AS TO THE ADMISSIBILITY OF

Application No. 23509/94
by Nicolaas Gerard VAN LUYK
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, 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 17 December 1993 by Nicolaas Gerard VAN LUYK against the Netherlands and registered on 17 February 1994 under file No. 23509/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 23 January 1996 and the observations in reply submitted by the applicant on 3 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch national, born in 1947, and resides in Dordrecht, the Netherlands. Before the Commission he is represented by Mr. G.F. van der Hardt Aberson, a lawyer practising in Rotterdam.

A. Particular circumstances of the case

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

On 26 January 1990 the Public Prosecutions Department (Openbaar Ministerie) of Breda commenced a preliminary judicial investigation (gerechtelijk vooronderzoek) in respect of the applicant, who was suspected of arson, the handling and passing on of stolen goods and embezzlement.

In connection with the suspicion against him the applicant was arrested and detained on remand on 29 January 1990. Subsequently the lawfulness of the detention on remand was reviewed three times. The applicant argued that there was no relevant suspicion in law against him and that for that reason his detention was unlawful. The applicant was released on 27 March 1990.

On 13 August 1992 the applicant, pursuant to Section 36 of the Netherlands Code of Criminal Procedure (Wetboek van Strafvordering; hereinafter referred to as "CCP"), requested the Regional Court (Arrondissementsrechtbank) of Breda to declare the case closed, since a public hearing of the case had not been held within a reasonable time as required by Article 6 para. 1 of the Convention. On 2 September 1992, after hearing the applicant, his lawyer and the public prosecutor, the Regional Court, sitting in chambers (in Raadkamer), complied with this request, without dealing with the merits of the case.

On 25 November 1992 the applicant, on the basis of Section 89 CCP, presented a request for compensation of material and non-material damage, caused by his detention on remand.

After having heard the applicant and his lawyer, the Regional Court of Breda, sitting in chambers, rejected the applicant's request on 11 March 1993 as it found no reasonable ground for granting compensation. The applicant filed an appeal against this decision with the Court of Appeal (Gerechtshof) of 's-Hertogenbosch.

On 3 June 1993 the applicant, assisted by his lawyer, was heard by the Court of Appeal, sitting in chambers. The Court of Appeal confirmed the Regional Court's decision on 23 June 1993, but corrected the reasons for the latter Court's decision. In the annex (bijlage) to the Court of Appeal's decision, containing the reasons for the rejection of the applicant's claim for compensation, it considered, inter alia:

<Translation>
"On 25 January and 26 January 1990 K. has made an incriminating statement against the applicant concerning the embezzlement ... and the arson ... . The applicant has initially made untruthful statements with regard to the question if he had seen or spoken to K. on the evening of the fire. The applicant has further made vague and unclear statements concerning the embezzlement ... . Based on the facts mentioned above the Court is of the opinion that the applicant was correctly detained on remand.

The damage suffered by the applicant as a result of his detention on remand is, in the Court's opinion, wholly attributable to him, since in the circumstances described above the use of preventive measures against him was due to his own behaviour."

B. Relevant domestic law and practice

Section 36 CCP, insofar as relevant, provides:

<Translation>
"1. If a prosecution is not continued, the court ... may declare the case closed at the request of the accused.

..."

Section 89 para. 1 CCP, insofar as relevant, provides:

<Translation>
"1. If a case ends without the imposition of a punishment or measure ... the court may, at the request of the former accused, grant him compensation at the expense of the State for the damage

which he has suffered as a result of police custody ... or detention on remand. Such damage may include non-pecuniary damage ..."

Section 90 para. 1 CCP provides:

<Translation>
"1. Compensation is awarded where, and insofar as, in the opinion of the judge, taking all circumstances into account, there are equitable grounds for it."

COMPLAINTS

The applicant complains under Article 6 paras. 1 and 3 (d) of the Convention that in the proceedings to have the prosecution against him discontinued, he did not receive a public hearing and was unable to have witnesses examined.

He further complains that his request for compensation was rejected by the domestic courts without a public hearing and without the applicant being able to have witnesses examined. In this respect the applicant invokes Article 5 paras. 1 (c), 3 and 5 as well as Article 6 paras. 1 and 3 (d) of the Convention.

The applicant finally alleges that the Court of Appeal violated the principle of presumption of innocence enshrined in Article 6 para. 2 of the Convention when it held that his detention was due to his own behaviour.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 17 December 1993 and registered on 17 February 1994.

On 18 May 1995 the Commission decided to communicate the application to the respondent Government without inviting the Government at that stage of the proceedings to submit written observations. The further examination of the application was adjourned pending a final decision of the European Court of Human Rights in the case of Masson and Van Zon v. the Netherlands (30/1994/477/558-559).

On 5 December 1995 the Commission decided to resume the proceedings and to invite the Government to submit their observations on the case.

The Government's written observations were submitted on 23 January 1996. The applicant replied on 3 April 1996.

THE LAW

1. The applicant complains that the proceedings pursuant to Section 36 CCP to have the prosecution against him discontinued were not in conformity with the requirements of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

However, and leaving aside the question whether the applicant may be considered a victim within the meaning of Article 25 (Art. 25) of the Convention, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of these provisions, as Article 26 (Art. 26) of the Convention provides that the Commission "may only deal with the matter ... within a period of six months from the date on which the final decision was taken".

The Commission notes that the decision of the Regional Court of Breda to declare the case closed was made on 2 September 1992, whereas the application was introduced on 17 December 1993, that is more than

six months after the date of the decision. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period.

It follows that this part of the application has been introduced out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

2. In respect of the proceedings concerning his request for compensation pursuant to Section 89 CCP, the applicant alleges a violation of Article 5 paras. 1 (c), 3 and 5 (Art. 5-1-c, 5-3, 5-5) as well as Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

Article 5 paras. 1 (c), 3 and 5 (Art. 5-1-c, 5-3, 5-5), insofar as relevant, read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> ...
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial ...
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Paras. 1 and 3 (d) of Article 6 (Art. 6-1, 6-3-d), insofar as relevant, provide as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ...
> ...
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

The Government submit in the first place that Article 6 para. 1 (Art. 6-1) is not applicable to the proceedings at issue. In this respect they refer to the Masson and Van Zon v. the Netherlands judgment (Eur. Court HR, judgment of 28 September 1995, Series A no. 327).

The Government further submit that Article 6 para. 3 (Art. 6-3) is not applicable since the proceedings pursuant to Section 89 CCP cannot be deemed to determine a criminal charge.

Insofar as the applicant must be understood to argue that he was entitled to compensation since his detention on remand was unlawful, the Government deny that there is any indication to suggest that the applicant's detention on remand was not lawful.

The applicant contends that there was no reasonable suspicion of him having committed an offence. He also argues that since he was detained on remand he was entitled to a trial pursuant to Article 5 para. 3 (Art. 5-3) of the Convention but such a trial never took place. The applicant complains that for these reasons his detention on remand was contrary to Article 5 paras. 1 (c) and 3 (Art. 5-1-c, 5-3) of the Convention and that, therefore, he was entitled to compensation in accordance with para. 5 of Article 5 (Art. 5-5). Despite this entitlement his request for compensation was rejected by the domestic courts without a public hearing and without his having been able to have witnesses examined.

a. The Commission recalls that the right to compensation under Article 5 para. 5 (Art. 5-5) of the Convention presupposes that a violation of one of the other paragraphs of Article 5 (Art. 5) has been established, either by a domestic organ or by the Convention organs (cf. No. 10801/84, Rep. 03.10.88, D.R. 61 p. 62).

Insofar as the applicant has alleged a violation of Article 5 paras. 1 and 3 (Art. 5-1, 5-3) before the Dutch courts, the Commission observes that it does not appear that a breach of these provisions has been established by these courts.

Noting that the present application was introduced more than six months after the applicant's release from detention on remand on 27 March 1990, the Commission considers that pursuant to Article 26 (Art. 26) of the Convention it is not required to examine the alleged incompatibility of the detention on remand with Article 5 paras. 1 and 3 (Art. 5-1, 5-3).

It follows that the complaints under Article 5 paras. 1 and 3 (Art. 5-1, 5-3) of the Convention have been introduced out of time and must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

Furthermore, in the absence of a finding of the alleged breach of Article 5 paras. 1 and 3 (Art. 5-1, 5-3)of the Convention, it cannot be said that the applicant was entitled to compensation under Article 5 para. 5 (Art. 5-5).

Accordingly, this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

b. As regards the applicant's complaint that the compensation proceedings pursuant to Section 89 CCP were not in conformity with the requirements of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d), the Commission considers it clear that these proceedings did not concern a criminal charge against the applicant.

It follows that the applicant's complaint under Article 6 para. 3 (d) (Art. 6-3-d) is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

c. In respect of the applicant's complaint under Article 6 para. 1 (Art. 6-1) of the Convention under its "civil" head, the Commission reiterates in the first place that no right to compensation for lawful restrictions on a person's liberty after the discontinuation of criminal proceedings can be derived from the Convention. The Commission refers to the Masson and Van Zon v. the Netherlands judgment (loc. cit., p. 19, para. 49). It is true that that case concerned an acquittal rather than a discontinuation of criminal proceedings. However, the same principle was held to apply in the case of Leutscher v. the Netherlands, which concerned reimbursement of costs following the discontinuation of criminal proceedings (Eur. Court HR, judgment

of 26 March 1996, to be published, para. 24). In the domestic proceedings in the case of Leutscher, Section 90 CCP, according to which compensation may be awarded if there are equitable grounds for doing so, had been applicable in the same way as in the present case.

The Commission recalls that for Article 6 (Art. 6) to be applicable under its "civil" head, there must be a "dispute" over a right which can be said, at least on arguable grounds, to be recognised under domestic law. The "dispute" must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (cf. Eur. Court HR, Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22).

In the present case, the Commission notes that in the proceedings at issue the applicant requested compensation for damage caused by his detention on remand pursuant to Section 89 CCP.

In its Masson and Van Zon judgment the European Court of Human Rights has held that the claims of the applicants in that case, which included a claim for compensation for detention on remand pursuant to Section 89 CCP as in the present case, did not concern a "right" which could arguably be said to be recognised under the law of the Netherlands. This being so, the Court found that Article 6 para. 1 (Art. 6-1) of the Convention was not applicable to the impugned proceedings and had therefore not been violated (loc. cit., p. 20, para. 52).

The Commission finds that there is nothing in the present application which would lead to a different conclusion.

Accordingly the Commission must also reject this part of the application as being incompatible ratione materiae with the provisions of the Convention, pursuant to Article 27 para. 2 (Art. 27-2) of the Commission.

3. The applicant finally complains that the reasoning of the Court of Appeal violated the principle of presumption of innocence enshrined in Article 6 para. 2 (Art. 6-2) of the Convention.

Article 6 para. 2 (Art. 6-2) provides as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government submit that the Court of Appeal expressed no opinion whatsoever as to whether the applicant was guilty of the offences for which he had been prosecuted. In their opinion, the Court of Appeal was solely concerned with the grounds on which the applicant had been held in detention on remand.

The applicant takes the view that a distinction should be made between cases in which there has been a hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention and those, like the present case, in which there has not been such a hearing. Where no hearing has been held, the presumption of innocence should operate to the full extent.

The applicant argues that "the making of unclear, untruthful and vague statements" constitutes evidence in Dutch criminal law. By using such evidence as a reason for rejecting the applicant's request for compensation, the Court of Appeal violated Article 6 para. 2 (Art. 6-2).

The Commission recalls that, despite the wording of Article 6 para. 2 (Art. 6-2) of the Convention, it has consistently interpreted this provision as also applying to situations where the person

concerned is not or no longer formally subject to a criminal charge. Furthermore, the presumption of innocence is to be observed not only by the criminal court trying a case, but also by other authorities, including courts other than those which are competent to determine a criminal charge (cf. Sekanina v. Austria, Comm. Report 20.5.92, Eur. Court HR, Series A no. 266, p. 20, para. 36).

However, the Commission repeats its considerations mentioned above to the effect that neither Article 6 para. 2 (Art. 6-2) nor any other provision of the Convention gives a person "charged with a criminal offence" a right to compensation for lawful restrictions on his liberty where proceedings taken against him are discontinued.

Accordingly, the refusal to compensate the applicant for having been detained on remand did not in itself offend the presumption of innocence.

Nevertheless, a decision refusing compensation for detention on remand following discontinuation of proceedings may raise an issue under Article 6 para. 2 (Art. 6-2) if supporting reasoning amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence. In this respect the Convention organs distinguish between statements which reflect the opinion that the person concerned is guilty, and statements which merely describe a state of suspicion. The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Convention organs (cf. Leutscher v. the Netherlands judgment, loc. cit., para. 29).

The Commission observes that the refusal complained of was based on Section 89 para. 1 in conjunction with Section 90 CCP. In applying these provisions the competent judicial authorities, pursuant to Section 90 CCP, decide the matter on an equitable basis and have a degree of discretion in that they are under an obligation to take all circumstances into account.

It is true that the criminal proceedings in the present case were discontinued before the charges against the applicant had been examined by a court. However, the Commission finds that the refusal to award the applicant compensation does not amount to a penalty or a measure that can be equated with a penalty. From the reasoning applied by the Court of Appeal, it clearly appears that it confined itself in substance to noting the existence of circumstances which had justified his detention on remand and did not, as such, contain any finding of guilt.

The Commission is therefore of the opinion that the Court of Appeal's decision of 23 June 1993 did not offend the presumption of innocence guaranteed to the applicant under Article 6 para. 2 (Art. 6-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	G.H. THUNE
Secretary	President
to the Second Chamber	of the Second Chamber