COMMISSION EUROPEENNE
DES
DROITS DE L'HOMME
—
CONSEIL DE L'EUROPE
STRASBOURG

EUROPEAN COMMISSION
OF
HUMAN RIGHTS
—
COUNCIL OF EUROPE
STRASBOURG

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Application No : 43157/98
SISON v. the Netherlands

HR-R1A
AVs/ln

28 August 1998

Dear Sir,

I acknowledge receipt of your letter dated 3 August 1998 with enclosures. The above application was registered on 28 August 1998 under file No. 43157/98. This file number should be indicated on all future submissions and correspondence. The application will be considered as being introduced on 26 February 1998 unless the Commission decides otherwise.

In accordance with the Commission's Rules of Procedure, a single member of the Commission, acting as Rapporteur, will carry out a preliminary examination of this application and report to the Commission on the question of its admissibility.

The Commission is not permanently in session but will deal with the case as soon as practicable. The proceedings are primarily in writing and you will only be required to appear in person if the Commission invites you to do so. You will be informed of the Commission's decision.

You should inform me of any change in your or your client's address. Furthermore, you should, on your own motion, inform the Commission about any further developments regarding the above case, and submit any relevant court decision, if appropriate.

Finally, as of 1 November 1998 a new European Court of Human Rights will take over most of the Commission's pending case-files. This change is especially important for documents contained in these files, which may thereafter become accessible to the public unless the President of the Court decides otherwise.

Yours faithfully,

Agnes van Steijn
For the Secretary to the European
Commission of Human Rights

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Voir Notice explicative
See Explanatory Note

COMMISSION EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COMMISSION OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*
Strasbourg, France

REQUÊTE
APPLICATION

présentée en application de l'article 25 de la Convention européenne des Droits de l'Homme, ainsi que des articles 43 et 44 du Règlement intérieur de la Commission

under Article 25 of the European Convention on Human Rights and Rules 43 and 44 of the Rules of Procedure of the Commission

IMPORTANT : La présente requête est un document juridique et peut affecter vos droits et obligations.
This application is a formal legal document and may affect your rights and obligations.

14. STATEMENT OF THE FACTS

Jose Maria Sison is a well-known Philippine politician, poet and scholar, who has for a long time opposed repressive regimes in the Philippines.

In 1968 Mr. Sison revitalized the communist party of the Philippines (C.P.P.) and became its first chairman until his arrest in November 1997. Without ever having been brought to trial Mr Sison spent almost 9 years in detention, during which he was severely tortured and 5 years of which he spent in almost complete isolation.

After the downfall of the Marcos-regime in February 1996 Mr Sison was released by a presidential order of March 1986. After his release Mr Sison devoted most of his time to literary and scholarly activities. He was appointed professor of political studies at the University of the Philippines in Manilla and received the South-Asian writ award for his poems written in prison. He was invited by various universities to lecture on political and socio-economic issues.

In the meantime Mr Sison became involved in the National Democratic Front (N.D.F.), an opposition organisation encompassing 14 political movements of the Philippines, which eventually entered into negotiations with the Philippine government. In the begining of 1987 negotiations between the government and the National Democratic Front collapsed and the government declared all-out and open war on the N.D.F.. In January 1987 Mr Sison came to The Netherlands on the invitation of Utrecht University in order to conduct research. For that purpose he was granted a permit to stay by the competent Dutch authorities. During 1987 and 1988 the struggle between the Philippine government and the N.D.F. intensified. In September 1988 Mr Sison was falsly charged with having resumed the leadership of the (still forbidden) C.P.P. as well as with plotting to overthrow the Philippine government. Mr Sison's passport was revoked and a price was put on his head. Mr Sison decided to apply for political asylum in The Netherlands.

On October 26 1988 Mr Sison requested to be admitted as a refugee and to be granted a permit to stay for pressing humanitarian reasons. The request was rejected by decision of 13 July 1990.

