AS TO THE ADMISSIBILITY OF

Application No. 12596/86
by Leonardus VAN ZOMEREN
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 28 November 1986 by Leonardus VAN ZOMEREN against the Netherlands and registered on 2 December 1986 under file No. 12596/86;

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

A.PARTICULAR CIRCUMSTANCES OF THE CASE

The applicant is a Dutch citizen, born in 1962. At the time of the introduction of his application, he was detained in a State Institution (Rijksinrichting) in Balkbrug, the Netherlands. In the proceedings before the Commission he is represented by Mrs. G.E.M. Later, a lawyer practising in The Hague.

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

During his childhood the applicant lived in various foster-homes and homes for children.

In 1980 the applicant was accused of burglary and extortion. The

Juvenile Judge (Kinderrechter) acting as Investigating Judge (Rechter-Commissaris) of the Regional Court (Arrondissementsrecht-bank) of The Hague requested a psychiatrist of the Psychiatric Observation Clinic of the Prison System (Psychiatrische Observatiekliniek van het Gevangeniswezen) to investigate the applicant's mental state. In his report of 1 December 1980 the psychiatrist concluded that the applicant's state of mental health was not such that he should be placed at the Government's disposal (terbeschikkingstelling van de regering). In its decision of 30 December 1980 the Regional Court sentenced the applicant to eighteen months' imprisonment. He was released from prison on 26 March 1981.

On 24 November 1983, the applicant was arrested, charged with attempt to occasion grievous bodily harm, kidnapping, theft and possession of a radio-transmitter without a licence. On 17 July 1984, at the request of the Investigating Judge the same psychiatrist as in 1980 reported on the applicant's mental state. However, this time the psychiatrist advised that the applicant be placed at the Government's disposal.

On 11 September 1984 the Regional Court of The Hague sentenced the applicant to fifteen months' imprisonment and placed him at the Government's disposal.

The applicant appealed against this decision to the Court of Appeal (Gerechtshof) of The Hague, in particular because of the fact that he had been placed at the Government's disposal. He submitted, inter alia, that between March 1981 and November 1983 he had shown that he could support himself and that he had not presented a danger to society.

On 11 February 1985 the Court of Appeal dismissed the applicant's appeal. The applicant introduced a plea of nullity to the Supreme Court (Hoge Raad).

On 12 November 1985 the Supreme Court rejected the applicant's plea of nullity.

By letter of 18 February 1986 the applicant requested the Queen to pardon him (gratieverzoek). On 25 March 1986 the Deputy Minister (Staatssecretaris) of Justice replied that a pardon was not possible, since a measure (maatregel) was involved and not a penalty.

By letter of 14 March 1986 the applicant requested the Minister of Justice on the basis of Article 37 (e) para. 1 of the Penal Code to revoke the measure of placement at the Government's disposal.

By letter of 30 May 1986 the Deputy Minister of Justice informed the applicant that she saw no reason to release him from the placement at the Government's disposal. By letter of 10 June 1986 the applicant asked the Deputy Minister of Justice to indicate the reasons for the rejection of the applicant's request. However, up to the present date the Deputy Minister of Justice has not answered this letter.

Subsequently, the applicant's placement at the Government's disposal has been prolonged twice for a year, on 2 November 1987 by the Court of Appeal of The Hague which had already decided this matter on appeal in 1985, and on 21 November 1988 by the Regional Court of The Hague.

Pursuant to the amended legislation (see Relevant domestic law and practice), the applicant appealed on 25 November 1988 to the Arnhem Court of Appeal against the decision of the Regional Court of The Hague of 21 November 1988 to prolong his placement at the Government's disposal.

On 23 January 1989 the Arnhem Court of Appeal dismissed the appeal.

At present the applicant is no longer placed at the Government's disposal.

B. RELEVANT DOMESTIC LAW AND PRACTICE

Since 1928 the Netherlands Penal Code (Wetboek van Strafrecht) has contained special provisions applying to persons suffering from a mental deficiency or mental illness. The provisions were substantially amended by an Act of 19 November 1986, which came into force on 1 September 1988. According to Article 37, the perpetrator of an offence which cannot be imputed to him because he suffers from a mental deficiency or mental illness is not liable to punishment. If the protection of public order so requires, the court may direct that such a person be placed at the Government's disposal so that he can receive treatment at the Government's expense.

Such a measure may also be taken in conjunction with a criminal sanction if the convicted person's responsibility was merely diminished at the time of the offence (Article 37 (a)).

Under Article 37 (b) para. 1, the placement lasts for two years unless the Government terminates it earlier. This period commences as soon as the judgment ordering it has become final (paragraph 2 thereof); it is suspended by any other deprivation of liberty resulting from a judicial decision (paragraph 3).

The court which makes the initial order may extend the confinement, on each occasion for one or two years (Article 37 (b) para. 2), on an application by the public prosecutor, himself acting on the opinion of the director of the clinic where the detainee is given treatment. In practice, placement is indefinite with a review of the detainee's psychiatric status every year or every second year. The Minister of Justice may terminate the placement at the Government's disposal any time. No appeal is available against this decision.

However, the detainee can institute summary proceedings (kort geding) on the ground that the Minister has acted unlawfully by rejecting his request for release. Although these proceedings do not entail an examination of the merits of the case, the President of the Regional Court may, by means of an immediately enforceable ruling, terminate the placement order when he considers the Minister's refusal not to be reasonable.

The amended rules governing placement at the Government's disposal contain several substantial changes concerning the introduction of certain guarantees for the detainee. Thus, since 1 September 1988, a detainee has the possibility to appeal against an extension order to the penitentiary chamber (penitentiaire kamer) of the Arnhem Court of Appeal. Before extending the initial order the competent court must hear the detainee. Until 1988 there was no such statutory provision but instructions to that end had been issued to the courts by a circular of 16 April 1980 of the Minister of Justice.

COMPLAINTS

1. The applicant considers that his detention as a result of the decision to place him at the disposal of the Government is unjustified. He argues that the medical evidence on which this decision was based did not take into account his good conduct between March 1981 and November 1983. He invokes Article 5 para. 1 (a) and (e) and Article 6 of the Convention.

2. The applicant further complains that the proceedings at his disposal for the review of the lawfulness of his detention did not meet

the requirements of Article 5 para. 4 of the Convention. In this respect, he also complains that the decisions on his requests for pardon and for release from placement at the Government's disposal were not sufficiently reasoned and that he was unable for lack of means to call in an independent expert to assess his mental health. He invokes Article 5 para. 4 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 November 1986 and registered on 2 December 1986.

On 15 December 1988 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application with regard to the issue under Article 5 para. 4 of the Convention concerning the possibility of instituting proceedings which will review the mental health of a person placed at the Government's disposal.

The Government's observations were received by letter dated 16 March 1989 and the applicant's observations by letter dated 20 June 1989.

On 15 April 1991 the Commission decided to ask for additional information from the parties concerning the proceedings for review of a person's placement at the Government's disposal.

The Government's reply was received by letter dated 4 July 1991 and the applicant's reply by telefax dated 11 September 1991.

THE LAW

1. The applicant considers that there is no basis for his detention which he regards as unlawful. He considers that the psychiatrist's report did not take into account his good conduct between March 1981 and November 1983. He invokes Article 5 para. 1 (a) and (e) (Art. 5-1-a, 5-1-e) and Article 6 (Art. 6) of the Convention.

Article 5 para. 1 (Art. 5-1), insofar as relevant, reads as follows:

"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:

(a) the lawful detention of a person after conviction by a competent court; ...

(e) the lawful detention ... of persons of unsound mind...;"

The Commission observes that there can be no doubt that the applicant's prison sentence falls within the scope of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention, as the Regional Court is a "competent court" within the meaning of this provision.

As regards Article 5 para. 1 (e) (Art. 5-1-e), the Commission recalls that the placement at the Government's disposal with a view to treatment, for reason of defective mental development or mental illness, is equivalent to the "detention of a person of unsound mind" (No. 6852/74, Dec. 5.12.78, D.R. 15 p. 5).

In view of the fact that the applicant's detention is based on a finding of a state of unsound mind, the Commission will primarily examine it under Article 5 para. 1 (e) (Art. 5-1-e) of the Convention.

On the question whether the detention is "lawful", including whether it complies with "a procedure prescribed by law", the

Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (Art. 5), namely to protect individuals from arbitrariness (Eur. Court H.R., Wassink judgment of 27 September 1990, p. 7, para. 24).

The Commission notes that the applicant's detention was ordered by the Regional Court of The Hague on the basis of Articles 37 and 37 (a) of the Dutch Penal Code. It was therefore ordered in accordance with a "procedure prescribed by law" within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention.

