

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

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(Palm, Thomassen, Gaukur Jörundsson, Türmen, Bîrsan, Casadevall, Maruste)

Nr. 37331/97

m.nt. J.G. Brouwer en A.E. Schilder

EVRM art. 2 Vierde Protocol, EVRM art. 8

Samenvatting: Recht op bewegingsvrijheid, kenbaarheidseis en voorzienbaarheidseis. Aan L. is in de maanden september, oktober en november 1994 vijf keer een verwijderingsbevel van acht uren opgelegd voor een gebied in Amsterdam dat bekend staat onder de naam Ganzenhoef, onder meer wegens openlijk bezit en gebruik van hard drugs. Nadat voor een zesde keer het gebruik van hard drugs op straat is geconstateerd, legt de burgemeester hem een verblijfsontzegging op van 14 dagen op basis van art. 175 Gemw. L. komt hiertegen in het geweer, maar van de Afdeling bestuursrechtspraak krijgt hij uiteindelijk op alle punten ongelijk (ABRvS 19 december 1996, AB 1997, 79, (m.nt. FM.)).

In Straatsburg klaagt L. onder meer wegens schending van art. 2 Vierde Protocol. Het veertiendagenbevel ontbeert volgens hem een wettelijke basis, is slechts gebaseerd op een interne, niet-gepubliceerde instructie van de politie door de burgemeester en is niet noodzakelijk in een democratische samenleving.

Het EHRM stelt echter vast dat de beperking van het recht op bewegingsvrijheid voldoende basis heeft in het nationale recht, zich hiermee expliciet conformerende aan HR 23 april 1996, NJ 1996, 514 en ABRvS 19 december 1996, AB 1997, 79. "In accordance with the law" wil echter niet slechts zeggen dat er een wettelijke grondslag dient te zijn, het stelt ook voorwaarden aan de kwaliteit van de wet. De toegepaste bepaling voldoet aan de kenbaarheidseis (accessibility) nu zij deelt uitmaakt van de Gemeentewet en de rechtspraak over de uitleg ervan is gepubliceerd in nationale jurisprudentie-tijdschriften.

Ook aan de voorzienbaarheidseis (foreseeability) is voldaan. Weliswaar staat art. 175 Gemw. de burgemeester in vrij algemene termen toe in te grijpen door middel van maatregelen die hij noodzakelijk acht om een einde te maken aan verstoringen van de openbare orde, dan wel die te voorkomen. Hier staat echter tegenover dat de omstandigheden die de burgemeester nopen tot het uitvaardigen van de noodzakelijke noodbevelen zo uiteenlopend kunnen zijn dat het ondoenlijk is een formulering te kiezen die alle eventualiteiten dekt. Daar komt bij dat alvorens de burgemeester een veertiendagenbevel oplegt, er bij de vijfde geconstateerde overtreding expliciet is gewaarschuwd voor deze consequentie. Voor verzoeker was derhalve voorzienbaar welke het gevolg zou zijn van zijn handelen en was het mogelijk om zijn gedrag hierop af te stemmen.

Aan de in lid 4 vastgelegde beperkingsgrond "justified in the public interest in a democratic society" is voldaan.

L.,

tegen

The Netherlands.

Procedure

1. The case originated in an application (no. 37331/97) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights ("the

Commission") under former Article 25 of the Convention by a Netherlands national, L. ("the applicant"), on 20 May 1997.

2. The applicant alleged, in particular, that there had been violations of his rights under Article 8 of the Convention and Article 2 of Protocol No. 4 to the Convention.

3. On 21 October 1998 the Commission gave a decision adjourning its examination of part of the application and declaring the application inadmissible for the remainder.

4. The applicant, who had been granted legal aid, was represented before the Court by Mr G.P. Hamer, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agents, Mr R. Böcker and Ms. J. Schukking of the Ministry of Foreign Affairs.

5. On 1 November 1998 the competence to examine the application was transferred to the Court (Article 5 § 2 of Protocol No. 11 to the Convention). The Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. On 6 June 2000 the Court gave a decision declaring the applicant's complaints under Articles 8 of the Convention and 2 of Protocol No. 4 admissible and the remainder of the application inadmissible.

7. The applicant, but not the Government, filed a memorial. The Government confined themselves to referring to their observations filed at the stage of the examination of the admissibility of the application.

8. After consulting the Agent of the Government and the applicant, the Chamber decided that it was not necessary to hold a hearing (Rule 59 § 2 in fine).

9. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within former Section I.

The facts

I The circumstances of the case

A. The prohibition order

10. On 2 December 1994 the Burgomaster (Burgemeester) of Amsterdam, relying on Sections 172 and 175 of the Municipality Act (Gemeentewet) as amended on 1 January 1994, imposed a prohibition order (verwijderingsbevel) on the applicant to the effect that the latter would not be allowed for a period of fourteen days to enter a particular area, i.e. the "Ganzenhoef" area, one of the emergency areas designated by the Burgomaster. The following events were referred to in the Burgomaster's decision as having led to this order being issued:

- It appeared from police reports that on 9 and 12 September, 3 October, 14 and 16 November 1994 the applicant had either overtly used hard drugs, had had utensils for the use of hard drugs in his possession or had had hard drugs in his possession in the Ganzenhoef area and that on four of those occasions the applicant had been ordered to leave the area for eight hours.

- On 16 November 1994 the applicant had been heard by the police about his conduct and he had been told that he would either have to refrain from acts which disturbed the public order (openbare orde) or have to stay away from the area. The applicant had further been informed that if he committed such acts again in the near future, the Burgomaster would be requested to impose a prohibition order for fourteen days on him. On that occasion the applicant did not wish to state anything as to the reasons for his presence in that area.

- On 25 November 1994 the applicant had nevertheless overtly used hard drugs in the Ganzenhoef area. He had once again been ordered to leave the area for eight hours and the police had subsequently requested the Burgomaster to impose a prohibition order for fourteen days on the applicant.

11. In the opinion of the Burgomaster the applicant would again commit acts disturbing public order within the near future. In this respect the Burgomaster took account of the kind of conduct involved, i.e. acts seriously disturbing public order, the repetition and continuity of this conduct, the statement of the applicant, the short period of time within which the acts concerned had been observed and the fact that the applicant had continued his disruptive behaviour despite the eight-hour prohibition orders imposed on him and the warning given by the police. Finally, the Burgomaster noted that neither the applicant's home nor his place of work were situated in the area concerned.

B. The applicant's objection to the Burgomaster

12. On 12 December 1994 the applicant submitted an objection (bezwaarschrift) against the prohibition order to the Burgomaster. He submitted, inter alia, that the Burgomaster had failed to take into account the fact that he was residing in the Ganzenhoef area, that he needed to be present there in person twice a week in order to collect his social security benefits and that he received social counselling there. The applicant stated that the police knew this, but had failed to mention it in the police report on the applicant's hearing of 16 November 1994.

13. The applicant further submitted that the prohibition order could not be considered as having a legal basis in that the emergency powers granted to the Burgomaster under the Municipality Act were intended for emergency situations. According to the applicant, the legislature had never intended structural nuisance caused by drug abusers to be considered as creating an emergency situation. Moreover, the applicant's absence from the Ganzenhoef area would not make any difference in this respect since he was only one of many drug abusers in that area. The applicant also complained that the order was contrary to Article 6 of the Convention in that it constituted a sanction and could therefore only be imposed by a judge. He further complained that the order restricted his freedom of movement and was contrary to his right to respect for his private life, family life, home and correspondence.

