AS TO THE ADMISSIBILITY OF

Application No. 24774/94
by A.K.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 6 April 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

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

Having regard to the application introduced on 23 June 1994 by A.K. against the Netherlands and registered on 5 August 1994 under file No. 24774/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

1. Particular circumstances of the case

The applicant is a Dutch citizen, born in 1934, residing in Bilthoven, the Netherlands. Before the Commission he is represented by Mr. E.Th. Hummels, a lawyer practising in Utrecht, the Netherlands.

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

On 2 April 1990, the applicant was arrested on suspicion of having committed indecent assault on a boy under the age of 16. He was subsequently detained on remand. He was released on 12 April 1990. Apart from the applicant, two other men, among whom S., were arrested on the same suspicion.

On 2 April 1990, the applicant's house was searched by the police. Numerous items were confiscated by the police. Among these items were films, slides and photos of boys performing sexual acts.

After his arrest, the applicant was taken to the police station, where the police took away his belt, glasses, watch and pencil. On 3 April 1990, the applicant's glasses were returned to him and he received a pencil and paper. On 21 September 1990, the applicant lodged a complaint with the National Ombudsman (Nationale Ombudsman) against the police. He alleged that his possessions had been taken away without

any necessity and that he had been intentionally deprived of his dignity and that, due to the fact that his glasses, watch and pencil were taken away, he had been unable to prepare his defence before being brought before the investigating judge (rechter-commissaris). He argued that the way he had been treated by the police was in violation of, inter alia, Articles 3 and 6 of the Convention. On 17 March 1992, the National Ombudsman ruled that the police had acted correctly in taking away the applicant's belt and incorrectly in taking away the other possessions.

On 5 April 1990, the investigating judge saw the applicant and ordered the prolongation of his detention on remand.

On 6 April 1990, an article appeared in the "Utrechts Nieuwsblad", a regional daily newspaper. The article read as follows:

<translation>
"Men suspected of child pornography

The police of Nieuwegein have arrested three men who are suspected of having produced child pornography in Nieuwegein. The case got rolling last week after the arrest of the 67-year-old J.F.S. from Nieuwegein. He made a partial confession.
Yesterday, the police arrested the 54-year-old A.S. de R. from Nieuwegein and the 56-year-old A. de K. from Bilthoven. The police confiscated at the men's homes large quantities of films, slides and photos, showing children between the ages of seven and fifteen performing sexual acts. The three men were brought before the public prosecutor yesterday. The police are conducting further investigations."

On 19 April 1990, another article on the case appeared in the "Utrechts Nieuwsblad". The text of this article, as far as relevant, read as follows:

<translation>
"Suspect of child pornography is released

A 56-year-old man from Bilthoven who is suspected of producing child pornography has been released...by the Regional Court of Utrecht sitting in chambers. The man was arrested, together with two other men, in the beginning of this month.
In the house of one of the suspects a large quantity of films and slides was found showing children between the ages of 7 and 15 with whom sexual acts are being performed. The man from Bilthoven was released provisionally at the request of his lawyer. This concerns a procedural question.... On 12 April 1990, the Regional Court sitting in chambers decided to release the man from Bilthoven.... The other two suspects are still in detention on remand."

On 19 June 1990, the investigating judge at the Regional Court (Arrondissementsrechtbank) of Utrecht, in the presence of the applicant's lawyer, examined two of the alleged victims, namely the brothers C and D.

On 11 October 1990, the probation service (Stichting Reclassering) delivered a report on the applicant.

In early December 1991, the applicant was ordered to appear before the Regional Court of Utrecht on 10 January 1992. He was charged with indecent assault on four boys, A, B, C and D, born in 1974, 1974, 1981 and 1979 respectively. The offences had allegedly taken place between 1 January 1987 and 1 March 1990. The alleged indecent assault

on boy B had taken place between 1 January and 24 April 1987. The applicant was further charged with the distribution and/or display of nude photographs of boy A.

The Regional Court of Utrecht heard the applicant's case on 10 January 1992. On 24 January 1992, it acquitted the applicant of the distribution and/or display of nude photographs of boy A, convicted him of the four charges of indecent assault, and sentenced him to fifteen months' imprisonment, five months of which were suspended pending a probation period of two years.

On 24 January 1992, the applicant lodged an appeal with the Court of Appeal (Gerechtshof) of Amsterdam against his conviction and sentence.

By letter of 10 May 1993, the applicant requested the Procurator General (Procureur-Generaal) to summon a number of witnesses to be heard at the session of the Court of Appeal on 19 May 1993. The Procurator General refused the request.

At the session of the Court of Appeal on 19 May 1993, the applicant repeated his request to summon witnesses. The Court of Appeal decided to summon sixteen witnesses and adjourned its further examination of the case until 22 September 1993.

On 22 September 1993, the Court of Appeal examined fourteen of the sixteen witnesses. The fifteenth and sixteenth witnesses, boy A and co-suspect S., did not appear. The applicant stated that he did not wish those two witnesses to be examined by the Court of Appeal at a later date. Among the fourteen witnesses who were examined by the Court of Appeal were boys C and D, their sister, father and mother; boy B; the applicant's ex-wife; the applicant's son; and a number of acquaintances of the applicant.

Before the Court of Appeal the applicant confessed to the charge concerning boy B. He denied the charges concerning boys A, C and D. He stated that C and D had come to his house regularly.

The applicant argued that in view of the unnecessary and degrading taking away of his possessions by the police on the day of his arrest, the prosecution should be declared inadmissible.

He further argued that the prosecution should be declared inadmissible because the reasonable time requirement of Article 6 of the Convention had been violated. Regarding the charge involving boy B, the applicant submitted that the father of the boy had informed him on 22 April 1987 that he had reported to the police that the applicant had committed indecent assault on his son. The applicant argued that he was thus charged on 22 April 1987. He stated that it was unacceptable that the police had done nothing with the report for three years. He further alleged that he had been harmed in his defence because, due to the lapse of time between 22 April 1987 and the trial before the Regional Court on 10 January 1992, he had had less possibilities to defend himself against the charge involving boy B.

He further argued that the prosecution should be declared inadmissible concerning the charges involving boys A, B and D because no complaints had been lodged by them or their legal representatives, whereas since the amendment of Section 247 of the Criminal Code on 1 December 1991 such a complaint was a prerequisite for the prosecution of someone suspected of indecent assault on a minor between the ages of 12 and 16.

He also complained that the police and/or public prosecutor (officier van justitie) had given information to the press about his case, which had resulted in the newspaper articles of 6 and 19 April 1990. The applicant's lawyer stated:

<translation>
"[My] client has become the victim of incorrect publicity as a result of his arrest in this case. In an article in the Utrechts Nieuwsblad of 6 April 1990 it was reported that, inter alia, at the applicant's home, large quantities of films, slides and photos had been confiscated, showing children between the ages of 7 and 15 performing sexual acts. Despite the use of initials, [my] client could be identified by very many people in his neighbourhood. In an article in the Utrechts Nieuwsblad of 19 April 1990, it was reported that in [my] client's house a large quantity of films and slides had been found showing children between the ages of 7 and 15 with whom sexual acts were being performed.
In the opinion of my client, it is a very bad thing that the police and the judicial authorities gave such incorrect information to the press. [My] client sustained damage because of this. Thus, as a result of the publications in question, further unfounded accusations followed and [my] client became socially isolated. The giving of such completely incorrect information must lead to the inadmissibility of the prosecution due to the violation of the rules of procedure. To rouse public sentiment against a suspect, as in the present case, is not permissible."

On 6 October 1993, the Court of Appeal quashed the Regional Court's judgment, convicted the applicant of the same four charges of which he had been convicted by the Regional Court and sentenced him to eighteen months' imprisonment, six months of which were suspended pending a probation period of two years.

Regarding the charge involving boy A, the Court of Appeal used in evidence a statement of the applicant before the Court of Appeal, a statement of boy A to the police and a statement of co-suspect S. to the police. Regarding the charge involving boy B, the Court of Appeal used in evidence a confession of the applicant before the Court of Appeal and a statement of boy B to the police. Regarding the charges involving boys C and D, the Court of Appeal used in evidence a statement of the applicant before the Court of Appeal, the statements of C and D before the Court of Appeal, and the statements of the boys' parents before the Court of Appeal.

Concerning the taking away of the applicant's possessions by the police, the Court of Appeal ruled that this did not lead to the inadmissibility of the prosecution and that it had not been demonstrated that the applicant had been harmed in his defence as a result of this action.

As to the reasonable time argument, the Court of Appeal ruled that the applicant had been charged on 2 April 1990, and not on 22 April 1987 as alleged by him, and that the period of time that had elapsed since 2 April 1990 was not unreasonably long.

Regarding the applicant's argument that no complaints had been lodged by the minors or their legal representatives, the Court of Appeal considered that as far as boy D was concerned no complaint was necessary since he was younger than twelve at the time the offence was committed, and that the case-file contained statements of boys A and B and their legal representatives, clearly demonstrating that they wished the applicant to be prosecuted.

Regarding the information given to the press, the Court of Appeal stated:

<translation>
"It has not been made plausible that the police and the

judicial authorities, following the suspect's arrest, gave incorrect information to the press."

The applicant subsequently lodged an appeal in cassation with the Supreme Court (Hoge Raad). He reiterated the objections he had made before the Court of Appeal. He added that in his opinion the Court of Appeal had wrongly found the charges concerning boys A, C and D proven. As regards the information to the press he stated, inter alia:

<translation>
"The Court of Appeal did not even examine the complaint completely. The complaint was also that [the applicant] had been unnecessarily harmed in his private life and that the police and the judicial authorities do not have the right to give such information to the press."

On 26 April 1994, the Advocate General (Advocaat-Generaal) at the Supreme Court filed his submissions, which were transmitted to the applicant, who replied on 9 May 1994.

On 7 June 1994, the Supreme Court rejected the applicant's appeal in cassation. It upheld the reasoning of the Court of Appeal. It considered, inter alia, that the Court of Appeal had correctly interpreted the applicant's complaint concerning the publicity in his case as directed only against the giving of allegedly incorrect information to the press.

2. Relevant domestic law

Section 247 of the Criminal Code as in force at the time of the offences in question, which consisted of one paragraph only, stated, inter alia, that indecent assault on a person under the age of 16 could be punished with a maximum of six years' imprisonment or a fine of the fourth category. A complaint lodged by victims or their legal representative was not a prerequisite for prosecution.

Section 247 of the Criminal Code was amended on 1 December 1991. It now states, inter alia, that the person who commits indecent assault on a person under the age of 16 can be punished with a maximum of six years' imprisonment or a fine of the fourth category. Para. 2 of the same provision states that if a victim of indecent assault is under the age of 16 but over the age of 12, prosecution can only take place when a complaint (klacht) has been lodged. There are exceptions to this rule, but they are not relevant to the present case. A complaint can be lodged by a victim of indecent assault, his or her legal representative or the Child Care and Protection Board (Raad voor de Kinderbescherming).

Section 164 of the Code of Criminal Procedure (Wetboek van Strafvordering) states that a "complaint" consists of a report to the police (aangifte) and a request to prosecute (verzoek tot vervolging).

Rules concerning the giving of information by public authorities were laid down in the Publicity of Public Administration Act (Wet Openbaarheid van Bestuur), which entered into force on 1 May 1980.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention that the criminal charges against him were not determined within a reasonable time. In respect of the indecent assault on boy B he argues that the proceedings at issue started on 22 April 1987, the day on which the boy's father reported to the police that the applicant had committed indecent assault on his son and informed the applicant of this. The applicant alleges that from that moment onward he lived in the uncertainty that he might be prosecuted. He argues that the police or the public prosecutor should not have waited three years to begin

prosecution, and that in particular the period between 22 April 1987 and the trial by the Regional Court on 10 January 1992 was too long.

2. He further complains under Article 6 of the Convention that because so much time had elapsed between the period in which the indecent assault on boy B had allegedly taken place and the commencement of the trial, it had become more difficult to defend himself against this charge.

3. He complains under Article 6 para. 1 of the Convention that the Court of Appeal found the charges concerning the indecent assault on boys A, C and D proven and used statements of these three boys in evidence.

4. The applicant complains under Article 3 of the Convention of the taking away of his belt, glasses, watch and pencil by the police after his arrest. He argues that the confiscation of these items was unnecessary and that he was intentionally deprived of his dignity.

5. He complains under Article 7 of the Convention that he was convicted of acts that were not offences under the Dutch Criminal Code. He argues that the prosecution should have been declared inadmissible concerning the charges involving boys A, B and D, because no complaints had been lodged by them or their legal representatives, whereas since the amendment of Section 247 of the Criminal Code on 1 December 1991 such a complaint was a prerequisite for the prosecution of someone suspected of indecent assault on a minor between the ages of 12 and 16.

6. He complains under Article 8 of the Convention that after his arrest the police and/or public prosecutor gave information about his case to the press. People in his neighbourhood could identify him from the newspaper articles and as a consequence of these articles he was falsely accused of other offences and became socially isolated. He alleges that the information given to the press was incorrect. By giving such information to the press the authorities wrongly interfered with his right to respect for his private life.

THE LAW

1. The applicant has lodged several complaints under Article 6 (Art. 6) of the Convention. This provision, insofar as relevant, reads as follows:

> "1. In the determination of...any criminal charge against him, everyone is entitled to a fair...hearing within a reasonable time by a...tribunal established by 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;
> ....
> 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;
> ...."

2. The applicant complains that the criminal charges against him were not determined within a reasonable time within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. He argues that the proceedings at issue started on 22 April 1987, the day on which the father of boy B reported to the police that the applicant had committed indecent assault on his son and informed the applicant of this. He alleges that from that moment onward he lived in the uncertainty that he might be prosecuted.

The Commission considers that the competent authorities did not start an investigation after boy B's father had made a report to the police. There is no indication that until 2 April 1990 the applicant's situation was affected in any way by activities undertaken by the authorities.

The Commission finds that the proceedings at issue began on 2 April 1990, when the applicant was arrested, and ended with the Supreme Court's judgment on 7 June 1994. The proceedings thus lasted four years, two months and five days.

The Commission recalls that the reasonableness of the length of criminal proceedings is to be determined with reference to the criteria laid down in the Convention organs' case-law, which in this instance call for an overall assessment (Eur. Court H.R., Vendittelli judgment of 18 July 1994, Series A no. 293-A, para. 22).

The Commission notes that the facts in the present case were not particularly complex. As to the conduct of the applicant, the Commission notes that some delay was caused by the applicant who wished that the Court of Appeal examine sixteen witnesses. As regards the conduct of the competent authorities the Commission observes that the present case was examined by three different courts and that the applicant has failed to indicate any substantial periods of inactivity in the investigation or the trial. Moreover, apart from the period between 2 and 12 April 1990, the applicant was not detained pending the proceedings against him.

In these circumstances the Commission cannot find that the proceedings, considered as a whole, exceeded the reasonable time envisaged by Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains that, due to the long interval between the period in which the indecent assault of boy B was allegedly committed and the trial at first instance, it was more difficult for him to defend himself against this charge.

The Commission observes that the applicant, who denied having committed indecent assault on boys A, C and D, confessed before the Regional Court and the Court of Appeal that he had committed indecent assault on boy B. It has not been demonstrated in what way the applicant's defence against this charge became more difficult due to the lapse of time.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant further complains under Article 6 (Art. 6) of the Convention that the Court of Appeal found the charges concerning the indecent assault of boys A, C and D proven and used statements of these three boys in evidence.

The Commission recalls that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention organs is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (cf. Asch judgment, ibid., p. 10 para. 26; and Eur. Court H.R., Edwards judgment of 16 December 1992, Series A no. 247-B, pp. 34-35 para. 34).

The Commission observes that, in the course of the adversarial

criminal proceedings against him, the applicant, who was assisted by a lawyer throughout these proceedings, was given ample opportunity to state his case and to challenge the evidence against him and the reliability of the witnesses. Boys C and D were examined by the Court of Appeal and the applicant could put questions to them directly. As regards the charge concerning boy A, the Commission notes that at the applicant's request boy A and co-suspect S were summoned as witnesses. When they did not appear, the applicant stated he did not find it necessary that they be examined by the Court of Appeal at a later date.

In these circumstances the Commission is of the opinion that the criminal proceedings against the applicant, considered as a whole, cannot be regarded as unfair.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Article 3 (Art. 3) of the Convention of the taking away of a number of his possessions by the police after his arrest. Article 3 (Art. 3) reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (Eur. Court H.R., Ireland v. United Kingdom case, judgment of 18 January 1978, Series A no. 25, p. 65 para. 162).

The Commission finds that the facts complained of do not reach the required minimum level of severity mentioned above.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention as well.

6. The applicant complains under Article 7 para. 1 (Art. 7-1) of the Convention that he was convicted for offences that were not criminal under Dutch law. Article 7 para. 1 (Art. 7-1) reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Commission recalls that Article 7 para. 1 (Art. 7-1) reflects the principle that interferences with or restrictions on the exercise of fundamental rights must be "in accordance with law" or "prescribed by law", and that individuals should be able to regulate their conduct with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible - an individual must have an indication of the legal rules applicable in a given case - and he must be able to foresee the consequences of his actions, in particular to be able to avoid the incurring of a sanction of the criminal law (cf. S.W. v. United Kingdom, Comm. Report 27.6.94, para. 44).

In the present case, indecent assault on minors under the age of 16 was a criminal offence both before and after 1 December 1991. Section 247 of the Criminal Code was amended to the effect that as from

1 December 1991 indecent assault on a person under the age of 16 and over the age of 12 could only be prosecuted after the lodging of a complaint by a victim or his/her legal representative. The substance of the offence and the penalty that can be imposed were not modified.

The Commission therefore finds that the applicant's rights under Article 7 (Art. 7) of the Convention were not violated.

This part of the complaint is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

7. The applicant complains under Article 8 (Art. 8) of the Convention that the police and/or public prosecutor gave information about his case to the press. Article 8 (Art. 8) reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The applicant alleges that the information given to the press was incorrect. The domestic courts ruled, however, that this had not been demonstrated. In the proceedings before the Commission it has not been indicated in what respect the information given to the press was incorrect. The Commission therefore finds no basis for the assumption that the information given to the press did not correspond to the facts.

Assuming that the police and/or public prosecutor interfered with the applicant's respect for his private life by giving information about this case to the press, the question arises whether the interference was justified under Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission notes that at the time in question rules on the giving of information by public authorities were laid down in the Publicity of Public Administration Act. The applicant has not argued that these rules were violated. The Commission therefore accepts that the interference was "in accordance with the law".

As regards the aim and necessity of the interference, the Commission, noting the role of the press, and the freedom of information under Article 10 (Art. 10) of the Convention, notes that only the applicant's initials, age and place of residence were disclosed, that the information in the newspaper articles was summary and factual, and that information about this case could be considered to be of general interest. In the present case the giving of information to the press can reasonably be regarded as being "necessary in a democratic society" for the legitimate aim of ensuring the right of the public to receive information (cf., mutatis mutandis, Eur. Court H.R., Allenet de Ribemont judgment of 10 February 1995, Series A no. 308, para. 38).

The Commission therefore considers, even assuming there was an interference with the applicant's right to respect for his private life, that this interference was justified under Article 8 para. 2 (Art. 8-2) of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the

Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (H. DANELIUS)