



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

THIRD SECTION

DECISION

Application no. 2156/10

M

against the Netherlands

The European Court of Human Rights (Third Section), sitting on 2 December 2014 as a Chamber composed of:

Josep Casadevall, *President*,

Luis López Guerra,

Ján Šikuta,

Dragoljub Popović,

Kristina Pardalos,

Valeriu Grițco,

Iulia Antoanella Motoc, *judges*,

and Stephen Phillips, *Section Registrar*,

Having regard to the above application lodged on 7 January 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, M, is a Netherlands national who was born in 1970 and lives in Houten. He was represented before the Court by Mr A.W. Eikelboom, a lawyer practising in Amsterdam.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Introduction

3. The applicant was employed by the AIVD (*Algemene Inlichtingen- en Veiligheidsdienst*, General Intelligence and Security Service) as an audio editor and interpreter. In this capacity he had access to classified

information (*gerubriceerde informatie*), which he was under a duty not to divulge to persons not authorised to have knowledge of it.

4. The suspicion arose that the applicant had forwarded classified information to persons outside the service, including in some cases persons who were under covert investigation by the AIVD in connection with possible terrorist activity.

5. On 30 September 2004 the applicant was arrested. He was charged with divulging State secret information to persons not authorised to take cognisance of it and taken into detention on remand (*voorlopige hechtenis*).

6. The AIVD advised the applicant in writing that he was still under an obligation of secrecy. Consequently it would be constitutive of a further criminal offence if he were to discuss matters covered by his duty of secrecy with anyone including his counsel.

7. The applicant's counsel were also warned that they might be prosecuted should they divulge any State secret information to third parties.

2. Proceedings before the Regional Court

8. The trial opened before the Rotterdam Regional Court (*rechtbank*) on 10 January 2005. It was adjourned several times.

9. The applicant's counsel protested against the restrictions affecting communication between themselves and the applicant, which in their submission undermined the effectiveness of the defence. They also asked for certain documents to be added to make the file complete: these included the internal AIVD report which was the basis of the prosecution, which was absent from the file altogether, and the documents which had supposedly been leaked, which had been added to the case file in censored form. They further repeated a request, made earlier in writing, for the applicant to be released unconditionally from his duty of secrecy in order to conduct his defence (*vrijwaring*).

10. The public prosecutor (*officier van justitie*) agreed to add to the file some but not all of the documents requested by the defence but refused to release the applicant from his duty of secrecy unconditionally.

11. On 24 January 2005 the Regional Court gave a decision remitting the case to the investigating judge, to whom it would fall to carry out investigations in such a way as to mitigate, and compensate as far as possible, the handicaps under which the defence laboured.

12. On 4 March 2005 the head of the AIVD informed the applicant in writing that communication of matters covered by his duty of secrecy was permitted, subject to the following conditions:

1. He would be allowed to discuss such matters only with his counsel, Ms Böhler and Mr Pestman;
2. He was not allowed to reveal the identity of any AIVD staff or human sources;

3. He could discuss only “that which [was] contained in the case file”;
4. This exemption covered only information that was strictly necessary for the defence;
5. This exemption was valid only until the final judgment in the domestic proceedings was given.

13. On 15 April 2005 the Regional Court gave a decision in which, following the public prosecutor, it refused to make the exemption unconditional. It expressed the view that it would serve no useful purpose to allow the applicant to disclose the identities of AIVD staff members and informants to his counsel. The interests of the applicant were sufficiently protected inasmuch as the exemption covered information strictly necessary for his defence. The Regional Court ordered the investigating judge to hear thirteen witnesses referred to by name and seven witnesses referred to by a code name or number. It refused to order the hearing of fifteen other witnesses referred to by a number and one named witness immediately, leaving that decision to be taken by the investigating judge after a particular witness, an AIVD staff member called B., had been heard. As to the partially blacked-out documents, the Regional Court noted that it too was thereby prevented from considering whether they held secret information within the meaning of Articles 98 and 98a of the Criminal Code (*Wetboek van Strafrecht*, see below); even so, the prosecution interest in maintaining secrecy prevailed.

14. The named witness B. was heard on 23 May 2005 and 6 June 2005. It appears that he refused to answer certain questions because of his duty of secrecy.

15. It appears that on 9 June 2005 the investigating judge decided to refuse to hear the sixteen witnesses requested by the defence for lack of available time (*agendatechnische redenen*).

16. On 17 June 2005 the investigating judge decided that the unnamed witnesses permitted to be questioned would be heard at a secret location, under heavy disguise and with the use of voice distorting equipment. A representative of the AIVD and legal counsel of the State would attend in addition to the prosecution and the defence.

17. The defence lodged an objection against the investigating judge’s decision with the Regional Court. They also asked for the named witnesses already heard to be relieved of their duty of secrecy and to be heard anew.

18. The Regional Court held a hearing *in camera* on 5 July 2005. The defence outlined its provisional strategy, which was to aim for an acquittal by identifying potential sources of the leaks other than the applicant and by demonstrating that the documents leaked did not contain State secrets properly so-called. They also wished to establish the applicant’s attitude to his work for the AIVD. This strategy required the applicant’s former direct

colleagues to be questioned and uncensored copies of the documents in question to be made available to the defence and the court.

19. On 8 July 2005 the Regional Court gave an order for two further named witnesses to be heard but dismissed the defence's objection for the remainder.

20. On 14 July 2005 the defence challenged two judges of the trial chamber who had also taken part in the decision of 8 July 2005, arguing on various grounds that positions taken in the latter decision prejudged the outcome of the trial.

21. The following day, 15 July 2005, the challenge was dismissed and the trial hearing was resumed. The defence asked for documents to be added to the file, including all those found in the applicant's desk. The Regional Court remitted the case to the investigating judge for the hearing of the witnesses authorised to be heard, in so far as they had not already been heard, and requested the prosecutor to add documents to the file including a description – to be prepared by the AIVD – of the documents found in the applicant's desk.

22. Witnesses were heard on various dates. In so far as they were unnamed AIVD staff members they were heavily disguised and placed in a box that left only their upper body visible, and their voices were distorted. The applicant states that it was impossible to discern their body language and facial expressions. He further states that both named and unnamed witnesses refused to answer a proportion of the questions put by the defence and that this was permitted by the investigating judge.

23. The trial hearing was resumed on 30 August 2005. Finding no indication that the AIVD information had been leaked by someone else, the Regional Court yet again refused to hear the named witness and the fifteen unnamed witnesses. As to AIVD staff members who refused to disclose certain information based on their duty of secrecy, it stated that the final decision whether to allow this lay with the trial court itself but found that it could not set precise limits as the prosecution wanted.

24. The trial hearing was resumed on 6 and 7 October 2005. The applicant made no statement.

25. On 30 November 2005 the trial hearing resumed. The prosecution and the defence made their closing statements.

26. The Regional Court gave judgment on 14 December 2005. It convicted the applicant and sentenced him to four years and six months' imprisonment.

3. Proceedings before the Court of Appeal

27. The applicant lodged an appeal with the Court of Appeal (*gerechtshof*) of The Hague.

28. The appeal hearing opened on 28 September 2006. Among other things, the applicant's counsel objected to the refusal, in the proceedings at

first instance, to allow the defence an unconditional exemption that would allow the applicant and his counsel to communicate unimpeded; to the hearing of unnamed witnesses under heavy disguise, in a closed box that partially hid them from view, and with the use of voice distortion, even though they were the applicant's former direct colleagues; to the withholding of evidence by the witnesses, based on their duty of secrecy as AIVD staff members; and to the withholding of documentary evidence requested by the defence. The prosecuting advocate general (*advocaat-generaal*) conveyed an offer by the AIVD to allow an independent expert to see uncensored AIVD documents and report on their content; the expert proposed had previously been a member of a committee appointed to investigate the internal functioning of the AIVD itself. The defence protested that this expert lacked independence precisely for that reason.

