AS TO THE ADMISSIBILITY OF

Application No. 34970/97
by Willem Hendrik KLEIN POELHUIS
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 May 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
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 16 October 1995 by Willem Hendrik KLEIN POELHUIS against the Netherlands and registered on 18 February 1997 under file No. 34970/97;

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 1955, and exploits a pig farm in Haaksbergen, the Netherlands. Before the Commission he is represented by Mr R.L.H Boas, a lawyer practising in Bergen op Zoom.

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

1. Particular circumstances of the case

In the course of an inspection by officials of the General Inspection Service of the Ministry of Agriculture, Nature Conservancy and Fisheries (Algemene Inspectiedienst van het Ministerie van Landbouw, Natuurbeheer and Visserij) it was found that, contrary to the applicable rules on manure production, the applicant had increased the number of pigs on his farm in the years 1989, 1990 and 1991, which had resulted, according to the applicable calculation system on the basis of flat rates (forfaitaire normen), in an unlawful increase in manure production.

By judgment of 27 May 1993, the Magistrate for economic offences (economische politierechter) of the Regional Court (Arrondissementsrechtbank) of Almelo acquitted the applicant of offences under

the Manure Act (Meststoffenwet) for lack of evidence.

The prosecution filed an appeal with the Court of Appeal (Gerechtshof) of Arnhem. In its interlocutory judgment of 6 December 1993, the Court of Appeal held that the investigation had not been complete. It decided to hear witnesses and ordered the summoning of the applicant, a representative of the Ministry of Agriculture, Nature Conservancy and Fisheries as an expert-witness and one of the officials of the General Inspection Service of the Ministry of Agriculture, Nature Conservancy and Fisheries who had inspected the applicant's farm in order to hear them.

Hearings were held before the Court of Appeal on 22 November 1993 and 14 March 1994, in the course of which the persons summoned were heard before the Court of Appeal.

On 28 March 1994, the Court of Appeal quashed the judgment of 27 May 1993, convicted the applicant of having unlawfully increased the production of manure in 1989, 1990 and 1991 and imposed a NLG. 15.000 fine, suspending the payment of NLG. 10.000 of this fine pending a probation period of two years.

The Court of Appeal only partially accepted the argument of the defence that the number of pigs he was allowed to keep under the relevant rules had to be increased. It rejected the argument of the defence that the determination of the applicant's manure production on the basis of the statutory flat rates and not on the basis of the real production was incompatible with Article 6 para. 2 of the Convention.

The applicant's appeal in cassation was rejected by the Supreme Court (Hoge Raad) on 18 April 1995. It rejected the applicant's complaint on the use of flat rates in the calculation of manure production, as this was directly determined in the relevant statutory and secondary rules. The Supreme Court further held that the statutory flat rates constituted a material norm of conduct compatible with the requirements of Article 7 of the Convention.

2. Relevant domestic law

Pending the adoption of the Manure Act, the Dutch Parliament adopted the Interim Act on Restrictions on Pig and Poultry Farms (Interimwet Beperking varkens- en pluimveehouderijen - hereinafter referred to as the "Interim Act"). The Interim Bill had been submitted to Parliament on 2 November 1984 and the Interim Act entered into force on 10 January 1985. Parliament found it necessary to adopt an Interim Act in view of the urgent need to control the production of manure by livestock farms given its undesired environmental effects. Under the Interim Act it was prohibited, as from 3 November 1984, to increase the livestock of pig and poultry farms and thus the output of manure.

On 27 November 1986 the Dutch Parliament adopted the Manure Act replacing the Interim Act. The Manure Act entered into force on 1 January 1987. Pursuant to Articles 6 and 8 of the Manure Act, further rules in respect of the application of the Manure Act were set by Order in Council (Algemene Maatregel van Bestuur), i.e. the Manure Registration Order (Registratiebesluit Dierlijke Meststoffen) and the Rules indicating animal species and their manure production (Regeling aanwijzing diersoorten en hun mestproductie).

The Manure Act thus established certain norms on the basis of which the permitted quantity of manure produced can be determined for each individual farm. The quantity thus determined is, in practice, referred to as the "reference quantity of manure" (referentie-hoeveelheid dierlijke meststoffen). The reference quantity for a farm is determined on the basis of flat rates, which differ for each animal species, and on the basis of the situation of this farm on 31 December 1986.

Pursuant to Article 14 of the Manure Act it is prohibited to increase the production of manure, insofar as this increase would result in a situation where the total production of manure, calculated on the basis of flat rates per animal species, is or exceeds 125 kilogrammes of phosphate per hectare per year of the exploitable surface of the farm.

A violation of Section 14 of the Manure Act may result in criminal proceedings pursuant to the Act on Economic Offences (Wet op de Economische Delicten).

COMPLAINTS

The applicant complains under Article 6 of the Convention that the use of flat rates for the calculation of manure production, resulting in a situation where the determination of manure production is being reduced to a counting of pigs' tails, is contrary to the principle of presumption of innocence.

The applicant further complains that, given their complexity, the rules on manure production are incompatible with the requirements of Article 7 of the Convention.

THE LAW

1. The applicant complains that the use of flat rates for the calculation of permissible manure production is contrary to the presumption of innocence referred to in Article 6 (Art. 6) of the Convention.

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

"1. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. ..."

Insofar as the applicant can be understood as complaining that the domestic courts erred in their assessment of the evidence by failing to accept the argument of the defence that regard should be had to the actual production of manure on the farm he exploits, the Commission recalls in the first place its constant case-law that it cannot examine alleged errors of fact or law committed by national courts, unless it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (cf. No. 25062/94, Dec. 18.10.95, D.R. 83, p. 77).

Secondly, the Commission recalls that Article 6 para. 2 (Art. 6-2) of the Convention does not prohibit presumptions of fact or law in principle. Rather, it requires States to confine presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (cf. Eur. Court HR, Salabiaku v. France judgment of 7 October 1988, Series A no. 141, p. 16, para. 29; and Pham Hoang v. France judgment of 25 September 1992, Series A no. 243, p. 21, para. 33).

The Commission notes that, pursuant to the Manure Act, it is prohibited to exceed a fixed level of production of manure. The Commission further notes that the calculation of manure production per animal species has been determined in statutory and secondary legislation, according to which this calculation is to be made on the

basis of flat rates.

Having regard to the aim and purpose of the environmental legislation and the obvious technical difficulties in determining real manure production in individual cases, the Commission cannot find that the presumption at issue, i.e. the calculation of manure production based on flat rates per animal species, oversteps reasonable limits for the purposes of Article 6 para. 2 (Art. 6-2) of the Convention.

Moreover, noting that, in the proceedings against the applicant, the Court of Appeal has heard a number of witnesses and has provided the defence with ample opportunity to state its case and to submit whatever it found relevant, the Commission does not find that the applicant's defence rights under Article 6 (Art. 6) of the Convention have been infringed.

It follows that this complaint 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, given their complexity, the rules on manure production are incompatible with Article 7 (Art. 7) of the Convention.

Article 7 (Art. 7) of the Convention provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The Commission recalls that Article 7 (Art. 7) of the Convention embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty and the principle that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual concerned can reasonably foresee from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When referring to "law", Article 7 (Art. 7) of the Convention alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. The scope of the notion of foreseeability depends to a considerable degree on the content of the text at issue, the field it is designed to cover and the number and status of those to whom it is addressed.

A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (Eur. Court HR, Cantoni v. France judgment of 15 November 1996, to be published in

Reports 1996, paras. 29, 31 and 35).

The Commission notes that the applicant exploits a pig farm and that the relevant rules had been adopted already a number of years prior to the events at issue. In these circumstances and in the light of the principles set out above, the Commission is of the opinion that the detailed and explicit rules at issue were sufficiently clear to enable the applicant, if need be with appropriate advice, to foresee the possible consequences under the legislation on manure production of his choices in his professional activities.

It follows that this complaint must also be rejected as 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.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber