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 13 May 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
G. JÖRUNDSSON
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
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

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

- the Commission's decision of 27 February 1995 to declare the application partly inadmissible and to communicate it as regards the applicant's complaint under Article 6 para. 1 of the Convention that the criminal charges against him were not determined within a reasonable time;

- the observations submitted by the respondent Government on 28 April 1995 and the observations in reply submitted by the applicant on 5 July 1995;

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 was initially represented by Mr. J.B. Boone, a lawyer practising in Wijk bij Duurstede, the Netherlands, who was succeeded by Mr. J. Italianer, a lawyer practising in Amsterdam.

The facts of the case, as submitted by the parties, 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 in regard to 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) against the indictment 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 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 against the indictment 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 further 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 against the indictment which had been 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 against the indictment 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 against the indictment. 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 following a hearing on 22 April 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 against the indictment 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 indictment 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 to be replaced by six months' imprisonment in case of non-payment. When it imposed its sentence, the Court took into account inter alia that the long period of time which had elapsed between the applicant's arrest and the Court's decision could not solely be attributed to the applicant.

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.

On 2 December 1991, the Court of Appeal quashed the Regional Court's judgment, acquitted the applicant of two charges and convicted him of the remaining three (the same as those of which the Regional Court had convicted the applicant).

The Court of Appeal found that some undesirably long periods of delay had occurred at the stage of the examination of the objection against the indictment. It held, however, that the criminal charges against the applicant had been determined within a reasonable time. The Court stated that it would take into account the duration of the proceedings in the determination of the sentence.

When it imposed its sentence on the applicant, 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."

The applicant was sentenced to nine months' imprisonment, suspended pending a probation period of two years, and a fine of half a million Dutch guilders to be replaced by six months' imprisonment in case of non-payment.

On 10 December 1991, the applicant filed an appeal in cassation with the Supreme Court. He complained, inter alia, 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 against the indictment was dealt with to have been undesirably 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

The applicant complains under Article 6 para. 1 of the Convention that the criminal charges against him, which were subject to proceedings lasting for nine years and almost six months, were not determined within a reasonable time. He submits that, apparently as a result of the complexity of the case, the preliminary judicial investigation lasted for one year and four and a half months (from 9 December 1983 to 24 April 1985). The applicant furthermore admits that 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 six years and eight months were attributable to the judicial authorities. In this respect, the applicant refers in particular to the following delays:

- nine months elapsed between the decision of the Amsterdam Court of Appeal of 18 April 1986 that witnesses were to be heard and the summoning of these witnesses by the investigating judge in January 1987;
- almost twelve months elapsed between the decision of the Amsterdam Court of Appeal of 29 June 1988 and the decision of the Supreme Court of 6 June 1989;
- between the judgment of the Amsterdam Regional Court of 29 January 1990 and the first appeal hearing before the Amsterdam Court of Appeal on 17 June 1991 a period of seventeen months elapsed;
- a period of over seventeen months elapsed between the filing of the appeal in cassation on 10 December 1991 and the judgment of the Supreme Court on 1 June 1993.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 November 1993 and registered on 10 January 1994.

The Commission decided on 27 February 1995 to bring the application to the notice of the respondent Government and to invite them to submit written observations on the applicant's complaint that the criminal charges against the applicant were not determined within a reasonable time. The Commission declared the remainder of the applicant's complaints inadmissible.

The Government's written observations were submitted on 28 April 1995. The applicant replied on 5 July 1995, after an extension of the time-limit fixed for that purpose.

THE LAW

The applicant complains of the length of the criminal proceedings against him. He invokes Article 6 para. 1 (Art. 6-1) of the Convention, which provides, insofar as relevant:

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

1. The respondent Government argue in the first place that the applicant can no longer be regarded as a victim within the meaning of Article 25 (Art. 25) of the Convention in view of the reduction of the sentence imposed on the applicant by the Court of Appeal in connection with the undesirably protracted length of the criminal proceedings. In the opinion of the Government, this considerable reduction constituted a substantial redress for any damage the applicant suffered as a result

of the length of the proceedings.

The applicant refutes this argument, arguing that it appears from the judgment of the Court of Appeal that the length of the proceedings only played a role in the reduction of the term of imprisonment and not in the reduction of the monetary fine. He furthermore submits that the Court of Appeal failed to explain the relative weight attached to each of the three factors (the lapse of time, the psychological damage and the lack of previous convictions) which led it to impose only a suspended term of imprisonment. The applicant also points out that no redress was given for the period of over seventeen months which elapsed between the filing of the appeal in cassation and the date of the Supreme Court's judgment.

The Commission recalls that an applicant can no longer claim to be a victim of the failure to observe the "reasonable time" requirement in Article 6 para. 1 (Art. 6-1) of the Convention if his sentence has been reduced in an express and measurable manner after a judicial finding concerning the undue length of the proceedings (cf. No. 17661/91, Dec. 31.3.93, D.R. 74 p. 156).

The Commission notes, however, that the Court of Appeal in the present case expressly denied a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the applicant's complaint of the length of the proceedings. The Supreme Court endorsed this view. Consequently, there is no acknowledgement, either expressly or in substance, of a violation of the Convention and in these circumstances the Commission finds it unnecessary to examine whether the sentence imposed by the Court of Appeal may be considered as constituting full redress (cf. No. 21961/93, Dec. 28.2.96, unpublished).

Moreover, in respect of the time which had elapsed following the lodging of the appeal in cassation the Supreme Court found that even if this period of time was taken into account the proceedings had still not exceeded a reasonable time.

Accordingly, the applicant can still claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention of a breach of Article 6 para. 1 (Art. 6-1) of the Convention.

2. As regards the substance of the applicant's complaint, the Government observe that the case involved a very large and complex criminal investigation into tax fraud and forgery. This investigation related, amongst other things, to income tax and company tax returns for five separate years. Requests for assistance also had to be made in the course of the investigation to the authorities of the United Kingdom and Luxembourg. The investigation moreover focused on a number of suspects and involved the questioning of numerous witnesses and experts.

The Government further submit that the position adopted by the defence significantly contributed to the length of the proceedings. To begin with, the proceedings in the criminal case itself were considerably delayed as a result of the objection lodged by the applicant against the indictment. The Government also wish to stress that the applicant slowed down the proceedings on a number of occasions by requesting adjournments.

The applicant disputes that the case was as complex as argued by the Government. In this respect he submits that the facts at issue overlapped each other to a large extent. In his opinion, the Dutch authorities must have been aware that no judicial assistance would be forthcoming from the Luxembourg authorities as the case concerned fiscal offences or ordinary offences with a fiscal background. This prior knowledge of the Dutch authorities is borne out by the fact that the preliminary judicial investigation had already been closed before the decision of the Luxembourg authorities to refuse the request for

judicial assistance.

As regards the position adopted by the applicant or his counsel, the applicant submits that an accused can never be reproached for having made use of the legal remedies available to him, such as the lodging of an objection against the indictment. Moreover, in his view the delays which occurred at this stage of the proceedings were not the result of the recourse to this remedy but rather of the unacceptably long periods which elapsed between the various phases in the processing thereof. Finally, the applicant submits that any requests for adjournments made on his behalf are offset against numerous attempts to expedite the proceedings which were made by his counsel during the various hearings and in writing on 11 December 1984.

After an examination of the complaint in the light of the parties' submissions, the Commission considers that it raises issues of fact and law requiring an examination of the merits. The application cannot, therefore, be declared 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.

For these reasons, the Commission, by a majority,

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

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)