AS TO THE ADMISSIBILITY OF

Application No. 24775/94
by Fatma ELBERKANI
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 6 April 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, 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 2 June 1994 by Fatma ELBERKANI against the Netherlands and registered on 5 August 1994 under file No. 24775/94;

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 Moroccan national, born in 1941. She is presently serving a prison sentence in Zwolle, the Netherlands. Before the Commission she is represented by Mr. B.J. Duinhof, a lawyer practising in Utrecht, the Netherlands.

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

At the end of March 1992, the applicant was arrested on suspicion of being involved in the killing of her son-in-law A. on or around 7 March 1992 and the burning of his dead body in a shed on 12 March 1992. She was subsequently detained on remand. Apart from the applicant, her half-brother H. and her daughter B. were arrested.

During the police interrogations and before the domestic courts, the applicant was assisted by an interpreter.

During her detention on remand the applicant was interrogated by the police. Throughout the police investigation she denied involvement in the crimes. The police told the applicant that H. had made statements that incriminated her. Since the police had the impression that the applicant did not believe that H. had incriminated her, the public prosecutor and the police decided to hold a face to face confrontation between H. and the applicant. The confrontation took

place on 27 May 1992 and lasted from 2 p.m. till 4 p.m. The applicant and H. were each assisted by an interpreter. The confrontation was recorded on audio tape. A transcript was made of the recording, in which the statements of H. and the applicant are reproduced in their entirety, while questions and remarks by the police are summarised. Towards the end of the confrontation, the applicant expressed the wish to consult her lawyer. Shortly afterwards, the applicant's lawyer arrived at the police station.

During the confrontation, police officers said to the applicant: "You are lower than the lowest form of life", "You must talk", "Why do you let [H.] suffer all by himself, that poor man", "Why do you treat him like garbage", and "What a cold and heartless creature you are, when I enter this room it seems like a refrigerator".

By summons of 25 June 1992, the applicant was ordered to appear before the Regional Court (Arrondissementsrechtbank) of Utrecht on 7 July 1992 on the following charges: the murder of A., committed either alone or together with (an)other person(s); incitement to the murder of A.; arson; and incitement to arson.

On 26 June 1992, the applicant's lawyer received a copy of the procès-verbal of the technical investigations. The procès-verbal contained, inter alia, the results of the search of B.'s house and the report of the Forensic Laboratory (Gerechtelijk Laboratorium) on the autopsy.

On 7 July 1992, the Regional Court referred the case to the investigating judge at the request of the applicant, who wished, inter alia, that witnesses be heard in connection with the procès-verbal of the technical investigations. The Regional Court adjourned its further examination of the case until 18 August 1992.

On 18 August 1992, the case was adjourned once again, inter alia because thirteen more witnesses had to be examined by the investigating judge.

On 28 September 1992, the investigating judge examined police officers M. and D. in the presence of the applicant's lawyer and the public prosecutor. M. and D. had been involved in the applicant's interrogations. They had not been present at the face to face confrontation on 27 May 1992.

Police officer M. admitted that he had raised his voice and had pounded his fist on the table. He denied having shouted at the applicant, having said that she had to talk, having approached her aggressively or having intimidated her. He further denied having spoken negatively to the applicant about her lawyer. He assumed that he had told the applicant that B. was in detention and that B.'s children were taken care of. He stated that the applicant had never spoken in Dutch to him and that he thought that she understood very simple things said to her in Dutch. He further stated that as soon as the applicant had requested the assistance of a different interpreter, the police had arranged for a different interpreter. He did not rule out the possibility that an interpreter had asked the applicant more than he had asked.

Police officer D. admitted that he had raised his voice and had pounded his fist on the table. He denied having shouted at the applicant, having intimidated her or having said that she would be released if she confessed. He said that during the interrogations the applicant sat on one side of the table and he and his colleague sat on the opposite side. He stated that he had the impression that during the first days of her detention on remand, the applicant did not have enough contact or support from her lawyer, Mr. Duinhof. He did not rule out the possibility that he said something like: "What kind of a lawyer is that? He can't even arrange for an interpreter.". According to him,

the applicant understood Dutch fairly well. As far as the interpreters were concerned, he sometimes had the impression that they asked the applicant more than he had asked.

