AS TO THE ADMISSIBILITY OF

Application No. 27943/95
by Maximilian ABAS
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 26 February 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, 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 16 May 1995 by Maximilian ABAS against the Netherlands and registered on 21 July 1995 under file No. 27943/95;

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 national, born in 1934, and resides in Aerdenhout. He is a former KLM pilot. In the proceedings before the Commission, he is represented by Mr G. Spong, a lawyer practising in The Hague.

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

A. Particular circumstances of the present case

By letter of 23 December 1977, the accountant Mr C.S. requested the Inspector of Direct Taxes to exonerate the applicant of wage tax (loonbelasting) on the basis of the latter having taken up residence in the United Kingdom as from 15 November 1977.

By letter of 21 December 1981, Mr C.S. informed the Inspector of Direct Taxes that as from 1 August 1981 the applicant had taken up residence in Ireland and requested the Tax Inspector to continue to exonerate him from wage tax.

During that period, the applicant paid taxes in the United

Kingdom and Ireland, respectively, as a non-domiciled resident.

On 4 September 1987, the Inspector of Direct Taxes addressed a letter to the applicant requesting him to inform the tax authorities whether he resided in the Netherlands or in Ireland. This letter, insofar as relevant, reads:

(translation)

> "The Inspection of Direct Taxes regularly issues decisions upon a request of an employee who states that he moves abroad; pursuant to such a decision the employer may cease to deduct wage tax (the so-called Article 27 para. 3 decision).
>
> Such a decision has also been issued to you.
>
> In the context of a random sample investigation as to the correctness of rendering such decisions, I would like to receive from you, inter alia, the following information:
>
> 1. Where have you resided in Ireland as from your departure from the Netherlands until at present?
> ...
> 8. Did you, after you left for Ireland, dispose of a car in the Netherlands?
>
> In asking questions I avail myself of my competence under Article 47 para. 1 of the General State Taxes Act (Algemene Wet inzake Rijksbelastingen)."

By letter of 5 November 1987, Mr. C.S. replied the Inspector on behalf of the applicant. Mr. C.S. informed the Inspector that the applicant had moved to Ireland in August 1981 and, until 1 January 1981, lived at A. street in Dublin with an Irish national. The letter further stated that on 1 January 1981 the applicant moved to another specified address in Ireland following the rupture of the relationship with this Irish national. Mr. C.S. also informed the Inspector that the applicant normally resided in Ireland if he was not travelling.

On 21 February 1989, following the opening of a preliminary judicial investigation (gerechtelijk vooronderzoek) against the applicant, the home of the applicant's family in Aerdenhout (the Netherlands) was searched by the investigating judge (rechter-commissaris) of the Regional Court (Arrondissementsrechtbank) of Haarlem. A number of documents were seized from which it appeared that the applicant was in fact permanently residing in Aerdenhout.

By summons of 29 November 1991, the applicant was ordered to appear before the Regional Court of Haarlem on 25 March 1992 on charges of fraud and tax evasion.

On 25 March 1992, a hearing took place before the Regional Court of Haarlem.

By judgment of 8 April 1992, the Regional Court convicted the applicant of fraud and tax evasion and sentenced him to two years' imprisonment and payment of a fine of 500.000 Dutch guilders. The applicant filed an appeal.

On 8 April 1993, the Court of Appeal (Gerechtshof) of Amsterdam quashed the Regional Court's judgment of 8 April 1992 and convicted the applicant of fraud and fraudulent tax declarations. As regards the imposition of the sentence, the Court of Appeal stated that, having regard to the seriousness of the offence and sentences imposed in similar cases, in principle a prison sentence of two years would be appropriate. However, in view of, inter alia, the duration of the criminal proceedings against the applicant, the Court of Appeal limited

the sentence to one year's imprisonment, of which four months suspended pending a probation period of two years, and a fine of 500.000 Dutch guilders.

Insofar as the applicant argued that the prosecution should be declared inadmissible as the proceedings at issue had exceeded a reasonable time, the Court of Appeal held that it agreed with the applicant that the period to be taken into consideration had started on 21 February 1989, when the applicant's home was searched.

As regards the substance of this complaint, the Court of Appeal held that an undesirably long period had elapsed since this search but not to the extent that on this basis the prosecution should be declared inadmissible. The court considered in this respect that the applicant had not been placed in pre-trial detention and that the case was extremely complicated having required much investigation both in the Netherlands and abroad and that it formed a part of a much broader investigation of similar cases. The Court did, however, state that it would take the length of the proceedings into consideration in the imposition of the sentence.

The applicant further argued that his reply to the Inspector's letter of 4 September 1987 should be excluded from the evidence. He submitted that he was in a situation similar to that of a person who is questioned as a suspect of a criminal offence and consequently entitled to the right to silence protected by Article 29 of the Code of Criminal Procedure (Wetboek van Strafvordering) whereas at that time he had not been given the information referred to in Article 29 para. 2, i.e. that he was not obliged to answer any questions.

He submitted the following information on this point. In May 1986, a civil servant of the Immigration Department of the Ministry of Justice of Ireland had informed the Netherlands Embassy in Ireland that many KLM pilots had notified the Irish authorities of having taken up residence in Ireland and that the Irish authorities suspected tax evasion. The Netherlands Embassy sought instructions from the Netherlands authorities by letter of 26 May 1986. The Minister of Foreign Affairs replied on 17 September 1986 that, for wage and income tax purposes, a person is considered as residing abroad after notification of removal from the relevant Dutch registry and inscription in the registry of the new place of residence. The information from the Irish authorities was transmitted to the Ministry of Finance, where it was decided to investigate the matter, which led to a decision taken on 27 May 1987 to open a joint investigation of a selection of about 40 cases which resulted in addressing, on 4 September 1987, a standard letter requesting information from the selected persons.

The Court of Appeal held that the written questions in the letter of 4 September 1987 and the applicant's written answer could not, in principle, be considered as a hearing within the meaning of Article 29 of the Code of Criminal Procedure. The Court of Appeal found that no facts or circumstances had appeared on the basis of which it should be held that the letter of 4 September 1987 had been written and sent with the intent to gather evidence in a criminal investigation of suspicions arisen against the applicant.

After having considered the evidence, the Court of Appeal found it established that the applicant had in fact resided in the Netherlands in the relevant period and not in the United Kingdom or Ireland and that it had not been established that Mr C.S. had not acted bona fide.

It based the applicant's conviction on, inter alia, the applicant's confessing statements before the Court of Appeal and the police, a statement to the police of the applicant's spouse, a statement to the police of two domestic employees of the applicant's

family, a statement to the Irish police of the owner of the house in Ireland where the applicant had alleged to reside, statements to the police of a number of persons with whom the applicant had had regular contacts in the Netherlands in the course of the relevant period, a statement to the police by Mr C.S., a statement to the police of the head of the KLM wage administration and several documents including, inter alia, the applicant's study results at the University of Leiden during the relevant period, a membership list of a golf club, and statements on findings by police officers who had participated in the search of the applicant's home in Aerdenhout. The Court of Appeal also used the letter of 5 November 1987 written by Mr C.S. in reply to the Inspector's letter of 4 September 1987 in evidence, although it stated it had only used its contents as supporting evidence together with the other means of evidence.

The applicant filed an appeal in cassation with the Supreme Court (Hoge Raad). On 22 November 1994, the Supreme Court rejected the applicant's appeal in cassation.

Insofar as the applicant had complained that the principle of nemo tenetur had been violated in that the applicant had been subjected to a written hearing considering him as a suspect, whereas he had not been informed that he was not obliged to answer, the Supreme Court accepted the opinion of the Court of Appeal that it had not been made plausible that at the relevant time there was already a reasonable suspicion of the applicant having committed a criminal offence, let alone that there was already at that stage a "criminal charge" within the meaning of Article 6 para. 1 of the Convention.

B. Relevant domestic law and practice

Article 5 of the General State Taxes Act provides that the Tax Inspector determines the imposition of taxes.

Article 47 para. 1 of the General State Taxes Act provides:

(translation)

"Everyone is obliged, upon request, to provide the (tax) inspector with:

a. data and information which could be of relevance for the imposition of taxes on him ;

b. accounts, documents and other items containing data (gegevensdragers) or the contents thereof - such according to the inspector's choice - solely for the purpose of consultation which could be of importance for the determination of the facts which could influence the imposition of taxes on him."

Article 68 of the General State Taxes Act, insofar as relevant, reads:

(translation)

1. The person who:

a. ...

b. is obliged for fiscal purposes to provide information, data or indications and who does not, or who does incorrectly or insufficiently, provide information, data or indications;

...

if the consequence could be that taxes could be evaded, shall be punished with imprisonment of maximum six months or a fine of the third category.

2. The person who intentionally commits one of the facts described in the first paragraph shall be punished with imprisonment of maximum four years or a fine of the fourth category or, if this is higher, a maximum corresponding to the amount of tax evaded."

Pursuant to Article 80 of the General State Taxes Act, civil servants of the State Taxes Departments may investigate criminal offences under the fiscal legislation.

Under Article 76 of the General State Taxes Act, the fiscal authorities may decide not to seek prosecution of fiscal criminal offences when certain conditions, to be fixed by them, are met such as, inter alia, payment of the amount of taxes evaded, payment of a prescribed fine or retroactive compliance with an obligation under fiscal legislation.

Pursuant to Article 80 of the General State Taxes Act the fiscal authorities, insofar as they have not availed themselves of the possibility to set conditions referred to in Article 76 of the General State Taxes Act, must transmit their reports on fiscal criminal investigations to the competent public prosecutor. Pursuant to Article 167 of the Code of Criminal Procedure it is the task of the public prosecutor to decide whether or not to start criminal proceedings.

According to Article 80 para. 3 of the General State Taxes Act, it is however also open for the public prosecutor to return the case to the fiscal authorities for a resolution of the case by setting conditions within the meaning of Article 76 of the General State Taxes Act in order to avoid criminal proceedings.

Article 29 of the Code of Criminal Procedure reads:

(translation)

"1. In all cases where a person is heard as a suspect, the questioning judge or civil servant shall refrain from everything which could have the effect of obtaining a statement of which it could be said it was not freely made. The suspect is not obliged to answer.

2. Before the hearing the suspect is informed that he is not obliged to answer.

3. The statements of the suspect, in particular those of a confessing nature, shall be recorded in the minutes of the hearing, as far as possible, in his own words. The information referred to in the second paragraph shall be recorded in the minutes."

According to the case-law of the Supreme Court, the information referred to in Article 29 para. 2 of the Code of Criminal Procedure, the so-called "caution" (cautie), is only to be given as soon as there is a "reasonable suspicion" that the person questioned has committed a criminal offence (cf. Nederlandse Jurisprudentie 1982, nr. 258 and Nederlandse Jurisprudentie 1990, nr. 258). Insofar as it concerns questions put in writing, the Supreme Court considered there is no duty to give the caution as there is no direct confrontation between the interrogator and the interrogated person and the latter is not required immediately to answer the questions put to him or her (Nederlandse Jurisprudentie 1986, nr. 405). On the basis of this reasoning, the Supreme Court considered that questions put in writing by the Inspector of Direct Taxes do not constitute a hearing within the meaning of Article 29 of the Code of Criminal Procedure (Nederlandse Jurisprudentie 1986, nr. 406).

COMPLAINT

The applicant complains that, by way of the letter of 4 September 1987, he has been unjustly forced to disclose self-incriminating information which is contrary to the principle of nemo tenetur inherent in the notion of a fair hearing within the meaning

of Article 6 para. 1 of the Convention.

THE LAW

The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the principle of nemo tenetur has been violated in that, in the letter of 4 September 1987 from the tax authorities, he was not informed, pursuant to Article 29 para. 2 of the Netherlands Code of Criminal Procedure, that he was not obliged to answer the questions contained in that letter.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal...."

The Commission recalls at the outset that, as a general rule, questions concerning evidence are to be answered by the national courts. Article 6 (Art. 6) of the Convention does not lay down any rules for the admissibility of evidence as such, which is therefore a matter for regulation under domestic law (cf. Eur. Court H.R., Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, para. 46).

The Commission recalls that, although not specifically mentioned in Article 6 (Art. 6) of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (Art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (Art. 6) of the Convention. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove its case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (Eur. Court H.R., Saunders v. United Kingdom judgment of 17 December 1996, to be published in Reports 1996, para. 68).

The Commission further recalls that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as documents acquired pursuant to a warrant (Saunders v. United Kingdom judgment, loc. cit., para. 69).

In the present case the Commission is only called upon to determine whether the use made by the prosecution and the trial courts of a statement obtained from the applicant by the Tax Inspector amounted to an unjustifiable infringement of the right not to incriminate oneself. This question must be examined in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting evidence at his trial offended the basic principles of a fair procedure inherent in Article 6 para. 1 (Art. 6-1) of the Convention of which the right not to incriminate oneself is a constituent element.

It appears from Article 47 in conjunction with Article 68 of the General State Taxes Act that the applicant was subject to a legal obligation to provide information to the Tax Inspector. According to Article 68 of the General State Taxes Act, a refusal by the applicant

to answer the questions put to him could have led to the imposition of a fine or committal to prison.

As regards the question whether on 4 September 1987, the applicant was already "charged with a criminal offence" within the autonomous meaning of Article 6 para. 1 (Art. 6-1) of the Convention, the Commission recalls that a "charge" for the purposes of Article 6 (Art. 6) of the Convention may in general be defined as "the official notification given to the individual by the competent authority of an allegation that he has committed a criminal offence". It may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (cf. Eur. Court H.R., Eckle v. Germany judgment of 15 July 1982, Series A no. 51, p. 33, para. 73; Foti and Others v. Italy judgment of 10 December 1982, Series A no. 56, p. 18, para. 52 and No. 15921/89, Dec. 1.7.91, D.R. 71 p. 236).

The manner in which Article 6 (Art. 6) of the Convention is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 (Art. 6) - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (cf. Eur. Court H.R., Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, para. 38).

The Commission notes that the functions performed by the Tax Inspector under Article 47 of the General State Taxes Act in the present case were essentially investigative in nature. The purpose of the Inspector's investigation was to ascertain and record facts for fiscal purposes and not for a legal determination as to the applicant's criminal liability, albeit that the results of a fiscal investigation could be used as the basis for action by the prosecution authorities in case these facts would disclose a possibility that criminal offences under the tax laws had been committed.

The Commission further notes that the answers given by Mr C.S. on behalf of the applicant merely confirmed information already previously submitted voluntarily on the applicant's behalf to the tax authorities in connection with his requests for an exoneration of wage tax.

In these circumstances, the Commission cannot find that the applicant's situation was substantially affected for the purposes of Article 6 (Art. 6) of the Convention. The Commission further finds that a requirement that an investigation by a Tax Inspector under Article 47 of the General State Taxes Act should be subject to the guarantees of a judicial procedure as set forth in Article 6 para. 1 (Art. 6-1) of the Convention would in practice unduly hamper the effective functioning in the public interest of the activities of fiscal authorities (cf., mutatis mutandis, Eur. Court H.R., Fayed v. United Kingdom judgment of 21 September 1994, Series A no. 294-B, p. 48, para. 62 and Saunders v. United Kingdom, loc. cit., para. 67). The Commission is, therefore, of the opinion that the investigation by the Tax Inspector of the applicant's case was not such as to attract the application of Article 6 (Art. 6) of the Convention and, consequently, that the applicant's obligation to answer the Tax Inspector's questions did not constitute an infringement of the right to silence and the right not to incriminate oneself.

This applicant's situation for the purposes of Article 6 (Art. 6) of the Convention did, however, alter on 21 February 1989, when his family home in the Netherlands was searched in the context of a preliminary judicial investigation against him. The Commission considers that this event substantially affected the applicant's situation and, therefore, as from that date entitled him to the protection afforded by Article 6 para. 1 (Art. 6-1) of the Convention

as regards the rights of the defence. In this respect the Commission, moreover, notes that the applicant, when he complained before the Court of Appeal of the length of the proceedings, did in fact submit that the criminal proceedings against him had started on 21 February 1989.

Finally, noting that it has not been alleged nor appeared that, as from the start of the criminal proceedings against him on 21 February 1989, the applicant has been restricted in the exercise of his rights under Article 6 (Art. 6) of the Convention, the Commission finds no indication that the proceedings at issue fell short of the requirements of Article 6 (Art. 6) of the Convention.

It follows that the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber