AS TO THE ADMISSIBILITY OF

Application No. 23229/94
by H. H.
against the Netherlands

The European Commission of Human Rights sitting in private on 27 February 1995, the following members being present:

MM. C. A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
E. KONSTANTINOV
G. RESS

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 3 November 1993 by H. H. against the Netherlands and registered on 10 January 1994 under file No. 23229/94;

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 Dutch citizen, born in 1945, residing in Blaricum, the Netherlands. Before the Commission he is represented by Mr. J.B. Boone, a lawyer practising in Wijk bij Duurstede, the Netherlands.

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

On 5 December 1983, the applicant was arrested and subsequently detained on remand on suspicion of tax fraud and forgery. He was released on 9 December 1983.

Also on 5 December 1983, Mr. A., a lawyer and the applicant's financial adviser, was arrested on suspicion of having been an accessory or accomplice to forgery, or having procured the commission of forgery, and on suspicion of having been an accessory to tax fraud. On the same day, Mr. A.'s office was searched and documents that later proved to incriminate the applicant were confiscated.

In addition to the applicant and Mr. A., there were six other suspects, one of whom was a company with limited liability.

On 9 December 1983, the investigating judge (rechter-commissaris) of the Regional Court (Arrondissementsrechtbank) of Amsterdam, at the request of the public prosecutor (officier van justitie), opened a preliminary judicial investigation (gerechtelijk vooronderzoek) to investigate the suspicions against the applicant.

On 21 March 1984, the investigating authorities sent a request for international legal assistance (rechtshulpverzoek) to the competent British authorities, requesting, inter alia, the examination of witnesses and information about a number of companies. On 13 March 1985, the British authorities informed the Dutch authorities that they had been unable to carry out the request.

On 10 July 1984, a request for international legal assistance was sent to the competent authorities in Luxembourg, requesting the examination of witnesses and information about certain bank accounts. On 29 April 1985, the request was refused by the Luxembourg authorities.

On 11 December 1984, the applicant filed a request under Section 180 of the Code of Criminal Procedure (Wetboek van Strafvordering) with the Regional Court of Amsterdam, asking the court to order the acceleration of the investigation.

On 24 April 1985, the preliminary judicial investigation was closed. The applicant was notified of the closure on 17 May 1985.

On 19 June 1985, the applicant was summoned to appear before the Regional Court of Amsterdam on 5 September 1985 on five charges of tax fraud and forgery. The offences the applicant was charged with had allegedly been committed between February 1977 and September 1983.

On 20 June 1985, the applicant lodged an objection (bezwaarschrift) to the summons with the Regional Court of Amsterdam. As a consequence of this, the commencement of the examination of the case itself had to be postponed until after a final decision on the objection had been taken.

The Regional Court examined the objection at a hearing on 17 September 1985. It rejected the objection on 21 October 1985.

The applicant filed an appeal against the decision of 21 October 1985 with the Court of Appeal (Gerechtshof) of Amsterdam. On 18 April 1986, the Court of Appeal quashed the Regional Court's decision, finding that documents had been added to the applicant's case-file after the preliminary judicial investigation had been closed. The Court of Appeal referred the case to the investigating judge at the Regional Court of Amsterdam, and ordered that witnesses be heard and that the Regional Court of Amsterdam take a new decision on the applicant's objection to the summons lodged on 20 June 1985 after the examination of the witnesses.

In December 1986, the public prosecutor decided not to pursue the charges (sepot) against Mr. A. and the other six suspects in view of the perceived impossibility of concluding the criminal proceedings

against these suspects within a reasonable time within the meaning of Article 6 of the Convention. Their cases were dealt with by the tax authorities. The charges against the applicant, however, were not relinquished.

In January 1987, the investigating judge summoned the witnesses whose examination had been requested by the applicant. The applicant and his lawyer were invited to attend the hearings but did not appear, nor did they send the investigating judge questions in writing to be put to the witnesses. On 7 December 1989, the applicant stated before the Regional Court of Amsterdam that he and his lawyer had not attended the hearings because they had assumed that the charges brought against the applicant would be relinquished as well.

On 23 April 1987, the Regional Court of Amsterdam was due to re-examine the objection to the summons which was lodged by the applicant on 20 June 1985. At the applicant's request the hearing was adjourned.

On 11 November 1987, the applicant's objection to the summons was once again due to be re-examined by the Regional Court. This hearing was adjourned at the request of the public prosecutor.

On 8 January 1988, the Regional Court re-examined the applicant's objection to the summons. On 19 January 1988, it rejected the objection.

The applicant's appeal against the decision of 19 January 1988 was rejected by the Court of Appeal on 29 June 1988. The applicant's subsequent appeal in cassation against the decision of the Court of Appeal was rejected on 6 June 1989 by the Supreme Court (Hoge Raad).

After the Supreme Court had given its decision on the objection to the summons lodged by the applicant on 20 June 1985, the criminal case itself could be dealt with by the Regional Court of Amsterdam.

The applicant was summoned to appear before the Regional Court of Amsterdam on 26 October 1989. The court commenced its examination of the case but, at the request of the applicant, whose lawyer had to leave the court session on account of obligations elsewhere, and the public prosecutor, who wished to summon witnesses, namely Mr. A. and a certain Mr. B., and to add documents to the case-file, the examination was adjourned until 7 December 1989.

On 7 December 1989, the Regional Court resumed its examination of the case. Mr. B. was examined by the court as a witness. Mr. A. had not appeared. The Regional Court subsequently ordered that Mr. A. be brought before the court by force (bevel medebrenging) on that same day. However, Mr. A. could not be found. The applicant stated that he did not think it necessary that the court examine Mr. A. as a witness. However, upon request of the public prosecutor, who insisted that Mr. A. be examined by the court, the Regional Court adjourned the examination until 15 January 1990, ordering that Mr. A. be brought before the court by force.

On 15 January 1990, Mr. A. did not appear. The Regional Court heard the statement of one of the police officers who had been ordered to bring Mr. A. before the court. The court examined another witness. The applicant stated that he did not wish to have Mr. A. examined as a witness (afzien van het horen van de getuige). The Regional Court rejected the public prosecutor's request for another adjournment, which request was made in order to hear Mr. A. at a later date.

In his final address to the court, the public prosecutor stated, inter alia, that in his view the applicant had objected to the summons because he intended to delay the proceedings. He submitted that the applicant and his lawyer had not attended the hearings before the investigating judge and that the referral of the case by the Court of

Appeal to the investigating judge, in order to have the latter examine witnesses at the request of the defence, had proved useless.

On 29 January 1990, the Regional Court acquitted the applicant of two charges, convicted him of the remaining three, and sentenced him to nine months' imprisonment, suspended pending a probation period of two years, and a fine of 750,000 Dutch guilders.

Both the applicant and the public prosecutor lodged an appeal against the judgment with the Court of Appeal of Amsterdam.

The Court of Appeal started its examination of the case on 17 June 1991. The applicant was represented by another lawyer. The Court of Appeal adjourned its examination of the case until 5 September 1991 as Mr. A., who had been summoned as a witness, had not appeared, and as the applicant insisted that Mr. A. be heard. The Court of Appeal ordered that Mr. A. be brought before it by force.

On 5 September 1991, the Court of Appeal resumed its examination of the case. At the applicant's request it examined four witnesses. Mr. A. had not appeared. Because the applicant insisted that Mr. A. be heard, the court, noting the central role Mr. A. had played in the whole affair, adjourned its examination until 18 November 1991, ordering that Mr. A. be brought before the court by force. The Court of Appeal stated that should Mr. A. not be present on 18 November 1991, it would not further adjourn its proceedings.

On 18 November 1991, Mr. A. was, again, not present. In his pleadings, the applicant requested the Court of Appeal to declare the prosecution inadmissible because the criminal charges against him had not been determined within a reasonable time. He argued that the search of Mr. A.'s office had been unlawful because it disregarded A.'s right to professional secrecy, which he enjoyed as the applicant's lawyer. Consequently, he reasoned, the evidence found during the search was obtained in an unlawful manner and could not be used against him.

On 2 December 1991, the Court of Appeal quashed the Regional Court's judgment. It acquitted the applicant of two charges, convicted him of the remaining three (the same of which the Regional Court had convicted the applicant), and sentenced him to nine months' imprisonment, suspended pending a probation period of two years, and a fine of half a million Dutch guilders.

The Court of Appeal used in evidence, inter alia, statements of the applicant and his wife, documents such as tax returns (belastingaangiften) and agreements to which the applicant was a party, as well as statements made by a number of witnesses before the police. The Court of Appeal used Mr. A.'s statements in evidence for only one of the three charges of which it convicted the applicant. Mr. A. had made these statements before the police.

The Court of Appeal rejected the applicant's argument that the search of Mr. A.'s office had been unlawful holding, inter alia, that it had not become apparent that Mr. A. was the applicant's lawyer. As to the reasonable time, the court stated, inter alia, the following:

<translation>

> "When evaluating the argument that the trial did not take place within a reasonable time within the meaning of Article 6 of the Convention, the court emphasises that it concerns a complex criminal case, in which (initially) several suspects were involved, that [the] accused denies the charges against him, and that investigation of the accusations in the Netherlands and abroad proved to be necessary, and several (attempts to effect the execution of) requests for international legal assistance were made. The court also takes into account that [the] accused, after

the completion of the preliminary investigation in 1985, repeatedly had recourse to legal remedies...which led to the delay of the adjudication, while the examination of the case was repeatedly adjourned at the request of and in the interest of the defence, on account of the non-appearance of witnesses and the procedural attitude of the defence towards this. That does not, however, change the fact that undesirably long delays occurred a number of times, especially in the period in which the objection which was lodged to the summons in first instance was dealt with. The trial, measured by its total duration and by the periods between the various stages of the trial, took place within a reasonable time within the meaning of Article 6 of the Convention. When determining the sentence, the court will take into account the circumstances that during the trial undesirably long delays did occur and that a long period of time has elapsed since the alleged offences occurred."

As regards the sentence to be imposed, the Court of Appeal held, inter alia:

<translation>
"The accused repeatedly and on a large scale withheld money from society.... In this way, the accused aggrieved the community in a serious way. Apparently, the accused let himself be guided by the objective of financial gain at the expense of the community. Under these circumstances, the imposition of a penalty which deprives [him of his] freedom, in combination with a substantial fine, is in every way justified. In view of the facts that in the meantime a very long time has elapsed since the commission of the offences at issue, that it has become plausible that [the] accused has suffered psychological detriment because of the legal proceedings in question and the accompanying publicity, and that [the] accused has not previously been convicted of a criminal offence, the court finds it appropriate to decide that the imprisonment to be imposed shall be suspended."

On 10 December 1991, the applicant filed an appeal in cassation with the Supreme Court. He complained that the Court of Appeal had not examined Mr. A. He further complained of the length of the criminal proceedings against him and argued that the prosecution should have been declared inadmissible by the Court of Appeal for this reason.

The Supreme Court was scheduled to hear the case on 22 December 1992, but at the request of the applicant, the case was adjourned to 2 February 1993.

On 20 April 1993, the Advocate General (Advocaat-Generaal) at the Supreme Court submitted his written conclusions. The Advocate General stated, inter alia:

<translation>
"This case concerns extensive tax fraud, for which the Court of Appeal of Amsterdam, in addition to a fine of 500,000 Dutch guilders, would have imposed a non-suspended prison sentence, if the trial had not taken an undesirably long time. The court now imposed, in addition to the fine, a suspended prison sentence of nine months....
The court rejected the reasonable-time argument on sufficient grounds.... The court explained how a number of delays came about. Moreover, it considered in particular the period of time in which the objection to the summons was dealt with as unreasonably long and subsequently took the excessive length of the proceedings into account in the determination of the penalty."

The Advocate General's written conclusions were sent to the applicant's lawyer, who replied to them on 10 May 1993.

On 1 June 1993, the Supreme Court rejected the applicant's appeal in cassation. It upheld the reasoning of the Court of Appeal. The Supreme Court added:

<translation>
> "Even if the period of time between the lodging of the appeal in cassation and its examination during a session of the Supreme Court is taken into account, it cannot be said that the trial of this case has not taken place within a reasonable time within the meaning of...Article 6 of the Convention...."

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention that he was convicted on the basis of unlawfully obtained evidence. He alleges that a substantial part of the evidence used against him was seized during a search of the office of Mr. A., who, at that time, was his lawyer. The search of Mr. A.'s office was unlawful because it disregarded Mr. A.'s right to professional secrecy which he enjoyed as the applicant's lawyer.

2. The applicant further complains under Article 6 paras. 1 and 3 (d) of the Convention that he did not have a fair trial because he was convicted on the basis of statements of Mr. A., who played a crucial role in the whole affair, despite the fact that neither he nor his lawyer had the opportunity to examine Mr. A. directly.

3. The applicant finally complains under Article 6 para. 1 of the Convention that the criminal charges against him were not determined within a reasonable time. He submits that the criminal proceedings lasted 114 months. Sixteen and a half months were attributable to the complexity of the case (the preliminary judicial investigation). A delay of ten months was attributable to him (the period from 23 April 1987 to 8 January 1988, and the period from 22 December 1992 to 2 February 1993). A delay of seven and a half months was caused by the non-appearance of witnesses (the period from 26 October 1989 to 15 January 1990, and the period from 17 June to 18 November 1991). The remaining 80 months were attributable to the judicial authorities.

THE LAW

1. The applicant has raised several complaints under Article 6 (Art. 6) of the Convention. This article, insofar as relevant, reads as follows:

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

2. As regards the applicant's first complaint that the criminal proceedings against him were unfair because his conviction was based on, inter alia, evidence that had been obtained unlawfully, the Commission notes that the applicant has failed to raise this complaint

either in form or in substance in the proceedings before the Supreme Court. The applicant has not, therefore, in accordance with Article 26 (Art. 26) of the Convention, complied with the condition as to the exhaustion of domestic remedies.

It follows that this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant further complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention that he did not have a fair trial because he was convicted on the basis of declarations of Mr. A., despite the fact that neither he nor his lawyer had the opportunity to examine Mr. A. directly.

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

The Commission recalls that the admissibility of evidence is primarily governed by the rules of domestic law, and that, as a rule, it is for the national courts to assess the evidence before them. The task of the Convention organs is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (cf. Asch judgment, ibid., p. 10 para. 26; and Eur. Court H.R., Edwards judgment of 16 December 1992, Series A no. 247-B, pp. 34-35 para. 34).

All evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6-3-d, 6-1) of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings (Eur. Court H.R., Saïdi judgment of 20 September 1993, Series A no. 261-C, p. 56 para. 43).

As to the notion of witness, the Commission recalls that, although Mr. A. did not testify at a court hearing, he should, for the purposes of Article 6 para. 3 (d) (Art. 6-3-d) of the Convention, be regarded as a witness - a term to be given its autonomous interpretation - because his statements, as taken down by the police, were used in evidence by the domestic courts (Asch judgment, ibid., p. 10 para. 25).

The Commission further recalls that Article 6 (Art. 6) does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (cf. No. 8231/78, Dec. 6.3.82, D.R. 28 p. 5, and Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31 para. 89).

The Commission notes that the applicant's conviction was based on, inter alia, Mr. A.'s statements before the police. The applicant and his lawyer had no opportunity to examine A. directly.

The Commission observes that both the Regional Court and the Court of Appeal adjourned the trial a number of times and made several attempts to find Mr. A. in order to hear him as a witness. They summoned him and on several occasions ordered that he be brought before the court by force. However, all these attempts were to no avail. The Regional Court even examined a police officer who had been assigned the duty to bring Mr. A. before the court.

It would have been preferable if Mr. A. could have testified in court. However, the judicial authorities were not negligent in their efforts to bring Mr. A. before the courts. In view of the numerous unsuccessful efforts to bring Mr. A. before the courts, his failure to appear did not make it necessary to halt the prosecution (cf. Eur. Court H.R., Artner judgment of 28 August 1992, Series A no. 242-A, p. 10 para. 21).

Since it was impossible to secure Mr. A.'s attendance at the court hearings, it was open to the national courts, subject to the rights of the defence being respected, to have regard to Mr. A.'s statements before the police (Artner judgment, ibid., p. 10 para. 22).

The Commission observes that the applicant's conviction did not rest solely on Mr. A.'s statements. In fact, the Court of Appeal used Mr. A.'s statements in evidence for only one of the three charges for which it convicted the applicant. As regards that charge the Court of Appeal also used in evidence statements of a number of witnesses to the police, various documents and statements of the applicant himself and his wife.

The Commission further notes that in the proceedings before the Regional Court, it was the applicant himself who stated that he did not find it necessary that Mr. A. be examined as a witness.

Under these circumstances, the Commission finds that the fact that the applicant and his lawyer did not have an opportunity to examine Mr. A. directly did not affect the rights of the defence in breach of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

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

4. The applicant's last complaint is that the criminal charges against him were not determined within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention.

The proceedings at issue started on 5 December 1983, when the applicant was arrested, and ended on 1 June 1993, when the Supreme Court gave its judgment. The total length of the proceedings was thus nine years, five months and twenty-five days.

The Commission finds that it cannot, on the basis of the file, determine the admissibility of the applicant's last 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 complaint to the respondent Government.

For these reasons, the Commission, by a majority

DECIDES TO ADJOURN the examination of the applicant's complaint concerning the length of the criminal proceedings against him;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C. A. NØRGAARD)