



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

COURT (CHAMBER)

CASE OF VAN DE HURK v. THE NETHERLANDS

(Application no. 16034/90)

JUDGMENT

STRASBOURG

19 April 1994

In the case of Van de Hurk 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 S.K. MARTENS,

Mr I. FOIGHEL,

Mr R. PEKKANEN,

Mr A.N. LOIZOU,

Mr J.M. MORENILLA,

Mr F. BIGI,

Mr G. MIFSUD BONNICI,

Mr J. MAKARCZYK,

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

Having deliberated in private on 24 November 1993 and 22 March 1994,

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 13 February 1993 and by the Netherlands Government ("the Government") on 11 March 1993, 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. 16034/90) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Netherlands national, Mr Cornelis Petrus Maria van de Hurk, on 1 December 1989.

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 Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case

* Note by the Registrar. The case is numbered 9/1993/404/482. 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.

disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

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 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993, in the presence of the Registrar, the Vice-President of the Court, Mr R. Bernhardt, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Pekkanen, Mr A.N. Loizou, Mr J.M. Morenilla, Mr F. Bigi, Mr G. Mifsud Bonnici and Mr J. Makarczyk (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr I. Foighel, substitute judge, replaced Mr Pettiti, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's representative and the Delegate of the Commission 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 30 June 1993 and the Government's memorial on 8 July 1993. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. In accordance with the decision of the President, who had given the applicant leave to use the Dutch language (Rule 27 para. 3), the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 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 J.L. de WIJKERSLOOTH DE WEERDESTEIJN, Landsadvocaat,
Counsel,

Mr B.M.J. VAN DER MEULEN,
Mr Th.G.M. SIMONS, Ministry of Justice, *Advisers*;

- for the Commission

Mr L. LOUCAIDES, *Delegate*;

- for the applicant

Mr Th.J.H.M. LINSEN, advocaat en procureur,
Mr R.M. VAN MALE, advocaat en procureur, *Counsel*.

The Court heard addresses by Mr Loucaides, Mr de Wijkerslooth de Weerdesteijn, Mr Linssen and Mr van Male and replies to questions put by some of its members.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant is a Netherlands national born in 1945. He lives at Geffen in the province of Noord-Brabant, where he is a dairy farmer.

7. The applicant owned a cowshed in which there were originally 90 stands for milch cows and cows in calf as well as 63 stands for calves and heifers. In the years 1981, 1982 and 1983 the numbers of milch cows and cows in calf were 90, 96 and 102, respectively; the quantities of milk produced by the applicant in those years were 475,952, 445,571 and 488,026 kilograms.

8. After the Ordinance no. J 1731 on the Additional Levy (Beschikking Superheffing) of 18 April 1984, Staatscourant (Government Gazette) 79 - "the 1984 Ordinance"- was published on 19 April 1984, the applicant was allocated a reference quantity (that is a quantity of milk in excess of which an additional levy is payable - see paragraph 23 below) of 445,813 kilograms.

9. On 29 June 1984 the applicant filed a claim for a larger levy-free quantity of milk under Article 11 of the 1984 Ordinance (see paragraph 27 below) with the Head of the District Office of the Board for the Implementation of Agricultural Measures (districtsbureauhouder van de Stichting tot Uitvoering van Landbouwmaatregelen) of the province of Noord-Brabant. He stated that he had entered into obligations to invest in increasing the number of cow stands for milch cows and cows in calf as early as January 1984. These investments related to a new shed for heifers and bulls, the construction of which would release 40 stands in the existing shed for milch cows and cows in calf. The number of such stands would thus be raised from 90 to 130, an increase of more than 25%.

The total cost of building the new shed and adapting the existing one came to more than NLG 100,000.

10. The Head of the District Office of the Board for the Implementation of Agricultural Measures forwarded the applicant's claim to the Director of Agriculture and Food Supply (directeur voor de landbouw en voedselvoorziening) of the province of Noord-Brabant (see paragraph 28 below). The latter rejected it on 1 November 1984, on the ground that the applicant had failed to show "that it had always been his intention to increase the number of stands for milch cows as stated in his claim".

11. On 27 November 1984 the applicant filed an objection to this decision with the Minister of Agriculture and Fisheries (see paragraph 30 below), arguing at length that he had in fact been planning such an increase for a long time.

12. The Minister of Agriculture and Fisheries dismissed the applicant's objection on 11 November 1985, on the ground that "it appeared from the facts and circumstances stated in the objection and from information obtained officially from other sources (ambtelijk overig ingewonnen informatie)" that the number of stands for milch cows and cows in calf had been increased from 118 to 130 (i.e. by 12 or approximately 10%). The increase thus fell well short of the minimum of 25% required by the 1984 Ordinance (see paragraph 27 below).

13. The applicant appealed to the Industrial Appeals Tribunal (College van Beroep voor het Bedrijfsleven) ("the Tribunal" - see paragraph 31 below) on 3 December 1985. He maintained that the number of stands had been increased by 40 and argued that the Minister had erred in considering that the cowshed had originally contained 118 stands.

14. In addition, by a letter which reached the registry of the Tribunal on 30 December 1986, Mr van de Hurk applied to the President of the Tribunal (see paragraph 35 below) for an interim measure to the effect that, pending the Tribunal's judgment, he should not be required to pay the additional levy for 1984-85 and the following milk years and that he should be paid back the additional levy he had already paid in respect of milk production which had not exceeded the reference quantity claimed on the basis of 28 new stands.

15. After a public hearing, the President of the Tribunal, in a letter dated 10 February 1987, asked the Minister to indicate whether he was prepared to reconsider his decision. By a letter dated 3 April 1987 the Minister replied that he saw no reason to do so and that the interim measure requested by the applicant should be refused. The Minister discussed the question of the increase in the number of stands and maintained his previous position. He submitted in the alternative that the applicant's investments referable to that increase fell short of the required minimum of NLG 100,000. The Minister estimated that the total investment had been worth NLG 176,608.27 and the price per square metre of the new shed had been NLG 197.23; calculating on the basis of the surface taken up in the old shed by the new stands for milch cows and cows in calf, he concluded that the amount involved in the increase had been NLG 48,406.65 at the most.

16. The applicant set out his objections in a letter dated 18 May 1987. He argued firstly that the Minister was estopped from using this argument, which had never been invoked as a reason for rejecting the applicant's original claim; in the alternative, the Minister's calculations were wrong. He claimed, with reference to a list of the costs concerned drawn up by his accountant, that his total investment had in fact been NLG 215,183.22, and criticised the method of calculation used by the Minister. In his view, 65% of the total investment was referable to cow stands in the new shed for heifers, of which 90% replaced similar stands in the old shed that were now

to be used for milch cows and cows in calf; the sum relating to the relevant increase was therefore NLG 125,882.

