AS TO THE ADMISSIBILITY OF

Application No. 12728/87
by A.
against the Netherlands

The European Commission of Human Rights sitting in private on 10 April 1991, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. SPERDUTI
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
Mrs. G. H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. J.-C. GEUS
M.P. PELLONPÄÄ

Mr. K. ROGGE, Secretary to the Second 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 9 February 1987 by A. against the Netherlands, and registered on 12 February 1987 under file No. 12728/87;

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

The applicant is a Dutch citizen, born in 1955. He is at present detained in a prison in The Hague. In the proceedings before the Commission he is represented by Mrs. G. Later, a lawyer practising in The Hague.

The facts, as submitted by the parties, may be summarised as follows:

On 18 January 1983 the applicant was arrested and charged with incitement to murder. He was accused of having promised money and heroin to another person, for helping him to kill someone, and of having supplied a description and the address of the person to be killed. On the same day he was detained on remand.

By judgment of 17 May 1983 the Regional Court (Arrondissementsrechtbank) of The Hague convicted the applicant and sentenced him to twelve years' imprisonment less the time already spent in prison pending trial.

The applicant appealed to the Court of Appeal (Gerechtshof) of The Hague. By judgment of 29 August 1983 the Court of Appeal upheld the judgment of the Regional Court.

The applicant introduced a plea of nullity to the Supreme Court (Hoge Raad). By judgment of 15 January 1985 the Supreme Court quashed the Court of Appeal's judgment on technical points and referred the case to the Court of Appeal of Amsterdam.

On 31 May 1985 the Procurator General at Amsterdam Court of Appeal issued a summons against the applicant. The Court of Appeal heard the case on 28 June 1985. The applicant's request to suspend his detention on remand was refused by the Court but his request to suspend the hearing was granted. Before granting the suspension, the President referred the applicant and his lawyer to Article 277a of the Code of Criminal Procedure, which states that, if the suspect is in pre-trial detention and the hearing is suspended, the court will as a rule set the suspension at no more than one month. If there are compelling reasons, however, it can set a longer period; in such cases the reasons should be stated in the official report. The President informed the applicant and his lawyer of the existence of a compelling reason affecting the length of the suspension, namely that the Court of Appeal's calendar would not permit the hearing to be resumed before 20 September 1985. The lawyer agreed to this on behalf of the applicant.

The Court of Appeal resumed its hearing on 20 September 1985. It refused a new request by the applicant to suspend his detention on remand.

By judgment of 4 October 1985 the Court of Appeal convicted the applicant and sentenced him to ten years' imprisonment less the time already spent in prison pending trial.

The applicant introduced a plea of nullity to the Supreme Court. He submitted, inter alia, that the length of the proceedings exceeded "a reasonable time" within the meaning of Articles 5 para. 3 and 6 para. 1 of the Convention.

By letter of 4 February 1986 the applicant requested the Court of Appeal of Amsterdam to suspend his detention on remand for several weeks pending his Supreme Court appeal. The Court of Appeal suspended his detention on remand for two weeks in April 1986. On 3 June 1986 the applicant requested the Court of Appeal of Amsterdam to suspend his detention on remand for an additional two weeks, and for one week-end every month. The Court of Appeal suspended the detention on remand for two weeks in July 1986, but rejected the request to suspend the detention on remand for one week-end every month.

On 15 September 1986 the documents concerning the case were received by the Registry of the Supreme Court.

On 10 October 1986 the applicant requested the Court of Appeal to release him from detention on remand, invoking, inter alia, Articles 5 para. 3 and 6 para. 1 of the Convention. In the alternative, he asked for suspension of the detention on remand. By decision of 29 October 1986 the Court of Appeal rejected the requests.

By judgment of 19 May 1987 the Supreme Court dismissed the applicant's plea of nullity. It held in respect of the period between 29 August 1983 and 15 January 1985 and the period between 15 January 1985 and 4 October 1985 that the applicant had not raised a complaint of the length of proceedings before the Court of Appeal of Amsterdam. Nor was the Court of Appeal bound to make an ex officio investigation into the reasonableness of the length of proceedings, merely because these proceedings lasted a particular length of time. It held in respect of the period after 4 October 1985 that Articles 5 para. 3 and 6 para. 1 of the Convention had not been violated.

The applicant submitted on 4 June 1987 a request for a pardon, which was refused on 12 November 1987 by the Deputy Minister of Justice.

An application for review, which the applicant lodged on 28 December 1987, was declared inadmissible by the Supreme Court on 6 December 1988.

COMPLAINTS

1. The applicant complains that he has been detained on remand for more than four years. He invokes Article 5 paras. 1 (c) and 3 of the Convention.

2. The applicant complains that his detention on remand amounts to inhuman treatment. He submits that during his detention on remand he could not regularly be with his family, which is possible during detention after conviction. The applicant invokes Article 3 of the Convention.

3. The applicant complains that the determination of the criminal charge against him did not take place within a reasonable time. In particular, the first proceedings before the Supreme Court took more than sixteen months and the proceedings before the Court of Appeal of Amsterdam more than eight months. In addition, the applicant submits that under Section 433 of the Dutch Code of Criminal Procedure the documents concerning his case should have been sent to the Supreme Court within a maximum of 54 days from the day of the decision of the Court of Appeal. In the present case the Court of Appeal of Amsterdam took its decision on 4 October 1985, but the documents concerning the applicant's case were not received by the Registry of the Supreme Court until 15 September 1986, i.e. more than eleven months later. The Supreme Court took its final decision on 19 May 1987, i.e. more than nineteen months after the decision of the Court of Appeal of Amsterdam. The applicant invokes Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 9 February 1987 and registered on 12 February 1987.

On 13 April 1989 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application limited to the issue under Article 6 para. 1 of the Convention concerning the length of the proceedings.

The Government submitted the observations on 22 September 1989 and the applicant's observations in reply were submitted on 19 December 1989.

On 26 February 1991 the Commission decided to refer the application to the Second Chamber.

THE LAW

1. The applicant complains that he has been detained on remand for more than four years. The applicant invokes Article 5 paras. 1 (c) and 3 (Art. 5-1-c, 5-3) of the Convention, which read insofar as relevant:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing

after having done so;

....

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Commission notes that the applicant was arrested on 18 January 1983 and was convicted at first instance on 17 May 1983. His conviction was set aside on 15 January 1985. The applicant was again convicted on 4 October 1985.

The Commission recalls that, for the purposes of the Convention, a detention on remand after conviction while an appeal is pending is detention "after conviction" within the meaning of Article 5 para. 1 (a) (Art. 5-1-a), even if the detention continues to be considered as detention on remand under domestic law (cf. as the most recent authority the B v. Austria judgment of 28 March 1990, Eur. Court H.R., Series A No. 175, paras. 35-40). In the present case, therefore, the applicant's detention on remand, under Article 5 para. 1 (c) (Art. 5-1-c), ended on 17 May 1983 when he was convicted by the Regional Court. Subsequently he was detained as a convicted person under Article 5 para. 1 (a) (Art. 5-1-a). On 15 January 1985 his conviction was quashed by the Supreme Court and a new period of detention under Article 5 para. 1 (c) (Art. 5-1-c) commenced - cf. Herczegfalvy v. Austria, Comm. Report 1.3.91, para. 193. This period lasted until 4 October 1985, when the applicant was again convicted.

The Commission does not find that the period of four months between the applicant's arrest and his first conviction exceeded a "reasonable time" in the sense of Article 5 para. 3 (Art. 5-3) of the Convention.

With regard to the period of eight months and 19 days between the Supreme Court's judgment of 15 January 1985 and the applicant's second conviction the Commission notes that, on 31 May 1985, the Procurator General issued a summons against the applicant; that the Court of Appeal heard the case on 28 June 1985 and granted the applicant's request for an adjournment; that the new date fixed by the Court (20 September 1985) was agreed with the applicant; that the hearing was resumed on that day; and that the applicant was convicted on 4 October 1985. In these circumstances the Commission does not find that the second period of detention under Article 5 para. 1 (c) (Art. 5-1-c) exceeded a reasonable time. The Commission notes furthermore that the time the applicant was detained on remand has been deducted from his sentence.

The Commission concludes that his complaint concerning his detention on remand is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains under Article 3 (Art. 3) of the Convention that his detention on remand amounted to inhuman treatment. He submits that during his detention on remand he could not regularly be with his family, which is possible during detention after conviction.

The Commission finds no issue under Article 3 (Art. 3) nor, concerning family life, under Article 8 (Art. 8) of the Convention.

This complaint must therefore also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant furthermore complains under Article 6 para. 1 (Art. 6-1) of the Convention that the determination of the criminal charge against him did not take place within a reasonable time. In particular, the first proceedings before the Supreme Court took more than sixteen months and the proceedings before the Court of Appeal of Amsterdam more than eight months. In addition, the applicant submits that under Section 433 of the Dutch Code of Criminal Procedure the documents concerning his case should have been sent to the Supreme Court within a maximum of 54 days from the day of the decision of the Court of Appeal. In the present case the Court of Appeal of Amsterdam took its final decision on 19 May 1987, i.e. more than nineteen months after the decision of the Court of Appeal of Amsterdam.

Article 6 para. 1 (Art. 6-1) states, insofar as relevant:

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

The Government submit that the applicant did not raise this complaint during the cassation proceedings against the judgment of 29 August 1983 of the Appeal Court of The Hague nor in the proceedings before the Appeal Court of Amsterdam after the case had been referred back by the Supreme Court. He only raised this complaint in the second proceedings before the Supreme Court. In its decision of 19 May 1987 the Supreme Court rejected this complaint. In the Government's opinion, this means that the applicant did not exhaust the remedies available under Dutch law.

The applicant submits that it is not necessary to raise this complaint in each instance of the case, and states furthermore that the delay became all the more unreasonable with the passing of time. He refers in particular to the period between 29 August 1983 (judgment of the Court of Appeal of The Hague) and 15 January 1985 (first judgment of the Supreme Court) (more than sixteen months); the period between 15 January 1985 (judgment of the Supreme Court) and 4 October 1985 (judgment of the Court of Appeal of Amsterdam) (more than eight months); and the period between 4 October 1985 (judgment of the Court of Appeal of Amsterdam) and 19 May 1987 (second judgment of the Supreme Court) (more than nineteen months).

The Commission notes that the applicant raised his complaint concerning the length of the proceedings in his plea of nullity to the Supreme Court against his conviction and sentence of 4 October 1985. The Supreme Court, in its judgment of 19 May 1987, rejected this complaint partly on the ground that the applicant had not raised it before the Court of Appeal and partly as being ill-founded. The judgment does not indicate that the sentence might have been mitigated if the length complaint had been raised before the Court of Appeal as required by the Supreme Court.

The Commission considers that the length of the proceedings against the applicant must be examined as a whole. The applicant has raised this issue before the Supreme Court.

His complaint under Article 6 para. 1 (Art. 6-1) can therefore not be rejected under Article 27 para. 3 and Article 26 (Art. 27-3, 26) of the Convention for non-exhaustion of domestic remedies.

The Commission further notes that the period to be taken into consideration under Article 6 para. 1 (Art. 6-1) began on the day when the applicant was substantially affected by the proceedings against him and ended on the day of his final conviction (cf. No. 9132/80, Dec. 12.12.83, D.R. 41 p. 13). In thus started with the applicant's arrest on 18 January 1983 and ended with the Supreme Court's decision of 19 May 1987, lasting altogether 4 years, 4 months and 1 day.

The Commission, having regard to the parties' submissions under Article 6 para. 1 (Art. 6-1) of the Convention concerning the length of the proceedings, considers that this complaint raises complex issues of fact and law which can only be resolved by an examination of the merits. This part of the application cannot, therefore be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission by a majority

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint under Article 6 para. 1 (Art. 6-1) of the Convention concerning the length of the proceedings;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber	President of the Second Chamber
(K. ROGGE)	(S. TRECHSEL)