AS TO THE ADMISSIBILITY OF

Application No. 17581/90
by M. VAES
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 6 December 1990 by Maarten VAES against the Netherlands and registered on 20 December 1990 under file No. 17581/90;

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

The applicant is a Dutch citizen, born in 1966 and resident at 's-Hertogenbosch. He is represented before the Commission by Mrs. G.E.M. Later, a lawyer practising in The Hague.

From 16 May 1990 the applicant was on a voluntary basis in the psychiatric hospital Reinier van Arkel at 's-Hertogenbosch. On 17 May 1990 his mother addressed to the District Court judge (kantonrechter) of 's-Hertogenbosch a request for a judicial order (rechterlijke machtiging) to have him detained in a mental hospital. The request reached the District Court on 28 May 1990. A medical certificate dated

23 May 1990 was annexed to it. On 5 June 1990 the District Court judge, after hearing the applicant and a psychiatrist, issued an order for the applicant's detention.

At the hearing before the District Court judge, the applicant was not assisted by a lawyer. The documents in the case do not indicate that he was asked whether he wished to have a lawyer. He was not informed of the hearing in advance, which made it impossible for him to contact a lawyer himself. Moreover, he had no access to the documents in the case-file and was not informed of their contents. At least there is no indication in the minutes of any such information having been provided.

In his appeal to the Supreme Court (Hoge Raad) the applicant invoked these deficiencies in the procedure. He alleged that the procedure was not consistent with the principles developed in the Supreme Court's case-law and referred in particular to a judgment of 19 January 1990 (N.J. 1990, 442). However, on 12 October 1990 the Supreme Court declared the appeal inadmissible, the reason being that an order of this kind issued by a District Court judge could only be challenged on specific and limited grounds and the grounds invoked by the applicant were not admissible.

COMPLAINTS

The applicants complains of violations of Articles 5, 6, 13 and 14 of the Convention.

1. The applicant complains that, when a detention order is issued by a District Court judge, there is only a limited right to appeal to the Supreme Court, whereas similar decisions by the President of a Regional Court (Arrondissementsrechtbank) are subject to such an appeal without any restriction. The applicant considers that this distinction is discriminatory and apparently alleges a violation of Article 14 of the Convention.

2. The applicant considers that Article 5 para. 1 of the Convention was violated in that he was not assisted by a lawyer at the hearing on 5 June 1990.

3.The applicant further complains of not having been given the opportunity to acquaint himself with the documents in the case-file and he seems to rely in this respect on Article 5 paras. 1 and 2 of the Convention.

4.The applicant submits that he was not summoned to appear at the hearing before the District Court judge, and he seems to rely in this respect on Article 5 paras. 1 and 2 of the Convention.

5. As the Supreme Court refused to examine the applicant's appeal, he considers that there was no judicial remedy satisfying Article 5 para. 4 of the Convention. In his opinion, the absence of a remedy was also a violation of Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 December 1990 and registered on 20 December 1990.

After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 8 April 1991. 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 their written observations on admissibility and merits.

The Government's observations were submitted on 21 June 1991. The applicant's observations in reply were received on 12 August 1991.

THE LAW

1. The applicant first complains that, when a detention order is issued by a District Court judge, there is only a limited right to appeal to the Supreme Court, whereas similar decisions by the President of a Regional Court are subject to such an appeal without any restriction. The applicant considers that this distinction is discriminatory and apparently alleges a violation of Article 14 (Art. 14) of the Convention.

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 alleges a violation of Article 5 para. 1 (Art. 5-1) of the Convention in that he was not assisted by a lawyer at the hearing on 5 June 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 his 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 (cf. 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 wishes to have a lawyer and that, where he is heard without being assisted by a laywer, 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. However, the Government admit that the judge's failure to inquire whether the applicant wished a lawyer to be appointed was not consistent with the Supreme Court's judgment.

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 further complains of not having been given the opportunity to acquaint himself with the documents in the case-file and he seems to rely, in this respect, on Article 5 paras. 1 and 2 (Art. 5-1, 5-2) of the Convention.

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 acquaint himself with the relevant documents before or during the hearing in the case.

The applicant replies that in the helpless condition in which he was, it could not be expected of him that he should ask to see the documents in the case-file.

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 also submits that he was not summoned to appear at the hearing before the District Court judge, and he seems to rely in this respect on Article 5 paras. 1 and 2 (Art. 5-1, 5-2) of the Convention.

The Commission first notes that on 5 June 1990 the applicant had already been for some time in a mental hospital. At the hearing on 5 June 1990 he must also have been informed of the reasons for that hearing. Moreover, whether or not the applicant received the text of the detention order, it has not been alleged that he was not promptly informed of the fact that a detention order had been issued on 5 June 1990.

In these circumstances, the Commission considers this complaint to be manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant finally submits that, as the Supreme Court refused to examine his appeal, he had no judicial remedy satisfying the requirements of Article 5 para. 4 (Art. 5-4) of the Convention. He also considers that the absence of a remedy was a violation of Article 13 (Art. 13) of the Convention.

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.

As, in regard to detention, Article 13 (Art. 13) of the Convention must be seen as subsidiary to Article 5 para. 4 (Art. 5-4), the latter being the lex specialis, the Commission finds the complaint regarding Article 13 (Art. 13) also to be manifestly ill-founded.

For these reasons, the Commission, unanimously

-DECLARES INADMISSIBLE, the applicant's complaints of discrimination with regard to the right of appeal and of not having been summoned to appear before the District Court judge,

- DECLARES ADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)