CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33129/96
by Hans Walter OLIVIEIRA
against the Netherlands

The European Court of Human Rights (First Section), sitting on 6 June 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mrs W. Thomassen,
Mr L. Ferrari Bravo,
Mr C. Bîrsan,
Mr J. Casadevall,
Mr Gaukur Jörundsson,
Mr R. Türmen, *judges*,
and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 9 July 1996 and registered on 24 September 1996,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the Commission's partial decision of 1 July 1998,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Netherlands national, born in 1954 and living in Amsterdam. He is represented before the Court by Mr G.P. Hamer, a lawyer practising in Amsterdam.

A. The circumstances of the case

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

On 6 November 1992 the Burgomaster (*Burgemeester*) of Amsterdam, basing himself on Section 219 of the former Municipality Act (*Gemeentewet*), imposed a prohibition order (*verwijderingsbevel*) on the applicant to the effect that the latter would not be allowed to enter a particular area, the so-called emergency area, of the city centre for fourteen days. The following events, which were referred to in the Burgomaster's decision, led to this decision.

It appeared from police reports that twice on 21 July, on 29 July, 12 August, 26 August and 10 September 1992 the applicant had either overtly used hard drugs or had had hard drugs in his possession in streets situated in the emergency area and that on each of those occasions the applicant had been ordered to leave the area for eight hours.

On 5 November 1992 the applicant had been heard by the police about his conduct and he had been told that he would either have to desist from such 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 Burgomaster would be requested to impose a prohibition order for fourteen days on him. The applicant had told the police that as well as preparing and using drugs he also met his friends in the area concerned.

On 5 November 1992 the applicant had nevertheless overtly used hard drugs on one of the streets in the emergency area. He had once again been ordered to leave the area for eight hours and the police had subsequently requested the Burgomaster to impose a prohibition order for fourteen days on the applicant.

In the opinion of the Burgomaster the applicant would again commit acts disturbing public order within the near future. In this respect the Burgomaster took account of the kind of conduct involved, i.e. acts seriously disturbing 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 Burgomaster noted that neither the applicant's home nor his place of work were situated in the area concerned.

The applicant filed an objection (*bezwaarschrift*) against the prohibition order with the Burgomaster. He submitted, *inter alia*, that the Burgomaster ought only to make use of the emergency powers granted to him pursuant to Section 219 of the former Municipality Act in exceptional situations. As the Burgomaster had been issuing prohibition orders for eight hours since 1983 and for fourteen days since 1989 it could no longer be argued that an exceptional situation was still in place. The Burgomaster had, moreover, had sufficient time to ensure that the emergency measures were enacted in a general municipal bye-law (*Algemene Politie Verordening*).

The applicant also stated that the prohibition order, which in his opinion constituted a criminal sanction, interfered with his right to liberty of movement and violated the principle of proportionality. In this respect he argued that he had always complied with the prohibition orders imposed on him for a duration of eight hours and that he therefore failed to understand why a prohibition order for fourteen days had been called for all of a sudden.

On 14 January 1993 a hearing took place before an advisory committee. During this hearing the representative of the Burgomaster stated that in 1992 3,300 prohibition orders for eight hours (compared to 2,130 in 1991) and 204 prohibition orders for fourteen days (111 in 1991) had been issued to people dealing in or using drugs or committing acts related to those activities. The representative further said that it was the intention to enact the power to issue prohibition orders in a general municipal bye-law.

On 8 March 1993 the committee advised the Burgomaster to reject the objection and to maintain the prohibition order. It considered, *inter alia*, that the disruption of public order in the area concerned was still such as to constitute an exceptional situation within the meaning of Section 219 of the former Municipality Act. In view of the seriousness and scale of the problems involved the committee found it unlikely that public order could sufficiently be maintained by normal methods and that for that reason the Burgomaster was entitled to use the powers granted to him under Section 219.

Having regard to the fact that the applicant had, within a short period of time, regularly committed acts which had disturbed the public order and that the prohibition orders for eight hours which had been issued had not prevented him from behaving in that manner, the committee further found that the imposition of a prohibition order for a duration of fourteen days had not been unreasonable. 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.

By decision of 11 March 1993 the Burgomaster rejected the applicant's objection, adopting the reasoning applied by the advisory committee.

The applicant filed an appeal against the Burgomaster's decision with the Judicial Division (*Afdeling Rechtspraak*) of the Council of State (*Raad van State*) on 19 March 1993. In his appeal, which he elaborated by letter of 17 May 1993, he raised the same complaints as he had before the Burgomaster. In his written observations of 14 March 1994 the Burgomaster referred to the report drawn up by the advisory committee. A hearing took place before the Administrative Law Division (*Afdeling Bestuursrechtspraak*), the successor to the Judicial Division, on 23 January 1996.

On 14 May 1996 the Administrative Law Division rejected the applicant's appeal. Its reasoning included the following:

<Original>

"In artikel 219 is een wettelijke voorziening getroffen voor omstandigheden waarin gewone middelen ontoereikend zijn voor het herstellen en handhaven van de openbare orde.

Naar het oordeel van de Afdeling zijn deze gewone middelen in dit geval ontoereikend te achten en was ten tijde van het bestreden besluit sprake van een uitzonderingssituatie. In dit verband is van belang dat ten tijde van het bestreden besluit een oplossing van het onderhavige probleem via een gemeentelijke regeling niet mogelijk was. Op dat moment ontbrak – en ook thans ontbreekt – een ter zake relevante bepaling in een gemeentelijke verordening en is evenmin anderszins een toereikend juridisch middel voorhanden.

Op grond van het verhandelde ter zitting, alsmede het aantal achtuurs- en veertiendagenbevelen dat in het betrokken gebied is uitgereikt, stelt de Afdeling vast dat de ter zake aan verweerder ter beschikking staande personele en materiële voorzieningen onvoldoende waren om de problematische situatie, bestaande uit verstoring van de openbare orde door de in het besluit van 13 november 1989 omschreven gedragingen van drugsverslaafden, ter plaatse het hoofd te kunnen bieden. Gelet hierop is de Afdeling van oordeel dat niet met vrucht kan worden gesteld dat verweerder in het onderhavige geval niet in redelijkheid kon besluiten geruik te maken van de hem in artikel 219, eerste lid, van de gemeentewet toegekende bevoegdheid.

De Afdeling tekent hierbij echter het volgende aan.

Zij kan niet inzien waarom, indien de hierboven weergegeven situatie nog langere tijd zal voortduren, de mogelijkheid tot het uitbrengen van de veertiendagenbevelen niet in een door de gemeenteraad vastgestelde verordening zou kunnen worden genomen. Uit een oogpunt van rechtszekerheid en van legitimatie van overheidsoptreden is regeling in een verordening aangewezen in plaats van een maatregel op grond van de noodbevoegdheid van verweerder. Uit de stukken is gebleken dat verweerder ter zake reeds een concept-bepaling heeft ontwikkeld, welke uiteindelijk niet in de Algemene politieverordening is opgenomen, aangezien de momenteel gehanteerde werkwijze, tot stand gekomen in overleg tussen verweerder, politie en justitie, met betrekking tot de veertiendagenbevelen, bijzonder effectief wordt geacht. Naar het oordeel van de Afdeling mag enkel de veronderstelde effectiviteit van een noodmaatregel in samenhand met het vervolgingsbeleid van het Openbaar Ministerie echter geen reden zijn om af te zien van gemeentelijke regeling. De Afdeling is van oordeel dat verweerders zich bij de beoordeling of sprake is van een uitzonderingssituatie als bedoeld in artikel 219 van de gemeentewet (thans artikel 175 van de Gemeentewet) in beginsel niet meer in redelijkheid kunnen beroepen op het ontbreken van een ter zake relevante bepaling in een gemeentelijke verordening, gelet op de inmiddels langdurige periode dat zich drugsoverlast voordoet waardoor deze overlast structurele aspecten is gaan tonen, indien de mogelijkheid tot het uitbrengen van een veertiendagenbevel thans niet binnen redelijke termijn in een door de gemeenteraad vastgelegde verordening wordt opgenomen."

<Translation>

"Section 219 of the Municipality Act is a legal provision intended for situations where ordinary means are insufficient for restoring and maintaining public order.

In the opinion of the Division these ordinary means may be considered insufficient in the present case and there was, at the time of the decision appealed against, an exceptional situation. It is relevant in this context that at the time of the decision appealed against it was not possible to solve the problem in question through a municipal arrangement. There was not at that time – and there is not now – any relevant provision in a municipal bye-law, nor is any other sufficient legal means available.

On the basis of the case file and the submissions made at the hearing, in addition to the number of eight-hour and fourteen-day orders that have been issued in the area concerned, the Division finds that the appropriate staff and matériel available to the defendant were inadequate to counter the difficult situation consisting of breaches of public order by the behaviour of drug addicts as described in the decision of 13 November 1989. This leads the Division to hold that it cannot be stated that the defendant could not reasonably make use of the powers granted him by section 219 of the Municipality Act.

The Division would, however, express the following reservations.

It cannot see why, if the above-described situation should continue for longer, the possibility to issue fourteen-day orders should not be provided for in a bye-law established by the Local Council. From the point of view of legal certainty and legitimacy of action by public authority an arrangement provided for by a municipal bye-law is indicated instead of a measure based on the defendant's emergency powers. It appears from the case file that the defendant has already prepared a draft of an appropriate provision, which however was eventually not incorporated into the General Municipal Bye-Law because the method used at present, which was arrived at in consultation between the defendant, the police and the prosecuting authorities (*verweerder, politie en justitie*) with regard to the fourteen-day orders, was considered extraordinarily effective. The Division is however of the opinion that the presumed effectiveness of an emergency measure coupled with the prosecuting policy of the prosecution authorities (*Openbaar Ministerie*) do not constitute a reason not to make appropriate provision at the municipal level. The Division considers that defendants, in assessing whether there is an exceptional situation as provided for by section 219 of the Municipality Act (now section 175 of the Municipality Act), in principle can no longer rely on the lack of any appropriate provision in a municipal bye-law, in view of the already lengthy period during which there has been drugs-related nuisance (*drugsoverlast*), which has caused this nuisance to display structural aspects, if the possibility to issue fourteen-day orders is not now provided for by a bye-law created by the Local Council within a reasonable time."

This decision was published, with a learned comment, in *Jurisprudentie Bestuursrecht* (Administrative Law Reports) 1996, no. 169.

Apart from the proceedings described above, the applicant was convicted by a single-judge chamber (*Politierechter*) of the Regional Court (*Arrondissementsrechtbank*) of Amsterdam on 8 December 1992 of having intentionally failed to comply with the prohibition order on 20 November 1992 which, pursuant to Section 184 of the Criminal Code (*Wetboek van Strafrecht*), constituted a criminal offence. He was sentenced to four weeks' imprisonment. Following an appeal to the Court of Appeal (*Gerechtshof*) of Amsterdam, which also convicted the applicant, an appeal on points of law was lodged with the Supreme Court (*Hoge Raad*). The Court has not been informed of the final outcome of these proceedings, which do not form part of the present application.

B. Relevant domestic law and practice

At the relevant time section 219 of the former Municipality Act provided as follows:

[Original]

> "1. Ingeval van oproerige beweging, samenscholing of andere stoornis der openbare orde of van ernstige rampen, dan wel van ernstige vrees voor het ontstaan daarvan, is de burgemeester bevoegd alle bevelen, die hij ter handhaving van de openbare orde of ter beperking van gemeen gevaar nodig acht te geven.
>
> ..."

[Translation]

> "1. In case of a riotous movement, gathering or other disturbance of public order or of serious calamities, as well as in case of a well-founded fear of the development thereof, the Burgomaster is empowered to issue all orders which he deems necessary for the maintenance of public order or the limitation of general danger.
>
> ..."

Article 184 of the Criminal Code (*Wetboek van Strafrecht*), insofar as relevant, reads:

[Original]

> "1. Hij die opzettelijk niet voldoet aan een bevel of een vordering, krachtens wettelijk voorschrift gedaan door een ambtenaar met de uitoefening van enig toezicht belast of door een ambtenaar belast met of bevoegd verklaard tot het opsporen of onderzoeken van strafbare feiten, alsmede hij die opzettelijk enige handeling, door een van die ambtenaren ondernomen ter uitvoering van enig wettelijk voorschrift, belet, belemmert of verijdelt, wordt gestraft met gevangenisstraf van ten hoogste drie maanden of geldboete van de tweede categorie.
>
> 2. ...
>
> 3. ...

4. Indien tijdens het plegen van het misdrijf nog geen twee jaren zijn verlopen sedert een vroegere veroordeling van de schuldige wegens gelijk misdrijf onherroepelijk is geworden, kan de gevangenisstraf met een derde worden verhoogd."

[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 Burgomaster 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 Burgomaster'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 Burgomaster 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 Burgomaster found that the situation existing in the area constituted a exceptional situation within the meaning of Section 219 of the former Municipality Act.

The Burgomaster extended the 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 Burgomaster also empowered the Chief Superintendent and his officers to order people to leave the designated city centre area for fourteen days. By letter of 17 October 1989 the Burgomaster changed this instruction replacing the discretion of the police officers to issue eight-hour prohibition orders by a strict order to do so in specified circumstances. The Burgomaster's instructions were further changed by letter of 13 November 1989 pursuant to which prohibition orders for fourteen days could no longer be issued by the police on behalf of the Burgomaster but only by the Burgomaster himself.

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 highway;

- dealing in addictive substances appearing in Annex 1 to the Opium Act on the public highway;
- 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 Article 184 of the Criminal Code where the order that had not complied with was a prohibition order for eight hours;
- acts of violence, thefts from cars on or along the public highway, overt selling on of stolen goods on or along the public highway, insofar as there was a connection between these offences and hard drugs.

On the occasion of a fourth procès-verbal being drawn up against him, the person concerned would be heard by a police 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 Burgomaster to impose a prohibition order for fourteen days.

In a judgment of 4 May 1990, *Nederlandse Jurisprudentie* (Netherlands Law Reports) 1990, no. 680, which related to a criminal prosecution under Article 184 of the Criminal Code for failure to comply with an eight-hour prohibition order, the Amsterdam Court of Appeal found that section 219 of the Municipality Act did not entitle the Burgomaster to delegate to individual police officers the discretion to decide whether or not to impose such orders on his behalf.

In a judgment of 23 April 1996, *Nederlandse Jurisprudentie* 1996, no. 514, which related to a criminal prosecution under Article 184 of the Criminal Code for failure to comply with an eight-hour prohibition order, the Supreme Court (*Hoge Raad*) accepted that the Burgomaster's powers under section 219 of the Municipality Act were intended only for exceptional situations. It held, however, that the mere fact that two and a half years had passed since the Burgomaster had declared an emergency situation – the case related to the Burgomaster's instruction of 17 October 1989 – was not sufficient *per se* to justify the conclusion that an exceptional situation no longer existed. It also held, in the same judgment, that Article 6 of the Convention did not apply to eight-hour prohibition orders because such orders were not given by way of penal sanction but were in the nature of a measure aimed at preserving public order. Nor did such orders violate Article 2 of the Fourth Protocol, since they were "in accordance with law" and "necessary in a democratic society" for "the maintenance of *ordre public*". The judgment of the Supreme Court left in force a judgment of the Amsterdam Court of Appeal sentencing the defendant in that case to two weeks' imprisonment.

In the Netherlands, a Burgomaster of a town or city is appointed by the Queen (Section 65 of the former Municipality Act). Municipal regulations, such as general municipal bye-laws, are adopted by the Municipal Council (Section 168 former 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. He submits in particular that this interference was not in accordance with the law since, firstly, the letters and instructions from the Burgomaster to the Chief Superintendent of Police had not been published; and secondly, by 1992 the situation characterised by the Burgomaster as exceptional had become structural. As a result, Section 219 of the former Municipality Act no longer applied. It could similarly not be said that the imposition of prohibition orders pursued the aim of the maintenance of public order.

He further invokes Article 6 of the Convention, complaining of the length of the proceedings. Under this provision he also argues that the prohibition order constituted a criminal sanction which had been imposed on him without a trial having taken place before a tribunal.

THE LAW

Article 2 of Protocol No. 4 provides as follows:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

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 provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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."

Article 6 of the Convention, in so far as it is relevant, provides as follows:

"1. In the determination of ... of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ...

..."

1. The Government do not dispute that there has been an "interference" with the applicant's rights under Article 2 of Protocol No. 4 or of Article 8 of the Convention as the case may be. They disagree with the applicant's position that this interference was not "in accordance with law/in accordance with the law".

In the Government's submission, the Burgomaster's powers derive from section 219 of the Municipalities Act (as in force at the relevant time). This was also accepted, in the present case and in others, by the competent domestic courts. In support of this submission the Government cited the judgment of the Supreme Court mentioned above (see the "Relevant domestic law" section) and several interim decisions of the President of the Administrative Litigation Division (*Afdeling rechtspraak*) of the Council of State suspending orders given by the Burgomaster of Amsterdam under section 219 of the (former) Municipality Act pending the outcome of proceedings on the merits. To that extent, in the Government's view, there existed a basis in domestic law.

As to the foreseeability requirement, they argued that the applicant must reasonably have been aware of the possible consequences if he continued to disrupt public order by his behaviour. A total of six eight-hour prohibition orders had already been imposed on him, and he had been warned by the police that he could expect a fourteen-day prohibition order if he displayed such behaviour again. The warning had been issued to him in writing.

The suggestion of the applicant's representative that the guidelines issued by the Burgomaster ought to have been published appeared "to have been inspired by purely legal arguments". The applicant's representative could not truly maintain that the applicant would have been any better informed had these guidelines appeared in any official publication. Precisely by adopting a "direct approach" to any person who risked being affected by the measure, the Burgomaster of Amsterdam had discharged his duty to comply with the requirements of accessibility and foreseeability particularly well.

For the remainder, the interference in question had served the "legitimate aims" of maintaining public order, but also the interests of public safety, the prevention of crime and the protection of the rights and freedoms of others. Given the dire situation in the affected parts of Amsterdam, there was obviously a "pressing social need"; and the measure in question, being limited in both time and extent, had not been disproportionate.

The applicant submitted in reply that the domestic case-law cited by the Government consisted of provisional decisions given in summary proceedings. Additionally, even in those cases the respondent authorities had admitted that the measures in question were provisional in nature. However, the applicant was not aware of any other situation in the Netherlands in which an emergency measure had been allowed to remain in force for as long as ten years.

He also argued that section 219 of the Municipality Act had never been intended to give the Burgomaster the power to declare an emergency situation on which he was then entitled to rely for more than ten years. This provision, in his submission, was clearly intended for no other purpose than to enable local authority to deal with riots and other such transient public-order problems. Moreover, the kind of behaviour which might give rise to a prohibition order had nowhere been satisfactorily defined. Finally, there was no provision in either statutory or delegated legislation for orders preventing people from entering certain areas for a period of fourteen days. He noted in this regard that even the written warning issued by the police had not made reference to any such provision.

Nor, in the applicant's contention, had the aim pursued by the interference in question been legitimate. It had served no other purpose than to enable persons who committed public order offences, which normally attracted only limited penal sanctions under municipality bye-laws, to be taken into pre-trial custody on the much more serious charge of disobeying an official order. This was apparent from the findings of the President of the Administrative Jurisdiction Division in the present case, from which it appeared unambiguously that no specific bye-law provision had been made because the practice followed had turned out to be highly effective.

As to "necessity in a democratic society", the applicant was of the opinion that, firstly, even assuming that there was a "pressing social need" then the competent legislative bodies – whether at state or municipality level – might reasonably have been expected to take appropriate legislative action before ten years had passed; secondly, with regard to the proportionality of the measure, he stated that he had been prevented for fourteen days from entering a large part of Amsterdam where all his friends and acquaintances lived.

Having regard to the parties' submissions and to its case-law, the Court considers that the applicant's complaints under Article 2 of Protocol No. 4 and Article 8 of the Convention raise complex questions of fact and law which require an examination on the merits. They cannot, therefore, be declared inadmissible as manifestly ill-founded within the meaning of Article 35 § 1 of the Convention.

2. The Government objected that the applicant had never complained before the Administrative Jurisdiction Division about the length of the proceedings. He had therefore failed to exhaust the available domestic remedies in this respect.

As the Court understands the Government's arguments, this objection is based on the fact the applicant did not ask for his case to be dealt with in expedited proceedings when lodging his appeal; nor did he seek a speedier decision elsewhere, for instance in the civil courts.

The Government adverted to the possibility of asking for the case to be dealt with under an expedited procedure. They also referred to the Court's finding in its Oerlemans v. the Netherlands judgment of 27 November 1991, Series A no. 219, that "here an administrative appeal to a higher authority is not consider to offer sufficient safeguards as to

a fair procedure it is possible to have recourse to the civil courts for a full review of the lawfulness of the administrative decision" (loc. cit., § 53). This finding had been confirmed in the Court's British-American Tobacco Company Ltd. v. the Netherlands judgment of 20 November 1995, Series A no. 331.

The applicant replied that when he lodged his appeal with the Administrative Jurisdiction Division the length of the judicial proceedings had not yet exceeded a "reasonable time": that was in fact the starting point of the period to be considered. It was not likely either, given that the fourteen-day period covered by the prohibition order had already passed, that the Administrative Jurisdiction Division would have agreed to expedited proceedings. Nor was it foreseeable from the outset that the proceedings would last for three years. In addition, although he had not applied for his case to be dealt with in expedited proceedings this did not constitute a waiver of his right to a "determination" of the "criminal charge" against him within a "reasonable time".

For its part, the Court is not convinced that the Administrative Jurisdiction Division would have been able to decide the case sooner or, in the alternative, disposed to give the applicant's case priority over other cases pending before it. It notes that the Government themselves, in their observations, describe the applicant's interest in a speedy decision as "minor".

As to the possibility of bringing an action in the civil courts, the Court notes, firstly, that quite apart from the fact that the applicant's complaint does not raise issues of fairness, the situation which gave rise to a finding of no violation in the Oerlemans judgment was one in which access to the civil courts made up for procedural failings of administrative appeals to a higher (administrative) authority. It is wholly irrelevant to appeals to an administrative tribunal.

Secondly, with reference to the British-American Tobacco Company Ltd. judgment, the Court finds nothing to suggest that civil courts in the Netherlands would be prepared to find that the Administrative Jurisdiction Division of the Council of State was not a "tribunal" satisfying the requirements of Article 6.

The applicant's complaint under Article 6 cannot therefore be declared inadmissible on the ground that domestic remedies have not been exhausted.

3. The Government argued that the prohibition order imposed on the applicant did not involve a "criminal charge". Consequently, Article 6 of the Convention was not applicable. They referred to the criteria developed by the Court in its case-law, particularly the Engel and Others v. the Netherlands judgment of 8 June 1976 (Series A no. 22) and the Öztürk v. Germany judgment of 21 February 1984 (Series A no. 73).

As to the first criterion, the classification of the offending behaviour in national law, they stated that the prohibition order in question was part of administrative procedure. This followed from the legal basis, namely section 219 of the Municipality Act as in force at the time and the Burgomaster's instructions given thereunder, and from the fact that objections in such cases were dealt with in administrative proceedings without involvement of the prosecutor. They also observed in this connection that the applicant's prosecution at a later stage, for disobeying the prohibition order, clearly did involve a "criminal charge".

As to the second and third criteria, the nature of the offence and the nature and severity of the penalty imposed, the Government relied on the Court's Raimondo v. Italy judgment of 22 February 1994 (Series A no. 281-A). In their view the measure imposed on the applicant was designed to prevent the commission of offences and therefore comparable to the special supervision order imposed on the applicant Raimondo.

The applicant conceded that the prohibition order imposed on him was not provided for by any provision of the criminal law. On the other hand, the behaviour which was liable to give rise to such an order was defined in terms of offences which themselves were part of criminal law. It was further significant that the Burgomaster, as head of the local police force, had the power to impose such orders, that the legal framework had been worked out by the Burgomaster together with the public prosecution service and the police, and that the factual basis of a prohibition order was a procès-verbal drawn up by the police.

Moreover, a fourteen-day prohibition order entailed a severe curtailment of the applicant's freedom of movement. Unlike the supervision order which was the subject of the relevant findings in the Raimondo judgment, the prohibition order was imposed after the applicant had committed certain proscribed acts. Its geographic extent and duration were the same in all cases and were in no way related to the personal circumstances of the offender.

The Court agrees with the Government that the formal classification under Netherlands law is not such as to bring prohibition orders such as that imposed on the applicant within the sphere of criminal law. It finds support for this view in the judgment of the Netherlands Supreme Court of 23 April 1996, *Nederlandse Jurisprudentie* (Netherlands Law Reports) 1996, no. 514. Although strictly it concerns only an eight-hour prohibition order, such orders have a legal basis which is virtually identical to that of fourteen-aday prohibition orders. In addition, they serve an identical purpose, namely the maintenance of public order in a specified area of Amsterdam.

The Court is further of the opinion that the purely preventive nature of the measure concerned is not affected by the fact that the applicant's actions could have led to a criminal prosecution. It is appropriate to draw a parallel to the above-mentioned Raimondo case, where the situation was similar (loc. cit., §§ 16 and 43).

As to the severity of the measure, it is again appropriate to make a comparison with the supervision order imposed on the applicant Raimondo. The latter was required to inform the police before leaving his home, to report to the police on the days indicated to that effect, and not to be absent from his house from 9 p.m. until 7 a.m. unless he had the prior permission of the relevant authorities. In addition, he was required to lodge a security to ensure that he complied with this order (loc. cit., § 13). In the Court's opinion these constraints were more severe than those imposed on the applicant in the present case.

The above considerations lead the Court to find that the proceedings in question did not involve the "determination" of a "criminal charge" against the applicant. It follows that the applicant's complaint under Article 6 is inadmissible as being incompatible with the Convention *ratione materiae*.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints under Article 2 of Protocol No. 4 and Article 8 of the Convention;

DECLARES INADMISSIBLE the remainder of the application.

Michael O'Boyle
Registrar

Elisabeth Palm
President