17. On 7 July 1987 the President of the Tribunal gave a decision refusing the interim measure requested, holding that it was not *prima facie* likely that the Tribunal itself would overturn the Minister's decision. In his view, the Minister had not erred in rejecting the applicant's claim. The President did not find it necessary to address the question of the increase in the number of stands for milch cows and cows in calf, since he accepted the Minister's alternative argument concerning the applicant's investment. He rejected the applicant's submission that the Minister was estopped from relying on that ground, holding that section 51 of the 1954 Industrial Appeals Act (*Wet administratieve rechtspraak bedrijfsorganisatie*, *Staatsblad* (Official Bulletin) 1954, 416, as amended - "the 1954 Act") entitled him to supplement his arguments while the applicant had not only had sufficient possibility of replying to the Minister's alternative submission but had in fact done so. Accepting the method of calculation used by the Minister and the total investment submitted by the applicant, the President arrived at a figure of NLG 55,440 referable to the increase in the number of stands in the old cowshed, and that figure was insufficient.

18. By a letter of 25 September 1987 to the registrar of the Tribunal the applicant stated that he wished to continue the proceedings. Commenting on the President's decision, he discussed extensively his own method of calculation. Like the Minister, he took as his starting-point the investment involved in building the new shed for heifers. Starting from the figure which he gave before the President - NLG 215,183.22 (see paragraph 16 above) - he calculated a price per square metre of NLG 240. On that basis he arrived at a figure of NLG 125,882 for the investment referable to the increase in the number of cow stands for milch cows and cows in calf in the existing cowshed. In the alternative, if the Minister's calculations were to be followed, he submitted that the Minister had based them on incorrect premises; if applied correctly, the Minister's method resulted in a figure referable to the extension of stands for milch cows and cows in calf of NLG 91,200, which was sufficient since the applicant had carried out the physical work involved in building the new cowshed himself (see paragraph 27 below).

19. The Minister filed a written statement in reply on 21 November 1988. A public hearing was held on 19 April 1989, during which the applicant again contested the Minister's method of calculation and argued that, should the Tribunal accept it nevertheless, the price per square metre calculated by the Minister was in any case too low; it was not NLG 240 - the Minister's figure - but NLG 342.85.

20. The Tribunal delivered its judgment on the merits on 16 June 1989. Adopting the same approach as the President, it did not decide whether the increase in the number of cow stands had been sufficient; indeed, it

explicitly declined to address this point. It likewise accepted the Minister's method of calculation; applying it to the figures submitted by the applicant in response to the decision of its President (a price per square metre of NLG 240, the new stands covering a surface of 330 square metres), the Tribunal arrived at an investment of NLG 79,200 referable to the increase in the number of stands. The Tribunal refused to consider the price per square metre put forward by the applicant at the hearing, on grounds of belatedness, holding:

"The applicant's statement first made at the hearing to the effect that the price per square metre is in reality NLG 342.85 will not be taken into account in reviewing the decision appealed against, in view of the rule laid down in Article 6 para. 2 of the Ordinance, amongst other things."

Accordingly, concluding that the applicant's investments fell short of the minimum required, the Tribunal rejected the applicant's appeal.

II. RELEVANT EUROPEAN ECONOMIC COMMUNITY LAW AND DOMESTIC LAW AND PRACTICE

A. European Economic Community regulations

21. There had been surpluses of milk and milk products for some considerable time. By 1984, according to the preamble of Council Regulation (EEC) no. 856/84, "quantities of milk delivered [were] increasing at a rate such that disposal of surpluses [was] imposing financial burdens and market difficulties which [jeopardised] the very future of the common agricultural policy".

22. Amending an earlier regulation which had not proved sufficiently effective, Council Regulation (EEC) no. 856/84 (OJ (Official Journal) no. L 90 of 1 April 1984, p. 10) was adopted by the Council of the European Communities in response to these structural surpluses.

23. The Council of the European Communities decided that for an initial period of five years the quantity of milk every dairy farmer would be allowed to produce should be limited to a fixed amount (the "reference quantity"). To this end they introduced a system under which dairy farmers had to pay a penalty or "additional levy" on milk delivered in excess of their allotted quantities. It was left to the States themselves to share out their guaranteed quantities within their jurisdictions according to a formula prescribed by Council Regulation (EEC) no. 857/84 (OJ no. L 90 of 1 April 1984, p. 13).

24. Under Article 189 of the EEC Treaty, Council Regulations (EEC) no. 856/84 and (EEC) no. 857/84 were binding in their entirety and directly

applicable in all member States of the European Communities. They entered into force on 1 April 1984.

B. Implementation of Council Regulations (EEC) no. 856/84 and (EEC) no. 857/84 in the Netherlands

1. Substantive provisions

25. Under section 13 paras. 1-2 of the Agriculture Act (Landbouwwet), the Minister of Agriculture, Nature Conservancy and Fisheries (minister voor landbouw, natuurbeheer en visserij) is empowered to issue an ordinance (beschikking) imposing a levy on the production, supply and processing of agricultural produce. Such an ordinance may be adopted, inter alia, to give effect to regulations, guidelines, decisions and recommendations of the EEC in so far as they relate to its common agricultural policy.

26. Council Regulations (EEC) no. 856/84 and (EEC) no. 857/84 were implemented by the 1984 Ordinance. This Ordinance was given retroactive effect to 1 April 1984, that being the date of entry into force of the EEC regulations.

27. Dairy farmers who had assumed obligations in connection with investments (investeringsverplichtingen) after 1 September 1981 but before 1 March 1984 could claim a larger reference quantity, calculated according to a formula given in the 1984 Ordinance, if certain conditions were fulfilled. Such an increased reference quantity was available, inter alia, to dairy farmers who could prove that they had entered into financial obligations to increase the number of their cow stands (for milch cows or cows in calf) by at least 25% to more than 60 (Article 11 of the 1984 Ordinance). The amount required to be invested was at least NLG 100,000, or 90% of that figure if the farmer could prove that he himself had contributed sufficiently to the physical work involved to make up the difference.

2. Procedural provisions

28. A person claiming an increased reference quantity on the basis of Article 11 of the 1984 Ordinance had until 1 August 1984 to file his claim with the Head of the District Office of the Board for the Implementation of Agricultural Measures, who would forward it to the provincial Director of Agriculture and Food Supply (Articles 6 para. 1, 7 para. 1 of the 1984 Ordinance). The Director gave a decision after consulting an advisory panel.

29. Such a claim had to be accompanied by a statement setting out the arguments and documentary evidence. According to Article 6 para. 2 of the 1984 Ordinance:

"A claim as referred to in the first paragraph shall be reasoned. It shall include a statement supported by evidence as to the various grounds of the claim referred to in Articles 11, 11b, 11c, 12 and 13.

The claim shall not be admissible if ... the rules laid down in this paragraph have not been complied with."

