AS TO THE ADMISSIBILITY OF

Application No. 38054/97
by Charles Alan BROWN
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 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 8 July 1997 by Charles Alan BROWN. against the Netherlands and registered on 6 October 1997 under file No. 38054/97;

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 citizen of the United Kingdom, born in 1966, and at the time of the introduction of the application was detained in the Netherlands. 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

On 4 May 1995, the Regional Court (Arrondissementsrechtbank) of Amsterdam handed down its judgment in the criminal proceedings which had been brought against the applicant on charges of, inter alia, theft and attempted manslaughter committed at a railway station in Hilversum on 12 October 1994. Both the applicant and the prosecution filed an appeal with the Court of Appeal (Gerechtshof) of Amsterdam.

On 28 November 1995, a hearing was held before the Court of Appeal. Following a request by the defence to take evidence from the witness G.D., presumably residing at P. Road in London, and an unidentified woman mentioned in information of the Regional Criminal Intelligence Service (Regionale Criminele Inlichtingen Dienst) in connection with the question whether or not the applicant had been in Hilversum on 12 October 1994, the Court of Appeal adjourned its further examination for a maximum period of three months and instructed the investigating judge (rechter-commissaris) to take evidence from G.D. and, if her identity would become known, the unidentified woman.

On 9 February 1996, G.D. was heard in London. On 15 February 1996, the Court of Appeal resumed the proceedings against the applicant. In the course of that hearing the applicant denied that the public transport card stamped on 12 October 1994 in the public transport zone of Hilversum, which was included in his case-file, had been found on him.

By judgment of 29 February 1996, the Court of Appeal declared the prosecution's appeal inadmissible, quashed the judgment of 4 May 1995, convicted the applicant of theft and attempted manslaughter and sentenced him to five years' imprisonment with deduction of the time spent in pre-trial detention.

The Court of Appeal found it established that in Hilversum on 12 October 1994 the applicant had stolen a wallet, had hit two persons and had stabbed two persons. It based the applicant's conviction on the statements of six eye-witnesses, three of whom had identified the applicant from a collection of photographs and one of whom had identified the applicant through a one-way glass. It rejected the argument raised by the defence that this evidence had been unlawfully obtained.

In its assessment of the evidence, the Court of Appeal further considered:

<Translation>

"... it is further important that the respective identifications not only reinforce each other, but are further supported by the fact that, at his arrest, the accused was in possession of a public transportation card, which had been stamped in the vicinity of the <railway> station in Hilversum shortly after the <occurrence of the> facts of the charges. The accused, who maintains not to have been in Hilversum on 12 October 1994, has not been able to give any reasonable explanation for this fact."

The applicant's subsequent appeal in cassation was rejected by the Supreme Court (Hoge Raad) on 3 June 1997.

One of the complaints raised by the applicant in the cassation proceedings was that the principle of nemo tenetur had been violated in that, in its assessment of the evidence, the Court of Appeal had taken into consideration that the applicant, who denied that he had been in Hilversum at the relevant time, had been unable to give a reasonable explanation for the public transportation card, which had been stamped in the vicinity of the station in Hilversum shortly after the events at issue took place and which was found on him at the time of his arrest.

On this point and having regard to Article 29 para. 1 of the Code of Criminal Procedure (Wetboek van Strafvordering), the Supreme Court considered that the fact that an accused refuses to make a statement or to answer a question cannot in itself be used in evidence. However, this does not mean that in the assessment of evidence a judge may not have regard to the fact that an accused has not given a reasonable exculpating explanation for a fact which, either in itself or in connection with the other means of evidence, is consistent and of relevance.

The Supreme Court accepted that, in connection with the evidence related to the recognition of the applicant as the perpetrator, the Court of Appeal considered the public transport card found on the applicant as being of relevance to the evidence. The Supreme Court found that the Court of Appeal had not acted unlawfully by taking into consideration the applicant's failure to provide any reasonable explanation for this fact.

The Supreme Court further rejected the applicant's complaint that the trial court had failed to warn him of the consequence of his failure to give a reasonable explanation for the public transport card found in his possession. It held that a trial court is not obliged to warn an accused of the consequences of failing to adduce exculpating circumstances.

b. Relevant domestic law

Article 29 of the Code of Criminal Procedure, insofar as relevant, reads as follows:

<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 that 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."

A statement made by a suspect in the course of a criminal investigation against him without the suspect having been previously informed that he is not obliged to answer may in principle not be used in evidence. However, it may be used in evidence where this failure cannot be considered as having harmed the interests of the suspect (Hoge Raad, 26 June 1979, Nederlandse Jurisprudentie 1979, no. 567; and Hoge Raad, 26 January 1982, Nederlandse Jurisprudentie 1982, no. 353).

COMPLAINTS

The applicant complains under Article 6 of the Convention that he did not have a fair trial in the criminal proceedings against him. He submits that the principle of nemo tenetur was not respected by the Court of Appeal's failure to warn him of the possible consequences of the position adopted by him before the Court of Appeal as regards the public transport card.

THE LAW

The applicant complains under Article 6 of the Convention that he did not have a fair trial in the criminal proceedings against him in that the Court of Appeal did not warn him of the possible consequences of the position adopted by him before the Court of Appeal in respect of the public transport card.

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

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Commission recalls that the right to remain silent 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 of the Convention. It is incompatible with these rights to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. However, these rights are not of an absolute nature. They do not prevent that an accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Whether the drawing of

adverse inferences from an accused's silence infringes Article 6 of the Convention is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation (Eur. Court HR, John Murray v. United Kingdom judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I No. 1, p. 49, paras. 45 and 47)

The Commission notes in the first place that it has not appeared nor been alleged that Article 29 of the Code of Criminal Procedure was not respected in the applicant's case.

The Commission further notes that the Court of Appeal based the applicant's conviction on the statements of six eye-witnesses, four of whom had identified the applicant either from a collection of photographs or through a one-way glass. The Court of Appeal found that the evidence given by these persons was supported by the stamps on a public transport card, which was found in the applicant's possession.

Having regard to the evidence against the applicant adduced by the eye-witnesses to the events at issue and the applicant's denial to have been at the scene of the incident at the relevant time, the Commission is of the opinion that the taking into account by the Court of Appeal, in its assessment of the evidence, of the applicant's failure to give any explanation as regards the public transport card at issue was a matter of common sense and cannot, as such, be regarded as unfair or unreasonable or that the applicant should have been given an explicit warning beforehand that this might affect the assessment of the evidence by the Court of Appeal. Moreover, it cannot be said that the applicant's conviction was solely or mainly based on his failure to give such an explanation.

In these circumstances, the Commission cannot find that, on this point, the applicant was deprived of a fair trial within the meaning of Article 6 of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

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