AS TO THE ADMISSIBILITY OF

Application No. 16531/90
by T.
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 26 April 1990 by T. against the Netherlands and registered on 27 April 1990 under file No. 16531/90;

Having regard to;

- the observations submitted by the respondent Government on 9 July 1990 and the observations in reply submitted by the applicant on 16 August 1990;

- the supplementary observations submitted by the applicant on 27 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, a Malaysian national born in 1953, is a cook residing at S. in the Netherlands. Before the Commission he is represented by Mr. R. van Asperen, a lawyer practising in Groningen.

The applicant has been in the Netherlands since 1975. He was granted a residence permit (vergunning tot verblijf) as from 2 April 1980, and a permanent residence permit (vergunning tot vestiging) as from 4 April 1984. During this period, he transferred as a courier at least on one occasion a sum of 70.000 Dutch guilders relating to

heroin traffic from the Netherlands to Malaysia.

In 1984, the applicant filed a request for naturalisation. This request was rejected on 15 February 1989 by the Deputy Minister of Justice (Staatssecretaris van Justitie) on the ground that he represented a danger for the public order. The applicant did not appeal against this decision.

Apparently in 1986 criminal proceedings were instituted against the applicant on account of drug offences, in particular of complicity in importing heroin into the Netherlands.

On 29 April 1986 the investigating judge at the District Court (Kantongerecht) of 's-Hertogenbosch issued a letter rogatory to the competent Malaysian police and judicial authorities concerning criminal proceedings instituted in the Netherlands against a certain Ch. The letter rogatory referred to various other persons in respect of whom preliminary investigations were being conducted, among them the applicant. The letter rogatory asked the Malaysian authorities to question certain persons then detained in Malaysia. Subsequently, a Dutch rogatory commission travelled to Malaysia.

On 25 May 1987 the Court of Appeal (Gerechtshof) of 's-Hertogenbosch convicted the applicant of importing heroin. He was sentenced to six years' imprisonment and a fine of 20.000 Dutch guilders. On 15 November 1988 the Supreme Court (Hoge Raad) rejected his appeal.

By letter of 9 April 1988 a Malaysian law firm wrote to the applicant upon request of his family members in Malaysia. The letter stated inter alia:

"On your return to Malaysia, as you have been found guilty in Holland, you are deemed to be a drug trafficker by virtue of Malaysian law and you will be arrested by the Police and detained at one of the 2 detention centres without trial.

The Detention will be under Section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Period of detention will be for 2 years and can be extended for a period of 2 years."

On 28 April 1989 the Minister of Justice revoked his permanent residence permit. The applicant was declared an undesirable alien within the meaning of Section 21 of the Aliens' Act (Vreemdelingenwet) and an exclusion order (ongenwenstverklaring) was issued against him.

The applicant's request for a review of this decision was rejected on 28 March 1990 and his subsequent appeal pending before the Council of State (Raad van State) was denied suspensive effect. On 23 April 1990 the President of the Regional Court (Arrondissmentsrechtbank) at The Hague in summary proceedings (kort geding) refused to grant suspensive effect to that appeal. The subsequent appeal which he filed against this decision had no suspensive effect either.

The applicant completed his term of imprisonment and was subsequently placed under an aliens' remand order pending expulsion. He has since been released on the condition that he reports weekly to the authorities concerned.

On 3 May 1990 the applicant again submitted an application for a residence permit. The application was refused in June 1990 by order of the Municipal Police.

COMPLAINTS

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

probably be tried for dealing with drugs on the basis of his conviction in the Netherlands. He alleges that the Dutch rogatory commission in Malaysia alerted the Malaysian authorities to him and that one of his accomplices is currently in detention in Malaysia and is informing the authorities of the applicant's complicity in drug-trafficking. The applicant submits that he is also suspected of a drug offence, namely of having transported money to Malaysia relating to heroin traffic. He submits that, if he is convicted, the Malaysian judge is required by law to pronounce the death penalty. The applicant refers in this context 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 further complains under Articles 5 and 6 of the Convention that, if he is deported to Malaysia, he may be detained for up to two years without due process, and a prolongation of the detention is possible. He claims that upon his return to Malaysia he will immediately be detained on the basis of the Internal Security Act. The applicant has in this context also referred to the Dangerous Drugs Act and the Malaysian Emergency (Public Order and Prevention of Crime) Ordinance.

3. The applicant also complains under Article 8 that he was denied Dutch nationality although he fulfilled all requirements. He also submits that the Dutch authorities were under an obligation to decide earlier, i.e. before his conviction. In addition, he contends that his expulsion infringes his right to respect for his private life within the meaning of this provision.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 26 April 1990 and registered on 27 April 1990.

On 27 April 1990 the President 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 President also made an indication to the respondent Government under Rule 36 of the Rules of Procedure.

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

The Government's observations were submitted on 9 July 1990. The applicant's observations were dated 16 August 1990.

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

27 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 Mr. R. van Asperen, by Mesdames G.E.M. Later and C.M. Zeyl-Terzol and Mr. B.P. Vermeulen, lawyers.

THE LAW

1. The applicant complains that, if he is deported to Malaysia, he will probably be prosecuted there for exporting drugs, for which he will receive the death penalty. He submits that since the Malaysian authorities have been alerted about him, he risks detention without due process upon his return. He argues that this detention in itself constitutes an inhuman punishment and that the conditions of detention lasting up to two years with possible prolongations may amount to degrading treatment. Moreover, he claims that since he has only been convicted in the Netherlands of complicity in transporting drugs, the Malaysian authorities will most certainly prosecute him for involvement in an international drug offence without breaching the principle of "ne bis in idem". There is therefore a real risk of the death penalty. 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."

The Government submit that, they have been informed by the Malaysian Embassy in the Netherlands 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. The Government point out that the mere fact that a Dutch investigating judge has referred in an official notification concerning another person to the applicant, cannot suffice to substantiate the applicant's claim that he risks prosecution and a death sentence in Malaysia. In particular, the respondent Government have referred to one specific case where they were aware of the 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 (Art. 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) and 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, namely for transporting drugs from Malaysia to the Netherlands. He also claims that he is suspected of having transported money to Malaysia relating to heroin traffic.

The Commission considers that the applicant was convicted in the Netherlands of drug offences on 25 May 1987. On the other hand, the Commission notes that the applicant has not shown any case where a person has been convicted and subjected to the death penalty in Malaysia following his conviction for the same offence elsewhere. He has also not sufficiently demonstrated that upon his return to Malaysia he will be prosecuted and eventually sentenced to the death penalty for transporting money to Malaysia. To the extent that the applicant may be understood as referring to the letter of a Malaysian law firm of 9 April 1988, the Commission finds that this letter does not indicate any threat of a death penalty.

The applicant further complains that, on the basis of either the Malaysian Dangerous Drugs Act, the Malaysian Internal Security Act or the Malaysian Emergency (Public Order and Prevention of Crime) Ordinance, upon his return to Malaysia he will be arbitrarily arrested and detained without due process which detention can be prolonged.

The Commission notes the applicant's allegation according to which the Malaysian authorities have been made aware of his situation in the context of rogatory proceedings. He has furthermore referred to a letter written to him, upon request of his family, by a Malaysian law firm (see above, THE FACTS).

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 complaint 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 also complains under Article 8 (Art. 8) that he was denied Dutch nationality although he fulfilled all the requirements. He also submits that the Dutch authorities were under an obligation to decide earlier, i.e. before his conviction. In addition, he contends that his expulsion infringes his right to respect for his private life within the meaning of this provision.

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 provision invoked by the applicant. It follows that the remainder of the application is also 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)