30. In the event of his claim being rejected, the claimant had thirty days within which to file an objection (*bezwaarschrift*) to the Director's decision with the Minister (Article 7 paras. 2-3 of the 1984 Ordinance).

C. The Industrial Appeals Tribunal

31. An appeal against the decision of the Minister lay within thirty days to the Tribunal (section 46 of the Agriculture Act).

32. The Tribunal is a judicial body set up under the 1954 Act. It was instituted initially to hear appeals against decisions and acts by various economic regulatory bodies, but gradually its jurisdiction has been extended to include certain decisions of central government and other independent government bodies under specialist legislation. According to the "Guidelines for making provision for appeals to the Industrial Appeals Tribunal" (*Richtlijnen voor het openstellen van beroep op het College van Beroep voor het Bedrijfsleven*) of 24 June 1986, Government Gazette 1986, 124, the Tribunal should in principle be the competent court with regard to "legislation of a socio-economic nature".

Section 5 of the 1954 Act gave the Tribunal competence to review such acts and decisions for compliance with legislation of a general nature and general principles of good governance (*algemene beginselen van behoorlijk bestuur*), to check whether there had been any abuse of authority and to determine whether in weighing up the interests at stake, the government body concerned had acted reasonably in deciding as it had.

33. The judges of the Tribunal are appointed for life by the Crown. They must have the same qualifications as Court of Appeal judges (section 9 of the 1954 Act). They take the same oath and receive the same salary as Court of Appeal judges and are subject to the same rules and procedure as regards supervision and dismissal (sections 11 and 12 of the 1954 Act).

Tribunal judges may not have any other official position, nor may they hold any position in private enterprise or in any association of employers or employees (section 10 of the 1954 Act).

34. The proceedings before the Tribunal are public. At the material time, they normally comprised written proceedings (an application filed by an appellant, a memorial in reply submitted by the government body concerned, and possibly - if the President consented - additional memorials) followed by an oral hearing (sections 29 et seq. of the 1954 Act).

Section 51 allowed both the government body and the applicant to "alter their claim or their defence and the grounds advanced in support, until the close of the hearing, unless the Tribunal [was] of the opinion that such a change place[d] the opponent at an unreasonable disadvantage".

35. Under section 65 of the 1954 Act the applicant could apply for interim measures to the President of the Tribunal. He could do so both before and after filing an appeal on the merits. The President would give a decision as soon as possible, having heard the government body concerned or at least offered it the opportunity to be heard.

36. The Tribunal, against whose judgment there was no further appeal, was empowered to overrule the decision appealed against and to provide for the consequences of such reversal; in particular, it could order the government body concerned to make, retract or alter a decision or to act or refrain from acting in a certain way. The judgment might include an order to pay a penalty in the event of non-compliance (section 58 of the 1954 Act). The Tribunal could also order the body to pay compensation for any damage suffered by the appellant as a result of the decision or act appealed against (section 60). To the extent that the judgment ordered payment of a sum of money, it could be executed in accordance with the rules pertaining to the execution of judgments of the courts in civil cases (section 62).

37. Sections 74 and 75 of the 1954 Act provided as follows:

Section 74

"1. If in Our opinion the consequences of a judgment [i.e. of the Industrial Appeals Tribunal] are contrary to the general interest, We may, on the recommendation of those of Our ministers whom it concerns, decide that it shall not be followed or shall not be followed in its entirety.

2. Pending the taking of a decision under the preceding paragraph, We may, on the recommendation of those of Our ministers whom it concerns, suspend the judgment in whole or in part for a length of time to be determined by Us. Even after prolongation, suspension may not be for longer than one year.

3. A decision as referred to in the first paragraph may only be taken within two months of the judgment or, if the judgment is suspended within that period, within the length of time determined for the suspension. A decision as referred to in the second paragraph may only be taken within two months of the judgment.

4. Our decisions shall be published in the Official Bulletin.

5. The first two paragraphs shall not apply in so far as the decision awards compensation or partial compensation or orders the payment of costs.

6. ..."

Section 75

"1. If We decide that the judgment shall not be followed or shall not be followed in its entirety, the Industrial Appeals Tribunal may, at the request of the person concerned, retry the case taking due notice of Our Decision or order the government body concerned to pay compensation for all or part of the damage suffered by the appellant as a consequence of the fact that the judgment is not followed or not followed in its entirety.

2-4. ..."

The expressions "We", "Our" and "Us" in the above sections referred to the fact that the decisions under section 74 took the form of a royal decree (Koninklijk besluit), that is a decree signed by the Monarch and the Minister responsible. Since such a decree can only be adopted on the initiative and the (political) responsibility of a Minister, it was effectively the Minister who had the power to issue a decision under section 74 paras. 1-2. Following customary Netherlands terminology, the present judgment will refer to the Monarch and the Minister together as "the Crown".

38. No use was ever made of the powers under sections 74 and 75 of the 1954 Act. The above-mentioned Guidelines (see paragraph 32 above) stated explicitly that new laws conferring jurisdiction on the Tribunal should declare the 1954 Act applicable except for sections 74 and 75. Before the Guidelines were drawn up, the Minister of Justice replied as follows to a question from the Council of State (Raad van State):

"In my opinion, it is in principle never necessary to declare sections 74 and 75 applicable by analogy. At the time, these two provisions were included in the Act as a matter of prudence, which may be explained by the circumstance that more than thirty years ago the legislature had little idea of the way in which administrative judicial procedure would develop. No use has ever been made of the Crown's powers under section 74. One might even venture to suggest that the scheme of sections 74 and 75 has become a dead letter." (Kamerstukken (Parliamentary Documents) II 1984-1985, 18798, A-C, p. 10)

39. The 1954 Act remained in force until 1 January 1994. On that date a General Administrative Code (Algemene Wet Bestuursrecht) came into force, laying down new uniform rules of administrative-law procedure.

At the same time the 1954 Act was replaced by the Industrial Organisation (Administrative Jurisdiction) Act (Wet bestuursrechtspraak bedrijfsorganisatie). Under section 19 of that Act, the new uniform rules laid down in the General Administrative Code also govern the procedure of the Tribunal.

There is no provision in either the Code or the Act empowering any executive authority to interfere with the binding force of a judgment.

PROCEEDINGS BEFORE THE COMMISSION

40. In his application (no. 16034/90) lodged with the Commission on 1 December 1989, the applicant alleged a violation of Article 6 para. 1 (art. 6-1) of the Convention on three counts.

Firstly, his case had not been dealt with by an "independent and impartial" tribunal, since the Crown and thus the Minister could decide that a judgment of the Tribunal should not be implemented or suspend its execution.

Secondly, he claimed that he had not been afforded a "fair hearing" by the Tribunal since it had disregarded his arguments while allowing the Minister to make further submissions at a later stage and had, moreover, deviated from the issue originally addressed by his objection to the Minister's decision (the number of cow stands) by ruling only on the sum he had invested.

