COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF OERLEMANS v. THE NETHERLANDS

(Application no. 12565/86)

JUDGMENT

STRASBOURG

27 November 1991

In the Oerlemans case v. the Netherlands[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court[***], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr L.-E. PETTITI,
Mr R. MACDONALD,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr J.M. MORENILLA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 22 May and 23 October 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 7 July 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12565/86) against the Netherlands lodged with the Commission under Article 25 (art. 25) by Mr Johannes Oerlemans, a Dutch national, on 5 September 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

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[*] The case is numbered 42/1990/233/299. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

[***] The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Dutch nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. C. Dremona, Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr R. Macdonald, Mr A. Spielmann, Mr J. De Meyer and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr I. Foighel, substitute judge, replaced Mr Cremona, who was unable to take part in the consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Dutch Government ("the Government"), the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the registry received the applicant's memorial on 17 December 1990 and the Government's memorial on 21 December 1990. In a letter of 18 January 1991 the Secretary to the Commission informed the Registrar that the Delegate did not wish to submit one.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 11 April 1991 that the oral proceedings should open on 22 May 1991 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr K. DE VEY MESTDAGH, *Agent*,
  Mr J.L. DE WIJKERSLOOTH DE WEERDESTEIJN, *Counsel*,
  Mr Th. G.M. SIMONS, *Adviser*;
- for the Commission
  Mr F. MARTINEZ, *Delegate*;
- for the applicant
  Mr C.E.A.M. VAN DE MORTEL, advocaat, *Counsel*.

The Court heard addresses by Mr de Vey Mestdagh and Mr de Wijkerslooth de Weerdesteijn for the Government, Mr Martinez for the Commission and Mr van de Mortel for the applicant, as well as the Government's and the applicant's replies to its questions. In the course of

the hearing both the Government and the applicant filed various documents with the Court.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr Johannes Oerlemans lives at Hogerheide, in the commune of Woensdrecht (Netherlands).

Since 1968 he has been involved in cattle farming on a farm of approximately 110 hectares which his father had operated before him. The farmland comprises a parcel registered as "Commune Woensdrecht, section G, no. 1836" (circa 64.5 hectares), of which Mr Oerlemans is a co-owner together with the Stichting Het Brabants Landschap, a foundation set up for the purpose of nature preservation. He has a one sixth interest in the land. The above parcel was situated outside the dyke along the eastern end of the Oosterschelde, an arm of the North Sea.

8. The eastern part of the Oosterschelde has been shut off from the sea by a series of dykes whose purpose was to strengthen the defences against the sea rather than to reclaim land.

Before the completion of these dykes the area comprising the parcel G, no. 1836 consisted partly of a complex of open water, strips of mudland and siltland submerged either by each high tide or by spring tides (slikken en schorren), intersected by inlets, and partly of low dunes backed by cliffs). The open-water area was a mixture of salt and fresh water. Due to these conditions, only limited use could be made of the parcel.

The dyke enclosing the land comprising the parcel - called "Markiezaatskade" after the local delta region known as the "Markiezaatsmeer" - was completed in August 1983. Thereafter, with the disappearance of the tides and the predominance of fresh water, the land gradually became drier with changes in the flora and fauna of the area and an explosive growth of thistles.

At the present time the Markiezaatsmeer, an area composed of some 700 hectares land and 800 hectares water, is partly a "protected natural site" in the sense of section 7 of the Nature Protection Act 1967 ("the 1967 Act" - (Natuurbeschermingswet) and partly a "national nature preserve" in the sense of section 21 of that Act (see paragraphs 15-19 below). The Stichting Het Brabants Landschap acts as a supervisor for the area.

A. The designation order

9. Before the Markiezaatskade was completed the Minister of Culture, Recreation and Public Works designated the area which includes the parcel as a "protected natural site" by an order of 20 September 1982 made pursuant to section 7 of the 1967 Act.

An explanatory note was appended to the order. Points 2 and 3 of the note contained a comprehensive description of the particular scientific and environmental importance of the area as it then was. Point 4 described the developments to be expected from the completion of the dykes, including the gradual cessation of tidal effects, the transformation into a freshwater zone, the drying out of the land and important changes in the existing biotope.

Point 6 of the note specified that "current long-established use of land could continue as usual" but that "certain actions should, however, be subject to authorisation"; among these were "the use of methods intended or likely to alter or intensify the existing use of land", "removing, destroying or degrading the soil (...), filling in, levelling, clearing or ploughing the land" and "the use of herbicides or substances to promote or inhibit growth".

