AS TO THE ADMISSIBILITY OF

Application No. 21961/93
by W.H.
against the Netherlands

The European Commission of Human Rights (Second Chamber) sitting in private on 28 February 1996, the following members being present:

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

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 26 May 1993 by W.H. against the Netherlands and registered on 2 June 1993 under file No. 21961/93;

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 11 November 1994 and the observations in reply submitted by the applicant on 20 February 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch citizen, born in 1943, and residing in Belgium. He is represented before the Commission by Mr P.J. Baauw, a lawyer practising in Utrecht.

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

In the late 1970's and early 1980's, the applicant was the director of, inter alia, the cleaning agencies S. and S.N., both companies with limited liability. In September 1980, the Dutch tax authorities inspected the accounts of another cleaning company, W.N. This inspection showed that the latter company was a subcontractor of the S. and S.N. companies. Between 1981 and 1984 the tax authorities inspected the accounts of the S. and S.N. companies and all their subcontractors.

On 31 December 1981, the tax inspector issued the first of a number of supplementary tax assessments to the companies of which the

applicant was the director. In accordance with Dutch tax laws, these assessments were increased by 100% which implied that fiscal offences had been committed. It appears that the applicant started fiscal proceedings challenging the supplementary tax assessments, but no further information on these proceedings has been submitted.

On 28 June 1982, the Fiscal Intelligence and Investigation Department (Fiscale Inlichtingen en Opsporingsdienst, hereinafter referred to as "FIOD") allegedly informed the applicant's lawyer that they suspected the applicant of fraud committed between 1979 and 1982.

In May 1984, the Audit Division of the Department of Direct Taxes at The Hague handed the investigation against, inter alia, the companies of which the applicant was the director over to the FIOD. On 14 June 1984, the FIOD interrogated the applicant as a suspect. In the same month the FIOD seized his accounts for investigation purposes. Between 27 February 1985 and 10 June 1986 the FIOD questioned about 70 persons in connection with the investigation against the applicant.

On 8 May 1985, the applicant was arrested on suspicion of fraud and detained on remand. On 17 June 1985, he was conditionally released. The conditions for his release, inter alia, a bank guarantee of 200.000 Dutch guilders, were lifted on 11 December 1985.

On 10 May 1985, a judicial investigation (gerechtelijk vooronderzoek) against the applicant was opened, during which the investigating judge heard the applicant on four occasions. The investigating judge further examined 25 witnesses and 3 experts, most of them at the applicant's request.

The judicial investigation was closed in January 1989 and the applicant was subsequently summoned to appear before the Regional Court (Arrondissementsrechtbank) of The Hague on 13 April 1989 on five counts of fraud, and for participation in a criminal organisation.

The applicant's objection (bezwaar) against the summons was rejected after a hearing, and on 18 May 1989, the Regional Court started its examination of the substance of the charges. Another hearing was held on 27 July 1989. On 10 August 1989, the Regional Court acquitted the applicant of participation in a criminal organisation, convicted him of five counts of fraud and sentenced him to twenty-four months' imprisonment, six months of which suspended during a probation period of two years, and a fine of 500.000 Dutch guilders. The time the applicant had spent in pre-trial detention was to be deducted from his prison sentence.

Both the applicant and the public prosecutor filed an appeal against this judgment with the Court of Appeal (Gerechtshof) of The Hague.

On 11 July 1991, the Court of Appeal quashed the Regional Court's judgment, convicted the applicant of three counts of fraud, acquitted him of two counts of fraud and, in accordance with Section 63 of the Criminal Code (Wetboek van Strafrecht) after having noted a previous conviction, sentenced him to six months' imprisonment, three months of which were suspended during a probation period of two years, and a fine of 25.000 Dutch guilders.

As to the argument that the prosecution should be declared inadmissible because the criminal charges had not been determined within a reasonable time, the Court of Appeal found that the criminal proceedings had started on 14 June 1984, when the applicant had been questioned for the first time. It further held that:

[Dutch]

"Het ging om de administratie van een aantal nauw met elkaar

verweven b.v.'s die deze verwevenheid voor de buitenwereld trachtten te verhullen. Bij de aanvang van het onderzoek tegen verdachte was dit nog allerminst duidelijk en was daarmee ook niet duidelijk dat er gebruik gemaakt was van valse fakturen (...). Gezien de ingewikkeldheid van het onderzoek is de redelijke termijn in de zin van artikel 6 EVRM in de onderhavige strafzaak in deze fase dan ook niet overschreden. (...) De verdediging wijt de lange duur van het gerechtelijk vooronderzoek mede aan de berispelijke kwaliteit van het onderzoek van de fiscale recherche en aan de beperkte tijd die de rechter-commissaris beschikbaar had. Wat daarvan zij, de lange duur is in de eerste plaats veroorzaakt door de wens van de verdediging om vele reeds eerder gehoorde getuigen zeer uitgebreid opnieuw te doen horen. Ook al valt wellicht aan het FIOD onderzoek het een en ander af te dingen, het is zeker niet uitsluitend of in overwegende mate aan de justitiële autoriteiten te wijten dat met deze ingewikkelde zaak veel tijd gemoeid is geweest.
Ook bij de behandeling van de onderhavige strafzaak in hoger beroep is een redelijke termijn niet overschreden, in aanmerking genomen enerzijds de duur van de bedoelde periode, anderzijds de ernst van de onderhavige feiten. Al het vorenoverwogene in aanmerking genomen is evenmin sprake van overschrijding van een redelijke termijn wat betreft de totale duur van de behandeling van deze strafzaak tot op heden. Het hof verwijst hier naar hetgeen hierboven gezegd is omtrent de ingewikkeldheid van de zaak."

[Translation]

"It concerns the administration of a number of closely intertwined companies with limited liability which attempted to conceal their close links from the outside world. At the outset of the investigation against the suspect this was still far from clear and it was also not clear that use had been made of fake invoices (...). In view of the complexity of the investigation, the reasonable time within the meaning of Article 6 of the European Convention of Human Rights has not been exceeded at that stage of the present criminal case. (...) The defence attributes the long duration of the judicial investigation also to the inferior quality of the investigation by the Fiscal Information and Investigation Department and the limited time at the disposal of the investigating judge. Be that as it may, the long duration is primarily caused by the defence's wish to have many witnesses, who had already been interrogated, examined again very extensively. Even though the investigation by the FIOD may not have been flawless, the judicial authorities are certainly not exclusively or mainly to blame for the fact that this complex case has taken much time.
Also in the appeal proceedings in the present criminal case the reasonable time has not been exceeded, considering, on the one hand, the duration of this period, and, on the other hand, the serious facts at issue. Taking all the aforementioned into account, the total length of the proceedings up to this present day in this criminal case has not exceeded a reasonable time either. The court refers to its remarks above as regards the complexity of the case."

As regards the sentence to be imposed, the Court of Appeal held, inter alia,:

[Dutch]

"Het Hof acht enerzijds gelet op de ernst van de bewezen-verklaarde feiten een onvoorwaardelijke gevangenisstraf alleszins gerechtvaardigd. Verdachte heeft de feitelijke leiding gehad van S. en S.N. Verdachte heeft zich daarbij schuldig gemaakt gedurende een ruime periode en op grote schaal aan ontduiking van

verschuldigde sociale premies en vennootschapsbelasting, teneinde de kas van die B.V.'s te spekken c.q. de mensen die in die B.V.'s de dienst uitmaken te bevoordelen, een en ander ten nadele van derden.
Anderzijds houdt het Hof rekening met het tijdsverloop dat is verstreken sinds de telastegelegde feiten. Het Hof zal derhalve thans overgaan tot het opleggen van een gevangenisstraf van na te melden duur waarvan de helft voorwaardelijk en zulks gecombineerd met een geldboete."

[Translation]

"On the one hand, the Court is of the opinion that an unconditional prison sentence is in every respect justified, taking into account the seriousness of the proven facts. The suspect was in reality the director of S. and S.N. In that capacity the suspect is guilty, for an extended period of time and on a large scale, of evasion in paying due social security contributions and due corporation taxes, in order to increase the assets of these companies and/or benefit the people who were in charge of these companies, all to the detriment of third parties. On the other hand, the Court takes into account the time that has elapsed since the commission of the crimes the suspect was charged with. The Court will therefore now proceed to impose a prison sentence of a duration to be stated below of which half will be conditional and this in combination with a fine."