14. On 10 January 1995 a hearing took place before an advisory committee. During this hearing the representative of the Burgomaster stated that already on 19 April 1994 a prohibition order for fourteen days had been imposed on the applicant and that on 16 November 1994 the applicant had not wished to make any statement to the police as to the reasons for his presence in the Ganzenhoef area. Despite the previous orders, the applicant had continued his undesirable conduct and on this ground the imposition of a new prohibition order had been sought. The Burgomaster's representative further stated that the address where the applicant had stated that he resided and where he collected his mail and social security benefits was in fact the address of the Streetcornerwork Foundation. It was not possible to reside at that address. This Foundation had a procedure under which social-security benefits for persons subject to a prohibition order could be collected by an authorised third party and it was possible for the applicant to avail himself of that procedure.

15. On 29 June 1995 the committee advised the Burgomaster to reject the objection and to maintain the prohibition order. It considered, inter alia, having regard to the fact that the applicant had, within a short period of time, regularly committed acts which had disrupted public order and that the prohibition orders for eight hours which had been issued had not prevented him from behaving in that manner, that the imposition of the prohibition order had not been unreasonable. It further found that the order was in conformity with Section 172 (3) of the Municipality Act, that therefore it was not necessary to examine the question whether or not the conditions set out in Section 175 of the Municipality Act had been fulfilled, and that the

Burgomaster had not exceeded his competence under the Municipality Act. It did not agree with the applicant that the impugned measure constituted a penalty as it had been issued in order to maintain public order. The committee finally found that the interference with the applicant's right to liberty of movement had been justified and that the prohibition order could not be regarded as disproportionate.

16. By decision of 6 July 1995 the Burgomaster rejected the applicant's objection, adopting as his own the reasoning applied by the advisory committee.

### C. Proceedings in the Regional Court

17. The applicant lodged an appeal with the Regional Court (arrondissementsrechtbank) of Amsterdam.

18. By judgment of 19 January 1996, following adversarial proceedings in the course of which a hearing was held on 8 December 1995, the Regional Court declared the applicant's appeal well-founded and quashed the prohibition order.

19. The Regional Court accepted that the overt use of hard drugs in public places and the presence of a concentration of drug abusers and dealers disrupted public order and acknowledged the necessity to end such nuisance, in particular when this occurred continuously at specific locations in the city. The Regional Court noted that the Burgomaster availed himself of two means to that end, namely prohibition orders of either eight hours or fourteen days. It considered the procedure established as regards the imposition of prohibition orders for a duration of fourteen days and noted that this procedure had not been fully complied with in that the applicant's prohibition order had not been sought by the competent police officer. However, as it was not established that this had harmed the applicant's interests, it did not find that this flaw should result in the quashing of the order. It did, however, find that the order should be quashed on other grounds.

20. The Regional Court held that, unlike the situation in which an eight-hour prohibition order has been imposed, Section 172 (3) of the Municipality Act offered no basis for the imposition of a prohibition order for a duration of fourteen days. It held on this point that the competence established by this provision aimed to create a possibility for direct reaction to an expected disturbance of public order and might serve to prohibit someone's presence for a limited period of time in the area where the disturbance of public order was expected. It held that the eight-hour prohibition order was such as to meet this need, but not the fourteen days prohibition order, the latter measure being disproportionate in relation to the expected disruption of public order and thus going beyond what could be considered necessary for maintaining public order.

21. The Regional Court added that in the present case this was all the more so as the applicant had no permanent place of residence and used the address of the Streetcornerwork Foundation as his postal address. The prohibition order implied that the applicant's freedom of movement was limited for fourteen days in a manner which prevented him from collecting his mail and from receiving his social security benefits. It rejected the argument advanced by the Burgomaster's representative that the police would not undertake any formal action against the applicant for acting contrary to Article 184 of the Criminal Code (Wetboek van Strafrecht), i.e. the offence of failure to comply with an official order (ambtelijk bevel), when collecting his social security benefits at the address of the Streetcornerwork Foundation, considering that the applicant's freedom of movement could not be made dependent on the willingness of the police officer on duty to tolerate intrinsically punishable conduct.

22. The Regional Court further found that the situation at issue, i.e. nuisance caused by drug abuse, did not constitute a situation within the meaning of Section 175 of the

Municipality Act and accordingly held that the Burgomaster could not have based the prohibition order on this provision. As it had already found the prohibition order to be incompatible with national law, the Regional Court did not find it necessary to determine whether or not the order was compatible with Article 6 of the Convention. D. Proceedings in the Administrative Jurisdiction Division of the Council of State 23. On 7 February 1996, the Burgomaster lodged an appeal against the Regional Court's judgment with the Administrative Jurisdiction Division (Afdeling Bestuursrechtspraak) of the Council of State (Raad van State).

24. In its judgment of 19 December 1996, following adversarial proceedings, the Administrative Jurisdiction Division quashed the Regional Court's judgment of 19 January 1996 and rejected the applicant's appeal to the Regional Court as ill-founded. Its reasoning included the following:

"The prohibition order issued against L. is based on a decision of the appellant, dated 28 October 1993 and addressed to the Chief Superintendent of Police, which contains an instruction to the police relating to the preparation and issuing of a fourteen-day prohibition order. This instruction designates the Ganzenhoef area as an "emergency area" and indicates the behaviour which the appellant considers to be constitutive of serious breaches of public order, including the overt possession or use on or near the public highway of addictive substances within the meaning of Section 2 of the Opium Act.

The Regional Court held, among other things, that the appellant was not competent to act on the basis of Section 175 of the Municipality Act, because a situation within the meaning of that Section was lacking. The Administrative Jurisdiction Division does not share this opinion. Its reasons are the following.

It is laid down in Section 175, first paragraph, of the Municipality Act that in case of a riotous movement, of other serious disorders or of calamities, as well as in case of a well-founded fear of the development thereof, the Burgomaster is empowered to issue all orders which he deems necessary for the maintenance of public order or the limitation of general danger. In doing so he may deviate from rules other than those of the Constitution.

The Administrative Jurisdiction Division notes at the outset that giving orders in the situations described in Section 175 of the Municipality Act is not contrary to the right to freedom of movement as guaranteed by Article 12 of the International Covenant on Civil and Political Rights and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, since provision has been made for the possibility to limit this right by law - which also includes an order given by the Burgomaster pursuant to the law - for the protection of public order.

Section 175 of the Municipality Act replaced Section 219 of the Municipality Act which was repealed as of 1 January 1994. As did Section 219, Section 175 grants the Burgomaster emergency powers which should only be used in exceptional situations. Thus provision has been made by law for circumstances in which ordinary means are insufficient to restore and maintain public order. The Administrative Jurisdiction Division notes in this connection that the wording of Section 175 does not lead to the conclusion that that provision, as compared with Section 219, is intended to introduce any changes as regards the circumstances in which emergency powers may be used. Its drafting history does not justify holding otherwise.

In the opinion of the Administrative Jurisdiction Division, ordinary means may be considered insufficient in the present case and there was, at the time of the decision on the objection, an exceptional situation of the kind referred to above. The Administrative Jurisdiction Division finds in this regard that the facts relating to the situation in the Ganzenhoef area, based on which the appellant decided to issue the fourteen-day prohibition order, are established. In light of the decision of 28 October 1993 the situation there was characterised by the presence of a large number of drug addicts and the attendant nuisance, inconvenience, insecurity and threats to other citizens. This factual situation is so serious that the personnel and means available to the appellant were insufficient to counter the disruptions of public order thereby caused.

It is important to note in this context that at the time the objection was decided on, it was not possible to solve the problem there by means of a regulation adopted by the municipality (gemeentelijke regeling). At that time there was no relevant provision in any municipality bye-law, nor were any other adequate administrative-law means available. Given that the decision dismissing the objection was given before the Administrative Jurisdiction Division delivered its decision of 14 May 1996 ..., the absence of such a provision cannot be held against the appellant. Apart from that, by a decision of 26 June 1996, Section 2.6 A has been added to the General Municipal Bye-law of Amsterdam, which contains a regulation governing prohibition orders in relation to hard drugs. Against this background, the Administrative Jurisdiction Division is of the opinion that it cannot be maintained that the appellant was not entitled to use the powers granted him by Section 175 of the Municipality Act.

Moreover, nothing brought forward by L. constitutes a ground to find that the appellant could not reasonably decide, in the light of the circumstances of the case, to issue a fourteen-day prohibition order.

... The position taken by the appellant, that the risk of repetition of behaviour constituting a breach of the peace was so great that a fourteen-day prohibition order was necessary, is not unreasonable.

The Administrative Jurisdiction Division further notes that L. is not resident in the Ganzenhoef area, is not dependent on that area for work, and that he was offered the possibility to collect his social-security benefits from the Streetcornerwork Foundation."

#### E. Criminal proceedings

25. Apart from the proceedings described above, the applicant was arrested and placed in detention on 4 December 1994 for failure to comply with the prohibition order of 2 December 1994. On 20 December 1994 the single-judge chamber (politierechter) of the Amsterdam Regional Court (arrondissementsrechtbank) suspended the applicant's pre-trial detention in order to allow the applicant to be admitted to the Crisis Observation and Detoxification Department of the J. clinic and adjourned the criminal proceedings against the applicant sine die.

26. By judgment of 22 May 1995, the single-judge chamber of the Regional Court convicted the applicant of having failed to respect a prohibition order on two occasions and sentenced him to four months' imprisonment with deduction of the time

spent in pre-trial detention. The applicant appealed to the Court of Appeal (gerechtshof) of Amsterdam.

27. In its judgment of 4 February 1997, the Court of Appeal quashed the judgment of 22 May 1995 and convicted the applicant of having failed to respect a prohibition order on one occasion. However, as the applicant had also amassed other convictions which the law required to be taken into account for sentencing purposes, the Court of Appeal was prevented from imposing any sentence as the maximum aggregate penalty had already been attained. The applicant's subsequent appeal on points of law was rejected on 16 June 1998 by the Supreme Court (Hoge Raad).

28. The criminal proceedings against the applicant do not form part of the case before the Court.

## II. Relevant domestic law and practice

### A. Relevant statutory provisions

29. Section 219 of the former Municipality Act, in force until 31 December 1993, provided as follows:

"1. In case of a riotous movement, gathering or other disturbance of public order or of serious calamities, as well as in case of a well-founded fear of the development thereof, the Burgomaster is empowered to issue all orders which he deems necessary for the maintenance of public order or the limitation of general danger.

..."

30. A new Municipality Act entered into force on 1 January 1994. Section 172 of the new Municipality Act provides as follows:

"1. The Burgomaster is responsible for maintaining public order.

2. The Burgomaster is empowered to prevent or to end offences against statutory provisions relating to public order. In doing so he avails himself of the police under his authority.

3. In case of disruption of public order or a well-founded fear of the development thereof, the Burgomaster is empowered to issue orders deemed necessary for the maintenance of public order."

31. Section 175 of the new Municipality Act reads:

"1. In case of a riotous movement, of other serious disorders or of calamities, as well as in case of a well-founded fear of the development thereof, the Burgomaster is empowered to issue all orders which he deems necessary for the maintenance of public order or the limitation of general danger. In doing so he may deviate from rules other than those of the Constitution.

2. The Burgomaster shall not have recourse to measures of violence without having issued the necessary warning.

32. Article 184 of the Criminal Code (Wetboek van Strafrecht), in so far as relevant, reads:

1. Any person who intentionally fails to comply with an order or demand made in accordance with a statutory regulation by an official charged with supervisory powers or by an official responsible for the detection or investigation of criminal offences or

duly authorised for this purpose, and any person who intentionally obstructs, hinders or thwarts any act carried out by such an official in the implementation of any statutory regulation, shall be liable to a term of imprisonment not exceeding three months or a second-category fine.

2. ...

3. ...

4. If the offender commits the indictable offence within two years of a previous conviction for such an offence having become final, the term of imprisonment may be increased by a third.

33. In the Netherlands, a Burgomaster of a town or city is appointed by the Queen (Section 61 of the Municipality Act). Municipal regulations, such as general municipal bye-laws, are adopted by the Municipal Council (Section 147 of the Municipality Act) which is elected by those inhabitants of the town or city who are eligible to vote in elections for the Lower House of Parliament (Article 129 of the Constitution)."

#### B. The Burgomaster's instructions

34. By letter of 4 July 1983 the Burgomaster of Amsterdam informed the Chief Superintendent (Hoofdcommissaris) of the Amsterdam police that, in view of the situation in the city centre, the Chief Superintendent and police officers acting on the Burgomaster's behalf would be able to give orders, based on Section 219 of the Municipality Act, as in force at the time, to people to leave a particular area within the city centre and not to return to it for eight hours.

35. The Burgomaster extended the area of the city centre where these orders could be issued by letter of 25 July 1988. Subsequently, by letter of 8 March 1989, the Burgomaster also empowered the Chief Superintendent and his officers to order people to leave the designated city centre area for fourteen days.

36. By letter of 17 October 1989 the Burgomaster changed this instruction replacing the discretion of the police officers to issue eight-hour prohibition orders by a strict order to do so in specified circumstances. This letter contains the following passage:

In so acting I have considered that the designated city centre area exerts a continuing attraction on persons addicted to, dealers in, and addicts dealing in, hard drugs. The attending behaviour disrupts public order, causes considerable nuisance and constitutes an incessant threat to public life. In these circumstances (in dit verband) I judge the situation to constitute an exceptional situation within the meaning of Section 219 of the Municipality Act.

37. The Burgomaster's instructions were further changed by letter of 13 November 1989 pursuant to which prohibition orders for fourteen days could no longer be issued by the police on behalf of the Burgomaster but only by the Burgomaster himself.

38. A prohibition order for fourteen days could be imposed on a person if in the preceding six months five procès-verbaux or other reports had been drawn up by the police concerning acts committed by him which had disturbed public order, such as, inter alia:

- the possession and use of addictive substances appearing in Annex 1 to the Opium Act (Opiumwet; i.e. hard drugs) on the public highway;

- dealing in addictive substances appearing in Annex 1 to the Opium Act on the public highway;
- overt possession of knives or other banned objects in so far as this constituted a criminal offence pursuant to the general municipal bye-law or the Arms and Ammunition Act (Wet Wapens en Munitie);
- committing the offence of Article 184 of the Criminal Code where the order not complied with was a prohibition order for eight hours;
- acts of violence, thefts from cars on or along the public highway, overt selling of stolen goods on or along the public highway, in so far as there was a connection between these offences and hard drugs.

39. On the occasion of a fourth procès-verbal being drawn up against him, the person concerned would be heard by a police sergeant about his disruptive behaviour and the reason for his (continued) presence in the emergency area. The police sergeant would issue a warning to the effect that if in the near future the person concerned again disrupted public order, the police would request the Burgomaster to impose a prohibition order for fourteen days.

40. It is undisputed that the Burgomaster's letters aforementioned were neither published nor laid open to public inspection and that the Burgomaster's instructions were not otherwise made public.

#### C. Relevant domestic case-law

41. In a decision of 11 January 1989, Administratiefrechtelijke Beslissingen (Administrative Law Reports) 1989, no. 424, given under former Section 219 of the Municipality Act and relating to a part of the old city centre of Amsterdam where the situation was similar to that in the Ganzenhoef area, the President of the Judicial Division of the Council of State held as follows:

"As the Judicial Division has held in previous decisions, Section 219 of the Municipality Act - paraphrased above - confers on the Burgomaster emergency powers which should be used only in exceptional situations. Such exceptional situations include riotous movements, gatherings or other disturbances of public order, serious calamities, and also a serious fear of the development thereof. Thus provision has been made by law for situations in which it may definitely be expected that ordinary measures will be insufficient for restoring and maintaining public order.

It must now first be examined whether in the present case there was a situation of the kind aimed at by the aforementioned Section 219, first paragraph.

In so doing, we will consider the undisputed statement made by the respondent party at the hearing concerning the situation in the (old) city centre of Amsterdam:

"The old city centre of Amsterdam is known internationally and nationally as a centre for the trade in hard drugs. It continues to attract large numbers of addicts. The doings and dealings of addicts and dealers generally cause serious nuisance: overt use and dealing, intimidating group behaviour, threats to passers-by (frequently with knives), shouting, raving, fights, robberies (frequently with knives), thefts, receiving stolen property, etc. The old city centre has many functions; an important one is as a residential and commercial area. However, the situation threatens all the time to become unliveable.

The extent to which matters have deteriorated for the residents yet again is apparent from the desperate protests which took place at the beginning of November last year.

These protests ended, for the time being, at a meeting of the Police Affairs Committee which was attended by a crowd of people.

The Damstraat, Oude Doelenstraat, Nieuwe and Oude Hoogstraat are part of the crisis area. The Damstraat (the Oude Doelenstraat, the Nieuwe and Oude Hoogstraat are the prolongation of the Damstraat) constitutes the entrance to the old city centre. In this part of the town all manner of soft drugs, but especially hard drugs, are for sale, in small or large amounts: hashish, cocaine, amphetamine, LSD, heroin and other mind-altering substances. In this area especially street traders go about more than elsewhere in the city centre peddling fake hard drugs.

The presence of the dealers and large numbers of addicts with the attending criminality seriously affect the area.

Because of, amongst other things, the strong protests of local residents a special project team of the police was active in the Damstraat area for six weeks from 14 November 1988 onwards. Their actions were directed in particular towards the bridge between the Oude Doelenstraat and the Oude Hoogstraat, the so-called pills bridge. This bridge was occupied by representatives of a new phenomenon, namely multiple drugs use.

The project team set itself the primary task of restoring public order. During the action there were 600! arrests, hundreds of knives were seized and hundreds of prohibition orders were issued."

Noting all this, we are of the provisional opinion that an emergency situation of the kind referred to in Section 219, first paragraph, of the Municipality Act was rightly found to exist. The respondent was therefore entitled to issue the disputed orders."

Similarly, in a decision of 31 July 1989, Kort Geding (Summary Proceedings Law Reports) 1989, no. 314, the President of the Judicial Division held:

"As the Judicial Division has held in previous decisions, Section 219 of the Municipality Act - paraphrased above - confers on the Burgomaster emergency powers which should be used only in exceptional situations. Such exceptional situations include riotous movements, gatherings or other disturbances of public order, serious calamities, and also a serious fear of the development thereof. Thus provision has been made by law for situations in which it may definitely be expected that ordinary measures will be insufficient for restoring and maintaining public order.

It must now first be examined whether in the present case there was a situation of the kind aimed at by the aforementioned Section 219, first paragraph.

As was held in the decision of 11 January 1989 (...) in relation to the situation in the (old) city centre, the respondent rightly found that an emergency situation of the kind referred to in Section 219, first paragraph, of the Municipality Act existed."

42. In a judgment of 23 April 1996, Nederlandse Jurisprudentie 1996, no. 514, which related to a criminal prosecution under Article 184 of the Criminal Code for failure to comply with an eight-hour prohibition order, the Supreme Court (Hoge Raad) accepted that the Burgomaster's powers under Section 219 of the former Municipality

Act (for present purposes, the predecessor to Sections 172 and 175 of the present Municipality Act) were intended only for exceptional situations. It held, however, that the mere fact that two and a half years had passed since the Burgomaster had declared an emergency situation - the case related to the Burgomaster's instruction of 17 October 1989 - was not sufficient per se to justify the conclusion that an exceptional situation no longer existed. It also held, in the same judgment, that Article 6 of the Convention did not apply to eight-hour prohibition orders because such orders were not given by way of penal sanction but were in the nature of a measure aimed at preserving public order. Nor did such orders violate Article 2 of the Fourth Protocol, since they were "in accordance with law" and "necessary in a democratic society" for "the maintenance of ordre public". The judgment of the Supreme Court left in force a judgment of the Amsterdam Court of Appeal sentencing the defendant in that case to two weeks' imprisonment.

#### D. Procedure

43. Section 7:1 of the General Administrative Law Act (Algemene wet bestuursrecht) provides, in relevant part, that a person entitled to appeal to an administrative tribunal against a decision of an administrative organ (see the following paragraph) should first submit an objection to the administrative organ in question. The objector and any other interested party are entitled to be heard (Section 7:2). The administrative organ can delegate the hearing to an advisory committee (Section 7:13).

44. A person directly affected by a decision of an administrative organ (certain categories of decisions, not relevant to the present case, excepted) is entitled to appeal against that decision to the Regional Court (Section 8:1 of the General Administrative Law Act). Except in certain exceptional cases not relevant to the present case, a further appeal lay to the Administrative Jurisdiction Division of the Council of State (Section 37 of the Council of State Act - Wet op de Raad van State).

#### The law

##### I. Alleged violation of article 2 of Protocol No. 4 to the Convention

45. The applicant, who does not complain about the eight-hour prohibition orders imposed on him, alleges that the fourteen-day prohibition order issued against him by the Burgomaster of Amsterdam violated his rights under Article 2 of Protocol No. 4 to the Convention, which provides, in relevant part, as follows:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement ...

2. ...

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

##### A. As to whether there was a "restriction" of the applicant's liberty of movement

46. The Government do not dispute that there has been a restriction of the applicant's rights as set forth in the first paragraph of that Article. The Court so finds.