B. The applicant's appeal to the Crown

10. On 30 October 1982 the applicant appealed against the designation order to the Crown under section 19 of the 1967 Act (see paragraph 18 below).

He pointed out that he used parts of the designated area including parcel G, no. 1836 for pasturing cattle and alleged that the order would turn those parts into wasteland. He submitted that this would not be in the interests of nature conservation and would, moreover, entail considerable economic losses. Further, the area's protection as a natural site was already sufficiently secured by the West Brabant regional development plan and the Woensdrecht municipal land-use plan, both of which respected the rights of farmers. He concluded that the reasons given for the order were both insufficient and superfluous and that it should be annulled.

11. The appeal was heard before the Administrative Disputes Division (Afdeling Geschillen van Bestuur) of the Council of State (Raad van State) (see paragraphs 36 and 37 below) on 8 November 1985.

In accordance with the advisory opinion of that Division the applicant's appeal was dismissed by Royal Decree of 14 March 1986, no. 38 (Administrative Decisions (Administratiefrechtelijke Beslissingen) 1986, 484).

The Crown first held that the area met the requirements of section 1 (b) of the 1967 Act. It then examined and rejected the objection that the requirement of section 7 of that Act was not fulfilled in that the protection

of the area was already secured in another way. As to the applicant's fear that his user of parcel G, no. 1836 for pasturing cattle would be unduly restricted, the Crown held that at the hearing it had been established that the manner in which he had exploited the parcel did not impair the essential characteristics of the area so that the existing use could be continued without an authorisation being required. The applicant's fear that the site would turn into wasteland was considered unfounded because it was possible to use the land so as to prevent that. Finally the Crown held that the interests of protecting the area as a "protected natural site" under the Nature Protection Act outweighed the interests of the applicant.

C. The applicant's subsequent appeals arising out of measures taken under the Nature Protection Act

12. In 1987 the applicant had some 15 hectares of parcel G, no. 1836 levelled and some inlets filled in. When this was discovered, the Minister of Agriculture and Fisheries on 2 July 1987 issued an order under section 29 of the 1967 Act to cease work. The applicant appealed against this order to the Litigation Division (Afdeling Rechtspraak) of the Council of State (see paragraph 27 below) and requested an interim injunction from the President of that Division. Following the dismissal of that request on 18 August 1987, the Minister, by order of 23 February 1988, specified the steps to be taken by the applicant to restore the land to its original state. The Minister stated that, if these measures were not carried out by the applicant before 1 September 1988, they would be done at his expense. The applicant appealed against this order to the Litigation Division alleging that he had taken the impugned measures in order to destroy the thistles proliferating on parcel G, no. 1836, as he had been ordered to do by the municipal authorities of the commune of Woensdrecht. The Litigation Division joined the appeals and dismissed them on 26 November 1990.

13. On 8 March 1988 the Minister of Agriculture and Fisheries refused to grant the applicant authorisation to use mechanical means for destroying thistles on part of the land.

The applicant appealed to the Crown against this decision. In accordance with section 1 para. 1 of the Interim Act on Crown Appeals (Tijdelijke wet Kroongeschillen), the appeal was referred for decision to the Administrative Disputes Division of the Council of State. The appeal was dismissed on 15 September 1989.

14. On 22 January 1988 the applicant claimed compensation under section 18 of the 1967 Act. He claimed that he had suffered damage because of the manner in which the natural site was managed. As a result thistles had become so abundant that all other growth had ceased and the use of parcel G, no. 1836 for pasture had become impossible. He based his claim for Hfl. 200,000 on the allegation that as from 1984 he had had the intention to use

that parcel for intensive pasture, increasing the number of cattle to two hundred.

The Minister dismissed the claim on 16 May 1989, pointing out, inter alia, that the applicant could not reasonably have expected that after the closure of the Markiezaatskade he would have been able to use the parcel more intensively than before since he must have known long before that the area would be designated as a protected natural site.

On 10 July 1989 the applicant appealed against this decision to the Crown. At the date of the hearing before the Court the appeal was still pending before the Administrative Disputes Division of the Council of State.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Nature Protection Act of 15 November 1967

15. Section 1 (b) of the 1967 Act defines a natural site as composed of grounds and waters which are of general interest as regards their scenic beauty or scientific value.

Under section 7 of the Act the Minister of Culture, Recreation and Public Works may, in agreement with the Minister for Planning and Development (ruimtelijke ordening), designate as a protected natural site (beschermd natuurmonument) a natural site which is not protected in any other way. Designation takes place by means of a reasoned decision which must specify the land registry parcels affected by the designation.

16. Section 12 (1) of the Act states that it is forbidden to carry out actions detrimental to the scenic beauty or scientific interest of a protected natural site or which might disfigure the site, without authorisation by the Minister or in breach of the terms of such an authorisation. Section 12 (2) specifies that the actions envisaged by section 12 (1) are those which affect the essential characteristics of the protected natural site as set out in the designation order.

17. Section 18 of the Act allows for the possibility of obtaining compensation for damage suffered as a result of a designation order, refusal of authorisation or the terms attached to an authorisation.

18. Section 19 of the Act limits appeal to the Crown by interested parties to: a designation order under section 7, a repeal of such an order under section 11, decisions as to authorisations made under section 13 and decisions as to compensation for damage under section 18.

19. Under section 21 the Minister of Culture, Recreation and Public Works may designate as a "national nature preserve" (staatsnatuurmonument) a natural site which belongs to the State.

20. Sections 26 to 29 of the Act provide for various penalties or coercive measures in respect of actions contrary to the provisions of the Act.

B. General principles and practice as to remedies against the administration under Netherlands law and the consequences of the Benthem judgment

1. The competence of the civil courts in claims against the administration

21. Under Netherlands law the civil courts have traditionally had competence to grant relief against the administration if and in so far as no other relief is available.

This competence is based on the Constitution and on the Act on the Organisation of the Judiciary of 1827 (Wet op de rechterlijke organisatie (RO)).

Under subsection 1 of section 112 of the Constitution it is for the judiciary to adjudicate on "disputes on civil rights and claims". The "judiciary" responsible for the administration of justice in civil cases is composed of the Supreme Court, the courts of appeal, the district and cantonal courts.

Section 2 RO provides (as far as relevant):

> "The judiciary is exclusively charged to take cognizance of and to decide upon all disputes on property or rights derived from property, on claims or civil rights ..."

22. The leading precedents as to the interpretation of section 2 are the Supreme Court's judgments of 31 December 1915 and of 18 August 1944.

In its judgment of 31 December 1915 (Nederlandse Jurisprudentie (NJ) 1916, p. 407) the Supreme Court held that:

> "under section 2 RO, the exclusive competence of the judiciary depends on the object of the dispute, that is the right for which the plaintiff claims protection, and not on the nature of the right on which the defendant's argument is based".

The case which was decided by the Supreme Court in its judgment of 18 August 1944 (NJ 1944/45, no. 598) concerned an action brought by a commune against a province based on the latter's refusal to deliver electricity to the commune. The commune alleged in the first place that it was entitled to delivery under a quasi-contractual obligation incumbent on the province and in the second place that the refusal constituted a tort since it was contrary to a public law obligation. The commune sought both a declaratory judgment that the refusal was unlawful and a judicial order to deliver.

As to the first ground the Supreme Court, reiterating its decision of 1915, held inter alia that:

> "for the question whether there is a claim within the meaning of that section [section 2 RO] it is immaterial whether the obligation is governed by public or by civil law ..."

On the second ground the Supreme Court noted that these claims were based on section 1401 of the Civil Code and held:

> "that the protection afforded by this section is not confined only to the claim for damages to which it explicitly refers, but also applies to preventive measures where there exists a serious threat that injustice is on the point of being done."

It concluded that as far as the latter ground was concerned the "object of the dispute" was an obligation under section 1401 of the Civil Code and that, accordingly, the case concerned a civil right within the meaning of section 2 RO, it being irrelevant for the competence of the civil courts whether or not the obligation to deliver the electricity was of a public law nature.

23. The above case-law is understood to imply that where a citizen bases his claims against the administration on the allegation that the latter has committed a tort against him, the civil courts are, in principle, competent to take cognizance of the case.

24. Finally it should be noted that where the civil courts are competent the President of the District Court has competence in interlocutory proceedings (kort geding - see, for the role of these proceedings in the Netherlands, the Keus judgment of 25 October 1990, Series A no. 185, p. 64, para. 17).

a. Judicial review by the civil courts of administrative acts

25. Under section 120 of the Constitution, as construed in the constant case-law of the Supreme Court, the judiciary is not permitted to examine the lawfulness of Acts of Parliament. The courts can, however, review the lawfulness of subordinate legislation and of all other acts of the administration including the lawfulness of decisions which have a general character (such as regulations, plans or, directives).

A decision of the administration is unlawful (onrechtmatig) and constitutes a tort within the meaning of section 1401 of the Civil Code when it violates a right of the plaintiff or is contrary to a rule of international or domestic law which seeks to protect the plaintiff's interests, or to general principles of proper administration which, inter alia, forbid abuse of power and encompass the principles of proportionality and reasoned decisions as well as requiring that all relevant considerations be taken into account in reaching a decision.

b. Remedies under section 1401 of the Civil Code

26. Although section 1401 of the Civil Code states that a victim of a tort is entitled to damages, his rights under this section are wider. He may ask for a declaratory judgment and for an injunction by which the defendant is

either forbidden or ordered to do something (see also paragraph 21 above). That means that a citizen who claims that a decision of the administration constitutes a tort may demand, if need be in interlocutory proceedings, that the court or its President restrains the administration, for example, from executing or having executed its impugned decision (see Supreme Court judgment of 1 July 1983, NJ 1984, no. 360). In this sense the courts, although they lack competence to annul the decisions of administrative authorities, may, as the Supreme Court explained in its judgment of 1 July 1983, make such a decision "inoperative".

Although claims for damages against the administration are subject to a limitation period of five years under a special Act of 31 October 1924, the period of limitation for other forms of relief against the administration based on section 1401 of the Civil Code is the normal thirty year period provided for in section 2004 of that code.

2. Further forms of relief against the administration: appeal to an administrative tribunal or to a higher administrative authority ("administrative appeal")

27. Under Netherlands law there are two other forms of relief against the administration.

a. Administrative Tribunals

28. In the first place, it may be possible to appeal to an administrative tribunal with competence to make a decision in the matter. This is, as a general rule, possible in areas such as fiscal law, social security law, and the law concerning civil servants: in these fields cases are dealt with by either special administrative tribunals or special sections of the civil courts.

Since 1 July 1976, when the Act concerning administrative jurisdiction as to decisions of the administration (Wet administratieve rechtspraak overheidsbeschikkingen (AROB-Act)) entered into force, there is, moreover, a more general administrative tribunal, the Litigation Division (Afdeling Rechtspraak) of the Council of State (Raad van State), which is competent only as regards administrative decisions. It is since the AROB-Act that it has become possible to appeal to the Litigation Division from those orders made under the Nature Protection Act against which under section 19 there is no appeal to the Crown (see paragraphs 12, 18 and 20 above).

b. Appeals to a higher administrative authority

29. In the second place, under Netherlands law as it stood before the enactment of the Interim Act on Crown Appeals (see paragraph 40 below) there was a special form of relief against the administration, referred to as an "administrative appeal". Under this procedure the aggrieved citizen was

given the right to appeal from the decision of an administrative authority to a higher administrative authority which, if the appeal was allowed, had competence to take the proper decision itself. The appeal to the Crown under section 19 of the 1967 Act from the designation order of the Minister (see paragraph 18 above) is an example of this type of relief. A further example was the administrative appeal which was at stake in the Supreme Court's judgments of 22 February 1957 (NJ 1957, no. 310) and 26 March 1976 (NJ 1976, no 375): the appeal from a decision by the municipal executive to the municipal council (see paragraph 30 in fine below).

3. The doctrine of the competence of civil courts where an "administrative appeal" is possible

30. In its judgment of 9 March 1938 (NJ 1938, no. 1000), the Supreme Court examined whether the lower court was correct in holding that it should not examine the lawfulness of a municipal development plan. The Supreme Court recalled that an appeal lies to the Crown after such a plan has been approved first by the municipal council and then by the provincial council. It added that in such an appeal the Administrative Division of the Council of State gives an advisory opinion and thus "an examination of the case in adversary proceedings is secured".

The Court concluded:

> "that the law, by making available the above-described administrative procedure, offers such guarantees to all those interested in the substance of the municipal development plan, that it is to be assumed that a plan which has been formally drawn up in accordance with the law is final for everybody ..., so that an action before the civil courts, based on the allegation that the plan is null and void because the substance is contrary to the law, is excluded."

In its above-mentioned judgment of 22 February 1957 (NJ 1957, no. 310) the Supreme Court took the opposite view with regard to the administrative appeal then under examination:

> "... because the appeal to the municipal council which is possible under the law does not offer sufficient guarantees for it to be regarded as a special procedure which excludes the possibility of seeking relief before the civil courts ..."

The Supreme Court reiterated this opinion in its judgment of 26 March 1976 (NJ 1976, no. 375). There the court held that:

> "if the applicant for a building licence is of the opinion that the authorities by refusing his application have violated section 48 of the Housing Act, he may under section 1401 of the Civil Code claim damages for the harm he has suffered. The court in assessing that claim must examine the lawfulness of the decision refusing the application because the procedure to seek relief from such a decision does not offer sufficient guarantees for it to be considered a special procedure which excludes examination on the basis of section 1401 of the Civil Code."

31. The above-mentioned judgments form part of an extensive case-law to the effect that where an administrative appeal offers sufficient guarantees

as to a fair procedure, the civil courts, although remaining in principle competent, should refrain from examining the lawfulness of the administrative decision against which the appeal lies. Examination of the latter question is not, however, excluded if the administrative appeal does not offer such guarantees.

4. Consequences of Article 6 para. 1 (art. 6-1) of the Convention on the doctrine of the competence of civil courts where an "administrative appeal" is possible

32. In 1979, in a much noted article by G.J. Wiarda (Non sine causa, Opstellen aangeboden aan Prof. Mr G.J. Scholten, pp. 459 et seq.) it was submitted that the Crown did not meet the requirements of Article 6 para. 1 (art. 6-1) of the Convention. The author warned that there might be many cases of appeal to the Crown where that provision applied and argued that the appeal to the Crown procedure should be revised. The Court's judgment in the Benthem case (the judgment of 23 October 1985, Series A no. 97) confirmed the correctness of these views.

33. Prior to the Benthem judgment several authorities - among whom a member of the Supreme Court - had already stated that, if the above proposition was right, the consequence would be that (1) the appeal to the Crown could no longer be said to be an administrative appeal which "offers sufficient guarantees" as to a fair procedure and (2) that, accordingly, under the doctrine described in paragraphs 30-31 above, the civil courts would be free to examine the lawfulness of any decision of the administration coming within the province of Article 6 (art. 6) of the Convention against which appeal to the Crown lies (see, inter alia: B.W.N. de Waard, Tijdschrift voor Openbaar Bestuur, 1980, pp. 551 et seq.; A.R. Bloembergen, Bouwrecht, 1981, p. 284; E.M.H. Hirsch Ballin, Preadvies voor de Nederlandse Juristenvereniging, HNJV 1983, I.2., p. 48; J.A.E. van der Does & J.L. de Wijkerslooth, Onrechtmatige Overheidsdaad (1985), p. 33).

After the Benthem judgment this view was generally accepted among the many learned writers who examined the consequences of that judgment for the Netherlands system of remedies against the administration (see, inter alia, J.M. Polak, Nederlands Juristenblad 1985, p. 1197; P.J.J. van Buren, ibid., p. 1301; B.F. de Jong, Nederlands Juristenblad 1986, p. 813; "Kroonberoep en Art. 6 ECRM" (1986), pp. 29, 63, 70 and 71; E.M.H. Hirsch Ballin, in his note on the Benthem judgment, Administratiefrechtelijke Beslissingen 1986, no. 1; De Haan and Drupsteen, Bestuursrecht in de sociale rechtsstaat, II, p. 289). The only question which divided the legal profession was whether or not it would be necessary to appeal to the Crown before taking the case to a civil court.

The above view concerning the competence of the civil courts was also accepted by the Arnhem Court of Appeal in a judgment of 17 February 1986 in interlocutory proceedings (Kort Geding 1986, no. 138).

34. The Supreme Court decided this issue for the first time in its judgment of 12 December 1986 (NJ 1987, no. 381). The case concerned a decision taken by the municipal authorities under the Nuisance Act 1952 (Hinderwet) to close down the plaintiff's business. Under that Act the plaintiff could have appealed to the Crown ("administrative appeal") and in that context he could have requested interim mesures from the President of the Administrative Disputes Division of the Council of State. Instead, however, he instituted interlocutory proceedings (kort geding) before the President of a civil court. Both the President and the Court of Appeal held that the plaintiff should have availed himself of the appeal procedure to the Crown and refused to entertain the action. In conformity with the advisory opinion of the acting Procureur Generaal the Supreme Court dismissed the appeal.

The Court first recalled that:

> "the fact that, under section 2 RO civil courts are competent to take cognizance of an action based on section 1401 of the Civil Code, does not prevent a refusal to entertain the action based on, to put it briefly, the existence of another remedy which offers sufficient guarantees."

The Court then held that there actually was such a procedure because the plaintiff could have addressed himself to the President of the Administrative Disputes Division of the Council of State; accordingly, the President of the civil court was not the appropriate judge in the matter.

As appears from the opinion of Mr Bloembergen, a Supreme Court judge acting as Procureur Generaal, this was in conformity with the doctrine referred to in paragraphs 30 and 31 above. He had, however, also discussed the question whether that doctrine could still be upheld after the Benthem judgment which he considered ought to be taken into account. He concluded that "also after the Benthem judgment in principle the citizen will have to appeal to the Crown first; thereafter he can address himself to the civil courts" (NJ 1987, no. 1375, para. 5.3).

The Supreme Court considered that the Benthem judgment was immaterial because the case concerned interlocutory proceedings which did not involve a "determination" of the plaintiff's civil rights. It added:

> "It is true, however, that it would be difficult to accept the aforementioned exclusion of the President as kort geding judge if it were open to an interested party in cases concerning a determination of civil rights within the meaning of Article 6 para. 1 (art. 6-1) of the Convention to take the case as to the merits directly to the civil courts. The system in force at the moment should, in order to avoid procedural complications, however, be understood as enabling the interested party to bring his case to the civil courts only after a decision on his appeal to the Crown."

In his annotation to the judgment Professor Scheltema pointed out that the conclusions drawn by the Supreme Court were to be expected in the light of its case-law:

"the appeal to the Crown is no longer to be considered as offering sufficient guarantees; consequently, until the Interim Act on Crown Appeals has made the Administrative Division of the Council of State a tribunal in most cases, there is a role for the civil courts."

35. The above interpretation was endorsed by a judgment of the Supreme Court of 6 February 1987 (NJ 1988, no. 926). In that case the plaintiff (Aral) had asked for a new licence under the Nuisance Act 1952 in view of plans to extend and modify a filling station. In anticipation of the granting of this licence the company had in 1976 - with the full knowledge and approval of the head of the municipal "Nuisance-Act- department" - reconstructed its installations in the station. However, in 1979 the muncipal authorities refused to grant the licence requested and at the same time closed down all of the company's installations. Upon appeal the Crown annulled the decisions of the municipal authorities and issued the requested licence. Aral thereupon instituted a claim for damages in a civil court. The Court of Appeal held that the commune had committed a tort and ordered it to pay damages. The Supreme Court dismissed the commune's appeal.

In its appeal the commune complained that the Court of Appeal had considered itself bound by the decision of the Crown. The Supreme Court recalled the doctrine referred to above (in paragraphs 30 and 31). It held that the appeal to the Crown was, as far as the domestic law of the Netherlands was concerned, to be considered as an administrative procedure which offered sufficient guarantees. Consequently, in principle, the civil courts were bound by the Crown's decision. However, the Supreme Court added:

"In view of the judgment of the European Court of Human Rights of 23 October 1985, NJ 1986, 102 (the Benthem case) an exception to that principle must, however, be made if 'the licencee or the person who exploits the installations' pleads that the Crown cannot be deemed to be a 'tribunal' which meets the requirements of Article 6 para. 1 (art. 6-1) of the European Convention on Human Rights: in that case the aforementioned principle is not to be applied and it is the duty of the civil courts also to deal fully and independently with the issue already decided by the Crown. It has, however, not been established that Aral has made such a plea based on the above-mentioned treaty provision and the commune cannot make such a plea."

This ruling was further confirmed by the Supreme Court's judgment of 28 April 1989 (NJ 1990, no. 213).

C. Provisions relating to procedure in appeals to the Crown (Kroonberoep)

1. Before the entry into force of the Act of 18 June 1987

36. Under the Constitution the King or Queen is inviolable. The Sovereign takes decisions on the responsibility of a Minister, who must countersign them.

In ordinary language, the expression "the Crown" means the Sovereign and Minister or Ministers exercising their decision-making powers.

37. The Crown rules on administrative disputes brought before it on appeal. It decides only after the Administrative Disputes Division of the Raad van State has investigated the case and prepared a draft decision (section 26 para. 1 of the Act on the Raad van State).

The members of the Division, whose number is fixed by the Crown but must be at least five including the President, are chosen by the Crown from among the members of the Raad van State and on its recommendation. The Administrative Disputes Division should not be confused with the Litigation Division which itself examines cases within its jurisdiction.

38. The President of the Division calls for the necessary official reports and informs the Minister concerned accordingly (section 32 (c) para. 1). The parties may submit such documentary evidence as they consider necessary (section 34). A public hearing gives them an opportunity to argue their cases if they so wish (section 45). They have the right, as does the President of the Division, to call witnesses and experts, put questions to them and comment on any evidence given (section 41 para. 4, section 46 paras. 5 and 6 and section 48).

The Division deliberates in camera (section 51). It can carry out an inspection of the premises (section 52), obtain additional official reports, which the parties are able to comment on (section 54), and hold further hearings (section 55).

It then draws up a draft Royal Decree which it submits to the Crown together with its opinion (section 56). The relevant Minister has six months to inform the Division of any objections he may have and ask it to reconsider the case (section 57).

39. After receiving the Division's opinion or additional opinion the Crown issues a Royal Decree within six months. This time-limit may be extended by three months (section 58 para. 1). Once it has expired the Crown must follow the Division's opinion (section 58 (a)); prior thereto it may depart from the opinion, but only if the Minister concerned has first consulted the Minister of Justice or, if the latter is himself concerned, the Prime Minister (section 57 and section 58 para. 2 (a) and (b)). In practice this happens only very rarely.

The Crown's decision may be based on considerations of law or expediency; subject to the jurisdiction of the civil court (see paragraphs 32-35 above) no appeal may be brought against it.

The reasoned Decree is sent immediately to the parties and the Division, and is then made available to the public for one month at the Secretariat of the Raad van State (section 59 para. 2). If it goes against the Division's opinion it is published in the Official Journal (Staatsblad) together with the Minister's report, which contains the Division's draft and the Minister's

correspondence with the Division and with the Minister of Justice or Prime Minister (section 58 para. 3).

2. The Interim Act on Crown Appeals

40. The Interim Act on Crown Appeals was passed on 18 June 1987 in order to give effect to the Benthem judgment. The Act came into force on 1 January 1988 and will expire five years after that date (section 11). Following the expiry of the Act it is envisaged to create within the Council of State an administrative division with jurisdiction to decide any administrative appeal and to introduce administrative chambers in regional courts.

Under section 1 para. 1 of the Act the Administrative Disputes Division of the Council of State is to decide all disputes which formerly were to be decided by the Crown. Section 1 para. 2, however, provides, inter alia, that this amendment shall not apply to "decisions of a general character".

The Administrative Disputes Division has held that a designation order made under section 7 of the Nature Protection Act is not a "decision of a general character" within the meaning of section 1 para. 2 of the 1987 Act. Consequently an appeal against a section 7 designation order is at present decided by the Administrative Disputes Division (decision of 31 May 1988 in the case of the "Limitische Heide" (unpublished); decision of 26 October 1988 in the case of the "Tafelberg-en Blaricummerheide (Administratiefrechtelijke Beslissingen 1989, no. 41; Milieu en Recht 1989, p. 274); decision of 2 November 1988 in the case of the "Busummer- en Westerheide" - unpublished). In its decision of 26 October 1988 the Minister's order was quashed; in the other two cases the appeal was dismissed.

PROCEEDINGS BEFORE THE COMMISSION

41. Mr Oerlemans lodged his application with the Commission on 24 November 1986 (no. 12565/86). He alleged violations of Article 6 para. 1 (art. 6-1) of the Convention and Article 1 of Protocol No. 1 (P1-1).

42. On 10 July 1989 the Commission declared the applicant's complaint under Article 6 para. 1 (art. 6-1) admissible and rejected the remainder of the application.

In its report adopted on 3 April 1990 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that there had been a violation of Article 6 para. 1 (art. 6-1) (by fifteen votes to two). The full text of the

Commission's opinion and the dissenting opinion contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

43. At the hearing before the Court on 22 May 1991 the Government submitted that "Article 6 para. 1 (art. 6-1) of the Convention has not been violated in this case".

AS TO THE LAW

44. The applicant complained that he was unable under Netherlands law to challenge the designation order affecting his property before a court. He invoked Article 6 para. 1 (art. 6-1) of the Convention according to which:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing by an independent and impartial tribunal ... ."

The Commission upheld his complaint.

A. Applicability of Article 6 para. 1 (art. 6-1)

1. Existence of a dispute ("contestation") over a right"

45. The Government submitted that Article 6 para. 1 (art. 6-1) was not applicable in this case.

Referring to the case-law of the Court they did not accept that there was a dispute of a genuine or serious nature because the applicant was not hindered in using his property for grazing cattle in the same manner as he did before the designation order was made. Indeed the explanatory notes of the order explicitly stated that long-standing use of agricultural land could continue normally. It was only after the construction of the dykes that the useful value of the land became potentially larger. Accordingly, it could not be argued that the outcome of the dispute was decisive for the applicant's rights, which it only affected remotely or tenuously.

In the Government's submission such a dispute would only arise, inter alia, when an authorisation was refused or when compensation was denied.

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[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 219 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

46. The Court is not persuaded by this reasoning. In the first place, there existed a dispute concerning the lawfulness of the designation order (see paragraphs 10 and 11 above). In the second place, the legal consequences of the designation order were that the applicant was no longer free to cultivate his land as he saw fit and was required to seek an authorisation from the Minister for various purposes, for example if he sought to alter or intensify existing use or carry out certain farming activities such as clearing or ploughing the land or using herbicides (see paragraph 9 above). The extent to which he was restricted in his use of the land can be seen from the subsequent disputes that he had with the Minister concerning work that he had carried out or proposed to carry out (see paragraphs 12-14 above).

There thus existed a serious dispute in the present case concerning the resultant restrictions on the applicant's use of his property (see, as the most recent authorities in this area, the Skärby judgment of 28 June 1990, Series A no. 180-B, p. 36, para. 27, and the Fredin judgment of 18 February 1991, Series A no. 192, p. 20, para. 63). It makes no difference to this conclusion that the potential of the land was enhanced by the completion of the dyke in 1983 (see paragraph 8 above)

2. The "civil" character of the right in issue

47. The Government also pleaded, in the alternative, that there was no right of a "civil" character at issue.

48. However, in the light of the Court's case-law there can be no doubt that the property right in question was "civil" in nature within the meaning of Article 6 para. 1 (art. 6-1) (see, inter alia, the above-mentioned Skärby and Fredin judgments, Series A no. 180-B, p. 37, para. 29, and Series A no. 192, p. 20, para. 63).

49. In sum, Article 6 para. 1 (art. 6-1) applies to the present case.

B. Compliance with Article 6 para. 1 (art. 6-1)

50. In the applicant's submission he was not able to challenge the lawfulness of the designation order before a court, the appeal procedure to the Crown not involving an independent and impartial tribunal within the meaning of Article 6 para. 1 (art. 6-1). He did not consider that an action before the civil courts was open to him.

51. The Government, on the other hand, contended that following the Court's Benthem judgment of 23 October 1985 (Series A no. 97) the administrative appeal to the Crown could no longer be considered to offer sufficient guarantees of a fair procedure as required by Article 6 para. 1 (art. 6-1). Consequently, in the light of existing principles of Netherlands law it would have been open to the applicant, following the Royal Decree of 14 March 1986 in his case, to challenge the lawfulness of the designation order before a civil court.

52. The Commission considered the existence of this remedy before the civil courts to be debatable. In any event, the Supreme Court decision of 12 December 1986 which acknowledged the remedy for the first time was nine months after the Royal Decree in the applicant's case (see paragraph 34 above).

53. The Court notes that under Netherlands law it is clearly established, in extensive case-law which predates the present dispute, that where an administrative appeal to a higher authority is not considered to offer sufficient guarantees as to a fair procedure it is possible to have recourse to the civil courts for a full review of the lawfulness of the administrative decision (see paragraphs 25-26 and 30-31 above). The fact that the dispute is of a public law nature is irrelevant in this context (see paragraph 22 above).

54. Following the Benthem judgment it was the view of many authorities on Netherlands law that, as a direct consequence of the above doctrine, the civil courts would thus be able to examine the lawfulness of any administrative decision coming within the scope of Article 6 (art. 6) against which an appeal lay to the Crown (see paragraph 33 above). Indeed this opinion had already been expressed by several commentators in writings which preceded the Benthem judgment (ibid.). The only difference of opinion concerned the question of whether it was necessary to appeal first to the Crown before going to the civil court (ibid.).

55. The Supreme Court upheld this view concerning the competence of the civil courts in a decision of 12 December 1986 and confirmed the principle in several subsequent judgments (see paragraphs 34-35 above).

56. Under Netherlands law a civil court can carry out a full examination of all acts of the administration in the light, inter alia, of principles of administrative law, can award damages for torts committed and can grant injunctions against the administration (see paragraphs 25-26 above).

57. The Court concludes that, under well-established principles of Netherlands law which existed at the time of the Royal Decree in the present case (14 March 1986), the applicant could have submitted his dispute to the civil courts for examination.

C. Conclusion

58. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT

Holds unanimously that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 November 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar