AS TO THE ADMISSIBILITY OF

Application No. 21207/93
by K.D.
against the Netherlands

The European Commission of Human Rights sitting in private on 30 November 1994, the following members being present:

Present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, 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 3 December 1992 by K.D. against the Netherlands and registered on 20 January 1993 under file No. 21207/93;

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

1. The particular circumstances of the case

The applicant is a Dutch citizen, born in 1952, residing in Venlo, the Netherlands. Before the Commission he is represented by Mr. H.H.M. van Dijk, a lawyer practising in Oss, the Netherlands.

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

On 25 January 1988, the applicant was arrested and subsequently detained on remand for suspicion of drug offences. He was released on 7 April 1988.

At the time of his arrest, the applicant worked as a probation officer with the Health Centre for Alcohol and Drug Abuse (Consultatie-bureau voor Alcohol en Drugs) in Venlo. During the preliminary judicial investigation (gerechtelijk vooronderzoek), the investigating judge (rechter-commissaris) authorised the tapping of the applicant's home telephone. Information obtained in this way had resulted in the applicant's arrest.

On 3 March 1989, the Regional Court (Arrondissementsrechtbank) of Roermond convicted the applicant of four drug offences and sentenced

him to one year and six months' imprisonment and confiscation of a number of bank accounts.

On 11 December 1990, the Court of Appeal (Gerechtshof) of 's-Hertogenbosch quashed the Regional Court's judgment on technical grounds, convicted the applicant of four drug offences, and sentenced him to one year and six months' imprisonment and a fine of 100.000 Dutch guilders.

In the proceedings before the Court of Appeal, the applicant alleged that the evidence against him had been obtained unlawfully. Referring to a judgment of the Dutch Supreme Court (Hoge Raad) of 10 April 1979, he argued that the tapping of his home telephone was unlawful because it disregarded his professional obligation to secrecy and his privilege of non-disclosure. The Court of Appeal rejected the argument, considering that it was the applicant's home telephone that had been tapped whilst it had not been demonstrated that the applicant used his home telephone in the exercise of his profession.

The applicant lodged an appeal in cassation with the Supreme Court. On 28 April 1992, the Advocate General (Advocaat-Generaal) at the Supreme Court submitted his written conclusions (conclusie), which were sent to the applicant's lawyer. On 22 May 1992, the applicant's lawyer responded to the written conclusions. On 9 June 1992, the Supreme Court rejected the appeal in cassation.

In paragraph 2.2 of its judgment, the Supreme Court stated that it had examined the response from the applicant's lawyer, dated 22 May 1992.

As to the tapping of the applicant's home telephone, the Supreme Court held that the decision of the Court of Appeal was correct. The Supreme Court added, as obiter dictum:

<Dutch>

> "Voor zover aan het middel voorts ten grondslag ligt de stelling, dat de rechter-commissaris onder geen enkele omstandigheid bevoegd is om te bepalen dat telefoongesprekken worden afgeluisterd welke worden gevoerd met of vanuit enige telefoonaansluiting staande op naam van een reclasserings-ambtenaar zonder dat deze daartoe toestemming heeft gegeven, faalt het, aangezien die stelling geen steun vindt in het recht."

<translation>

> "Insofar as the plea is also based on the argument that the investigating judge is under no circumstances entitled to authorise the tapping of telephone conversations that are made to or from a telephone that is registered in the name of a probation officer, without the latter having given permission for the tapping, it fails, as it has no legal basis."

2. Relevant domestic law and practice

Telephone tapping is regulated by Sections 125 f-h of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering). Telephone tapping may only be utilised for investigation of offences for which detention on remand (voorlopige hechtenis) may be imposed, i.e. offences of a certain gravity. Only telephone conversations the suspect is likely to participate in may be monitored, and the tapping may only be ordered when the investigation urgently requires it. The tapping must be authorised by the investigating judge. A written record of the telephone conversations that are tapped must be prepared within 48 hours. Records without relevance must be destroyed as soon as possible by order of the investigating judge.

The Code of Criminal Procedure does not limit the tapping of telephones to a certain period. However, the "Guidelines regarding

Interception of Telephone Conversations", dated 2 July 1984, indicate that a request for authorisation for telephone tapping shall concern a period of not more than four weeks. A request for prolongation shall also concern a period not exceeding four weeks. The guidelines are public and have been published.

Section 125h para. 2 requires the destruction of procès-verbaux insofar as they concern statements made by or to a person who, on the basis of Section 218, enjoys the privilege of non-disclosure.

Section 218 of the Code of Criminal Procedure states that those who have a professional obligation to secrecy, have the privilege of non-disclosure concerning matters confided to them in a professional capacity. In a decision of 20 June 1968, the Supreme Court recognised the (limited) right of non-disclosure of probation officers.

In a judgment of 10 April 1979 (Nederlandse Jurisprudentie 1979, nr. 374), the Supreme Court ruled that Section 125g of the Code of Criminal Procedure does not allow the investigating judge to authorise the tapping of telephone conversations made to or from a telephone used by a lawyer, who himself is not suspected, in the exercise of his profession.

In judgments of 17 May 1988 (Nederlandse Jurisprudentie 1989, nr. 439) and 9 June 1992 (Nederlandse Jurisprudentie 1992, nr. 776), the Supreme Court ruled that the tapping of telephone conversations that are made to or from a telephone of a person with a professional obligation to secrecy is allowed, when the telephone is used primarily for private calls.

In a judgment of 29 June 1993 (Nederlandse Jurisprudentie 1993, nr. 692), the Supreme Court ruled that an investigating judge may order the tapping of a lawyer's professional telephone if the lawyer himself is a suspect.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention that the judgment of the Supreme Court does not indicate that the Supreme Court took into account or read the letter of 22 May 1992 which the applicant's lawyer sent in response to the written conclusions of the Advocate General at the Supreme Court.

2. The applicant further complains under Article 8 of the Convention that the tapping of his home telephone was not in accordance with the law, because, as he was a probation officer, tapping of his home telephone was not allowed under the relevant provisions of the Dutch Code of Criminal Procedure.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that his reply to the submissions of the Advocate General was not taken into account by the Supreme Court.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

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

The Commission notes from paragraph 2.2 of the Supreme Court's judgment of 9 June 1992 that it examined the response from the applicant's lawyer, dated 22 May 1992. The applicant's first complaint, therefore, lacks foundation and must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the

Convention.

2. The applicant further complains that the tapping of his home telephone violated his rights under Article 8 (Art. 8) of the Convention. Article 8 (Art. 8) of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that telephone communications are covered by the notion of "private life" and "correspondence" within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention (cf. Eur. Court H.R., Huvig judgment of 24 April 1990, Series A no. 176-B, p. 52, para 25; and No. 10862/84, Dec. 6.3.86, D.R. 46 pp. 136-137).

The Commission therefore finds that the tapping of the applicant's home telephone constituted an interference by a public authority with his right to respect for his private life and correspondence.

The question which thus remains to be answered is whether this interference was justified under Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission has first examined whether the tapping of the applicant's home telephone was "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission recalls in this respect that, where the Convention refers to domestic law, it is primarily the task of the national authorities to apply and interpret domestic law, and that the Convention organs have a limited jurisdiction in controlling the manner in which this is done (cf. No. 10689/83, Dec. 14.5.84, D.R. 37 p. 225). However, the phrase "in accordance with the law" does not merely refer back to domestic law, but also relates to the quality of law, requiring it to be compatible with the rule of law (cf. Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, p. 30, para. 61).

The Commission has previously examined the Dutch rules on telephone tapping as contained in, inter alia, Sections 125 f-h of the Dutch Code of Criminal Procedure, and found that these rules are sufficiently precise to be considered as "law" within the meaning of Article 8 para. 2 (Art. 8-2) (No. 18395/91, Dec. 7.12.92, unpublished; No. 20555/92, Dec. 6.4.94, unpublished; and No. 22788/93, Dec. 6.4.94, unpublished).

The Commission finds no reason to take a different view in the present case.

The Commission observes that, under Dutch law, persons enjoying the privilege of non-disclosure are not exempt from telephone tapping when their telephone is used primarily for private calls or when such persons themselves are suspected of having committed criminal offences.

The Commission notes that, in the present case, the national courts ruled that the tapping of the applicant's home telephone was lawful, considering that it had not been demonstrated that he used his home telephone in the exercise of his profession. Moreover, the Supreme Court added that the applicant's argument that a probation officer's

telephone can never be tapped, has no legal basis.

The Commission cannot find these findings unreasonable or arbitrary and finds no indication of non-observance of the relevant provisions of the Dutch Code of Criminal Procedure. Consequently, the Commission considers that the interference at issue was "in accordance with the law" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission finally observes that the applicant has not complained that the tapping of his home telephone had no legitimate aim or was not necessary in a democratic society.

Having regard to the fact that the applicant was suspected of drug offences, the Commission considers that in the present case the tapping of the applicant's home telephone was "in accordance with the law" and can reasonably be regarded as being necessary in a democratic society for the legitimate aim of the prevention of crime within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

It follows that the interference with the applicant's private life and correspondence can be regarded as justified under Article 8 para. 2 (Art. 8-2) of the Convention. This part of the application is, therefore, also 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.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)