AS TO THE ADMISSIBILITY OF

Application No. 15553/89
by Jean Helena Jacobus NICOL
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 11 May 1994, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
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 23 May 1989 by Jean Helena Jacobus NICOL against the Netherlands and registered on 28 September 1989 under file No. 15553/89;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 26 November 1992 and the observations in reply submitted by the applicant on 25 February 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch citizen, born in 1944 and residing in Klimmen, the Netherlands. He is working as a parole officer.

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

On 16 June 1984 the National Police stopped the applicant on the highway. An official report was drawn up as it appeared that the applicant's car with the number plate 74-92-UE was uninsured and technically unfit for use on the public road.

By summons (dagvaarding) of 4 October 1985, served on the applicant in person on 5 October 1985, he was ordered to appear on 11 October 1985 before the District Court (kantongerecht) of Maastricht on charges of having driven a technically unfit and uninsured car on a public road.

The applicant states that his request to consult his complete case-file at the District Court was refused. He was only allowed to consult his case-file after some documents had been taken out on the instructions of the public prosecutor (Officier van Justitie). The applicant states that he objected against the removal of certain documents from the file, but that he was informed that his protests were meaningless, since the public prosecutor could not be reached anymore. According to the Government the applicant's case-file contains no indication that he has made such an objection.

On 11 October 1985 the District Court judge (kantonrechter), following adversarial proceedings in which the applicant confirmed that he had driven his car with the number plate 74-92-UE on the public road on 16 June 1984, convicted and sentenced him for having driven a technically unfit car on the public road. In respect of the charge of having driven an uninsured car the District Court judge suspended the examination of this charge for an indefinite period pending a further investigation into the insurance of the car.

On 20 January 1987 the District Court judge resumed the examination of the charge of having driven an uninsured car. After having heard the applicant, who then informed the District Court judge that he had been refused access to his case-file, the District Court judge convicted and sentenced the applicant for having driven an uninsured car on the public road.

The applicant filed an appeal against both convictions with the Regional Court (Arrondissementsrechtbank) of Maastricht. The Registry of the District Court sent the applicant's two case-files to the Registry of the Regional Court on 16 January 1986 and 16 June 1987 respectively, where they were received on 17 January 1986 and 17 June 1987 respectively.

By summonses of 24 July 1987, served on the applicant in person on 17 August 1987, he was ordered to appear on 22 September 1987 before the Regional Court.

The applicant states that on 17 August 1987 he requested the Regional Court's Registry to allow him to consult his complete case-file, but that this was refused. He was given access after certain documents had been removed from the file. Following his protests he was informed that he could not consult certain documents since they were not for him. According to the Government there is no evidence in the applicant's file that he has requested access to his case-file.

On the same day the applicant subsequently submitted an objection in writing (bezwaarschrift) against the respective summonses to the Regional Court and requested the Court to dismiss the charges against him on the ground that he had been denied access to his case-file and therefore could not prepare his defence.

By letter of 21 August 1987 the public prosecutor informed the applicant that, according to Sections 415 and 425 of the Code of Criminal Procedure (Wetboek van Strafvordering), the procedure of objecting against a summons is not applicable to summonses to appear before an appeal court and, since the applicant's objection was thus inadmissible and the summons would not be cancelled, advised him to appear at the hearing on 22 September 1987. The public prosecutor also informed the applicant that a certain letter by the applicant's insurance agent about the applicant's car insurance had been joined to the applicant's file and that this agent had been summoned to testify at the hearing.

The applicant did not appear at the hearing before the Regional Court on 22 September 1987. After having declared the applicant in default of appearance, the Regional Court quashed both judgments by the District Court judge on formal grounds. After a full new examination of the facts and evidence, including the statement made by the applicant's

insurance agent before the Regional Court, the police reports and the applicant's statement before the District Court judge, the Regional Court, on 22 September 1987, convicted the applicant in absentia of having driven a technically unfit car on the public road and sentenced him to a fine of one hundred Dutch guilders. In a further judgment it convicted the applicant in absentia of having driven an uninsured car on the public road and sentenced him to a suspended fine of two hundred Dutch guilders with two years' probation.

The applicant states that he contacted the Registry of the Regional Court on 2 October 1987, assuming that the hearing of 22 September 1987 had been postponed following his objections against the summonses. According to the Government there are no documents in the applicant's file showing that he did contact the Registry on that date. According to the applicant, he then learnt that, on 22 September 1987, he had been convicted and sentenced in absentia in both proceedings. When he requested a copy of both judgments he was informed that they were not yet available. On the same date the applicant filed appeals in cassation against both judgments with the Supreme Court (Hoge Raad).

The applicant states that on 2 December 1987 he contacted the Regional Court's Registry again and was told that the judgments were not yet available as they were circulating for signature. He was also informed that requests of this kind must be addressed to the Registry in writing. The Government state there is no record of the applicant having contacted the Court on 2 December 1987.

The applicant further states that he asked the Regional Court's Registry by letters of 22 December 1987 and 25 March 1988 for copies of the judgments of 22 September 1987. In telephone conversations of 4 July 1988 and 23 September 1988 with the Registry he was informed that his requests for copies of the judgments had been noted. According to the Government the letters the applicant alleges to have sent on 22 December 1987 and 25 March 1988 are not in his file, nor is there any record of the telephone conversations the applicant claims to have had with the Registry on 4 July 1988 and 23 September 1988.

The Registry of the Regional Court sent the applicant's two case-files to the Supreme Court's Registry on 28 July 1988, where they were received on 29 July 1988.

By letter of 18 October 1988 the applicant submitted his written means of cassation in respect of both convictions to the Supreme Court. In these submissions he complained, inter alia, that Article 6 of the Convention had been violated in that he had not received a fair hearing. The principle of equality of arms had been violated by the refusal of access to his case-file and the fact that, until that day, he had never been provided with a copy of the judgments of 22 September 1987.

On 3 January 1989 the Supreme Court rejected the applicant's appeals in cassation, and the applicant was informed of this decision by the Supreme Court's Registry by way of a notification (aanzegging).

The applicant states that by letter of 14 April 1989 he requested the Registry of the Supreme Court to provide him with copies of the conclusions of the advocate-general and the Supreme Court judgments in his case. According to the Government there is no such letter in the applicant's case-file.

When the applicant submitted his application to the Commission, he stated that he had still not received the texts of the judgments of the Regional Court and the Supreme Court.

RELEVANT DOMESTIC LAW

a. Access to documents

Pursuant to Sections 30 - 34 and 51 of the Code of Criminal Procedure the accused or his lawyer is entitled to have access to the file in the accused's case as from the start of the preliminary investigation until the proceedings have ended.

There are, however, certain restrictions of this right during the preliminary investigation. Under Section 30 para. 2 of the Code of Criminal Procedure the investigating judge (rechter-commissaris) or the prosecution authorities (openbaar ministerie) can refuse an accused or his lawyer access to certain documents in the case-file, if they consider this to be in the interest of the investigation of the case. In such a case the accused or his lawyer will be informed in writing that the file is not complete (Section 30 para. 2). There is no obligation to indicate to the accused or his lawyer which documents have been taken out. However as soon as the summons to appear before the court has been served, the accused or his lawyer is entitled to have access to the complete case-file. The failure to inform an accused or his lawyer in writing that the case-file is not complete may entail nullity. If it is the public prosecutor, who fails to provide the accused or his lawyer with a statement in writing that the case-file is incomplete, the latter two can also request the Procurator-General (Procureur-Generaal) to order that the accused or his lawyer be provided with a statement in writing within the meaning of Section 30 para. 2 of the Code of Criminal Procedure.

When full access to a case-file is refused the accused can, pursuant to Section 32 of the Code of Criminal Procedure, file an objection (bezwaarschrift) within a time-limit of fourteen days with the competent court and pursuant to Section 35 of the Code of Criminal Procedure request the court to be heard. The absence of a written statement does not necessarily lead to inadmissibility of an objection against a refusal to grant access to a complete case-file.

b. Objection against a summons

In order to protect persons from being prosecuted too readily and unnecessarily having to stand trial in public and where no notification of the decision to continue the prosecution (kennisgeving van verdere vervolging) has been issued, Section 262 of the Code of Criminal Procedure enables an accused to file an objection (bezwaarschrift) with the Regional Court against a summons to appear before a court within a time-limit of eight days following the serving (betekening) of the summons. The judge's Chamber (Raadkamer) of the Regional Court will then as soon as possible rule on the objection, i.e whether or not it is competent to examine it, whether or not it is admissible and, if so, whether or not the case should go to trial.

However, according to Section 398 para. 3 of the Code of Criminal Procedure no objection lies against a summons to appear before a District Court judge. Furthermore, no objection lies against a summons to appear before an appeal court.

c. Notification of judgment

Pursuant to Section 362 of the Code of Criminal Procedure judgment must be pronounced in public. Where the accused is present, the President of the court shall inform him in accordance with Section 364 of the Code of Criminal Procedure of the possibilities for appeal and the time-limit for filing an appeal.

