COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Applications Nos. 8543/79, 8674/79, 8675/79 and 8685/79

VAN MARLE, VAN ZOMEREN, FLANTUA and DE BRUIJN

against

THE NETHERLANDS

Report of the Commission

(Adopted on 8 May 1984)

STRASBOURG

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the Parties to the European Commission of Human Rights.

A. The substance of the applications

2. All four applicants are Dutch citizens. The first applicant, Mr. Germen van Marle, was born in 1938 and is resident in Rotterdam. The second applicant, Mr. Johannes Petrus van Zomeren, was born in 1928 and is resident in Utrecht. The third applicant, Mr. Johannes Flantua, was born in 1915 and is resident in Utrecht. The fourth applicant, Mr. Roelof Hendrik de Bruijn, was born in 1929 and is resident in Amersfoort.

3. The applicants were originally represented by Mr. H.C.G.L. Polak, a lawyer practising in Rotterdam. Since 26 August 1983 Mr. van Marle has been represented by Mr. E. van der Schans, a lawyer practising in Amsterdam, and the three other applicants by Mr. W.L. Nouwen, a lawyer practising in Rotterdam. The Government have been represented by Miss F.Y. van der Wal, Assistant Legal Adviser at the Ministry of Foreign Affairs, as their Agent.

4. The applications to the Commission arise from the application of the transitional provisions of the Act on Certified Accountants of 1972 (Wet op de Accountants-administratieconsulenten), which led to a decision by the competent authorities under these provisions, the Board of Admission (Commissie voor de Toelating) and the Board of Appeal (Commissie van Beroep) not to designate the applicants for registration as certified accountants within the meaning of the Act. The applicants maintain that the above proceedings were unfair and were conducted in breach of the requirements of Art. 6 para. (1) of the Convention and that as a result of the above decisions they have suffered considerable damage, incompatible with the provisions of Art. 1 of the First Protocol.

B. Proceedings before the Commission

5. The first application (No. 8543/79) was introduced with the Commission on 10 January 1979 and registered on 8 March 1979. The second and third applications (Nos. 8674/79 and 8675/79) were introduced with the Commission on 20 June 1979 and registered on 25 June 1979. The fourth application (No. 8685/79) was introduced on 17 July 1979 and registered on 19 July 1979.

6. On 2 october 1979 the Commission examined the admissibility of the applications. On that date it ordered the joinder of the first three applications under Rule 29 of the Commission's Rules of Procedure. It further decided, in accordance with Rule 42 (2) (b) of its Rules of Procedure, to give notice of all four applications to the respondent

Government and to invite them to submit written observations on its admissibility. The Government submitted their observations on 6 December 1979 and the applicant's observations in reply were submitted on 13 February 1980.

7. On 6 May 1980 the Commission further considered the applications. Having ordered the joinder of the fourth application (No. 8685/79) to the three other applications, it decided to hold an oral hearing on the admissibility and merits of the application. The hearing was held on 13 October 1980. The applicants were represented by Mr. H.C.G.L. Polak, counsel, assisted by Mr. W.L. Nouwen and Mr. G. de Wilde. The first applicant, Mr. van Marle, was also present in person. The respondent Government was represented by Miss F.Y. van der Wal, Assistant Legal Adviser at the Ministry of Foreign Affairs as their Agent, assisted by Mrs. C.E.M.N. van der Kraan-Meertens, Mr. J.H. van Kreveld and Mr. H.G. Lyklema of the Ministry of Economic Affairs, as advisers.

8. Following the hearing the Commission deliberated on the question of admissibility and merits of the applications. On the same date, i.e. 13 October 1980, the Commission declared the applications admissible (1) on the ground that the applications raised substantial questions of interpretation of Art. 6 of the Convention and of Art. 1 of the First Protocol to the Convention, which were of such complexity that their determination should depend on a full examination of the merits. The Commission decided that a certain number of question required further clarification by the Parties.

9. On 27 January 1981 the decision on admissibility was communicated to the Parties under Rule 43 (1) of the Rules of Procedure. At the same time the Parties were invited to make additional submissions on the merits of the applications in the light of the question put to the Parties by the Commission.

The applicants submitted additional observation on the merits on 4 March 1981 and on 13 April 1981. On 24 June 1981 the respondent Government submitted their additional observations on the merits.

10. Following the decision on admissibility the Commission, acting in accordance with Art. 28 (b) of the Convention, placed itself at the disposal of the Parties with a view to securing a friendly settlement of the matter. Numerous meetings took place between the Parties between 1981 and 1983 (cf. Appendix I). In the light of the Parties' ultimate reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

(1) See decision on admissibility, Appendix II.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
G. SPERDUTI
J.A. FROWEIN
J.E.S. FAWCETT
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
M. MELCHIOR
J. SAMPAIO
A.S. GÖZÜBÜYÜK
A. WEITZEL
H.G. SCHERMERS

12. The text of the Report was adopted by the Commission on 8 May 1984 and is now transmitted to the Committee of Ministers in accordance with Art. 31, para. (2) of the Convention.

13. A friendly settlement not having been achieved, the purpose of the present Report, pursuant to Art. 31 of the Convention, is accordingly:

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of their obligations under the Convention.

14. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I. The Commission's decisions on the admissibility of the applications are attached hereto as Appendix II.

15. The full text of the oral and written pleadings and the documents produced by the Parties in support of their submission are held in the Commission's archives and are available to the Committee of Ministers, if required.

II. ESTABLISHMENT OF THE FACTS

16. This section of the Report contains a description of the facts found by the Commission on the basis of the information submitted by the Parties. The facts are not in dispute between the Parties.

A. General background and relevant domestic law

17. Until 1962 the exercise of the accountancy profession was not regulated by law in the Netherlands.

The absence of legal rules concerning qualifications of those exercising the above profession being considered unsatisfactory for economic relations existing within the Netherlands society, the Netherlands Parliament adopted two successive laws designed to regulate and circumscribe the profession.

18. First, in the Act on Chartered Accountants (Wet op de Registeraccountants) of 28 June 1962 (Official Bulletin 1962, No. 258), rules were laid down concerning the requirements of professional competence for those accountants who were called upon to exercise the profession on a full scale. Particular regard was had to those accountants who were required to prepare audits of company accounts.

Secondly, in the Act on Certified Accountants (Wet op de Accountants-administratieconsulenten) of 13 December 1972 (Official Bulletin 1972, No. 748), which entered into force on 1 March 1974 (Official Bulletin 1974, No. 70), rules were laid down for those accountants who were not required to exercise the above control activity and for whom such high standard of competence in the field of accountancy was not required. Particular regard was had to those who performed certain accountancy functions for the medium and small-sized branches of industry.

19. Art. 85 para. (2) in conjunction with Art. 28 para. 2 and Art. 29 para. (2) of the Act on Certified Accountants, provides that five years after its entry into force, i.e. on 1 March 1979, only those persons who are entitled by law to hold the title of chartered accountant or that of certified accountant or who occupy a post of accountant in the public service are entitled to name themselves "accountant" (1). Non compliance with of the above is liable to the imposition of a fine.

(1) This right was equally conceded to a further category of persons authorised to carry on accountancy activities by ministerial decree in accordance with Art. 42 (a) of the Code of Commerce. The latter provision was abolished in 1976.

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20. The 1972 Act creates an advisory body to the responsible minister concerning the proper exercise of the accountancy profession: the Council for Certified Accountants (Raad voor Accountants-administratieconsulenten). Certified accountants must be registered as such (Art. 7). Those candidates who are in the possession of one of the three diplomas listed in the law or other certificate which according to the minister demonstrates a similar professional skill qualify for registration (Art. 10).

21. Decisions on requests for registration are taken by the Board of Registration (Commissie voor de Inschrijving). Decisions of the Board of Registration are subject to appeal to the Board of Appeal (Commissie van Beroep).

22. The Act contains transitional provisions (Arts. 64-76) for those who at the time of the entry into force of the Act have practised the accountancy profession for a specified length of time and whose practical experience and knowledge, both in terms of extent and level, indicate that they possess adequate professional capabilities. These persons may at their request be designated for registration, provided they comply with a number of statutory requirements.

