AS TO THE ADMISSIBILITY OF

Application No. 19083/91
by R.G.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 13 October 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 21 October 1991 by R.G. against the Netherlands and registered on 15 November 1991 under file No. 19083/91;

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 1954 and resident at Amsterdam. He is represented before the Commission by Ms. Ties Prakken, a lawyer at Amsterdam.

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

Since 12 October 1990 the applicant was detained in Spain pending his extradition to the Netherlands.

In May 1991 the applicant's then lawyer asked the public prosecutor (officier van justitie) and the investigating judge (rechter-commissaris) in the Netherlands for access to the case-file regarding the criminal case against the applicant. This request was granted by the investigating judge on 5 June 1991, but the documents that were made available were in fact not the whole case-file.

On 30 August 1991 the applicant was extradited to the Netherlands and provisionally detained by the Dutch police on the suspicion of murder, alternatively manslaughter. On 2 September 1991 the applicant was detained on remand by the investigating judge for a period of six days, which was prolonged on the same day by another six days.

On 4 September 1991 the investigating judge decided that the applicant and his lawyer would not be given access to certain documents regarding the criminal investigation as long as this was justified by the requirements of the investigation. The reason which was given was that certain investigatory measures could be impeded or disturbed if the applicant had access to the documents concerned.

On 9 September 1991 the applicant appealed against this decision. In his appeal he stated that the refusal to grant him access to certain parts of the case-file prejudiced his defence and that he was entitled to verify, on the basis of the evidence in the case, whether his detention was justified and, if need be, to request a judge to examine the justification for his detention. He referred in this regard to Article 5 para. 4 of the Convention and to the judgment of the European Court of Human Rights in the Lamy case (Eur. Court H.R., judgment of 30 March 1989, Series A no. 151).

On 10 September 1991 the Regional Court (Arrondissementsrechtbank) of Amsterdam ordered the applicant's detention on remand for 30 days. The applicant appealed against this decision on 13 September 1991.

On 17 September 1991 the Regional Court decided on the applicant's appeal against the decision of 4 September 1991. The Court considered the appeal well-founded. It stated that the applicant's defence was seriously prejudiced by the refusal to give him access to the documents concerned and that he was entitled to examine, on the basis of the evidence against him, whether his detention was justified. Consequently, the applicant should urgently be given access to the documents concerned.

On 23 September 1991 the applicant's lawyer was given access to certain documents which had previously been withheld from him (minutes of the hearing of two witnesses and certain pages from reports on telephone tapping).

On 16 October 1991 the Court of Appeal (Gerechtshof) of Amsterdam rejected the applicant's appeal against the decision of 10 September 1991 regarding his detention on remand.

COMPLAINTS

The applicant complains of violations of Article 5 para. 4 of the Convention in that decisions on the applicant's detention on remand were taken without the applicant having been given access to documents in the case-file which were relevant to the question of detention. He points out that these documents were available to the public prosecutor, the investigating judge and the Regional Court and that there was therefore no equality of arms and no truly adversarial procedure. He refers to the judgment in the Lamy case and considers that this case-law should also be applicable in the present case.

THE LAW

The applicant complains of violations of Article 5 para. 4 (Art. 5-4) of the Convention in that decisions on his detention on remand were taken without him having been given access to documents in the case-file which were relevant to the question of detention. He refers in this respect to the judgment in the Lamy case.

Article 5 para. 4 (Art. 5-1) of the Convention provides as follows:

"Everyone who is deprived of his liberty by arrest or

detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The applicant argues in particular that the documents initially available to him did not show the existence of serious evidence which could justify his detention on remand whereas the crucial documents from which his involvement in the offence could emerge were withheld from him. He claims that, although on appeal these documents were available to him, he was originally unable to challenge the lawfulness of his detention on remand on the basis of the restricted case-file.

He further observes that for a request to the Regional Court to revoke the detention order under Article 69 of the Code of Criminal Procedure (Wetboek van Strafvordering) to be effective, he would have needed access to all the documents in the case-file. He therefore considers that he still is a victim of the alleged violations of Article 5 para. 4 (Art. 5-4) of the Convention.

The Government submit that the applicant was initially denied access to the documents as the investigating judge feared that the applicant or his representative might exert unlawful influence on certain witnesses whose names appeared in those documents and who had not yet been questioned by the investigating judge.

The Government further argue that the present case differs from the Lamy case. The preliminary investigation in Belgium is secret and inquisitorial and during the first thirty days of pre-trial detention, both the suspect and his lawyer are denied access to the entire case-file. Dutch law of criminal procedure is of a moderately accusatorial nature and only allows temporarily for a limited restriction of access to the case-file. Thus, on the basis of a domestic remedy which led to the Regional Court's decision of 17 September 1991, the applicant obtained access to the entire case-file and was able to challenge the lawfulness of his detention. The respondent Government therefore consider that the applicant can no longer be considered a victim within the meaning of Article 25 (Art. 25) of the Convention of the alleged violations of the Convention.

The Government also observe that the refusal of access to certain documents in the case-file did not render the detention unlawful since the courts automatically review the lawfulness of a detention whenever an extension of such detention is requested. This is illustrated in the instant case by the fact that the applicant's appeal against the order of 10 September 1991 prolonging his detention on remand was rejected on 16 October 1991 by the Court of Appeal.

Finally, the Government, whilst expressly declaring not to rely on non-exhaustion of domestic remedies, point out that the applicant could have filed a request to the Regional Court under Article 69 of the Code of Criminal Procedure to have the detention order revoked.

The Commission observes that, under Article 25 para. 1 (Art. 25-1) of the Convention, it "may receive petitions ... from any person ... claiming to be a victim of the rights set forth in (the) Convention".

The Commission recalls its case-law according to which it falls first to the national authorities to redress any alleged violation of the Convention (see e.g. No. 10668/83, Dec. 13.5.87, D.R. 52 pp. 177, 181).

The Commission notes that the applicant was detained on remand on 2 September 1991 and that the investigating judge denied the applicant and his representative full access to the case-file on 4 September 1991. However, when deciding on the applicant's objection

against this restriction, the Regional Court granted the applicant full access to all the documents on 17 September 1991. Moreover, after the applicant had been granted access to the full case-file, the Court of Appeal on 16 October 1991 confirmed the lawfulness of the prolongation of the applicant's detention on remand.

In these circumstances, the Commission considers that the applicant, by making use of domestic remedies available to him, has obtained adequate redress at the domestic level for the violations which he now alleges before the Commission. The Commission concludes that the applicant can therefore no longer claim to be a victim of the alleged violations within the meaning of Article 25 (Art. 25) of the Convention.

It follows that the application is inadmissible under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)