Thirdly, he alleged that in its judgment the Tribunal had not, or not sufficiently, dealt with various arguments which he had advanced.

41. On 8 January 1992 the Commission declared the application admissible.

In its report of 10 December 1992 (made under Article 31) (art. 31), the Commission expressed the opinion, by twelve votes to five, that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention.

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

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 PARA. 1 (art. 6-1)

42. According to Article 6 para. 1 (art. 6-1) of the Convention,

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent ... tribunal ..."

43. The present case concerns the "determination of civil rights and obligations" so that Article 6 para. 1 (art. 6-1) is applicable; indeed, this was not disputed.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 288 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

A. "Independent tribunal"

44. The applicant alleged that his case had not been determined by an "independent tribunal" as required by Article 6 para. 1 (art. 6-1) of the Convention, since section 74 of the 1954 Act allowed the Crown to decide that judgments of the Tribunal should not be implemented.

The Government contested this allegation, whereas the Commission accepted it.

45. In the Court's opinion, the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal", as is confirmed by the word "determination" ("qui décidera") (compare the following judgments: *Bentham v. the Netherlands*, 23 October 1985, Series A no. 97, p. 17, para. 40; *H. v. Belgium*, 30 November 1987, Series A no. 127, p. 34, para. 50; and *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, p. 29, para. 64). This power can also be seen as a component of the "independence" required by Article 6 para. 1 (art. 6-1).

46. The applicant, while admitting that the Government in defending cases before the Industrial Appeals Tribunal never referred to their powers under section 74 of the 1954 Act, maintained that the mere existence of that power impaired that tribunal's independence, since it clearly influenced its decisions. This, he alleged, was shown by the fact - which as such was not denied by the Government - that of the many thousands of appeals lodged with the Tribunal by dairy farmers concerning the application of the 1984 Ordinance only a very limited proportion - no more than 2% - had been successful. It was suggested by the applicant that in deciding these cases the Tribunal had borne in mind the possibility of the Crown exercising its powers under section 74.

47. The Court finds that there is nothing in the information at its disposal to indicate that the mere existence of the Crown's powers under section 74 had any influence on the way the Tribunal handled and decided the cases which came before it. In particular, no significance can be attributed to the low success rate of appeals against decisions taken under the 1984 Ordinance. Whether or not the requirements of Article 6 (art. 6) have been met cannot be assessed with reference to the applicant's chances of success alone, since this provision does not guarantee any particular outcome (see, *inter alia* and *mutatis mutandis*, the *Costello-Roberts v. the United Kingdom* judgment of 25 March 1993, Series A no. 247-C, p. 62, para. 40).

48. In the Government's view, the existence of the Crown's powers under section 74 was no obstacle to classifying the Industrial Appeals Tribunal as a "tribunal", since section 74 did not confer upon the Crown the power to overturn the Tribunal's judgments as regards their reasoning, but

merely the possibility of blocking their consequences if they ran counter to the general interest.

In addition, section 74 of the 1954 Act was in any event a dead letter. They emphasised that no use had ever been made of that provision and that it was due to be repealed when the new General Administrative Code entered into force on 1 January 1994.

49. As to the first argument, the Court, while accepting that section 74 may be construed as suggested by the Government, points out that for an individual litigant it is the consequences of litigation - the operative provisions of a judgment - which are of importance; the actual content of his civil rights and obligations is determined by those provisions.

50. Nor can it be accepted that section 74 had lost all legal significance. Like the Commission, the Court cannot disregard the fact that section 74 was still law at the time of the events complained of and for several years thereafter. There was nothing to prevent the Crown (in the person of the Minister of Agriculture, Nature Conservancy and Fisheries) from availing itself of the powers thereby conferred upon it had it considered such a course of action necessary or desirable in view of what it might perceive as the general interest (see, *mutatis mutandis*, the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, p. 24, para. 48, and the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 11, para. 23).

51. In this context the Government appear to contend, moreover, that had the Crown ever made use of its powers under section 74, the individual concerned could have sought review of the resulting decision in the civil courts.

In the absence of any clear statutory provision and of any domestic case-law on this issue - the Crown never having made use of the said powers - the Court is unable to verify the existence and effectiveness of such a remedy.

52. It follows that at the material time section 74 of the 1954 Act, which remained in force until 1 January 1994, allowed the Minister partially or completely to deprive a judgment of the Tribunal of its effect to the detriment of an individual party. One of the basic attributes of a "tribunal" was therefore missing.

A defect of this nature may, however, be remedied by the availability of a form of subsequent review by a judicial body that affords all the guarantees required by Article 6 (art. 6) (see, as recent authorities and *mutatis mutandis*, the following judgments: 24 August 1993, *Nortier v. the Netherlands*, Series A no. 267, p. 16, para. 36; 25 November 1993, *Holm v. Sweden*, Series A no. 279-A, p. 16, para. 33).

53. The Government maintained that such a review was in fact available.

Firstly, section 75 of the 1954 Act allowed for the possibility of a retrial by the Industrial Appeals Tribunal itself. The Government pointed out that - since the original judgment remained binding, at any rate in so far as it established that the originally impugned decision of the government body was unlawful - such a retrial would necessarily lead to a judgment ordering the government body to pay damages and stressed that paragraph 5 of section 74 made it clear that the Crown had no power to set aside judgments requiring the government body to pay damages.

In the second place, the Government suggested that since the Convention was directly applicable in the Netherlands, the applicant could - under well-established principles of Netherlands law (see the *Oerlemans v. the Netherlands* judgment of 27 November 1991, Series A no. 219, p. 22, para. 57) - have taken his case to the civil courts on the ground that the Industrial Appeals Tribunal could not be considered an independent tribunal within the meaning of Article 6 (art. 6) of the Convention.

54. The Court is not convinced by these arguments.

As to the first remedy, the Court notes that section 75 of the 1954 Act did not allow the Tribunal to depart from the Crown's decision under section 74. To that extent the possibility of a retrial can hardly be considered an effective remedy within the meaning of the case-law referred to in paragraph 52 above. Moreover, although it is true that section 75 allowed for compensation in the event of the Crown's using its powers under section 74, compensation cannot be equated with advantages obtained under an original judgment of the Industrial Appeals Tribunal ordering a government body to take a specific decision in favour of the party seeking review.

As to the second remedy, its effectiveness is open to doubt. The Government themselves have stated that, on the few occasions when the question was addressed by the civil courts, it was held that the Tribunal "[afforded] sufficient guarantees of judicial review" (see the *Oerlemans* judgment referred to above, *ibid.*).

55. There has accordingly been a violation of Article 6 para. 1 (art. 6-1) in that the applicant's civil rights and obligations were not "determined" by a "tribunal".