On 16 October 1992, the chief public prosecutor (Hoofdofficier van Justitie) of Utrecht requested that the Mayor (Burgemeester) of N., the public official responsible for the policemen in question, start disciplinary proceedings against the police officer(s) who had said to the applicant "You are lower than the lowest form of life", "You must talk", "Why do you let [H.] suffer all by himself, that poor man" and "Why do you treat him like garbage". The chief public prosecutor stated that according to him the police officer(s) had acted in an unacceptable manner.

In a letter of 3 November 1992, the chief of police of N. wrote to the Mayor of N. that the statement "You are lower than the lowest form of life" was unacceptable, that measures had been taken and that the police would offer their apologies to the applicant. He further wrote that the other statements should be seen in the context of the interrogation.

On 6 November 1992, the Regional Court continued its examination of the case. It examined a witness with expertise on the ethnic group to which the applicant belongs. Subsequently, the Regional Court adjourned its further examination until 27 November 1992.

On 27 November 1992, the public prosecutor made his closing statement and the applicant pleaded her case. She alleged that during the police investigation she had been subjected to inhuman and degrading treatment and unacceptable interrogation tactics. She argued that her rights under Articles 3 and 6 paras. 1, 2 and 3 (a), (b) and (d) of the Convention had been violated in that:

- the police told her that her lawyer was incompetent because he was not able to arrange for an interpreter and because he did not visit her enough; she alleged that this was an attempt to confuse her so much that she would talk and that because of this it took her a long time to gain confidence in her lawyer;
- the interpreters used by the police during the first interrogations and the face to face confrontation, conducted the interrogations themselves, which the police allowed; translated incorrectly or incompletely; laughed at her; were incompetent and sometimes refused to translate things she said;
- the police allowed that interpreters told her that she would be punished, if not by the judge then by Allah; this showed that interpreters were prejudiced against her;
- when she made use of her right to remain silent police officers shouted at her things like: "Silence gives consent", "You must talk", "We believe [H.]", "Look at this photo, this is your son-in-law that YOU killed! Have a good look at it! Are you going to let [H.] suffer for this?!", "Why don't you defend yourself?", "It was your plan, your responsibility, your interest", "Don't use your [handicap] as an excuse again, it's wearing me out";
- during the face to face confrontation with H., police officers said to her: "You are lower than the lowest form of life" and "What a cold and heartless creature you are, when I enter this room it seems like a refrigerator";
- she was incompletely informed of her right to remain silent and her right not to testify against her family;
- police officers showed her abruptly and at short distance, photos of her son-in-law and rubbed the photos in her face, while shouting "This is the son-in-law that YOU killed! Have a good look at it!"; police officers pounded their fists on the table; looked at her threateningly; spoke with threatening voice from very short distances; and demonstrated abruptly and very close to her body how they thought she had stabbed her son-in-law;
- she was shown to approximately twenty police officers and called

the murderess who did not want to co-operate with the investigation;
- police officers gave her incorrect information about the possible detention of her children and their health situation;
- during the face to face confrontation with H., police officers rewarded H. by giving him cigarettes and talking to him kindly when he repeated his accusations against her;
- the police did not record all their activities during the investigation;
- the applicant did not receive the procès-verbal of the technical investigations until 26 June 1992.

The applicant argued that as a result of the aforementioned facts and circumstances the prosecution should be declared inadmissible. She further argued that her statements to the police were obtained unlawfully and could, therefore, not be used in evidence against her.

On 11 December 1992, the Regional Court convicted the applicant of murder committed together with other persons and arson, acquitted her of the remaining two charges, and sentenced her to ten years' imprisonment.