23. The required professional competence is specified in Art. 65 of the Act. According to that provision the following categories of persons qualify for registration under the transitional arrangement:

- those who during a period of 15 years preceding the entry into force of the Act have during at least 10 years professionally carried out further specified accountancy activities to an extent and in a manner which warrant sufficient professional skill (Art. 65, para. (1) (a));

- those who are in the possession of a diploma or certificate listed in this provision and, in addition, have during a period of at least three years immediately preceding the entry into force of the Act professionally carried out further specified accountancy activities to an extent and in a manner which warrant sufficient professional skill (Art. 65, para. (1) (b)).

The accountancy activities concerned are further specified in Art. 65, para. (3). They consist in the running and assessing of an effective administration, drawing up of annual accounts, analysing and interpretation of administrative data in explanatory reports and giving advice on the basis of these data.

24. A Board of Admission (Commissie voor de Toelating) is established under the transitional provisions, responsible for determining who met the above requirements (Art. 68) (1).

25. The Board of Admission is composed of a number of members determined by the Minister of Economic Affairs. Members are appointed by the Minister who also designates amongst the members its president and one or more vice-presidents. The Minister of Economic Affairs consults the Minister of Education and Science and of Agriculture and Fisheries on the above decisions. The Board may be divided in chambers of at least three members.

26. The Board of Admission is only concerned with applications for registration under the transitional arrangement. All other applications are handled by the Board of Registration (cf. para. 21 above).

27. The Board of Admission examines applications and hears, if appropriate, the applicant (Art. 69, para. (1)). A decision to reject an application may only be taken by the Board of Admission after hearing the applicant or after inviting the applicant by registered letter to appear before it (Art. 69, para. (3)). Unless the Board of Admission decides otherwise, the applicant may be represented at the hearing. He may also be assisted by counsel (Art. 69, para. (4)). Negative decisions by the Board of Admission must be accompanied by reasons and are communicated to the applicant by registered mail (Art. 70, para. (2)).

28. The Board of Appeal examines appeals against unfavourable decisions taken by the Board of Registration and by the Board of Admission (Art. 19 and Art. 71). The Board of Appeal is composed of five members and five substitute members. Three of the members and three of the substitute members must qualify for nomination as a judge in a district court and exercise, or have exercised, judicial functions, but must not exercise, or have exercised, the profession

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(1) Art. 68 para. (4) provides that the Board of Admission will be abolished after the expiry of the delay within which applications for registration under the transitional provisions can be introduced and it has decided on all reports.

of chartered or certified accountants (Art. 18, para. (1)). Members and substitute members of the Board of Appeal are appointed by the Minister of Economic Affairs, who also designates the president and vice-president amongst the above-mentioned three members and substitute members. The Minister of Economic Affairs consults the Minister of Justice on the above decisions (Art. 18, para. (2)).

The Act contains no provision for dismissial of members. Members receive no fixed salary, but allowances in accordance with regulations laid down by the Minister of Economic Affairs (Art. 25). Members are obliged to observe professional secrecy (Art. 26).

29. The Board of Appeal must hear the applicant before deciding on the appeal or after having invited the applicant to appear before it by registered letter (Art. 20, para. (1) and Art. 72, para. (1)). The Board of Appeal may invite the Board of Registration or the Board of Admission to provide information and hear third persons (Art. 20, para. (1) and Art. 72, para. (1)).

Applicants may be represented at the hearing, unless the Board decides otherwise and may be assisted by counsel (Art. 72, para. (2) in conjunction with Art. 20, para. (2)). The Board of Appeal may refuse the representation or assistance by non-lawyers (Art. 72, para. (2) in conjunction with Art. 20, para. (3)). The decision of the Board of Appeal is accompanied by reasons (Arts. 21 and 73). The decision is communicated to the applicant and to the Board of Registration or the Board of Admission (Art. 21, para. (2) and art. 73, para. (2)).

B. Particulars of the individual applications

30. The first applicant, Mr. G. van Marle, who claimed to have exercised since 1947 accountancy activities corresponding to the description in Art. 65, para. (3) of the Act, introduced on 22 March 1974 a request with the Board of Admission in order to be registered as a certified accountant in accordance with Art. 66 of the Act. By letter of 17 January 1977 the applicant was convened for an interview to be held on 17 February 1977. He was invited to present at the interview some 5 annual accounts drawn up under his responsibility covering 1973 and preceding years.

31. The interview took place on 17 February 1977. The annual accounts which the applicant had submitted in advance were returned to him at the end of the interview.

32. On 18 March 1977 the Board of Admission rejected the request. The decision was communicated to the applicant on 20 June 1977.

33. The applicant appealed to the Board of Appeal. By letter of 10 May 1978 he was convened for an interview on 23 May 1978. He was invited to present himself with a number of accounts prepared by him.

34. The interview took place on 23 May 1978. The accounts were returned to the applicant at the end of the interview.

35. On 14 July 1978 the Board of Appeal rejected the appeal as being unfounded on the grounds that the accounts submitted by the applicant fell short on some essential points and that his answers to the questions did not show that he possessed sufficient professional skill.

36. The second applicant, Mr. J.P. van Zomeren, who claimed to have exercised since 1950 accountancy activities corresponding to the description in Art. 65, para. (3) of the Act, introduced on 4 April 1974 a request to the Board of Admission in order to be registered as a certified accountant in accordance with Art. 66 of the Act. By letter of 20 June 1977 he was convened for an interview on 18 July 1977. As agreed beforehand, he had submitted in advance some 5 annual accounts drawn up under his responsibility.

37. The interview took place on 18 July 1977 The accounts submitted by him were returned at the end of the interview.

38. On 5 August 1977 the Board of Admission rejected the request. The decision was communicated to the applicant on 3 November 1977.

39. The applicant appealed to the Board of Appeal. By letter of 3 November 1978 he was convened for an interview on 21 november 1978. He was invited to present himself with a number of accounts prepared by him.

40. The interview took place on 21 November 1978. The accounts were returned to the applicant at the end of the interview.

41. On 9 January 1979 the Board of Appeal rejected the appeal as being unfounded on the grounds that the accounts submitted by the applicant fell short on some essential points and that his answers to the questions put to him during the interview did not show that he possessed sufficient professional skill.

42. The third applicant, Mr. J. Flantua, who claimed to have exercised since 1950 accountancy activities corresponding to the description in Art. 65, para. (3) of the Act, introduced on 4 April 1974 a request to the Board of Admission in order to be registered as a certified accountant in accordance with Art. 66 of the Act. By letter of 20 June 1977 he was convened for an interview on 18 July 1977. As agreed beforehand, he had submitted in advance some 5 annual accounts prepared under his responsibility.

43. The interview took place on 18 July 1977. The accounts submitted by him were returned at the end of the interview.

44. On 5 August 1977 the Board of Admission rejected the request. The decision was communicated to the applicant on 3 November 1977.

45. The applicant appealed to the Board of Appeal. By letter of 3 November 1978 he was convened for an interview on 21 November 1978. He was invited to present himself with a number of accounts prepared by him.

46. The interview took place on 21 November 1978. The accounts were returned to him at the end of the interview.

47. On 9 January 1979 the Board of Appeal rejected the appeal as being unfounded on the grounds that the reports submitted by the applicant fell short on some essential points and that his answers to the questions did not show that he possessed sufficient professional skill.

48. The fourth applicant, Mr. R.H. de Bruijn, who claimed to have exercised since 1947 accountancy activities corresponding to the description in Art. 65 para. (3) of the Act, introduced on 29 May 1974 a request to the Board of Admission in order to be registered as a certified accountant in accordance with Art. 66 of the Act. By letter of 17 May 1977 he was convened for an interview on 16 June 1977. As agreed beforehand, he had submitted in advance some 5 annual accounts prepared under his responsibility.

49. The interview took place on 16 June 1977. The accounts submitted by the applicant were returned at the end of the interview.

50. On 15 July 1977 the Board of Admission rejected the request.

51. The applicant appealed to the Board of Appeal. He was convened for an interview on 17 November 1978.

52. The interview took place on 17 November 1978. At the outset of the interview the President of the Board of Appeal informed the applicant that one of the members of the Board was prevented from attending the meeting. The applicant declared not to object to the proceedings being carried out in the presence of four members only.

