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HUMAN RIGHTS COMMITTEE
Forty-sixth session

DECISIONS

Communication No. 432/1990

Submitted by : W.B.E.

Alleged victim : The author

State party : The Netherlands

Date of communication : 20 July 1990 (initial submission)

Documentation references : Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 31 July 1991 (not issued in document form)

Date of present decision : 23 October 1992

Decision on admissibility

[See annex]

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ANNEX */

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights - Forty-sixth session -

concerning

Communication No. 432/1990

Submitted by : W.B.E. (name deleted)

Alleged victim : The author

State party : The Netherlands

Date of communication : 20 July 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication is W.B.E., a Dutch businessman residing in Amsterdam. He claims to be the victim of a violation by the Netherlands of articles 9, paragraphs 3 and 5, and 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author:

2.1 The author was detained from 10 December 1979 to 27 March 1980 on suspicion of involvement in drug smuggling activities. On 27 March 1980 the District Court (Arrondissementsrechtbank) of Haarlem acquitted him of the charges on a point of law. The Public Prosecutor appealed to the Amsterdam Court of Appeal (Gerechtshof), which, on 29 December 1980, acquitted the author,

considering that the charges against him had not been proven lawfully and convincingly.

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*/ Made public by decision of the Human Rights Committee.

2.2 On 20 March 1981, the author submitted two petitions to the Amsterdam Court of Appeal, pursuant to articles 89 and 591a of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering), for award of compensation for damages resulting from the time spent in detention and from lost revenue (altogether DFL 19,612,550). By decision of 10 February 1982, the Court rejected his petitions on the ground that, although he had been acquitted of the charges against him, the evidence produced at the trial showed that he had been closely involved in the realization of the plan for the illegal import of a substantial amount of heroin and had played an important role in the transport.

2.3 On 15 February 1982, the author appealed this decision to the Supreme Court (Hoge Raad), which, on 20 April 1982, declared his appeal inadmissible, on the ground that under Dutch law a refusal of the Court of Appeal to grant compensation is not appealable.

2.4 On 14 October 1983, the author initiated a civil action against the State before the District Court of The Hague (Arrondissementsrechtbank), with a view to having declared void the Amsterdam Court of Appeal judgment of 10 February 1982. The Court rejected his request on 10 April 1985. His subsequent appeal against this decision was rejected by the The Hague Court of Appeal on 11 December 1986. This judgment was confirmed by the Supreme Court on 25 November 1988.

2.5 On 15 October 1983, the author filed an application with the European Commission of Human Rights, which declared it inadmissible on 6 May 1985.

The complaint :

3.1 The author claims that his continued detention constituted a violation of article 9, paragraph 3, of the Covenant. He acknowledges that a reasonable suspicion that criminal acts had taken place was present in his case, but contends that continued pre-trial detention should only be allowed in order to prevent flight or the commitment of further crimes. The author claims that, in the absence of serious grounds to assume that he would leave the jurisdiction or commit further crimes, 107 days of pre-trial detention was unreasonably long. He submits that he had

offered bail, but that this offer was ignored by the Dutch authorities.

3.2 The author further claims that he has a right to compensation, pursuant to article 9, paragraph 5, since he was acquitted of the charges against him. In his opinion, the ground given by the Court of Appeal to reject his petitions for compensation constitutes a violation of article 14, paragraph 2, of the Covenant. He argues that this provision must be interpreted broadly and should also apply to procedures for compensation following acquittal of a criminal charge.

3.3 Finally, he claims that the decisions rejecting his petitions pursuant to articles 89 and 591a of the Code of Criminal Procedure were beset with irregularities which constitute a violation of article 14, paragraph 1. With respect to his petition under article 89, he points to two irregularities: firstly, the Chamber (Raadkamer) of the Amsterdam Court of Appeal was not composed of the judges who had previously decided on the criminal case, as is prescribed by law, and secondly, one of the judges participating in the decision had not even taken part in the examination of his request. With respect to the rejection of his petition under article 591a, the author claims that the written judgment of the Court of Appeal did not permit the identification of its signatories. The author alleges that the refusal to grant him compensation is the direct result of the composition of the Chamber.

The State party's observations and the author's comments thereon :

4.1 By submission, dated 25 October 1991, the State party argues that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies, non-substantiation of the allegations, and incompatibility of the claims with the Covenant.

4.2 The State party contends that the author has not exhausted domestic remedies, since he never invoked the substantive rights of the Covenant during the domestic procedures, although he had the opportunity to do so.

4.3 As regards the author's allegation that article 9, paragraph 3 of the Covenant was violated by keeping him in pre-trial detention for 107 days, the State party refers to its legislation, which prescribes that detention, after an initial 4 days, be ordered by an examining magistrate, and after another 12 days, by the District Court. The District Court can only order detention not exceeding 30 days, which period may be extended twice. Grounds on which pre-trial detention may be ordered are

laid down in articles 67 and 67a of the Code of Criminal Procedure, and only apply when there is a high level of evidence that the suspect committed a serious crime, carrying a prison sentence of 4 years or longer.

4.4 The State party argues that the author's detention was in accordance with the law, given the seriousness of the suspicions against him. The Court ordered his detention under article 67a, paragraph 2.3 of the Code, which provides that pre-trial detention can be lawfully imposed if it is reasonable to suppose that this is necessary to enable the facts to be established, other than through statements made by the suspect. The State party argues that the detention was necessary in order to prevent the investigation from being impeded by the author influencing fellow suspects and witnesses, and obliterating the traces of the offence in other ways.

4.5 As regards the author's allegation that article 9, paragraph 5, has been violated, the State party submits that serious suspicions existed that the author had committed criminal offences and that his detention was not unlawful. Thus, the State party argues that this part of the communication should be declared inadmissible as incompatible with the provisions of the Covenant.

4.6 With regard to the alleged violation of article 14, paragraph 2, the State party argues that this provision applies to criminal proceedings only, and not to proceedings to assess compensation for damages resulting from detention.

4.7 With regard to the alleged violation of article 14, paragraph 1, the State party submits that the composition of the Chamber hearing an application for compensation is regulated in article 89, paragraph 4, of the Code of Criminal Procedure. This provision stipulates that, insofar as it is possible, the chamber shall be composed of the members of the Court who were present at the trial. The State party argues that this, however, is not a binding rule, and largely enacted for practical reasons. It argues that the fact that the Court in chambers had a different composition from the Court which had heard the criminal case does not imply that the decision was not arrived at independently and in objectivity, or that it was biased.

4.8 Moreover, the State party argues that article 14, paragraph 1, of the Covenant does not apply to the proceedings under article 89 of the Code of Criminal Procedure. It contends that these constitute neither the determination of a criminal charge nor of a civil right in a suit at law.

5.1 In his comments on the State party's submission, the author

argues that he was not obliged to invoke the articles of the Covenant during the domestic procedures. He submits that he has exhausted all domestic remedies.

5.2 The author concedes that the statutory procedure regarding pre-trial detention is, as such, consistent with the provisions of the Covenant under article 9. However, he argues that the application of the statutory provisions in his case led to unlawful deprivation of his liberty. He denies the presence of serious reasons to suspect that he was involved in drug-smuggling.

5.3 In this connection, he submits that, in 1979, he was working as a police-informer, and in this capacity he allegedly informed an Amsterdam police chief inspector about a shipment of heroin from Turkey to the Netherlands. However, according to the author, due to a power struggle within the police, the intervention with the shipment failed, and the author's informer, a Turkish acquaintance, was killed. The author then decided to discontinue working for the police inspector.

5.4 The author contends that his arrest, on 10 December 1979, was a direct attempt to shift the responsibility of the failing narcotics policy of the police department to him, by qualifying his activities as a police informer as crimes. He submits that there was no reason for the Public Prosecutor to believe that he had acted otherwise than under orders and as a police informer.

5.5 The author claims therefore that his detention was unlawful, and that he was entitled to compensation under article 89 of the Code of Criminal Procedure. Since this compensation was denied to him, he maintains that he is a victim of a violation of article 9, paragraph 5.

5.6 As regards the alleged violation of article 14, paragraph 2, the author argues that the compensation proceedings under articles 89 and 591a of the Code of Criminal Procedure are a continuation of the criminal proceedings. He reiterates his allegation that the Court of Appeal violated his right to be presumed innocent, when it considered that there was evidence that he had been closely involved in the illegal import of heroin.

5.7 As regards the compensation proceedings, the author maintains that he was denied a fair hearing by an impartial tribunal; since the judges were not familiar with his case, he alleges that the Public Prosecutor was in a position to influence their decision. He further submits that compensation after

unlawful detention is a civil right and that article 14, paragraph 1, therefore applies also to the determination of compensation after unlawful arrest.

Issues and proceedings before the Committee :

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the State party's argument that the author has not exhausted domestic remedies because he did not invoke the relevant provisions of the Covenant before the Dutch courts, the Committee observes that, whereas the authors must invoke the substantive rights contained in the Covenant, they are not required, for purposes of the Optional Protocol, to do so by reference to specific articles of the Covenant. [1] The Committee observes that in the instant case, the author contested his detention and claimed compensation through available domestic remedies, and thereby invoked the substantive rights contained in articles 9 and 14 of the Covenant.

6.3 With regard to the author's allegation that his pre-trial detention was in violation of article 9 of the Covenant, the Committee observes that article 9, paragraph 3, allows pre-trial detention as an exception; pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences. On the basis of the information before the Committee, it appears that the author's detention was based on considerations that there was a serious risk that, if released, he might interfere with the evidence against him.

6.4 The Committee considers that, since pre-trial detention to prevent interference with evidence is, as such, compatible with article 9, paragraph 3, of the Covenant, and since the author has not substantiated, for purposes of admissibility, his claim that there was no lawful reason to extend his detention, this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.

6.5 With regard to the author's allegation that his right to compensation under article 9, paragraph 5, was violated, the

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[1] See communication No. 273/1988 (B.d.B. v. the Netherlands), declared inadmissible on 30 March 1989.

Committee recalls that this provision grants victims of unlawful arrest or detention an enforceable right to compensation. The author, however, has not substantiated, for purposes of admissibility, his claim that his detention was unlawful. In this connection, the Committee observes that the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful. This part of the communication is therefore inadmissible under articles 2 and 3 of the Optional Protocol.

6.6 With respect to the author's allegation of a violation of the principle of presumption of innocence enshrined in article 14, paragraph 2, of the Covenant, the Committee observes that this provision applies only to criminal proceedings and not to proceedings for compensation; accordingly, it finds that this claim is inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's allegation that the hearing regarding his claim for compensation was unfair, the Committee observes that he has not substantiated it, for purposes of admissibility, and that he has failed to advance a claim under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) that this decision shall be transmitted to the State party and to the author.

[Done in English, French, Russian and Spanish, the English text being the original version.]

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