AS TO THE ADMISSIBILITY OF

Application No. 17314/90
by Jakob Koos LEUTSCHER
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 1 December 1993, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
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 29 June 1990 by Jakob Koos LEUTSCHER against the Netherlands and registered on 17 October 1990 under file No. 17314/90;

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 facts of the case.

The applicant is a Dutch national, born in 1927, and resides at Alicante, Spain.

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

By letter of 14 December 1979 the Inspector of direct taxes informed the applicant that an additional income tax for 1974 and an additional capital tax for 1975 would be imposed, as it had appeared that the applicant had not or not fully declared certain earnings and capital in his tax declarations. Moreover, a 100% surcharge would be imposed.

The applicant started proceedings against both assessments. In respect of the additional income tax assessment for 1974 the Court of Appeal (Gerechtshof) of Amsterdam in its judgment of 6 January 1988 quashed the additional assessment. The additional capital tax assessment for 1975 was quashed by the Court of Appeal on 13 April 1988. The applicant's subsequent appeal to the Supreme Court (Hoge Raad) against the decision of 13 April 1988 was rejected on 14 June 1989 for lack of legal interest, as an appeal in cassation could not lead to a more advantageous decision for the applicant.

In addition criminal proceedings were brought against the applicant on several charges of tax evasion between 1974 and 1977. On

7 june 1984 the Regional Court (Arrondissementsrechtbank) of Amsterdam convicted the applicant and sentenced him in absentia to one year's imprisonment and a fine of one million Dutch guilders.

In the subsequent appeal proceedings, the Court of Appeal of Amsterdam on 13 March 1987 declared the public prosecution inadmissible as it could no longer be held that the criminal charges against the applicant would be determined within a reasonable time as required by Article 6 para. 1 of the Convention. The penal proceedings were consequently discontinued.

On 25 June 1987 the applicant submitted a compensation claim within the meaning of Sections 90, 591 and 591a of the Code of Criminal Procedure (Wetboek van Strafvordering) of 156,366.35 Dutch guilders for the counsel's fees, expenses incurred by witnesses, costs of clerical assistance and travelling and accommodation expenses he had allegedly incurred in respect of the penal proceedings.

Following a hearing by the Court of Appeal in chambers on 20 July 1988 in the presence of the applicant and his lawyer, the Court of Appeal, in its decision of 16 March 1990, awarded 1,492 guilders for the costs claimed in respect of two witnesses, 822.09 guilders for the applicant's administrative costs, and 1,802 guilders for his travel expenses. The Court of Appeal rejected the claim for the remainder.
In respect of the applicant's compensation claim of 61,400 guilders for lawyer's fees, the Court held:

<Dutch>
"Uit het procesdossier blijkt dat verzoeker betrokken was bij een aantal vennootschappen en dat deze vennootschappen onder leiding dan wel in opdracht van verzoeker zich hebben schuldig gemaakt aan een aantal fiscale delicten waardoor de Staat tot aanzienlijke bedragen is benadeeld. De rechtbank heeft onder meer ter zake van deze feiten verzoeker veroordeeld (...) De stukken betreffende het opsporingsonderzoek noch de behandeling van het verzoekschrift geven aanleiding tot twijfel aan de juistheid van deze veroordeling. Onder deze omstandigheden acht het hof, alle omstandigheden in aanmerking genomen, geen gronden van billijkheid aanwezig voor toekenning van een vergoeding ter zake van rechtsbijstand."

<Translation>
"It appears from the file that the applicant was involved in a number of companies and that these companies, under the management or orders of the applicant, have committed a number of fiscal offences as a result of which the State has been deprived of considerable sums. In respect of, inter alia, these facts the Regional Court has convicted the applicant (...) Neither the documents concerning the investigation nor the examination of the request give rise to doubt the correctness of this conviction. Under these circumstances the court considers, all circumstances taken into account, that there are no equitable grounds for awarding compensation for legal assistance."

Under Dutch law no appeal could be lodged against the Court of Appeal's decision of 16 March 1990.

In connection with the additional tax assessments the applicant requested the tax authorities by letter of 27 August 1985 to provide him with the Government Audit Department's reports and documents on his personal tax matters and those of the companies with which he was involved. He based this request on the Publicity of Public Administration Act (Wet Openbaarheid van Bestuur).

On 18 September 1985, in the absence of a reaction to this

request, the applicant filed an appeal on the basis of the Administrative Decisions Appeal Act (Wet Administratieve Rechtspraak Overheidsbeschikkingen) with the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State) against the presumed refusal (fictieve weigering) by the tax authorities to decide upon the request.

Following an invitation thereto by the President of the Judicial Division, the Minister of Finance considered the applicant's request as an objection which he rejected on 6 May 1986.

As a result of the applicant's subsequent appeal, the Judicial Division on 10 November 1986 quashed the Minister's decision of 6 May 1986 for lack of motivation.

On 11 March 1987 the Minister of Finance, in a new decision, again refused to provide the applicant with the requested information, inter alia, on the ground mentioned in Section 1 para. 2 (b) of the Publicity of Public Administration Act which, insofar as relevant, at that time read:

<Dutch>

"Een verzoek om informatie, vervat in documenten die zijn opgesteld ten behoeve van intern beraad, wordt ingewilligd behoudens voor zover het betrekking heeft op:
(...)
b. persoonlijke beleidsopvattingen van bewindslieden, bestuurders of ambtenaren. (...)."

<Translation>

"A request for information, contained in documents, which have been written for internal consultation, will be granted except when it concerns:
(...)
b. personal views on policy by members of government, administrators or civil servants. (...)."

Following the applicant's appeal, the Judicial Division on 3 February 1988 quashed the decision of 11 March 1987 insofar as the applicant's request for information concerned the company Van Engelen & Co. International B.V. and in respect of the period during which he was director of this company.

On 16 January 1990 the Minister of Finance granted the applicant's request in respect of the company Van Engelen & Co. International B.V. and in respect of the period during which the applicant was director of this company and rejected it, on the basis of, inter alia, Section 1 para. 2 (b) of the Publicity of Public Administration Act, in respect of certain parts of the documents relating to the abovementioned company and period.

Following the applicant's appeal against this decision, the Judicial Division on 7 September 1992 rejected the appeal insofar as it concerned the Government Audit Department's report and quashed the Minister's decision of 16 January 1990 in respect of certain other documents, which according to the Minister were not (anymore) available. In view of these circumstances the Judicial Division did not consider it necessary for the Minister to take a new decision.

2. The relevant domestic law.

Section 591 para. 1 of the Code of Criminal Procedure provides:

<Dutch>

"Aan de gewezen verdachte of zijn erfgenamen wordt uit 's Rijks kas een vergoeding toegekend voor de kosten, welke ingevolge het bij en krachtens de Wet tarieven in

strafzaken bepaalde ten laste van de gewezen verdachte zijn gekomen, voor zover de aanwending dier kosten het belang van het onderzoek heeft gediend of door intrekking van dagvaardingen of rechtsmiddelen door het openbaar ministerie nutteloos is geworden."

<Translation>
"Compensation, to be paid from the Treasury, is awarded to the former suspect or his heirs for costs, which have been borne by the former suspect pursuant to the Act on fees in criminal cases, insofar as these costs were relevant for the investigation or have become pointless by the withdrawal of summonses or remedies by the public prosecution."

Section 591a paras. 1, 2 and 4 of the Code of Criminal Procedure, insofar as relevant, provides:

<Dutch>
"1. Indien de zaak eindigt zonder oplegging van straf of maatregel (...), wordt aan de gewezen verdachte of zijn erfgenamen uit 's Rijks kas een vergoeding toegekend voor zijn ten behoeve van het onderzoek en de behandeling der zaak gemaakte reis- en verblijfskosten, berekend op de voet van het bij en krachtens de Wet tarieven in strafzaken bepaalde.
2. Indien de zaak eindigt zonder oplegging van straf of maatregel (...), kan aan de gewezen verdachte of zijn erfgenamen uit 's Rijks kas een vergoeding worden toegekend voor de schade welke hij ten gevolge van tijdverzuim door het gerechtelijk vooronderzoek en de behandeling der zaak ter terechtziting werkelijk heeft geleden, alsmede in de kosten van een raadsman. (...).
4. De artikelen 90 en 591, tweede tot en met vijfde lid zijn van overeenkomstige toepassing."

<Translation>
"1. If a case comes to an end without imposition of a punishment or a measure (...), compensation out of the Treasury is awarded to the former suspect or his heirs for his travel and accommodation costs, calculated in accordance with the Act on fees in criminal cases, made in respect of the investigation and the examination of the case.
2. If a case comes to an end without imposition of a punishment or a measure (...), compensation out of the Treasury may be awarded to the former suspect or his heirs for the damage which he has actually suffered as a result of loss of time due to the preliminary judicial investigation and the trial itself, as well as the fees of a counsel. (...).
4. Sections 90 and 591, second up to and including fifth paragraph also apply."

Section 90 para. 1 of the Code of Criminal Procedure reads:

<Dutch>
"De toekenning van een schadevergoeding heeft steeds plaats, indien en voorzover daartoe, naar het oordeel van de rechter, alle omstandigheden in aanmerking genomen, gronden van billijkheid aanwezig zijn."

<Translation>
"Compensation is awarded where, and insofar as, in the opinion of the judge, taking all circumstances into account, there are equitable grounds for it."

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3 (b) and (d) of the Convention that both the additional tax assessments and the penal proceedings against him were based on incorrect facts and that he was denied the possibility to prove that both the assessments and penal charges were unjust. He submits that the additional tax assessments and penal charges were based on fiscal documents to which he was denied access, which seriously impeded him in challenging the assessments and charges. As a result thereof he did not have a fair hearing before the Court of Appeal in respect of his claim for compensation after the penal proceedings had been discontinued.

The applicant also complains that the Court of Appeal's reference to the correctness of his conviction in first instance in its decision of 16 March 1990 in respect of his compensation claim violated his rights under Article 6 para. 2 of the Convention as this reference in the decision not to grant him compensation for legal assistance reflected the opinion that he was guilty of the offences he was charged with, whereas the penal proceedings had been discontinued.

The applicant finally complains under Article 6 para. 1 of the Convention that the reasonable time has been exceeded as a result of the lengthy proceedings concerning his requests to be provided with certain fiscal documents on which the additional tax assessments and increases were allegedly based.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 June 1990 and registered on 17 October 1990.

On 2 September 1992 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

The Government's observations were submitted on 15 January 1993 and the applicant submitted his observations in reply on 22 May 1993.

THE LAW

1. The applicant complains under Article 6 paras. 1, 2 and 3 (b) (Art. 6-1, 6-2, 6-3-b) of the Convention that he did not receive a fair hearing before the Court of Appeal in the proceedings concerning his request for compensation for costs incurred in the criminal proceedings against him.

The applicant further complains under Article 6 (Art. 6) of the Convention that the additional tax assessments and the criminal proceedings against him were founded on incorrect facts and that he was denied the possibility to prove this, as he was refused access to certain fiscal documents he considered relevant.

The applicant finally complains under Article 6 para. 1 (Art. 6-1) of the Convention of the length of the proceedings in respect of his requests to be provided with certain fiscal documents.

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

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair (...) hearing within a reasonable time by a (...) tribunal (...).

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:
(...)
b. to have adequate time and facilities for the preparation of his defence;
(...)."

2. Concerning the applicant's complaint that the additional tax assessments were founded on incorrect facts and that he has been denied the possibility to prove this, as he was refused access to certain relevant fiscal documents, the Commission recalls that Article 6 para. 1 (Art. 6-1) of the Convention is not applicable to proceedings relating to tax assessments (cf. No. 9908/82, Dec. 4.5.83, D.R. 32 p. 266). Even if Article 6 (Art. 6)would apply to these proceedings in view of the 100% surcharge imposed, the Commission notes that the additional tax assessments at issue have been quashed by the Amsterdam Court of Appeal. The applicant, therefore, can no longer claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention.

It follows that this part of the application must be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

3. Insofar as the applicant complains that the criminal proceedings against him were not in conformity with Article 6 (Art. 6)of the Convention the Commission recalls that under Article 26 of the Convention it may only deal with an application which is introduced within six months as from the date on which the final decision was taken.

The Commission notes that the final decision on the criminal charges against the applicant was taken by the Court of Appeal on 13 March 1987, when it declared the public prosecution inadmissible. This is more than six months before the introduction of the present application.

This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

4. Insofar as the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention of the length of the proceedings concerning his requests for access to certain fiscal documents, the Commission does not find that these proceedings involved a determination of civil rights and obligations or of any criminal charge against the applicant. Article 6 para. 1 (Art. 6-1) of the Convention is consequently not applicable to these proceedings.

This part of the application must, therefore, be rejected as incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant further complains under Article 6 paras. 1, 2 and 3 (b) (Art. 6-1, 6-2, 6-3-b) of the Convention that he did not receive a fair hearing before the Court of Appeal in the proceedings concerning his request for reimbursement of his lawyer's fees and that the Court of Appeal's decision of 16 March 1990 violated the principle of presumption of innocence.

Insofar as the applicant invokes Article 6 para. 1 (Art. 6-1) of the Convention, the Government consider that this provision is not applicable to proceedings concerning a request for reimbursement of lawyer's fees following a discontinuation of criminal proceedings, since such proceedings do not involve a determination of a civil right.

In respect of the applicant's complaint under Article 6 para. 2 (Art. 6-2) of the Convention the Government submit that the Court of

Appeal's decision of 16 March 1990 did not violate the principle of presumption of innocence as the Court of Appeal in reaching this decision took all relevant facts into account and merely wished to state that, although the criminal proceedings had been discontinued, there still existed a serious suspicion that the applicant had committed the offences in question.

The applicant submits that the proceedings on his request for compensation involved a determination of his civil rights and obligations within the meaning of Article 6 para. 1 (Art. 6-1), since Dutch law provides a possibility to be awarded compensation for lawyer's fees when criminal proceedings end without the imposition of a punishment or a measure. The Court of Appeal, by referring to his conviction by the Amsterdam Regional Court, violated the principle of presumption of innocence, the more so since he was convicted in absentia and therefore had not been able to defend himself. He further alleges that the different proceedings between 1979 and 1987 also violated his rights under Articles 3, 5, 7 and 8 (Art. 3, 5, 7, 8) of the Convention.

The Commission, having regard to the parties' submissions under Article 6 (Art. 6) of the Convention in respect of the proceedings on the applicant's request for reimbursement of his lawyer's fees following the discontinuation of the criminal proceedings against him and in respect of the alleged violation of his right to be presumed innocent, considers that this part of the application raises issues of fact and law which can only be resolved by an examination of the merits. This part of 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, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaints under Article 6 (Art. 6) of the Convention in respect of the proceedings on the applicant's request for reimbursement of his lawyer's fees following the discontinuation of the criminal proceedings against him and in respect of his right to be presumed innocent;

and, by a majority,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)