29. The Court of Appeal delivered an interlocutory judgment on 12 October 2006. It noted the "particular tension between fundamentally opposed interests", namely the applicant's interest as a defendant in a criminal trial and the State interest in maintaining the secrecy of AIVD information, but rejected the protests put forward on the applicant's behalf. The judgment took note of a promise made by the advocate general not to prosecute for a violation of the duty of secrecy if that violation was justified by reliance on Article 6 of the Convention (*gerechtvaardigd is door een beroep op artikel 6 EVRM*). It asked the prosecution to submit certain official reports but not the uncensored AIVD documents requested by the defence.

30. The appeal hearing was resumed on 12 and 15 February 2007. The applicant announced that he might, in his own defence, have to reveal State secret information. This prompted the Court of Appeal to exclude the public from the interrogation of the applicant, despite the latter's protests.

31. In the course of questioning by his counsel the applicant mentioned the names of particular AIVD staff members; these are not recorded in the official record of the hearing. The advocate general protested against the mentioning of these names in so far as they were not already to be found in the case file, which in his view was not justified by Article 6 of the Convention, and announced his intention to prosecute if the applicant should "transgress those limits" (*mocht hij die grenzen overschrijden*). The applicant's counsel replied that the defence needed these names in order to decide whether to call the persons concerned as defence witnesses and pointed out that the public had been excluded. After the president decided that the advocate general should be entitled to state a view on the acceptability of questions put to the applicant by his counsel, the applicant stated that he would for the remainder of the hearing comply with his duty of secrecy. Thereupon the hearing was reopened to the public.

32. The Court of Appeal gave judgment on 1 March 2007. It quashed the judgment of the Regional Court on technical grounds, convicted the

applicant and sentenced him to four years' imprisonment. Its reasoning included the following:

"In considering whether the positions adopted by the service [i.e. the AIVD] and/or its members as regards the necessary secrecy and in answering the question to what extent restrictions on (among other things) the right to question witnesses can be justified, other issues than that of defining State secrets in a strict sense also play a part. That is apparent from the chapeau paragraph of section 85(1) of the 2002 Intelligence and Security Services Act (*Wet op de inlichtingen- en veiligheidsdiensten*), which imposes on AIVD officials a duty of secrecy 'without prejudice to Articles 98-98c of the Criminal Code'. That obligation extends to 'all information the confidential character of which he knows or ought reasonably to suspect'. Only a ministerial decision as referred to in section 86(2) of that Act can relieve the official of this duty of secrecy if he wishes to act as a witness. The legislature has thus placed the choice in the 'conflict ... between the interests of State security, which may imperatively require certain sources or information to be kept secret, and the interest of establishing the material truth in, among other things, ... criminal procedure' [reference to the statutory drafting history of an earlier Act, repealed by the 2002 Intelligence and Security Services Act, omitted] in the hands of the said Ministers.

...

The above leads the Court of Appeal to conclude as follows. In addition to State secrets within the meaning of Article 98 of the Criminal Code there are other matters that (in the view of the AIVD) fall under the duty of secrecy of section 85 of the 2002 Intelligence and Security Services Act. The Court of Appeal deduces, on the basis of what is laid down in section 86 of that Act, that that obligation (in principle) prevails over the duties of a witness in a criminal trial. The Court of Appeal's examination of the question whether an AIVD staff member has rightly invoked his duty [of secrecy] is necessarily detached/marginal. Things are different where it concerns the question whether the right of the defence to question witnesses is materially impaired, it being relevant, in the opinion of the Court of Appeal, whether the statement of that particular witness is used in evidence."

and

"The interests of State security, which the 2002 Intelligence and Security Services Act and Articles 98 and following of the Criminal Code are intended to protect, stand in the way of granting a complete exemption from the duty of secrecy as desired by the defence.

It is obvious that the said duty of secrecy constitutes, to some extent, a restriction on – normally entirely – unimpeded free and confidential discussion between the suspect and his counsel and that – had it been in force unmitigated – it would prevent a fair trial.

As the Court of Appeal held in its interlocutory judgment of 12 October 2006, the duty of secrecy is subject only to the exceptions set out in the 2002 Intelligence and Security Services Act.

This means that the situation in which the suspect finds himself in the present criminal case leaves only the avenue left by section 86(1) of the said Act."

and

“The advocate general has given the undertaking, at the Court of Appeal’s hearing of 2 September 2006, that [the applicant] shall not be prosecuted if a violation of the duty of secrecy by [the applicant] is justified by reliance on Article 6 of the Convention, with due regard to the demands of proportionality and subsidiarity of pertaining to a legal defence (*strafuitsluitingsgrond*).

The conditions attached to the exemption aforementioned, all of which concern the interest of State security in relation to the interests of the defence in the present criminal proceedings, do not appear unreasonable to the Court of Appeal within the framework of the interests of State security and in the Court of Appeal’s opinion have done no relevant harm to the interests of the defence.”

and

“The Court of Appeal can only answer the question whether the information in issue is to be considered ‘State secret’ or as information relating to State security by referring to the texts, as contained in the file, of [the documents concerned], to the extent that these documents have been added to the file in censored form as appendices to the AIVD’s official record of 15 March 2005, [an uncensored e-mail relevant to one of the charges] and the explanations to these documents given by the AIVD, especially as contained in the said official record of the head of the AIVD of 10 February 2005 and the official record of the acting head of the AIVD of 28 December 2006, which latter report has been verified by the National Public Prosecutor for Counter-terrorism (*Landelijke Officier van Justitie Terrorismebestrijding*) as appears from the latter’s official report of 29 December 2006.

The Court of Appeal considers itself sufficiently able to determine the nature and character of this information on the basis of these documents, considered in context. For that purpose it is not necessary, in the opinion of the Court of Appeal, to possess or have access to entirely uncensored versions of the information. In this connection, the Court of Appeal has sought, in giving its interlocutory judgment aimed at obtaining a further official report about the type and nature of the State security interest of the information contained in the censored texts portions, to gain optimum understanding of the nature and character of the information. Although the AIVD, in submitting its official record of 28 December 2006 (verified by the National Public Prosecutor for Counter-terrorism), has not entirely kept to the letter of the Court of Appeal’s order, the Court of Appeal has, based on the texts before it, considered in context with the AIVD’s explanations in its official records of 10 February 2005 and 28 December 2006, sufficiently gained the understanding referred to.”

4. Proceedings before the Supreme Court

33. The applicant lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*).

34. The Supreme Court gave judgment on 7 July 2009 (*Landelijk Jurisprudentie Nummer* (National Jurisprudence Number) BG7232). It quashed the judgment of the Court of Appeal on the technical ground that the length of the proceedings before it had been excessive and reduced the applicant’s sentence by two months, to three years and ten months. It held, however, that the appeal was unfounded. Its reasoning included the following:

“5.5. There is no statutory provision for an exception to the duty of secrecy laid down in section 85 of the 2002 Intelligence and Security Services Act in the event that the official concerned is a suspect. Even then the official is bound by his duty of secrecy and he will not be permitted to disclose information in violation of that duty.

If, however, the trial judge takes the view, whether or not it be in response to a request or a legal argument (*verweer*) put forward by the defence, that the interest of the defence requires that information falling under the suspect’s duty of secrecy is disclosed, the court will have to weigh the conflicting interests in the case. The guiding principle (*richtsnoer*) in so doing is whether, if this information cannot be disclosed after all, there can still be a fair trial within the meaning of Article 6 of the Convention.

If the trial court reaches the finding that it is necessary, from the point of view of that Convention guarantee, to take cognisance of that secret information and the resulting handicap for the defence is not sufficiently compensated by the procedure followed, it will have to determine – for example, by hearing the appropriate AIVD official or officials on this point – whether the duty of secrecy is to be maintained intact in relation to that information. If that is the case, the conclusion will have to be that there cannot be any fair trial and the prosecution will have to be declared inadmissible (*zal de officier van justitie niet-ontvankelijk moeten worden verklaard in de vervolging*).

5.6. In so far as the Court of Appeal has been inspired by a procedural framework other than outlined above, it has misinterpreted the law (*heeft het blijk gegeven van een onjuiste rechtsopvatting*). However, that need not lead to the quashing of the judgment [of the Court of Appeal] for the following reasons.”

