AS TO THE ADMISSIBILITY OF

Application No. 17132/90
by W.P.
against the Netherlands

The European Commission of Human Rights sitting in private on 8 January 1992, the following members being present:

MM.C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

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 August 1990 by W. P. against the Netherlands and registered on 7 September 1990 under file No. 17132/90;

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

The applicant is a Dutch citizen, born in 1967 and resident at 's-Hertogenbosch. She is represented before the Commission by Mrs. G.E.M. Later, a lawyer practising in The Hague.

The facts, as they appear from the applicant's submissions, are as follows.

After the applicant had been committed to a mental hospital by a provisional order of the Burgomaster of 's-Hertogenbosch, she signed a request to the District Court judge (Kantonrechter) in 's-Hertogenbosch for placement in a mental hospital by reason of mental illness.

On 20 February 1990, the District Court judge visited her at the hospital where she was interned on the basis of the Burgomaster's order. She was then heard by the judge, and she objected to being compulsorily interned. She was not assisted by a lawyer.

On the same day, the District Court judge issued an order for her internment. In his decision, he referred to a medical certificate issued under Section 16 of the Mentally Ill Persons Act (Krankzinnigenwet) by Dr. J. Kool. The judge stated in his decision that it appeared from the minutes of the hearing of the applicant and the medical certificate that the applicant was in such a state of mental illness that there existed a danger for herself, for other persons or for the general safety of persons or property and that on account of this danger internment in a mental hospital was necessary.

The applicant appealed to the Supreme Court (Hoge Raad), but her appeal was rejected, the main reason being that a District Court judge's decision on a matter of this kind was not subject to appeal. However, the Supreme Court also made some comments on the question whether the judge had been justified in considering that Dr. Kool had not been treating the applicant at that time. As, in his certificate, Dr. Kool had indicated another doctor as being the doctor treating the applicant, it was understandable, in the Supreme Court's view, that the District Court judge had concluded that the applicant was not in treatment by Dr. Kool.

COMPLAINTS

The applicant alleges violations of Articles 5, 6, 13 and 14 of the Convention. She complains, in particular,

a) that it is normally not possible under Dutch law to appeal against a decision by which a District Court judge has ordered the detention of a mentally ill person, whereas a similar decision by the President of a Regional Court (Arrondissementsrechtbank) can be appealed to the Supreme Court; this is, in the applicant's view a discriminatory difference between the two procedures;

b) that no lawyer assisted her when she was heard by the District Court judge, although it appears from the Supreme Court's case-law that she should have been so assisted or, in any case, that it must appear from the documents on what grounds such assistance was not deemed necessary;

c)that she was not given access to her case-file, which made it impossible for her to know on what basis the District Court judge had taken his decision;

d) that Dr. Kool was the doctor who was treating her at that time and was therefore not competent to issue a certificate under Section 16 of the Mentally Ill Persons Act;

e) that patients who are deprived of their liberty by a District Court judge have no effective remedy.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 August 1990 and registered on 7 September 1990.

After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 9 November 1990. It decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on

admissibility and merits.

The Government's observations were submitted on 25 February 1991. The applicant's observations in reply were received on 14 June 1991.

THE LAW

The applicant alleges violations of Articles 5, 6, 13 and 14 (Art. 5, 6, 13, 14) of the Convention. Her complaints relate to the following matters.

1. She first complains of discrimination in that it is normally not possible under Dutch law to appeal against a decision by which a District Court judge has ordered the detention of a mentally ill person, whereas a similar decision by the President of a Regional Court can be appealed to the Supreme Court.

The Commission notes that under Dutch law the simplified procedure before a District Court judge is applied where detention is requested by the person concerned or by a close relative or a guardian, whereas the other procedure before the President of a Regional Court is used where detention is requested by a public prosecutor.

Consequently, the existing procedural differences, including the restrictions on the right of appeal in regard to decisions of a District Court judge, must be considered to have a reasonable justification and cannot be regarded as discriminatory within the meaning of Article 14 (Art. 14) of the Convention.

This part of the application must therefore be rejected under Article 27 para. 2 (Art. 27-2) of the Convention as manifestly ill-founded.

2. The applicant complains that she was not assisted by a lawyer at the hearing before the District Court judge on 20 February 1990.

The Government argue that in regard to this complaint the domestic remedies have not been exhausted. In the Government's opinion, an available remedy was a request for discharge from the hospital together with a claim for compensation. They also refer to the possibility of asking for release in summary proceedings (kort geding) before the President of a Regional Court on the ground of illegal detention.

The applicant contests that the remedies referred to by the Government could be regarded as effective.

The Commission notes that the applicant did not have at her disposal any remedy against the detention order itself. It considers that the right to ask for a subsequent discharge cannot be seen as a remedy against the detention order. Nor can the right to bring proceedings for damages be regarded as sufficient in this context, since such proceedings are not primarily aimed at obtaining the release of the detained person.

As regards summary proceedings before the President of a Regional Court, there can be no doubt that this is in Dutch law and practice an important remedy against various illegal acts (Eur. Court H.R., Keus judgment 25.10.90, Series A vol. 185-C, para. 16). However, in the Government's brief remarks on such proceedings, it has in no way been demonstrated that summary proceedings would have constituted an effective remedy in the present case.

The Commission is therefore of the opinion that this complaint should not be rejected on the ground of failure to exhaust domestic remedies.

Both the applicant and the Government refer to a judgment of the Supreme Court of 19 January 1990 from which it appears that in cases regarding detention in a mental hospital the judge shall ask the person concerned whether he or she wishes to have a lawyer and that, where the person concerned is heard without being assisted by a lawyer, the reasons for this shall appear from the case-file. The Government note that this judgment concerned a case where, unlike in the present case, detention had been requested by a public prosecutor and that the question arises whether the same considerations apply to the present case where the detention order has been requested by the person whose detention was at issue. The Government add that this question was answered in the affirmative by the Advocate-General at the Supreme Court in his conclusions in the present case, and the Government defer to the Commission's judgment on this point.

The Commission considers that this part of the application raises important issues of fact and law whose determination should depend on an examination of the merits of the complaint. It should therefore be declared admissible.

3. The applicant complains that she was not given access to her case-file, which made it impossible for her to know on what basis the District Court judge had taken his decision.

The Government point out that according to the case-law of the Supreme Court the person whose detention is requested under the Mentally Ill Persons Act shall have the opportunity to read the relevant documents before or during the hearing. The Government add that there is nothing to show that the applicant was unable to exercise this right; on the contrary, the fact that she herself applied for detention indicates that she had seen the medical certificate issued about her.

The applicant replies that the request which she signed contains nothing about the medical certificate and that the conclusion that she had seen that certificate is therefore unjustified.

The Commission considers that the present complaint is closely connected with the complaint under 2 regarding the absence of a lawyer and that it should therefore also be declared admissible.

4. The applicant refers to Section 16 of the Mentally Ill Persons Act from which it appears that a detention order shall be based on a medical certificate issued by a psychiatrist other than the one who is treating the patient. She submits that Dr. Kool was the doctor who treated her at the relevant time and that he was therefore not competent to issue the certificate.

The Government have referred to the Supreme Court's finding that, since the name of another doctor was indicated in the certificate as being the doctor treating the applicant, the District Court judge's assumption that Dr. Kool was not treating her was understandable.

The applicant has maintained her position on this point and, in support of it, has referred to another medical certificate of 13 February 1990 in which it is stated that Dr. Kool was the doctor treating her at that time.

The Commission considers that, in view of the uncertainty about the facts, the present complaint cannot be considered manifestly ill-founded. A further examination of the merits is required, and this part of the application must therefore be declared admissible.

5. The applicant, referring to the limited competence of the Supreme Court, finally complains that patients who are deprived of their liberty by a District Court judge have no effective remedy.

According to Article 5 para. 4 (Art. 5-4) of the Convention,

everyone who is detained shall be entitled to take proceedings by which the lawfulness of his detention shall be decided by a court. Article 13 (Art. 13) of the Convention provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority.

The Commission considers that the present complaint is closely connected with the complaints relating to Article 5 para. 1 (Art. 5-1) of the Convention and that it should therefore also be declared admissible.

For these reasons, the Commission, unanimously

- DECLARES INADMISSIBLE, the applicant's complaint of discrimination with regard to the right of appeal,

- DECLARES ADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)