53. On 19 January 1979 the Board of Appeal rejected the appeal as being unfounded on the grounds that the applicant could not be considered as having exercised the accountancy profession in the relevant period and that his reports were insufficient. The decision was signed by all five members of the Board of Appeal.

III. SUBMISSIONS OF THE PARTIES

54. The Parties' submissions concerning the facts of the case and the relevant domestic law are incorporated in the preceding section of the Report. The substance of the remaining written and oral submissions made by them in the course of the proceedings set out below concern therefore only the legal issues under the Convention.

A. As to the applicability of Art. 6 para. (1) of the Convention

1) The applicants

55. The applicants are of the opinion that in the relevant proceedings there was a determination of their civil rights. However they did not receive a public hearing before an independent and impartial tribunal established by law as Art. 6 para. (1) required.

The rights at issue are twofold: the right to exercise the accountancy profession and the right to carry the title of "accountant" or to present themselves with that name. Prior to the entry into force of the Act on Certified Accountants in 1974, they exercised both rights.

56. The legal qualification under the Netherlands law of the exercise of accountancy activities was that of "concluding a contract with a view to rendering particular services" (Art. 1637 of the Civil Code). Prior to the impugned legislation the law, unless explicitly stated, did not limit the power of certain categories of people to make enforceable agreements of such a nature. This contractual freedom was not only of a factual nature, but legally enforceable and tantamount to a right.

57. The free choice of employment was also laid down in the Universal Declaration of Human Rights (Art. 23) and the International Covenant on Economic, Social and Cultural Rights (Art. 6). The Court of Justice of the European Communities had also qualified the freedom to pursue professional activities as a right (judgment of 13 December 1979, para. 32 of the Law, case 44/79, Hauer v. Land Rheinland-Pfalz).

58. The right to the exercise of the profession ran parallel to the right to the title of accountant. The designation as "accountant" was an auxiliary to the exercise of the profession. Since that title was not legally protected until the entry into force of the Act, everyone was entitled to use the title of accountant.

59. The applicants had during many years preceding the entry into force of the Act availed themselves of the above rights. The legislator had considered that factor legally relevant, since the transitional provisions attached a legal consequence to the exercise of a practice as accountant over a certain length of time, namely registration as a certified accountant. The transitional provisions were thus aimed at respecting "acquired rights".

60. The applicants are of the opinion that in general where a new legislation contains transitional provisions or is accompanied by a introductory act earlier rights are at hand.

61. The transitional provisions of the Act on Certified Accountants were designed to protect these rights. It was also clear from the history of the provisions concerning the protection of the title, as explained in the official governmental explanatory memoranda, that particular attention was being given to the rights and interests of those who already used the title of accountant.

Even if these rights were not based on any written provision, the exercise thereof could legally not be impeded by third persons or the authorities. Moreover that, what the Government qualified as factual freedom had developed into a right through its continuous exercise and by the fact that a social position was based thereupon. This view was endorsed by the doctrine on transitional law.

62. The applicants are further of the opinion that the rights concerned are "civil" in nature. The exercise of the accountancy profession consists in entering into contracts in the sphere of private law. This is also true for the use of the title of "accountant", since it constitutes merely an expedient in the exercise of the profession.

63. The applicants in this context refer to the case-law of the European Court of Human Rights, and in particular the judgment in the Ringeisen (Publications of the Court, Series A, Vol. 13) and König cases (ibid. Vol. 27) which show that the question whether a case is to be considered as relating to "civil rights and obligations" depends neither on the character of the domestic legislation nor on the character of the authority invested with jurisdiction but on the

character of the rights and obligations for which the result of the proceedings is decisive. Quoting Judge Wiarda in his separate opinion in the König judgment (ibid. p. 44), the applicants express the view that the right to practise as an accountant under that name must be qualified as a civil right, even if a supervisory role has been assigned to the public authorities and if the decisions of the Board of Appeal are of an administrative nature.

64. The decisions of the Board of Appeal were decisive for and determined the applicant's civil rights, since they put an end to their acquired right to present themselves as accountants and to practise as such. In any event, as from 1 March 1979, they were liable to criminal sanctions as regards the use of the now protected title.

65. The applicants finally consider Art. 6 para. (1) to be applicable in view of the fact that their property rights, which were of a civil nature, have been interfered with (cf. para. 93 below).

2) The Government

66. The Government are of the opinion that Art. 6 para. (1) is not applicable to the present case.

The Government explain that legislation was introduced in order to clarify the confusion as regards professional competence of the users of the title of accountant, until then legally unprotected.

67. The first legislation enacted, the Act on Chartered Accountants of 1962, concerned the level of competence required for those accountants who exercised the profession to its full extent. It concerned those accountants who carried out accounting activities of a highly specialised nature such as the control of financial accounts of companies leading to the delivery of a certificate of conformity (verklaring van getrouwheid).

68. The Act on Certified Accountants, enacted in 1972 concerned those accountants who performed accounting activities for medium and small-sized companies, and for whom the level of competence required was inferior. The legislation was in the first place a legislation designed to protect the title. Its purpose was to offer guarantees that the users of the title possessed a particular level of professional competence by introducing an examination procedure. Moreover reliability was ensured by professional rules of conduct and inherent disciplinary law.

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69. Five years after the entry into force of the Act on Certified Accountants, e.g. 1 March 1979, the use of the title of "accountant" was reserved for chartered or certified accountants only. Usurpation of the title was subject to criminal sanctions. Further protection was afforded by professional rules of conduct and disciplinary law.

70. The transitional provisions in both the Act on Chartered Accountants and the Act on Certified Accountants provided for a possibility for those who lacked the required certificates to become a chartered accountant or certified accountant provided they possessed the level of competence set by the law. By adopting these provisions, the legislator wished to take into account the interests of those who had been professionally engaged in the accountancy profession for a certain length of time. Although it was found necessary to respect these interests to some extent, it did not follow that these interests could be equated with rights.

71. The Government emphasise that the legislation did not interfere with the factual freedom of the applicants to continue to carry out accounting activities, but exclusively with the factual freedom to operate in society under that particular title or name, without being legally qualified to do so.

72. At the same time the Government admit that as a result of subsequent regulations the right to present oneself as an accountant has acquired a certain relevance. However these regulations combined with the Act on Certified Accountants and decisions taken by virtue of this Act, taken as a whole, cannot be considered as having interfered with an existing right. Moreover, these statutory regulations reserve the right to prepare the required audits for legally qualified accountants, but do not contain any prohibition as regards the exercise of accounting activities as such.

73. The Government further explain that the transitional provisions provide for a decision by the competent board to designate candidates for registration ("aanwijzing ter inschrijving"). Such decision compelled the Board of Registration to register designated candidates as certified accountants within the meaning of the Act.

74. A favourable decision by the Board of Appeal created a right to registration. That right was of a public nature, since the registration was of a purely administrative act. The right to the title of accountant, which was created as a result of the registration, was also of a public nature, having been created in the public interest. The decision of the Board of Appeal therefore determined a right of a public nature.

B. As to the conformity with the requirements of Art. 6 para. (1)

1) The applicants

75. The applicants claim that the Board of Appeal is not a judicial body but an administrative authority. They point out that a number of features confirm its non-judicial character, such as the fact that:

- members are appointed by the Minister, and not by the Crown (Art. 18, para. (2));
- allowances of members are not regulated in law but determined by the Minister (Art. 25);
- meetings of the Board of Appeal are held in camera and decisions are not pronounced publicly;
- the Deputy-Secretary to the Board of Appeal is an official of the Ministry of Economic Affairs who in that capacity corresponds on official paper of the Ministry;
- the law does not provide for the challenge of members;
- Art. 72 of the Act enables the Board of Appeal to consult the Board of Admission on a particular case without the appellant's knowledge or consent.

76. The applicants are further of the opinion that, in view of the triviality of the differences between the Board of Admission and the Board of Appeal, the legal character of both boards must be identical. Since the Board of Admission is an administrative body, as equally confirmed by the Government, the Board of Appeal is also an administrative body.

77. The applicants also refer to the standing practice by the Board of Appeal to inform unsuccessful appellants that the decision can be challenged before the Jurisdiction Division of the Council of State, who is normally competent to examine appeals against administrative decisions. In this respect the applicants consider that the decision by the Council of State (Jurisdiction Division) of 4 September 1977 from which it appeared that the Council of State considered the Board of Appeal as a judicial body is, although relevant in the context of Art. 26 of the Convention, subject to review by the European Commission and Court of Human Rights.

78. The lack of independence of the Board of Appeal is according to the applicants particularly illustrated by the fact that members can be dismissed by the Minister and that the level of their allowances is determined by the Minister and not in law.

79. As regards the lack of impartiality, the applicants point out that the majority of candidates whose application for registration has been successful were members of the Dutch Order of Accountants, (Nederlandse Orde van Accountants (N.O.V.A.)), although that association represented only approximately 14% of the practising accountants.

80. In addition membership of the Board of Admission and Board of Appeal was limited almost exclusively to members of that association. The applicants further believe that members of that association who had applied for registration had the written evidence which they intended to submit in support of their application corrected and verified by other members of the association. The privileged treatment of members of the association was also shown by the fact that their applications for registration were accepted de plano without an oral hearing, hearings being compulsory only if the application was rejected. The influence of the association on the decision-making process of the Board of Appeal was also evidenced by the fact that the meettings of the Board of Admission were held on the premises of the association and that its secretariat was permanently established there.

81. The applicants are of the opinion that they have been denied a fair hearing as required by Art. 6 para. (1) of the Convention.

The limited amount of time - ranging between 15 to 20 minutes - which the Board of Appeal as well as the Board of Admission devoted to the examination of their case was clearly insufficient to judge whether the candidates' professional competence was adequate, in particular since the supporting documents were only submitted in the course of the interview and returned to the candidates at the end.

82. The fact that the Board of Appeal had without the applicants' consent presumably taken cognisance of the disobliging comments drawn up by the Board of Admission constituted a further unfair element in the procedure.

83. The proceedings in respect of the fourth applicant, Mr. de Bruijn, were moreover particularly unfair, as the decision taken by the Board of Appeal was signed by a member who had not been present at the hearing and who had therefore not been able to form an opinion himself on the applicant's competence either on the basis of the written evidence submitted by him at the outset of the interview, and returned to him at the end, or on his personal appearance.

2) The Government

84. The Government are of the opinion that the Board of Appeal is an independent tribunal within the meaning of Art. 6 para. (1) of the Convention. The features which distinguished it from the Board of Admission which the Government indeed consider as an administrative body are the following:

- members are appointed by the Minister of Economic Affairs after consultation with the Minister of Justice, while members of the Board of Admission are appointed by the Minister of Economic Affairs after consultation with the Minister of Education and Science and with the Minister of Agriculture and Fisheries;

- the majority of its members must exercise or have exercised judicial functions while this requirement does not apply to the members of the Board of Admission;

- the Board of Appeal meets with a quorum of 5 members, while the quorum of the Board of Admission is 3 members;

- the Board of Appeal must always hear the appellant before taking a decision while a hearing by the Board of Admission is obligatory only for negative decisions.

85. The Government further refer to a decision of the Jurisdiction Division of the Council of State of 4 September 1977 by which the appeal introduced against a decision by the Board of Appeal was declared inadmissible on the ground that the Board of Appeal was an independent tribunal. This decision, the Government explain, was based on the following considerations:

(i) the proceedings before the Board of Appeal were subject to the necessary procedural safeguards by virtue of the Act on Certified Accountants;

(ii) members of the Board of Appeal hold office indefinitely;

(iii) the Board of Appeal is in no way bound by ministerial instructions, nor does the Minister exercise any influence over its decisions.

86. The Government confirm that this is how the Board operates in practice. It reaches its decisions completely independently after hearing the appellant, and its decisions are based only on legal criteria.

87. According to the Government and contrary to what the applicants suggest, members of the Board of Appeal are not financially dependent on the Minister for Economic Affairs, since members exercise these functions in addition to their everyday work.

88. It is a general principle of proper legal practice under Dutch law that if any doubt arises as to the impartiality of one or more members of the judiciary they may be challenged. The right to challenge does not require any explicit statutory basis. The Government fails to understand why the applicants have not in the course of the interview expressed any doubts as to the impartiality of the members of the Board of Appeal.

89. The Government explain that Art. 175 of the Netherlands Constitution (1) provides that all court sessions are held in public. To the knowledge of the Government the Board of Appeal has never availed itself of the possibility offered by the same provision to derogate from this principle in the interest of public order and for the protection of morals. For these reasons, the Government fail to understand why the applicants contend that hearings by the Board of Appeal in their cases took place in camera.

90. As regards the public character of the Board of Appeal's decisions, the Government explain that the fact that the Board does not deliver its decisions publicly is inspired by the respect for privacy of appellants and their clients. Moreover, nothing prevented the applicants subsequently from publishing the decision in professional magazines, if they so wished.

91. The Government consider that the applicants were fairly treated. They were given sufficient opportunity to defend their case properly. Since it was the Board of Appeal's standing practice to inform appellants of the grounds on which the Board of Admission had rejected an application, appellants, many of whom made use of their right to be assisted by counsel, had in general the opportunity to explain why they believed that the decision was unfounded. The Board of Appeal then made a fresh and independent assessment of the appellant's professional competence on the basis of supporting documents and questions put in order to assess whether the level of professional competence required by the law was met in the instant case. After that, the Board deliberated in camera and decided as a collegial body.

(1) Present text: Art. 121.

92. The procedures in the case of the applicants had followed the above pattern. The circumstances of the proceedings concerning the fourth applicant, Mr. de Bruijn, had been exceptional. The law did not however prescribe that the interview should take place in the presence of all members, but only that 5 members must participate in the decision. Moreover, the applicant himself had accepted to maintain the hearing. The absent "judicial" member of the Board had based his opinion on the written material and his colleagues' opinion on the oral phase in the proceedings. In any event in general the "judicial" members of the Board relied for the assessment of the professional skill of candidates on the opinion of the "technical" members.

C. As to Art. 1 of the First Procotol

1) The applicants

93. The applicants consider that their right to peaceful enjoyment of their possessions guaranteed by Art. 1 of the First Protocol has been interfered with and that they have partially been deprived of their possessions, without adequate compensation, in breach of that provision. The applicants refer in this respect to Judge Wiarda's separate opinion in the König jugment (opus. cit. p. 44) in which he stated that the clinic, the practice and the patients of Dr. König represented an element of "goodwill" which was in the nature of a private right, similar in some respects to the right of property.

94. The decisions of the Board of Appeal have adversely affected the applicants' income and goodwill value of their accountancy practice, which forms part of these possessions. They fear that this prejudice will increase in the future.

95. After the entry into force of the Act on Certified Accountants, the central Government and regional and local administrations have introduced numerous regulations in particular relating to subsidies in which it is stipulated that particular certificates or declarations required by the legislation in question may only be delivered by chartered or certified accountants. The above development leads to the inevitable consequence that their present clients turn away from them in order to seek the accountancy services from formally qualified accountants. This implies considerable loss of income. In spite of the applicants' efforts not to disclose to the public the legal limits of their competence, the public at large is increasingly made aware of the existence of a category of legally not fully qualified

accountants to which the applicants belong. Banks and other private institutions advise their clients to rely on services of formally recognised accountants. Companies stipulate in their statutes that annual accounts may only be verified by officially recognised accountants. The applicants feel moreover hemmed in by the threat of criminal sanctions. The uncertainty as regards their professional future prevents investments in their business which decreases their efficiency and the quality of their services.

96. The applicants estimate that as a result of the above development their annual turnover is being reduced to approximately 50 to 60%.

2) The Government

97. The Government are of the opinion that Art. 1 of the First Protocol is not applicable to the applicant's complaints. Even if it were accepted that the applicants had a right to the title of accountant or the right to the exercise of accountancy activities, these rights cannot be qualified as property rights.

98. The Government deny the existence of "ownership of goodwill". Ownership is the full right to dispose of a good or a right and according to Dutch law no such thing as a "right to goodwill" exists. According to the Netherlands Supreme Court goodwill is not a separate transferable entity. Goodwill consists in a constellation of factors which are beyond the entrepreneur's command. The right to dispose of a good which is characteristic for the right of ownership is therefore unthinkable in the context of goodwill.

99. However, even assuming that the applicants had a right to the title of accountant and a right to the exercise of accountancy activities and even if these rights were to be considered as property rights and if consequently Art. 1 of the First Protocol were applicable, the Government are of the opinion that that provision has not been violated in the present case. They observe that the Act on Certified Accountants has been introduced primarily to protect the public interest.

100. In any event, even assuming that there can be a question of partial expropriation, the applicants cannot claim any right to compensation under Art. 1 of the First Protocol, the general principles of international law referred to in that provision relating to expropriation of aliens only.

101. The Government suggest that the applicants can palliate the effect of the prejudice which they ascribe to the legislation by shifting their field of action or by seeking some form of practical cooperation with officially recognised chartered or certified accountants.

IV. OPINION OF THE COMMISSION

Points at issue

102. In the Commission's view, the present case raises the following points at issue under the Convention:

A. Under Art. 6 para. (1) of the Convention:

1. - whether the decisions taken by the Netherlands authorities by virtue of the transitional provisions of the Act on Certified Accountants not to accept the applicants for registration as certified accountants constituted a determination of civil rights and obligations within the meaning of Art. 6 para. (1) of the Convention;

2. - if so, whether the applicants were victims of a breach of Art. 6 para. (1) of the Convention because the finding of unfitness was not taken by a tribunal satisfying the material requirements of Art. 6 para. (1) and/or no form of appeal procedure was available in which the decisions could be reviewed by a court.

B. Under Art. 1 of the First Protocol

3. - Whether the decisions taken by virtue of the transitional provisions of the Act on Certified Accountants in respect of the applicants could be considered as an interference with the applicants' right to peaceful enjoyment of possessions within the meaning of the first paragraph of Art. 1.

4. - Whether, if the answer to the preceding question is affirmative, the interference with the applicants' right to peaceful enjoyment of possessions could be justified under the second paragraph of Art. 1.

A. As to Art. 6 para. (1) of the Convention

103. The applicants complain that the decisions taken by the competent authorities under the transitional provisions of the Act on Certified Accountants, according to which they were found not to qualify as certified accountants, were taken without the requirements of Art. 6 para. (1) having been observed.

104. Art. 6 para. (1), so far as relevant, is in the following terms:

> "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...".

105. The respondent Government submit that the above provision was inapplicable since the applicants' claim did not concern the determination of a right vested in them.

106. In deciding the question whether the applicants' claim to the exercise of the profession of certified accountant and of using the title in doing so falls under Art. 6 para. (1), it is relevant to take into account the situation before the new legislation came into existence.

107. In this regard the Commission observes that until 1962 the exercise of the accountancy profession was not regulated at all by law in the Netherlands. In 1962 a first legislation was enacted, the Act on Chartered Accountants (Wet op de Registeraccountants) in which rules were laid down as to the required level of competence for those who exercise accountancy activities on a full scale. This legislation was supplemented by a second law, enacted in 1972, the Act on Certified Accountants (Wet op de Accountants-Administratieconsulenten) which laid down the level of competence for those persons whose accountancy activities required a lesser degree of professional competence. Henceforth, after a certain transitory period, the use of the title of "accountant" in the exercise of professional activities was reserved for those who qualified under either legislation.

108. Examination boards were established whose task it was to establish whether individuals who claimed to possess the level of competence set by the law for the exercise of the profession did indeed qualify: the Board of Registration (Commissie voor de Inschrijving) and the Board of Appeal (Commissie van Beroep). As in the case of other professions such as doctors and lawyers, it was thought that a system of examinations offered the community the best protection against professional incompetence.

109. The absence of any legal rules concerning the accountancy profession prior to the legislation prompted the legislator to adopt transitory rules which equated persons who were not in the possession of the diplomas referred to in the law with those who had, provided their practical experience demonstrated the same level of professional competence. Again the decision as to whether candidates qualified under these regulations was entrusted to examination boards: the Board of Admission (Commissie voor de Toelating) and the Board of Appeal (Commissie van Beroep).

110. In order to determine whether any right of the applicants under Art. 6 para. (1) was violated in the present case the Commission must first answer the preliminary question whether the procedures in question concerned a determination of the applicants' civil rights within the meaning of that provision.

The Commission recalls that the concept of "civil rights and obligations" in Art. 6 para. (1) of the Convention cannot be interpreted solely by reference to the domestic law of the respondent State, but it must be given an autonomous interpretation in the light of the object and purpose of the Convention (cf. Eur. Court of H.R., König case, judgment of 28 June 1978, Series A, Vol. 27, para. 88). It covers all proceedings the result of which is decisive for private rights and obligations (cf. Eur. Court of H.R., Ringeisen case, judgment of 16 July 1971, Series A, Vol. 13, para. 94). The Court has added, however, that a tenuous connection or remote consequences do not suffice for Art. 6 para. (1), that civil rights and obligations must be the object - or one of the objects - of the "contestation" (dispute) and that the result of the proceedings must be directly decisive for such a right (Eur. Court of H.R., case of Le Compte, van Leuven and de Meyere, judgment of 23 June 1981, Series A, Vol. 43, para. 47).

111. Contrary to the situation at issue in the above-mentioned cases, the applicants' claim does not concern the right to continue their professional activities, but that of being authorised to exercise the profession and using the title of accountant in doing so, which the new legislation had taken away from them. Indeed five years after the entry into force of the act nobody was entitled to exercise the profession of accountant and carry the title in doing so, unless found to qualify under either legislation.

The applicants, as they were not in the possession of the diplomas referred to in the law, applied for recognition as accountants on the basis of the transitional provisions, relying in particular on their practical experience.

112. The Commission notes that the decisions as to the applicants' professional competence were taken by examination boards which were composed of experts. They were decisions as to competence, and although they were based upon legal provisions and, if favourable, conferred the right to practise as an accountant, they must be distinguished from the determination of rights involving a decision on lawfulness by a judicial organ.

113. The question then arises whether such a decision must be capable of being submitted to a court with jurisdiction to determine the matter within the meaning of Art. 6 para. (1). For Art. 6 para. (1) to be applicable in such a case it is important whether the applicant actually alleges any interference by the competent authority with rights granted by national legislation. In fact the Commission has consistently held in the past that in deciding whether a right of access to court arises in a given case, the nature of the applicants' claim under the relevant domestic law is of critical importance (cf. also Commission's Report in the Kaplan case, para. 164). Art. 6 para. (1) does not grant the right to have all important matters decided by a court. It is therefore crucial whether the applicants in the present case allege any unlawfulness concerning the acts of the competent boards (cf. also Eur. Court of H.R., judgment in the case of Sporrong and Lönnroth, Series A, Vol. 52, paras. 80, 81 and 82).

114. It is clear from the applicants' submissions that they consider themselves qualified to exercise the profession of certified accountants and that they disagree with the decisions of the Boards declaring them unfit to do so. In their opinion their capability of exercising the profession is sufficiently evidenced by their longstanding accountancy practice. That view however is not in line with the system created by the Dutch legislation concerning the exercise of the accountancy profession. Under that law they do not qualify as certified accountants, because they have not met its standard. This shows that they do not claim any unlawfulness but rather an erroneous evaluation of their competence.

115. The Commission does not find it possible to read into the allegation of the application any claim concerning an interference with their "rights". What they claim as their "right", namely to practise as accountants and carry the title was taken away by the new legislation. The Commission will later consider whether this raises an issue under Art. 1 of the First Protocol. As the Commission has already held, for an issue to arise under Art. 6 para. (1) the applicant must allege before the Commission a violation of a right

recognised by the the national legal system. The evaluation of competence with which the applicants disagree does not involve such rights. The Commission refers to the well-established practice in many countries, where a full control of administrative acts exists, according to which courts will not, or only to a very limited extent, review decisions by examination or other boards. The Commission itself has frequently rejected applications where the applicant sought judicial review of the outcome of university and other examinations (cf. e.g. decision on the admissibility of Applications Nos. 10219/83 v. United Kingdom and 10649/82 v. United Kingdom, not yet published).

116. The Commission does not however exclude that under specific circumstances an individual may be entitled to judicial review. In particular where it is alleged that rules of procedure were not complied with or that the decision was arbitrary or considered as a "détournement de pouvoir" the individual concerning must be able to challenge the lawfulness of the impugned decision before a judicial authority. This is however not the claim put before the Commission and, therefore, no finding can be made in that respect. The Commission notes that one applicant, Mr. de Bruijn, has alleged a procedural "unfairness". It cannot see, however, that this was considered by the applicant as unlawfulness under the applicable Dutch legislation.

117. In the present case the applicants differed from the Boards on questions of judgment as regards the relevance of their professional experience for the decision as regards their professional competence required by the law. The Commission does not consider that such a claim can be regarded as a complaint that the impugned decisions were unlawful according to domestic law.

118. Consequently the Commission finds that Art. 6 para. (1) is not applicable to the applicants' complaints.

Conclusion

119. The Commission concludes by 8 votes against 4 that Article 6 para. (1) has not been violated in the present case.

B. As to Art. 1 of the First Protocol

120. The applicants also complain that as a result of the above decisions their property rights have been interfered with since their business potential has been considerably reduced.

121. Art. 1 of the First Protocol reads as follows:

> "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."

122. The question which arises is whether the right claimed by the applicants can be assimilated to the right of property envisaged by the above provision, which the Government deny.

123. The Commission acknowledges that at the time when the Act on Certified Accountants came into existence, the applicants' acquired rights were affected. The scope of their activities became circumscribed, which had adverse repercussions on the goodwill of their business and hence on their income. This, the Commission considers, can be regarded as an interference with the right to peaceful enjoyment of possessions which Art. 1 of the First Protocol ensures.

124. The question then arises whether the interference can be justified under the second paragraph of Art. 1 as being taken by virtue of a law enforced for the purpose of controlling the use of property in accordance with the general interest.

125. The Commission recalls that the purpose of the legislation concerned is that of setting rules of professional competence for a so far unregulated profession affecting the society as a whole.

126. There can be no doubt that the above aim was legitimate as being in the general interest within the meaning of Art. 1 of the First Protocol.

8543/79 etc.

127. The transitional provisions were introduced in order to strike a balance between the above aim and the respect of the acquired rights of persons in the situation of the applicants, by offering the latter an opportunity to qualify as certified accountants, provided they could give proof of possessing the level of competence set by the law, otherwise than by diplomas.

128. Moreover, it is relevant to point out that the applicants, having failed the test under the transitional provisions, are by no means definitively barred from the accountancy profession. They can apply for registration as certified accountants in accordance with the procedure laid down by the Act on Certified Accountants.

129. The Commission considers that the balance thus struck is a fair one and satisfies the requirements of Art. 1 of the First Protocol, the general interest being served by the State protecting the public against incompetency in a profession affecting the society as a whole.

Conclusion

130. The Commission concludes by 11 votes with one abstention that Art. 1 of the First Protocol has not been violated in the present case.

C. Recapitulation of the Commission's conclusions

131. The Commission concludes by 8 votes against 4 that Art. 6 para. (1) has not been violated in the present case.

132. The Commission concludes by 11 votes with one abstention that Art. 1 of the First Protocol has not been violated in the present case.

Secretary to the Commission

(H.C. KRUGER)

President of the Commission

(C.A. NØRGAARD)

Dissenting opinion of Mr. Sperduti joined by MM. Busuttil*, Melchior, Sampaio and Weitzel

1. I am unable to accept the reasoning followed by the majority of the Commission and the conclusions to which it has come.

2. First of all, I cannot accept the statement that "for an issue to arise under Art. 6, the applicant must allege before the Commission a violation of a right recognised by the national legal system" (para. 115, fourth sentence). The violation which the applicant must allege is in fact violation of Art. 6 para. (1) itself by the conduct of the judicial authorities which had a duty to respect the provisions of the said article. This is, however, the violation which the applicants have alleged under the conditions which I shall specify below.

3. The majority has felt obliged to refer to "the well-established practice in many countries, where a full control of administrative acts exists, according to which courts will not, or only to a very limited extent, review decisions by examination of other boards" (para. 115, penultimate sentence). In itself, this may be regarded as correct, as may certain other statements made in connection with it, such as: "The Commission does not however exclude that under specific circumstances an individual may be entitled to judicial review. In particular where it is alleged that rules of procedure were not complied with or that the decision was arbitrary or considered as a "détournement de pouvoir" the individual concerned must be able to challege the lawfulness of the impugned decision before a judicial authority" (para. 116 first and second sentence). I feel bound to say, however, that I do not regard these comments as relevant to the present cases or calculated to be of genuine assistance in apprehending the true nature of these cases and viewing them in proper relation to Article 6.

4. These cases turn on the fact that, in the Netherlands Government's view, the Board of Appeal was a judicial tribunal (para. 84), and a decision given by the Jurisdiction Division of the Council of State on 4 September 1977 in which it declared that an appeal brought before it against a decision by the Board was inadmissible on the ground that the decision complained of had been given by an independent tribunal which, as such, was not subject to review by this high administrative court.

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* Mr. Busuttil was not present when the final vote was taken. The Commission decided, in accordance with Rule 52 (3) of its Rules of Procedure to permit him to express a separate opinion in the Report.

We are thus clearly dealing with judicial proceedings of the kind described by the Court, "the results of which are decisive" for certain rights. The proceedings at issue in these cases, through the very fact of their also being proceedings at last instance, come directly and immediately within the scope of Article 6 para. (1), always assuming, of course, that the rights in question are civil rights within the meaning of that article.

The applicants complain that the decision determining their registration or non-registration as "certified accountants" by the Board of Registration - the decision which thus legally annulled or confirmed their status as accountants - was taken by a tribunal of last instance which did not satisfy the conditions required by Article 6 para. (1) for the proper administration of justice.

5. When the Netherlands Government speaks of the "factual freedom" (para. 71) formerly enjoyed by the applicants to practise as accountants by assuming this title, I feel that this term can only be taken to mean that what was involved was a special kind of civil right.

Similarly, I cannot agree that the right to a fair hearing in civil matters, recognised in Article 6 para. (1), applies to proceedings concerned with the possible suppression of a right or even the possible imposition of restrictions on its exercise, but not to proceedings in which the recognition of a new right is claimed on the ground that the legal condition for recognition have been satisfied. A distinction of this kind would be justified from neither a rational nor a practical standpoint.

Having said this and returning to the present cases, we are bound to conclude that Article 6 para. (1) is relevant in determining whether proceedings conducted before the Board of Appeal under the above conditions are, or are not, compatible with the Convention.

As we saw a moment ago, one of the main features of proceedings before the Board is that the Boards's decision can lead to the suppression of a right acquired through the very fact of exercising it or through its conversion into a legal right.

6. The above conclusion leaves open the question of whether Article 6 para. (1) has or has not been violated in the present instance.

I shall, however, add a few brief comments on the complaint under Article 1 of the First Protocol. I do not believe that the applicants are on solid ground when they also argue that the decision given against them by the Board of Appeal has violated the said article of the First Protocol by depriving them of a possession, defined as the right to exercise their profession, which they have acquired by exercising it freely at a time when it was not subject to regulations.

It is a wholly different question whether the prohibition on describing themselves henceforth as certified accountant does not entitle them to compensation for damage unfairly suffered.

This brings us back, as the source of the damage, to the decisions given at last instance by the Board of Appeal, which must be seen in the light of the Court's legal theory and its logical implications.

II.

7. In fact, this theory continues to raise difficulties, especially in connection with the question - particularly important in our own time - of interference by the public authorities with civil rights and freedoms.

Very recently, the majority of the Commission stated, in its report on the Benthem case, adopted on 8 October 1983: "... there is still a great deal of uncertainty as to how far the applicability of Article 6 (1) extends" (para. 91). They went on: "... the Contracting States are clearly in need of further guidance on this matter, which for many of them has a considerable impact on their legal systems".

In my view, a careful and systematic study of the Court's case-law can help to clarify certain implications of the above concise formula, which the Court has upheld since the Ringeisen case.

8. It is unnecessary to emphasize, since this is a well-established point, that the concept of civil rights and obligations must be seen as an autonomous concept - one, in other words, whose scope must be determined with reference to the Convention. It must, however, be noted that the Court's legal theory, by using the above concise formula, covers two different possibilities. Note must also be taken, from the outset, of one other fact: this theory is basically rooted in the principle of the "rule of law", a principle which is upheld by the member States of the Council of Europe and enshrined in the Preamble to the Convention.

We submit that, within the framework of the Convention, states retain a very large measure of discretionary power regarding the way in which their domestic legal systems regulate civil rights and obligations. One aspect of this freedom, an aspect which, as we have said, is particularly marked in our own day, is the way in which the law creates, modifies or even extinguishes certain civil rights dependent on an act by a public authority, such as the granting of authority to exercise a liberal profession, the approving of a private law contract before it can take effect, the taking of disciplinary action involving suspension or withdrawal of the right to practise a profession, the laying-down of new conditions for continued operation of a commerical firm, and so on.

9. Let us now consider the first of the two possibilities envisaged. We shall speak of the Court's theory regarding the right to a decision by a court on disputes concerning the lawfulness of administrative or disciplinary proceedings culminating in decisions which determine civil rights.

The principle of "the rule of law" requires that, in cases where administrative or disciplinary decisions affecting the civil rights of individuals are thought to have been taken in violation of the law, particularly following proceedings marred by one or more defects, the person concerned shall be entitled to a hearing by a court, which shall give a fair judgment on the issue. In states party to the Convention, a fair judgment must be taken to mean a judgment given in accordance with Article 6 para. (1) of the Convention. When appropriate, an application under Article 25 of the Convention may then be made to the Commission in Strasbourg, alleging violation of this same Article by the domestic judicial authority.

10. The second possibility may be expressed as follows: The Court's theory regarding proceedings, the outcome of which is decisive for civil rights also indicates that these proceedings must, under certain conditions, themselves be conducted in a manner which meets the requirements of Article 6 para. (1) - failing which, the Convention must already be regarded as having been violated.

The basic point at issue is the following. Wholly or partly for the purpose of simplifying matters, action by the authorities affecting the rights and freedoms of private persons is sometimes so organised that it follows and results from specific proceedings of a judicial nature. In such cases, disciplinary sanctions, the approval or non-approval of contracts and compliance or non-compliance with the legal conditions for continued exercise of a profession form the subject of decisions taken directly by a body having the status of a court. Regardless of whether appeal to a higher authority is possible, it is important that the requirements of Article 6 para. (1) can be satisfied, and are actually satisfied in a given instance. In short, it is important that the person concerned should have been able to avail of the guarantee of a fair hearing and can thus be sure that the measure taken respecting him is in fact a lawful one.

11. For a logically similar situation, reference may be made to the judgment given by the Court on 18 June 1971 in the de Wilde, Ooms and Versyp case, particularly the section concerned with Article 5 (4) of the Convention. This provision gives everyone deprived of his liberty by arrest or detention the right "to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". The Court considered that judicial supervision of the lawfulness of the measure depriving the person concerned of liberty might be regarded as "incorporated" in the decision whereby this measure was taken, if this decision had been made "by a court at the close of judicial proceedings".

8543/79 etc.

12. Coming back to the above method of regulating intervention by the authorities in the professional field, the following additional comment may be made. Article 6 para. (1) would be violated, inter alia, if a decision depriving an individual of the right to practise his profession were taken at last instance by a judicial authority which could not be regarded in itself as being capable of giving a judgment compatible with Article 6 para. (1) because, for instance, no provision was made for a public hearing or because the members of the board were not completely independent.

13. It would thus appear that the concise formula employed by the Court is ambivalent, i.e. applies to two things. It always refers to acts by public authorities which have "determining" effects and which follow proceedings of which they constitute the outcome. Its ambivalence resides in the fact that it applies, fistly, to administrative and disciplinary proceedings which determine civil rights and, secondly, to judicial proceedings which have the same effect. In the first instance, the point to be remembered is that any dispute regarding the lawfulness of the said proceedings confers the right, under Article 6 (1) of the Convention, to a fair hearing as a means of securing a decision on the dispute. In the second instance, what is involved is the direct application of Article 6 para. (1) to the judicial proceedings in question.

14. A few of the judgments given by the Court will be recalled. Examples of judgments affirming the right to a tribunal as specified in Article 6 para. (1) in disputes relating to disciplinary or administrative decisions include the judgment given on 28 June 1978 in the König case and the judgment given on 23 September 1983 in the Sporrong and Lönnroth cases.

The case-law concerning the direct applicability of Article 6 para. (1) to judicial proceedings of the above type is more extensive. Examples include the judgment given in the Ringeisen case on 16 July 1971 and the two cases involving Belgian doctors: the judgment given in the Le Compte, van Leuven and de Meyere case on 23 June 1981 and the judgment given the in Albert and Le Compte case on 10 February 1983.

15. The special circumstances of the combined van Marle, van Zomeren, Flantua and de Bruijn case would seem to indicate that these cases are covered by the second branch of the Court's theory, insofar as the applicants complain of the non-compatibility with Article 6 para. (1) of the very structure of the judicial authority established in the Netherlands, under the name "Board of Appeal", to decide at last instance on the qualifications needed, under the "Act on Certified Accountants", for the registration of persons covered by the Act as "certified accountants".

Dissenting opinion of Mr. Melchior on compliance with Art. 6 para. (1)

1. Having joined Mr. Sperduti in his dissenting opinion in which he expressed the opinion that Art. 6 para. (1) is applicable to the present case, I consider it necessary to express a view on the compliance with the requirements of Art. para. 6 (1) in the present case.

2. According to the applicants the guarantees set out in Art. 6 (1) were not observed during the proceedings before the Board of Admission and Board of Appeal. The respondent Government consider that only the proceedings before the Board of Appeal are relevant for the purpose of Art. 6 para. (1).

3. As the Commission has pointed out previously, the essential role of Art. 6 para. (1) is to lay down guarantees concerning the mode in which claims or disputes covering these rights and obligations are to be resolved (cf. Reports of the Commission on Application No. 7598/76, Kaplan v. United Kingdom, para. 154 and Application No. 8790/79, Sramek v. Austria, para. 69). In the present case the dispute arises as a result of the decision of the Board of Admission, while the resolution of the dispute was incumbent on the Board of Appeal. Consequently it is those proceedings which require an examination from the point of view of Art. 6 para. (1).

4. As mentioned above (cf. "Establishment of the Facts"), the creation of the Board of Appeal was provided for by the Act on Certified Accountants of 13 December 1972. It can thus be considered as having been "established by law" within the meaning of Art. 6 para. (1) of the Convention.

5. The applicants maintain that the Board of Appeal does not comply with the criteria of independence and impartiality, as cited in Art. 6 para. (1) on account of its composition and procedure. In assessing whether the Board of Appeal possesses the character of a "court", regard must be had to the status and procedure before it (cf. Commission's Report in Application No. 5100/71 e.g. Engel and others v. the Netherlands, para. 98).

6. The Board is composed of five members and their substitutes, three of which are eligible for judicial functions. Members are appointed by the Minister of Economic Affairs after consultation with the Minister of Justice. The fact that the Board is composed of two technical members in addition to the three judicial members cannot deprive it, as such, of its independent character. It is true that the Act contains no provision on the irremovability of the members. However this does not prove lack of independence on the part of the Board unless it were shown that the Minister made use of the power of

dismissal in an arbitrary manner. The lack of independence cannot be inferred from the fact that contrary to the appointment procedure for the judiciary, the Minister is solely responsible for the decision to appoint, the difference being of a purely formal nature. There is in my view further no merit in the applicants' argument based on the procedure for fixing rules as regards the remuneration of members of the Board, incumbent on the Minister, having regard also to the part-time nature of the function concerned.

7. As regards the procedure before the Board of Appeal, it is relevant to point out that appellants are always heard and that the Board may also hear third parties. Decisions are accompanied by reasons. The law envisages representation by counsel. The above features point to the judicial character of the proceedings.

8. In the light of the above, I consider that the Board of Appeal can be considered as a tribunal within the meaning of Art. 6 para. (1).

9. The applicants have alleged that the proceedings in their particular case were unfair, in particular in the light of the limited amount of time of which they disposed to present their case orally and the summary way in which the Board of Appeal disposed of the written material adduced by the applicants in support of their appeal. They further considered that the proceedings were biased in view of the fact that the technical members of the Board belonged to a professional organisation to which the applicants did not adhere. In this context they submit that the Act on Certified Accountants does not contain any provision on the challenge to members of the Board. The Government submit that the challenge of members of the judiciary is based on a long-standing tradition and does not require a statutory basis.

10. On the latter point I note that the file does not contain any evidence that at any stage of the domestic proceedings the applicants raised openly their objections against the participation of members whom they considered to be biased. Neither is there any evidence in the file that these particular members exercised a crucial influence on the decision taken by a majority vote. In these circumstances the above allegations must be considered as unsubstantiated.

11. Furthermore, the fact alone that the various hearings lasted approximately 30 minutes is not enough to establish that the proceedings were unfair. Finally, the mere assumption that the Board of Appeal may have availed itself of the faculty offered to it by law to obtain information from the Board of Admission without the applicants' knowledge is not sufficient to conclude that the hearing was unfair.

12. As regards the case of Mr. de Bruijn, I am likewise unable to conclude that the decision was arbitrary, on the sole ground that not all members who signed the decision attended the hearing. The transcript of the hearing moreover shows a thorough investigation on behalf of the Board into the applicants' professional capabilities.

13. The applicants finally complain that the proceedings before the Board of Appeal were held in camera and that the decisions were not pronounced publicly as Art. 6 para. (1) requires. The Government state that in the absence of any decision as to the contrary taken on a statutory basis, the constitutional requirement concerning the public character of court hearings was observed in the present case. The fact that decisions were not pronounced publicly was inspired by the respect for privacy of the candidates and third persons.

14. As the Court has stated the public character of proceedings before judicial bodies referred to in Art 6 para. (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained (cf. e.g. Eur. Court of H.R., case of Pretto and others, judgment of 8 December 1983, Series A, Vol. 71, para. 21). In view of the above-described fundamental nature of the right at issue, a formalistic approach adopted by the Government in this context is inappropriate. What matters are the realities of the proceedings in question.

15. The applicants were informed at the outset of the session that only the applicants themselves and/or their counsel could be admitted to the meeting room. The applicants consequently had to face the interrogation by the Board alone, in some cases assisted by counsel. Having regard to the nature of the questions put to the applicants during the interrogation, there is nothing to indicate that any of the grounds listed in the second sentence of Art. 6 (1) could have justified sitting in camera, in particular since the applicants themselves wanted a public hearing and consequently did not rely on the protection of their private life.

16. As regards the public character of the pronouncement of the decision, the form of publicity to be given to the "judgment" under the domestic law must in each case be assessed in the light of the special feature of the proceedings in question and by reference to the object and purpose of Art. 6 para. (1) (cf. Pretto judgment, para. 26).

17. It is true that the Court has in the past admitted that a reading out aloud of the judgment is not the only option by which a member State can comply with its obligations under this provision, in particular where the jurisdiction concerned was concerned solely with points of law. In that case the Court was satisfied with the possibility to consult or obtain a copy of the judgment on application to the court registry.

8543/79 etc.

18. In the present case however the task of the Board of Appeal is predominantly of a factual nature, namely that of assessing the professional qualificiations of the applicants. Taking also into account the fact that decisions of the Board of Appeal are not subject to (further) judicial control by the Council of State, I am of the opinion that a derogation from the principle laid down in the Convention is not justified. The fact that the applicants were free to publish the decision of the Board of Appeal in professional magazines or elsewhere is, as suggested by the Government, irrelevant.

19. For these reasons, I am of the opinion that the publicity requirements of Art. 6 para. (1) both as regards the hearing and as regards the delivery of the decision was not complied with in the present case. I, therefore, conclude that Art. 6 para. (1) has not been complied with in the present case.

APPENDIX I

History of Proceedings

Item	Date	Note
Introduction of the applications:		
van Marle (No. 8543/79)	10 January 1979	
van Zomeren (No. 8674/79)	20 June 1979	
Flantua (No. 8675/79)	20 June 1979	
de Bruijn (No. 8685/79)	17 July 1979	
Registration of the applications:		
van Marle (No. 8543/79)	8 March 1979	
van Zomeren (No. 8674/79)	25 June 1979	
Flantua (No. 8675/79)	25 June 1979	
de Bruijn (No. 8685/79)	19 July 1979	
Commission's deliberations and decision to join the first three applications (van Marle, van Zomeren and Flantua) and decision to invite respondent Government to submit written observations on admissibility of applications	2 October 1979	MM. J.E.S. Fawcett, President G. Sperduti C.A. Nørgaard B. Daver C.H.F. Polak G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J. Sampaio
Government's observations submitted	6 December 1979	
Applicants' observations in reply submitted	13 February 1980	
Commission's deliberations and decision to join application No. 8685/79 (de Bruijn) to the three other applications and decision to hold a hearing on the admissibility and merits of the applications	6 May 1980	MM. G. Sperduti, Acting President (Rule 7) C.A. Nørgaard B. Daver C.H.F. Polak J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J. Sampaio

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Item	Date	Note
Hearing on the admissibility and merits	13 October 1980	MM. C.A. Nørgaard, Acting President (Rule 7) G. Sperduti F. Ermacora E. Busuttil L. Kellberg B. Daver J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J. Sampaio J.A. Carrillo For the applicants MM. H.C.G.L. Polak W.L. Nouwen G. de Wilde Mr. van Marle was also present For the Government Miss F.Y. van der Wal Mrs. C.E.M.N. van der Kraan-Meertens MM. J.H. van Kreveld H.G. Lyklema
Additional observations on the merits submitted by applicants	4 March 1981	
Additional observations on the merits submitted by applicants	13 April 1984	
Additional observations on the merits submitted by applicants	24 June 1981	

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Item	Date	Note
Additional observations on the merits submitted by applicants	11 September 1981	
Consideration of case by Commission	15 October 1981	MM. J.A. Frowein (Acting President, Rule 7) G. Jörundsson G. Tenekides S. Trechsel B. Kiernan M. Melchior J. Sampaio A.S. Gözübüyük A. Weitzel
Attempts to secure a friendly settlement under Art. 28 (a) of the Convention	1 December 1981 to 24 November 1983	
Consideration of state of proceedings and decision to sever applications Nos. 8674/79, 8675/79 and 8685/79 (Flantua, van Zomeren and de Bruijn) from application No. 8543/79 (van Marle)	8 October 1983	MM. C.A. Nørgaard, President G. Sperduti J.A. Frowein F. Ermacora J.E.S. Fawcett M.A. Triantafyllides E. Busuttil T. Opsahl G. Jörundsson G. Tenekides S. Trechsel B. Kiernan M. Melchior J. Sampaio A.S. Gözübüyük A. Weitzel J.C. Soyer H.G. Schermers H. Danelius
Consideration of state of proceedings and decision to draw up a Report on the merits	10 December 1983	MM. C.A. Nørgaard, President G. Sperduti J.A. Frowein F. Ermacora G. Jörundsson G. Tenekides S. Trechsel B. Kiernan M. Melchior J. Sampaio A.S. Gözübüyük A. Weitzel J.C. Soyer H.G. Schermers H. Danelius G. Batliner

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Item	Date	Note
Commission's deliberations and examination of draft Art. 31 Report and decision to join application No. 8543/79 to applications Nos. 8674/79, 8675/79 and 8685/79	2 March 1984	MM. C.A. Nørgaard President G. Sperduti J.A. Frowein F. Ermacora E. Busuttil G. Jörundsson G. Tenekides S. Trechsel M. Melchior J. Sampaio J.A. Carrillo H.G. Schermers
Commission's deliberations and adoption of the Report	8 May 1984	MM. C.A. Nørgaard, President G. Sperduti J.A. Frowein J.E.S. Fawcett G. Jörundsson G. Tenekides S. Trechsel M. Melchior J. Sampaio A.S. Gözübüyük A. Weitzel H.G. Schermers

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