AS TO THE ADMISSIBILITY OF

Application No. 37331/97
by Franklin Edgar LANDVREUGD
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
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 20 May 1997 by Franklin Edgar LANDVREUGD against the Netherlands and registered on 8 August 1997 under file No. 37331/97;

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 citizen, born in 1950, and residing in Amsterdam. Before the Commission, he is represented by Mr Gerard P. Hamer, a lawyer practising in Amsterdam.

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

a. The particular circumstances of the case

On 2 December 1994 the Mayor (Burgemeester) of Amsterdam, basing himself on Articles 172 and 175 of the Municipality Act (Gemeentewet) as amended on 1 January 1994, imposed a prohibition order (verwijderingsbevel) on the applicant to the effect that the latter would not be allowed for a period of fourteen days to enter a particular area, i.e. the "Ganzenhoef" area, one of the emergency areas designated by the Mayor. The following events, which were referred to in the Mayor's decision, led to this decision.

It appeared from police reports that on 9 and 12 September, 3 October, 14 and 16 November 1994 the applicant had either overtly used hard drugs, had tools for the use of hard drugs in his possession or had hard drugs in his possession in the Ganzenhoef area and that on four of those occasions the applicant had been ordered to leave the area for eight hours.

On 16 November 1994 the applicant had been heard by the police about his conduct and he had been told that he would either have to refrain from acts which disturbed the public order (openbare orde) or have to stay away from the area. The applicant had further been informed that if he committed such acts again in the near future, the Mayor would be requested to impose a prohibition order for fourteen days on him. On that occasion the applicant did not wish to state anything as to the reasons for his presence in that area.

On 25 November 1994 the applicant had nevertheless overtly used hard drugs in the Ganzenhoef area. He had once again been ordered to leave the area for eight hours and the police had subsequently requested the Mayor to impose a prohibition order for fourteen days on the applicant.

In the opinion of the Mayor the applicant would again commit acts disturbing the public order within the near future. In this respect the Mayor took account of the kind of conduct involved, i.e. acts seriously disturbing the public order, the repetition and continuity of this conduct, the statement of the applicant, the short period of time within which the acts concerned had been observed and the fact that the applicant had continued his disruptive behaviour despite the eight hour prohibition orders imposed on him and the warning given by the police.
Finally, the Mayor noted that neither the applicant's home nor his place of work were situated in the area concerned.

On 12 December 1994 the applicant filed an objection (bezwaarschrift) against the prohibition order with the Mayor. He submitted, inter alia, that the Mayor had unjustly not taken into account that he is residing in the Ganzenhoef area, that he needs to be present there twice per week in order to collect his social security benefits and that he receives social counselling there. The applicant stated that the police knew this, but had failed to mention this in the police report on the applicant's hearing on 16 November 1994.

The applicant further submitted that the prohibition order could not be considered as having a legal basis in that the emergency powers granted to the Mayor under the Municipality Act were intended for emergency situations. According to the applicant, the legislator had never intended that structural nuisance by drug abusers should be considered as creating an emergency situation. Moreover, the applicant's absence from the Ganzenhoef area would not change that nuisance since he is only one of many drug abusers in that area. The applicant also complained that the order was contrary to Article 6 of the Convention in that it constitutes a sanction which can only be imposed by a judge. He further complained that the order restricted him in his freedom of movement and was contrary to his right to respect for his private life, family life, home and correspondence.

On 10 January 1995 a hearing took place before an advisory committee. During this hearing the representative of the Mayor stated that already on 19 April 1994 a prohibition order for fourteen days had been imposed on the applicant and that on 16 November 1994 the applicant had not wished to make any statement to the police as to the reasons for his presence in the Ganzenhoef area. Despite the previous orders, the applicant had continued his undesirable conduct and on this basis the imposition of a new prohibition order had been sought. The Mayor's representative further stated that the address where the applicant had stated that he resided and where he collects his mail and social security benefits is in fact the address of the Foundation Streetcornerwork. It is not possible to live at this address. This Foundation has a procedure under which social security benefits for persons subject to a prohibition order may be collected by an authorised third person and the applicant could avail himself of this procedure.

On 29 June 1995 the committee advised the Mayor to reject the objection and to maintain the prohibition order. It considered, inter alia, having regard to the fact that the applicant had, within a short period of time, regularly committed acts which had disrupted public order and that the prohibition orders for eight hours which had been issued had not prevented him from behaving in that manner, that the imposition of the prohibition order had not been unreasonable. It further found that the order was in conformity with Article 172 para. 3 of the Municipality Act, that therefore it was not necessary to examine the question whether or not the conditions of Article 175 of the Municipality Act had been fulfilled and that the Mayor had not exceeded his competence under the Municipality Act.

It did not agree with the applicant that the impugned measure constituted a penalty as it had been issued in order to maintain public order. The committee finally

found that the interference with the applicant's right to liberty of movement had been justified and that the prohibition order could not be regarded as disproportionate.

By decision of 6 July 1995 the Mayor rejected the applicant's objection, adopting the reasoning applied by the advisory committee. The applicant filed an appeal with the Regional Court (Arrondissementsrechtbank) of Amsterdam.

By judgment of 19 January 1996, following adversarial proceedings in the course of which a hearing was held on 8 December 1995, the Regional Court declared the applicant's appeal well-founded and quashed the prohibition order.

The Regional Court accepted that the overt use of hard drugs in public places and the presence of a concentration of drug abusers and dealers disrupt public order and acknowledged the necessity to end such nuisance in particular when this occurs continuously on specific locations in the city. The Regional Court noted that to this end the Mayor avails himself of two tools in this respect, i.e. prohibition orders of either eight hours or fourteen days. It considered the procedure established as regards the imposition of prohibition orders for a duration of fourteen days and noted that this procedure had not been fully complied with in that the applicant's prohibition order had not been sought by the competent police officer. However, as it was not established that this had harmed the applicant's interests, it did not find that this flaw should result in the quashing of the order. It did, however, find that the order should be quashed on other grounds.

The Regional Court held that, unlike the situation in which an eight hour prohibition order has been imposed, Article 172 para. 3 of the Municipality Act offers no basis for the imposition of a prohibition order for a duration of fourteen days. It held on this point that the competence established by this provision aims to create the possibility for a direct reaction to an expected disturbance of public order and may serve to prohibit a presence for a limited period of time in the area where the disturbance of public order is expected. It held that the eight hour prohibition order complies with this, but not the fourteen days prohibition order, in that the latter measure is disproportionate in relation to the expected disruption of public order and thus goes beyond what can be considered as necessary for maintaining public order.

The Regional Court added that in the present case this was even more so as the applicant has no permanent place of residence and uses the address of the Foundation Streetcornerwork as his mail address. The prohibition order implies that the applicant's freedom of movement is limited for fourteen days in a manner which prevents him from collecting his mail and from receiving his social security benefits. It rejected the argument advanced by the Mayor's representative that the police would not undertake any formal action against the applicant for acting contrary to Article 184 of the Criminal Code (Wetboek van Strafrecht), i.e. the offence of failure to comply with an official order (ambtelijk bevel), when he would collect his social security benefits at the address of the Foundation Streetcornerwork, holding that the applicant's freedom of movement could not be made dependent on the willingness of the police officer on duty to tolerate this punishable conduct.

The Regional Court further found that the situation at issue, i.e. nuisance caused by drug abuse, did not constitute a situation within the meaning of Article 175 of the Municipality Act and, consequently, held that the Mayor could not have based the prohibition order on this provision. As it had already found the prohibition order to be incompatible with national law, the Regional Court did not find it necessary to determine whether or not the order was compatible with Article 6 of the Convention.

The Mayor filed an appeal against the Regional Court's judgment with the Administrative Law Division (Afdeling Bestuursrechtspraak) of the Council of State (Raad van State) on 7 February 1996.

In its judgment of 19 December 1996, following adversarial proceedings, the Administrative Law Division quashed the Regional Court's judgment of 19 January 1996 and rejected the applicant's appeal to the Regional Court as ill-founded.

The Administrative Law Division rejected the Regional Court's finding that the Mayor was not competent to act on the basis of Article 175 of the Municipality Act. It found that the issuance of orders in situations within the meaning of Article 175 is not contrary to the right of freedom of movement within the meaning of Article 2 or Protocol No. 4 as this right may be restricted by law for the protection of public order. According to the Administrative Law Division, Article 175 of the Municipality Act attributes to the Mayor an emergency competence which is only to be used in exceptional situations. Thus a statutory provision has been made for circumstances where normal methods are insufficient for restoring and maintaining public order.

The Administrative Law Division held that in the instant case normal methods to restore and maintain public order could not be considered to have sufficed and that at the time of the impugned measure there had indeed existed an exceptional situation in that the situation in the Ganzenhoef area was characterised by the presence of a large number of drug abusers and the concomitant restrictions, nuisance, lack of safety and threat to other citizens.

The Administrative Law Division noted that, at the relevant time, there had been no relevant provision in a municipal bye-law or any other adequate legal instrument available, but that, on 26 June 1996, Article 2.6 A had been added to the general municipal bye-law (Algemene Plaatselijke Verordening) of Amsterdam, providing for a regulation for prohibition orders in relation to hard drugs. Against this background the Administrative Law Division rejected the argument that the Mayor could not have availed himself of the competence given to him by Article 175 of the Municipality Act.

The Administrative Law Division further held that no grounds had been established on the basis of which it should be held that the Mayor could not reasonably have reached his decision to impose a prohibition order for fourteen days and that the prohibition order for fourteen days should be considered as no more than a preventive

measure aimed at avoiding a continuing disturbance of public order and thus could not be regarded as a "criminal charge" within the meaning of Article 6 of the Convention.

It finally took into consideration that neither the applicant's home nor his place of work were situated in the area concerned and that he has been provided with a possibility to collect his social security benefits at the Foundation Streetcornerwork.

Apart from the proceedings described above, the applicant was arrested and placed in detention on 4 December 1994 for failure to comply with the prohibition order of 2 December 1994. On 20 December 1994, the Magistrate (Politierechter) of the Regional Court (Arrondissementsrechtbank) of Amsterdam suspended the applicant's pre-trial detention in order to allow the applicant to be admitted to the Crisis Observation and Detoxification Department of the J. clinic and adjourned the criminal proceedings against the applicant for an unspecified period of time.

By judgment of 22 May 1995, the Magistrate convicted the applicant of having failed to respect a prohibition order on two occasions and sentenced him to four months' imprisonment with deduction of the time spent in pre-trial detention. The applicant filed an appeal with the Court of Appeal (Gerechtshof) of Amsterdam.

In its judgment of 4 February 1997, the Court of Appeal quashed the judgment of 22 May 1995 and convicted the applicant of having failed to respect a prohibition order on one occasion. However, in view of other convictions of the applicant of offences against Article 184 of the Criminal Code, the Court of Appeal decided not to impose any sentence as the maximum penalty for this offence had already been attained.

The applicant's subsequent appeal in cassation with the Supreme Court (Hoge Raad) was rejected on 16 June 1998.

b. Relevant domestic law and practice

Article 272 of the Municipality Act provides as follows:

[Translation]
"1. The Mayor is responsible for maintaining public order.

2. The Mayor is empowered to prevent or to end offences against statutory provisions relating to public order. In doing so he avails himself of the police under his authority.

3. In case of disruption of public order or a well-founded fear for the development thereof, the Mayor is empowered to issue orders deemed necessary for the maintenance of public order."

Article 175 of the Municipality Act reads:

[Translation]

"1. In case of a riotous movement, of other serious disorders or of calamities, as well as in case of a well-founded fear of the development thereof, the Mayor is empowered to issue all orders which he deems necessary for the maintenance of public order or the limitation of general danger. In doing so he may deviate from rules other than those of the Constitution.

2. The Mayor shall not have recourse to measures of violence without having issued the necessary warning."

Article 184 of the Criminal Code, insofar as relevant, reads:

[Translation]

"1. Any person who intentionally fails to comply with an order or demand made in accordance with a statutory regulation by an official charged with supervisory powers or by an official responsible for the detection or investigation of criminal offences or duly authorised for this purpose, and any person who intentionally obstructs, hinders or thwarts any act carried out by such an official in the implementation of any statutory regulation, shall be liable to a term of imprisonment not exceeding three months or a second-category fine.

2. ...

3. ...

4. If the offender commits the indictable offence within two years of a previous conviction for such an offence having become final, the term of imprisonment may be increased by a third."

By letter of 4 July 1983 the Mayor of Amsterdam informed the Chief Superintendent (hoofdcommissaris) of the Amsterdam police that, in view of the situation in the city centre, the Chief Superintendent and police officers acting on the Mayor's behalf would be able to order people to leave a particular area within the city centre and not to return to it for eight hours. The Mayor considered that the designated city centre area continually attracted persons addicted to, and dealers in, hard drugs. The activities carried out by them, insofar as they related to drugs, disrupted public order, caused considerable nuisance and constituted an incessant threat to public life. For this reason the Mayor found that the situation existing in the area constituted an exceptional situation within the meaning of Section 219 of the former Municipality Act.

The Mayor extended the so-called emergency area of the city centre where these orders could be issued by letter of 25 July 1988. Subsequently, by letter of 8 March 1989, the Mayor also enabled the Chief Superintendent and his officers to order people to leave the designated city centre area for fourteen days. The instructions contained in the last letter were changed by letter of 13 November 1989 according to which prohibition orders for fourteen days could no longer be issued by the police on behalf of the Mayor but only by the Mayor himself. The Mayor made certain further adjustments to his instructions to the police by letter of 27 May 1992.

On 28 October 1993, the Mayor indicated the Ganzenhoef area in Amsterdam as one of the emergency areas where prohibition orders could be issued.

A prohibition order for fourteen days could be imposed on a person if in the preceding six months five procès-verbaux or other reports had been drawn up by the police concerning acts committed by him which had disturbed the public order such as, inter alia:

- the possession and use of addictive substances appearing in Annex 1 to the Opium Act (Opiumwet; i.e. hard drugs) on the public road;
- dealing in addictive substances appearing in Annex 1 to the Opium Act on the public road;
- overt possession of knives or other banned objects insofar as this constituted a criminal offence pursuant to the general municipal bye-law or the Arms and Ammunition Act (Wet Wapens en Munitie);
- committing the offence of Section 184 of the Criminal Code;
- acts of violence, thefts from cars on or along the public road, overt selling of stolen goods on or along the public road, insofar as there was a connection between these offences and hard drugs.

On the occasion of a fourth procès-verbal being drawn up, the person concerned would be heard by a police officer having at least the rank of sergeant about his disruptive behaviour and the reason for his continued presence in the emergency area. The police sergeant would issue a warning to the effect that if in the near future the person concerned again disrupted public order, the police would request the Mayor to impose a prohibition order for fourteen days.

In the Netherlands, a mayor of a town or city is appointed by the Queen (Article 61 of the Municipality Act). Municipal regulations, such as general municipal bye-laws, are adopted by the Municipal Council (Section 147 of the Municipality Act) which is elected by those inhabitants of the town or city who are eligible to vote in elections for the Lower House of Parliament (Article 129 of the Constitution).

COMPLAINTS

The applicant complains under Article 2 of Protocol No. 4 and Article 8 of the Convention of an unjustified interference with his rights to liberty of movement and respect for his private life in particular given that he was prohibited from finding himself in an area, where he resides, where he receives his mail, where he receives payment of his social security benefits and where he receives social assistance. He submits that this interference was not in accordance with the law since, firstly, the letters and instructions from the Mayor to the Chief Superintendent of police had not been published. Secondly, by 1994 the situation characterised by the Mayor as exceptional had become structural. As a result, the relevant Articles of the Municipality Act can no longer be considered

applicable to the situation concerned. It could similarly not be said that the imposition of prohibition orders pursued the aim of the maintenance of public order.

The applicant further submits that the prohibition order imposed on him interfered with his rights to freedom of religion and expression as guaranteed by Articles 9 and 10 of the Convention, in that the impugned measure prevented him from going to church and from participating in demonstrations in the designated area.

He finally complains under Article 6 of the Convention that the prohibition order constitutes a criminal sanction which has been imposed on him without a trial having taken place before a tribunal.

THE LAW

1. The applicant complains of an unjustified interference with his rights to freedom of movement and respect for his private life. He invokes Article 2 of Protocol No. 4 and Article 8 of the Convention which provide, insofar as relevant, as follows:

Article 2 of Protocol No. 4

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement ...

...

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

Article 8 of the Convention

"1. Everyone has the right to respect for his private ... life ...

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 applicant further complains under Article 6 of the Convention that the prohibition order was a criminal sanction which was imposed on him without any kind of trial before a tribunal having taken place.

Article 6 of the Convention, insofar as relevant, reads 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. ...

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

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

a. to be informed promptly, ... and in detail, of the nature and cause of the accusation against him;

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 interests of justice so require;

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;

..."

The Commission finds that it cannot, on the basis of the file, determine the admissibility of these complaints 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 these complaints to the respondent Government.

2. The applicant alleges that the prohibition order imposed on him infringed his rights to freedom of religion and expression as guaranteed by Articles 9 and 10 of the Convention.

The Commission reiterates that according to Article 26 of the Convention it may only deal with a complaint after all domestic remedies have been exhausted. The mere fact that an applicant has submitted his case to the competent court does not in itself constitute compliance with this rule. It is also required that the substance of any complaint made before the Commission should have been raised during the proceedings

concerned. The Commission refers to its established case-law on this matter (cf. e.g. No. 12717/87, Dec. 8.9.88, D.R. 57, p. 196).

The Commission observes that in the present case the applicant did not complain, either formally or in substance, of a breach of Articles 9 and 10 of the Convention in the domestic proceedings. Consequently, the Commission finds that the applicant has not complied with the requirement of exhaustion of domestic remedies.

It follows that this part of the application is inadmissible under Articles 26 and 27 para. 3 of the Convention.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaint of an unjustified interference with his rights to freedom of movement and respect for his private life, as well as his complaints that a criminal sanction was imposed on him without a trial having taken place before a tribunal;

and, unanimously,
DECLARES INADMISSIBLE the remainder of the application.

M.-T. SCHOEPFER Secretary to the Second Chamber	J.-C. GEUS President of the Second Chamber