As regards the question of the lawfulness of the detention, regard must be had to the object and purpose of Article 5 para. 1 (Art. 5-1), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (Eur. Court H.R., Winterwerp judgment of 24 October 1979, p. 16, para. 37). In particular, the very nature of a mental disorder calls for objective medical expertise and furthermore, it must be of a kind or degree warranting compulsory confinement (ibid., p. 18, para. 39).

In the present case, the psychiatric and medical evidence submitted to the Regional Court indicated that the applicant suffered from development psychopathy which required placement at the Government's disposal.

Despite the applicant's alleged good conduct between March 1981 and November 1983, the Commission has no reason to doubt the objectivity and reliability of the medical evidence on the basis of which the Regional Court ordered the applicant's placement at the Government's disposal. Neither is there any indication that the contested deprivation of liberty was effected for a wrongful purpose.

The Commission accordingly concludes that the applicant's detention constitutes "the lawful detention of a person of unsound mind" within the meaning of sub-paragraph (e) of Article 5 para. 1 (Art. 5-1).

It follows that this part of 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 about his detention under Article 6 (Art. 6) of the Convention. The Commission recalls that the right to liberty is not a civil right within the meaning of Article 6 (Art. 6) of the Convention (Eur. Court H.R., Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, para. 23).

It follows that Article 6 (Art. 6) is not applicable with regard to these proceedings and this particular complaint 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).

3. The applicant finally complains that he could not take proceedings by which the lawfulness of his detention shall be decided since the Minister of Justice is not a "court". He invokes Article 5 para. 4 (Art. 5-4) of the Convention which reads:

"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."

In this respect, the Commission observes that in accordance with the Convention organs' case-law (Eur. Court H.R., Luberti judgment of

23 February 1984, Series A no. 75, p. 15, para. 31), the applicant has been deprived of his liberty by a court decision at the close of judicial proceedings. As the reasons initially warranting placement at the Government's disposal may cease to exist, it is essential that a review of the lawfulness should be available at reasonable intervals. The court which makes the initial order may extend the confinement, on each occasion for one or two years (Article 37 (b), para. 2 of the Dutch Penal Code), on an application by the public prosecutor, himself acting on the opinion of the director of the clinic. The Commission therefore concludes, pursuant to the Court's finding in the Keus case (Eur. Court H.R., judgment of 25 October 1990, Series A no. 185-C, para. 24), that the contested proceedings amounted to an "automatic review of a judicial character".

The question arises nevertheless whether a fresh review was available to the applicant during the two years between the initial order and the extension order.

In this respect the applicant argues that instituting summary proceedings (kort geding) does not constitute an effective means for assessing the lawfulness of the detention since it involves merely a marginal review of the Minister's rejection of the request for release. He argues that practice has shown that a release will seldom be obtained through these proceedings.

The Government submit that the safeguards contained in the review proceedings justify the absence of a specific legal remedy against the Minister's refusal. However, an action on the basis of Article 1401 of the Civil Code in summary proceedings can provide the detainee with an effective redress in that the President of the Regional Court may order his release if he considers the Minister's refusal to be unreasonable.

The Commission shares the applicant's view that a request for release addressed to the Minister of Justice cannot be regarded as proceedings before "a court". The Commission refers in this respect to the Keus judgment (Eur. Court H.R., Keus judgment of 25 October 1990, Series A no. 185-C, pp. 67-68 para. 28). However, the Commission notes that the applicant could have instituted summary proceedings to obtain his release on the ground that, in the light of the improvement of his mental state, public order no longer required the continuation of his placement. The Commission recalls that the Court has held in the above-metioned Keus judgment (ibid., para. 28) that summary proceedings constitute an effective means of contesting the Minister's decision and that they satisfy the requirements of Article 5 para. 4 (Art. 5-4) of the Convention.

In view of the above, the Commission finds that the applicant was able to obtain a fresh review during the period of two years between the initial order and the review proceedings resulting in an extension of his placement at the Government's disposal. Whether or not the applicant considered it advisable to have recourse thereto makes no difference in this respect.

Insofar as the applicant complains that the decisions on his requests for pardon and for release were not sufficiently reasoned and that his indigence prevented him from calling in an independent expert to examine his mental health, the Commission observes that this complaint raises no issue under para. 4 of Article 5 (Art. 5-4) as these proceedings fall outside the scope of this provision.

It follows that the application in this respect is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)