AS TO THE ADMISSIBILITY OF

Application No. 35138/97
by Ali AYYILDIZ
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 9 September 1998, the following members being present:

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

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 5 November 1996 by Ali AYYILDIZ against the Netherlands and registered on 28 February 1997 under file No. 35138/97;

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 1954, and resides in Rotterdam. He is represented by Ms T. Prakken, a lawyer practising in Amsterdam.

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

In the course of an investigation in the Netherlands of racketeering of which members of the Turkish movement "Dev-Sol" were suspected, the Dutch investigating authorities compiled in albums and used as an investigative tool a collection of photographs of Dev-Sol members and sympathisers. A number of persons to whom this collection was shown identified the applicant as having committed offences. The statements of these persons were recorded in formal minutes (processen-verbaal) to which copies were attached of the photographs of the applicant from which he had been identified.

On 6 December 1993, the applicant was arrested on suspicion of having committed a number of offences, including attempted extortion, theft and unlawful possession of a firearm, and subsequently placed in pre-trial detention. At some unspecified point in time, the applicant was committed for trial.

By judgment of 17 June 1994, following adversarial proceedings, the Regional Court (Arrondissementsrechtbank) of The Hague convicted the applicant of threat, attempted extortion, theft and unlawful possession of a firearm and ammunition and sentenced him to four years' imprisonment.

The argument advanced by the defence that the prosecution should be declared inadmissible for failure to respect the fair trial principle in that the applicant himself had not been given access to the photograph albums used in the investigation phase was rejected by the Regional Court. It held on this point:

<Translation>
"During the hearing on 17 March 1994, the Regional Court rejected the request <of the defence> to add to the case-file the photograph albums <used in the investigation>.
The accused and lawyers have an interest in access to the photograph albums in order to examine whether these books have been composed in a balanced manner in a way guaranteeing a reliable recognition.
Having regard to, inter alia, future investigations into extortion activities of this <Dev-Sol> organisation, the Prosecution Department has an interest in keeping secret the identity of other persons whose photographs are included in these albums and in respect of whom, according to information supplied by the Prosecution Department, there are indications that they are involved in Dev-Sol.

In the court's opinion the interest of the accused in casu does not outweigh the general investigation interest of the Prosecution Department. The court further considers that the privacy of the other photographed persons is to be respected as much as possible.

At the trial, the Regional Court has examined the contents of the photograph albums and, at the hearing on 17 March 1994, has provided the applicant's lawyer with an opportunity thereto of which she has not availed herself.

Noting the above the Regional Court does not consider that the applicant has been harmed in his defence and finds that to deny the accused access <to these albums> cannot lead to the inadmissibility of the prosecution."

Both the public prosecutor and the applicant filed an appeal with the Court of Appeal (Gerechtshof) of The Hague.

In its judgment of 6 February 1995, following adversarial proceedings, the Court of Appeal quashed the judgment of 17 June 1994, convicted the applicant of threat, theft and unlawful possession of a firearm and sentenced him to three years and six months' imprisonment. It based the applicant's conviction on, inter alia, a statement by the applicant before the Court of Appeal and statements of a number of witnesses who had made recorded statements to the police and who had been heard before the investigating judge (rechter-commissaris).

In its judgment, the Court of Appeal stated inter alia:

<Translation>

"At the trial the defence argued, submitting the same grounds as raised in first instance, that the prosecution should be declared inadmissible. No new grounds have been raised in respect of this argument.

The Court of Appeal agrees with the rejection by the Regional Court of that argument and the reasons given therefor, albeit with a single exception, to be discussed below, amendment and addition to these reasons.

(...)

The Court of Appeal finds, contrary to the lawyer's argument, that the photograph albums at issue are no formal trial documents (processtukken) within the meaning of the law. These albums are to be considered as <an> investigating tool on the basis of which formal trial documents - such as statements of witnesses recorded in formal minutes (proces-verbaal) and copies of photographs of the accused which have led to the recognition - are established. Therefore the defence cannot claim a right to <be provided with> copies of that photographic material. The Court of Appeal further notes that at the trial - together with the Court of Appeal - the lawyer has had the opportunity to verify the composition of the photograph albums, which she refused."

The applicant filed an appeal in cassation to the Supreme Court (Hoge Raad).

On 7 May 1996, the Supreme Court handed down its judgment. As regards the applicant's complaint that the photograph albums had not been added to his case-file as a

formal trial document and that he had been denied personal access to these photographs, the Supreme Court held:

"The notion formal trial documents is not defined in the law, nor does the law contain rules about which official determines the composition of the case-file.

Insofar as it concerns documents which might influence the evidence, it must be assumed that - apart from the competence of the defence to add documents to the case-file itself and what is stated in Article 414 of the Code of Criminal Procedure - the public prosecutor adds documents concerning the results of the criminal investigation to the case-file. Insofar as there has been a preliminary judicial investigation, the investigating judge has a similar task as regards the results of the preliminary judicial investigation. To the case-file must be added documents which reasonably could be of interest as being either inculpating or exculpating for the accused. The above does not alter the fact that the judge, either ex officio or upon the request of the prosecution or the defence, may order certain documents to be added to the case-file. Access to formal trial documents may not, apart from exceptions not relevant to the present case, be denied to the accused and his lawyer. Copies of formal trial documents will further be made available."

After having noted the nature of the photograph albums and their function in the investigation, the Supreme Court accepted the Court of Appeal's finding that these albums were not to be considered as formal trial documents which should have been included in the applicant's case-file.