Section 365 of the Code of Criminal Procedure provides that the judgment shall be signed within forty-eight hours by the judges who have rendered it and the Registrar to the court. Failure to do so does not entail nullity (cf. Hoge Raad, judgment of 12 April 1949, N.J. 1949, no. 429). As soon as the judgment has been signed and, in any event, after the expiry of the forty-eight hours stipulated in Section 365, the accused or his lawyer can consult the judgment and the procès-verbal of the hearing.

According to Section 366 of the Code of Criminal Procedure the judgment must be served on the accused as soon as possible, where he has been convicted in absentia. If, however, the summons to appear before the court has been served on the accused in person, it is not required to serve the judgment on him, since in that case he is aware of the proceedings against him.

Under Section 433 of the Code of Criminal Procedure the accused, who has filed an appeal on points of law, may file his written grounds of appeal with the Supreme Court not later than the day of the hearing before the Supreme Court.

COMPLAINTS

1. The applicant complains under Article 6 paras. 1 and 3 (b) of the Convention that he did not receive a fair trial in that the principle of equality of arms has been violated, as he was denied access to his case-file and was not provided with copies of the judgments of the Regional Court of 22 September 1987 and therefore could not prepare his defence satisfactorily.

2. The applicant complains under Article 6 para. 1 of the Convention that the public prosecutor declared his objections against the summonses inadmissible. The applicant submits that the public prosecutor, in this respect, cannot be considered as an independent and impartial judge.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 May 1989 and registered on 28 September 1989.

On 7 November 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them pursuant to Rule 48 para. 2 (a) of its Rules of Procedure to submit certain documents.

On 11 January 1991 the Government submitted the documents, which were communicated to the applicant for comments. His comments in reply were submitted on 30 March 1991.

On 27 August 1991 the President of the Commission requested the Government to submit certain additional documents. On 20 September 1991 the Government submitted additional documents, which were sent to the applicant for information.

On 3 September 1992 the Commission decided to invite the respondent Government pursuant to Rule 48 para. 2 (b) of its Rules of Procedure to submit written observations on the admissibility and merits of the application and to refer the application to the Second Chamber of the Commission.

The Government submitted their observations on 26 November 1992 and the applicant's observations in reply were submitted on 25 February 1993.

On 8 September 1993 the Commission (Second Chamber) requested the Government to submit additional information and a copy of the applicant's complete case-file concerning the two proceedings at issue. The requested information and the original case-file were submitted by the Government on 5 November 1993 and a copy was communicated to the applicant.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (b) (Art. 6-1, 6-3-b) of the Convention that he did not receive a fair trial as he was denied access to his case-file and was not provided with texts of the judgments of the Regional Court and therefore could not prepare

his defence satisfactorily and that the public prosecutor declared his objections against the summonses inadmissible.

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

> "1. In the determination 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.
> (...)
>
> 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;
> (...)."

The Commission recalls at the outset that the right of the accused to have adequate facilities for the preparation of his defence is a particular aspect of the notion of a fair trial (Eur. Court H.R., Melin judgment of 22 June 1993, to be published in Series A no. 261-A, para. 21). It will therefore examine the applicant's complaints under paras. 1 and 3 (b) of Article 6 (Art. 6-1+6-3-b) taken together.

a. Refusal of access to the case-file

The applicant submits that when he requested access to his case-file at the District Court, a number of documents were taken out of the file in his presence and he could then consult the rest of the file. When he objected to the removal of those documents he was informed that this was done on the public prosecutor's instructions and that it was pointless to protest, since the public prosecutor could not be reached.

The applicant further states that when he requested access to his file at the Registry of the Regional Court for the proceedings on appeal, again certain documents were removed from the file. He protested again and was informed that those documents were not for him. The public prosecutor failed to provide him with a written statement that the file was not complete as required by Section 32 of the Code of Criminal Procedure.

The applicant finally submits that he did not attend the hearing of 22 September 1987 before the Regional Court since he presumed that pursuant to Section 262 of the Code of Criminal Procedure this hearing would not take place until his objections against the summonses had been decided upon.

The Government submit that, as a rule, access to a case-file is allowed to a suspect if the file is present and the date of the hearing is known. In principle no documents are removed from the file. However, erroneously filed documents belonging to an unrelated other case or marked documents intended for internal use such as draft judgments may be removed. The Government state that they cannot verify whether or not such documents were removed from the applicant's file, but find that it is unlikely since the case involved offences of a minor nature, in respect of which the files seldom contain documents which should be removed.

The Government argue that, apart from the applicant's statement before the District Court judge on 20 January 1987 that he had not been able to see the entire case-file and his written objections of 17 August 1987 against the summonses to appear before the Regional Court, there is no evidence in his case-file in support of his alleged attempts to consult his case-file at the Registry of the District Court or the Regional Court. Moreover, the applicant failed to appear at the hearing

before the Regional Court on 22 September 1987, where he could have made his objections known, and the procès-verbal of this hearing does not refer to any complaint by him that he had not been able to consult the file. Furthermore, since the applicant had not invoked this argument before the Regional Court, the Supreme Court could not deal with this complaint when he raised it in the cassation proceedings as the Supreme Court cannot take new facts into consideration, but bases its decision on the facts as established and assessed by the trial court.

The Government finally submit that the applicant has failed to lodge an objection under Section 32 of the Code of Criminal Procedure against the alleged refusal of access to his complete case-file. This remedy applies even where there is no written statement by the public prosecutor or the investigating judge. The applicant has therefore failed to exhaust domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

In respect of the proceedings before the District Court, the Commission notes that the District Court's judgments of 11 October 1985 and 20 January 1987 respectively were quashed on appeal. In these circumstances the Commission considers that in respect of the proceedings before the District Court the applicant 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.

As regards the alleged refusal of access to the complete case-file at the Regional Court's Registry on 17 August 1987, the Commission is not required to decide whether or not it discloses any appearance of a violation of Article 6 (Art. 6) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The applicant failed to file an objection within the meaning of Section 32 of the Code of Criminal Procedure against the removal of certain documents from his case-file before he was allowed to consult it, and has, therefore, not exhausted the remedies available to him under Dutch law. An examination of the case as it has been submitted does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal. Moreover, the Commission does not find that the applicant's objections of 17 August 1987 against the summonses to appear before the Regional Court constituted an effective remedy in respect of the present complaint.

It follows that in this respect the applicant has not complied with the condition as to the exhaustion of domestic remedies and that this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

b. The objections against the summonses to appear before the Regional Court

The Commission observes that the public prosecutor informed the applicant by letter of 21 August 1987 that the procedure of objecting against a summons is not applicable to summonses to appear before an appeal court and, as the applicant's objections were therefore inadmissible, advised him to appear at the hearing on 22 September 1987.

The Commission finds that the information given to the applicant by the public prosecutor did not affect the fairness of the criminal proceedings and that the charges against the applicant were determined by independent and impartial courts.

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

c. Failure to provide the applicant with copies of the Regional Court judgments of 22 September 1987

The applicant considers it "rather strange" that between 1984 and 1988 requests for copies of judgments against which an appeal had been lodged were apparently referred to the appeal court dealing with the case. He submits that in any event he was never informed, not even after his written requests for copies of the judgments of the Regional Court, that he should address such a request to the Supreme Court. He was only informed that copies of the judgments would become available for him when the judges had signed them.

The Government submit that between 1984 and 1988 it was a practice at the Registry of the Maastricht Regional Court not to provide copies of judgments, which were being appealed against, but to refer such requests to the court where the appeal had been lodged and to add such written requests to the case-file. The Government consider it possible that the applicant did request copies of both judgments of 22 September 1987 and that he was referred to the Supreme Court, but submit that there is no evidence in the case-file in support of his alleged attempts to obtain copies of the two judgments of 22 September 1987.

The Government add that, as a rule, the Supreme Court allows access to case-files to convicted persons making a request to that end. However, there is no record in the file of a request by the applicant, either to the Regional Court Registry or to the Supreme Court. The applicant was notified of the Supreme Court's decisions of 3 January 1989 to reject his appeals in cassation.

The Commission recalls that a State which institutes courts of appeal or cassation is required to ensure that persons amenable to the law shall enjoy when before these courts the fundamental guarantees contained in Article 6 (Art. 6) of the Convention (Eur. Court H.R., Delcourt judgment of 6 May 1985, Series A no. 11, p. 14, para. 25).

Having regard to the parties' submissions and the above-mentioned jurisprudence, the Commission considers that the failure to provide the applicant with a copy of the judgments of 22 September 1987 while his appeal in cassation was pending 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 regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention and must be declared admissible, no other grounds for inadmissibility having been established.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that he did not receive copies of the Regional Court's judgments of 22 September 1987;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)