On 6 August 1990 Mr Sison filed a request for revision of the decision of 13 July 1990. However, the competent Dutch authorities failed to take a decision on the request of 6 August 1990. On the basis of article 34 (2) of the Foreigners Act (Vreemdelingenwet) in force at that time a failure to take a decision on the request concerned is considered to amount to the

rejection of the request. From this fictive rejection Mr Sison has lodged appeal with the Judicial Branche of the State Council on 6 December 1990.

Within the framework of that procedure the government has asked the advice of the Commission for Foreigner Affairs (Adviescommissie Vreemdelingenzaken). The Commission did hear the applicant on 25 February 1991. Eventually this Commission adviced the government to stick to its rejection of the request.

Nevertheless, the rejection on the part of the government was nullified by the Judicial Branche of the State Council by its decision of 17th December 1992, no. RO 2.90.4934.

However, the renewed request for revision on the part of Mr Sison was again rejected by the government by its decision of 26th of March 1993. On 23 April 1993 Mr Sison again appealed to the Judicial Branche of the State Council.

By decision of 21 February 1995, no RO 2.93.2274 the Judicial Branche of the State Council nullified the government's decision of 26th of March 1993.

On 26 of June 1995 Mr Sison has lodged appeal with court at The Hague (Arrondissementsrechtbank) against the refusal on the part of the government to timely decide on his request for revision of 6 August 1990.

By judgement of 29 April 1996 the court granted the appeal and decided that the government had to take a decision on the request for revision of 6 August 1990 within 6 weeks from the date of its judgement.

By decision of 4 June 1996 the government again decided to reject the applicant's request to be admitted as a refugee and to be granted a permit to stay. In addition the government decided that Mr Sison would not be sent back to The Philippines as long as there were reasons to fear prosecution in the sense of the Refugee Treaty of 28 July 1951, as amended by the Protocol of New York of 31 January 1967 or fear of a treatment in violation of article 3 of the European Convention on Human Rights. Finally, the government ordered Mr Sison to leave The Netherlands.

From the government's decision Mr Sison has lodged appeal with the court at The Hague (Arrondissementsrechtbank) on 12 August 1996. The court decided to refer the case to its chamber for the uniform application of the law (Rechtseenheidkamer). By judgement of 11 September 1997 the chamber rejected Mr Sison's appeal.

15. STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND OF RELEVANT ARGUMENTS

1. As was already observed in foregoing, Mr Sison has repeatedly submitted to the competent Dutch Authorities requests to be admitted as a refugee and to be granted a permit to stay. In 1995 Mr Sison came close to having granted both these requests. On 21 February 1995 the Judicial Branche of the State Council decided favourably with respect to Mr Sisons requests. The Judicial Branche of the State Council took its decision under two headings:

I. Ten aanzien van het beroep van appellant voor zover dat is gericht tegen de afwijzing van zijn verzoek om herziening van de weigering hem als vluchteling toe te laten. [With respect to the appeal of the applicant as far as it is directed at the rejection of his request for revision of the refusal to be admitted as a refugee].

II. Ten aanzien van het beroep van appellant voor zover dat is gericht tegen de afwijzing van zijn verzoek om herziening van de weigering hem een vergunning tot verblijf te verlenen. [With respect to the appeal of the applicant as far as it is directed at the rejection of his request for revision ofthe refusal to be granted a permit to stay].

2. The relevant parts of the State Council's decision under the first heading read as follows:

> "Gezien het vorenstaande zal de Afdeling vervolgens nagaan of de door verweerder (subsidiair) gegeven motivering om appellant op grond van artikel 15, tweede lid, van de Vreemdelingenwet, de toelating tot Nederland te weigeren, toereikend is.
>
> Hoewel de Afdeling het door verweerder gestelde belang erkent, mede gelet op de door haar geconstateerde aanwijzingen voor persoonlijke contacten tussen appellant en vertegenwoordigers van terroristische organisaties, kan dit – indien niet is gegarandeerd dat appellant in een ander land dan de Phillipijnen zal worden toegelaten, niet leiden tot het gerechtvaardigd inroepen van artikel 15, tweede lid, van de Vreemdelingenwet. Hieraan staat in de weg dat een dergelijke weigering appellant toe te laten als strijdig met artikel 3 van het Europees Verdrag tot Bescherming van de Rechten van de Mens en de Fundamentele Vrijheden, hierna te noemen: het EVRM, moet

worden geoordeeld.

...

Met de appellant is de Afdeling mede op grond van de het hiervoor overwogene, met name met betrekking tot het vluchtelingschap van appellant, van oordeel dat deze bij terugkeer naar de Phillipijnen het reële gevaar loopt onderworpen te worden aan een behandeling in strijd met artikel 3 van het EVRM. De Afdeling komt tot haar oordeel dat het reële gevaar waarvoor appellant vreest, onmenselijke of vernederende behandelingen of straffen betreft, op grond van een "fair balance" als aangegeven door het Europese Hof voor de Rechten van de Mens in zijn arrest van 7 juli 1989, RV 1989, 94, in de zaak Soering. Is eenmaal aldus de conclusie bereikt dat er reël gevaar voor onmenselijke of vernederende behandelingen of straffen bestaat, dan is er voor een nadere afweging tussen het belang van appellant daarvan gevrijwaard te blijven en het door verweerder aangevoerde belang van de Nederlandse Staat bij niet-toelating geen ruimte, gelet op het absolute karakter van het in artikel 3 van het EVRM neergelegde verbod, dat in hetzelfde arrest in de zaak Soering is beklemtoond.

Hieruit volgt dat de bestreden beslissing ook op dit punt niet in stand kan blijven."

["In view of the foregoing the Judicial Branche will now investigate whether the reasons (alternatively) provided by the defendant are sufficient for refusing the applicant to be admitted to the Netherlands on the basis of article 15, second paragraph, of the Foreigners Act.

Although the Judicial Branche recognises the interest put forward by the defendant, in view also of the indications found by the defendant of personal contacts between the applicant and representatives of terrorists organisations, this cannot lead to a justified reliance on article 15, second paragraph, of the Foreigners Act – if it is not garantueed that the applicant will be admitted to another country than the Phillippines –. This is so because such a refusal to admit the applicant must be considered to be in violation of article 3 of the European Convention for the

Protection of Human Rights on Fundamental Freedoms, hereinafter: ECRM.

...

The Judicial Branche agrees with the applicant, also on the basis of the foregoing, in particular with respect to the refurgee status of the applicant, that he runs the real risk of being submitted to a treatment in violation of article 3 of the ECRM upon return to the Phillipines. The Judicial Branche comes to the conclusion that the real risk which the applicant fears, consists of inhuman or degrading treatment or punishment, on the basis of a "fair balance" as set forth by the European Court of Human Rights in its judgement of 7 July 1989, RV 1989, 94, in the case of Soering. Once it has been concluded, that there exists a real danger for inhuman or degrading treatment or punishment, there is no longer room for a weighing of the interest of the applicant to be safeguarded therefrom and the interest, put forward by the defendant, of the Kingdom of the Netherlands in non-admitance, taking into account the absolute character of the probition contained in article 3 of the ECRM, which was stressed in the same judgement concerning the case of Soering.

It follows from the forgoing that also in this respect the contested decision cannot stand."]

3. Under the second heading the Judicial Branche of State Council decided as follows:

"Aangezien dit onderdeel van de bestreden beslissing eerst naar behoren kan worden beoordeeld, nadat bekend is geworden welke beslissing uiteindelijk op het verzoek van appellant om toelating als vluchteling is genomen en op welke gronden die beslissing berust, ziet de Afdeling in de vernietiging van de weigering om appellant als vluchteling toe te laten voldoende aanleiding om – op dezelfde gronden – over te gaan tot vernietiging van de weigering om appelant een vergunning tot verblijf te verlenen".

