AS TO THE ADMISSIBILITY OF

Application No. 38089/97
by Murray William GIBBS
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
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 8 July 1997 by Murray William GIBBS against the Netherlands and registered on 8 October 1997 under file No. 38089/97;

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 national, born in 1974, and at the time of the introduction of the application was detained in the Koraalspecht prison of Curaçao, the Netherlands Antilles. He is represented by Mr G. Spong, a lawyer practising in The Hague.

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

a. Particular circumstances of the present case

On 13 June 1994, the applicant was placed in pre-trial detention on suspicion of having committed two armed robberies.

By summons of 31 October 1994, the applicant was ordered to appear on 9 November 1994 before the First Instance Court of the Netherlands Antilles (Gerecht in Eerste Aanleg van de Nederlandse Antillen).

On 8 December 1994, the First Instance Court of the Netherlands Antilles handed down its judgment. On 13 December 1994, the applicant filed an appeal with the Joint Court of Appeal of the Netherlands Antilles and Aruba (Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba). The applicant's case-file was received at the Registry of the Joint Court of Appeal on 10 May 1995.

The Joint Court of Appeal examined the applicant's appeal in the course of adversarial proceedings in which the applicant was represented by a lawyer and in the course of which hearings were held on 12 September, 19 October, and 16 and 29 November 1995.

On 12 September 1995, the Joint Court of Appeal adjourned its examination, as the applicant wished to be represented by a new lawyer who had not studied the case-file.

On 19 October 1995, yet another lawyer took over the applicant's case. During that hearing, the new lawyer sought an adjournment of the proceedings with a view to hearing a number of witnesses before the court, whose names the lawyer would communicate at some further point in time. The Joint Court of Appeal granted this request and adjourned its examination until 16 November 1995. By letter of 2 November 1995 the defence submitted the names of seven witnesses, including U.H., whom the defence wished to hear before the Joint Court of Appeal.

On 16 November 1995, four witnesses appeared and were heard before the Joint Court of Appeal. Three of them were heard in relation to the applicant's alibi. After these four witnesses had given evidence, the defence sought a further adjournment in order to hear the two of the three witnesses who had not appeared, i.e. U.H. and J.F., and a further witness D.B. The Joint Court of Appeal granted the request and adjourned its further examination until 29 November 1995.

On 27 November 1995, on the basis of an order of the Joint Court of Appeal, the witness J.F. was heard before the investigating judge (rechter-commissaris). Although the witness U.H. had also been summoned to give evidence before the investigating judge, this witness failed to appear before the investigating judge.

At the hearing of 29 November 1995, the President of the Joint Court of Appeal stated that four witnesses had been heard on 16 November 1995 and that a further witness had been heard before the investigating judge. He further stated that it had been ordered that the witness U.H. be forcibly brought (medebrenging) before the Joint Court of Appeal, but that this witness had not appeared.

The defence persisted in its request that U.H. be heard and submitted that on 16 November 1995 three witnesses had been heard in relation to the applicant's alibi and that the applicant had the right also to hear U.H. in relation to this subject. According to the defence, the applicant was not to blame for the fact that U.H. could not be reached. The prosecution objected to a further stay of the proceedings and argued that the applicant, who had been represented throughout the proceedings, had been provided with ample opportunity to have witnesses heard.

After having deliberated, the Joint Court of Appeal decided to reject the request by the defence to hear U.H. It did not state any explicit reasons for this decision.

In its judgment of 20 December 1995, the Joint Court of Appeal quashed the judgment of 8 December 1994, convicted the applicant of theft involving threat to use violence and use of violence having caused death, extortion and unlawful possession of a fire-arm, and sentenced him to fifteen years' imprisonment with deduction of the time spent in pre-trial detention.

On 27 December 1995, the applicant filed an appeal in cassation with the Supreme Court (Hoge Raad), including a complaint of the length of the proceedings. On 30 July 1996, the applicant's case-file was received at the Registry of the Supreme Court, which examined the applicant's case for the first time on 3 December 1996.

In his conclusions, the Procurator General (Procureur-Generaal) to the Supreme Court advised the Supreme Court, inter alia, to reject the applicant's complaint under Article 6 of the Convention in respect of the delay between 8 December 1994 and 10 May 1995. He noted that the applicant, who had been represented by a lawyer in the proceedings on appeal, had not raised this complaint in the proceedings before the Joint Court of Appeal and considered that this complaint could not be raised for the first time in the cassation proceedings before the Supreme Court. He further considered that the delay was not of such a nature that the Joint Court of Appeal should ex officio have examined the compatibility of this delay with Article 6 of the Convention.

Insofar as the applicant complained of the delay between 20 December 1995 and the first examination of the applicant's appeal in cassation, the Procurator General advised the Supreme Court to reject this complaint on the basis of a finding that this

delay was not so long that the applicant's right to a hearing within a reasonable time had been violated. The Procurator General further considered that the total length of the proceedings against the applicant, i.e. more than 2□ years, had also not exceeded a reasonable time.

The Supreme Court rejected the applicant's appeal in cassation by judgment of 25 March 1997.

As regards the applicant's complaint that the Joint Court of Appeal, contrary to Article 6 of the Convention and Article 186 of the Code of Criminal Procedure of the Netherlands Antilles (Wetboek van Strafvordering van de Nederlandse Antillen) had rejected his request to hear the witness U.H. on 29 November 1995 without stating any reasons for this decision, the Supreme Court held that - although Article 186 of the Code of Criminal Procedure of the Netherlands Antilles does not oblige a judge to state reasons for a decision like the one at issue - principles of due process of law do oblige a judge to give reasons where, in view of the specific circumstances of a case and what has been submitted in support of a request, a decision would otherwise be incomprehensible. However the Supreme Court held that this situation did not arise in the present case, since U.H. had failed to appear before the Joint Court of Appeal despite several summonses to appear and even an order that he be forcibly brought before the Joint Court of Appeal and since, as stated by the defence on 29 November 1995, the Joint Court of Appeal had already heard three witnesses in relation to the applicant's alibi whereas the hearing of U.H. would concern the same subject. In these circumstances, the Supreme Court found that the absence of reasons for the decision at issue had not deprived the applicant of a fair hearing within the meaning of Article 6 of the Convention.

