COURT (PLENARY)

# CASE OF VAN MARLE AND OTHERS v. THE NETHERLANDS

*(Application no. 8543/79; 8674/79; 8675/79; 8685/79)*

JUDGMENT

STRASBOURG

26 June 1986

**In the case of van Marle and Others*,**

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. J. CREMONA,
Mr. G. WIARDA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,
Mr. A. SPIELMANN,

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

Having deliberated in private on 28 and 29 November 1985 and 25 January, 21 February and 2 and 3 June 1986,

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

## PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1984, within the three-month period laid down by Article 32 para. 1 and Article 47

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* Note by the Registrar: The case is numbered 7/1984/79/123-126. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

(art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in four applications (nos. 8543/79, 8674/79, 8675/79 and 8685/79) against the Kingdom of the Netherlands lodged with the Commission in 1979 under Article 25 (art. 25) by four Dutch citizens, Mr. Germen van Marle, Mr. Johannes Petrus van Zomeren, Mr. Johannes Flantua and Mr. Roelof Hendrik de Bruijn.

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 the respondent State of its obligations under Article 6 of the Convention and Article 1 of Protocol No. 1 (art. 6, P1-1).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyers who would represent them (Rule 30).

3. The Vice-President of the Court, acting as President, decided on 15 October 1984 that, in the interests of the proper administration of justice, both the present case and the Feldbrugge case should be heard by a single Chamber (Rule 21 para. 6). The Chamber of seven judges to be constituted included, as ex officio members, Mr. G. Wiarda, the elected judge of Dutch nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, then the Vice-President of the Court (Rule 21 para. 3(b)). On 22 October 1984, Mr. Wiarda, in his capacity as President of the Court, drew by lot in the presence of the Registrar the names of the five other members, namely Mr. J. Cremona, Mr. J. Pinheiro Farinha, Sir Vincent Evans, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 5), ascertained, through the Registrar, the views of the Agent of the Government of the Netherlands ("the Government"), the Delegate of the Commission and the applicants' lawyers as to the necessity for a written procedure (Rule 37 para. 1). In accordance with the President's Orders, the Registrar received, on 1 February 1985, the Government's memorial and, on 14 March 1985, Mr. van Marle's claims under Article 50 (art. 50) of the Convention.

By letter of 8 May 1985, the Secretary to the Commission informed the Registrar that the Delegate would wait until the hearings to express his views on the questions at issue.

5. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicants' lawyers, the President directed on 3 July 1985 that the oral proceedings should open on 26 November 1985.

On 11 July, the lawyer acting for Mr. van Zomeren, Mr. Flantua and Mr. de Bruijn stated that he would not be taking part in the hearings.

6. On 25 September 1985, the Chamber decided, under Rule 50, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. In November 1985, at the President's request, the Commission and Mr. van Marle's lawyer lodged various documents.

8. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. G.W. MAAS GEESTERANUS, Legal Adviser,
Ministry of Foreign Affairs, *Agent*,
Mr. E. KORTHALS ALTES, Landsadvocaat, *Counsel*,
Mr. J.H. VAN KREVELD,
Mrs. K.M. BRESJER,
Mr. I.W. VAN DER EIJK, Ministry of Economic Affairs, *Advisers*;

- for the Commission

Mr. J. A. FROWEIN, *Delegate*;

- for the applicant Mr. van Marle

Mr. E. VAN DER SCHANS,
Mr. G.C.L. VAN LEEUWEN, advocaten, *Counsel*.

9. The Court heard addresses by Mr. Korthals Altes for the Government, by Mr. Frowein for the Commission and by Mr. van der Schans for Mr. van Marle, as well as their replies to questions put by the Court and by several of its members. The other applicants filed their replies to the Court's questions on 25 November 1985 and 9 January 1986; the Government supplemented their replies, in writing, on 26 January 1986.

## AS TO THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

10. Mr. van Marle, Mr. van Zomeren, Mr. Flantua and Mr. de Bruijn were born in 1928, 1928, 1915 and 1929, respectively. The first of them resides in

Rotterdam, the second and third in Utrecht and the fourth in Amersfoort. All four have, since various dates between 1947 and 1950, practised as accountants.

11. In 1974, each of the applicants applied to be registered as a certified accountant, in accordance with the transitional provisions contained in section 65 of the Act of 13 December 1972 regulating this profession (see paragraphs 17 and 20 below).

Each of them was asked by the Board of Admission (see paragraph 21 below) to submit five annual accounts drawn up under his responsibility, and they were interviewed by the Board in the course of 1977. The Board finally rejected the applications, on 18 March 1977 in the case of Mr. van Marle, on 5 August 1977 in the cases of Mr. van Zomeren and Mr. Flantua, and on 15 July 1977 in the case of Mr. de Bruijn.

12. The applicants then appealed to the Board of Appeal (see paragraph 22 below). They were again asked to submit accounts prepared by them and were interviewed by the Board in the course of 1978.

A note concerning the Board of Admission's proceedings was communicated to the Board of Appeal, but not to the applicants.

The Board dismissed the appeals on the ground that the applicants' statements had been unsatisfactory on certain essential points and that their replies to questions did not show sufficient professional competence. It reached these decisions on 14 July 1978 in the case of Mr. van Marle, on 9 January 1979 in the cases of Mr. van Zomeren and Mr. Flantua, and on 19 January 1979 in the case of Mr. de Bruijn.

13. At the start of Mr. de Bruijn's interview, the chairman informed him that one of the members of the Board was unable to attend the meeting. Mr. de Bruijn agreed nonetheless to the proceedings taking place; the decision bore the signatures of all five members.

14. None of the applicants took his case to the Council of State as provided for under the Administrative Appeals Act. They considered that there was no point in doing so; as evidence of this they cited a decision of 4 September 1977 of the Judicial Division of the Council of State, which had declared an appeal against a decision of the Board of Appeal inadmissible on the ground that the Board of Appeal was a judicial body and could not be regarded as an administrative one.

## II. RELEVANT LEGISLATION

15. In 1962 and 1972 the Netherlands Parliament passed two Acts designed to regulate and delimit the profession of accountant, which until then had not been subject to any statutory control.

16. The Act of 28 June 1962The Act of 28 June 1962 (Wet op de Registeraccountants) lays down the standards of professional competence required of accountants practising on a large scale, who are called upon to audit company accounts with a view to issuing a certificate of accuracy (verklaring van getrouwheid).

17. The only statute directly relevant to the present case is the Certified Accountants Act of 13 December 1972 (Wet op de Accountants-administratie-consulenten). It concerns those accountants who do not engage in the aforesaid activities and are not required to have so high a standard of competence - essentially accountants acting for small and medium-sized firms.

18. Since 1 March 1979 - five years after the 1972 Act came into force (1 March 1974) - the position has been that the only persons entitled to call themselves accountants are those covered by the 1962 Act, certified accountants and persons working as accountants in the public service (section 85(2) of the 1972 Act, read in conjunction with section 28(2) and section 29). Anyone wrongfully using the title is liable to criminal penalties and disciplinary proceedings.

19. Application for registration as a certified accountant is made to the Board of Registration (commissie voor de inschrijving), whose decisions are subject to appeal to the Board of Appeal (commissie van beroep; see paragraph 22 below).

Applicants must hold one of the three diplomas specified in the Act or another qualification which, in the view of the Minister for Economic Affairs, denotes similar professional competence (section 10).

20. However, transitional provisions contained in section 65 also permit the registration of persons who had been engaged in professional accountancy work to an extent and in a manner evidencing adequate professional competence

- either for at least ten of the fifteen years immediately preceding 1 March 1974 (section 65(1)(a));

- or, as regards holders of one of the diplomas or qualifications specified in section 65(1)(b), for at least three years immediately preceding 1 March 1974.

Section 65(3) provides that the work in question consists of organising effective management, assessing management effectiveness, drawing up annual accounts, preparing explanatory reports analysing and interpreting data supplied by management and giving advice accordingly.

21. Under section 66 anyone wishing, like the applicants, to take advantage of the transitional provisions must apply to the Board of Admission (commissie voor de toelating), a body established to determine whether a person satisfies the requirements of section 65.