B. Fairness of proceedings

56. The applicant complained that while Article 6 para. 2 of the 1984 Ordinance required him to produce all his arguments and his evidence at the outset, his opponent - the Minister - had been able to change his arguments to suit his position as the case evolved. The rejection by the Director of Agriculture and Food Supply of the applicant's initial request for a larger reference quantity of milk was based on the consideration that he had failed to show "that it had always been his intention to increase the number of stands for milch cows"; the Minister's dismissal of his objection was

grounded on an alleged insufficient increase in the number of cow stands for milch cows and cows in calf. Before the Tribunal, however, the Minister had based his case on the allegation that his investments had fallen short of the figure required. Accordingly there was a violation of the principle of "equality of arms" enshrined in Article 6 para. 1 (art. 6-1) of the Convention.

57. Firstly, this complaint overlooks the fact that section 51 of the 1954 Act meets the requirement of "equality of arms" in that it allows both parties to the proceedings before the Industrial Appeals Tribunal to "alter their claim or their defence and the grounds advanced in support" (see paragraph 34 above). Furthermore, the complaint does not take into account the fact that, although in the proceedings before the Industrial Appeals Tribunal the Minister, making use of the opportunity afforded him under section 51, did indeed base his case on new arguments which differed from those on which he had founded his original refusal of the applicant's request, the applicant was allowed to submit, *inter alia*, a report by his accountant as well as counter-arguments. Therefore, not only did the applicant have a genuine opportunity to respond (see the *Ruiz-Mateos v. Spain* judgment of 23 June 1993, Series A no. 262, p. 25, para. 63) but he actually did so. No breach of the principle of "equality of arms" is therefore established.

58. With reference to the fact that the Tribunal had refused to consider the price per square metre referable to the increase in the number of cow stands for milch cows and cows in calf which he had submitted at its hearing, the applicant claimed further that his case had not been dealt with "fairly".

59. The effect of Article 6 para. 1 (art. 6-1) is, *inter alia*, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see the *Kraska v. Switzerland* judgment of 19 April 1993, Series A no. 254-B, p. 49, para. 30). It has to be determined whether this condition was satisfied in the instant case.

60. The Tribunal based its assessment on the price per square metre provided by the applicant himself previously, in his written pleadings, and which followed from calculations on which the applicant had relied in the proceedings before the President of the Tribunal (see paragraphs 16 and 18 above). It chose to apply to this figure a method of calculation different from that advocated by the applicant and thereby arrived at a result which was not favourable to him. It is not for the Court to criticise this choice; as a general rule, the assessment of the facts is within the province of the national courts (see, as the most recent authority, the *Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, pp. 18-19, para. 31).

It is true that the Tribunal refused to consider the applicant's new figure. However, he only produced it at the latest possible stage, namely at the oral hearing after the Minister had responded in writing to his written pleadings.

Given these circumstances, the refusal of the Tribunal to consider the applicant's new figure does not constitute a violation of Article 6 para. 1 (art. 6-1).

61. The applicant lastly brought forward a series of grievances which may be summarised as a complaint that in its judgment the Industrial Appeals Tribunal did not, or not sufficiently, deal with various arguments advanced by him.

Article 6 para. 1 (art. 6-1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. Nor is the European Court called upon to examine whether arguments are adequately met.

Making a general assessment, the Court does not find that the judgment of the Industrial Appeals Tribunal is insufficiently reasoned. Consequently no violation of Article 6 para. 1 (art. 6-1) is established in this respect either.

II. APPLICATION OF ARTICLE 50 (art. 50)

62. Under 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 the decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

63. The applicant claimed a total of NLG 622,137 for loss of business, in addition to compensation for the levy-free quantity which in his contention had been wrongly denied him and the value of which at 1 July 1993 he put at NLG 397,952. The total claimed thus came to NLG 1,020,089. He submitted extensive and detailed calculations based on the situation which would have existed had the extra reference quantity in fact been allowed.

64. This claim is based on the assumption that the judgment of the Tribunal would have been favourable to the applicant had the alleged violations of Article 6 para. 1 (art. 6-1) not taken place. However, it is by no means clear that the outcome of the case would have been different in the absence of the violation found (see paragraph 55 above). The Court therefore agrees with the Delegate of the Commission and the Government that the applicant's claim under this head must be dismissed.

B. Costs and expenses

65. The applicant did not receive legal aid before either the Commission or the Court. He claimed reimbursement of lawyer's fees "directly connected with the present proceedings" (which the Court takes to mean the Strasbourg proceedings). Up to the hearing, they were estimated to have amounted to 200 hours at NLG 265 an hour for counsel's fees, i.e. a total of NLG 53,000, excluding value-added tax; the travel and accommodation expenses incurred through attendance at the hearing itself would have to be added.

The Delegate of the Commission considered that the applicant was entitled to reimbursement of expenses incurred in presenting his case before the Convention institutions. The Government considered the amount of time spent on the case "unreasonable".

66. It is reiterated that legal costs are only recoverable in so far as they relate to the violation found (see, *inter alia*, the *Pham Hoang v. France* judgment of 25 September 1992, Series A no. 243, p. 24, para. 46). Although the applicant also alleged a lack of fairness in the proceedings, he concentrated on the question in respect of which a violation has been found. The Court therefore finds it reasonable to award the applicant a sum of NLG 35,000 together with any value-added tax that may be chargeable.

67. No particulars were provided regarding travel and accommodation expenses. However, the Court finds it reasonable to award the applicant an amount equal to that which would have been due to him under the legal aid scheme to cover these costs for himself and his representative, namely FRF 6,336.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been a violation of Article 6 para. 1 (art. 6-1) in that the applicant's civil rights and obligations were not "determined" by a "tribunal" within the meaning of that provision;
2. Holds unanimously that there has been no violation of Article 6 para. 1 (art. 6-1) as regards the requirements of fairness of proceedings;
3. Holds by eight votes to one that the respondent State is to pay to the applicant, within three months, 35,000 (thirty-five thousand) Netherlands guilders, together with any value-added tax which may be chargeable, in respect of costs and expenses, to which is to be added 6,336 (six thousand three hundred and thirty-six) French francs to be converted into Netherlands currency at the rate of exchange applicable on the date of delivery of this judgment;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English* and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 April 1994.

Rolv RYSSDAL
President

for the Registrar
Herbert PETZOLD
Deputy 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 following separate opinions are annexed to the judgment:

- (a) concurring opinion of Mr Ryssdal;
- (b) partly dissenting opinion of Mr Martens;
- (c) partly dissenting opinion of Mr Foighel;
- (d) partly dissenting opinion of Mr Mifsud Bonnici.

R.R.
H.P.

* Note by the Registrar. As a derogation from the usual practice (Rules 26 and 27 par. 5 of the Rules of Court), the French text was not available until June 1994; but it too is authentic.

CONCURRING OPINION OF JUDGE RYSSDAL

I have only voted for a violation reluctantly. I share the opinion that the Crown's power under section 74 of the 1954 Act is incompatible with Article 6 para. 1 (art. 6-1) of the Convention. But that power has never been used. It is unlikely that it could still have been used at the material time, and its mere existence cannot be said to be detrimental to the applicant. However, the Government have not contended that the applicant lacked the required quality of victim of the above violation.

PARTLY DISSENTING OPINION OF JUDGE MARTENS

I. INTRODUCTION

1. Like the majority I am of the opinion that section 74 of the 1954 Act is incompatible with Article 6 (art. 6) of the Convention. However, I find myself unable to accept that this justifies the finding that in the present case there has been a violation of that Article (art. 6) in that the applicant's civil rights and obligations were not "determined" by a "tribunal" within the meaning of that provision.

2. I note that the Court apparently holds that the present case calls for an exception to its established case-law, according to which "in principle it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention"¹. Section 74 of the 1954 Act was not applied to the detriment of the applicant - indeed section 74 was never applied at any time during the forty years that it remained "on the statute book"² - but the Court considers its mere existence sufficient to find a violation of Article 6 (art. 6) of the Convention.

In itself this approach is in line with the one I have consistently advocated even in cases where the complaint was that the application of a certain provision violated rights under the Convention³. I feel, however, that the Court should have given reasons for this exceptional approach to the present case.

II. THE NATURE OF THE VIOLATION OF ARTICLE 6 (art. 6)

3. One of the essential problems in this case is the nature of the violation of Article 6 (art. 6).

The applicant contended that the mere existence of the Crown's powers under section 74 impaired the independence of the Industrial Appeals Tribunal, since it clearly influenced its decisions. I entirely concur in the Court's rejection of that argument⁴.

For its part the Court concentrates on the notion of a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention and concludes that, because of the Crown's power under section 74, the Industrial Appeals Tribunal did not meet all the requirements implied in that notion. In order to justify this conclusion, the Court reads into the notion a requirement which

¹ See the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 18, para. 33.

² See the *Modinos v. Cyprus* judgment of 22 April 1993, Series A no. 259, p. 11, para. 20.

³ See my concurring opinion in the *Fey v. Austria* case, judgment of 24 February 1993, Series A no. 255-A, p. 16, para. 1.

⁴ See paragraphs 46 and 47 of the Court's judgment.

is "new" in the sense that it had not been made explicit in the Court's case-law referred to in paragraph 45 of the judgment: for a court to be considered a tribunal within the meaning of Article 6 (art. 6), it does not suffice for it to have the power to give a binding decision; it is moreover required that such a decision "may not be altered by a non-judicial authority to the detriment of an individual party" (see paragraph 45 of the Court's judgment - emphasis mine).

The reference to "an individual party" reveals that this extra requirement has been created for the nonce and that is, perhaps, why it failed to persuade me to share the Court's opinion that the Industrial Appeals Tribunal - which I hold in esteem - is deficient in that it cannot even be considered a tribunal within the meaning of Article 6 (art. 6).

4. In my opinion there is nothing amiss with the Industrial Appeals Tribunal. There is, however, a violation of Article 6 (art. 6) because section 74 is incompatible with the fundamental principle of the rule of law which Article 6 (art. 6) is intended to enshrine⁵.

Let me try to explain.

Section 74 of the 1954 Act was a safety-valve to be used only in very exceptional cases. The perceived need for this safety-valve was understandable, not only in view of the very wide powers given to the Industrial Appeals Tribunal at a time when the Netherlands still had very little experience with administrative tribunals, but also in view of the fact that originally the Industrial Appeals Tribunal heard appeals only against decisions and acts of economic regulatory bodies set up under the Industrial Organisation Act (*Wet op de Bedrijfsorganisatie*)⁶. It is understandable that the legislature should have feared at the time that those lower bodies, when presenting their case before the Industrial Appeals Tribunal, might very well take a view of "the general interest" which differed from that of central Government, so that the latter ought to have an opportunity to intervene if the "general interest" as they saw it was endangered by the Industrial Appeals Tribunal's ruling.

Indeed, it is quite conceivable that the "general interest" justifies deciding that although an administrative decision detrimental to an individual's "civil rights"⁷ was unlawful, the individual concerned should not be entitled to *restitutio in integrum* but only to compensation⁸.

⁵ See, as the most recent authority, the *Salabiaku v. France* judgment of 7 October 1988, Series A no. 141-A, p. 16, par. 28. It may be deduced from the *Håkansson and Stureson v. Sweden* judgment of 21 February 1990, Series A no. 171-A, pp. 16-17, paras. 45-50, that the Court is prepared to examine alleged violations of the principle of the rule of law.

⁶ See paragraph 32 of the Court's judgment.

⁷ In fairness to the Netherlands legislature of 1954, it should be observed that it was quite unfamiliar with the idea that administrative proceedings might well concern "civil rights"!

⁸ Compare Article 6:168 para. 1 of the Netherlands' new Civil Code.

However, under the rule of law it is essentially for the judiciary - and not the executive - to decide in the last resort whether an injured individual's civil rights should be subordinated to the "general interest"⁹.

The fundamental flaw of section 74 and the essence of its incompatibility with Article 6 (art. 6) of the Convention is therefore that it assigns this decision to the Crown¹⁰.

Had the power under section 74 ever been used, it would have violated the principle of "equality of arms" and would have undermined the confidence which the courts should inspire in a democratic society. The above analysis shows, however, that section 74 violates Article 6 para. 1 (art. 6-1) of the Convention per se, quite apart from whether it is used or not.

5. Even when the original Bill was introduced in the 1950s, the incompatibility of section 74 with the principle of the rule of law was noticed both outside¹¹ and inside Parliament. Nearly all those who took part in the debate on the Bill mentioned the point. Those who took the view (in some instances with considerable hesitation) that - as most of the speakers put it - "the Government's power to decree that certain decisions of the Industrial Appeals Tribunal [would] have no effect"¹² was not incompatible with the rule of law based that opinion on the understanding that the requirements of that principle were less strict in the field of administrative law than in that of civil law¹³. Their opponents - who were in a minority - disagreed. The spokesman for the latter (a renowned professor of private international law at Leiden University) said in this context:

"According to the prevailing view ... there is no place for judicial proceedings in the proper sense of the word in the field of public law. I consider this wrong in principle, since it is in the nature of things that judicial proceedings are an inherent part of the rule of law and it is only by them that the power of public authority is subjected to the

⁹ As the Court said in its *Klass and Others v. Germany* judgment (see note (1) above), pp. 25-26, para. 55: "The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."

¹⁰ Giving the "final say" to the executive was symptomatic of the attitude which also was at the root of the "appeal to the Crown" that the Court condemned in its *Bentham v. the Netherlands* judgment of 23 October 1983, Series A no. 97. But see note (7) above.