Regarding the plea that the prosecution should be declared inadmissible, the court stated, inter alia:

<translation>
"The court is of the opinion that the plea to declare the prosecution inadmissible fails. Although it has been established that police officers made statements to [the] suspect that were, in themselves, not permissible - unnecessarily grievous and/or humiliating and/or unnecessarily incriminating -, in the present case this treatment of [the] suspect does not lead to the far-reaching consequence that the public prosecutor loses his right to prosecute [the] suspect.
....
Likewise, the fact that documents were only added to the case-file at a late stage does not constitute a fact (not even in combination with the above-mentioned treatment of [the] suspect) which makes the public prosecutor lose his right to prosecute."

As regards the argument that the applicant's statements to the police were obtained unlawfully, the Regional Court stated, inter alia:

<translation>
"In evaluating the question whether the charges against [the] suspect should be declared proven, the court has disregarded the statements made by [the] suspect, insofar as from those statements any involvement of [the] suspect in what she is being accused of could possibly be established or inferred. The court has taken the same attitude as regards the question whether special significance can be attributed to the attitude of [the] suspect during the investigation and afterwards...."

The Regional Court of Utrecht convicted both the applicant's daughter and the applicant's half-brother and sentenced them to ten years' imprisonment. H. did not appeal against his conviction. B. initially appealed against her conviction but withdrew her appeal in July 1993.

The applicant lodged an appeal with the Court of Appeal (Gerechtshof) of Amsterdam against her conviction and sentence.

The Court of Appeal dealt with the case on 2 July 1993 and 21 July 1993. On the latter date, the Court of Appeal listened to

excerpts of the recording of the face to face confrontation that had taken place on 27 May 1992 between the applicant and her half-brother. The applicant's lawyer had selected the excerpts. In addition, the Court of Appeal examined B. and H. as witnesses in the presence of the applicant and her lawyer.

The applicant maintained that she was innocent. She stated that H. was lying and that the incriminating statements of B. were unreliable. She reiterated the statements she had made before the Regional Court about the way she had been treated by the police and argued that the prosecution should be declared inadmissible.

On 3 August 1993, the Court of Appeal quashed the Regional Court's judgment, acquitted the applicant of arson, convicted her of murder committed together with other persons, and sentenced her to eight years' imprisonment.

In respect of the police interrogations, the Court of Appeal stated:

<translation>
"The Court of Appeal considers...even after listening to the tape recording in question, that it has not appeared from the examination that unacceptable pressure was exerted on [the] suspect nor that she was treated so badly that it cannot be said that [the] suspect made her statement freely. Furthermore, it also has not appeared that the principles of proper legal procedure were violated, which would be a ground for denying the prosecution the right to further prosecute [the] suspect...."

Regarding the admissibility of evidence, the Court of Appeal stated, inter alia:

<translation>
"The suspect's lawyer has also argued that...evidence was obtained unlawfully so that the statements made by [the] suspect to the police, including the aforementioned tape-recorded interrogation on 27 May 1992, cannot be used in evidence.
This argument is rejected as well. The Court of Appeal does not take the above-mentioned statements into consideration as they are not relevant to the evidence, and moreover is of the opinion...that no unacceptable pressure was exerted on [the] suspect during the interrogations by the police."

The Court of Appeal used in evidence a statement of the applicant made before the Court of Appeal on 2 July 1992, the statement of H. before the Court of Appeal, statements of B. before the Court of Appeal and to the police, a procès-verbal drawn up by the two police officers who found A.'s dead body in the burned shed, and the autopsy report.

The applicant subsequently lodged an appeal in cassation with the Supreme Court (Hoge Raad).

On 25 January 1994, the Advocate General to the Supreme Court submitted his written conclusions, which were sent to the applicant's lawyer, who replied on 1 February 1994.

On 8 March 1994, the Supreme Court rejected the applicant's appeal in cassation.

COMPLAINTS

The applicant complains that the behaviour of the police, especially when she was being interrogated, violated her rights under Articles 3 and 6 paras. 1, 2 and 3 (a), (b) and (d) of the Convention.

She further complains that the belated transmission of a procès-verbal constituted a violation of her rights under Article 6.

THE LAW

1. The applicant complains under Article 3 (Art. 3) of the Convention of the way she was treated by the police. Article 3 (Art. 3) reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (Eur. Court H.R., Ireland v. United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65 para. 162).

Treatment causing, if not actual bodily harm, at least intense physical and mental suffering, falls into the category of inhuman treatment within the meaning of Article 3 (Art. 3). It is degrading if it arouses in the person subjected thereto feelings of fear, anguish and inferiority capable of humiliating and possibly breaking his or her physical or moral resistance (Ribitsch v. Austria, Comm. Rep. 4.7.94, para. 91).

The Commission first notes that the applicant's treatment by police officers when they questioned her led to the institution of disciplinary proceedings against them. The Commission further notes that the Court of Appeal, after listening to the recording that was made of the face to face confrontation between the applicant and H., did not find that the applicant had been subjected to unacceptable pressure by the police.

The Commission, while noticing the Regional Court's criticism of statements made by police officers, does not find that this treatment attained the minimum level of severity mentioned above.

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. The applicant complains that she did not receive a fair trial within the meaning of Article 6 (Art. 6), which, insofar as relevant, reads as follows:

> "1. In the determination of...any criminal charge against him, everyone is entitled to a fair...public hearing...by a... tribunal....
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> ....
>
> 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;
...."

As the guarantees in paras. 2 and 3 of Article 6 (Art. 6-2, 6-3) are specific aspects of the right to a fair trial set forth in para. 1 of that provision, the Commission will consider the complaint under the three paragraphs taken together (cf. Eur. Court H.R. Asch judgment of 26 April 1991, Series A no. 203, p. 10 para. 25).

The Commission notes that the domestic courts did not use in evidence any statements made by the applicant to the police, nor were conclusions as to the applicant's guilt drawn from her conduct on that occasion. The applicant's conviction was based primarily on statements of her daughter and half-brother. Both of them were examined by the Court of Appeal in the applicant's presence. The applicant, who was assisted by a lawyer throughout the domestic proceedings, had ample opportunity to state her innocence, challenge the incriminating statements against her and challenge the credibility of the witnesses. She had the assistance of interpreters throughout the proceedings before the domestic courts and she has not complained that their interpretation was inadequate at that stage.

As regards the belated transmission of a procès-verbal, the Commission notes that the applicant was provided with a copy of this procès-verbal on 26 June 1992. On 7 July 1992, at the defence's request, the Regional Court adjourned its examination of the case, inter alia, so that the investigating judge could examine witnesses in connection with the technical evidence. The Commission thus finds no indication that the late transmission of the procès-verbal affected the fairness of the criminal proceedings against the applicant. Neither is there any indication that the fairness of the proceedings was affected by the fact that the police did not record all their activities during the investigation.

As regards the alleged violation of Article 6 para. 2 (Art. 6-2) of the Convention, the Commission recalls that the presumption of innocence will be violated if a judicial decision concerning persons charged with a criminal offence reflects an opinion that they are guilty before they have been proved guilty according to law and that not only a judge or a court but also other public authorities can infringe the presumption of innocence (Eur. Court H.R., Allenet de Ribemont judgment of 10 February 1995, Series A no. 308, paras. 35 and 36).

In the present case the applicant alleges that the behaviour of the police and/or interpreters during the pre-trial investigation constituted a violation of the presumption of innocence. However, there is no indication that alleged prejudice of the police or interpreters became public or prejudged the assessments of the facts by the domestic courts. The Commission, therefore, does not find a violation of Article 6 para. 2 (Art. 6-2) of the Convention (cf. Allenet de Ribemont judgment, ibid., para. 41).

In these circumstances, the Commission finds that the criminal proceedings against the applicant, considered as a whole, do not disclose any appearance of a violation of Article 6 (Art. 6) of the Convention.

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

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber	President of the Second Chamber
(K. ROGGE)	(H. DANELIUS)