AS TO THE ADMISSIBILITY OF

Application No. 38061/97
by Mustafa CAVLUN
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 10 July 1997 by Mustafa CAVLUN against the Netherlands and registered on 6 October 1997 under file No. 38061/97;

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 Turkish national, born in 1960, and residing in Doetinchem, 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.

On 15 November 1993, a summons was served on the applicant ordering him to appear before the Regional Court (Arrondissementsrechtbank) of Arnhem on charges of heroin trafficking.

In its judgment of 28 December 1993 the Regional Court convicted the applicant of being an accessory to the commission of drug offences and sentenced him to four years' imprisonment. The applicant filed an appeal with the Court of Appeal (Gerechtshof) of Arnhem.

On 4 September 1995, a hearing took place before the Court of Appeal. The applicant's lawyer requested that thirteen witnesses be heard before the Court of Appeal.

After having deliberated, the Court of Appeal rejected this request, holding that it had been established that seven of these persons - three of whom being police officers involved in the investigation against the applicant - had already been heard before the investigating judge, that the defence had then been provided with the opportunity to question them and to take whatever action it considered to be in the interest of the applicant and that the hearing of the six others, who could not be found, was pointless as it was not to be expected that they would appear.

At this hearing the applicant's lawyer further submitted the following request:

<Translation>
"The Regional Court has used in evidence non-certified copies. It follows from the case-law of the Supreme Court that such evidence may only be used in conjunction with a legal means of evidence. Such a legal means of evidence can be a witness statement made in the course of a trial hearing. In addition to this, since use has only been made of copies, I cannot verify whether there were also exculpating statements for the applicant with the original documents. In these copies reference is made to the "Nijmegen files". I have not found these files and therefore cannot verify the contents thereof. Maybe they are of relevance. The defence has the right to have access to all <material> which might be of relevance. Whether or not something is of relevance cannot be assessed by the defence without <having been given> access. That is why all material, which has been gathered in the course of the investigation or to which reference is made in the investigation, should be made available to the defence. I consider it necessary to have access to these files."

The prosecution replied that no statements had been left out and that it is indicated in the main formal records (hoofdproces-verbaal) where the original documents are to be found.

After having deliberated, the Court of Appeal also rejected this request, holding that this request, which apparently was aimed at having added to the applicant's case-file material relating to other criminal investigations, was so vague that the granting of the request could not be considered as necessary in the interest of the investigation of the applicant's case.

A further hearing before the Court of Appeal took place on 20 December 1995. The Court of Appeal handed down its judgment on 2 January 1996. It quashed the judgment of 28 December 1993 and convicted the applicant of participation in the commission of offences under the Opium Act (Opiumwet). It based the applicant's conviction inter alia on:

- the main formal records of 8 July 1991 drafted by the police concerning the establishment of a Regional Criminal Investigation Team in order to investigate the transportation of two kilogrammes of heroin from the Netherlands to Spain in March 1990 by J.H.M. and of five kilogrammes of heroin from the Netherlands to Spain in May 1990 by J.M.V., who had been arrested in Spain while being in possession of five kilogrammes of heroin;
- a letter of 19 April 1990 from the Belgian National Police stating their findings on a search of the applicant's luggage carried out following the latter's arrival by plane from Malaga; and
- statements made by the applicant and five witnesses before the police and/or the investigating judge.

Having found that the proceedings had exceeded a reasonable time within the meaning of Article 6 para. 1 of the Convention, the Court of Appeal decided to impose a mitigated sentence, i.e. three years' imprisonment. The applicant filed an appeal in cassation with the Supreme Court (Hoge Raad).

The Supreme Court rejected the applicant's appeal in cassation by judgment of 21 January 1997. As to the applicant's complaint that the Court of Appeal had refused the request by the defence to add the "Nijmegen files" to the applicant's case-file, the Supreme Court held:

<Translation>

"Insofar as it concerns documents which might be of influence on the evidence it must be assumed that - apart from the competence of the defence to submit documents itself and apart from what is provided for in Article 414 of the Code of Criminal Procedure (Wetboek van Strafvordering) - the public prosecutor adds the documents concerning the results of the investigation to the case-file. Where a preliminary judicial investigation has been opened, the investigating judge has a similar task in respect of the results of the preliminary judicial investigation. Documents are to be added to the case-file which might reasonably be of relevance in respect of the suspect either in an

inculpating or exculpating sense. The judge may ex officio, upon the request of either the defence or the prosecution, order further documents to be added to the case-file. Access to the case-file may, apart from exceptions for a limited duration not relevant in the present case, not be denied to the suspect and his counsel.

