence was concerned. It further held that the *De Cubber* judgment did not imply that the performance of the functions of investigating judge and trial judge in the same case constituted a breach of Article 6 para. 1 (art. 6-1) under all circumstances. Netherlands juvenile criminal procedure provided for an exception to the rule of general criminal procedure prohibiting the combination in a single person of the functions of investigating judge and trial judge (see paragraph 20 (a) below). As the juvenile judge had rightly emphasised in his decision, the reason for this was to be found in the pre-eminence of the educational aspect of juvenile criminal law and the importance of optimally co-ordinating the various decisions taken with regard to the minor.

15. The applicant was eventually tried on 25 January 1988, by Juvenile Judge Meulenbroek. He was assisted by his lawyer. One of the social workers representing the private association which was the applicant's legal guardian was also present and allowed to speak.

Confirming his earlier statements, the applicant admitted the charge, which was then held to be proven in the light of the evidence. In accordance with the recommendation contained in the psychiatric report (see paragraph 11 above), the applicant was committed to an institution for the psychiatric treatment of juvenile offenders pursuant to Article 77k of the Criminal Code. He was reminded by the juvenile judge of the right to appeal, but the applicant's lawyer, who alone could decide to do so (see paragraph 22 below), did not file an appeal.

In March 1990 Juvenile Judge Meulenbroek carried out the biennial review required by Article 77r of the Criminal Code to determine whether or not it continued to be in the applicant's interests for him to remain in the

institution. Apparently neither the applicant nor his lawyer raised any objection to the prolongation of the measure. The applicant was released unconditionally on 9 August 1991.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The legal structure of juvenile penal law and criminal procedure

16. Since 1901 it has been the rule in the Netherlands not to apply penal law and criminal procedure to juveniles in the same way as to adults. Juvenile penal law and criminal procedure provide for exceptions to the general law: that is, general penal law and criminal procedure apply to the extent that they are not expressly deviated from.

Juveniles cannot be prosecuted for acts committed before the age of twelve (Article 77a of the Criminal Code).

Juvenile criminal procedure applies if the suspect has not yet reached the age of eighteen when a prosecution against him is commenced (Article 487 of the Code of Criminal Procedure (Wetboek van Strafvordering)).

In principle, the same age-limit applies in juvenile penal law (Article 77b of the Criminal Code). However, subject to certain conditions, the Criminal Code makes it possible on the one hand to apply general penal law to a suspect who at the time of the offence was sixteen or seventeen years old (Article 77c, *ibid.*), and on the other hand to apply juvenile penal law to a suspect who at the time of the offence had reached the age of eighteen but not yet that of twenty-one (Article 77d, *ibid.*).

17. Juvenile penal law is different from that applying to adults only in that it has its own system of punishments (*straffen*) and curative or protective measures (*maatregelen*) designed to meet the specific aims of this branch of criminal law which (in the words of the Explanatory Note to the Act of 9 November 1961 - see paragraph 18 below) "has primarily a pedagogical purpose, the interests of the minor being borne in mind at all times", and which, accordingly, seeks mainly to protect and educate the juvenile concerned.

Punishments available under juvenile penal law are placement in a youth custody centre (*tuchtschool*) for up to six months, juvenile detention (*arrest*) for up to fourteen days, a fine of up to five hundred guilders and a reprimand (*berisping*) (Article 77g). The measures include, *inter alia*, judicial supervision (*ondertoezichtstelling*) - which is in fact a protective measure under civil law (Articles 1:245 *et seq.* of the Civil Code (*Burgerlijk Wetboek*)) - and committal to an institution for the psychiatric treatment of young offenders (Article 77h). The latter is a curative measure applied only to young persons with impaired mental development or suffering from a serious mental disturbance (Article 77k).

18. Juvenile criminal procedure also seeks to protect and educate, but here the differences from general criminal procedure are considerable.

The underlying principle of juvenile criminal procedure is that it

"should be simple and understandable for both the minors concerned and their parents. Formalities which have some purpose for adults but are practically devoid of purpose in relation to minors should be omitted, whereas on the other hand special requirements should ensure proper treatment of juvenile cases". (Quoted from the Explanatory Note to the Act of 9 November 1961, which Act entered into force in 1965, by which juvenile criminal procedure - introduced in 1901 and thoroughly reviewed in 1921 - was modernised)

It is by reason of this basic idea and of the need to improve the protection of juveniles by creating links with the protection of juveniles in civil law - in which the juvenile judge is the central actor and is empowered to order various protective measures - that the juvenile judge is the central actor in juvenile criminal procedure also. Several advantages are claimed for this system:

(a) it is conducive to the protection of the juvenile if the juvenile judge is consulted beforehand on the subject of the desirability of criminal prosecution, especially if he already knows the minor concerned; this may be the case for example if he has been involved in protective measures under civil law, such as placing the minor under judicial supervision;

(b) a relationship of trust may develop between the juvenile judge on the one hand and the minor and his or her parents or guardian on the other owing to the fact that the minor and his or her parents or guardian (who are summoned to appear at the preliminary investigation stage and the trial and have the right to speak) are dealt with by one and the same judge throughout the proceedings, which moreover are held in private and in an informal manner;

(c) in those cases in which the juvenile has made an immediate confession - as usually happens when the suspect is a minor - a plan may be developed at an early stage for the future of the juvenile concerned, even during the preliminary investigation;

(d) the juvenile judge is the most suitable person for the purpose in view of his expert knowledge and his considerable decision-making powers.

The close link between protective measures under civil law and criminal prosecution may be seen in Article 14a of the Code of Criminal Procedure; if there are proceedings relating to the protection of the minor under civil law (such as a request to have him or her placed under judicial supervision or aimed at divesting the parents of their parental rights) running parallel to the criminal prosecution, then under this provision the prosecution may be suspended until a final decision has been taken in those parallel proceedings.

19. The central position of the juvenile judge appears clearly from the fact that the juvenile judge is involved in the decision whether or not to

prosecute. According to Article 493 of the Code of Criminal Procedure, if the Public Prosecutor wishes to drop charges against a minor unconditionally, he must first consult the juvenile judge; if he wishes to do so conditionally, he requires the juvenile judge's consent. If charges are not dropped immediately, the Public Prosecutor must obtain from the child welfare authorities information on the minor's personality and living conditions; they may then comment on the desirability of prosecution (*ibid.*, Article 495).

In order to implement these provisions effectively, it has been the practice for the juvenile judge, the Public Prosecutor and the representative of the child welfare authorities to meet on a regular basis to discuss case files together. This so-called "three-way consultation" (*driehoeksoverleg*) took place in the absence of the minor or his legal representative or counsel, and without their being informed about it.

20. The juvenile judge is also the central figure in the investigation phase.

(a) This is clear in the first place from Article 494 of the Code of Criminal Procedure, which stipulates that the juvenile judge is to act as investigating judge, and from Article 496, which reads:

"1. The juvenile judge shall be responsible for the preliminary investigation, unless the case involves one or more suspects who have reached the age of eighteen at the moment the prosecution against them is commenced and the case cannot, in the initial opinion of the Public Prosecutor and the juvenile judge, be divided.

2. In cases where the juvenile judge orders a preliminary investigation, he shall be regarded as investigating judge responsible for the preliminary investigation."

This means that the juvenile judge has all the decision-making powers of an investigating judge and that he is in charge of the preliminary investigation.

A preliminary investigation may involve such matters as obtaining expert opinions and technical evidence, questioning witnesses, mail and telephone interceptions, searches and visits to the scene of the crime, as well as interrogation of the suspect.

According to Article 268 of the Code of Criminal Procedure, a judge who has undertaken any investigation in the case as an investigating judge is debarred from taking part in the trial; however, by virtue of Article 500d, this provision does not apply in juvenile procedure.