Referring to Article 101a of the Judicial Organisation Act (Wet op de Rechterlijke Organisatie), the Supreme Court further rejected the applicant's complaint of the length of proceedings as not prompting a determination of legal issues in the interest of legal unity and development.

b. Relevant domestic law and practise

In a judgment of 17 June 1997 (nr. 105.153 A), concerning an appeal in cassation against a judgment of 2 January 1996 of the Joint Court of Appeal of the Netherlands Antilles and Aruba in which a complaint was raised that the period of time which had elapsed between the date on which the Joint Court of Appeal had handed down its judgment and the first examination of the appeal in cassation constituted a delay contrary to the reasonable time requirement under Article 6 of the Convention, the Supreme Court noted that the appeal in cassation had been filed on 8 January 1996, that the pertaining case-file had been received by the Registry of the Supreme Court on 18 September 1996 and that the appeal in cassation had been examined for the first time on 14 January 1997.

The Supreme Court considered that no special circumstances had appeared which could justify the period of eight months and ten days which had elapsed between 8 January 1996 and 18 September 1996. It concluded that, therefore, the reasonable time

requirement under Article 6 of the Convention had not been met and that, on this basis, the sentence imposed on the applicant should be mitigated. The Supreme Court quashed the determination of the applicant's sentence and referred the case back to the Joint Court of Appeal of the Netherlands Antilles and Aruba for a new determination of the applicant's sentence.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention that the proceedings exceeded a reasonable time given the delays which occurred between the judgment of 8 December 1994 and the first examination of his appeal by the Joint Court of Appeal and between the judgment of 20 December 1995 and the first examination of his appeal in cassation before the Supreme Court. He argues in this respect that the reasonable time requirement in his particular case should be applied even more strict than in normal circumstances as, pending the proceedings at issue, he was detained in the Koraalspecht prison of Curaçao, where the conditions of detention have been found unacceptable in terms of both material aspects and available activities by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Report of 18 January 1996 on the visit to the Netherlands Antilles).

2. The applicant further complains under Article 6 of the Convention that the Joint Court of Appeal rejected his request to hear the witness U.H. without stating any reasons for this decision.

THE LAW

1. The applicant complains under Article 6 of the Convention that the criminal proceedings against him have exceeded a reasonable time in that there were two unacceptable delays.

Article 6 of the Convention, insofar as relevant, provides:

"1. In the determination of ...any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ...."

The Commission finds that it cannot, on the basis of the file, determine the admissibility of this complaint at this stage and considers that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Commission's Rules of Procedure, to give notice of this part of the application to the respondent Government.

2. The applicant further complains under Article 6 of the Convention that the Joint Court of Appeal rejected his request to hear the witness U.H. without stating any reasons for this decision.

Article 6 of the Convention, insofar as relevant, reads:

"1. In the determination of ...any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ...

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 Commission recalls that, depending on the specific circumstances, the absence of reasons in a court decision might raise an issue as to the fairness of the procedure, in particular where there is the possibility of an appeal on the merits of the case (cf. Eur. Court HR, Hadjianastassiou v. Greece judgment of 16 December 1992, Series A no. 252, p. 16, para. 33; and No. 20664/92, Dec. 29.6.94, D.R. 78, p. 97).

The Commission further recalls that as a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of the evidence which a defendant seeks to adduce. Furthermore, Article 6 para. 3 (d) of the Convention does not guarantee an unlimited right for an accused to have witnesses called. As a general rule it is for the national courts to assess whether it is appropriate to call witnesses (cf. No. 25062/94, Dec. 18.10.95, D.R. 83, p. 77).

The Commission observes that the Joint Court of Appeal acceded to the request of the defence to hear a number of witnesses, including U.H. who, despite several summonses to appear and even an order that he be forcibly brought, failed to appear before this court.

The Commission further observes that the purpose of hearing this witness was to obtain evidence as regards the applicant's alibi and that, on this particular subject, three other witnesses had already given evidence before the Joint Court of Appeal. In these circumstances, the Commission cannot find that the decision not to hear this witness can be regarded as unreasonable or arbitrary or that it deprived the applicant of a fair trial within the meaning of Article 6 of the Convention.

As to the question whether or not the fact that the Joint Court of Appeal failed to state explicit reasons for its decision not to take evidence from U.H. rendered the proceedings against the applicant unfair for the purposes of Article 6 of the Convention, the Commission is of the opinion that, in the circumstances of the present case, it must have been clear to the applicant why the Joint Court of Appeal considered that further attempts to obtain evidence from this witness were pointless. Moreover, it does not appear from the case-file that the applicant sought any clarification from the Joint Court

of Appeal as to its reasons for the decision at issue when he was informed of this decision at the hearing of 29 November 1995.

The Commission is, therefore, of the opinion that the fact that the Joint Court of Appeal did not state any explicit reasons for its decision not to take evidence from U.H. did not, in the circumstances of the present case, deprive the applicant of a fair hearing within the meaning of Article 6 of the Convention.

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaint that the criminal proceedings against him have exceeded a reasonable time;

and, unanimously,
DECLARES INADMISSIBLE the remainder of the application.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber