AS TO THE ADMISSIBILITY OF

Application No. 22922/93
by Ahmet COLAK
against the Netherlands

The European Commission of Human Rights sitting in private on 27 February 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
E. KONSTANTINOV
G. RESS

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 4 August 1993 by Ahmet Colak against the Netherlands and registered on 16 November 1993 under file No. 22922/93;

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

a. The particular circumstances of the case

The applicant is a Turkish national, born in 1967, and resides at Deventer, the Netherlands. Before the Commission he is represented by Mr. F. Leemans, a lawyer practising in Apeldoorn, the Netherlands.

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

On 9 July 1990, an armed robbery took place in Apeldoorn. On 11 and 12 July 1990, a police officer showed a set of twelve photographs of twelve different men, among whom the applicant, to four

witnesses. All four witnesses identified the applicant as the perpetrator of the armed robbery.

On 15 July 1990, the applicant was arrested and subsequently detained on remand on suspicion of having committed the armed robbery. He was released on an unspecified date in September 1990.

On 19 July 1990, S.C., a friend of the applicant, was questioned by the police as a witness. The procès-verbal of this questioning was not added to the case-file until the beginning of September 1990.

In or around October 1990, the preliminary judicial investigation (gerechtelijk vooronderzoek) against the applicant was closed.

By summons of 21 December 1990, the applicant was ordered to appear before the Regional Court (Arrondissementsrechtbank) of Zutphen on 13 February 1991 on charges of extortion under the threat of violence.

By summons of 19 January 1991, the applicant was ordered to appear before the Regional Court of Zutphen on 13 February 1991 on charges of assault on a police officer in the exercise of his functions.

On 13 February 1991, the Regional Court tried the armed robbery case and the case concerning the assault on a police officer jointly. The applicant argued, inter alia, that the photo identifications had not been carried out in conformity with the procedure laid down in a Report of 14 July 1989 on "Identification of persons by eye-witnesses" ("Identificatie van personen door ooggetuigen"), of the Criminal Investigation Advisory Commission (Recherche Advies Commissie). He also complained of the late transmission of the procès-verbal of 19 July 1990.

On 27 February 1991, the Regional Court convicted the applicant of extortion and of assault on a police officer. It sentenced him to fourteen months' imprisonment, six months of which were suspended.

A copy of the Regional Court's judgment was sent to the applicant. Page 6 of this copy stated "This judgment does not contain the means of evidence." ("In dit vonnis zijn geen bewijsmiddelen opgenomen.").

On 11 March 1991, the applicant lodged an appeal against the Regional Court's judgment with the Court of Appeal (Gerechtshof) of Arnhem. On 25 March 1991, his lawyer submitted a memorial containing the applicant's grounds of appeal to the Court of Appeal.

A few days before the Court of Appeal was scheduled to examine the case, the applicant's lawyer consulted the case-file in which he then found a copy of the Regional Court's judgment containing also the means of evidence.

The Court of Appeal examined the case on 17 January 1992. It had at its disposal the set of twelve photographs which had been shown to the witnesses. The applicant complained, inter alia, that the copy of the Regional Court's judgment he had received did not contain the means of evidence on which his conviction had been based, and that the photo identification had not been carried out in conformity with the procedure laid down in the Report of 14 July 1989 on "Identification of persons by eye-witnesses" of the Criminal Investigation Advisory Commission, and could thus not be admitted as evidence. The applicant also complained of the late transmission of the procès-verbal of 19 July 1990.

On 31 January 1992, the Court of Appeal quashed the Regional Court's judgment, acquitted the applicant of the assault on a police

officer, convicted him of extortion and sentenced him to two years' imprisonment. The Court of Appeal observed, inter alia, that it had found a complete version of the Regional Court's judgment in the case-file. The Court of Appeal rejected the complaints about the photo identification, holding that the Report of 14 July 1989 had no force of law and that the assessment of the evidence lies within the judicial discretion. It did not deal with the complaint about the late transmission of the procès-verbal of 19 July 1990.

The applicant requested a copy of the Court of Appeal's judgment. He was again provided with a judgment which did not contain the means of evidence on which his conviction had been based.

Within 14 days of the judgment of the Court of Appeal, the applicant lodged an appeal in cassation with the Supreme Court (Hoge Raad).

On 9 November 1992, the applicant submitted the grounds for his appeal in cassation (middelen van cassatie). At that time he had obtained a complete version of the Court of Appeal's judgment. The applicant complained that the copies he had been given of the judgments of the Regional Court and the Court of Appeal did not contain the means of evidence on which his conviction had been based. He further complained of the way in which the photo identification had been carried out and of the late transmission of the procès-verbal of 19 July 1990. He invoked Article 6 of the Convention.

On 9 February 1993, the Supreme Court dismissed the applicant's appeal in cassation.

b. Relevant domestic law and practice

Pursuant to Sections 30 - 34 and 51 of the Code of Criminal Procedure (Wetboek van Strafvordering), the accused and his lawyer have the right of access to the case-file. During the police investigation or during a preliminary judicial investigation, this right can be subject to limitations. However, once the preliminary judicial investigation is closed or once the accused is summoned to the court hearing, the accused and his lawyer have full access to the case-file. Sections 30 - 34 and 51 are applicable at all stages of the criminal proceedings.

