CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45282/99
by H.P. BLOKKER
against the Netherlands

The European Court of Human Rights (First Section), sitting on 7 November 2000 as a Chamber composed of

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr T. PANŢÎRU, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 8 October 1998 and registered on 8 January 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Dutch national, born in 1943 and living in Haarlem. He is represented before the Court by Mr J. Koekoek, a lawyer practising in Haarlem.

A. The circumstances of the case

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

On 7 April 1997, while driving a car, the applicant was stopped by the police for an alcohol test. A breath test taken from him disclosed an alcohol level of 655 µg/l. As this was higher than 220 µg/l, the statutory maximum level, the police confiscated (*invordering*) his driving licence.

On 10 April 1997, the applicant was informed by the public prosecutor at the Haarlem Regional Court (*Arrondissementsrechtbank*) that his driving licence would remain confiscated for a period of nine months. On 21 April 1997, the applicant filed an objection (*bezwaarschrift*) with the Haarlem Regional Court against the public prosecutor's decision to confiscate his driving licence. In this objection, the applicant mentioned having paid a fine in 1995 for drunken driving and explained that he needed his driving licence for professional reasons. He further explained that, on 7 April 1997, he had consumed more alcohol than legally allowed for driving as he had been under a great emotional stress caused by private circumstances. In his opinion, to deprive him of his driving licence for such a lengthy period was disproportionate in that it would not only affect his own professional activities, but also those of the persons working for him.

By summons of 22 April 1997, the applicant was ordered to appear on 21 May 1997 before the Magistrate (*politierechter*) of the Haarlem Regional Court on charges of drunken driving. On 21 May 1997, the Magistrate convicted the applicant of drunken driving. The applicant was sentenced to payment of a fine of NLG. 2,500 and disqualification for driving for a period of six months (*ontzegging rijbevoegdheid*). The disqualification for driving was suspended pending a probation period of two years. The applicant did not file an appeal against this judgment.

Also on 21 May 1997, the Haarlem Regional Court determined the applicant's objection of 21 April 1997. It held that, although the public prosecutor's decision of 10 April 1997 could not be regarded as unreasonable, the applicant's written and oral submissions disclosed reasons

for ordering that the confiscated driving licence be returned to the applicant and, consequently, issued an order to this effect.

By letter of 27 May 1997 the applicant was informed that, following information provided by the police on 7 April 1997, the Minister of Transport, Public Works and Water Management (*Minister van Verkeer en Waterstaat*; hereinafter "the Minister") had decided that the applicant should be subjected to an Educational Measure Alcohol and Traffic (*Educatieve Maatregel Alcohol en Verkeer*; hereinafter "EMA"). He was further informed that the costs of this measure, i.e. NLG. 500, were to be paid by himself. He was warned that a failure to co-operate in respect of the EMA would result in declaring his driving licence invalid.

The applicant's objection (*bezwaar*) against the decision of 27 May 1997 was rejected by the Minister. The applicant was informed of this by letter of 15 October 1997. The applicant filed an appeal against this rejection with the Haarlem Regional Court, which was rejected by the President of this court by judgment of 27 January 1998.

The applicant filed an appeal against the judgment of 27 January 1998 with the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*). Relying on Article 6 of the Convention under its criminal head, he argued that the imposition of the EMA constituted a double punishment or punitive measure since the criminal court had already dealt with his case. He further complained that, as his driving licence had already been returned to him, the imposition of the EMA constituted undue hardship. He further complained of unequal treatment as persons in whom a higher alcohol percentage is found are not subject to an EMA imposition, but are subjected to a medical examination.

In its decision of 29 April 1998, the President of the Administrative Jurisdiction Division rejected the applicant's appeal. Insofar as relevant, the President of the Administrative Jurisdiction Division held:

<Translation>

> "The President [of the Regional Court] has justly considered that, with the fact that the appellant was found to have an alcohol level of 655 µg/l, the requirements set out in the relevant rules for imposing the Educational Measure have been fulfilled.
>
> The circumstance that the criminal court, at the time of the imposition of the Educational Measure, had already taken a decision as to the confiscation of the appellant's driving licence does not alter this, as the confiscation under criminal law of the driving licence on grounds of Article 164 of the 1994 Road and Traffic Act (*Wegenverkeerswet*) concerns a wholly different procedure than the

administrative law measure of imposing the obligation to comply with an Educational Measure. The legislator does not exclude that, in addition to dealing with an offence involving alcohol under criminal law, an administrative law measure is imposed like the obligation to comply with an Educational Measure. ... A connection between the criminal and administrative procedures in the Road and Traffic Act, as the appellant apparently wants to make, has not been intended by the legislator. The circumstance that the criminal procedure apparently has ended prior to the administrative law procedure, therefore, has no consequences for the imposition of the Educational Measure.

The President shares the opinion of the president <of the Regional Court> that imposing on the appellant the obligation to subject himself to an Educational Measure cannot be regarded as a "criminal charge" within the meaning of Article 6 of the Convention. The qualification given by the legislator to the measure, the aim the measure pursues, the nature and seriousness of the measure and the lacking of a punitive character of the measure make that it does not concern a punishment or sanction as argued by the appellant.

As to the appellant's argument that the regulation results in an unequal treatment of motorised vehicle drivers having consumed alcohol, the President subscribes in the first place to the finding of the president <of the Regional Court> that it does not concern similar cases. Motorised vehicle drivers, with whom at the time when they are stopped <by the police> a breath alcohol level higher than 915 µg/l is found are not in a similar situation that drivers with whom an alcohol level between 570 µg/l and 915 µg/l is found. Like the president <of the Regional Court>, the President finds no basis for the correctness of the appellant's contention that persons having driven a car with a considerable higher alcohol percentage receive a less severe treatment that persons like him. In this connection, the President points to the possibility, as mentioned by the president [of the Regional Court], of suspending the validity of the driving licence of persons falling in the "heavier category". Furthermore, unlike persons falling in the "heavier category", the applicant will not be confronted with an examination of his driving ability or suitability with, as a possible result, a declaration of invalidity of his driving licence."

B. Relevant domestic law and practice

Where suspicion arises as to the driving ability or the physical or mental suitability to drive of a holder of a driving licence, the police or other public officials as designated by an Order in Council (*Algemene Maatregel van Bestuur*) are obliged, under Article 130 § 1 of the 1994 Road and Traffic Act (*Wegenverkeerswet*), to report this in writing to the Minister of Transport, Public Works and Water Management ("the Minister").

Under Article 131 § 1 of the 1994 Roads and Traffic Act, the Minister may order, in case the information transmitted gives reason for doing so, that the driving licence holder concerned must be subjected to an investigation of his or her driving ability or suitability. In case the results of such an investigation are unsatisfactory, the Minister may declare the driving licence of the person concerned invalid.

Under Article 131 § 5 of the 1994 Road and Traffic Act, the Minister may decide, where the Minister finds that the information transmitted does not disclose a need for an investigation of the driving ability or suitability, to subject the driving licence holder concerned to an Educational Measure.

Pursuant to Article 132 § 1 of the Road and Traffic Act, the person in respect of whom it has been decided to impose an Educational Measure is obliged to co-operate in the execution of the Educational Measure. According to Article 132 § 2 of the Road and Traffic Act the Minister, in case of failure of co-operation of the person concerned, shall immediately decide to declare invalid (*ongeldigheidsverklaring*) the driving licence held by that person.

Article 8 §§ 1 and 2 of the Regulation measures driving ability and suitability (*Regeling maatregelen rijvaardigheid en geschiktheid*), published in the Official Gazette (*Staatscourant*) 1996, nr. 183, provides that the Minister shall impose an Educational Measure Alcohol and Traffic ("EMA") where:

- it has been found that the person concerned had a breath or blood alcohol level higher than, respectively, 570 µg/l or 1.3‰ and not higher than, respectively, 915 µg/l or 2.1‰; or

- it has been found that the person concerned had a breath or blood alcohol level higher than, respectively, 350 µg/l or 0.8‰ whereas the person concerned, within a previous period of five years has been stopped <by the police> on suspicion of driving under the influence of alcohol or another substance of which the person concerns knows or should know that it affects the ability to drive.

According to Article 10 of the Regulation measures driving ability and aptitude, the costs of an Educational Measure are to be borne by the person concerned.

An EMA consists of teaching sessions, given by a teacher of the Centre for Alcohol and Drugs, about the risks of driving under influence. The total duration of an EMA is three full days (one day per week) and it is finished by an individual evaluation lasting about 1½ hours on the fourth day. The teacher will transmit a report to the Minister on his or her findings as to the participation of the person concerned in the EMA. On the basis of these findings, the Minister will decide whether or not the driving licence of the person concerned is to be declared invalid.

A person subjected to an Educational Measure may file an objection with the Minister against that decision. An appeal against the Minister's decision on such an objection lies with the Administrative Jurisdiction Division of the Council of State.

Only the Minister is competent to order the imposition of an EMA. Consequently, it cannot be imposed by a criminal court judge as part of a sentence in cases where a person has been convicted of a traffic offence. Under Article 179 of the Road and Traffic Act, a criminal court may - after having convicted a driver of, *inter alia*, drunken driving - impose as a secondary penalty (*bijkomende straf*) disqualification for driving for a maximum period of five years. In case the conviction of, *inter alia*, drunken driving is the second one during a period of five years, the disqualification can be ordered for a maximum period of ten years.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the imposition of the EMA, including the obligation to pay the costs of the EMA, constitutes a punitive sanction and that, despite the administrative character of the proceedings concerning the imposition of the EMA, they are to be considered as constituting a determination of a criminal charge within the meaning of Article 6 § 1. In these circumstances, the applicant is of the opinion that the EMA violates the principle of *ne bis in idem* as he has already been convicted of and sentenced for drunken driving. He argues that, in these criminal proceedings, the judge had already assessed his suitability for driving.

The applicant further complains under Article 6 § 1 of the Convention that it is in fact the teacher involved in the EMA who decides whether or not the EMA has been successfully completed and therefore whether or not the driving licence is to be declared invalid. Although this would concern a new decision in respect of which remedies exist, a decision declaring a driving licence invalid is in fact left to the arbitrary discretion of one person and therefore contrary to the requirements of proper and fair proceedings under the Convention.

The applicant finally complains that the EMA regulations are contrary to the principle of fair play and equality of treatment. He submits that persons, in respect of whom an alcohol level of higher than 2.1‰ is found, are to be subjected to a different (medical/psychiatric) examination and that, where the results of this examination are positive, no EMA has to

be followed and thus no demands in respect of this person's money, time and driving licence are made.

THE LAW

1. The applicant complains under Article 6 § 1 of the Convention that the imposition of the Educational Measure Alcohol and Traffic and the proceedings in relation to this measure are contrary to Article 6 § 1 and Article 14 of the Convention.

Article 6 § 1 of the Convention, insofar as relevant, reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal established by law..."

Article 14 of the Convention reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Insofar as the applicant complains of a violation of the principle of "*ne bis in idem*", the Court observes that in the Convention system this principle, as relied upon by the applicant, is regulated in Article 4 of Protocol No. 7 which has not been ratified by the Netherlands. This part of the application is therefore incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

As to the applicant's complaints under Article 6 § 1 of the Convention, the Court considers that the first question that arises is whether or not a "criminal charge" was in issue in the present case. In ascertaining whether there was a "criminal charge", the Court has regard to three criteria: the legal classification of the measure in question in national law, the very nature of the measure, and the nature and degree of severity of the "penalty" (cf. *Escoubet v. Belgium* [GC], no. 26780/95, § 32, ECHR 1999-VII).

The Court notes that the EMA is not a measure imposed under criminal law, but a measure governed by administrative law provisions. Classification in domestic law is not, however, decisive for the purposes of

the Convention, having regard to the autonomous and substantive meaning to be given to the term "criminal charge" (cf. Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, pp. 15-16, § 31).

The Court further notes that the EMA, as indicated by its very title, has an educational character in that it appears to be aimed at raising, by teaching sessions, the awareness of a specific category of holders of a driving licence about the dangers of driving under the influence of alcohol.

As to the nature and degree of severity of the "penalty", the Court recalls that the concept of a "penalty" in Article 7 of the Convention, like the concept of a "criminal charge" in Article 6 § 1 of the Convention, is an autonomous one and that, in assessing this issue, the Court is not bound by the indications furnished by domestic law, which have only a relative value. It is for the Court to determine whether the application of the EMA had the *de facto* effect of bringing a "criminal charge" against the applicant on account of its nature and repercussions (cf. *Escoubet v. Belgium*, *loc. cit*., § 35).

As to the nature of the EMA, the Court notes that the relevant statutory and secondary rules do not presuppose any finding of guilt. Although the application of the rules governing the EMA may be triggered off by the results of an alcohol test taken by the police from the person concerned, its application is totally independent of any criminal proceedings which may be brought in relation to the results of this alcohol test taken.

The imposition of an EMA appears to be a measure aimed at securing the safety of both the person concerned as well as other road-users, in that it is designed to raise the awareness of the person concerned of the dangers of driving under the influence of alcohol. The Court considers that it should be compared with the procedure of issuing a driving licence, which is undoubtedly an administrative procedure, and which is aimed at ensuring that a driver possesses the required skills and knowledge of the relevant traffic rules for driving on a public road, and realises the importance of responsible and correct conduct on the public road. Where the conduct of a driver holding a licence gives rise to doubts as to these elements, the Court cannot regard it as unreasonable that such a person is required to follow a refresher course in order to remedy the shortcomings found.

This is not altered by the fact that the costs of an EMA are to be borne by the person concerned. The Court considers that these costs, as well as the obligation to make 3½ days available to attend this course, are to be compared to the time and costs spent on lessons or examinations to be taken by persons seeking to obtain a driving licence. The Court cannot find that

these elements are sufficient for allowing the EMA to be classified as a "criminal penalty". It is furthermore not altered by the fact that, in case of failure to comply with an EMA, the Minister may decide to declare a driving licence invalid as this can be compared with failing to pay for or to take an examination for the purposes of obtaining a driving licence. The Court is of the opinion that to declare a driving licence invalid on such grounds is to be distinguished from disqualification for driving, as the latter is a measure ordered by the criminal court in the context of, and after the outcome of, a criminal prosecution. In such a case, the criminal court assesses and qualifies the facts constituting the offence which may give rise to disqualification, before imposing this as a secondary penalty for a period it deems appropriate.

In these circumstances, the Court is of the opinion that Article 6 is not applicable under its criminal head. It follows that this part of the application is also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

Insofar as the applicant's complaint of a difference in treatment between himself and drivers in whom an alcohol level or more than 2.1‰ has been found can be understood as a complaint of discriminatory treatment contrary to Article 14 of the Convention, the Court notes that Article 14 of the Convention has no independent existence as the scope of this provision is limited to the substantive rights and freedoms guaranteed by the Convention. Consequently, where the facts of the case fall outside the scope of these substantive provisions, there is no room for the application of Article 14 of the Convention.

Having found that the facts of the case fall outside the scope of Article 6 § 1 of the Convention under its criminal head, the Court considers that they also fall outside the scope of Article 14 of the Convention and that also this part of the application is also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'BOYLE
Registrar

Elisabeth PALM
President