AS TO THE ADMISSIBILITY OF

Application No. 12229/86
by De Geillustreerde Pers
against the Netherlands

The European Commission of Human Rights sitting in private on 9 November 1987, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. J. RAYMOND, Deputy 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 30 May 1986 by De Geillustreerde Pers against the Netherlands and registered on 20 June 1986 under file N° 12229/86;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the applicant company, may be summarised as follows:

The applicant company, a publishing firm, is a corporate body registered in Amsterdam.

In the proceedings before the Commission it is represented by Mr. A.H. Vermeulen, a lawyer practising in The Hague.

A magazine published by the applicant company investigated whether banks were prepared to accept illegally obtained money. The reporters carrying out the investigation did not reveal their identity to the bank managers. The investigation revealed that most of the bank managers interviewed did not object to handling such money.

The banks were later informed of these findings by another reporter. One of the banks started proceedings against the applicant company and requested the Regional Court (Arrondissementsrechtbank) of Amsterdam to hold preliminary proceedings in order to have their

informant heard as a witness about, inter alia, the identity of their bank manager.

After this witness had denied that he knew the bank manager's identity the general editor was heard as a witness.

He claimed that, being a reporter, he had the right to refuse to disclose such information. He was supported by the applicant company.

On 14 March 1985 the judge (Rechter-Commissaris) in the case rejected the general editor's claim.

Both the applicant company and the general editor appealed against this decision to the Court of Appeal (Gerechtshof) of Amsterdam.

On 13 June 1985 the Court declared the applicant company's appeal inadmissible because only the witness had the right to appeal against a decision of this kind.

The general editor's appeal was also declared inadmissible because he no longer had any interest in the appeal since the bank had already discovered the bank manager's identity.

The applicant company and the general editor appealed against these decisions to the Supreme Court (Hoge Raad), which declared the applicant company's appeal admissible.

It considered, however, that it follows from the nature of the right to refuse to testify that it is personal to the witness and cannot be claimed by other parties. Accordingly, it is only open to the witness to appeal against a decision failing to uphold this right and not other parties to the litigation.

On the other hand, if at first instance the refusal to testify is acknowledged, then the parties involved do have the possibility to appeal when they are of the opinion that it is in their interest to have the witness heard. In the Supreme Court's opinion this rule does not raise an issue under Article 6 of the Convention.

Therefore the Supreme Court rejected the applicant company's appeal. The general editor's appeal was also rejected because the Supreme Court did not find the Court of Appeal's considerations to be at fault.

COMPLAINTS

The applicant company states that the Supreme Court's opinion implies a right of appeal for the party who objects to the granting of the right not to testify, whereas there is no right of appeal for the party who objects to the refusal to grant this right to the witness concerned. The applicant company complains that this difference in appeal rights contravenes the principle of "equality of arms" in breach of Article 6 of the Convention.

THE LAW

The applicant company complains that the decision of the Supreme Court constitutes a breach of the principle of equality of arms in breach of Article 6 para. 1 (Art. 6-1) of the Convention, the relevant part of which provides as follows: "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing." The Commission notes that this is the sole issue raised by the applicant company. The Commission also notes that the present case involves preliminary proceedings concerning the examination of a witness.

It may be asked whether the above proceedings can be considered to determine a civil right or obligation.

The Commission, however, does not find it necessary to decide this issue because, even assuming that Article 6 para. 1 (Art. 6-1) was applicable, the complaints of the applicant company are inadmissibile as being manifestly ill-founded for the following reasons:

According to the Commission's case-law Article 6 para. 1 (Art. 6-1) guarantees, inter alia, the principle of equality of arms, i.e. that anyone who is a party to civil proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent (No. 7450/76, Dec. 28.2.77, D.R. 9 p. 108).

The Commission considers that the absence of a right of appeal for the applicant company against a preliminary court decision ordering a witness to disclose information about a particular person does not contravene this principle. In fact, exemptions from the general obligation to give evidence before the court are closely related to the special situation of the witness concerned, and they are not aimed at giving a procedural advantage to one of the parties to the proceedings. Consequently, it is normal that only the witness is competent to decide both whether to claim a right to exemption and whether to appeal against a decision by which such exemption has been refused.

The Commission therefore concludes that the complaint of the applicant company is manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)