AS TO THE ADMISSIBILITY OF

Application No. 32603/96
by Recep EVCEN
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 3 December 1997, the following members being present:

Mrs G.H. THUNE, President
MM J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV

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 2 April 1996 by Recep EVCEN against the Netherlands and registered on 13 August 1996 under file No. 32603/96;

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 Turkish national, born in 1958, and resides in Amsterdam. He is represented by Mr Th.A. de Roos, a lawyer practising in Amsterdam.

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

a. Particular circumstances of the present case

On 21 April 1992, the police was informed that a Turkish woman had been kidnapped by the applicant, who would possess a firearm and who would be known as being rather violent. The police was further informed that the woman was being held by the applicant in a shop cellar, located at R. street in Amsterdam.

On the same day, three police officers entered the shop after having identified themselves to the shop staff. One staff member showed the officers a stairway leading to the basement, where the police

officers found a door. After having opened this door, the police officers found a room where a naked man and woman were engaged in sexual acts. The woman stated that she was there of her own free will.

While the police officers questioned the man and the woman, they spotted a pistol on the floor underneath the bed in the room. The pistol was found to contain eight bullets. Both the man and the woman were subsequently arrested on suspicion of offences under the Arms and Ammunition Act (Wet Wapens en Munitie). The woman stated to the police that she was having an extra-marital affair with the applicant, that she had voluntarily entered the shop and that the pistol found belonged to the applicant. The applicant confirmed her statement. He further stated that he had acquired the pistol in order to defend himself against a possible attack since three of his friends had been found dead. The woman was released in the early morning of 22 April 1992. The applicant was released later that day.

By summons of 17 September 1993, the applicant was ordered to appear before the Magistrate (politierechter) of the Regional Court (Arrondissementsrechtbank) of Amsterdam on charges of unlawful possession of a firearm. On 5 November 1993, the Magistrate convicted the applicant of unlawful possession of a firearm and sentenced him to one month's imprisonment. The Magistrate further ordered the withdrawal from circulation of the seized pistol and ammunition. The applicant filed an appeal with the Court of Appeal (Gerechtshof) of Amsterdam.

On 5 October 1994, following a hearing held on 21 September 1994, the Court of Appeal quashed the judgment of 5 November 1993 on procedural grounds, convicted the applicant of unlawful possession of a firearm and sentenced him to one month's imprisonment. It further ordered the withdrawal from circulation of the seized pistol and ammunition.

It rejected the applicant's argument that the entry by the police in the shop had been unlawful in that there was no reasonable suspicion at that time that he had committed a punishable offence. The Court of Appeal held that the information received by the police was a sufficient basis for holding a reasonable suspicion within the meaning of Article 27 of the Code of Criminal Procedure (Wetboek van Strafvordering) that the applicant had committed the punishable offence of unlawful deprivation of liberty and acted contrary to the Arms and Ammunition Act.

Insofar as the applicant complained that his right to respect for his home under Article 8 of the Convention had been violated, the Court of Appeal considered that the police had not entered against the will of the persons present in the shop. It further held that the presence of certain items of furniture would not justify, as such, the conclusion that the applicant was leading a private home life there and, in the absence of any intention to live there, it had not been made plausible that this room was to be considered as his home within the meaning of Article 8 of the Convention or within the meaning of Article 120ff. of the Code of Criminal Procedure.

The Court of Appeal further rejected the applicant's argument that the police had carried out an unlawful search of the room. It held on this point that the officers spotted the pistol in the room while questioning and that, therefore, no search as such took place. It added that in any event Article 49 of the Arms and Ammunition Act authorises investigating officers to search places where there is a reasonable suspicion that arms or ammunition are present.

The applicant's subsequent appeal in cassation to the Supreme Court (Hoge Raad) was rejected on 3 October 1995. Insofar as the applicant complained that his right to respect for his home had been violated, the Supreme Court accepted the finding of the Court of Appeal that the room in the shop cellar could not be regarded as a home within

the meaning of Article 120 of the Code of Criminal Procedure.

The Supreme Court disagreed, however, with the finding of the Court of Appeal that the room at issue was also not a home within the meaning of Article 8 of the Convention, as this notion can also include business premises.

The Supreme Court did not find it necessary to quash the judgment of the Court of Appeal on this ground, as the applicant's complaint in cassation was based on the assumption that, if the room was a "home" within the meaning of Article 8 of the Convention, Articles 120-123 of the Code of Criminal Procedure would be applicable. According to the Supreme Court, Article 8 of the Convention demands that any interference with the rights referred to in the first paragraph of this provision must be in accordance with the law. In the present case, that would be Article 55 para. 2 of the Code of Criminal Procedure. Article 8 of the Convention does not prevent that the specific formalities for spaces considered as homes under the Dutch rules do not apply to those spaces which are not considered as a home under Dutch law, but which do constitute a home within the meaning of Article 8 of the Convention.

b. Relevant domestic law

Article 27 para. 1 of the Code of Criminal Procedure defines a suspect as the person in respect of whom a reasonable suspicion of guilt of a punishable act arises from facts and circumstances.
Article 55 para. 2 of the Code of Criminal Procedure provides:

<Translation>
"In order to apprehend a suspect, every investigating officer may enter any place, both in cases of discovery in flagrante delicto and in other cases. Articles 120-123 [of the Code of Criminal Procedure] apply."

Articles 120-123 of the Code of Criminal Procedure, as in force at the relevant time, contain certain limitations where the investigating authorities wish to enter a private home against the will of the occupant or a meeting room of a national, provincial or municipal parliamentary body, a room used for religious services or a room where court hearings are held. In a situation where an occupant of a private home refuses entry, investigating officers may only enter when certain conditions have been fulfilled, i.e. that the entering investigating officers be accompanied by a District Court judge, a Police Commissioner or a Mayor or carry a written order issued by the competent prosecution authorities.

COMPLAINTS

The applicant complains that, since the requirements of Article 20 of the Code of Criminal Procedure, as in force at the relevant time, were not met when the police officers entered the room in the shop cellar, there has been an unjustified interference with the applicant's rights under Article 8 para. 1 of the Convention. The applicant submits that Article 55 para. 2 of the Code of Criminal Procedure offers insufficient protection against intrusions in a personal life sphere since for the application of this provision it is sufficient that there is a suspicion that an offence has been committed and that the entry is made by investigating officers. In the present case, the room at issue was permanently in use by the applicant for activities pre-eminently pertaining to his personal life sphere.

THE LAW

The applicant complains that the entry by police officers of the room in a shop cellar where he found himself constituted an unjustified

interference with his rights guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention.

Article 8 (Art. 8) of the Convention, insofar as relevant, reads:

"1. Everyone has the right to respect for his private ... life, his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of ... crime ..."

Although the Commission has doubts whether the applicant's situation is comparable to the situation in the case of Niemietz (Eur. Court HR, Niemietz v. Germany judgment of 16 December 1992, Series A no. 251-B), it accepts that the entry at issue constituted an interference with the applicant's rights under Article 8 para. 1 (Art. 8-1) of the Convention.

It must therefore be examined whether this interference was justified under Article 8 para. 2 (Art. 8-2) of the Convention, which authorises certain restrictions on the rights guaranteed in the first paragraph of this provision, provided that such restrictions are "in accordance with the law" and "necessary in a democratic society" for one or more of the aims enumerated in Article 8 para. 2 (Art. 8-2).

In determining whether an interference was "in accordance with the law", it is primarily for the national authorities to interpret domestic law, but the Convention institutions have a limited jurisdiction to control the manner in which this is done (cf. No. 10689/83, Dec. 14.5.84, D.R. 37, p. 225).

However, the expression "in accordance with the law" also relates to the quality of the law in question. This implies that the law should be accessible to the persons concerned, who must moreover be able to foresee its consequences for them. Finally, the law must be compatible with the rule of law, which implies that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by Article 8 para. 1 (Art. 8-1) of the Convention. If a law confers a discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the particular subject-matter (cf. Eur. Court HR, Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 27, paras. 88-89).

The Commission has no doubts as to the existence of a legal basis and the accessibility of the law in the present case as regards the powers of public investigating officers to enter premises in the course of their professional duties. Noting that, under Dutch law, the right of the investigating authorities to enter premises is limited to those situations where there is a reasonable suspicion that a criminal offence is committed there, the Commission cannot find that the Dutch rules at issue fall short of the requirements as to the quality of the law for the purposes of Article 8 (Art. 8) of the Convention.

The Commission notes that the Supreme Court rejected the applicant's argument that the police had entered the room unlawfully and concluded that the police had entered the room on the basis of their powers of entry under the Code of Criminal Procedure.

Noting the contents of the relevant provisions of the Code of Criminal Procedure and the specific circumstances of the present case, the Commission cannot find that the Supreme Court's finding on this point can be regarded as unreasonable or arbitrary. The question whether or not the room at issue can be qualified as a "home" under Dutch law is irrelevant for the purposes of Article 8 (Art. 8) of the

Convention as the notion of a "home" within the meaning of this provision is an autonomous concept. Article 8 (Art. 8) of the Convention merely establishes minimum standards which are to be respected by Contracting States, the latter being free to set higher standards than those required by Article 8 (Art. 8).

The Commission is, therefore, satisfied that the entry in the present case took place "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention. Noting that the entry occurred on the basis of a suspicion of a serious criminal offence, the Commission further finds that the interference at issue can reasonably be regarded as necessary in a democratic society for the prevention of crime within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

It follows that the application must be rejected as being 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.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber