AS TO THE ADMISSIBILITY OF

Application No. 12228/86
by Jacobus KEUS
against the Netherlands

The European Commission of Human Rights sitting in private on 6 July 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. H.C. KRÜGER Secretary to the Commission

Having regard to Article 25 (Art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to:

- the Commission's decision of 2 December 1986 to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits;

- the observations submitted by the respondent Government on 4 March 1987 and the observations in reply submitted by the applicant on 15 May 1987;

- the Report of April 1988 provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

The applicant is a Dutch citizen, born in 1963. In the

proceedings before the Commission he is represented by Mrs. G.E.M. Later, a lawyer practising in the Hague.

On 15 December 1981, the applicant was convicted of armed robbery and homicide and sentenced to four years' imprisonment by the Regional Court (Arrondissementsrechtbank) of the Hague. The Court further ordered that the applicant be placed at the Government's disposal subsequent to his prison sentence.

While serving his prison sentence, the applicant escaped on several occasions and, in total, spent several months outside detention. After having served two-thirds of his sentence, he was released on probation on 3 May 1984. Thereafter he was detained at the Government's disposal in a psychiatric hospital.

It appears that on 29 November 1985 the applicant ran away from the psychiatric hospital where he was being treated.

On 4 December 1985, the Public Prosecutor requested the Regional Court of the Hague that the applicant's placement at the Government's disposal be prolonged for two years. Neither the applicant nor his lawyer were informed of this request.

On 18 December 1985, the applicant's lawyer wrote to the hospital's director requesting that the applicant's money be transferred to her account. On the same day, the applicant's lawyer requested the Minister of Justice that the applicant should no longer be placed at the Government's disposal.

When the applicant contacted the psychiatric hospital by telephone on 19 January 1986, he was informed that, on 7 January 1986, his placement at the Government's disposal had been prolonged for two years by the Regional Court of the Hague.

After reporting back to the psychiatric hospital, the applicant has been detained since 22 February 1986, on the basis of that prolongation decision.

In a letter of 20 August 1986, the Deputy Minister of Justice informed the applicant's lawyer that the applicant's placement at the Government's disposal would not cease for the time being. This letter was received by the lawyer on 26 August 1986.

COMPLAINTS

The applicant complains that neither he nor his lawyer were heard by the Regional Court of the Hague when it had to decide on the prolongation of the applicant's placement at the Government's disposal. The application submits that all authorities concerned were aware that he was represented by a lawyer. The applicant alleges a violation of Article 5 para. 1 (a) alternatively para. 1 (e) (Art. 5-1-a) (Art.5-1-e), of the Convention.

The applicant further complains that neither he nor his lawyer were informed of the request for prolongation of his placement at the Government's disposal, and he alleges a violation of Article 5 para. 2 (Art. 5-2) of the Convention in this respect.

In addition, the applicant complains that he did not have the possibility of challenging the legality of his placement at the Government's disposal. The sole possibility open to him was to request the Minister of Justice to order that he be no longer placed at the Government's disposal. Such a request was made on 18 December 1985 and rejected by letter of 20 August 1986. The applicant alleges a violation of Article 5 para. 4 (Art. 5-4) of the Convention

in this respect.

Moreover, the applicant complains that since he was not informed of the proceedings concerning the prolongation of his placement at the Government's disposal, he did not have a fair trial and he alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant also claims that the proceedings concerning the prolongation of his placement at the Government's disposal were the consequence, and the continuation, of the determination of a criminal charge against him. He complains that as he was unaware of the proceedings instituted against him, he was not given the opportunity of preparing his defence, and that he could not be assisted by a lawyer. Accordingly, he alleges a violation of Article 6 para. 3 (Art. 6-3) of the Convention.

Furthermore, the applicant complains that since no appeal is possible against the decision of the Regional Court to prolong his placement at the Government's disposal it will take two years before the case can again be brought before a court, by way of a request for prolongation. The applicant submits that this constitutes a violation of Article 5 para. 4 (Art. 5-4) of the Convention, read in conjunction with Article 6 para. 1 (Art. 5-4 + Art. 6-1) of the Convention.

Finally, the applicant claims that since he has been detained in contravention of Article 5 (Art. 5) of the Convention, he is entitled to compensation under Article 5 para. 5 (Art. 5-5) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 June 1986 and registered on 20 June 1986.

On 2 December 1986 the Commission decided to invite the respondent Government, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure, to submit written observations on admissibility and merits before 6 March 1987.

The Government's observations were submitted on 4 March 1987 and the applicant's observations in reply on 15 May 1987.

On 13 March 1987 the Commission decided that the applicant be granted legal aid.

SUBMISSIONS OF THE PARTIES

A. The Government&S

1. On the facts

National legislation

Placement at the Government's disposal is based on Section 37 (b) of the Dutch Penal Code (Wetboek van Strafrecht). A period of placement lasts two years and then may be prolonged. Placement begins from the moment at which the judge's decision becomes final, but does not run while the person concerned is otherwise in detention (see para. 2 of Section 37 (b) Penal Code). A prolongation of the placement is decided upon by the original sentencing court upon an application made by the Public Prosecutor between one and two months prior to the expiration of the current period of placement. The application must be accompanied by a statement concerning the physical and mental condition of the person, as well as a signed, reasoned statement by the consulting psychiatrist concerning the

desirability of continued placement.

In accordance with the Penal Code and the instructions of the Minister of Justice (by circular of 16 April 1980), the judge must allow the person concerned an opportunity to be heard before taking a decision on the prolongation. The person may be summoned to appear before the court and the Public Prosecutor, as well as the lawyer of the person concerned, may be present at the hearing. A decision on prolongation for one or two years is to be taken within two months of the public prosecution's application. This decision is not open to appeal.

The facts of the case

To arrive at the date on which the applicant's first two-year period of placement at the Government's disposal terminated, it is necessary to take into account the following facts.

The applicant was sentenced on 15 December 1981, the sentence became final on 30 December 1981. At that moment the four-year prison term began. After having served two thirds of this sentence the applicant could be released on probation. Because he had escaped on several occasions, and the serving of a sentence is suspended while the prisoner is fugitive, the periods of time not spent in prison were added on to his sentence. This amounted to 109 days. He received a supplementary punishment of twenty-nine days. The result was that the two-thirds of his sentence terminated on 3 May 1984, when he was released on probation, by decision of the Deputy Minister of Justice of 1 May 1984.

The period of placement at the Government's disposal begins on the date the judge's decision becomes final. It is suspended only by any period of time spent in detention on remand or while serving a prison sentence. Therefore, every period of time when the applicant had escaped and his prison sentence was suspended, he is to be considered as having been at the Government's disposal. When he was released on probation on 3 May 1984 his placement at the Government's disposal automatically began. However, as his fugitive periods are also considered as placement at the Government's disposal, on 3 May 1984 he had, in fact, already been in placement for 109 days. As a result, the expiration date of his first two years of placement was not 3 May 1986, but 14 January 1986. A letter stating this was sent to the Public Prosecutors and the hospital directors concerned.

During the applicant's placement in the "Dr. H. van der Hoeven" Clinic in Utrecht, he escaped on several occasions. The last occasion was 29 November 1985. He could therefore not be reached when the Public Prosecutor made the application for prolongation on 4 December 1985. This application was accompanied by the required statements concerning the applicant's condition and the necessity of his prolonged placement. On 7 January 1986, the Regional Court of the Hague took the prolongation decision. The applicant reported back to the Clinic on 22 February 1986 and was transferred to another Clinic two days later. Beginning in July 1986 he began working towards a return to society by means of temporary leave periods.

2. Article 5 para. 4 (Art. 5-4)

In the prolongation procedure, a summons was prepared on 13 December 1985 to have the applicant appear before the judge in order to be heard. This could not be served on the applicant because he was fugitive. The applicant's lawyer only has a right to be present in court if there is a hearing.

Both the applicant and his lawyer could have known that the expiration date of the two-year period of placement was 14 January 1986 by asking the Public Prosecutor or the hospital director. The

prolongation decision was taken on 7 January 1986 by the Regional Court of the Hague, which is an independent judicial body established by law.

Between the date of this decision and that of the next prolongation decision, the only way the applicant can request to be released is by applying to the Minister of Justice. On 18 December 1985, the applicant had his lawyer make such an application. The Minister refused to deal with this request while the applicant was fugitive. After the applicant's return to the Clinic, the Minister, taking into account the advice of the director of the Clinic, informed the lawyer on 20 August 1986 that the placement at the Government's disposal would not be terminated for the time being.

That the procedure before the Minister of Justice does not satisfy the requirements of Article 5 para. 4 (Art. 5-4) of the Convention cannot be maintained, because this procedure is only supplementary, and does not replace the prolongation procedure, which takes place before an independent court, and is established by law.

The Government consider that the prolongation procedure followed in the present case satisfies the requirements of Article 5 para.4 (Art. 5-4) of the Convention because it was conducted by a court in accordance with the relevant provisions of national law. That neither the applicant nor his lawyer were heard, does not, in the given circumstances, violate any basic legal principles in such a way that this decision should not be executed.

3. Article 6 para. 1 (Art. 6-1)

The proceedings in no way affect the applicant's right to administer his property or in any other way amount to a determination of his civil rights and obligations. Therefore Article 6 para. 1 (Art. 6-1) of the Convention does not apply.

4. Article 5 para. 2 (Art. 5-2)

Without entering into the question of whether Article 5 para. 2 (Art. 5-2) of the Convention, which only speaks of persons who are arrested, applies in this case, the Government consider that under Article 5 para. 4 (Art. 5-4) of the Convention the applicant is entitled to information concerning the grounds for the prolongation request and the reasons for granting the prolongation. The applicant did receive this information.

5. Compensation under Article 5 para. 5 (Art. 5-4)

The legal regime concerning placement at the Government's disposal does not provide for compensation. If it were established that the applicant's prolongation was unlawful because in violation of Article 5 (Art. 5-4) of the Convention, the applicant could sue the State for having committed a wrongful act under Section 1401 of the Dutch Civil Code (Burgerlijk Wetboek).

B. The applicant

1. On the facts

The applicant would point out that the information concerning the expiration date of his initial two years of placement was notified only to the Public Prosecutors of Utrecht and the Hague and to the Directors of the Clinics where he had been placed. At no time was he told that the expiration date was 14 January 1986 and he was under the impression that it would be at the beginning of May 1986.

Furthermore, the applicant was never notified that an

application for prolongation had been made on 4 December 1985. He never received, neither before nor after the Regional Court decision of 7 January 1986, copies of the prolongation request or the supporting documents concerning his mental and physical condition and the consulting psychiatrist's statement on the desirability of prolongation. Several written requests by the applicant's lawyer for this information have as yet yielded no result.

2. Article 5 para. 4 (Art. 5-4)

The applicant was not aware of the expiration date of his placement. He was not informed of the letter of 22 May 1984 by which the Public Prosecutor and the Clinics were informed of this. He cannot be held responsible for not having asked one of them about the date.

The applicant escaped from the Clinic because he could not agree with the treatment he received and he could not wait for the prolongation proceedings, which he expected to take place in April or May of 1986. Therefore, he made his release request to the Minister of Justice on 18 December 1985, in accordance with Section 37 (e) of the Penal Code. Surely, the Minister could have informed him at that time that a prolongation request had been made against him on 4 December.

Furthermore, every official agency involved in this case was demonstrably aware of the identity of the applicant's lawyer. She should have been informed of the prolongation request. They had to know that although the applicant was fugitive he could be reached through her. Because the lawyer is entitled to be present during the hearing of the applicant, under Section 37 (g) para. 7 of the Penal Code, she should have been informed of the hearing date.

The applicant concludes that he was denied any opportunity to present his arguments. In fact he was denied the right to bring his case before a court which could order his release. Furthermore, the procedure contained in the Penal Code for making a release request to the Minister of Justice is in violation of Article 5 para. 4 (Art. 5-4) of the Convention, because the Minister is not an independent court, and the procedure contains no guarantees for the applicant.

3. Article 6 para. 1 (Art. 6-1)

Although the applicant did not lose the capacity to administer his property when he was placed at the Government's disposal, it appears from the file that the Director of the Clinic was not prepared to deliver a sum of 8.000 - 9.000 guilders of the applicant's money. The applicant intended to use that money to have an independent authority testify on his behalf as to the necessity of his placement at the Government's disposal.

4. Article 5 para. 2 (Art. 5-2)

The Government claims that the applicant received all the information concerning the prolongation request, the supporting statements and the prolongation decision of 7 January 1986. In fact, he has received nothing and he still does not know what the reasons were which supported the prolongation request. Only after numerous requests by his lawyer was a copy of the decision itself sent to the applicant on 26 August 1986, that is seven and a half months after the decision was taken. The decision itself refers to all the supporting documents and, therefore, the applicant cannot read the reasons for the prolongation from it.

THE LAW

1. The applicant has complained that the decision to prolong his

placement at the Government's disposal was not taken in accordance with a procedure prescribed by law because neither he nor his lawyer were heard by the Court. He alleges a violation of Article 5 para. 1 (Art. 5-1) of the Convention in this respect. The relevant parts of Article 5 para. 1 (Art. 5-1) read as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

...

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;"

The Government have stated that, as the applicant had absconded, he could not be summoned to a hearing. The Government have added that the applicant's lawyer, under Dutch law, had no independent right to be heard on the applicant's behalf, but only a subsidiary right to be present at the hearing. Consequently, the fact that the applicant and his lawyer were not heard did not make the prolongation decision unlawful under Dutch law.

2. The applicant has complained that neither he nor his lawyer were informed of the request for prolongation of his placement at the Government's disposal, or of the reasons supporting this request. He invokes Article 5 para. 2 (Art. 5-2) of the Convention, which reads as follows:

> "2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

While leaving it open whether Article 5 para. 2 (Art. 5-2) is applicable to the present case, the Government have pointed out that the applicant was entitled to information under Article 5 para. 4 (Art. 5-4) of the Convention and that he in fact received such information.

3. The applicant has also complained that he did not have the opportunity of challenging the lawfulness of his placement at the Government's disposal before a court. He only had recourse to a release request procedure before the Minister of Justice, which he alleges does not satisfy the requirements of Article 5 para. 4 (Art. 5-4) of the Convention. The provision reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government have stated that the applicant would have had a court hearing if he had not absconded and that, under Dutch law, a lawyer cannot replace the detained person at such a hearing.

4. The applicant has furthermore stated that since he was detained in contravention of Article 5 (Art. 5) of the Convention, he is entitled to compensation under Article 5 para. 5 (Art. 5-5) of the Convention which provides as follows:

> "5. Everyone who has been the victim of arrest or

detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Government have pointed out that, although the Penal Code does not provide a facility for compensation in such cases, the applicant could, if the detention was found to be contrary to Article 5 (Art.5), bring a civil suit against the State for damages under the provision on wrongful acts in Section 1401 of the Civil Code.

5. The applicant has complained that because he was not informed that the prolongation procedure was to take place, he was denied a fair hearing, in violation of Article 6 para. 1 (Art. 6-1) of the Convention, which provides, inter alia, as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Government have stated that the procedure for prolongation did not concern the determination of the applicant's civil rights and obligations or of a criminal charge. The Government therefore submitted that Article 6 (Art. 6) of the Convention was not applicable in the present case.

6. The applicant, finally, has complained that the proceedings concerning prolongation of his placement at the Government's disposal were in consequence of, and a continuation of, the determination of a criminal charge. He has alleged that as he was unaware of the proceedings he was unable to prepare his defence, with or without the assistance of a lawyer. He has submitted that he has been denied the guarantees of Article 6 para. 3 (Art. 6-3) of the Convention, which in relevant parts reads as follows:

"3. Everyone charged with a criminal offence has the following minimum rights:

.....

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require;

....."

The Government have maintained that the whole of Article 6 (Art. 6) of the Convention does not apply to this case.

7. The Commission finds that the present application raises complex issues of law and fact under the Convention the determination of which should depend on an examination of the merits of the application. No other ground for inadmissibility having been established, this application must therefore be declared admissible.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE without prejudging the merits of the case

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)