AS TO THE ADMISSIBILITY OF

Application No. 20524/92
by Désiré DOORSON
against the Netherlands

The European Commission of Human Rights sitting in private on 29 November 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA

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 27 June 1992 by Désiré DOORSON against the Netherlands and registered on 24 August 1992 under file No. 20524/92;

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 Dutch citizen, born in 1958 and resident in Amsterdam. He is represented before the Commission by Mr. G.P. Hamer, a lawyer practising in Amsterdam.

The facts as submitted by the parties may be summarised as follows.

On 12 April 1988 the applicant was arrested as suspected of narcotics offences. The reason for the suspicion was that some drug abusers had declared to the police that the applicant had sold drugs. Six of these drug abusers remained anonymous; they were referred to by the police under the code names Y.05, Y.06, Y.13, Y.14, Y.15, Y.16 and GH.021/87. Moreover, there were two persons whose identity was disclosed, namely R. and N.

The declarations to the police had been made in the following way. The eight witnesses had been shown a collection of photographs of suspected drug dealers and had been asked if they could identify a person who had sold drugs to them. They had then stated that they recognised the applicant's photograph, which dated from 1985, as representing the person concerned.

The rules governing the possession and use of photographs by the police were laid down in the Automated Records Recognition Service Regulations 1986 (Reglement Geautomatiseerde Registraties Herkenningsdienst). As from 1990, this matter was governed by the Police Records Act (Wet Politieregisters).

In the proceedings before the Regional Court (Arrondissements-rechtbank) of Amsterdam the applicant requested that the persons who had identified him should be heard as witnesses. This request was rejected as far as the six anonymous persons were concerned. N. was heard and changed his previous statement by denying that the applicant had sold drugs to him. R. did not appear before the Court, and the applicant finally refrained from requesting that he be heard.

On 30 May 1988 the applicant's lawyer was invited to attend the hearing of two anonymous witnesses by the investigating judge (rechter-commissaris). However, he left the investigating judge's chambers before the hearing started. The investigating judge heard the witnesses in the absence of the applicant's lawyer.

On 13 December 1988 the Regional Court convicted the applicant and sentenced him to 15 months' imprisonment.

The applicant appealed to the Court of Appeal (Gerechtshof) of Amsterdam which held a number of hearings in the case.

The applicant requested that the six anonymous witnesses be heard by the Court of Appeal. This request was rejected, but the Court of Appeal ordered that some of these witnesses be heard, in the presence of the applicant's lawyer, by the investigating judge. On 14 February 1990 the investigating judge then heard the witnesses Y.15 and Y.16 in the presence of the lawyer. The investigating judge had previously, as a member of the Regional Court, ruled that there was sufficient evidence against the applicant to prolong his detention on remand.

In the course of the hearing of 10 May 1990 before the Court of Appeal, the Court gave further consideration to the wish of the two anonymous witnesses to remain anonymous and concluded that it had been argued sufficiently convincingly that the two anonymous witnesses had good reasons to feel seriously threatened. Accordingly, the Court did not call these witnesses.

On 28 August 1990 the witness N. was heard by the Court of Appeal in the applicant's presence and the applicant's lawyer was given the opportunity to question this witness. N. declared that he had lied to the police and withdrew his statement accusing the applicant of drugs traffic.

The witness R. repeatedly failed to appear before the Court of Appeal. After the Court had ordered that he be brought there by force, he was present at a hearing on 28 August 1990, but before he had been heard, he disappeared from the Court and could not be found again.

The applicant also requested the hearing of K., a researcher who had performed a great deal of research about drug abusers in Amsterdam. Although K. was present at the hearing on 28 August 1990, the Court of Appeal decided not to hear him as an expert on the ground that his statement could not be expected to contribute to the elucidation of the facts in the case.

In a police report of 19 November 1990, the reliability of the two anonymous witnesses was confirmed by the investigating judge at the public prosecutor's (officier van justitie) request.

At the following hearing, on 22 November 1990, the public prosecutor (procureur-generaal) requested that a police officer, I.,

who was present on that occasion, be heard. Despite the protests of the defence, the Court of Appeal agreed to the request, and I. was heard concerning the way in which the investigation had been conducted.

Before the Court of Appeal the applicant argued that the investigating judge had been biased when hearing Y.15 and Y.16, since she had already found that the declarations of the anonymous witnesses were sufficient to justify the applicant's detention on remand. He also objected to the way the investigation had been carried out. There was in his opinion no legal basis for including his photograph in a collection of photographs to be shown to about 150 drug abusers in Amsterdam. By placing his photograph in this collection, the police had already indicated that he was a drug dealer. He also stated that the use of his photograph in this manner was an interference with his privacy.

On 6 December 1990 the Court of Appeal found the applicant guilty of drug offences and sentenced him to 15 months' imprisonment.

The applicant appealed to the Supreme Court (Hoge Raad). He based his appeal on the following arguments:

(a) He had not been allowed to hear witnesses and experts on the same conditions as the public prosecutor. The Court of Appeal had refused to hear K. as an expert. The latter would have been able to give information about the anonymous witnesses who were all drug abusers. On the other hand the Court of Appeal agreed to hear I. at the public prosecutor's request.

(b) The applicant's conviction was essentially based on statements by persons whom the applicant had not been able to hear in person, in particular the witnesses Y.15, Y.16 and R. Moreover, he was not even aware of the names of some of the witnesses. The fact that R. was not heard was also to be attributed to the Court of Appeal which had allowed him to leave the court hearing at which he had first been present.

(c) The applicant's privacy had been breached by the use that was made of his photograph.

(d) The investigating judge, who had decided on the applicant's detention on remand, was not impartial when hearing the witnesses Y.15 and Y.16.

On these various points the applicant referred to Articles 6 and 8 of the Convention.

On 24 March 1992 the Supreme Court rejected the plea of nullity.

COMPLAINTS

1. The applicant complains that he did not have a fair trial as he was convicted essentially on the basis of the statements of three persons who were never heard in his presence and whom he never had the possibility to interrogate. Two of these persons were anonymous (Y.15 and Y.16) and one disappeared from the court hearing (R). He invokes Article 6 paras. 1 and 3 (d) of the Convention.

2. The applicant further complains about the absence of a fair trial in that the Court of Appeal considered the two anonymous witnesses to be reliable on the basis of the declaration of the investigating judge who, at a previous stage of the proceedings, had already decided to keep the applicant detained because of the statements of the anonymous witnesses. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

3. The applicant finally complains under Article 6 paras. 1 and 3 (d) that he did not have a fair trial as the Court of Appeal refused

to hear K., whose hearing had been requested by the applicant, but agreed to hear I. at the public prosecutor's request.

4. The applicant finally alleges that his right to privacy was breached without any legal basis. There was no law which allowed the police to show the applicant's photograph to third persons as if he were a suspect. He relies on Article 8 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 June 1992 and registered on 24 August 1992.

On 8 February 1993 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

The Government's observations were received by letter dated 23 April 1993 and the applicant's observations were dated 1 June 1993.

THE LAW

1. The applicant complains that he did not have a fair trial as he was convicted essentially on the basis of the statements of three persons who were never heard in his presence and whom he never had the possibility to interrogate. Two of these persons were anonymous (Y.15 and Y.16) and one disappeared from the court hearing (R.). The applicant further complains that the Court of Appeal considered the two anonymous witnesses to be reliable on the basis of the declaration of the investigating judge who, at a previous stage of the proceedings, had already decided to keep the applicant detained because of the statements of the anonymous witnesses. The applicant finally complains that the Court of Appeal refused to hear K., whose hearing had been requested by the applicant, but agreed to hear I. at the public prosecutor's request. He invokes Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention which provide, insofar as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
> ...
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

The applicant submits that a confrontation with Y.15 and Y.16 was essential in order to ascertain whether they recognised him. He adds that the anonymous witnesses, most of whom are drug addicts, are not the most reliable witnesses because of their way of life. Moreover, the anonymous witnesses only gave information about the applicant's appearance after they had been shown his photograph. Therefore the fact that his lawyer could put questions to Y.15 and Y.16 is not decisive as the applicant himself was not present.

The applicant points out that it seems very strange that these two particular anonymous witnesses were considered to be reliable, whereas some 150 persons had been questioned and around 140 statements were not included in the case-file.

The applicant further argues that these witnesses had been granted anonymity as they had been threatened in the past in similar circumstances and not in view of any possible threats by or on behalf

of the applicant. In any event the investigating judge did not give any explanation as to why these anonymous witnesses should be considered as being reliable.

The Government submit that the criteria established by the Supreme Court for the use of anonymous statements have been complied with in the present case. In this respect the Government point out that the personal data of Y.15 and Y.16 were known to the investigating judge, as is shown by the procès-verbal of 14 February 1990. In addition, as laid down in the procès-verbaux, the investigating judge had concluded that these witnesses had well-founded reasons for wishing to remain anonymous and not to appear in court.

The Government observe that these anonymous witnesses were questioned on two different occasions by the investigating judge and that on the second occasion, the applicant's lawyer had the opportunity to put questions to them. Considering also that the Court of Appeal found that the applicant's defence had not been prejudiced by the fact that he had not been able to question the witness R., the Government take the view that the applicant did have a fair hearing.

The Government finally note that it was not necessary for the applicant to be confronted with the witnesses since all of them, including those whose statements had not been used as evidence, positively identified the applicant from the picture independently of each other. Moreover, their statements as to the applicant's appearance and nickname largely coincided.

The Commission, having regard to the parties' submissions, considers that these complaints raise complex issues of fact and law which must be examined on the merits. This part of the application cannot therefore be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

2. The applicant finally alleges that his right to privacy was breached without any legal basis. There was no law which allowed the police to show the applicant's photograph to third persons as if he were a suspect. He relies on Article 8 (Art. 8) of the Convention which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The applicant argues in particular that the police used a photograph of him which had been provided to them a long time ago for another investigation. He further submits that the Police Records Act 1990 which authorises investigating officers to show photographs to third parties, was not yet in force in 1988. The only relevant regulations in this context, the Automated Records Recognition Service Regulations 1986, about which neither Parliament nor the legislator has been heard or given its consent, do not have the status of "law".

These regulations do not provide for the possibility of entering photographs into a file. They contain an exhaustive list of data which can be entered into a file concerning persons arrested or suspected of an indictable offence. Moreover, no real test takes place as to the circumstances in which a photograph may be provided to an investigating officer and in which these officers may show it to third parties, like the 150 persons in the present case.

The Government submit that on several occasions in the past the police apprehended the applicant, known to them as a drugs dealer. In that context photographs were taken of the applicant during police custody or pre-trial detention, pursuant to Article 6, para. 2c of the Regulations on Police Custody. These photographs were then kept in the files of the Technical Investigation and Identification Service of the Amsterdam Municipal Police and were used when, in August 1987, the Amsterdam public prosecutor decided to take action against the nuisance caused by drug trafficking in the area of the Zeedijk street and its surroundings.

The Government further submit that the Automated Records Recognition Service Regulations 1986 define the data relating to persons that may be entered in files and stipulate that they can be provided only to investigating officers if required for the investigation of a criminal offence. Moreover, the Police Records Act 1990 allows for an investigating officer to make data, such as pictures, known to third parties if necessary.

The Government conclude that there has been no interference with the applicant's right to respect for his private life since the police officers were entitled to use the applicant's photographs. In any event, should this nevertheless amount to an interference with his right to respect for his private life, the Government take the view that this interference was in accordance with the law and necessary in a democratic society for the prevention of disorder or crime within the meaning of para. 2 of Article 8 (Art. 8-2).

The Commission has noted the following elements in the case as it has been presented: first, that the photographs were not taken in a way which constitutes an intrusion upon the applicant's privacy; secondly, that the photographs were kept in police or other official archives since they had been taken by the police in connection with a previous arrest; and thirdly, that they were used solely for the purpose of the identification of drugdealers during an action initiated by the Public Prosecutor to relieve a certain area of Amsterdam from the nuisance caused by drug trafficking and there is no suggestion that they have been made available to the general public or used for any other purpose. Under these circumstances, the Commission finds that the use of the photographs of the applicant cannot be considered to amount to an interference with his private life within the meaning of Article 8 (Art. 8) of the Convention (cf. No. 18395/91, Comm. Dec. 7.12.92, LUPKER and others v. the Netherlands).

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.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaints concerning the fairness of the hearing and notably the impossibility to question the witnesses against him,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)