¹¹ For a synopsis of the critical comments of learned writers at that time, see A.J. Haakman, *Rechtspraak Bedrijfsorganisatie* (Samson, Alphen aan den Rijn, 1957), paragraph 174 (pp. 145-46).

¹² Thus the leader of the Liberals, Mr Oud, *Handelingen der Tweede Kamer, Zitting 1953-1954*, p. 2423.

¹³ See, for instance, Oud, *Handelingen der Tweede Kamer, Zitting 1953-1954*, pp. 2419 and 2424, and Kikkert, *ibid.*, p. 2434.

law. Only by them can a fair balance between private and general interests truly be ensured."¹⁴

I cannot refrain from including one more quotation from his speech, not only because it has a remarkably modern flavour but also because it well illustrates the point that I am trying to make:

"In my opinion, what is at issue here is the proper balance between the judiciary and the Government, between the concrete legal situation determined by the judiciary and the exercise of the Government's responsibility. If this view is taken of their interrelationship, one can discern no good reason why the Government should independently enforce the exercise of their responsibility in a way directly opposed to the decision of the judiciary.

On the contrary, it might be argued that under the rule of law the decision of the judiciary should be allowed to prevail, since it must be accepted that such a decision will in certain cases be detrimental to the general interest."¹⁵

6. Criticism of section 74 never subsided. Again and again leading commentators on administrative law have condemned section 74 as unacceptable¹⁶. Some of these critical comments date from after the Court's judgment in the *Bentham v. the Netherlands* case (23 October 1985, Series A no. 97)¹⁷, but several antedate that landmark decision. Van der Burg and Cartigny¹⁸ criticised the Crown's power under section 74 as "half-hearted and inconsistent", Tak and Ten Berge¹⁹ described it as "questionable" and Stroink²⁰ as "scandalous", whilst Hirsch Ballin (the present Minister of Justice), analysing the inferences to be drawn from Article 6 (art. 6) of the Convention²¹, confined himself to saying that this power allowed independent decisions of the Industrial Appeals Tribunal to be interfered

¹⁴ Lemaire, *Handelingen der Tweede Kamer, Zitting 1953-1954*, p. 2435. It might be argued that ideas like these were at the root of the Court's extensive interpretation of the field of application of Article 6 (art. 6) of the Convention.

¹⁵ Lemaire, *ibid.*, p. 2436.

¹⁶ However, E.A. Alkema, *Nederlands Juristenblad* 1980, p. 196, defended section 74 as compatible with Article 6 (art. 6); in his annotation to the *Bentham* judgment (*Nederlandse Jurisprudentie* 1986, no. 102) he maintained that opinion.

¹⁷ See inter alia: W. Konijnenbelt, *De Gemeentestem*, p. 355; A.W. Heringa, *NJCM-Bulletin* 1985, pp. 691 et seq.; E.M.A. Hirsch Ballin, *Administratiefrechtelijke Beslissingen* 1986, no. 1; I. Sewandono, *Nederlands Juristenblad* 1986, pp. 465 et seq.; R.J.G. Widdershoven, *Gespecialiseerde rechtsgangen in het administratief recht* (Tjeenk Willink, Zwolle, 1989), pp. 128-29. See also Ernst Holthöfer, *Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert* (Vittorio Klostermann, Frankfurt am Main, 1993), p. 47 ("auffallendes rechtsstaatliches Defizit").

¹⁸ F.H. van der Burg and G.J.M. Cartigny, *Rechtsbescherming tegen de Overheid* (3rd edition, *Ars Aequi Libri*, Nijmegen, 1983), p. 79.

¹⁹ A.Q.C. Tak and J.B.J.M. ten Berge, *Nederlands Administratief Procesrecht* (Tjeenk Willink, Zwolle, 1983), II. para. 1560 (p. 245).

²⁰ E.A.M. Stroink, *Administratieve rechtspraak en rechterlijke macht* 1985, p. 9.

²¹ *Preadvies voor de Nederlandse Juristenvereniging, Handelingen van de Nederlandse Juristenvereniging* 1983, I.2, pp. 119 et seq.

with and recommended that this provision should be amended "if it [was] necessary to maintain it at all".

This persistent criticism of section 74 highlights the fact that it has never been repealed. In 1984 the Minister of Justice cautiously said: "One might even venture to suggest that the scheme of sections 74 and 75 has become a dead letter"²² but, although he said this when introducing a Bill to amend the 1954 Act, he was very careful not to propose repealing the controversial provisions! Nor were they immediately repealed as a result of the Benthem judgment. Does this not suggest that the Government wished not only to retain their power under section 74 but also to reserve the right to use it?²³

III. IS THE APPLICANT A "VICTIM"?

7. It is surprising that the Government did not at any stage of the proceedings contend that the applicant could not properly claim to be a "victim" of any violation, section 74 not having been applied to his detriment.

That curious omission should not, however, have prevented the Court from examining *proprio motu* whether or not the applicant had the standing to complain about the incompatibility of section 74 of the 1954 Act with Article 6 (art. 6) of the Convention. The requirement of the status of "victim" is not merely a question of admissibility but rather a question of competence. A respondent State may waive reliance on the preliminary objection that the application was filed out of time or that domestic remedies were not exhausted, but cannot, by not raising the question of victim status, create competence where that is lacking. After all, Article 25 (art. 25) of the Convention "does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law in *abstracto* simply because they feel that it contravenes the Convention"²⁴.

8. *Quaeritur ergo*: is the applicant to be considered a "victim" on account of the mere existence of a provision of national law that is incompatible with the Convention, even though section 74 was not applied to his detriment?

²² See the Court's judgment, paragraph 48 in fine.

²³ In this context I note that commentators on the Industrial Appeals Act always point out that had the Crown ever made use of its powers under section 74, the individual concerned could have had its decision reviewed by the civil courts. In my opinion, it would have been a persuasive argument for the Government to draw the Court's attention to this remedy and to plead that, in view of the disuse to which the Minister had referred officially, the civil courts would certainly have set aside the Crown's decision under section 74 as being contrary to general principles of good governance, in particular the principle of legal certainty and the principle that legitimate expectations must be fulfilled. However, the Government did not use this argument.

²⁴ See the *Klass and Others v. Germany* judgment (see note (1) above), p. 18, para. 33.

In answering this question I recall, firstly, that there are undoubtedly cases in which the very existence of certain provisions of national law affects an individual so continuously, directly and distressingly that he is to be considered a victim. In this respect it is sufficient to refer to the *Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, and especially to the judgments in the cases concerning homosexuals and transsexuals²⁵. It goes without saying that the present case does not fall into that category.