After consulting the Minister of Education and Science and the Minister for Agriculture and Fisheries, the Minister for Economic Affairs decides the size of the Board, appoints the members and designates the chairman and the vice-chairman or vice-chairmen.

The Board, which may sit in chambers of three or more members, may hear the applicant (section 69(1)). He has the option of being assisted by an adviser and, unless the Board decides otherwise, of being represented at the hearing (section 69(4)).

An unfavourable decision may be taken only after the applicant has been heard or at least invited by registered letter to appear before the Board (section 69(1)). Reasons must be given for any such decision and it must be notified to the applicant by registered mail (section 70(2)).

22. The Board of Appeal hears appeals against unfavourable decisions of the Board of Admission (section 71) and the Board of Registration. It is composed of five members and five substitutes. Three of each must be eligible for appointment as a district court judge and exercise, or have exercised, judicial functions, but they may not be, or have been, accountants (section 18(1)); the other two members and substitutes must be accountancy experts.

The members are bound by professional secrecy (section 26). After consulting the Minister of Justice, the Minister for Economic Affairs appoints them and designates the chairman and vice-chairman.

23. Before giving its decision, the Board of Appeal must hear the appellant or invite him by registered letter to appear before it (sections 20(1) and 72(1)). It may obtain information from the Board of first instance and hear third persons (section 72).

Unless the Board decides otherwise, the appellant may be assisted by a lawyer or represented at the hearing; the Board may also refuse to allow him to be represented or assisted by a person who is not a lawyer (section 72(2), read in conjunction with section 20(2) and (3)).

The Board must give reasons for its decision and notify the decision and reasons to the appellant and to the Board of first instance (sections 21(2) and 73(2)).

## PROCEEDINGS BEFORE THE COMMISSION

24. Mr. van Marle applied to the Commission on 10 January 1979, Mr. van Zomeren and Mr. Flantua on 20 June 1979 and Mr. de Bruijn on 17 July 1979.

In their submission, the decisions in question constituted determinations of "civil rights", in which there had not been a fair and public hearing by an independent and impartial tribunal as is required by Article 6 para. 1 (art. 6-1) of the Convention. They further maintained that the decisions infringed their right to the peaceful enjoyment of their possessions, guaranteed by Article 1 of Protocol No. 1 (P1-1).

25. The Commission declared the applications admissible on 13 October 1980, having ordered their joinder on 2 October 1979 and 6 May 1980.

In its report of 8 May 1984 (Article 31) (art. 31), the Commission expressed the opinion that Article 6 para. 1 (art. 6-1) of the Convention was not applicable in the present case (eight votes to four) and that there had been no violation of Article 1 of Protocol No. 1 (P1-1) (eleven votes, with one abstention).

The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to the present judgment.

## FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

26. In their memorial of 1 February 1985, the Government requested the Court "to decide that neither Article 6 para. 1 (art. 6-1) of the Convention nor Article 1 of Protocol No. 1 (P1-1) has been violated in the present case".

## AS TO THE LAW

### I. ALLEGED BREACH OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

27. The applicants claimed to be victims of a breach of Article 6 para. 1 (art. 6-1), which reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

28. The Court must first determine whether this provision is applicable. The Government and the Commission took the view that it was not.

29. According to the applicants, the decisions of the Board of Admission and the Board of Appeal were decisive for their rights to continue practising their profession and to call themselves accountants, rights which they considered to be civil rights within the meaning of Article 6 para. 1 (art. 6-1).

They pointed out that since 1 March 1979, following the introduction of statutory regulations on the matter, they would be liable to criminal penalties if they used that title.

However, for many years before the 1972 Act came into force they had availed themselves of these two rights, the exercise of which could not have been impeded by third parties or by the public authorities. In their submission, the new legislation had taken the existence of acquired rights into account by laying down transitional provisions.

In addition, the applicants alleged that the said decisions had given rise to an infringement of their property rights.

30. The Government's view, on the other hand, was that use of the title of accountant had formerly been unregulated and that the aim of the 1972 Act was to ensure certain standards of professional competence, verified by supervisory machinery. They maintained that the Act also sought to protect the title by introducing a code of professional ethics and disciplinary rules.

They submitted that, whilst the transitional provisions were admittedly designed to safeguard the interests of those who had been carrying on the profession for some time previously, that did not amount to recognition of any acquired rights.

They argued that what was at issue in the dispute (contestation) was the conferment of a new right, namely the right to use the title of accountant; it was not the applicants' right to continue their professional activities, since nothing prevented them from doing so.

On this latter point, the Commission agreed with the Government. The Commission further considered that the decisions in question concerned the applicants' professional ability and that what the applicants were alleging was an incorrect assessment of their competence rather than any procedural or other irregularity. In its view, a grievance of this kind did not really involve a "contestation" (dispute) over civil rights and obligations, with the result that Article 6 (art. 6) was not applicable in the present case.

31. The Court notes that the applicants consider that they fulfil the conditions required by law for registration as certified accountants within the meaning of the 1972 Act. As, however, the Board of Admission rejected their applications, they took their cases to the Board of Appeal. It was at this stage that there was a disagreement to be resolved about their professional competence and thus about their claim of right to be registered as certified accountants. However, it has to be determined whether there was a "contestation" (dispute) within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

32. The principles which emerge from the Court's case-law include the following:

(a) Conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning" (see the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 20, para. 45).

(b) The "contestation" (dispute) must be genuine and of a serious nature (see the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 30, para. 81).

(c) The "contestation" (dispute) may relate not only to "the actual existence of a ... right" but also to its scope or the manner in which it may be exercised (see the above-mentioned Le Compte, Van Leuven and De Meyere judgment, p. 22, para. 49).

(d) The "contestation" (dispute) may concern both "questions of fact" and "questions of law" (see the same judgment, loc. cit., p. 23, para. 51 in fine, and the Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 16, para. 29 in fine, and p. 19, para. 36).

33. In addition, it is necessary to analyse the object of the disagreement which was submitted in the present case to the Board of Appeal.

34. The function of the Board of Appeal is both to review the proper conduct of Board of Admission proceedings and to reconsider whether applicants, as regards ability, experience, length of time in the profession, or diplomas or qualifications held (see paragraph 20 above), meet the legal requirements for registration.

35. The former task may involve such matters as ruling whether a decision was arbitrary or ultra vires or whether there were procedural irregularities. Matters of this kind inherently lend themselves to judicial decision and any disagreement about them may be regarded as a "contestation" (dispute) within the meaning of Article 6 para. 1 (art. 6-1).

In the present cases, however, the applicants did not allege before the Board of Appeal that there had been any such irregularity.

36. The question whether the statutory conditions for registration are satisfied may also touch on matters of law and of fact susceptible to judicial assessment, such as interpretation of the legal requirements, length of time in the profession and diplomas or qualifications held.

The applicants' objections to the Board of Admission's decision did not fall into this category either. It is true that Mr. de Bruijn complained, amongst other things, of a miscalculation of the time during which he had been self-employed, but he did not pursue this point before the Convention institutions.

With this one exception, the complaints made by the applicants to the Board of Appeal concerned, in essence, what they regarded as an incorrect assessment of their competence by the Board of Admission. The Board of Appeal re-examined the applicants, calling them to interviews at which they had the opportunity to comment on balance sheets they had drawn up and to answer questions on accountancy theory and practice.

An assessment of this kind, evaluating knowledge and experience for carrying on a profession under a particular title, is akin to a school or university examination and is so far removed from the exercise of the normal judicial function that the safeguards in Article 6 (art. 6) cannot be taken as covering resultant disagreements.

37. There was thus no "contestation" (dispute) within the meaning of Article 6 (art. 6), which therefore was not applicable in the present case. The fact that, in domestic law, the Board of Appeal is considered to be a tribunal does not alter this conclusion.

38. The Court thus need not inquire whether the rights claimed by the applicants are "civil rights", or whether the proceedings at issue complied with the requirements of Article 6 para. 1 (art. 6-1).

## II. ALLEGED BREACH OF ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

39. The applicants further claimed to be victims of breaches of Article 1 of Protocol No. 1 (P1-1), which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

They alleged that, as a result of the Board of Appeal's decisions, their income and the value of the goodwill of their accountancy practices had diminished. They maintained that they had thereby been subjected to an interference with the exercise of their right to the peaceful enjoyment of their possessions and to a partial deprivation thereof without compensation.

40. The Government, on the other hand, considered that the applicants had no "acquired right" to the use of the title "accountant" before the entry into force of the legislation regulating the use of that title. They contended that until then there was no legally recognised and protected right, but only a freedom to use the title. Moreover, in their opinion, even if there was an acquired right, it could not be classified as a "possession" within the meaning of Article 1 (P1-1). The Government also pointed out that as a matter of Netherlands law there was no such thing as a "right to goodwill" which could be regarded as property for the purposes of the Article.
In the alternative, the Government submitted that there had been no breach of Article 1 (P1-1) as the purpose of the legislation was to promote the "general interest".

41. The Court agrees with the Commission that the right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up a clientèle; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case.

42. The refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientèle and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions.

43. However, that interference was, as the Commission considered, justified in terms of the second paragraph of Article 1 (P1-1).

First, the 1972 Act was designed to promote the "general interest": its purpose was to structure a profession that is important to the entire economic sector by providing the public with guarantees of the competence of those who carry on that profession.

Secondly, a fair balance between the means used and the intended aim (see the above-mentioned Sporrong and Lönnroth judgment, Series A no. 52, p. 26, para. 69) was at any rate ensured by transitional provisions enabling the former unqualified accountants to gain entry to the new profession on prescribed conditions.

44. The Court thus concludes that there was no breach of Article 1 of Protocol No. 1 (P1-1).

## FOR THESE REASONS, THE COURT

1. Holds by eleven votes to seven that Article 6 para. 1 (art. 6-1) of the Convention was not applicable in the present case;

2. Holds by sixteen votes to two that Article 1 of Protocol No. 1 (P1-1) was applicable in the present case;

3. Holds unanimously that there has been no violation of the said Article 1 (P1-1).

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 26 June 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

- joint concurring opinion of Mr. Ryssdal, Mr. Matscher and Mr. Bernhardt;

- dissenting opinion of Mr. Cremona;

- joint dissenting opinion of Mr. Thór Vilhjálmsson, Mr. Pettiti, Mr. Macdonald, Mr. Russo, Mr. Gersing and Mr. Spielmann;

- joint dissenting opinion of Sir Vincent Evans and Mr. Gersing.

R.R.

M.-A.E.

# JOINT CONCURRING OPINION OF JUDGES RYSSDAL, MATSCHER AND BERNHARDT

In conformity with the majority of our colleagues we consider Article 6 (art. 6) of the Convention not to be applicable in the present case. But our reasoning is different.

In our view, the applicants had a right to be registered as accountants if they satisfied the conditions laid down in the legislation (that is, in the 1972 Act). They claimed that they met these conditions, but this was denied by the Netherlands authorities. Therefore, there existed a dispute ("contestation"). However, this dispute did not concern a civil right within the meaning of Article 6 (art. 6). It concerned an examination and an evaluation of the applicants' professional competence by a public authority, a matter which cannot be brought under the notion of civil rights.

# DISSENTING OPINION OF JUDGE CREMONA

Whilst agreeing with the majority of my brother judges on Article 1 of Protocol No. 1 (P1-1), I find myself unable to agree with them on Article 6 (art. 6) of the Convention.

This is a case with certain peculiar features of its own.

Whatever the difficulties raised by it (and they are many), it does not concern the continued exercise of a profession affected by the result of disciplinary proceedings, which (as was indeed, in my view, the case in Le Compte, Van Leuven and De Meyere; see the joint separate opinion of myself and Judge Bindschedler-Robert, annexed to the Court's judgment of 23 June 1981, Series A no. 43, pp. 29-30) do in certain circumstances essentially fall to be considered as dealing with "the determination ... of a criminal charge" for the purposes of Article 6 para. 1 (art. 6-1) of the Convention.

What the applicants are in essence complaining of in the present case is that they have been impeded in the continued effective exercise of their accountancy profession by being denied the continued use of the title of accountant, a title which they had in fact used for several years and was vital to the effective exercise of their profession, but which was now regulated by new legislation (the Certified Accountants Act of 1972). Indeed they claimed to have fulfilled all the statutory conditions for the use of that title as laid down in section 65 of such new legislation, including that of adequate professional ability.

That provision was in fact part of a transitional mechanism in the Act itself, clearly designed to afford legal protection to those, like the applicants, who had previously practised, quite lawfully, the accountancy profession under the title of accountant, if they fulfilled certain statutory conditions.

The competence of deciding on the fulfilment of such conditions was entrusted by the new legislation itself first to a Board of Admission and thereafter to a proper judicial tribunal termed Board of Appeal. That the latter was a proper judicial tribunal is confirmed by a specific judgment of the Dutch Council of State (see paragraph 14 of the present judgment).

It is of course appreciated that normally the evaluation of knowledge by means of, say, a school or university examination, referred to in paragraph 36 of the judgment, (as distinct, for instance, from the question whether the rules governing such examination have or have not been observed) is subtracted from the judicial sphere. But in the present case we are faced with the fact that the new Dutch legislation actually saw fit to create a

proper judicial tribunal to control the decisions of the Board of Admission, including what may be termed the competence-evaluation element (see paragraph 34 of the judgment). In any event the applicants' claim in the present case went well beyond the mere question of passing a qualifying examination.

In my view and on the basis of the Court's relevant case-law, there was in this case a "contestation" (dispute) over a civil right within the meaning of Article 6 (art. 6) of the Convention. What was in fact at issue was the continued effective exercise by the applicants of their accountancy profession under the title of accountant, which they had in fact used for several years and was now denied to them but to which they claimed to be also entitled by reason of their meeting all the statutory requirements of the applicable transitional provisions of the new legislation regulating registration under that title. The Board of Admission ruled that they did not so meet all such statutory requirements, but on their taking the case up to the Board of Appeal (a proper judicial tribunal vested by the new legislation itself with the competence of deciding also on the fulfilment of those requirements, including that of adequate professional ability) there arose a "contestation" which to my mind, in the aforesaid circumstances, concerned a civil right within the meaning of Article 6 (art. 6).

In this connection, it is to be borne in mind that the continued use by the applicants of the professional title of accountant was intimately bound up with, and indeed essentially vital to, the continued effective exercise of their accountancy profession (based on private-law relationships with their clients) and had also substantial patrimonial connotations (see paragraph 42 of the judgment) that were indeed important for the applicants' very livelihood. The result of the proceedings complained of was directly decisive for the right at issue.

Article 6 (art. 6) of the Convention was thus applicable and in my view was also violated on the following grounds: (1) the so-called "protocols" of the Board of Admission were communicated to the Board of Appeal but not to the applicants themselves, who thus, when conducting their cases before the latter Board, could not know the reasons for the rejection of their applications by the former Board, a fact which impaired the fairness requirement in Article 6 para. 1 (art. 6-1), and (2) the decision given by the Board of Appeal did not meet the publicity requirement in that same provision, not even in the extended sense accepted in the Pretto and Others judgment of 8 December 1983 (Series A no. 71).

# JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, PETTITI, MACDONALD, RUSSO, GERSING AND SPIELMANN

*(Translation)*

Contrary to the majority we voted in favour of the applicability of Article 6 (art. 6). Our reasoning is as follows.

*1. Existence of a "contestation" (dispute) concerning a right*

The following principles, amongst others, emerge from the Court's case-law, and reference is made to them in the judgment:

(a) conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning";

(b) the "contestation" (dispute) must be genuine and of a serious nature;

(c) it may relate not only to "the actual existence of a ... right" but also to its scope or the manner in which it may be exercised;

(d) it may concern both "questions of fact" and "questions of law".

But the conclusion drawn by the majority from these principles in the instant case does not appear to us satisfactory in so far as it considered that there was not in the circumstances any "contestation" (dispute), the determination of which would fall within the normal exercise of the judicial function. The Court notes that the relevant legislation laid down transitional provisions designed to preserve the acquired rights of a particular category of accountants for a limited period. Under the Act, persons able to prove that they possess sufficient skill and experience are entitled to continue to practise their profession on its new legal footing. The "contestation" (dispute) therefore indeed related to the actual existence of the right which the applicants were claiming.

The decision of the Board of Appeal, refusing the applicants the right to use the title, had the direct consequence of depriving them of their qualification and therefore of their clients, who drew the conclusion that refusal of the title implied inadequate ability.

It was not merely a question of deliberating in the light of a proficiency examination relating to the conferment of a diploma but of deciding whether or not a professional practice carried on over many years by the applicants to the satisfaction of their clients who had entered into contracts with them should continue as before. The judicial function does normally extend to

determining technical questions. It is impossible within a deliberation to dissociate what is "justiciable" from what is factual and technical.

The "contestation" (dispute) related to this loss of professional practice whereas, above all, one association of accountants had a privileged position in relation to the other in a majority of the cases being examined.

Such a loss had repercussions on the existence of a right and on the carrying on of an occupation.

This was indeed, then, a "contestation" (dispute) as customarily interpreted by the Court, most recently in its Benthem judgment.

*2. Civil character of the right at issue*

We consider that the right in question is of a civil character. The practice of the profession consists in concluding private-law contracts; as to the use of the title, it is one of the means of practising the profession and, in particular, of keeping one's clients and securing new ones.

In our view, the administrative nature of the decisions of the Board of Appeal has no bearing on the real nature of the right.

The Government maintained that the decision of the Board of Appeal determined public rights - the right to registration and to the title of accountant.

The Court has held that "the concept of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State" (see the König judgment of 28 June 1978, Series A no. 27, pp. 29-30, paras. 88-89).

Furthermore, Article 6 (art. 6) does not cover only "private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law", and not "in its sovereign capacity" (see the same judgment, loc. cit., p. 30, para. 90). Accordingly, "the character of the legislation which governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter ... are ... of little consequence": the latter may be an "ordinary court", [an] "administrative body, etc.".

The question of success in an examination giving access to a profession does not, as such, involve a civil right.

In the instant case, however, the applicants' position presented a number of special features which went beyond the dimension of an examination. Inclusion in the list of certified accountants was one of the prerequisites of being able to continue carrying on their occupation in equivalent conditions.

Refusal of enrolment in fact entailed loss of occupation and, since a profit-making profession was involved, could have very adverse economic consequences.

Accordingly, what was at stake was a "civil" right within the meaning of Article 6 para. 1 (art. 6-1), which therefore was applicable to the proceedings before the Board of Appeal.

Compliance with Article 6 (art. 6)

Had the Court had to consider this point, we should have held that there had been a breach of Article 6 (art. 6), on account notably of non-compliance with the principle of equality of arms (in particular, the fact that the note concerning the proceedings was not communicated) and with the principle that the procedure be conducted in public.

# JOINT DISSENTING OPINION OF JUDGES SIR VINCENT EVANS AND GERSING ON THE APPLICABILITY OF ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

1. We regret that we are unable to share the opinion of the majority of the Court on this issue.

2. It is our view that Article 1 of Protocol No. 1 (P1-1) is not applicable in the present case. No doubt the effect of the 1972 Act and of the Board of Appeal's decisions under it was to reduce the scope of the applicants' professional activities, but we find it difficult to conclude that this involved an interference with "the peaceful enjoyment of [their] possessions" within the meaning of Article 1 (P1-1).

3. The freedom to use the title "accountant" which the applicants had prior to the entry into force of the regulatory provisions of the 1972 Act did not, in our opinion, constitute a property right protected by that Article. Nor were the measures taken directed at controlling the use of property but at regulating the exercise of a professional activity.

4. As to the alleged loss of clientèle resulting from the measures complained of, "goodwill" may indeed for certain purposes be an element of the economic value of a person's business and thus an integral part of his property. However, we do not consider that the professional expectations allegedly lost by the applicants should be regarded as part of their "possessions", or that the measures taken should be regarded as an interference with the peaceful enjoyment of their "possessions", within the meaning of Article 1 (P1-1). A wide variety of legislative and other measures can affect incidentally the scope, profitability and therefore the "goodwill" value of a business. We take the view that the Contracting States are entitled to adopt measures of the kind in question in the present case without being bound by the restrictions embodied in Article 1 (P1-1). To regard such measures as an interference with the peaceful enjoyment of possessions requiring justification within the terms of that Article (P1-1) gives it, in our opinion, an interpretation going beyond its object and purpose.