CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 34328/96
by Egbert PEREE
against the Netherlands

The European Court of Human Rights (First Section), sitting on 17 November 1998, the following judges being present:

Mrs E. Palm, President,
Mr J. Casadevall,
Mr G. Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Mrs W. Thomassen,
Mr R. Maruste,

Mr M. O'Boyle, Section Registrar

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 17 April 1996 by Egbert PEREE against the Netherlands and registered on 20 December 1996 under file No. 34328/96;

THE FACTS

The applicant is a Dutch national, born in 1924, and resides in Maastricht.

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

On 6 October 1992, an article appeared in the Dutch regional newspaper "De Dordtenaar" concerning a protest action against the planned housing of asylum seekers from Yugoslavia in an empty school building in Zwijndrecht. In response to this article the local Dordrecht Anti-Discrimination Council (*Anti Discriminatie Raad*) sent a letter to this newspaper in which it criticised the apparently underlying motives for the protest action, i.e. intolerance and discrimination.

In reaction to this letter, the applicant addressed a letter to the Anti-Discrimination Council which read, inter alia:

<Translation>

> "A privileged top with slaves at the bottom. And, which includes your group, with an absolute control apparatus to take judicial proceedings against anyone who does not remain in line. The name SA is not unfitting for you ..."

On 17 December 1992, the Anti-Discrimination Council filed a criminal complaint against the applicant for insult and criminal proceedings were subsequently instituted against the applicant.

By judgment of 8 November 1993, the Magistrate (*politierechter*) of the Regional Court (*Arrondissementsrechtbank*) of Dordrecht convicted the applicant of having insulted the Anti-Discrimination Council and imposed a fine of NLG. 500. The applicant filed an appeal with the Court of Appeal (*Gerechtshof*) of The Hague.

On 21 November 1993, the applicant noticed his conviction being discussed in a local television programme. He contacted the television station, went there and gave an interview, which was broadcast on the same day. In this interview, the applicant in fact repeated the statements, which had formed the basis of his conviction of 8 November 1993. He stated, inter alia:

<Translation>

> "The Anti-Discrimination Council Dordrecht, for instance, makes door-to-door visits and makes people afraid, at registering for elections threats follow, I have experienced myself in my house that the SA troops, I say it again on purpose, were standing in front of my house, masked, armed, carrying weapons, I was arrested, the police did nothing about these persons and it is a system which belongs to it, not all members of the NSB (former Dutch National Socialist Party), not a single one I think, have killed Jews in the last World War, but they belonged to a system which enabled it and this is how I see the Anti-Discrimination Council Dordrecht, very clearly ... if one wishes to fight Nazis

with Nazi-symptoms uh, methods, that has been often enough in the newspaper, they act in the same manner and also use that name..."

On 1 December 1993 the Anti-Discrimination Council filed a criminal complaint with the police in relation to this interview and the applicant was subsequently charged with slander.

On 24 October 1994, the Magistrate of the Regional Court of Dordrecht convicted the applicant of slander and sentenced him to three weeks' imprisonment, suspended pending a probation period of two years, and payment of a fine of NLG. 1,500, to be replaced by thirty days' imprisonment in case of non-payment. The applicant filed an appeal with the Court of Appeal of The Hague.

In its judgment of 29 March 1995, the Court of Appeal noted that the Dordrecht Anti-Discrimination Council's aim was to fight racism and fascism. After having examined the case, it quashed the judgment of 8 November 1993, convicted the applicant of insult and imposed a fine of NLG. 500, to be replaced by ten days' imprisonment in case of non-payment. This sentence was suspended pending a probation period of two years.

In a separate judgment of 29 March 1995, the Court of Appeal quashed the judgment of 24 October 1994, convicted the applicant of slander and imposed a fine of NLG. 1,000, to be replaced by twenty days' imprisonment in case of non-payment.

The applicant's subsequent appeals in cassation were both rejected by the Supreme Court (*Hoge Raad*) on 20 February 1996. As regards the applicant's complaint in both appeals that the Court of Appeal had violated his rights under Article 10 of the Convention, the Supreme Court held that the Court of Appeal, by finding the applicant guilty of, respectively, insult within the meaning of Article 266 of the Criminal Code (*Wetboek van Strafrecht*) and slander within the meaning of Article 261 of the Criminal Code, had not acted contrary to Article 10 of the Convention as paragraph 2 of this provision allows sanctions foreseen by law and insofar as this is necessary in a democratic society for the protection of the reputation or rights of others. The Supreme Court further held that, as no explicit complaint relating to the right to freedom of expression had been raised before the trial courts in the respective proceedings, the Court of Appeal was not obliged to give any explicit reasons in this respect.

COMPLAINTS

1. The applicant complains under Article 10 of the Convention that his convictions for insult and slander constitute unjustified interferences with his right to freedom of expression.

2. The applicant further complains that, in the criminal proceedings against him, he was not at all stages represented by a lawyer.

THE LAW

The applicant complains that his respective convictions for insult and slander are contrary to his rights under Article 10 of the Convention.

Article 10 of the Convention, insofar as relevant, reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ..."

The Court considers that the applicant's respective convictions for insult and slander interfered with his right to freedom of expression within the meaning of Article 10 para. 1 of the Convention. Such interference is in breach of Article 10, unless it is justified under paragraph 2 of this provision, i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 of the Convention and be "necessary in a democratic society".

As to the question whether the interferences at issue were prescribed by law, the Court recalls that the phrase "prescribed by law" in Article 10 para. 2 of the Convention must be given the same interpretation as the phrase "in accordance with the law" in Article 8 para. 2 of the Convention (Eur. Court HR, Silver and Others v. United Kingdom judgment of 25 March 1983, Series A no. 61, p. 33, para. 85). Where the Convention refers to domestic law, it is primarily the task of the national authorities to apply and interpret domestic law. The Convention organs have a limited jurisdiction in the controlling the manner in which this is done (Eur. Court HR, Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, p. 17, para. 45).

The Court notes that the applicant was convicted of offences under Articles 261 and 266 of the Criminal Code respectively. In these circumstances, the Court is satisfied that the interferences at issue were "prescribed by law" within the meaning of Article 10 para. 2 of the Convention.

As to the question whether the interferences complained of had a legitimate aim, the Court accepts that they were "for the protection of the reputation or rights of others" within the meaning of Article 10 para. 2 of the Convention.

As to the question whether the interferences at issue were "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention, the Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society (Eur. Court HR, Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, para. 31).

Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court HR, Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 41).

The adjective "necessary" within the meaning of Article 10 para. 2 implies the existence of a "pressing social need" which must be convincingly established. In this matter as in others, it is primarily for the national authorities to determine the need for an interference with the exercise of freedom of expression. What they may do in this connection is, however, subject to a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (cf. Eur. Court HR, De Haes and Gijsels v. Belgium judgment of 24 February 1997, Reports of Judgments and Decisions 1997-I, p. 233-234, para. 37; Worm v. Austria judgment of 29 August 1997, Reports 1997-V, pp. 1550-1551, para. 47).

The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (Worm v. Austria judgment, loc. cit.).

The Court observes that on two occasions the applicant likened the Dordrecht Anti-Discrimination Council, which organisation’s aim appears to be fighting against racism and fascism, to the Nazi S.A. The Court notes that he did so in response to an opinion expressed by the Anti-Discrimination Council in a local newspaper in which it criticised a protest action against the planned housing of Yugoslav asylum seekers and the underlying motives for this action. The Court finally notes the respective sentences imposed on the applicant, i.e. one suspended conditional fine in an amount of NLG. 500 and payment of a fine in an amount of NLG.1,000.

In this light and having regard to the duties and responsibilities inherent in the right of freedom of expression guaranteed by Article 10 of the Convention, the Court considers that the interferences at issue were justifiable and proportionate to the legitimate aim pursued.

The interferences complained of can, therefore, reasonably be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention.

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 35 para. 3 of the Convention.

2. The applicant complains that, in the criminal proceedings against him, he was not at all stages represented by a lawyer.

This complaint must be examined under Article 6 of the Convention which provision, insofar as relevant, reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...
> ...
> 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;
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> ..."

The Court observes that it does not appear from the applicant's submissions that he has raised this complaint, either in form or in substance, in the proceedings before the Court of Appeal and, subsequently, the Supreme Court.

The Court considers that the mere fact that all remedies have been tried does not of itself constitute compliance with the exhaustion of domestic remedies. It is also required that the applicant, at least in substance, has submitted to the competent domestic authorities the complaint he puts to the Court (cf. No. 15669/89, Dec. 28.6.93, D.R. 75, p. 39; and No. 20948/92, Dec. 22.5.95, D.R. 81, p. 35).

The Court is, therefore, of the opinion that, as regards this complaint, the applicant has not exhausted domestic remedies as required by Article 35 para. 1 of the Convention.

It follows that this part of the application must be rejected pursuant to Article 35 para. 1 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Michael O'Boyle
Registrar

Elisabeth Palm
President