AS TO THE ADMISSIBILITY OF

Application No. 23807/94
by D.S.E.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 15 May 1996, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

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 12 October 1993 by D.S.E. against the Netherlands and registered on 5 April 1994 under file No. 23807/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 5 October 1994 and the observations in reply submitted by the applicant on 3 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Ethiopian citizen, born in 1970 and at present detained at the Psychiatric Clinic "Oldenkotte" at Rekken, the Netherlands. He is represented before the Commission by Mr. M.-W. Stoet, a lawyer practising in Amsterdam.

A. The particular circumstances of the case

The facts, as presented by the applicant, may be summarised as follows.

On 21 June 1990 the Regional Court (Arrondissementsrechtbank) of Groningen convicted the applicant of repeated manslaughter and sentenced him to five years' imprisonment (with deduction of detention on remand) and to placement at the Government's disposal (terbeschikkingstelling) with committal to a psychiatric institution. The period of placement at such an institution began on 3 July 1991 and expired two years later, on 3 July 1993.

According to Section 509o para. 1 of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering, hereinafter referred to as "CCP"), a request for the extension of such placement shall be made by the Public Prosecutor not later than one month before the expiry of the previous period of placement. The last day for making such a request in the present case was therefore 3 June 1993.

By letter of 17 May 1993, which the applicant received on 19 May 1993, he was informed by the Public Prosecutor that the latter had requested the extension of the applicant's placement at the Government's disposal on 17 May 1993. The applicant was also informed that he could be represented by counsel. It appears, however, that the request prepared by the Public Prosecutor, which was indeed dated 17 May 1993, did not arrive at that time at the registry of the Regional Court of Groningen but was, apparently by mistake, placed in the archives of the Court.

About three and a half months after receiving the letter of the Public Prosecutor, the applicant alerted the staff in the psychiatric institution to the fact that he had not been further informed as regards the extension of his placement. The request was then found in the archives of the Court on 7 September 1993. It was received at the Court's registry on 8 September 1993.

In the proceedings regarding the extension, the applicant asked the Regional Court to declare the Public Prosecutor's request inadmissible on the ground that both Section 509o para. 1 CCP and the European Convention on Human Rights had been violated.

The Regional Court examined the application on 15 September 1993. In its decision, which was given on 23 September 1993, the Court rejected the applicant's objections and extended his placement at the Government's disposal for another year. Pursuant to Section 509v CCP no appeal lies against this decision, as it concerned a first extension not exceeding one year.

In its decision the Regional Court stated as follows:

[Translation]

> "3. It appears from the contents of the relevant documents that the request for an extension of the placement at the Government's disposal should have been submitted not later than 3 June 1993. According to the stamp indicating the receipt, the request was not received and registered at the registry of this Court until 8 September 1993.
>
> 4. The Code of Criminal Procedure does not indicate any consequences of a failure to observe the time-limit contained in Section 509o para. 1. However, in view of the wording of the provision and its legal history, the Court is of the opinion that failure to observe the last time-limit should in principle result in the inadmissibility of the Public Prosecutor's application. This conclusion can be drawn on the basis that failure to respect this procedural provision is not in conformity with a good administration of justice.
>
> 5. However, in some cases special circumstances might exist which would justify a departure from that principle. The Court considers that such special circumstances are present in this case.
>
> 6. The provision referred to has a specific procedural significance and aims at letting the judge examine periodically whether an extension of the judicial measure is necessary. Indirectly the provision also protects the interests of the person placed at the Government's disposal since it ensures that this person will know in good time whether or not there will be

a request for an extension. In the present case the interests of that person were not prejudiced since the request was notified to him in person on 19 May 1993. He has therefore been able to get legal assistance in time and he has not been, for an unnecessarily long period, kept in doubt as to the intentions of the Public Prosecutor.

7. It remains to be examined whether the violation of the time-limit has prejudiced a fair procedure. When considering this question, it is of importance, inter alia, that the placement at the Government's disposal remains in force as long as there is no final decision on the request. Although there has been a violation of the time-limit for the extension, it does not follow that the deprivation of liberty is unlawful.

8. In substance, there has not been a failure to respect the time-limit within which the request must be made. The Public Prosecutor prepared a request for an extension in time and he communicated it two days later to the person placed at the Government's disposal.

Because of circumstances, which have been further explained in the written memorial of the Public Prosecutor, it was not possible, however, for the Court to decide earlier on this request which had been prepared in time. It is not possible to consider this a flagrant violation of the procedural provisions. The Public Prosecutor may only be reproached for the fact that the request did not arrive at the registry of this Court in time, which means that the request was only formally submitted too late.

9. Moreover an evaluation must be made between different interests in the sense that the interest of the person placed at the Government's disposal in having the violated legal provision respected must be weighed against the general interest which might be harmed by a decision which would lead to the termination of the placement at the Government's disposal.

10. The Court considers that, on account of the following circumstances, the last-mentioned interest must prevail.

The measure was originally imposed because of two acts of manslaughter. The above-mentioned opinions of the Institution quite clearly refer to the necessity of extending this coercive measure. The risk of further criminal behaviour is considered still to be present to the same degree, since the person concerned can still not appreciate the vulnerability of his personality. The supplementary opinion regarding the extension repeats this conclusion and also mentions an incident in which violence was used between the person concerned and another person in the Institution. On this occasion the person concerned lost his senses for a short while and it was necessary to isolate him for some time in his room."

B. Relevant domestic law and practice

Placement at the disposal of the Government may be imposed on the accused who, at the time of committing an offence, suffered from a mental deficiency or derangement (Section 37a of the Criminal Code). A judge may further decide that a person placed at the disposal of the Government shall receive treatment at the Government's expense (verpleging, Section 37b Criminal Code).

The provisions relating to the extension of the placement at the disposal of the Government are laid down in Sections 509o to 509x CCP.

In accordance with Section 509o para. 1 CCP, the request to

extend the placement should be submitted not earlier than two months and not later than one month before the date on which the placement expires. The date on which the request has been received by the registry of the Regional Court concerned is considered as the date of submission. The request must be accompanied by a recommendation which the institution in which the patient is being treated has prepared not more than one month before the request was submitted. In accordance with the provisions of Section 509o para. 6, the person concerned must immediately be given a copy of the request.

According to Section 509s CCP, the Regional Court must immediately set a date for the examination of the case and the person concerned must be informed promptly of this date. In accordance with Section 509t CCP, the Regional Court must give its decision within two months after the request was submitted. According to Section 509q CCP, the placement remains in force until the decision on the request to extend it has become irrevocable. If the request is granted later than the date on which the placement would have expired had no request to extend it been submitted, the placement is nonetheless considered to have been extended as from that date.

The CCP does not impose any sanction on the exceeding of the time-limits laid down in Sections 509o and 509t. In practice, the lawfulness of the placement after expiry of its statutory period is not affected pursuant to a Supreme Court judgment of 14 June 1974 (Nederlandse Jurisprudentie, NJ, 1974, no. 436). In this case the Supreme Court took the view that a placement remained lawful even if the Regional Court exceeded the two months time-limit of Section 509t, which was at that time provided for in a differently numbered provision. In a later judgment (29 September 1989, NJ 1990, no. 2), the Supreme Court held that only in certain circumstances would the State be obliged to terminate the placement after its statutory period had expired and no decision as to its extension had been taken. In order to ascertain whether such an obligation existed, the court should have regard to the extent to which the statutory time-limit had been exceeded, the reasons for exceeding the time-limit as well as the personal and social interests at stake.

As the case-law developed, the opinion that the time-limit referred to in Section 509t CCP is not of an absolute nature has also been found to apply to the time-limit now enacted in Section 509o para. 1 CCP. On 19 February 1993, in a case where the time-limits provided for in Section 509o para. 1 CCP had been exceeded, the Supreme Court found that in light of Section 509q CCP the placement had remained lawful despite the fact that its extension had not been requested in time (NJ 1993, no. 302).

According to Section 509v CCP, both the Public Prosecutor and the person concerned may lodge an appeal with the Court of Appeal (Gerechtshof) of Arnhem within two weeks of the service of the judgment given by the Regional Court. However, this provision rules out an appeal in regard to the first decision to extend the placement for a period of one year.

It appears from Dutch case-law that summary civil proceedings (kort geding) may be instituted in cases where a person placed at the Government's disposal wishes to obtain a court judgment on the lawfulness of his detention.

In a case which was brought before the President of the Regional Court of The Hague, the question of the relationship between the court responsible for extending the placement and the court before which summary proceedings are brought was considered (decision of 30 March 1990, published in Sancties 1990 pp. 352-353). The President held that in principle either court may decide that the person involved should be released.

In the above-mentioned case before the President of the Regional Court of The Hague, the request to terminate the placement was rejected, inter alia in view of the fact that the court responsible for extending the placement would in any event examine the matter within a week's time.

COMPLAINTS

The applicant complains of violations of Article 5 paras. 1 and 4 of the Convention in that the decision to extend his placement at the Government's disposal was not given in a procedure prescribed by law, which made the placement unlawful. He further states that, after he had been informed that the extension had been requested on 17 May 1993, he was entitled to expect the Court's decision to be taken within two months, i.e. not later than 17 July 1993, but this did not happen. This too was a violation of Article 5 paras. 1 and 4 of the Convention.

The applicant further complains of violations of Article 5 paras. 1 (a) and 4 and Article 13 of the Convention on the ground that no appeal was available against the decision to extend his detention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 October 1993 and registered on 5 April 1994.

On 5 July 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 5 October 1994. The applicant replied on 3 February 1995, after an extension of the time-limit fixed for that purpose.

THE LAW

1. The applicant complains under Article 5 paras. 1 and 4 (Art. 5-1, 4) of the Convention that the procedure by which his placement at the Government's disposal was extended was not in accordance with a procedure prescribed by law which rendered his detention unlawful.

Exhaustion of domestic remedies

The Government argue in the first place that the application is inadmissible since the applicant failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention. They contend that he could have instituted summary civil proceedings to petition the President of the Regional Court to terminate a placement at the Government's disposal.

The applicant submits that in the circumstances of the present case the institution of summary proceedings would not have constituted an effective remedy. For a request to order the termination of his placement at the Government's disposal to be admissible in summary proceedings, the President of the Regional Court concerned would have wished to ascertain that no other procedure was open to the applicant which could result in a decision within a very short period. The applicant contends that if he had instituted summary proceedings, the President would have noted that the hearing before the Groningen Regional Court was imminent and his request would have been rejected.

The Commission recalls that in previous complaints against the Netherlands, summary proceedings have been found by the Convention organs to constitute an effective remedy in cases where a person wishes to obtain a fresh review of the lawfulness of his detention (cf. Eur. Court H.R., Keus judgment of 25 October 1990, Series A no. 185-C, p.

67, para. 28; No. 12596/86, Van Zomeren v. the Netherlands, Dec. 8.1.92, unpublished).

However, what was at issue in those cases was the question whether, on the basis of Dutch law, a person claiming that his mental state had improved had to wait for the expiry of his placement before he was able to obtain a decision as to its lawfulness.

The Commission notes that in the present case, following the discovery of the Public Prosecutor's request for the extension of the applicant's placement in the archives of the Groningen Regional Court on 7 September 1993, it was sent to the Court's registry where it was received on 8 September 1993. A hearing before the Regional Court was subsequently set to take place one week later, on 15 September 1993.

The Commission also has regard to Dutch case-law, as illustrated by the decision of the President of the Regional Court of The Hague of 30 March 1990 (Sancties, 1990 pp. 352-353), where a request in summary proceedings for termination of a placement was rejected, inter alia in view of the fact that the court responsible for extending the placement would in any event be dealing with the matter one week later. In these circumstances the Commission considers that summary proceedings would not have constituted an effective remedy in the present case.

The Commission concludes that the application cannot be rejected for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

As regards the merits

The Commission notes that the applicant's placement at the Government's disposal commenced on 3 July 1991 and was due to expire on 3 July 1993. However, the request for an extension was not received by the registry of the Groningen Regional Court until 8 September 1993 and the decision to extend the placement was not made until 23 September 1993. The Commission considers, therefore, that it should examine whether the applicant's detention between 3 July and 23 September 1993 was lawful, whether the decision to prolong the applicant's detention was taken in accordance with a procedure prescribed by law within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention, and whether the applicant's right to a speedy court examination in respect of the lawfulness of his detention was respected.

Article 5 para. 1 (Art. 5-1), insofar as relevant, provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
>
> ...
>
> e. the lawful detention ... of persons of unsound mind ... ;
>
> ..."

Article 5 para. 4 (Art. 5-4) provides as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court

and his release ordered if the detention is not lawful."

The Commission notes in the first place that the applicant was convicted by judgment of the Groningen Regional Court of 21 June 1990. Article 5 para. 1 (a) (Art. 5-1-a) of the Convention therefore applies. Furthermore, the placement at the Government's disposal with a view to treatment by reason of defective mental development or mental illness is equivalent to detention of a person of unsound mind (No. 6852/74, Dec. 5.12.78, D.R. 15 p. 5; No. 12596/88, mentioned above). Accordingly, the applicant's detention also falls to be considered under Article 5 para. 1 (e) (Art. 5-1-e) of the Convention (cf. Eur. Court H.R., X. v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 17, para. 39).

The Government argue that the fact that a time-limit has been exceeded should not always, regardless of the circumstances of the case, lead to the termination of a detention. According to Dutch case-law regarding Section 509q CCP, which provides that placement at the Government's disposal remains in force until the decision on a request to extend it has become irrevocable, a placement is not unlawful because the decision on the request to extend it was only given after the date on which the placement was due to expire. Only in certain circumstances does the State have an obligation to terminate a placement as a result of the fact that its statutory period has expired. Given that in the present case the Groningen Regional Court held that these circumstances did not exist, the applicant's placement after 3 July 1993 was, in the Government's opinion, lawful.

The Government submit that, in principle, when the time-limit referred to in Section 509o para. 1 CCP is exceeded, this should lead to the Public Prosecutor's request being declared inadmissible. This decision would mean the termination of the placement at the Government's disposal either immediately (in cases in which the judgment is given after the date on which the placement was due to expire) or within a very short time if the expiry date has not yet been reached.

The Government refer, however, to case-law which shows that in assessing whether the time-limit pursuant to Section 509o para. 1 CCP has been exceeded, the court always examines the special circumstances involved. In addition, it considers the extent to which the interests of the individual concerned have been violated. The provisions of the said section are designed to ensure that the individual concerned should be informed of the Public Prosecutor's intentions early enough to be able to seek the assistance of counsel. If the time-limit has been exceeded but the individual concerned has nonetheless been able to prepare himself adequately for the hearing, the Public Prosecutor's request is generally not declared inadmissible. According to the Government, the Groningen Regional Court acted in conformity with this case-law in the present case.

The applicant does not elaborate on the lawfulness of his detention after 3 July 1993 and prior to the Regional Court's decision to extend it. However, the Commission understands the application to include the applicant's complaint that after expiry of the statutory period on 3 July 1993 his detention had become unlawful since no request for its extension had been received by the registry of the Regional Court. Moreover, the applicant argues that the Public Prosecutor's request to extend his placement should have been declared inadmissible by the Groningen Regional Court for having been lodged out of time without there being any circumstances which could have justified the delay. Had the request been declared inadmissible, this would have entailed the immediate termination of the placement in view of the fact that its statutory period had already expired. Instead, the applicant was left in uncertainty for a long period of time and when the authorities, upon his instigation, discovered their mistake, a hearing was arranged very quickly, leaving him little time to obtain

legal assistance.

The Commission, having regard to the parties' submissions and the case-law of the Convention organs, considers that these complaints raise questions of fact and law which require an examination of the merits. The complaints cannot, therefore, be declared inadmissible 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 also complains under Article 5 paras. 1 (a) and 4 and Article 13 (Art. 5-1-a, 5-4, 13) of the Convention that no appeal was available against the decision to extend his detention.

Article 13 (Art. 13) of the Convention provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government explain that appeal proceedings usually take approximately one year and that for that reason no appeal lies against the first extension of a placement at the Government's disposal for the duration of one year. By lodging an appeal against a decision to extend the placement by one year, a person could, in effect, avoid remaining in care in the final year. The interests at stake here were considered to outweigh the interests at stake in creating scope for an appeal.

The applicant submits that appeal proceedings only rarely take one year before a decision is given. Furthermore, pending the appeal proceedings the placement is not suspended. In the applicant's opinion, the decision to extend a placement has such serious consequences that an appeal should lie in all cases.

The Commission finds this complaint to be so closely linked to the main complaints relating to Article 5 paras. 1 and 4 (Art. 5-1, 5-4) of the Convention that it should also be declared admissible.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)