The Supreme Court went on to find that the compensatory measures had been sufficient in the circumstances: the possibility was offered to hear AIVD officials as witnesses without disclosing their identities, and the Court of Appeal had been sufficiently informed by the information contained in the case file – the uncensored parts of documents, the official explanatory documents submitted by the AIVD, and the checking of the AIVD position by the National Public Prosecutor for Counter-terrorism – to make a proper assessment as to whether the documents in issue were properly classified State secret.

B. Relevant domestic law

1. The Criminal Code

35. Provisions of the Criminal Code relevant to the case before the Court are the following:

Article 98

“1. He who deliberately delivers or makes available knowledge (*inlichting*) which needs to be kept secret in the interest of the State or its allies, an object from which such information can be derived, or such information (*gegevens*) to a person or body not authorised to take cognisance of it, shall, if he knows or ought reasonably to be aware that it concerns such knowledge, such an object or such information, be

sentenced to a term of imprisonment not exceeding six years or a fifth-category fine [i.e. up to 74,000 euros (EUR)]. ...”

Article 98c

“1. The following shall be sentenced to a term of imprisonment not exceeding six years or a fifth-category fine:

- i. he who deliberately takes or keeps knowledge, an object or information as referred to in Article 98 without being duly authorised;
- ii. he who undertakes any action with intent to obtain knowledge, an object or information as referred to in Article 98 without being duly authorised; ...”

2. *The Code of Criminal Procedure*

36. Provisions of the Code of Criminal Procedure (*Wetboek van Strafvordering*) relevant to the case before the Court are the following:

Article 190

“1. The investigating judge shall ask suspects, witnesses and experts to state their names and first names, age, profession and place of residence or abode; and the suspect to state his place of birth. If the suspect is known, the investigating judge shall ask witnesses and experts whether they are his relatives by blood or marriage, and in the affirmative, in what degree of kinship.

2. The investigating judge may, either *ex officio* or on an application (*vordering*) of the public prosecutor or at the request of the suspect or the witness, determine that particular information as referred to in the first paragraph shall not be asked for if there is reason to suspect (*vermoeden*) that the witness will be inconvenienced in connection with the making of his statement or will be hindered in the exercise of his profession. The investigating judge shall take whatever measures are reasonably necessary to prevent the disclosure of this information.

3. The investigating judge shall state the reasons for which the second paragraph has been applied in his official record. ...”

3. *The 2002 Intelligence and Security Services Act*

37. Provisions of the 2002 Intelligence and Security Services Act relevant to the case before the Court are the following:

Section 6

“1. There shall be a General Intelligence and Security Service [i.e. the AIVD].

2. The [AIVD]’s tasks, in the interest of national security, are the following:

- a. to carry out investigations relative to organisations and persons who, by the aims which they pursue or their activities, give rise to serious suspicion (*het ernstige vermoeden*) that they constitute a danger to the continued existence of the democratic legal order or to the security or other weighty interests of the State;
- b. ...
- c. to promote measures (*het bevorderen van maatregelen*) for the protection of the interests mentioned in sub-paragraph a, including measures aimed at securing

information which needs to be kept secret in the interest of national security and of those parts of Government service and private enterprise (*bedrijfsleven*) which in the judgment of the Ministers invested with responsibility in the matter are of vital importance for the maintenance of social life (*de instandhouding van het maatschappelijk leven*);

d. to carry out investigations concerning other countries relative to subject-matter indicated by the Prime Minister, Minister of General Affairs (*Minister-President, Minister van Algemene Zaken* [the Prime Minister being both at the same time]), in agreement with other Ministers involved; ...”

Section 9

“1. Officials of the [intelligence and security] services are not invested with powers of criminal investigation (*bezitten geen bevoegdheid tot het opsporen van strafbare feiten*). ...”

Section 12

“1. The [intelligence and security] services are empowered (*bevoegd*) to process data taking into account the constraints (*eisen*) posed thereon by the present Act ...

