

## HUMAN RIGHTS COMMITTEE

### van Alphen v. the Netherlands

Communication No. 305/1988

23 July 1990

### VIEWS

*Submitted by: Hugo van Alphen*

*Alleged victim: The author*

*State party concerned: The Netherlands*

*Date of communication: 12 April 1988 (date of initial letter)*

*Date of the decision on admissibility: 29 March 1989*

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

Meeting on 23 July 1990,

Having concluded its consideration of communication No. 305/1988, submitted to the Committee by Hugo van Alphen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol \***

1. The author of the communication dated 12 April 1988 is Hugo van Alphen, a Netherlands solicitor born in 1924, currently residing in The Hague, the Netherlands. He claims to be a victim of a violation by the Netherlands of articles 9, paragraphs 1 to 5, 14, paragraph 3, and 17 of the International Covenant on Civil and Political Rights.

## Facts as submitted

2.1 The author was arrested on 5 December 1983 on the suspicion of having been an accessory or accomplice to the offence of forgery, or having procured the commission of the offence of forgery, and of having been an accessory to the intentional filing of false income tax returns for the years 1980 and 1981. He was taken from his home to the police station. On the same day, the author's home was searched by agents of the Tax Inquiry and Investigation Department, pursuant to article 97 of the Code of Criminal Procedure; documents belonging to the author were seized on this occasion. The author complained of the seizure to the Examining Magistrate.

2.2 Immediately upon arrival at the police station, at 20:10 hours, the author was brought before an Assistant Public Prosecutor, who decided that the author be remanded in custody. The author was informed of the reasons for the decision. On 7 December 1983, the Public Prosecutor extended the remand order. The previous day, on 6 December 1983, the Public Prosecutor had applied for a preliminary judicial investigation, and followed up with a further application for such an investigation on 16 December 1983. At the Prosecutor's request, the Examining Magistrate, a judge handling criminal cases at the District Court of Amsterdam, decreed on 8 December that the author be remanded in custody for a maximum of six days, after having heard the author. The order was subsequently extended.

2.3 After again hearing the author, the District Court of Amsterdam, on 15 December 1983, decided that the author be kept in custody for a maximum of 30 days. On 4 January 1984, the author's legal representative requested the court to release his client. After hearing the author, the court twice extended the remand order, first on 12 January and again on 31 January 1984. By further judgment of 31 January 1984, the remand period was terminated on 9 February 1984 at the author's request; on the latter date, the author was released.

2.4 Under Dutch law, the arrest and remand in custody of suspects in a criminal investigation is governed by articles 52 to 62 of the Code of Criminal Procedure. Suspects who are arrested are immediately brought before a public prosecutor. If the offence for which an individual has been arrested is a serious one, the public prosecutor or the assistant public prosecutor may issue a remand order in the interest of the criminal investigation, after having questioned the suspect. This remand order can normally be issued for not more than two days; if deemed necessary, the prosecutor may extend the remand order once for two days. Article 40 of the Code of Criminal Procedure stipulates that the suspect be provided with legal assistance for the period of his custody. If the public prosecutor considers that a prolongation of the detention is warranted by the circumstances, he may refer the suspect to an Examining Magistrate, who decides whether further to keep the suspect in detention, pursuant to article 64 of the Code of Criminal Procedure. Remand orders issued by an Examining Magistrate are valid for up to six days: the Magistrate may extend the order once for a maximum of six days

2.5 Upon application by the Public Prosecutor, the court may decide that a suspect who was remanded in custody by order of the Examining Magistrate shall be further detained in the interest of the investigation. Before the decision is taken, the suspect is heard by the court. The Length of the period for which custody is extended may not exceed 30 days; at the request of the Public Prosecutor, this period may twice be extended. The court may rescind the order on its own

initiative, at the request of the suspect, at the recommendation of the Examining Magistrate or upon application by the Public Prosecutor (art. 69 of the Code of Criminal Procedure).

2.6 Examining magistrates in the Netherlands may also take a number of measures that restrict the freedom of suspects in a criminal investigation during the investigation. The legal basis for such measures is article 225, paragraph 1, of the Act establishing the Code of Criminal procedure, in conjunction with article 132 of the Prison Rules, which empower Examining Magistrates to impose restrictions on a suspect's correspondence or visits. Upon examining an application for a six-day remand order, the Examining Magistrate generally informs the suspect as to whether restrictions are to be imposed, and what they would entail. Pursuant to article 225, paragraph 3, of the Act establishing the Code of Criminal Procedure, the suspect may appeal against such measures to the District Court.

2.7 When the author was first heard by the Examining Magistrate on 8 December 1983, following the Public Prosecutor's application for a six-day remand order, the Magistrate informed the author that restrictions would be imposed in the interest of the criminal investigation. From that day until 6 January 1984, the author could not contact his family or his office, and only his legal representative was allowed to visit him. The author did not appeal against the restrictions imposed by the Magistrates; on 6 January 1984, the restriction order was lifted with immediate effect.

2.8 In respect of the author's complaint against the search of his home and the seizure of documents, a meeting was convened by the Examining Magistrate on 16 December 1983, which, apart from the author, was attended by his counsel, two investigating officers of the Fiscal Intelligence Department and by the Dean of the Hague Branch of the Netherlands Bar Association. The purpose of the meeting was to discuss the reasons for the seizure of the documents on 5 December. On 3 January 1984 the Examining Magistrate, in the company of the Assistant Public Prosecutor and the Deputy Clerk of the Court, carried out a search of the author's home and office, after an application to this effect had been filed by the Public Prosecutor and a search warrant issued. Also present during this search was the Dean of the Hague Branch of the Netherlands Bar Association.

2.9 The principal reason for the length of the author's detention - over nine weeks - was his refusal to waive his professional obligation to secrecy, although the interested party had released him from his obligations in this respect. From 1984 to 1986, extensive judicial investigations took place into the complex tax fraud scheme the author was suspected to be an accomplice in, or an accessory to. At the request of the Public Prosecutor, these investigations were discontinued in December 1986. The reason for this decision was the perceived impossibility to conclude the investigations and initiate criminal proceedings within a reasonable period of time, in the light of article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c), of the International Covenant Civil and Political Rights. On 23 January 1987, the author was informed that the Public Prosecutor had dropped the charges and that the case would be solved by fiscal means.

2.10 On 2 April 1987, the author filed two claims for damages with the Amsterdam District Court. Article 89 of the Code of Criminal Procedure provides that any individual suspected of having committed a criminal offence, whose case does not result in any court sentence being imposed, may submit a claim for damages to the court. The principal purpose is to provide for the possibility of

compensation in cases involving pre-trial detention which subsequently proves to have been mistaken. The possibility of filing a claim for compensation is not restricted to cases of unlawful pre-trial detention but extends to pre-trial detention deemed to have been lawful. Damages for pre-trial detention may only be granted in cases which were concluded without the imposition of a sentence and in respect of which, in the Court's opinion, award of damages is warranted. The author's first claim was based on article 89 of the Code of Criminal Procedure; the second claim was based on article 591a of the Code of Criminal Procedure, involving compensation for legal fees incurred between 1983 and 1986.

2.11 The Amsterdam District Court scheduled a hearing to hear the author's claim for 23 April 1987, but, owing to the Court's heavy work-load, this hearing did not take place until 26 August 1987. By written judgement of 9 September 1988, the District Court awarded the author compensation for the legal aid costs incurred, as well as such compensation for the material and immaterial damages suffered as was considered reasonable and just.

2.12 On 6 October 1988, the author appealed against this judgement to the Amsterdam Court of Appeal. On 24 February 1989, the Court of Appeal quashed the District Court's judgement. No further remedies exist against the Court of Appeals's decision.

2.13 In its judgement, the Court of Appeal held that in the light of the statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for the application for a preliminary judicial investigation, serious grounds had existed for suspecting the author of involvement in a criminal offence. The Court of Appeal considered that the length of the author's detention was partly attributable to his consistent pleading of his professional obligation to observe confidentiality, even after the party directly concerned had relieved him of that obligation and that, that being so, it was not unreasonable to expect the author, as a former suspect, to bear the losses that had resulted from his pre-trial detention and his prosecution. In the light of these considerations, the Court of Appeal considered that there were no reasonable grounds for awarding the author damages.

### Author's allegations

3.1 The author alleges that his arrest and his detention were arbitrary and therefore in violation of article 9, paragraphs 1 to 4, of the Covenant. In his opinion, the arrest and subsequent nine-week detention were used deliberately as a means of pressure against him, so as to force him to waive his professional obligation to secrecy and to solicit statements and evidence which could be used in the investigations against his clients. He claims that arrest and detention remained arbitrary and unlawful even if those serving the arrest warrant and implementing the decisions related to his detention complied with the applicable regulations and with the instructions they had received. It is submitted that detention based primarily on the observance of the professional duties of lawyers in itself amounts to a violation of the provisions of the Covenant, as a refusal to comply with the wishes of criminal investigators is not a criminal offence for which the law admits of detention. Furthermore, the author claims, he was deliberately left in the dark about the exact nature of the charges in connection with the search of his office and of his home. Finally, he alleges a violation of his enforceable right, under article 9, paragraph 5, to compensation for unlawful detention. In this

context, he submits that the Netherlands authorities are generally reluctant to deal with claims for damages and compensation filed by victims of unlawful acts in cases such as his, and that such cases as reach the courts are handled negligently.

3.2 In respect to his right to a fair trial, the author alleges that the Court of Appeal failed to observe the minimum guarantees of article 14, paragraph 3, of the Covenant. He contends that the length of the proceedings before the Amsterdam District Court, which postponed hearings on his claims for compensation on two occasions and did not produce a written judgement until 9 September 1988, i.e., over one year after the hearing on 26 August 1987, were incompatible with his right, under article 14, paragraph 3 (c), to have the trial proceed without undue delay. He further argues that the Court of Appeal did not afford him the opportunity to examine the content of various statements incriminating him made by third parties, and that he was denied the possibility to himself cross-examine prosecution witnesses, who had been heard in the course of the investigation more than five years ago, and to have witnesses examined on his behalf.

3.3 The author complains that coercive measures such as arrest, detention, house and office searches and widely disseminated adverse publicity are frequently used by the authorities in fiscal investigations, so as to force suspects either to confess or to make statements that can be used by the authorities against other individuals subject to taxation. In this respect, the author states that these coercive measures seriously affected his professional reputation and his social position, and submits that they constituted arbitrary and unlawful interference with his privacy and family life, his correspondence, as well as an unlawful attack on his honour and reputation.

#### State party's comments and observations

4.1 The State party contends that the author did not, either in the course of the petition procedure governed by articles 89 and 591a of the Code of Criminal Procedure or during his detention, invoke the substantive rights protected by the Covenant before a court of law, and that therefore he cannot be deemed to have complied with the requirement of exhaustion of domestic remedies. It refers, in this context, to the decision adopted by the Human Rights Committee in communication No. 273/1988, a/ which it had been held, inter alia, that "authors must invoke the substantive rights contained in the Covenant", in domestic proceedings. The State party adds that the author was entitled to apply to the competent court for an interlocutory injunction based on a claim of a violation of article 9, paragraph 1, or of any violation of the other provisions of article 9. Although himself a solicitor and represented by counsel of his choice throughout the period of pre-trial detention, the author made no use of that opportunity. The State party points out that it is a generally accepted principle of international law that individuals invoke the substantive rights contained in international instruments in the course of domestic judicial proceedings before petitioning an international instance. Since the author failed to comply with this requirement, the State party concludes his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 With respect to the allegation of a violation of article 9, paragraph 5, the State party argues that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol. It contends that article 9, paragraph 5, is not applicable to the author's case because, in the light of serious reasons for suspecting the author

of having committed criminal offences, his pre-trial detention was not unlawful.

4.3 Concerning the right, under article 14, paragraph 3 (c), to be tried without undue delay, the State party considers that this provision merely concerns the determination of a criminal charge and does not apply to claims for compensation such as those initiated by the author. Accordingly, the State party considers the communication to be incompatible with the provisions of the Covenant in so far as it relates to a violation of article 14, paragraph 3 (c). Furthermore, the author did not, in his appeal to the Amsterdam Court of Appeal, complain about the undue prolongation of the proceedings in his case before the District Court. Accordingly, he also failed to exhaust domestic remedies in that respect.

4.4 As to the merits of the author's case, the State party contends that, given the strong reasons for suspecting the author of involvement in a serious criminal offence, and given that the Netherlands judicial authorities complied with the provisions of the Code of Criminal Procedure that govern the arrest and remand in custody of suspects in a criminal investigation, it cannot be said that the author was arbitrarily arrested or detained and that article 9, paragraph 1, was violated. As to the length of the author's detention, the State party notes that it was attributable to the fact "that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". It further points out that the author was informed of the reasons for his arrest and detention, in accordance with the provisions of article 9, paragraph 2. Subsequently, the author had the option of applying to the competent court of an interlocutory injunction on the grounds of an alleged violation of article 9 of the Covenant. During his pre-trial detention, the author was heard on repeated occasions by the Examining Magistrate and the District Court of Amsterdam in connection with the request of the public prosecutor for an extension of the pre-trial detention. Thus, in the State party's opinion, the claim that article 9, paragraphs 3 and 4, were violated cannot be sustained.

4.5 In respect of the alleged violation of article 17, the State party points out that the search of the author's home on 5 December 1983 and on 3 January 1984 was carried out in accordance with the applicable regulations and that, accordingly, there can be no question of an arbitrary or unlawful interference with the author's privacy or home. The State party concludes that the author has not submitted any evidence in support of his claim of a violation of articles 9 and 17 of the Covenant.

#### Issues and proceedings before the Committee

5.1 When considering the communication at its thirty-fifth session, the Committee concluded, on the basis of the information before it, that the conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol. On 29 March 1989, the Committee declared the communication admissible.

5.2 In its decision on admissibility, the Committee indicated that its decision might be reviewed in accordance with rule 93, paragraph 4, of its rules of procedure, in the light of any pertinent information submitted by the State party. In its subsequent submission of 26 October 1989 (see paras. 4.1 to 4.3 above), the State party did contest the admissibility of the communication in respect

of the author's claims relating to violations of articles 9 and 14 of the Covenant.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It has taken note of the State party's contention that with respect to the alleged violations of articles 9 and 14, the author has failed to exhaust domestic remedies because he did not invoke substantive rights guaranteed by the Covenant before the courts.

5.4 With respect to the alleged violation of article 14, paragraph 3 (c), the author has not contradicted the State party's contention that, in his appeal to the Amsterdam Court of Appeal, he did not complain about the length of the proceedings before the District Court. Further, it must be noted that the appeal was filed on 6 October 1988, almost six months after the author had submitted his communication to the Committee for consideration under the Optional Protocol to the Covenant (because of the delay of the District Court in providing its written judgement). The Committee is precluded from considering claims which had not been made, or in respect of which local remedies had not been exhausted, at the time the Committee was seized of the case. Accordingly, the communication is inadmissible in respect of the author's claim that his request for compensation was not adjudicated without undue delay.

5.5 Concerning the alleged violations of articles 9 and 17, the Committee begins by noting that no appeal is possible against the judgement of the Amsterdam Court of Appeal of 24 February 1989. The State party has contended that the author did not invoke the substantive rights in the Covenant during his detention or during the judicial proceedings, and that he is, accordingly, precluded from claiming violation of article 9 before the Committee. The Committee reiterates that authors are not required, for purposes of the Optional Protocol, to invoke specific articles of the Covenant in the course of domestic judicial proceedings, although they must invoke the substantive rights protected by the Covenant. a/ After the decision of the public prosecutor to drop the criminal charges against the author and to settle the case by fiscal means, on the grounds that criminal proceedings would be expected to infringe article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c), of the Covenant, the author could only file a claim for compensation. He did file such a claim alleging that the detention between December 1983 and February 1984 had been an arbitrary one. Thus, it cannot be said that the author failed, in the course of the proceedings, to invoke "substantive rights protected by the Covenant". The Committee concludes, accordingly, that there is no reason to review its decision of 29 March 1989 in respect of alleged violations of articles 9 and 17.

5.6 The principal issue before the Committee is whether the author's detention from 5 December 1983 to 9 February 1984 was arbitrary. It is uncontested that the Netherlands judicial authorities, in determining repeatedly whether to prolong the author's detention, observed the rules governing pre-trial detention laid down in the Code of Criminal Procedure. It remains to be determined whether other factors may render an otherwise lawful detention arbitrary, and whether the author enjoys an absolute right to invoke his professional obligation to secrecy regardless of the circumstances of a criminal investigation.

5.7 In the instant case, the Committee has examined the reasons adduced by the State party for a prolongation of the author's detention for a period of nine weeks. The Committee observes that the privilege that protects a lawyer-client relationship belongs to the tenets of most legal systems. But

this privilege is intended to protect the client. In the case under consideration the client had waived the privilege. The Committee does not know the circumstances of the client's decision to withdraw the duty of confidentiality in the case. However, the author himself was a suspect, and although he was freed from his duty of confidentiality, he was not obliged to assist the State in mounting a case against him.

5.8 The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. It has, in fact, stated that the reason for the duration of the author's detention "was that the applicant continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility". Notwithstanding the waiver of the author's professional duty of confidentiality, he was not obliged to provide such co-operation. The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.

5.9 With respect to an alleged violation of article 17, the Committee finds that the author has failed to submit sufficient evidence to substantiate such a violation by the State party.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose a violation of article 9, paragraph 1, of the Covenant.

7. The State party is under an obligation to take effective measures to remedy the violation suffered by the author and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

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

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\*/ The text of an individual opinion submitted by Mr. Nisuke Ando is appended.

a/ See communication No. 273/1988 (B. d. B. v. Netherlands), decision of 30 March 1989, para. 6.3.

## **Appendix**

Individual opinion submitted by Mr. Nisuke Ando, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the views of the Committee on communication No. 305/1988, van Alphen v. Netherlands

The central issue of the present case is whether the author's detention of nine weeks - from 5 December 1983 to 9 February 1984 - should be regarded as "arbitrary" under the provision of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

Article 9, paragraph 1, prohibits "unlawful" detention as well as arbitrary detention. With respect to the relations between unlawful detention and arbitrary detention, I agree with the Committee's view that the latter is to be more broadly interpreted than the former to include the elements of inappropriateness, injustice, and lack of predictability. (See 5.8 of the views.) However, it is presumed that the laws of many States parties to the Covenant regulating detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not per se arbitrary and that any lawful detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not per se arbitrary (2.4, 2.5) and that the author's detention was in compliance with those laws.

As to the question whether this lawful detention of the author should be regarded as arbitrary, the Committee bases its views on the submission of the State party that "the reason for the length of the detention period was that the author continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from this obligation in this respect. The importance of the criminal investigation necessitated the author's detention for reasons of accessibility" (5.8). Presumably, the Committee considers that the facts as submitted, together with the search of the author's home and office and the seizure of documents as well as the subsequent dropping by the Public Prosecutor of the charges against the author, reveal the elements of inappropriateness, injustice and lack of predictability, thus making the detention arbitrary (2.1, 2.9).

On the other hand, the State party also submits that extensive judicial investigations took place for two years - from 1984 to 1986 - into the complex tax fraud scheme the author was suspected to be an accomplice in, or accessory to. It is true that the Public Prosecutor requested the discontinuance of these investigations and dropped the charges against the author (2.9). Nevertheless, it is also true that the case was not terminated permanently but was to be settled by fiscal means (2.9, 5.5). In addition, in its judgements of 24 February 1989, the Netherlands Court of Appeal held that, in the light of statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for applications for a preliminary judicial investigation, serious grounds existed for suspecting the author of involvement in a criminal offence. The court further considered that the length of the author's detention was partly attributable to his consistent pleading of his professional obligation to observe confidentiality, even after the party directly concerned had relieved him of that obligation, thus quashing the lower court's decision to award compensation to the author (2.13, emphases supplied).

Under the provision of article 5, paragraph 1, of the Optional Protocol to the Covenant, the Committee “shall consider communications received . . . in the light of all written information made available to it” by the parties concerned. In other words, the Committee must base its views solely on the written information at hand and consequently it is in no better position than the Netherlands Court of Appeal in ascertaining facts which should have essential weight for the purpose of regarding the detention as arbitrary. Taking into account all the above, I am unable to convince myself to agree to the Committee’s view that the facts as submitted reveal the elements of inappropriateness, injustice, and lack of predictability, thus making the author’s detention arbitrary.

Nisuke ANDO