The next point to be made is that it has not been disputed that the Industrial Appeals Tribunal possesses all the relevant characteristics of the judicial function as hitherto defined in the Court's case-law²⁶. It is in fact clear that the 1954 Act²⁷ conferred on the Industrial Appeals Tribunal the power to decide cases within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. Nor has it been contested that as far as the manner of appointment of its members and their terms of office are concerned and with regard to the guarantees afforded by its procedure, the Industrial Appeals Tribunal fully meets the requirements of an independent tribunal within the meaning of Article 6 para. 1 (art. 6-1). Furthermore, the Court has found (see paragraph 47 of its judgment)

"that there is nothing in the information at its disposal to indicate that the mere existence of the Crown's powers under section 74 had any influence on the way the Tribunal handled and decided the cases which came before it".

The conclusion must be that for all practical purposes the applicant's relevant civil rights were determined in conformity with Article 6 (art. 6)²⁸.

In other words, the applicant did not suffer any other harm than that of having to litigate before a jurisdiction handing down decisions which in theory - should the Crown use the power which, contrary to the principle of the rule of law, had been conferred upon it by section 74 - might be subject to change in the manner indicated in paragraph 54 of the Court's judgment, that is, that it might not entitle the applicant to a specific new administrative decision in his favour but only to compensation. It is true that under the Court's case-law the mere risk of being directly and detrimentally affected by the application of the impugned decision of national law may suffice to

²⁵ See my dissenting opinion in the *Cossey v. the United Kingdom* case, judgment of 27 September 1990, Series A no. 184, p. 26, para. 3.4.

²⁶ See the references in paragraph 45 of the Court's judgment.

²⁷ See paragraphs 32-36 of the Court's judgment.

²⁸ It follows that it is open to doubt whether even after the present judgment the Netherlands civil courts will feel bound to assume jurisdiction under the principles of Netherlands law referred to in the *Oerlemans v. the Netherlands* judgment of 27 November 1991, Series A no. 219, p. 22, para. 57. As the above analysis makes clear, it is at least arguable that the Court's finding that the Industrial Appeals Tribunal does not meet all the requirements implied in the notion of "tribunal" within the meaning of Article 6 (art. 6) does not necessarily imply that the Industrial Appeals Tribunal did "not afford sufficient guarantees as to a fair procedure" within the meaning of those principles of Netherlands law.

qualify a person as a "victim"²⁹, but, firstly, the risk that after more than thirty years the Crown should suddenly use the impugned power to prevent the applicant from being allowed a larger levy-free quantity of milk was infinitesimal, and, secondly, even if that risk had materialised, the applicant would nevertheless not have suffered any prejudice whatsoever, since any damage caused by a refusal to increase a levy-free quantity of milk is by its nature capable of being fully made good by financial compensation.

9. In sum: I cannot but conclude that in view of the fact that section 74 was not applied to the detriment of the applicant, he cannot be considered a "victim" of the fact that this provision of Netherlands law was incompatible with the fundamental principle of the rule of law and consequently violated Article 6 (art. 6) of the Convention.

IV. CONCLUSION

10. In view of my finding that the applicant lacks the required status of "victim" I had no other choice than to vote against point 1 of the operative provisions of the Court's judgment, even though I too am of the opinion that section 74 of the 1954 Act was incompatible with Article 6 (art. 6) of the Convention.

²⁹ See, as the most recent authorities, the *Open Door and Dublin Well Woman v. Ireland* judgment of 29 October 1992, Series A no. 246, p. 22, para. 44, and the *Informationsverein Lentia and Others v. Austria* judgment of 24 November 1993, Series A no. 276, p. 13, para. 27.

PARTLY DISSENTING OPINION OF JUDGE FOIGHHEL

As follows from paragraphs 56-61, there is no indication that the applicant was not treated with fairness when his case was determined by the Industrial Appeals Tribunal. The applicant's main complaint is that the mere existence of section 74 of the 1954 Act, according to which the Government could block the consequences of the Tribunal's decisions, impaired that Tribunal's independence.

I agree with the majority (paragraph 47) "that there is nothing in the information at [the Court's] disposal to indicate that the mere existence of the Crown's powers under section 74 had any influence on the way the Tribunal handled and decided the cases which came before it". Taking into consideration, furthermore, that the power stemming from section 74 was never used by the Government and that as from 1 January 1994 that power has been abolished, I come to the conclusion that the applicant is not a "victim" and his rights under Article 6 (art. 6) of the Convention have not been affected.

This makes it unnecessary for me to discuss the theoretical question whether a tribunal loses its independence if it cannot in all cases control the execution of its judgment.

I find no violation of Article 6 (art. 6) in this case.

PARTLY DISSENTING OPINION OF JUDGE MIFSUD BONNICI

1. The majority has found that the adjudicating organ set up by the 1954 Act could not be considered a "tribunal" because section 74 of that constituting law granted the possibility of an intervention by the executive whenever the judgment delivered by the Industrial Appeals Tribunal was considered, in whole or in part, contrary to the general interest. The judgment of the Court holds that, because of the presence of section 74, this adjudicating organ does not qualify as a "tribunal" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention and accordingly the applicant's civil rights and obligations were not determined by a tribunal.

2. My first difficulty arises from the consideration that the reasons adduced are not, in my opinion, of a conclusive nature. I cannot, of course, but agree that the faculty reserved for the executive is highly objectionable, but it does not follow that because of this the adjudicating organ is therefore not a tribunal. "Determination of rights and obligations" has the same meaning as "definition of rights and obligations", and accordingly this element appears to be present. The element of "effectiveness" is of greater weight, and I would be inclined to consider it as an element of disqualification if the circumstances of law and fact concur.

3. In the present case the relevant circumstances did not authorise this disqualification:

(a) the Executive's faculty to intervene has never been used since it was created in 1954, and could not be exercised in this case because the judgment was against the applicant;

(b) the Court rightly found that it is by no means clear that the outcome of the case would have been favourable to the applicant if the adjudicating organ had been a tribunal, in accordance with the Convention, and therefore his claim for pecuniary damage was rejected;

(c) section 74 of the Act was abrogated on 1 January 1994.

4. It seems to me that, in these circumstances, the "in abstracto" principle had to be applied. In the *Hauschildt v. Denmark* judgment of 24 May 1989 (Series A no. 154, p. 21, para. 45) this Court had said:

"The Court's task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected Mr Hauschildt gave rise to a violation of Article 6 para. 1 (art. 6-1)."

This constitutes my second and conclusive difficulty.

5. The presence of section 74 in the Act, which brought about the finding of a violation by the majority, did not, in reality, affect the applicant in any way, and he in effect did not qualify as a victim of a fundamental right violation.

6. In my opinion therefore, in the absence of a victim and without an in concreto element, I cannot agree with the delivery of a judgment which, practically, condemns a section of law which:

- (a) never prejudicially affected anybody and moreover,
- (b) is already inexistent on the date of that judgment.

7. In view of the fact that, in my opinion, the applicant was not a victim, I think that nothing is due to him under Article 50 (art. 50) of the Convention.