B. As to whether the restriction complained of was "in accordance with law"

47. The applicant argued that the Burgomaster had issued a regulation restricting human rights bypassing the representative legislative bodies. This was neither democratic nor lawful. To be valid as a matter of national law, this regulation ought to have been in the form of an "enactment", that being the way in which laws were made in countries with a civil-law system.

48. The applicant further argued that the prohibition order complained of was based solely on an internal instruction issued by the Burgomaster to the police. This instruction had not been published. Members of the public could therefore not be aware of the nature of the conduct likely to induce the Burgomaster to issue a prohibition order, nor could they be aware that sanctions in the nature of prohibition orders even existed. Moreover, since issuing the instruction in 1983 the Burgomaster had never made public any decision declaring that an exceptional situation existed in any particular area. The only information available was that supplied in individual cases by police officers. In these circumstances the foreseeability requirement enshrined in the concept of "law" had not been met.

49. Finally, the applicant contended that in the absence of any regulation of general purport passed by an elected representative body the restriction in question lacked democratic legitimacy and consequently could not be considered "necessary in a democratic society".

50. The Government, in their observations submitted at the stage of the examination of the admissibility of the application, considered Sections 172 and 175 of the Municipality Act a sufficient legal basis. They pointed to the relevant domestic case-law, which confirmed the existence of an emergency situation in the quarters of Amsterdam concerned by the measures in question and defined the scope of application of prohibition orders.

51. In the Government's contention, it could not be argued that the applicant had been unable to foresee the imposition of a fourteen-day prohibition order. He had already been given six consecutive eight-hour prohibition orders for openly using hard drugs in the area concerned. In addition, the police had given him warning, both orally and in writing, of the likely consequences. The issuance of a fourteen-day prohibition order could therefore have come as no surprise to the applicant. The method chosen to warn persons in the applicant's position was well adapted to the particular section of the public targeted by the measure. As to the argument put forward on the applicant's behalf to the effect that the Burgomaster's instructions ought to have been published, the Government observed that these were internal instructions to the police and not aimed at informing the public. In their contention, the rules governing the issuing of prohibition orders were sufficiently accessible to the public through published case-law.

52. The Government further stated that the restriction in question pursued various "legitimate aims", namely in the first place the maintenance of ordre public, and in addition public safety, the prevention of crime and the protection of the rights and freedoms of others.

53. Finally, the restriction could reasonably be considered "necessary in a democratic society". There was a "pressing social need" to act against the nuisance caused by drugs abusers in the area. Given that the prohibition order was limited in time and covered a small geographic area, that the Burgomaster had determined that the applicant did not live in the area or need to visit it for work and provision had been made for him to be able to pick up his social-security benefits and his mail, that the applicant's movements and activities were in no way restricted outside the area

concerned, and that society had a right to be protected against the nuisance caused by drugs users, the restriction could not be considered disproportionate vis-à-vis the applicant.

54. The Court reiterates that, according to its settled case-law, the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).

55. In the instant case the Court notes that Sections 172 and 175 of the Municipality Act confer upon the Burgomaster a discretion to issue the orders which he deems necessary in order to quell or prevent serious disturbances of public order.

56. In the present case both the Supreme Court - in a judgment which concerned eight-hour prohibition orders (see § 42 above) - and the Administrative Jurisdiction Division of the Council of State in the present case (see § 24 above) found these provisions to constitute a sufficient legal basis for restrictions on freedom of movement of the kind here at issue. As it is primarily for the national authorities, in particular the courts, to interpret and apply national law, the Court finds that the restriction in question had a basis in domestic law.

57. Having found that a basis for the restriction in domestic law exists, the Court must now examine whether the requirements of "accessibility" and "foreseeability" were met.

58. As to the accessibility of the law, the Court finds that requirement to have been satisfied, considering that the provision applied was a provision laid down in the Municipality Act, whereas the case-law concerning its interpretation was published in domestic law reports (see §§ 42 and 43 above).

59. As regards the law's foreseeability, the Court reiterates that a rule is "foreseeable" if it is formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his conduct. The Court has stressed the importance of this concept in the following terms (see the *Malone v. the United Kingdom* judgment of 2 August 1984, Series A no. 82, p. 32, § 67, *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II, reiterated in *Rotaru v. Romania*, cited above, § 55):

"The Court would reiterate its opinion that the phrase "in accordance with the law" does not merely refer back to domestic law but also relates to the quality of the "law", requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention..."

60. Sections 172 and 175 of the Municipality Act are admittedly rather general in terms and provide for intervention by the Burgomaster when he deems it to be necessary in order to quell or prevent serious disturbances of public order.

61. On the other hand the circumstances which call the Burgomaster to issue the orders which he deems to be necessary for the maintenance of public order are so diverse that it would scarcely be possible to formulate a law to cover every eventuality.

62. In the exercise of his discretion the Burgomaster had, at the relevant time and since 1983, ordered the Amsterdam police to issue, to persons who had committed certain circumscribed breaches of public order, eight-hour prohibition orders which deprived them of the right of access to the city centre for that length of time. After the fourth such breach of public order, a warning was to be issued to the effect that any

further breach could result in the issuance of a fourteen-day prohibition order by or on behalf of the Burgomaster. Since 1989 a warning could be issued to the effect that any further breach might induce the Burgomaster to issue himself a fourteen-day prohibition order.

63. In its decisions of 11 January 1989 and 31 July 1989 the Council of State ruled that at that time the situation in a specific area in the centre of Amsterdam could be considered as an "emergency situation" within the meaning of Section 219 of the Municipality Act, the forerunner of the present Sections 172 and 175, because of the public trafficking and use of hard drugs. That situation was similar to the situation in the area concerned in the present case.

64. It is not in dispute that in the instant case the applicant, after having been ordered on six different occasions to leave the area for eight hours - prohibition orders which are not challenged by the applicant as unlawful -, was finally told that he would have either to desist from using hard drugs or having hard drugs in his possession in streets situated in the emergency area - such use or possession constituting a disturbance of public order -, or to stay away from the area. He was informed that if he committed such acts again in the near future the Burgomaster would be requested to impose a prohibition order for fourteen days on him.

After the applicant had neglected this warning on yet a further occasion, and had again been ordered to leave the area for eight hours, the Burgomaster in fact issued a prohibition order for fourteen days.

65. It follows from the above that the applicant was able to foresee the consequences of his acts and that he was enabled to regulate his conduct in the matter before a prohibition order for fourteen days was imposed on him. Taking also into consideration that the applicant could institute objection proceedings and that a subsequent appeal may be filed with the Council of State, which remedies were used in the present case, adequate safeguards were afforded against possible abuse.

66. The Court therefore considers that in the particular circumstances of the case, the restriction at issue was in accordance with law.

C. As to whether the restriction complained of was "justified in the public interest in a democratic society"

67 It must now be examined whether the restriction of the applicant's freedom of movement was "justified in the public interest in a democratic society".

68 The measure complained of was applied in areas of Amsterdam where, as was established by the national courts, an emergency situation existed in respect of the traffic in and the use of hard drugs in public. It therefore pursued the legitimate aims of maintenance of *ordre public* and prevention of crime.

69 The applicant argued that the two types of prohibition order available to the Burgomaster, namely the eight-hour prohibition order and the fourteen-day prohibition order, were applied uniformly without any regard for the personal circumstances of the individual concerned. Moreover, whatever might have been the situation when the Burgomaster first gave the impugned instructions to the police, after more than ten or eleven years it could no longer be said that so serious a restriction without an adequate legal basis corresponded to a "pressing social need". In fact, the length of time that had passed since the Burgomaster had first designated a part of Amsterdam as an "emergency area", the number of additional areas so designated since then and the continued existence of an "emergency" proved that such designations were ineffective; the impugned measures could therefore not be considered "necessary in a democratic society". The behaviour which might give rise to prohibition orders was in any case designated as criminal by the law and it was thus

more appropriate to arrest offenders than to impose prohibition orders on them. Finally, it was not stated in writing, either in the prohibition order itself or elsewhere, that the applicant could visit the Streetcornerwork Foundation (located within the prohibited area) to collect his social-security benefits. This meant that he risked arrest for disobeying the prohibition order every time he went there.

70 The Government contended that there was a "pressing social need" to remove drug abusers from the part of Amsterdam covered by the prohibition order in order to protect the general public against the nuisance they caused. Before applying such a measure, which was limited in time, to the applicant the Burgomaster had ascertained that he would not suffer undue hardship as a result - that is, that the applicant did not live or work in the area in question - and had ensured that the applicant would be able to collect his social-security benefits and his mail from the Streetcornerwork Foundation. It could therefore not be said that the restriction on the applicant's freedom of movement was disproportionate.

71 The applicant claimed that the restriction imposed on him was disproportionate. The Court cannot agree with the applicant for the following reasons. The Court accepts that special measures might have to be taken to overcome the emergency situation in the area concerned at the relevant time (see § 24 above). It cannot be said that the national authorities overstepped their margin of appreciation when, in order to put an end to this situation, the Burgomaster issued a prohibition order to the applicant.

72 The Court notes that the applicant had already received several prohibition orders for eight hours but had nevertheless returned each time to the area to use hard drugs in public, that he was informed that if he committed such acts again in the near future the Burgomaster would be requested to impose a prohibition order for fourteen days, that he did not live or work in the area in question and that provision had been for him to enter the area with impunity for the purpose of collecting his social-security benefits and his mail from the Streetcornerwork Foundation.

73 The Court dismisses as hypothetical and unsubstantiated the suggestion that the applicant could be arrested on his way to the Streetcornerwork Foundation to collect his social-security benefits despite the promise of impunity, since it is not apparent (and has not been claimed) that such an eventuality ever materialised.

74 In these circumstances, the Court finds that the restriction on the applicant's freedom of movement cannot be regarded as disproportionate.

75 In conclusion, there has been no violation of Article 2 of Protocol No. 4 of the Convention.

## II. Alleged violation of article 8 of the Convention

76. The applicant also alleged a violation of his right to respect for his "private life" as guaranteed by Article 8 of the Convention in that the prohibition order prevented him from visiting persons and institutions in the area concerned.

Article 8 of the Convention provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

77. The Government expressed the view that a separate discussion of the case under this Article was unnecessary, since these complaints largely coincided with the applicant's complaints under Article 2 of Protocol No. 4.

78. The Court agrees with the Government that, since the applicant's complaints under Article 8 of the Convention essentially coincide with his complaints under Article 2 of Protocol No. 4, there is no issue under the former Article that needs to be addressed separately.

For these reasons, the Court

1. Holds by 4 votes to 3 that there has been no violation of Article 2 of Protocol No. 4 to the Convention;
2. Holds unanimously that there is no separate issue under Article 8 of the Convention.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Gaukur Jörundsson, Mr Türmen and Mr Maruste is annexed to this judgment.

Joint dissenting opinion of judges Gaukur Jörundsson, Türmen and Maruste

To our regret we are unable to agree with the conclusion reached by the majority as regards a violation of Article 2 of Protocol No. 4. In particular, we cannot find that the restriction here at issue was "in accordance with law".

While we concur with the majority opinion that a basis for the restriction in question existed in domestic law, we do not think that the requirements of "accessibility" and "foreseeability" were met.

This restriction was not based directly on Sections 172 and 175 of the Municipality Act. It was based on delegated legislation - namely, instructions under those provisions issued by the Burgomaster to the police. It is not in dispute that these instructions were neither published nor laid open to public inspection, and that at the relevant time there was no municipal bye-law regulating these matters, nor any other text enacted by an elected representative body. It follows that the precise content of the texts on which the fourteen-day prohibition order was based could not be known or studied either by the applicant or by any person advising him - in other words, these texts were not accessible.

It is true, as the Government state and the majority note, that persons in the applicant's position were warned orally and in writing by a police officer that a fourteen-day prohibition order might be issued against them if they committed any further breach of public order. Although such persons were thus put on notice that they might be made subject to a restriction on their freedom of movement, this cannot in our opinion be considered a proper substitute for public access to the official text of the instructions themselves (see the *Silver and Others v. the United Kingdom* judgment of 25 March 1983, Series A no. 61, p. 33, §§ 87 and 93). It should be remembered that such access does not only enable persons affected by them to regulate their conduct. It also places them in a position to verify the use made of the powers they grant, thus constituting an important safeguard against abuse. It is argued by the majority that the accessibility requirement was satisfied, since the case-law concerning the interpretation of the relevant provisions of Municipality Act was published. In common-law countries, of course, judge-made law is generally binding as "law" in its own right. Even in civil-law countries case-law is admittedly an important source of guidance as to the interpretation of prescribed legal norms. However, we do not accept that publishing the interpretation of a legal text can be a substitute for public access to the legal text itself.

We find no precedent for such reasoning in the Court's case-law until now.

The only accessible legal provisions on which the restriction at issue was based were thus Sections 172 and 175 of the Municipality Act. As noted, it conferred on the Burgomaster a large measure of discretion to give orders. As the Court has stated many times and as the majority state again in this case, the law must be formulated with sufficient precision to enable the persons concerned - if need be, with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, a law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, among other authorities, the *Margareta and Roger Andersson* judgment of 25 February 1992, Series A no. 226-A, p. 25, § 75). Furthermore, to grant broad and unspecified discretionary powers to an executive authority is not compatible with the very idea of the rule of law which is the cornerstone of the Convention and has always been upheld by the Court in its case-law. In our opinion, Sections 172 and 175 of the Municipality Act did not satisfy these requirements in the circumstances of the present case. They were addressed only to the Burgomaster, entitling him in case of "a riotous movement, gathering or other disturbance of public order or of serious calamities, as well as in case of a well-founded fear of the development thereof", to give orders, the nature of which was not specified, to persons who were not identified with a view to maintaining public order or limiting general danger. They did not give persons in the applicant's position any guidance as to the possible consequences of their behaviour. We thus find that the "foreseeability" requirement enshrined in the concept of "law" has not been met. Consequently, we reach the conclusion that there has been a violation of Article 2 of Protocol No. 4 of the Convention.

#### Annotatie

In 1983 verklaart de burgemeester van Amsterdam een groot deel van het stadscentrum tot noodgebied in de zin van art. 175 Gemw (art. 219 Gemw oud) en geeft hij opdracht aan de politie om in zijn naam verwijderingsbevelen van acht uren te geven aan personen die zich schuldig maken aan verstoring van de openbare orde als gevolg van bepaalde, in de instructie omschreven, handelingen waaronder openlijk drugsbezit of drugsgebruik. In 1989 breidt de burgemeester het noodgebied uit en creëert hij een nieuwe maatregel: indien tegen iemand in zes maanden tijd vijf keer proces-verbaal is opgemaakt wegens verstoring van de openbare orde als gevolg van hard drugsbezit, wapenbezit, overtreding van achtuursbevelen, geweldgebruik, autodiefstal of heling, kan de burgemeester een veertiendagenbevel opleggen. De politie aan wie deze bevoegdheid niet is gemandateerd dient na vier overtredingen van achtuursbevelen voor deze maatregel te waarschuwen.

Aan L. is in de maanden september, oktober en november 1994 vijf keer een verwijderingsbevel van acht uren opgelegd voor een gebied in Amsterdam dat bekend staat onder de naam Ganzenhoef, onder meer wegens openlijk bezit en gebruik van hard drugs. Tijdens het verhoor ter gelegenheid van het opleggen van de vijfde verblijfsontzegging deelt de politie aan L. mee dat hij bij een volgende overtreding een verwijderingsbevel van 14 dagen riskeert. Nadat voor een zesde keer het gebruik van hard drugs wordt geconstateerd, legt de burgemeester op 28 oktober 1993 inderdaad een verblijfsontzegging van 14 dagen op.

L. gaat in bezwaar en nadat dit ongegrond is verklaard in beroep. De rechtbank deelt zijn opvatting dat de hinder van het openbare leven als gevolg van drugs gerelateerde

overlast geen noodsituatie in de zin van art. 175 Gemw oplevert (Rb. Amsterdam, 19 januari 1996, JB 1996/49, Gst. 1996, 7027 nr. 2). In hoger beroep blijkt de Afdeling bestuursrechtspraak hier anders over te denken: het openlijk gebruik van en handel in drugs gepaard gaande met intimiderend groepsgedrag en bedreiging van passanten etc. in het Ganzenhoefgebied leveren wel degelijk een noodsituatie op als bedoeld in art. 175 Gemw (art. 219 gemw oud). En aangezien deze verstoring van de openbare orde niet met de gewone, bestuursrechtelijke middelen adequaat kan worden bestreden - er vigeerde toentertijd nog geen APV die voorzag in de mogelijkheid van het opleggen van verwijderbevelen - is de inzet van de noodbevoegdheid rechtmatig. Het opleggen van een veertiendagenbevel is bovendien niet onredelijk in de ogen van de Afdeling, nu L. niet in het Ganzenhoefgebied woont, maar hier slechts verblijf houdt, althans er tenminste twee keer per week aanwezig moet zijn om zijn bijstandsuitkering te innen en zijn post op te halen (ABRvS 19 december 1996, AB 1997, 79 (m.nt. FM)).

De rechter eist slechts een zorgvuldige motivering van de burgemeester van de vrees voor herhaling van het overlast veroorzakende gedrag als rechtvaardiging voor de langere periode. Het verwijderingsbevel mag niet het karakter hebben van een sanctie, want tot het geven hiervan verleent art. 175 Gemw (oud art. 219 lid 1) niet de bevoegdheid (Vz. ARRvS 31 juli 1989, AB 1990, 315).

Voor het EHRM klaagt L. onder meer over schending van art. 2 van het Vierde Protocol. Het veertiendagenbevel ontbeert volgens hem een wettelijke basis, is slechts gebaseerd op een interne, niet-gepubliceerde instructie voor de politie van de burgemeester en is niet noodzakelijk in een democratische samenleving.

Volgens constante jurisprudentie van het EHRM is het ten eerste aan de nationale autoriteiten, in het bijzonder aan de gerechten, om het nationale recht te interpreteren en toe te passen. In dit geval ziet het Hof geen reden om van deze lijn af te wijken en conformeert het zich aan het oordeel van de Afdeling bestuursrechtspraak over de rechtmatigheid van het noodbevel dat in 1992 was genomen. Die beschouwde de inzet van de noodbevoegdheid van art. 175 Gemw als rechtmatig evenals de Hoge Raad Raad (HR 23 april 1996, NJ 1996, 514), hoewel dit college wel een kunstgreep toepast om tot dit oordeel te komen.

De Hoge Raad neemt 17 oktober 1989 als ingangsdatum van de uitzonderingssituatie. Dat is evenwel niet de datum waarop de noodsituatie in de zin van art. 175 Gemw inging, maar de datum waarop de burgemeester zijn instructie aan de hoofdcommissaris van politie aanscherpte, uitbreiding gaf aan het noodgebied en de mogelijkheid opende om voortaan na zes overtredingen een veertiendagenbevel op te leggen. Hieruit valt af te leiden dat dit college meer moeite heeft met de structurele inzet van de noodbevoegdheid dan de Afdeling tot dan toe. Volgens de wetshistorie is het ook niet de bedoeling dat een burgemeester gedurende meer dan tien jaren de voorgeschreven democratische procedure van gemeentelijke wetgeving omzeilt door middel van noodbevelen. De toepassing van art. 175 Gemw is bedoeld voor buitengewone situaties waarin vergaande maatregelen onmiddellijk nodig zijn om de openbare orde te handhaven.

Het kan dan ook haast geen toeval zijn dat de Afdeling amper een maand na de uitspraak van de Hoge Raad de structurele inzet van de noodbevelen, zoals gestart in 1983, met ingang van 1996 onrechtmatig verklaart: in verband met eisen van rechtszekerheid en legitimatie van overheidsoptreden dienen verblijfsontzeggingen voortaan op een door de gemeenteraad vastgestelde verordening te worden gebaseerd (ABRvS 14 mei 1996, RAwb1996, 108 (m.a. M.A.D.W. de Jong), JB 1996, 196 (m.nt. BvM)).

Door zich te conformeren aan de nationale jurisprudentie neemt het EHRM een eerste, niet onbelangrijke hobbel. Het onderliggende probleem zou echter gemakkelijk kunnen terugkeren bij de vraag of de maatregel wel noodzakelijk is in een democratische rechtsorde: "necessary in a democratic society." Zou de maatregel werkelijk noodzakelijk zijn, dan mag men verwachten dat het verwijderingsbevel na zo'n lange tijd wel een basis zou hebben gekregen - quod non - in democratisch gelegitimeerde regelgeving. Het Hof omzeilt dit rif echter bekwaam door niet te toetsen aan de in het derde lid vastgelegde beperkingsgrond "noodzakelijk in een democratische rechtsorde", maar aan de in het vierde lid ruimer omschreven grond: "justified in the public interest in a democratic society." Van een pressing social need hoeft in dit geval geen sprake te zijn. Het Hof toetst uitsluitend of de inbreuk op het recht op bewegingsvrijheid niet disproportioneel is.

Problematischer ligt het voor de kwaliteitsmaatstaven - kenbaarheid en voorzienbaarheid - die worden gesteld aan de nationale wettelijke regeling die de basis vormt voor de beperking van het recht op bewegingsvrijheid. Het is slechts de kleinst mogelijke meerderheid binnen het Hof die de mening is toegedaan dat aan beide eisen wordt voldaan. Aan de kenbaarheidseis is volgens het Hof voldaan, nu de grondslag voor het optreden van de burgemeester is neergelegd in de (bekendgemaakte) Gemw en de uitleg van deze bepaling blijkt uit gepubliceerde rechtspraak.

De dissenters Gaukur Jörundsson, Türmen en Maruste hebben hiertegen bezwaren. Die bezwaren zijn echter terug te voeren op het feit dat de beperking volgens de dissenters niet direct op de Gemw is gebaseerd, maar op "delegated legislation". Zij passen daarom - anders dan het Hof doet - de kenbaarheidseis toe op de instructieregels aan de politie. Die zijn nooit gepubliceerd, noch hebben zij ter inzage gelegen, zodat klager noch een juridisch adviseur van de precieze inhoud ervan op de hoogte kon zijn. De waarschuwing die vooraf aan een betrokkene moest worden gegeven, kan men in hun ogen niet kwalificeren als een geschikt middel ter vervanging van de openbaarheid van de officiële tekst van de instructie zelf. Zij verwijzen hierbij naar de zaak Silver en anderen t. V.K. (25 maart 1983, Serie A nr. 61, p. 33, de paragrafen 87 en 93).

"Public access" heeft, aldus de dissenters, niet alleen als doel justitiabelen in staat te stellen hun gedrag op een norm af te stemmen, maar ook om een waarborg te bieden tegen mogelijk machtsmisbruik. Bekendmaking maakt het immers mogelijk om te controleren of er op een juiste manier gebruik wordt gemaakt van de bevoegdheid. Ze erkennen dat rechtspraak, zelfs in de continentale rechtstelsels, een belangrijke leidraad is voor de uitleg van voorschriften, maar het publiceren hiervan kan de bekendmaking van de relevante normen niet vervangen. Voor een dergelijk standpunt bestaat naar hun mening ook geen precedent in de jurisprudentie van het Hof.

In een commentaar onder deze uitpraak in European Human Rights Cases (afl. 7, p. 59) bestrijdt annotator J. van der Velde deze stelling. Er bestaat volgens hem wel een precedent. Het Hof heeft in de zaak Gaweda t. Polen (14 maart 2002, EHRC, 2002, 35 (m.nt. A.W. Heringa)) in dezelfde zin betekenis aan de jurisprudentie toegekend. Los hiervan kan men de vraag stellen of de terminologie "delegated legislation" wel op haar plaats is. Van een bevoegdheid tot het uitvaardigen van een algemeen verbindend voorschrift is in art. 175 Gemw geen sprake. De term delegated legislation is formeel daarom niet zuiver. Toch lijkt het daar wel op: de instructie van de burgemeester bestaat niet alleen uit een mandaatsbesluit, maar bevat ook algemene regels, inhoudende de omschrijving van handelingen waarvoor een verwijderingsbevel moet worden gegeven. Zij kunnen echter nog het beste als beleidsregels gekwalificeerd

worden. De kenbaarheid daarvan was in 1989 nog niet geregeld. Tegenwoordig geldt zowel voor mandaatsbesluiten, als voor beleidsregels de in de Awb voorgeschreven wijze van bekendmaking.

Art. 3:42 Awb noemt als mogelijkheden een door de overheid uitgegeven blad, een krant dan wel de bekendmaking op een andere geschikte wijze. Zou dit systeem van bekendmaking hebben gegolden ten tijde van het hier aangevochten besluit van de burgemeester, dan zou aan de bekendmakingseis zijn voldaan. De mondelinge mededeling door middel van de waarschuwing lijkt zelfs bij uitstek de geschikte manier om drugsverslaafden op de hoogte te stellen, want zij behoren in het algemeen niet tot de categorie oplettende burgers, die het nieuws op dit soort van punten nauwkeurig volgt en daarop hun gedrag afstemt.

Gesteld dat - zoals de dissenters doen - er inderdaad sprake zou zijn van "delegated legislation", is het dan terecht om aan de kenbaarheid van de noodbevelen dezelfde strikte eisen te stellen als aan gewone wetgeving? Dat lijkt ons niet per definitie het geval. In een "uitzonderingssituatie" - die hier overigens materieel niet aan de orde is - kan het plotseling geboden zijn om bepaalde noodbevelen te nemen en uit te voeren zonder dat voldaan is aan de strikte eisen van "accessibility". Om die reden bevat art. 175 Gemw een eigen waarborg in het tweede lid: de burgemeester kan niet tot maatregelen van geweld overgaan dan na het doen van de nodige waarschuwing. Een meerderheid van de Straatsburgse rechters meent dat de wettelijke norm waarop de beperking is gebaseerd, eveneens voldoet aan de voorzienbaarheidseis: zij is met voldoende precisie geformuleerd om een persoon in staat te stellen - zonedig met behulp van deskundig advies - om zijn gedrag hierop af te stemmen. Het gaat hier weliswaar om een betrekkelijk open norm, maar dat kan ook niet anders: de omstandigheden die de burgemeester nopen tot het uitvaardigen van de noodzakelijke noodbevelen kunnen zo uiteenlopend zijn dat het ondoenlijk is een formulering te kiezen die alle eventualiteiten dekt. Het is om die reden dat het Hof cruciale betekenis toekent aan de waarschuwing die vooraf aan L. is gegeven. Die concretiseert de norm voldoende om daarop zijn gedrag te kunnen afstemmen.

Een minderheid van de rechters kan niet leven met de gedachte dat voldaan is aan de eis van voorzienbaarheid: art. 175 Gemw verstrekt naar hun mening een zodanig ruime mate van "discretion" aan de burgemeester, dat er sprake is van strijd met de "rule of law", de hoeksteen van de Conventie. Zij beroepen zich hierbij op de Margareta en Roger Andersson zaak (EHRM 25 februari 1992, serie A, nr. 226-A, p. 25, paragraaf 25). Aan de eisen die het Hof daarin stelt aan beleidsvrijheid wordt naar hun mening niet voldaan: de discretionaire bevoegdheid moet een legitiem doel dienen, de omvang van de beleidsvrijheid en de wijze van invoering dienen in zodanige mate te zijn uitgewerkt dat zij het individu op adequate wijze beschermen tegen willekeur.

Het zijn serieuze tegenargumenten, want in feite beslist het Hof dat de bepaling niet zelf hoeft te voldoen aan de eis van de voorzienbaarheid. Een bestuursorgaan kan een zodanig gebrek opheffen door de norm te concretiseren in de vorm van een waarschuwing. Het is een constructie waarvan het lijkt alsof zij in de toekomst tot de nodige inflatoire effecten op de voorzienbaarheidseis gaat leiden. Men zou echter uit het arrest kunnen afleiden dat het Hof de waarschuwing als remedie tegen te vage normstelling wil beperken tot noodsituaties.

Zou het in de zaak L. werkelijk om de incidentele inzet van een noodbevoegdheid zijn gegaan, dan viel op deze uitspraak weinig af te dingen. In werkelijkheid - en dat was algemeen bekend - heeft de Amsterdamse burgemeester dit instrument gedurende meer dan een decennium toegepast. Een structureel gebruik van de noodbevoegdheid

ter beheersing van een dagelijks terugkerende overlastsituatie is evenwel niet te rechtvaardigen. Doordat het Hof zich wat dit onderdeel betreft echter conformeert aan de nationale rechtspraak, komt het aan de rechtmatigheidsbeoordeling daarvan niet toe. Het arrest toont daarmee op navrante wijze de beperkingen aan van het verdragsrechtelijk toezichtsmechanisme.

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