The ... decision refusing the request embodies the finding of the Court of Appeal that the "Nijmegen files" do not contain documents which in addition to the documents already included in the case-file might reasonably be of relevance in respect of the suspect either in an inculpating or exculpating sense. This finding is not incomprehensible in the light of what occurred at the trial, including the announcement of the Procurator General in reaction to the request by the defence that no statements have been withheld and the assertion on which the defence based its request that the "Nijmegen files" contain material "which might be of relevance". Departing from this basis the Court of Appeal - applying the correct standard - has rejected the request on sufficient grounds without displaying an incorrect legal opinion as regards the treaty provisions relied upon in the complaint in cassation."

COMPLAINTS

The applicant complains under Article 6 of the Convention that he did not have a fair hearing in that the Court of Appeal unjustly rejected his request to add the "Nijmegen files" to his case-file. He submits that in rejecting his request, the Court of Appeal based itself on a simple statement by the prosecution. He argues that any verification by the defence of the correctness of this statement is not possible where the defence is denied access to these "Nijmegen files" and that this state of affairs is incompatible with the principle of equality of arms. The applicant is of the opinion that information which indirectly may be of relevance to the assessment of the gathering of evidence in either the initial or any subsequent phase deserves to be considered as relevant.

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 principle of equality of arms was not respected by the refusal of his request to add the "Nijmegen files" to his case-file.

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

"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 time and facilities for the preparation of his defence;"

As the guarantees of Article 6 para. 3 of the Convention are to be seen as particular aspects of the general concept of a fair trial guaranteed by paragraph 1 of this provision (cf. Eur. Court HR, Daud v. Portugal judgment of 21 April 1998, to be published in Reports of Judgments and Decisions 1998, para. 33), the Commission will examine the complaint under both paragraphs taken together.

The Commission recalls that the Convention does not regulate, as such, the manner in which evidence should be taken, which is primarily a matter for domestic legislation. As a general rule, it is for the national courts to assess the evidence before them, as well as the evidence which the accused seeks to adduce. As the concept of "equality of arms" is one aspect among many others of the general concept of fairness of proceedings, it must be ascertained whether the proceedings, considered as a whole, were fair as required by Article 6 para. 1 of the Convention (cf. Eur. Court HR, Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, p. 32-33, para. 33; Edwards v. United Kingdom judgment of 16 December 1992, Series A no. 247-B, p. 34, para. 34; and No. 22420/93, Dec. 20.5.97, D.R. 89, p. 17).

The Commission further recalls that it is a requirement of fairness under Article 6 of the Convention that the prosecution authorities disclose to the defence all material evidence for or against the accused and that the failure to do so may give rise to a defect in the trial proceedings (Edwards v. United Kingdom judgment, loc. cit., p. 35, para. 36).

The Commission notes that in the proceedings on appeal, the applicant sought access to the so-called "Nijmegen files" on the basis of the argument that the first instance court had used in evidence non-certified copies of documents in which reference is made to the "Nijmegen files", and that these files might be of relevance to the applicant's case. After having been informed by the prosecution that no material had been left out of the case-file, the Court of Appeal rejected this request, which in its opinion was apparently aimed at obtaining access to material relating to other criminal investigations, for being too vague.

The Commission does not exclude that the prosecution department may have had at its disposal case-files concerning other criminal investigations which might have concerned the investigation of offences committed within a more or less connected factual context.

However, the Commission notes that the applicant's request to the Court of Appeal to add the "Nijmegen files" to his case-file was phrased in very broad terms and that no factual substantiation of the applicant's request appears to have been provided. In these circumstances the Commission cannot find the Court of Appeal's decision on this point to be unreasonable or arbitrary.

The Commission further notes that the Court of Appeal quashed the Regional Court's judgment of 28 December 1993 and, following adversarial proceedings, pronounced the applicant's conviction. It has not been argued before the Commission that

the Court of Appeal used in evidence any document in which reference was made to the "Nijmegen files" or that the applicant was restricted in the exercise of his defence rights as regards the evidence available to the Court of Appeal on the basis of which he was convicted on appeal.

Noting that the applicant was convicted following adversarial proceedings in which he was given ample opportunity to state his case, to challenge the evidence against him and to submit whatever he found relevant to the outcome, the Commission finds no indication that the proceedings, taken as a whole, fell short of the requirements of Article 6 of the Convention as regards fairness of proceedings.

It follows that the application must be rejected as 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	J.-C. GEUS
Secretary	President
to the Second Chamber	of the Second Chamber