(b) It is also the juvenile judge who takes all decisions concerning detention on remand. In adult criminal procedure, initial detention on remand (for a maximum of six days, which may be prolonged once for a further six days) is ordered by the investigating judge and extended detention on remand (for a maximum of thirty days, which may be prolonged twice for further periods of thirty days) by the review chamber of the Regional Court. In juvenile criminal procedure, the juvenile judge

exercises both these powers; he not only officiates as investigating judge but also, pursuant to Article 488, as review chamber. One consequence of this is that in cases where in adult criminal procedure an appeal against decisions of the investigating judge lies to the review chamber, and to the extent that such appeals are allowed in juvenile procedure, the juvenile judge may be called upon to hear appeals against some of his own decisions.

21. The central position of the juvenile judge further appears from the fact that it is, as a rule, the juvenile judge himself who, sitting as a single judge, conducts the trial and gives judgment (Article 500 para. 1). It is for the juvenile judge to decide whether or not the case is one that should be referred to a chamber consisting of the juvenile judge and two other judges (Article 500 para. 2, in conjunction with Article 500e).

The juvenile judge is also involved to a significant degree with the execution of the punishment or measure imposed. For example, a sentence to the punishment of juvenile detention is not executed until the judge who imposed it has been consulted (Article 505) and the punishment of reprimand is administered personally by the judge who imposed it (Article 506).

22. If the juvenile concerned has not yet reached the age of sixteen, then it is his lawyer who enjoys all the procedural rights afforded the suspect by the Code of Criminal Procedure) instead of the juvenile himself (with the exception of the rights which the suspect may avail himself of during the hearing) (Article 504 para. 1). However, the juvenile's legal guardian (*wettelijke vertegenwoordiger*) may file a note of protest to the president of the court with jurisdiction as to both facts and law before which the juvenile is being prosecuted or was last prosecuted if he disapproves of the lawyer's use of these rights or his failure to make use of them (Article 504 para. 2).

Pursuant to Article 56 of the Judiciary (Organisation) Act (*Wet op de Rechterlijke Organisatie*) an appeal against the judgment of the juvenile judge lies to the Court of Appeal (*gerechtshof*). Such an appeal involves a complete re-examination of the case by three judges (Article 422 of the Code of Criminal Procedure).

B. Criticism of the existing legal structure and the effects thereof on its application in practice

23. For a long time there has been criticism of the system described above. For this reason, a committee for the revision of juvenile criminal law was set up in 1979 and it published a report in 1982. Criticism of the existing system in legal writing increased as a result of this report and of the judgments of the European Court in the cases of *De Cubber v. Belgium* (judgment of 26 October 1984, Series A no. 86) and *Hauschildt v. Denmark* (judgment of 24 May 1989, Series A no. 154). However, opinion is still

divided on the question to what extent it is necessary to modify the present system.

These factors have resulted in informal changes in the way the system operates (see paragraph 24 below) and a proposal for a change of the law (see paragraph 25 below). In this connection, it is also useful to mention a development in Netherlands case-law (see paragraph 26 below).

24. In the first place, there is now an informal arrangement under which the juvenile judge, when confronted with a suspect who denies charges, entrusts the interrogation of witnesses to another juvenile judge and to that extent does not act as investigating judge. However, even in such cases he continues to take the decisions on detention on remand.

Secondly, "three-way consultations" (see paragraph 19 above) have been discontinued at most Regional Courts.

25. A proposal for an amendment of the law was sent to Parliament in 1989; the written procedure has not yet been completed. It essentially follows the suggestions of the committee referred to in paragraph 23 above, the gist of which is to remove from the juvenile judge the functions of investigating judge and review chamber. However, the proposal differs from those suggestions in that the juvenile judge is to retain the power to order initial detention on remand.

26. This last feature corresponds to the case-law of the Supreme Court (Hoge Raad), particularly its judgments of 15 March 1988, NJ (Nederlandse Jurisprudentie) 1988, no. 847 and 13 November 1990, NJ 1991, no. 219. In the first-mentioned judgment the Supreme Court construed Article 268 of the Code of Criminal Procedure (see paragraph 20 above) as meaning that an investigating judge who had not carried out any preliminary investigations but had given the order for initial detention on remand was not debarred from sitting at the trial. This was not held to jeopardise his independence. The judgment of 1990 concerned a juvenile judge who sat at the trial pursuant to Article 500e (see paragraph 21 above) after he had instituted a preliminary investigation in the case as investigating judge. The Supreme Court held that as a result one of the judges taking part in the trial lacked impartiality as required by Article 6 (art. 6) of the Convention. According to the Supreme Court, such would always be the case if

"one of those judges [had] previously had dealings in the same case aimed at the collection of evidence, either as an investigating judge in the course of the preliminary investigation or in another way during the investigations preparing the case".

C. Provisions relating to detention on remand

27. As far as the preconditions for initial and extended detention on remand are concerned, juvenile criminal procedure does not differ from

adult criminal procedure. They are to be found in Articles 67 and 67a of the Code of Criminal Procedure.

Article 67 of the Code of Criminal Procedure enumerates the cases in which detention on remand (*voorlopige hechtenis*) may be ordered; for present purposes, these may be summarised as those cases in which a person is suspected of a relatively serious crime (paragraphs 1 and 2). In addition, paragraph 3 of Article 67 provides as follows:

"The preceding paragraphs of this Article shall only be applied if it appears from certain facts or circumstances that there are serious indications (*ernstige bezwaren*) against the suspect."

In this connection, the Memorandum in Reply (*Memorie van Antwoord*) accompanying a proposal for amendment of the statutory provisions governing detention on remand states that there are such serious indications when in the opinion of the investigating judge

"it is *prima facie* likely (*aannemelijk*) that the suspect has committed the offence in relation to which detention on remand is applied for". (see *Bijlagen Handelingen Tweede Kamer* - Appendices to the Records of the Lower Chamber of Parliament - 1972-9994-No. 8, page 10)

Article 67a enumerates the reasons for which detention on remand may be ordered. These may be summarised as the serious risk of the suspect's absconding; the fact that the crime, being of a particularly grave nature, has created considerable social unrest; the serious risk that the suspect will commit more crimes of a grave nature and the need to secure evidence.

However, paragraph 3 of Article 67a provides:

"An order for detention on remand shall not be made if there exists a distinct possibility that in the event of conviction no unconditional prison sentence or measure involving loss of liberty will be imposed on the suspect, or that implementation of the order will cause [the suspect] to be deprived of his liberty for longer than the duration of the sentence or the measure."

PROCEEDINGS BEFORE THE COMMISSION

28. Mr Nortier applied to the Commission on 28 April 1988. He relied on Article 6 para. 1 (art. 6-1) of the Convention, complaining that he had not received a hearing before an impartial tribunal because the juvenile judge who tried him had also acted as investigating judge during the preliminary investigation and, moreover, had taken several decisions regarding the prolongation of his detention on remand.

29. The Commission declared the application (no. 13924/88) admissible on 9 October 1991. In its report of 9 July 1992 (Article 31) (art. 31), it expressed the opinion, by twelve votes to three, that there had been no violation of Article 6 para. 1 (art. 6-1).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment*.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

30. The applicant alleged that he had not received a hearing before an "impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1), which states that:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal ..."

31. The applicant stressed that throughout the proceedings, i.e. during the pre-trial phase as well as at the trial, his case had been dealt with by one and the same judge, Juvenile Judge Meulenbroek, who had taken all relevant decisions. He did not doubt the personal impartiality of Juvenile Judge Meulenbroek, but pointed to the fact that the latter had acted as investigating judge and had on four occasions decided on the applicant's detention on remand. These decisions implied that Judge Meulenbroek had already reached the conclusion at that stage that there were "serious indications" that the applicant had committed the crime of which he stood accused; furthermore, he must also already have formed an idea of the sentence or measure to be imposed, since the law required him to ascertain that it was unlikely that the detention on remand would last longer than any detention imposed under that sentence or measure (see paragraph 27 above). Consequently, the applicant had had legitimate grounds for fearing that Judge Meulenbroek, who tried his case as a single judge, lacked the impartiality required of a trial judge, the more so as the applicant was only fifteen years old and therefore less able to defend himself.

32. The Government and the Commission maintained that the applicant's fears could not be held to be objectively justified.

33. The Court recalls that what is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (see, as the most recent authorities, the *Fey v. Austria* judgment of

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 267 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

24 February 1993, Series A no. 255, p. 12, para. 30, and the *Padovani v. Italy* judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 27).

The mere fact that Juvenile Judge Meulenbroek also made pre-trial decisions, including decisions relating to detention on remand, cannot be taken as in itself justifying fears as to his impartiality; what matters is the scope and nature of these decisions.

34. Apart from his decisions relating to the applicant's detention on remand, Juvenile Judge Meulenbroek made no other pre-trial decisions than the one allowing the application made by the prosecution for a psychiatric examination of the applicant, which was not contested by the latter. He made no other use of his powers as investigating judge.

35. As for his decisions on the applicant's detention on remand, they could justify fears as to the judge's impartiality only under special circumstances such as those which obtained in the *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 22, para. 51, and the *Sainte-Marie v. France* judgment of 16 December 1992, Series A no. 253-A, p. 16, para. 32).

There was nothing of that nature in the present case. Contrary to the applicant's arguments, the questions which Juvenile Judge Meulenbroek had to answer when taking these decisions were not the same as those which were decisive for his final judgment. In finding that there were "serious indications" against the applicant his task was only to ascertain summarily that the prosecution had *prima facie* grounds for the charge against the applicant (see paragraph 27 above). The charge had, moreover, been admitted by the applicant and had already at that stage been supported by further evidence.

36. As to the arguments put forward by the applicant concerning the fact that the judge sat alone and in a case involving a fifteen year- old, the Court points out that the defendant's interests were looked after by a lawyer, who assisted him at all stages of the proceedings (see paragraph 22 above). It should also be observed that an appeal was available which would have consisted of a complete rehearing before a chamber of three judges of the Court of Appeal.

37. Under these circumstances the applicant's fear that Juvenile Judge Meulenbroek lacked impartiality cannot be regarded as objectively justified. There has therefore not been a violation of Article 6 para. 1 (art. 6-1).

38. In view of this conclusion it is not necessary to go into the question raised by the Government and by certain members of the Commission in their concurring opinion, namely whether Article 6 (art. 6) should be applied to juvenile criminal procedure in the same way as to adult criminal procedure.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has not been a violation of Article 6 para. 1 (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 August 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the concurring opinions of Mr Walsh and Mr Morenilla are annexed to this judgment.

R.R.
M.-A.E.

CONCURRING OPINION OF JUDGE WALSH

1. I agree that on the facts of the present case the applicant has failed to establish a breach of Article 6 para. 1 (art. 6-1) of the Convention. I think it is well established that a trial judge should be disqualified on the grounds of lack of structural impartiality if before the trial he has participated, by way of investigating judge or otherwise, in making any decision or forming an opinion on the case which called for an assessment of the probable guilt of the accused person. As I pointed out in my opinion in *Sainte-Marie v. France* (judgment of 16 December 1992, Series A no. 253-A, p. 18), this is to be ascertained by an examination of the precise circumstances of each case. In the present case I am satisfied on the evidence that in fact the judge had not engaged in any pre-trial activity which involved an assessment of the probable guilt of the accused.

2. Juveniles facing criminal charges and trial are as fully entitled as adults to benefit from all the Convention requirements for a fair trial. Great care must always be taken to ensure that this entitlement is not diluted by considerations of rehabilitation or of reform. These are considerations which should be in addition to all the procedural protections available. Fair trial and proper proof of guilt are absolute conditions precedent.

CONCURRING OPINION OF JUDGE MORENILLA

1. I agree with the conclusion that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention in the present case. The applicant's alleged apprehensions about Juvenile Judge Meulenbroek's lack of impartiality when deciding his case, based on the fact that the latter had acted as the investigating judge and had on four occasions decided that the applicant should be detained on remand and on the fact that he was the only judge dealing with the case, were not objectively justified.

Nevertheless, unlike the majority, when arriving at this conclusion it is to me of decisive importance that the applicant was fifteen years old when the facts took place; that the case was investigated and tried by a juvenile judge according to Netherlands juvenile criminal procedure; and that, in accordance with the recommendation in the psychiatric report, he was committed to a mental institution for minors where he remained under Juvenile Judge Meulenbroek's supervision until his unconditional release three and a half years later.

2. With Mr Trechsel and the members of the Commission who joined his separate concurring opinion, I think that minors are entitled to the same protection of their fundamental rights as adults but that the developing state of their personality - and consequently their limited social responsibility - should be taken into account in applying Article 6 (art. 6) of the Convention. In particular, the right of everyone charged with a criminal offence to be judged by an impartial tribunal should not be incompatible with the protective treatment of juvenile offenders. Under Article 25 of the Universal Declaration of Human Rights, childhood is entitled to special care and assistance. States, therefore, should afford them the "necessary protection and assistance so that they can fully assume their responsibilities within the community", and prepare them "to live an individual life in society" (preamble of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations, Resolution 44/25 of 20 November 1989), by promoting "the establishment of laws, procedures, authorities and institutions applicable to children alleged as, accused of, or recognised as having infringed the penal law" (*ibid.*, Article 40 para. 3).

3. The difficulties arising from the penal treatment of young offenders have been faced, in many penal systems, by setting up juvenile courts under specific procedural rules to apply penal or protective measures aiming at the correction or re-education of the minor rather than the punishment of criminal acts for which he is not fully responsible. The educational and psychiatric aspects of the treatment are therefore essential and the qualifications and functions of the juvenile judge should be seen in terms of these purposes. The organisation of the proceedings in a manner that a single judge deals with the case from the pre-trial investigation adopting the appropriate provisional measures until the execution of the sentence,

supervising the adopted protective measures of the judgment, in order to "[develop] a relationship of trust ... between the juvenile judge on the one hand and the minor and his ... parents or guardian on the other" (paragraph 18 (b) of the judgment) seems to me both reasonable and commendable to attain these objectives.

Accordingly, I cannot see the cumulative exercise of these functions by the juvenile judge as constituting a violation of Article 6 (art. 6) of the Convention. This Article (art. 6), like other substantive provisions of the Convention, has been designed, and should be interpreted, so as to protect the rights and freedoms of the individual from acts or omissions of the State that are opposed to them, but not so as to hinder measures intending the full development of minors. Such an interpretation would be, in my opinion, contrary to Article 60 (art. 60) of the Convention. Furthermore, I think that the protection of children is a matter about which national authorities are better prepared to plan in accordance with the demands of their society. The Convention is meant to be interpreted in the sense of giving the member States a margin of appreciation as to the organisation of their system of penal justice to protect both the interests of the child and those of society.

4. Considering these circumstances, the central role performed by Juvenile Judge Meulenbroek throughout the procedure does not to me appear objectively open to doubt as to his impartiality since his functions were legally designed to protect young offenders, not to punish them. Likewise I understand the majority's analysis of the "scope and nature" of the decisions that he took in the present case (paragraph 33 of the judgment) in the context of juvenile criminal proceedings. The conclusion of non-violation is then reconciled with the doctrine of the Court when interpreting the requirement of an "impartial tribunal" particularly in the cases of *De Cubber v. Belgium* (judgment of 26 October 1984, Series A no. 86, p. 16, para. 30) and *Hauschildt v. Denmark* (judgment of 24 May 1989, Series A no. 154, pp. 22-23, paras. 50-52).

In the *Padovani v. Italy* judgment of 26 February 1993 (Series A no. 257-B, pp. 20-21, paras. 27-28), in which the fear of lack of impartiality was based on the fact that "the pretore had before the trial questioned the applicant, taken measures restricting his liberty and summoned him to appear before him", the Court noted that the pretore "followed specific rules applicable to *flagrante delicto* cases". Similarly in the present case, for the sake of coherence with the case-law of the Court, when judging whether the applicant's fear was justified, the Court should have noted, in addition, the specificity of the procedural rules applicable to juvenile offenders under the Dutch system of penal justice so extensively expounded in paragraphs 16 to 26 of this judgment.