2. Data shall be processed only for a particular purpose and only in so far as is necessary for the proper implementation of this Act ...

3. Data shall be processed in accordance with the law and properly and with due care.”

Section 15

“The heads of the [intelligence and security] services shall see to:

a. the maintenance of the secrecy of data so designated (*daarvoor in aanmerking komende gegevens*);

b. the maintenance of the secrecy of sources so designated from which data are obtained;

c. the safety of the persons with whose co-operation data are collected.”

Section 16

“The heads of the [intelligence and security] services shall also see to:

a. the making of the arrangements necessary to ensure the correctness and completeness of the data to be processed;

b. the making of the arrangements of a technical and organisational nature necessary to secure the safety of the processing of data against loss or damage and against unauthorised processing;

c. the appointment of persons who shall be authorised, to the exclusion of others, to carry out the tasks appointed in the framework of data processing.”

Section 85

“1. Without prejudice to Articles 98-98c of the Criminal Code, everyone who is involved in the execution of this Act and thereby enters into the possession of information the confidential character of which he knows or ought reasonably to

suspect (*en daarbij de beschikking krijgt over gegevens waarvan hij het vertrouwelijke karakter kent of redelijkerwijs moet vermoeden*) shall have a duty to keep it secret except in so far as a legal provision places him under an obligation to divulge it. ...”

Section 86

“1. The duty of secrecy owed by an official involved in the execution of this Act shall not apply *vis-à-vis* the person to whom the official is directly or indirectly subordinate, nor to the extent that he has been exonerated from that duty by a superior.

2. The official referred to in the first paragraph, if obliged pursuant to a legal provision to act as a witness or an expert, shall only make a statement about the matters covered by his duty of secrecy to the extent that the Minister concerned and the Minister of Justice together have exonerated him from that duty in writing. ...”

4. *The Protection of State Secrets Act*

38. Provisions of the Protection of State Secrets Act (*Wet bescherming staatsgeheimen*) relevant to the case are the following:

Section 1

“Every place used by the State or a State company (*staatsbedrijf*) may be designated out of bounds by Us [i.e. the Monarch, effectively the Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*)] (*kan door Ons als verboden plaats worden aangewezen*) for the protection of information that needs to be kept secret in the interest of State security (*waarvan de geheimhouding door het belang van de veiligheid van de Staat wordt geboden*).”

39. Places designated out of bounds by Royal Decree (*koninklijk besluit*) pursuant to this provision include buildings used by the AIVD.

5. *The Information specific to State service (Security) Order*

40. Provisions of the Information specific to State service (Security) Order (*Voorschrift informatiebeveiliging rijksdienst-bijzondere informatie*, also known domestically as “Vir-bi”) relevant to the case are the following:

Section 1

“In this Order:

‘State secret’ shall mean: specific knowledge which needs to be kept secret in the interest of the State or its allies;

‘Classify’ shall mean: to establish and indicate that particular information (*een gegeven*) constitute specific information and to determine and indicate the level of security to be assigned to this information.”

Section 5

“State secrets shall be classified as follows:

- a. State secret TOP SECRET (*Stg. ZEER GEHEIM*), if the interests of the State or its allies can be very seriously harmed should unauthorised persons take cognisance thereof;
- b. State secret SECRET (*Stg. GEHEIM*), if the interests of the State or its allies can be seriously harmed should unauthorised persons take cognisance thereof;
- c. State secret CONFIDENTIAL (*Stg. CONFIDENTIEEL*), if the interests of the State or its allies can be harmed should unauthorised persons take cognisance thereof.”

6. *Classification of the identity of AIVD staff members*

41. It is reflected in the drafting history of the 2002 Intelligence and Security Services Act (Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 1997-98, 25877, no. 3 (Explanatory Memorandum (*Memorie van Toelichting*), page 93) that the identity of AIVD staff may, depending on the circumstances, be State secret.

COMPLAINTS

42. The applicant makes the following complaints under Article 6 of the Convention:

- (a) He complains under Article 6 § 1 of the Convention that much of the documentary evidence, both incriminating and exculpating, was either disclosed to the defence only with extensive parts of the text blacked out by the AIVD or not disclosed to the defence at all.
- (b) He complains under Article 6 § 3 (d) that the domestic courts refused to hear his former AIVD colleagues as witnesses except under the cloak of anonymity, if at all, and that questions put by the defence were blocked at the behest of the AIVD which was represented when the witnesses were heard.
- (c) He complains – as the Court understands it, under Article 6 § 1 – that the information which he was allowed by the AIVD to divulge to the courts was limited, even at a hearing from which the public were excluded, which in his submission placed the AIVD in control of his defence.
- (d) He complains, under Article 6 § 3 (b) and (c), that the AIVD imposed restrictions on communication between him and his counsel.

43. In addition, the applicant complains that the exemptions covering communication between him and his counsel, such as they were, were valid only for the duration of the domestic proceedings and not also for the proceedings before the Court. This, in his submission, constitutes a

hindrance on the effective exercise of his right to lodge an application with the Court, within the meaning of Article 34 of the Convention.

THE LAW

A. Complaints under Article 6 of the Convention

44. The applicant complains that the criminal proceedings against him were unfair in that the AIVD exercised decisive control over the evidence, restricting his and the domestic courts' access to it and controlling its use, and preventing him from instructing his defence counsel effectively. He relies on Article 6 §§ 1 and 3(b), (c) and (d), which provide as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

45. The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

B. Complaint under Article 34 of the Convention

46. The applicant claims to have suffered a hindrance of his effective exercise of the right of petition in that the conditional exemption allowing him, within the limits set out above, to communicate matters covered by his duty of secrecy as a former AIVD official to his counsel ceased at the end of

the domestic proceedings and thus did not apply in the proceedings before the Court. He relies on Article 34 of the Convention, which provides as follows:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

47. It is worth noting at the outset that although the applicant’s position is based on the premise that the information which he was prevented from communicating to his counsel was crucial to his defence in the domestic criminal proceedings, it does not follow *ipso facto* that that same information will necessarily be of assistance to the Court.

48. It should be remembered that it is not the Court’s function to deal with errors of fact or law allegedly committed by the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Cornelis v. the Netherlands* (dec.), no. 994/03, ECHR 2004-V (extracts)), as it is not a court of appeal – or, as is sometimes said, a “fourth instance” – from these courts (see, among many other authorities, *Kemmache v. France* (no. 3), 24 November 1994, § 44, Series A no. 296-C; and *Melnychuk v. Ukraine* (dec), no. 28743/03, ECHR 2005-IX). From this it follows that it is not the Court’s task to review in detail the evidence which the applicant would have wished to present to the domestic courts. At all events, Article 6 does not guarantee a particular outcome of criminal proceedings (see *Withey v. the United Kingdom* (dec.), no. 59493/00, ECHR 2003-X).

49. The Court notes in addition that the applicant is neither prevented from bringing an application before the Court nor from arguing effectively that he has been the victim of violations of his defence rights under Article 6 of the Convention. Moreover, this very decision demonstrates that the Court does not consider itself prevented by the absence of the information in issue from communicating the applicant’s complaints under Article 6 to the respondent Party. There is accordingly no apparent need at the present stage of the proceedings for the applicant to divulge to the Court information covered by his duty of secrecy.

50. In case the need should arise, the Court retains the option of itself requiring the respondent Government to submit particular information (Article 38 of the Convention; see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 203, ECHR 2013).

51. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints:

that much of the documentary evidence, both incriminating and exculpatory, was either disclosed to the defence only with extensive parts of the text blacked out or not disclosed to the defence at all;

that the domestic courts refused to hear his former AIVD colleagues as witnesses except under the cloak of anonymity, if at all, and that questions put by the defence were blocked at the behest of the AIVD which was represented when the witnesses were heard;

that the information which he was allowed by the AIVD to divulge to the courts was limited, even at a hearing from which the public were excluded, which in his submission placed the AIVD in control of his defence; and

that the AIVD imposed restrictions on communication between him and his counsel;

Declares the remainder of the application inadmissible.

Stephen Phillips
Registrar

Josep Casadevall
President