AS TO THE ADMISSIBILITY OF

Application No. 15216/89
by X.
against the Netherlands

The European Commission of Human Rights sitting in private on 16 January 1991, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

Mr. J. RAYMOND, Deputy 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 22 June 1989 by X. against the Netherlands and registered on 12 July 1989 under file No. 15216/89;

Having regard to;

- the observations submitted by the respondent Government on 11 May and 9 July 1990 and the observations in reply submitted by the applicant on 19 August 1990;

- the supplementary observations submitted by the applicant on 28 September 1990 and by the respondent Government on 10 October 1990;

- the submissions of the parties at the hearing on 16 January 1991;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Malaysian national, born in 1936, and at present resident in Rotterdam, the Netherlands, where he is an assistant cook. In the procedure before the Commission he is represented by Mrs. G.E.M. Later, a lawyer practising in The Hague.

On 14 April 1984, the applicant arrived in the Netherlands from Malaysia. On 15 April 1984, he was arrested in possession of approximately 41/2 kilograms of heroin.

On 11 September 1984, the Amsterdam Regional Court (Arrondissementsrechtbank) convicted him of importing heroin and sentenced him to five years' imprisonment. On 4 February 1985, the conviction and sentence were confirmed by the Amsterdam Court of Appeal (Gerechtshof).

On 15 July 1985, 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). This decision was notified to the applicant in person on 3 October 1985. He did not appeal against this decision.

As the applicant's passport was due to expire on 25 July 1985, the Aliens' Police sent it to the Malaysian Embassy. The Embassy indicated that the passport was returned to Malaysia and that the applicant could not be issued a new one. He would be given a laisser-passer in order to return to Malaysia at the appropriate time, at the request of the Aliens' Police.

On 30 December 1986, the applicant requested a residence permit, on humanitarian grounds. On 21 April 1987, the local chief of police rejected the request. On 2 September 1987, the Deputy Minister of Justice rejected a request for a review of the decision. On 28 September 1987, the applicant appealed against this decision to the Council of State (Raad van State). On 6 January 1989, this appeal was rejected, on the ground that, because the applicant had been declared an undesirable alien, he is ineligible for any type of residence permit.

In the meantime, on 14 August 1987, the applicant was released on parole. He was immediately detained for the purpose of his deportation. On 8 September 1987, he was subsequently released by order of the Regional Court of Utrecht sitting in chambers.

On 5 February, 12 May and 24 August 1987, as well as on 21 June 1989 the applicant requested the Deputy Minister of Justice to revoke or suspend the "undesirable alien" classification. These requests were unsuccessful.

By letter of 14 September 1987, the Minister of Foreign Affairs informed the Deputy Minister of Justice that, in respect of Malaysian nationals convicted outside Malaysia for drug offences, these people could not be prosecuted in Malaysia for the same crime, as Malaysia applies the principle of "ne bis in idem". However, if the authorities became alerted to someone's criminal activities committed before the foreign conviction, they could detain him without any form of trial for prolongable two year periods on the basis of the "special prevention measures" of the Dangerous Drugs Act. They could also detain him indefinitely on the basis of the Internal Security Act, hold him three weeks for questioning, or revoke his passport.

On 26 April 1988, the Deputy Minister of Justice requested the Embassy of Malaysia to confirm this information in regard to the applicant's status in Malaysia. By letter of 5 October 1988, the Embassy replied that the applicant had been arrested in 1984 on suspicion of fraud and embezzlement. He had been released on bail but had not appeared at the trial. If released to Malaysia he would be prosecuted for these crimes. To the question, "are import and export of drugs regarded as one and the same crime for the purposes of the principle of ne bis in idem", the Embassy replied that this principle was not relevant to the applicant's case, as he was not under suspicion of being involved in import or export of drugs.

On 22 June 1989, the applicant introduced a new request for a residence permit on humanitarian and medical grounds. He also introduced summary proceedings with the President of the Regional

Court of The Hague requesting the right to remain in the Netherlands pending this new request. He invoked, inter alia, Articles 3, 5, 13 and 14 of the Convention and Article 1 of Protocol No. 6. On 5 July 1989, the President adjourned the proceedings in order to have a psychiatric report drawn up on the applicant's mental health.

On 17 July 1989, the Rotterdam Chief of Police rejected the request for a residence permit. On 28 September 1989, the Deputy Minister of Justice rejected the request for a review. On 19 October 1989 the applicant appealed to the Council of State, which appeal was denied suspensive effect.

In the context of the summary proceedings, the applicant had submitted a statement by a psychiatrist, Dr. L., and a psychologist, Mr. B., who had been treating him since 4 July 1989 for depression, to the effect that, in his current state, deportation of the applicant could lead to a real risk of suicide. In his report of 5 February 1990 to the President of the Court, the District Psychiatrist, Dr. E., considered that the applicant's mental health was good, but that he became depressed to the point of being suicidal whenever decisions concerning his deportation are taken. Dr. E. stated that if the applicant were to be deported and he believed that he could be sentenced to death in Malaysia, he would commit suicide.

On 23 March 1990, the President of the Regional Court at The Hague, in summary proceedings, adjourned the further examination of the case, to allow the applicant to request the European Commission of Human Rights for a provisional measure. The President considered, inter alia, that it was not certain that the criminal act (importation of heroin) for which the applicant had been convicted in the Netherlands, could not be regarded as a different act (exportation of heroin) in Malaysia, for which he might receive the death penalty. As long as this doubt existed, the applicant's deportation would lead to a compulsion to commit suicide, which would constitute a medical reason for allowing him to remain in the Netherlands for treatment.

Against the decision of 23 March 1990 the applicant filed an appeal which is still pending. He further filed a new request for a residence permit which is also still pending.

COMPLAINTS

1. The applicant complains under Article 3 of the Convention and Article 1 of Protocol No. 6 that, if deported to Malaysia, he will be prosecuted there for exporting heroin, 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 a 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."

2. The applicant submits that either on the basis of this Act, the Dangerous Drugs Special Preventive Measures Act or of the Internal Security Act, he almost certainly will be arbitrarily detained without any form of due process, which detention can be prolonged indefinitely. He invokes Articles 3, 5 and 6 of the Convention and

Article 1 of Protocol No. 6.

3. The applicant complains as well that, in the proceedings concerning his residence permit in the Netherlands, his arguments pertaining to Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6 were not known and were not taken into account. He invokes Article 13 of the Convention in conjunction with the above Articles.

4. The applicant complains that he has not received a fair hearing regarding his requests for a residence permit in the Netherlands. He invokes Article 6 para. 1 of the Convention.

5. Finally, the applicant complains, inter alia, that the Aliens' Police 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 convicts. He invokes Article 14 of the Convention in conjunction with Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 June 1989 and registered on 12 July 1989.

On 6 April 1990 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 limited to the issue under Articles 3 and 5 of the Convention and Article 1 of Protocol No. 6. The Commission also decided to make an indication to the respondent Government under Rule 36 of the Rules of Procedure.

The Government's observations were submitted on 11 May and 9 July 1990. The applicant's observations were dated 19 August 1990.

On 12 May and 13 July 1990 the Commission decided to prolong the indication under Rule 36 of the Rules of Procedure.

On 7 September 1990 the Commission decided to invite the parties to submit supplementary written observations on the admissibility and merits of the application and to prolong the indication under Rule 36 of the Rules of Procedure.

The applicant's supplementary observations were submitted on 28 September 1990. The Government's supplementary observations were submitted on 10 October 1990.

On 12 October 1990 the Commission decided to prolong the indication under Rule 36 of the Rules of Procedure.

On 9 November 1990 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application. The Commission also decided to prolong the indication under Rule 36 of its Rules of Procedure.

The hearing took place on 16 January 1991. The respondent Government were represented by their Agent, Mr. K. de Vey Mestdagh, and by Mrs. R.C. Gevers Deynoot, Senior Legal Officer of the Ministry of Justice. The applicant was represented by his lawyer Mrs. G.E.M. Later, Mrs. C.M. Zeyl-Terzol and Messrs B.P. Vermeulen and R. van Asperen, lawyers.

THE LAW

1. The applicant complains that, if he is deported to Malaysia,

he will be prosecuted there for exporting drugs, for which he will receive the death penalty. He also complains that upon his return to Malaysia he will be arbitrarily detained without due process. The applicant invokes Articles 3 (Art.3 ), 5 (Art. 5) and 6 (Art. 6) of the Convention and Article 1 of Protocol No. 6 (P6-1).

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

a) The Government submit that in this respect the applicant has not complied with the requirement as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention as his case is still pending before the President of the Regional Court of The Hague.

Under Article 26 (Art. 26) of the Convention the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Government have submitted that the decision of the President of the Regional Court at The Hague of 23 March 1990, adjourning the case before that Court made it impossible for the applicant to exhaust domestic remedies before submitting his complaints before the Commission. The Commission considers that for this situation the applicant cannot be held responsible. Under these circumstances the Commission finds that no question of non-exhaustion of domestic remedies arises and that this part of the application cannot be rejected under Article 27 para. 3 of the Convention in conjunction with Article 26 (Art. 27-3+26) of the Convention.

b) The Commission has next examined the well-foundedness of the above complaints.

The applicant submits that the Malaysian authorities have not given any assurances that he will not be accused of a drug offence upon his return and, therefore, be subjected to the death penalty. The applicant contends that the principle "ne bis in idem" will not prevent the Malaysian authorities from prosecuting him for the exportation of drugs to the Netherlands, since he has only been convicted there of importing drugs. He refers to a newspaper article according to which such a prosecution may take place in the case of another person.

The applicant further submits that, as the Malaysian authorities allegedly have been informed by the Dutch authorities of his situation, or at least are aware of it, the danger of the applicant being prosecuted under the Dangerous Drugs Act has significantly increased, as well as the risk of detention under the Dangerous Drugs Special Preventive Measures Act or the Internal Security Act.

The Government submit that they have been informed by the Malaysian Embassy in the Netherlands that the Malaysian authorities are not interested in the applicant in connection with drug offences and that while the Malaysian authorities indeed enforce the death penalty in the case of illicit drug trading, they recognise the principle of "ne bis in idem". The applicant will, therefore, not be

prosecuted for the facts in respect of which he was convicted in the Netherlands. The Government mention in this context that approximately ten persons, after having served their sentences for drug offences elsewhere, have returned to Malaysia, whereupon they were only briefly detained by the authorities for questioning. In particular, the respondent Government have referred to one specific case in which they were aware of the specific treatment received by the extradited person.

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 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., Soering judgment of 7 July 1989, Series A no. 161, p. 35 et seq., 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 notes that even if Article 1 of Protocol No. 6 (P6-1) or Article 3 (Art. 3) of the Convention were applicable, substantial grounds would 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, loc. cit., p. 35, para. 91).

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. However, the Commission considers that in respect of these offences the applicant was already convicted in the Netherlands on 11 September 1984. Furthermore, according to a statement of the Malaysian Embassy in the Netherlands of 5 October 1988, there are currently no proceedings pending against the applicant in Malaysia other than the proceedings concerning the suspicion of fraud and embezzlement. The applicant has not demonstrated that this information is incorrect.

Finally, the Commission notes that the applicant has not shown any case where a person has been convicted and subjected to the death penalty following his conviction for the same offence elsewhere.

The applicant further complains that, on the basis of either the Malaysian Dangerous Drugs Act, the Malaysian Dangerous Drugs Special Preventive Measures Act or the Malaysian Internal Security Act, upon his return to Malaysia he will be arbitrarily arrested and detained without due process which detention can be prolonged indefinitely.

The Commission notes that the applicant no longer has a passport and is obliged to return to Malaysia where he may face prosecution for fraud and embezzlement. 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.

However, in the Commission's opinion, 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 conclusion that he will be subjected to treatment falling within the ambit of Article 1 of Protocol No. 6 (P6-1) and of Article 3 (Art. 3) of the Convention.

The applicant has also not provided sufficient substantiation with regard to his complaints under Articles 5 (Art. 5) and 6 (Art. 6) of the Convention.

As a result, the complaints do not disclose any appearance of a violation of the rights set out in Articles 3 (Art. 3), 5 (Art. 5) and 6 (Art. 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 complains under Article 6 (Art. 6) of the Convention that he has not received a fair hearing with regard to his request for a residence permit in the Netherlands. He submits in particular that his conclusive arguments as to why he could not be expected to return to Malaysia were never taken into account. However, Article 6 para. 1 (Art. 6-1) of the Convention does not apply to such proceedings. It follows that this part of the application must be rejected as being incompatible ratione materiae with the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Furthermore, the applicant complains, inter alia, that in the proceedings concerning his residence permit in the Netherlands his arguments pertaining to Articles 3 (Art. 3) and 5 (Art. 5) of the Convention and Article 1 of Protocol No. 6 (P6-1) were not taken into account. He relies on Article 13 (Art. 13+3+5+P6-1) 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 convicts.

The Commission has examined these remaining complaints as they have been submitted by the applicant. However, after considering these 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.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)