AS TO THE ADMISSIBILITY OF

Application No. 15185/89
by K.S.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 1 April 1992, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO

Mr. K. ROGGE, Secretary to the Second 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 22 June 1989 by K.S. against the Netherlands and registered on 30 June 1989 under file No. 15185/89;

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 Malaysian national, born in 1947, and at present resident in Delft. In the procedure before the Commission he is represented by Mrs. G.E.M. Later, a lawyer practising in The Hague.

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

In April 1984, the applicant arrived in the Netherlands and was arrested in possession of an important amount of heroin. During the investigation, a Dutch investigating team travelled to Malaysia and heard some witnesses who were detained there. On 21 August 1984 the Amsterdam Regional Court (Arrondissementsrechtbank) convicted him of importing heroin and sentenced him to nine years' imprisonment.

During the applicant's detention, his passport was sent back to the Malaysian embassy. This implied that the applicant would be given a Malaysian laissez-passer in order to return to Malaysia.

On 28 January 1986, the Deputy Minister of Justice (Staatssecretaris van Justitie) declared the applicant to be an "undesirable alien" (ongewenste vreemdeling), on the basis of the stipulations of Section 21 of the Aliens Act (Vreemdelingenwet). The applicant's request for a review of this decision was rejected on 8 October 1986. A subsequent appeal before the Council of State (Raad van State) was rejected by a judgment of 6 January 1989.

On 8 March 1990, the applicant requested a residence permit on humanitarian grounds. On 25 April 1990, the Deputy Minister of Justice rejected the request. On 29 May 1990, the applicant requested a review of the decision and asked for suspensive effect to be granted to that appeal. On 25 June 1990, the Deputy Minister of Justice refused to grant suspensive effect to the appeal. Since the Deputy Minister of Justice has not given a decision on the request itself within the prescribed time-limit of three months, the applicant appealed to the Council of State against the Minister's fictitious rejection of the request for a review of the decision of 25 April 1990. This appeal was still pending at the time of the present decision.

On 19 July 1990, the applicant introduced summary proceedings with the President of the Regional Court of The Hague requesting him to grant suspensive effect to his appeal to the Council of State and to his application to the Commission, invoking Articles 3, 5, 6 and 13 of the Convention and Article 1 of Protocol No. 6.

On 1 May 1991, the President of the Regional Court of The Hague rejected the applicant's request, referring, inter alia, to an inadmissibility decision of the Commission given on 16 January 1991 in a similar case (No. 15216/89 dec. 16.1.91, unpublished, in the applicant's co-accused's case). On 8 May 1991, the applicant appealed to the Court of Appeal (Gerechtshof) of The Hague. This appeal was still pending at the time of the present decision.

COMPLAINTS

1. The applicant complains under Articles 3 and 6 of the Convention and Article 1 of Protocol No. 6 that, if deported to Malaysia, he will most probably be prosecuted there for drug trafficking, for which he will receive the death penalty. He refers to Section 39 (B) of the Malaysian Dangerous Drugs Act of 1952, as amended in 1983, which reads as follows:

> "(1). No person shall, on his own behalf or on behalf of any other person, whether or not such person is in Malaysia:
>
> (a) traffic in a dangerous drug;
> (b) offer to traffic in a dangerous drug; or
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2). Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death."

He submits that the Malaysian authorities are aware of his situation in the context of rogatory proceedings in which some witnesses were heard in Malaysia and by the fact that his passport was sent back to the Malaysian embassy. He furthermore refers to information given by some relatives and friends that the Malaysian authorities have been quite interested in him for some time.

The applicant further complains that on the basis of either the above-mentioned Act, the Dangerous Drugs Special Preventive Measures Act or the Internal Security Act, he almost certainly will be arbitrarily detained without any form of due process, which detention can be prolonged indefinitely for periods of two years. He adds that the detention is ordered by a member of the Government. He invokes Articles 3 and 5 of the Convention.

2. The applicant also complains that, in the proceedings concerning his request for the review of the decision to declare him an "undesirable alien", the proceedings concerning his residence permit and the summary proceedings, his arguments under Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6 were never taken into

account. Invoking Article 6 of the Convention, he submits that he has not received a fair hearing.

3. The applicant also explains that since his conclusive arguments under Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6 were never taken into account by the Dutch authorities, he has not had an effective remedy for his complaints concerning the alleged violation of the above provisions. He invokes Article 13 of the Convention in conjunction with the above provisions.

The applicant further complains that the Dutch authorities sent his passport to the Malaysian authorities, thereby alerting them to his conviction for importation of heroin. They have thereby created problems for him upon his return to Malaysia and made it impossible for him to seek residence elsewhere. He submits that this is not a normal procedure as applied to other foreign detainees. He invokes Article 14 of the Convention in conjunction with Article 5 of the Convention.

4. The applicant also seems to consider that there is a violation of Protocol No. 7.

THE LAW

1. The applicant complains that, if deported to Malaysia, he will probably be prosecuted there for drug trafficking, for which he will receive the death penalty. He submits that since the Malaysian authorities have been alerted about him, he risks detention without due process upon his return, which detention can be prolonged indefinitely. He invokes Articles 3, 5 and 6 of the Convention and Article 1 of Protocol No. 6 (Art. 3, 5, 6, P6-1).