The Supreme Court further considered that a challenge by the defence of the reliability or lawfulness of evidence must be examined by a trial court and that principles of due process entail that, in principle, the defence may not be denied access to documents - not being formal trial documents - relevant for the examination of such an argument. However, the Supreme Court added that this does not imply that both a lawyer and the accused have an automatic right to be provided with a copy of or access to a tool, such as the one at issue, which has been used as such by the police, or to any other documentation.

The Supreme Court accepted the conclusion of the Court of Appeal, i.e. that the interests of the prosecution authorities outweighed the interests of the defence as regards the applicant's access to the albums, but that his lawyer would be given the opportunity to verify the contents of the books, an offer of which the defence did not avail itself. It concluded that the Court of Appeal had rejected the argument of the defence that the prosecution should be declared inadmissible on correct grounds.

Insofar as the applicant had been convicted of theft, the Supreme Court noted that the finding that the applicant had been directly involved in the facts relating to this charge were only founded on the statement of one witness whereas the defence had not been provided with an opportunity to question this witness.

Consequently, the Supreme Court quashed the judgment of 6 February 1995 in respect of this charge, referred the case to the Court of Appeal for a new decision as

regards this particular charge and the sentence imposed on the applicant. It rejected the applicant's appeal in cassation for the remainder.

By judgment of 29 april 1997, the Court of Appeal of Amsterdam acquitted the applicant of the charge of theft and determined his sentence for the charges of which the applicant had been convicted at three years' imprisonment.

COMPLAINTS

The applicant complains under Article 6 of the Convention that he has not received a fair trial in that the principle of equality of arms has been violated.

He submits that, despite his requests to this effect, the collection of photographs compiled and used by the police in the course of the pre-trial investigation was not added to his case-file. The applicant argues that he has been seriously harmed in his defence in that he has been unable to verify himself which photographs of other persons were included in this collection. He submits that the photographs possibly formed objective material for recognition purposes. In the applicant's opinion he should be entitled to verify this and to consult his lawyer on this element. The reason why he wished to consult these photographs in person was that he wished to be able to verify whether the other persons photographed were indeed other Dev-Sol sympathisers rather than other persons from the small Turkish-Kurdish community in The Hague - where the facts at issue had taken place and where the persons having filed criminal complaints and other witnesses were residing - not belonging to the group of Dev-Sol sympathisers. In the latter case his recognition as a perpetrator would have been very easy. As his lawyer was not familiar with the Turkish-Kurdish community there was no point in showing these photographs to her.

THE LAW

The applicant complains under Article 6 of the Convention that he did not receive a fair trial in that the principle of equality of arms has been violated as, despite his requests to this effect, the collection of photographs compiled and used by the police in the course of the pre-trial investigation was not added to his case-file.

Article 6 of the Convention, insofar as relevant, reads:

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

...

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

...

b. to have adequate ... facilities for the preparation of his defence;"

As the guarantees in paragraph 3 of Article 6 of the Convention are specific aspects of the right to a fair trial set forth in paragraph 1 of this provision, the Commission will consider the complaint under the two provisions taken together (cf. Eur. Court HR, Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, Reports of Judgments and Decisions 1997-III No. 36, p. 711, para. 49).

The Commission recalls that it is not for the Convention organs to substitute their view for that of the national courts which are primarily competent to determine the admissibility of evidence. The Commission should nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any (cf. Eur. Court HR, Miailhe v. France judgment of 26 September 1996, Reports 1996-IV, No. 16, p. 1338, para. 43).

The Commission recalls that it is a requirement of fairness under Article 6 para. 1 of the Convention that the prosecution authorities disclose to the defence all material evidence for or against the accused and that a failure to do so may give rise to a defect in the trial proceedings (cf. Eur. Court HR, Edwards v. United Kingdom judgment of 16 December 1992, Series A no. 274-B, p. 35, para. 36).

The Commission considers that the Convention does not preclude reliance, at the investigation stage, on investigative tools like the collection of photographs at issue. The subsequent use of information obtained as a result of the use of such tools by a trial court may, however, raise an issue under the Convention if the rights of the defence are not or are insufficiently respected.

In the instant case, the Commission notes that the photographs of the applicant from which he had been identified by witnesses were added to the statements of those witnesses and that both these statements and photographs were included in the applicant's case-file.

The Commission observes that the reason for the applicant's wish to examine the photograph albums personally was to verify whether the persons whose photographs were included in these albums were in fact Dev-Sol sympathisers and whether these photographs could have served as objective material for identification purposes.

Noting that the photograph albums were required by the prosecution authorities for use in ongoing criminal investigations, the Commission accepts the domestic courts' finding that these albums could not be disclosed to the applicant in person on the basis of prevailing interests of the prosecution authorities.

The Commission further accepts that, in order to verify the manner in which the collection of photographs had been composed, it was sufficient for the purposes of Article 6 of the Convention to provide the applicant's lawyer with an opportunity to inspect this collection in the course of the trial. Both the Regional Court and the Court of

Appeal did verify the collection and invited the applicant's lawyer to examine the collection, an opportunity of which she chose not to avail herself.

Moreover, the photograph albums cannot be regarded as a decisive element for the applicant's conviction or as part of the material evidence against the applicant, The Commission notes that the applicant's conviction was not based on the mere identification of the applicant as a perpetrator from one or more photographs in the collection at issue, but on other subsequent material evidence obtained in the course of the police and judicial investigation, i.e. in particular statements made by a number of witnesses before the police and the investigating judge which were added to the applicant's case-file.

It has not been argued nor has it appeared that the applicant has been unable or insufficiently able to exercise his defence rights under Article 6 of the Convention in respect of the statements of those witnesses which formed a part of his case-file and on the basis of which he was finally convicted by the domestic courts.

In these circumstances, the Commission cannot find that the criminal proceedings against the applicant fell short of the requirements of Article 6 of the Convention as regards fairness of proceedings.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber