AS TO THE ADMISSIBILITY OF

Application No. 17741/91
by Eddy BISH
against the Netherlands

The European Commission of Human Rights sitting in private on 8 January 1992, the following members being present:

MM.C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 15 January 1991 by Eddy BISH against the Netherlands and registered on 31 January 1991 under file No. 17741/91;

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

The applicant is a Dutch citizen, born in 1948 and resident at 's-Hertogenbosch. He is represented before the Commission by Mrs. G.E.M. Later, a lawyer practising in The Hague.

On 25 April 1990, the Burgomaster of Boxtel issued an order for the applicant's provisional detention (inbewaringstelling) in a mental hospital. On the basis of this order he was detained in the psychiatric hospital Reinier van Arkel at 's-Hertogenbosch.

On 2 May 1990, the public prosecutor requested the continuation

of his provisional detention, and on 3 May 1990, the President of the Regional Court (Arrondissementsrechtbank) of 's-Hertogenbosch, after having heard the applicant, ordered that he should continue to be detained.

On 16 May 1990, the applicant's mother addressed to the District Court judge (kantonrechter) of 's-Hertogenbosch a request for a judicial order (rechterlijke machtiging) to have the applicant detained in a mental hospital. Having received this request, the District Court judge heard the applicant on 17 May 1990. On the same occasion, the judge also heard the psychiatrist who treated the applicant. At the hearing the applicant was not assisted by a lawyer. He remembers that he asked for his lawyer, but this is not mentioned in the minutes of the hearing. The applicant was not informed in advance of the hearing and had therefore not had the possibility to prepare himself. He had no opportunity to read the documents upon which the hearing was based, and the judge did not inform him of their contents.

On 17 May 1990, the District Court judge issued an order for the applicant's detention in a mental hospital. The applicant appealed to the Supreme Court (Hoge Raad), but his appeal was rejected on 12 October 1990 as inadmissible, the reason being that an order of this kind issued by a District Court judge could only be challenged on specific and limited grounds and the grounds invoked by the applicant were not admissible.

The applicant refers to a judgment of the Supreme Court of 19 January 1990, in which it was emphasised that a person whose detention in a mental hospital is requested must have a right of defence, which means that the judge, if the person concerned has no lawyer, shall appoint a lawyer ex officio or ask the person whether he wishes to have a lawyer. If no lawyer is present at the hearing, the reason should be indicated in the case-file. The applicant points out that these guarantees were not observed in the present case.

The applicant further points out that the Supreme Court has considered it to be a violation of the procedural rules inherent in the Mentally Ill Persons Act (Krankzinnigenwet), if the judge, in taking his decision, makes use of documents which are unknown to the person to be detained or his lawyer. It is also required that the person concerned or his lawyer shall be given an opportunity to comment upon these documents. These guarantees were not, in the applicant's opinion, observed in the present case.

The applicant further points out that the Mentally Ill Persons Act provides for two different procedures regarding detention in mental hospitals and that the procedural guarantees are very different in these two procedures. The first one - which was used in the present case - is before a District Court judge and is used when detention is requested by a close family member of the person to be detained. The second procedure is before the President of a Regional Court and is used when the request for detention is made by the public prosecutor. In the procedure before the District Court judge the procedural guarantees are very deficient, and there is in principle no right of appeal against the decision of the judge. Against the decision of the President of the Regional Court an appeal to the Supreme Court is always available, and the right of defence is respected in the procedure before the President.

COMPLAINTS

The applicant complains of violations of Articles 5, 6, 13 and 14 of the Convention.

1. The applicant alleges that there are unjustified differences in the procedure between, on the one hand, the situation where the

question of detention in a mental hospital is dealt with by a District Court judge and, on the other hand, the situation where the President of a Regional Court is competent. In particular, he refers to the fact that, where the detention order is issued by a District Court judge, there is only a limited right of appeal to the Supreme Court, whereas such an unrestricted appeal is available where the decision is taken by the President of a Regional Court. The applicant invokes Articles 6 and 14 of the Convention.

2. The applicant considers that Article 5 para. 1 of the Convention was violated in that he was not assisted by a lawyer at the hearing on 17 May 1990.

3. A violation of Article 5 para. 1 of the Convention also occurred, in the applicant's opinion, on the ground that he was not given the opportunity to acquaint himself with the documents in the case-file.

4. The applicant further complains that he was not informed about the proceedings against him, which meant that he could not himself request his lawyer to assist him. He considers that this violated Article 5 para. 2 of the Convention.

5. As the applicant had no right to appeal to the Supreme Court, there was also, in his opinion, a violation of Article 5 para. 4 and Article 13 of the Convention.

PROCEECINGS BEFORE THE COMMISSION

The application was introduced on 15 January 1991 and registered on 31 January 1991.

After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 8 April 1991. It decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit their written observations on admissibility and merits.

The Government's observations were submitted on 24 July 1991. The applicant's observations in reply were received on 9 August and 10 September 1991.

THE LAW

1. The applicant first alleges a violation of Articles 6 and 14 (Art. 6, 14) of the Convention in that there are unjustified differences in the procedure between, on the one hand, the situation where the question of detention in a mental hospital is dealt with by a District Court judge and, on the other hand, the situation where the President of a Regional Court is competent. In particular, he refers to the fact that, where the detention order is issued by a District Court judge, there is only a limited right of appeal to the Supreme Court, whereas no restrictions in regard to the appeal apply where the decision is taken by the President of a Regional Court.

The Commission notes that under Dutch law the simplified procedure before a District Court judge is applied where detention is requested by the person concerned or by a close relative or a guardian, whereas the other procedure before the President of a Regional Court is used where detention is requested by a public prosecutor.

Consequently, the existing procedural differences, insofar as they have been relevant in the proceedings regarding the applicant, including the restrictions on the right of appeal, must be considered

to have a reasonable justification and cannot be regarded as discriminatory within the meaning of Article 14 (Art. 14) of the Convention.

This part of the application must therefore be rejected under Article 27 para. 2 (Art. 27-2) of the Convention as manifestly ill-founded.

2. The applicant alleges a violation of Article 5 para. 1 (Art. 5-1) of the Convention in that he was not assisted by a lawyer at the hearing on 17 May 1990.

The Government argue that in regard to this complaint the domestic remedies have not been exhausted. In the Government's opinion, an available remedy was a request for discharge from the hospital together with a claim for compensation. They also refer to the possibility of asking for release in summary proceedings (kort geding) before the President of a Regional Court on the ground of illegal detention.

The applicant contests that the remedies referred to by the Government could be regarded as effective.

The Commission notes that the applicant did not have at his disposal any remedy against the detention order itself. It considers that the right to ask for a subsequent discharge cannot be seen as a remedy against the detention order. Nor can the right to bring proceedings for damages be regarded as sufficient in this context, since such proceedings are not primarily aimed at obtaining the release of the detained person.

As regards summary proceedings before the President of a Regional Court, there can be no doubt that this is in Dutch law and practice an important remedy against various illegal acts (cf. Eur. Court H.R., Keus judgment 25.10.90, Series A vol. 185-C, para. 16). However, in the Government's brief remarks on such proceedings in their observations, it has in no way been demonstrated that summary proceedings would have constituted an effective remedy in the present case.

The Commission is therefore of the opinion that this complaint should not be rejected on the ground of failure to exhaust domestic remedies.

Both the applicant and the Government refer to a judgment of the Supreme Court of 19 January 1990 from which it appears that in cases regarding detention in a mental hospital the judge shall ask the person concerned whether he wishes to have a lawyer and that, where he is heard without being assisted by a lawyer, the reasons for this shall appear from the case-file. The Government note that this judgment concerned a case where, unlike in the present case, detention had been requested by a public prosecutor. However, the Government admit that the judge's failure to investigate whether the person concerned wishes to have a lawyer is normally not consistent with his rights under that judgment.

As regards the present case, the Government consider that special circumstances nevertheless justify the conclusion that the applicant's detention was decided in accordance with a procedure prescribed by law. In the Government's opinion, the judge in the present case had reason to believe that neither the applicant nor his lawyer found the assistance of a lawyer on 17 May 1990 necessary and that a lawyer would not have been able to add any further information to the case. This is contested by the applicant who submits that his lawyer was not aware of the request for his detention or of the medical and other documents in the case.

The Commission considers that this part of the application raises

important issues of fact and law whose determination should depend on an examination of the merits of the complaint. It should therefore be declared admissible.

3. The applicant complains of a further violation of Article 5 para. 1 (Art. 5-1) of the Convention in that he was not given the opportunity to acquaint himself with the documents in the case-file.

The Government point out that according to the case-law of the Supreme Court the person whose detention is requested under the Mentally Ill Persons Act shall have the opportunity to acquaint himself with the relevant documents, either before or during the hearing in the case.

The applicant replies that in the helpless condition in which he was, it could not be expected of him that he should ask to see the documents before the hearing took place.

The Commission considers that the present complaint is closely connected with the complaint under 2 regarding the absence of a lawyer and that it should therefore also be declared admissible.

4. The applicant also considers that Article 5 para. 2 (Art. 5-2) of the Convention was violated in that he was not informed of the proceedings against him leading up to the detention order of 17 May 1990.

The Commission first notes that on 17 May 1990 the applicant had already been detained for some time in a mental hospital on the basis of a provisional detention order. Moreover, the request for a judicial detention order was only made on 16 May 1990, i.e. the day before the applicant was heard by the judge.

On 17 May 1990, when the applicant was heard, he must also have been informed of the reasons for that hearing. Moreover, whether or not he was promptly informed of the new detention order, issued on 17 May 1990, he must have understood that he continued to be detained for the same reasons as before.

In these circumstances, the Commission considers this complaint to be manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant finally submits that, since he could not have his detention reviewed by the Supreme Court, he had no judicial remedy satisfying Article 5 para. 4 (Art. 5-4) of the Convention. He also invokes Article 13 (Art. 13) of the Convention in this context.

According to Article 5 para. 4 (Art. 5-4) of the Convention, everyone who is detained shall be entitled to take proceedings by which the lawfulness of his detention shall be decided by a court. Article 13 (Art. 13) of the Convention provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority.

The Commission considers that the present complaint is closely connected with the complaints relating to Article 5 para. 1 (Art. 5-1) of the Convention and that it should therefore also be declared admissible.

As, in regard to detention, Article 13 (Art. 13) of the Convention must be seen as subsidiary to Article 5 para. 4 (Art. 5-4), the latter being the lex specialis, the Commission finds the complaint regarding Article 13 (Art. 13) also to be manifestly ill-founded.

For these reasons, the Commission, unanimously

-DECLARES INADMISSIBLE, the applicant's complaints of discrimination in regard to the right of appeal and of not having been informed about the proceedings against him,

- DECLARES ADMISSIBLE the remainder of the application.

Secretary to the Commission | President of the Commission

(H.C. KRÜGER) | (C.A. NØRGAARD)