The Commission has examined these complaints under Article 3 of the Convention and Article 1 of Protocol No. 6 (Art. 3, P6-1) to the Convention.

Article 3 (Art. 3) of the Convention states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 1 of Protocol No. 6 (P6-1) to the Convention states:

"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

The Commission recalls the case-law of the Convention organs according to which the right of an alien to reside in a particular country is not as such guaranteed by the Convention. However, the decision of a Contracting State to deport a person may give rise to an issue under Article 3 (Art. 3) of the Convention, and hence engage the responsibility of that State under the Convention, where there is a risk that a person, if deported, will be subjected to treatment contrary to Article 3 (Art. 3) of the Convention in the receiving country (see Eur. Court H.R., Cruz Varas judgement of 20 March 1991, Series A n° 201, para. 91; No. 12102/86, Dec. 9.5.86, D.R. 47 p. 286).

The question arises whether analogous considerations apply to Article 1 of Protocol No. 6 (P6-1) to the Convention, in particular whether this provision equally engages the responsibility of a Contracting State where, upon deportation, the person concerned faces a real risk of being subjected to the death penalty in the receiving State. The question also arises whether, if Article 1 of Protocol No. 6 (P6-1) cannot engage the responsibility of a Contracting State in such circumstances, Article 3 (Art. 3) of the Convention may serve to prohibit deportation to a country where the person concerned may be subjected to the treatment complained of.

However, the Commission need not resolve these issues since the complaints at issue are in any event manifestly ill-founded.

The Commission points out that the applicant no longer has a passport and will be obliged to return to Malaysia in the event of an execution of the deportation order. Moreover, the applicant has pointed out that the Malaysian authorities have been made aware of his situation. He has also referred to general information on the situation in Malaysia and to some information about his personal situation given by some relatives and friends.

The Commission notes that in order to establish the risk of a violation of Article 1 of Protocol No. 6 and Article 3 (P6-1, 3) of the Convention, substantial grounds have to be shown for believing that the person concerned faces a real risk of being subjected to the treatment complained of (see Eur. Court H.R., Soering judgment of 7 July 1989, Series A n° 161, p. 35, para. 91; Eur. Court H.R., Cruz Varas judgment, loc. cit., p. 28, para. 69-70; Eur. Court H.R., Vilvarajah judgment of 30 October 1991, para. 103, to be published in Series A No. 215).

In the present case, the applicant claims that, upon his return to Malaysia, he will be prosecuted and eventually subjected to the death penalty for illicit drug traffic.

The Commission first observes that the applicant was already convicted in the Netherlands of drug offences on 21 August 1984. The Commission further recalls its decision of 16 January 1991 in a case raising a similar issue (No. 16531/90, Dec. 16.1.1991, to be published) where it noted that the applicants had not shown any case where a person has been convicted and subjected to the death penalty in Malaysia following his conviction for the same offence elsewhere. Nor has the present applicant submitted any such evidence.

Furthermore, the Commission, referring to its above-mentioned decision of 16 January 1991, is of the opinion that the applicant did not give precise information about the specific conditions of the detention which he himself risks undergoing upon his return.

The applicant has therefore not shown substantial grounds which would enable the Commission to conclude that he will be subjected to treatment in violation of Article 1 of Protocol No. 6 or Article 3 (P6-1, 3) of the Convention.

The applicant has also failed to provide sufficient substantiation with regard to his allegations on the risk to be detained and the conditions thereof in Malaysia.

As a result, the complaints do not disclose any appearance of a violation of the rights set out in Articles 3, 5 and 6 (Art. 3, 5, 6) of the Convention or Article 1 of Protocol No. 6 (P6-1). It follows that in this respect the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that in the various proceedings he has introduced in the Netherlands, his arguments under Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6 (Art. 3, 5, P6-1) were never taken into account. Invoking Article 6 (Art. 6) of the Convention, he submits that he has not received a fair hearing.

However, Article 6 para. 1 (Art. 6-1) of the Convention does not apply to the incriminated proceedings, which concern either expulsion (cf. No. 8118/77, Dec. 19.3.81, D.R. 25, p. 105; No.9990/82, Dec. 15.5.84, D.R. 39, p. 119) or the question whether an alien should be allowed to stay in a particular country (cf No. 8244/78, Dec. 2.5.79, D.R. 17, p. 157; No. 9285/81, Dec. 6.7.82, D.R. 29, p. 205).

It follows that this part of the application must be rejected as being incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Furthermore, the applicant alleges a violation of Article 13 (Art. 13) of the Convention since his arguments under Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6 (Art. 3, 5, P6-1) were not taken into account in the proceedings in the Netherlands. He relies on Article 13 (Art. 13) of the Convention in conjunction with these provisions. Under Article 14 of the Convention in conjunction with Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6 (Art. 14+3+5, P6-1) the applicant complains that the Aliens Police sent his passport to the Malaysian authorities. He submits that this procedure is not applied to other foreign detainees.

The Commission has examined these remaining complaints as they have been submitted by the applicant. However, after considering the complaints as a whole, the Commission finds that they do not disclose any appearance of a violation of the provisions invoked by the applicant. It follows that the remainder of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant also seems to consider that there is a violation of Protocol No. 7 (P7).

However, the Commission notes that the Netherlands are not a Party to Protocol No. 7 (P7).

It follows that the application is in this respect incompatible ratione personae with the provisions 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)