Pursuant to Section 359 para. 1 of the Code of Criminal Procedure, a judgment must contain the means of evidence on which a conviction is based. However, in cases where the accused is convicted, it is not unusual that initially a so-called "head-tail-judgment" (kop-staart-vonnis) is drafted. Such a judgment does not account for the means of evidence on which the conviction is based. A complete version of the judgment is not prepared unless the convicted person lodges an appeal against the judgment. In that case the means of evidence are included in the judgment and the case-file, including the complete judgment, is transmitted to the appeal court.

When the appeal court examines the case, it should have a complete version of the judgment of the lower court. If this is not the case, the appeal court must quash the judgment of the lower court on formal grounds.

The appeal proceedings before the Court of Appeal offer a full new hearing. The accused, who has lodged the appeal, can submit his objections and possible additional objections to the judgment of the Regional Court in writing, both before and during the hearing on appeal. He can also submit additional objections orally in the course of the hearing on appeal until the formal closure of the appeal court's examination.

The use of "head-tail judgments" also occurs at the level of the

Court of Appeal.

The accused who has lodged an appeal in cassation, can submit grounds for his appeal in cassation in writing until the day the Supreme Court is scheduled to hear the case, and/or orally in the course of the hearing before the Supreme Court (Sections 433 para. 2 and 439 of the Code of Criminal Procedure) provided that these grounds are also set out in a written document which must be submitted to the Supreme Court before the closure of its hearing.

COMPLAINTS

The applicant complains under Article 6 of the Convention that the judgments of the Regional Court and the Court of Appeal he was provided with, did not contain the means of evidence on which his conviction was based.

The applicant further complains under Article 6 of the Convention of the late transmission of the procès-verbal of 19 July 1990, the contents of which were exculpating for him.

The applicant finally complains under Article 6 of the Convention that the photo identification was not carried out in conformity with the procedure laid down in a Report of 14 July 1989 on "Identification of persons by eye-witnesses" of the Criminal Investigation Advisory Commission.

THE LAW

1. The applicant complains that in the determination of the criminal charges against him he did not receive a fair hearing as required by Article 6 (Art. 6) of the Convention.

Article 6 (Art. 6) of the Convention, insofar as relevant, reads 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 regards the applicant's first complaint that he did not have a fair trial because the copies of the judgments of the Regional Court and the Court of Appeal which were given to him did not contain the means of evidence on which his conviction was based, the Commission recalls that national courts must indicate with sufficient clarity the grounds on which they base their decision (Eur. Court H.R., Hadjianastassiou judgment of 16 December 1992, Series A no. 252, p. 16 para. 33).

The question whether or not a trial as a whole is rendered unfair because the means of evidence on which a conviction is based are not immediately included in the written judgment, but only after the sentenced person has lodged an appeal, must be examined in the light of the particular circumstances of each case.

In the present case the Commission observes that the applicant and his lawyer, as from the closure of the preliminary judicial investigation against the applicant, had full access to the case-file. It also appears that the applicant and his lawyer were aware of the complete versions of the judgments of the Regional Court and the Court

of Appeal before the applicant's appeals were examined by the higher courts. The applicant also had the opportunity, if he so wished, to add new grounds of appeal, or new grounds of cassation, if he had found this appropriate after becoming acquainted with those parts of the judgments which had not immediately been communicated to him.

The Commission considers that a fair appeals procedure normally requires that a sentenced person should be aware of the full contents of the judgment by which he was convicted and sentenced, at the time when he decides whether or not to lodge an appeal against the judgment. However, in the present case what was missing from the judgments which were communicated to the applicant was essentially a factual summary of declarations by witnesses and not any assessments by the courts. Moreover, the applicant became acquainted with the Regional Court's and the Court of Appeal's complete judgments at a time when he could still present supplementary grounds of appeal, or grounds of cassation respectively. It cannot be considered, therefore, that the procedure which was applied was prejudicial to his defence or otherwise made the proceedings unfair.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. As to the applicant's complaint concerning the late transmission of the procès-verbal of 19 July 1990, the Commission notes that both the applicant and his lawyer had full access to the case-file as from the closure of the preliminary judicial investigation and that at the time of this closure the procès-verbal at issue had been added to the case-file.

The Commission finds no indication that the late transmission of this procès-verbal affected the fairness of the criminal proceedings against the applicant.

This part of the application is, therefore, also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. As to the applicant's complaint that the photo identification was not in conformity with domestic guidelines, the Commission recalls that it is for the domestic courts to decide on the admissibility of the evidence and to evaluate that evidence. The Convention organs' task is to ascertain whether the proceedings considered as a whole were fair (Eur. Court H.R., Asch judgment of 26 April 1991, series A no. 203, p. 10 para. 26).

The Commission notes that the applicant, who was assisted by a lawyer throughout the domestic proceedings, had ample opportunity to state his case, and to challenge the identification procedure as well as the admissibility and probative value of the evidence against him. It further does not appear from the case-file that the applicant requested the trial courts to examine the witnesses who had identified him from the photograph, or the police officer involved in the identification procedure. Neither does it appear that the applicant requested the trial courts to hear any other witnesses.

The Commission finds no indication that the criminal proceedings against the applicant were not in this respect in conformity with the requirements of Article 6 (Art. 6) of the Convention.

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

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission | President of the Commission

(H.C. KRÜGER) | (C.A. NØRGAARD)