[As this part of the contested decision can only be judged adeguately after it has become known which decision

eventually is taken on the request of the applicant to be admitted as a refugee and what the reasons for that decision are, according to the Judicial Branche the annulment of the refusal to admit the applicant as a refugee constitutes sufficient ground – for the same reasons – to also annul the refusal the grant the applicant a permit to stay.]

4. Despite this unequivocal decision on the part of the Judicial Branche of the State Council the compentent governmental authorities first refused to take any new decision, and subsequently – after being ordered by the court to do so – took a new decision, but again decided to reject Mr Sisons requests to be admited as a refugee and to be granted a permit to stay. Consequently, Mr Sison again had to lodge appeal with the court at The Hague (Arrondissementsrechtbank). The court's chamber for the uniform application of the law (Rechtseenheidskamer) by judgement of 11 September 1997 rejected Mr Sisons appeal.

Mr Sison alleges that this latter judgement constitutes a violation of article 3 of the European Convention, in that it sidesteps the consequences of article 3 of the European Convention which inescapably flow from the above-mentioned decision of the Judicial Branche of the State Council as well as from the case-law of the European Court of Human Rights.

5. The The Hague court arrives at its conclusion on the basis of a line of reasoning which in the view of the applicant is mistaken. The line of reasoning of the The Hague court comprises the following steps.

First, in consideration number 14 of its judgement of 11 September 1997 the The Hague court quotes the above-mentioned consideration of the State Council according to which: "Although the judicial branch recognises the interest put forward by the defendant, in view also of the indications found by the defendant of personal contacts between the applicant and representatives of terrorists organisations, this cannot lead to a justified reliance on article 15, second paragraph, of the Foreigners Act – if it is not garantueed that the applicant will be admitted in another country than the Phillippines. This is so because such a refusal to admit the applicant must be considered to be in violation of article 3 of the European Convention for the Protection of Human Rights on Fundamental Freedoms, hereinafter: ECRM". The The Hague court combines this consideration on the part of the State Council with another argument. In the meantime – i.e. in the period between the decision of the State Council and the proceedings before the The Hague court – the competent Dutch authorities – the defendant – had let it be known that they had decided not to expel Mr Sison to his country of origin,

i.e. the Phillipines. Because they had announced this decision only after the proceedings before the State Council, the State Council – so the defendant argued before the The Hague court – in taking its decision had started from the point of departure that the competent Dutch authorities indeed did intend to expel Mr Sison to his country of origin. The The Hague court agreed with this line of reasoning on the part of the defendant and concluded:

> "Aangezien verweerder niet langer voornemens is eiser uit te zetten en er derhalve van schending van artikel 3 EVRM geen sprake meer kan zijn, is aan de laatste zin van de onder rechtsoverweging 11 weergegeven overweging van de Afdeling rechtspraak de betekenis komen te ontvallen. Niet langer kan gesteld worden dat artikel 3 EVRM er aan in de weg staat, dat verweerder gebruik maakt van de hem in artikel 15 tweede lid Vw verleende bevoegdheid om aan eiser toelating als vluchteling te weigeren."
>
> ["Because the defendant no longer intends to expel the applicant and because, consequently there cannot be a violation of article 3 ECRM anymore, the last sentence of the consideration on the part of the State Council quoted above, "*Such a refusal to admit the applicant as a refurgee must be considered to be in violation of article 3 of European Convention for the Protection Human Rights and Fundamental Freedoms, hereinafter: the ECRM.*" – [italics added] has lost its meaning. It can no longer be upheld that article 3 prohibits the defendant to use his power under article 15, second paragraph Foreigners Act, to refuse to admit the applicant as a refugee."]

6. On behalf of Mr Sison it is submited that this line of reasoning is incorrect. First of all, the argument that the State Council had based its decision on the point of departure that the defendant intended to expel the applicant to his country of origin, is a mere supposition. That point of departure can in no way be deduced from the State Council's decision. Rather that decision points in the opposite direction. At any rate, the wording of the State Council's decision is unequivocal and leaves no room for doubt. Not only the sentence in the State Council's decision, which the The Hague court argues has lost its meaning, but also the concluding part of the State Councils decision, quoted above, explicitly refers to the *refusal to admit* Mr Sison as a refugee. Similarly, as pointed out above, the whole decision of the State Council is taken under the heading

> "With respect to the applicant's appeal to the extent that it is directed at the rejection of his request for revision of the *refusal to admit* him as a refugee".

Indeed, if it had been the State Council's intention to limit its decision to the *prohibition to expel* the applicant, it could have simply said so, instead of referring to the *refusal to admit*, unlike the The Hague court, the State Council apparently does not want to engage in legal hairsplitting and does not distinguish between the right not to be expelled on the one hand and the right to be admitted on the other hand. Form the point of view of the effective protection of human rights the distinction upheld by the The Hague court indeed constitutes a rather artificial one. For, if a person may not be expelled – because there is no other country where he or she can go to and because he or she upon return to the country of origin would run the real risk of being submitted to a treatment in violation of article 3 of the European Convention –, but at the same time the person concerned is not admitted as a refugee and is refused a permit to stay, that person in fact legally becomes a non-person, or at least a legal vacuum or a great legal uncertainly is created. While the State Council's decision avoids such a situation, the judgement of the The Hague court in fact creates such legal vacuum.

7. The position taken by the The Hague court is all the more remarkable because the court itself *expressis verbis* concedes:

> "Het is echter beleid van verweerder om indien zich een situatie voordoet dat er sprake is van gegronde vrees voor vervolging ..... en er geen ander land is dat de asielzoeker wil toelaten, de vreemdeling toe te laten als vluchteling."["However, it is the policy of the defendant, if a situation occurs of founded fear for persecution .... while no ohter country is prepared to admit the asylum seeker, to admit the foreigner as a refugee."]

And furthermore:

> "Het is beleid van verweerder om indien zich een situatie voordoet, waarin een vreemdeling bij terugkeer naar het land van herkomst het reële gevaar loopt onderworpen te worden aan een behandeling in strijd met artikel 3 van het EVRM, een vergunning tot verblijf zonder beperkingen te verlenen." ["It is the policy of the defendant, if the situation occurs in which a foreigner upon return to the country of origin runs the real risk of being submitted to a

treatment in violation of article 3 of the ECRM, to grant a permit to stay without limitations."]

On the basis of the forgoing one would have expected the The Hague court to grant Mr Sisons requests to be admitted as a refugee and to be granted a permit to stay without limitations. However, the court allows for an exception to the general policy as formulated above. After having set forth the policy to admit a asylum seekers in the above-mentioned situations as a refugee, the court added:

> "Verweerder heeft in beginsel de bevoegdheid om hierop een uitzondering te maken".
> ["The defendant in principle has the power to make exceptions to this."]

Similarly with respect to the policy to grant a permit to stay without limitations to foreigners in the situation as outlined above, the court observes:

> "Verweerder heeft echter aangevoerd, dat ook in een dergelijke situatie het vijfde lid van artikel 11 Vw van toepassing is: "Het verlenen van een vergunning tot verblijf .... kan worden geweigerd op gronden aan het algemeen belang ontleend."
>
> ["However, the defendant has adduced, that also in such a situation the fifth paragraph of article 11 of the Foreigners Act is applicable: "The granting of a permit to stay .... may be refused for reasons derived form the general interest."]

8. In the view of the applicant, the The Hague court thus encroaches upon the absolute character of article 3 of the European Convention. While the decision of the Judicial Branche of the State Council gives due consideration to the absolute character of article 3, the The Hague court seems to take the position that article 3 is not absolute, but just a "little absolute". In the view of Mr Sison this position of the The Hague court is untenable. As was pointed out above, the State Council ruled that once the conclusion is arrived at that there is a real risk for inhuman or degrading treatment of punishment, there is no room anymore for the weighing of the interest of the applicant to be safeguarded therefrom on the one hand and the interest of the defendant on the other hand in not having a person admitted, taking into account the absolute character of the prohibition contained in article 3

of the European Convention. The The Hague court however, in consideration 19 of its judgement of 11 September 1997, simply holds that the absolute character of article 3 of the European Convention does not bar a refusal to grant a permit to stay, and without further arguments adds that this point of view is in conformity with the case-law of the European Court of Human Rights.

However, the The Hague court does not make any reference at all to the Soering judgement of the European Court of Human Rights, on which the State Council explicitly relied. In its judgement in the case of Soering versus the United Kingdom of 7 July 1989 the European Court held:

> "Article 3 makes no provision for exceptions and no derogation from it is permissible under article 15 in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe." (Consideration 88).

It is this unequivocal ruling upon which the State Council's decision is based, but which the The Hague courts judgement seems to completely ignore.

Furthermore, after the State Council's decision, but before the The Hague court dealt with the case, the European Court of Human Rights delivered its Chahal judgement of 15 November 1996. In this Chahal judgement the European Court further had clarified its position taken in the Soering case. In the latter case the Court added to words quoted above:

> "As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that supect offenders who fly abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition." (Consideration 89).

In the Chahal judgement the European Court of Human Rights clarified this

position in no certain terms:

> "Article 3 enshrines one of the most fundamental values of democratic society (see the above-mentioned Soering judgement, P.34, paragraph 88)." The Court is well aware of the immense diffulcities faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct....The prohibition provided by article 3 against ill-treatment is equally absolute in expulsion cases....." (Consideration 79 en 80).

The Court then adds:

> "Paragraph 88 of the Court's above-mentioned Soering judgement, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgement, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responbility under article 3 is engaged." (Consideration 81).

The judgement of The Hague court of 11 September 1997 overlooks and completely ignores the consequences flowing from the absolute character of arcticle 3 as set out by the European Court of Human Rights, in that the 11 September 1997 judgement allows a weighing of interests which is unwarranted in view of the absolute charactor of article 3.

9. In sum, the applicant alleges that the judgement of the The Hague court of 11 September 1997 constitutes a violation of article 3 of the European Convention because it is contrary to the case-law of the State Council and the European Court of Human Rights in that it unwarrantedly distinguishes between the prohibition to expel the applicant on the one hand and the refusal to admit the applicant and to grant the applicant a permit to stay on the other hand, while in the process the judgement allows for a weighing of interests contrary to the absolute character of article 3.

16. The final judgement in this case was the judgement of 11 September 1997 by the The Hague court (Arrondissementsrechtbank).

17. The other relevant decisions in the present case are listed under question 21.

18. There is no other appeal or remedy available to the applicant.

19. The object of the present application is to have established that the rejection of the requests on the part of Mr Sison to be admitted as a refugee and to be granted a permit to stay constitute violations of article 3 of the European Convention and thus to induce the competant Dutch Aurthorities to as yet grant Mr Sison's requests.

20. The applicant has not submitted the present complaint to any other procedure of international investication or settlement.

21.
1. beschikking Ministerie van Justitie d.d. 13 juli 1990;
2. herzieningsverzoek (bezwaarschrift) d.d. 6 augustus 1990;
3. beroep op Rechtspraak Raad van State d.d. 6 december 1990;
4. advies ACV d.d. 25 februari 1991;
5. uitspraak Rechtspraak Raad van State d.d. 17 december 1992;
6. beschikking Ministerie van Justitie d.d. 26 maart 1993;
7. beroep op Rechtspraak Raad van State d.d. 23 april 1993;
8. uitspraak Rechtspraak Raad van State d.d. 21 februari 1995;
9. beroep op Rechtspraak Raad van State d.d. 26 juni 1995;
10. uitspraak Rechtspraak Raad van State d.d. 29 april 1996.

22. The applicant prefers to receive the Commission's decision in English.