The applicant's subsequent appeal in cassation was rejected by the Supreme Court (Hoge Raad) on 1 December 1992. Insofar as the applicant repeated his complaint that the criminal charges against him had not been determined within a reasonable time, the more so as the proceedings against him should be considered to have started on 31 December 1981, the Supreme Court accepted the reasoning of the Court of Appeal.

Pursuant to the relevant rules contained in the General State Taxes Act (Algemene Wet inzake Rijksbelastingen), the 100 % increase of the additional tax assessments ceased to apply as the facts on which this increase was based had led to a separate irrevocable substantive judgment.

COMPLAINT

The applicant complains under Article 6 para. 1 of the Convention that the criminal charges against him were not determined within a reasonable time. He submits that the criminal proceedings against him started on 31 December 1981, when he received the first supplementary tax assessment, and ended on 1 December 1992, when the Supreme Court rejected his appeal in cassation and that in virtually all stages of the criminal proceedings there were excessively long periods of inactivity imputable to the prosecution and judicial authorities.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 May 1993 and registered on 2 June 1993.

On 2 September 1994, the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 11 November 1994. The applicant replied on 20 February 1995, after an extension of the time-limit fixed for that purpose.

THE LAW

The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the criminal charges against him have not been determined within a reasonable time.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ..."

1. The Government submit in the first place that the applicant can no longer claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention as the Court of Appeal had taken the time involved in the proceedings into account in the determination of the applicant's sentence. In this respect the Government also emphasises that, as a result of the applicant's conviction, the fiscal penalties imposed, i.e. the 100% increase of the additional tax assessments, had ceased to apply.

The applicant refutes this argument, as the Court of Appeal has explicitly rejected his argument that the proceedings had exceeded a reasonable time within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. As regards the determination of the sentence, the Court of Appeal has only had regard to the time elapsed since the commission of the offences. The applicant argues that this does not concern the question whether the criminal proceedings have taken place within a reasonable time and that no redress has been obtained for an acknowledged violation of the Convention.

The Commission recalls that an applicant can no longer claim to be a victim of the failure to observe the "reasonable time" requirement in Article 6 para. 1 (Art. 6-1) of the Convention if the national authorities have acknowledged either expressly or in substance the breach of that provision and if redress has been given (cf. No. 17661/91, Dec. 31.3.93, D.R. 74, p. 156).

However, in the present case the domestic courts have expressly denied a violation of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the applicant's complaint of the length of the proceedings. Consequently, there is no acknowledgement, either expressly or in substance, of a violation of the Convention.

In these circumstances it is unnecessary to examine whether the the sentence imposed by the Court of Appeal may be considered as constituting redress (cf. No. 10868/84, Dec. 21.1.87, D.R. 51, p. 62).

The applicant can therefore still claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention of a breach of Article 6 para. 1 (Art. 6-1) of the Convention.

2. As regards the substance of the applicant's complaint the Government submit that the criminal proceedings at issue started on 14 June 1984, when the FIOD examined the applicant as a suspect. Before that date it was by no means obvious that steps would be taken against the applicant under criminal law.

The Government submit that it was only the preliminary judicial investigation which took longer than desirable. However, given the very large and complex criminal investigation in which the FIOD heard more than 70 persons, and the investigating judge heard 25 witnesses and 3 experts most of them at the request of the defence, the Government are of the opinion that it cannot be said that this investigation was not completed within a reasonable time. The Government finally submit that the proceedings before the Dutch courts did not last excessively long.

In view of these elements and further taking into account that

the applicant only spent one month in pre-trial detention, the Government are of the opinion that the proceedings did not exceed a reasonable time within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant submits that the proceedings against him started on 31 December 1981, when he received the first additional tax assessment increased by 100%. He further submits that he had asked for the examination of witnesses before the investigating judge, although these witnesses had already been examined by the FIOD, as his lawyer was not allowed to be present when the FIOD questioned these persons in the course of the FIOD investigation.

After an examination of the complaint in the light of the parties' submissions, the Commission considers that it raises issues of fact and law requiring an examination of the merits. The application cannot, therefore, be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)