

AS TO THE ADMISSIBILITY OF

Application No. 12074/86  
by B.  
against the Netherlands

The European Commission of Human Rights sitting in private on  
14 July 1988, the following members being present:

MM. C.A. NØRGAARD, President  
J.A. FROWEIN  
S. TRECHSEL  
F. ERMACORA  
G. SPERDUTI  
E. BUSUTTIL  
G. JÖRUNDSSON  
A.S. GÖZÜBÜYÜK  
A. WEITZEL  
J.C. SOYER  
H.G. SCHERMERS  
H. DANELIUS  
G. BATLINER  
H. VANDENBERGHE  
Mrs. G.H. THUNE  
Sir Basil HALL  
MM. F. MARTINEZ  
C.L. ROZAKIS  
Mrs. J. LIDDY  
  
Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 (Art. 25) of the Convention for the  
Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 18 December  
1985 by B. against the Netherlands and registered on  
1 April 1986 under file No. 12074/86;

Having regard to the report provided for in Rule 40 of the  
Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a worker of Moroccan nationality, living in  
Amsterdam, the Netherlands. In the proceedings before the Commission  
he is represented by Mr. Van Driel, a lawyer practising in Alkmaar.

After he had entered the Netherlands illegally, the applicant  
was employed by a company in Amsterdam from 12 April 1976 until  
3 November 1979.

On 6 May 1980, the Transitional Regulations on illegal foreign  
workers entered into force. These Regulations entitled a foreign  
worker and his employer with whom the worker had been employed  
without interruption between 1 January 1978 and 31 October 1979 to  
apply for and obtain a work permit if tax on wages and social security  
premiums had been paid in respect of the worker throughout this

period. Pursuant to Section 5 of the Foreign Workers Labour Act (Wet Arbeid Buitenlandse Werknemers), the application for the work permit had to be made by the employee and the employer jointly.

On 27 May 1980, the applicant applied, under the Transitional Regulations, for a work permit. His former employer refused to join him in his application for the permit, on the ground that the applicant was no longer employed by the company and that there was no possibility of re-recruiting him.

When no decision was made within 30 days after the date of the application, the request for a work permit had to be considered, under Dutch law, as being rejected. On 8 July 1980 the applicant was informed, by the Director of the Regional Employment Office (Gewestelijk Arbeidsbureau) that his request was considered not to have been made, since it had not been filed by the applicant and his employer jointly.

The applicant lodged objections with the Minister of Social Affairs and Employment against these decisions on 1 July 1980 and 8 August 1980, but they were rejected on the same ground. On 4 January 1982, the applicant, who had in the meantime been re-employed by his former employer on 17 August 1981, appealed to the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State). He argued, inter alia, that his application for a work permit should have been considered as admissible, since the Transitional Regulations' requirement that the application be made jointly by employer and employee barred the independent access to a court for a foreign worker as the requirement prevented the court from pronouncing itself on the merits of his application. He stated that the relevant provisions were incompatible with Article 6 (Art. 6) of the Convention and that the Judicial Division therefore had to declare his request admissible. He also argued that the work permit should be granted since he satisfied all other criteria for the granting of a permit.

The Judicial Division of the Council of State rejected the appeal on 20 June 1985, finding that the Foreign Workers Labour Act offered workers the opportunity of lodging an appeal on their own with the Judicial Division, in order to obtain a decision as to whether or not a request for a permit was rightly not dealt with or his entitlement rightly denied. The Judicial Division also considered that there existed no civil right, within the meaning of Article 6 (Art. 6) of the Convention, to have an application for a permit examined on the merits.

## COMPLAINTS

The applicant complains that his right of access to a court has been violated, since the statutory requirement that an application for a work permit be made by employer and employee jointly made it impossible for him to have independent recourse to a court that could pronounce itself on the merits of the case. He alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

## THE LAW

The applicant has complained that his right of access to a court has been violated because a foreign employee, under Dutch law, cannot apply for a work permit, without being dependent on his employer to join him in his application.

Article 6 para. 1 (Art. 6-1) of the Convention provides that

"1. In the determination of his civil rights and

obligations, ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... "

The Commission recalls that it is necessary, for Article 6 para. 1 (Art. 6-1) of the Convention to be applicable, that the applicant could claim a "right" within the meaning of that provision. This notion has an autonomous meaning in the sense that it is not decisive for the purpose of Article 6 para. 1 (Art. 6-1) whether a given privilege or interest which exists in the domestic legal system is classified or described as a "right" by that system (Sporrong and Lönnroth, Comm. Report 8.10.80, para. 150, Eur. Court H.R., Series B no. 46, p. 62). Even where a benefit can be granted as a matter of discretion rather than as a matter of right, a claim for such a benefit may well be considered to fall within the ambit of Article 6 para. 1 (Art. 6-1). However, there is no room for applying the autonomous notion of a "right" in such a way that the Commission would thereby be creating a new substantive right which has no legal basis in the Contracting State concerned (see, inter alia, W v. the United Kingdom, Comm. Report 15.10.85, para. 115, Eur. Court H.R., Series A no. 121, p. 48).

The Commission finds that this would be the case in regard to the present application. The applicant has claimed a right to apply for and obtain a work permit, without being dependent on his employer to join him in the application for that permit. The Commission notes, however, that Dutch law does not recognise such an independent right but expressly requires any application for a work permit to be made by employer and employee jointly.

By finding that the applicant could claim an independent "right" to a work permit, the Commission would in fact be creating a new substantive right which has no legal basis under Dutch law. Neither can there be found a legal basis for such a right in the Convention itself.

The Commission concludes that the applicant, in respect of his request for a work permit, could not claim an independent "right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. It follows therefore that Article 6 para. 1 (Art. 6-1) is not applicable in the present case and that this application must be declared incompatible *ratione materiae* with the Convention, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)