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

FORMER FIRST SECTION

CASE OF OLIVIEIRA v. THE NETHERLANDS

(Application no. 33129/96)

JUDGMENT

STRASBOURG

4 June 2002

FINAL

06/11/2002

In the case of Olivieira v. the Netherlands,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 October 2001 and on 14 May 2002,

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

PROCEDURE

1. The case originated in an application (no. 33129/96) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Netherlands national, Mr Hans Walter Olivieira ("the applicant"), on 9 July 1996.

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 1 July 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. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). It was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 6 June 2000 the Chamber declared the applicant's complaints under Articles 8 of the Convention and 2 of Protocol No. 4 admissible and

the remainder of the application inadmissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. The applicant 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 the former First Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The prohibition order

10. On 6 November 1992 the Burgomaster (*Burgemeester*) of Amsterdam, relying on section 219 of the Municipality Act (*Gemeentewet*) as in force at the relevant time, imposed a prohibition order (*verwijderingsbevel*) on the applicant to the effect that the latter would not be allowed to enter a particular area, the so-called emergency area, of the city centre for fourteen days. The following events were referred to in the Burgomaster's decision as having led to this order being issued.

(i) It transpired from police reports that on 21 July (twice), 29 July, 12 August, 26 August and 10 September 1992 the applicant had either overtly used hard drugs or had had hard drugs in his possession in streets situated in the emergency area and that on each of those occasions he had been ordered to leave the area for eight hours.

(ii) On 5 November 1992 the applicant had been heard by the police about his conduct and he had been told that he would either have to desist from such acts, which disturbed public order (*openbare orde*), or 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 fourteen-day prohibition order on him. The applicant had told the police that, as well as preparing and using drugs in the area concerned, he also met his friends there.

(iii) On 5 November 1992 the applicant had nevertheless overtly used hard drugs on one of the streets in the emergency 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 fourteen-day prohibition order on the applicant.

11. In the opinion of the Burgomaster, the applicant would again commit acts disturbing public order in the near future. In this context, the Burgomaster took account of the kind of conduct involved, namely 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's prohibition order

12. The applicant lodged an objection (*bezwaarschrift*) against the Burgomaster's prohibition order. He submitted, *inter alia*, that the Burgomaster ought only to make use of the emergency powers granted him by section 219 of the Municipality Act in exceptional situations. As the Burgomaster had been issuing eight-hour prohibition orders since 1983 and fourteen-day ones since 1989, it could no longer be argued that an exceptional situation prevailed. Moreover, the Burgomaster had had sufficient time to ensure that the emergency measures were enacted in a general municipal by-law (*Algemene Politie Verordening*).

13. The applicant also stated that the prohibition order, which in his opinion constituted a criminal sanction, interfered with his right to liberty of movement and violated the principle of proportionality. In this connection, he argued that he had always complied with the prohibition orders imposed on him for a duration of eight hours and that he therefore failed to understand why a prohibition order for fourteen days had been called for all of a sudden.

14. On 14 January 1993 a hearing took place before an advisory committee. At this hearing the representative of the Burgomaster stated that, in 1992, 3,300 eight-hour prohibition orders (compared with 2,130 in 1991) and 204 fourteen-day prohibition orders (compared with 111 in 1991) had been issued against people dealing in or using drugs or committing acts related to those activities. The representative further stated that it was intended to enact the power to issue prohibition orders in a general municipal by-law.

15. On 8 March 1993 the committee advised the Burgomaster to dismiss the objection and to maintain the prohibition order. It considered, *inter alia*, that the disruption of public order in the area concerned was still such as to constitute an exceptional situation within the meaning of section 219 of the Municipality Act. In view of the seriousness and scale of the problems

involved, the committee found it unlikely that public order could be adequately maintained by normal methods and that for that reason the Burgomaster was entitled to use the powers granted him under section 219.

16. Having regard to the fact that the applicant had, within a short period of time, regularly committed acts which had disturbed public order and that the eight-hour prohibition orders which had been issued had not prevented him from doing so, the committee further found that the imposition of a prohibition order for a duration of fourteen days had not been unreasonable. It did not agree with the applicant that the impugned measure constituted a penalty, as it had been taken 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.

17. By a decision of 11 March 1993 the Burgomaster dismissed the applicant's objection, adopting as his own the reasoning applied by the advisory committee.

C. The applicant's appeal against the Burgomaster's decision

18. The applicant lodged an appeal against the Burgomaster's decision with the Judicial Division (*Afdeling rechtspraak*) of the *Raad van State* on 19 March 1993. In his appeal, which he detailed in a letter of 17 May 1993, he raised the same complaints as he had before the Burgomaster. In his written observations of 14 March 1994 the Burgomaster referred to the report drawn up by the advisory committee. A hearing took place before the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*), the successor to the Judicial Division, on 23 January 1996.

19. On 14 May 1996 the Administrative Jurisdiction Division dismissed the applicant's appeal. Its reasoning included the following:

> "Article 12 of the International Covenant on Civil and Political Rights provides that everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose his residence. According to the third paragraph of that provision, this right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in that Covenant. An almost identical provision is contained in Article 2 of Protocol No. 4 to the Convention.
>
> Section 219, first paragraph, of the Municipality Act 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.
>
> Contrary to what the party seeking review has argued, the issuing of orders in the situations set out in section 219 of the Municipality Act does not run counter to the above-mentioned treaty provisions, since the latter provide for the possibility of

restricting the rights concerned by 'law' – a term which includes an order issued by the Burgomaster pursuant to the law – for the protection of public order.

Section 219 of the Municipality Act is a legal provision intended for situations where ordinary means are insufficient for restoring and maintaining public order.

In the opinion of the Division these ordinary means may be considered insufficient in the present case and there was, at the time of the decision appealed against, an exceptional situation. It is relevant in this context that at the time of the decision appealed against it was not possible to solve the problem in question through a municipal regulation. There was not at that time – and there is not now – any relevant provision in a municipal by-law, nor is any other sufficient legal means available.

On the basis of the case file and the submissions made at the hearing, in addition to the number of eight-hour and fourteen-day orders that have been issued in the area concerned, the Division finds that the appropriate staff and means available to the defendant were inadequate to counter the difficult situation arising from breaches of public order resulting from the behaviour of drug addicts as described in the decision of 13 November 1989. This leads the Division to hold that it cannot be stated that the defendant could not reasonably make use of the powers granted him by section 219 of the Municipality Act.

The Division would, however, express the following reservations.

It cannot see why, if the situation described above should continue, the possibility of issuing fourteen-day prohibition orders should not be provided for in a by-law enacted by the Local Council. From the point of view of legal certainty and legitimacy of action by public authority, a regulation provided by a municipal by-law seems preferable to a measure based on the defendant's emergency powers. It appears from the case file that the defendant had already prepared the draft of an appropriate provision, which, however, was never incorporated into the General Municipal By-Law because the method used at present, which was decided on in consultation between the defendant, the police and the prosecuting authorities [*verweerder, politie en justitie*] with regard to the fourteen-day prohibition orders, was considered extraordinarily effective. The Division is, however, of the opinion that the presumed effectiveness of an emergency measure coupled with the prosecuting policy of the prosecution authorities [*Openbaar Ministerie*] do not constitute a reason not to make appropriate provision at the municipal level. The Division considers that the defendant, in assessing whether there is an exceptional situation within the meaning of section 219 of the Municipality Act (now section 175 of the Municipality Act), may, in principle, no longer rely on the lack of an appropriate provision in a municipal by-law, in view of the length of time this drugs-related nuisance [*drugsoverlast*] has already prevailed, causing it to display structural aspects, if the possibility of issuing fourteen-day prohibition orders is not now provided for in a by-law enacted by the Local Council within a reasonable time."

This decision was published, with a learned comment, in *Jurisprudentie Bestuursrecht* (Administrative Law Jurisprudence) 1996, no. 169.

D. The Criminal proceedings

20. Apart from the proceedings described above, the applicant was convicted by a single-judge Chamber (*politierechter*) of the Regional Court (*arrondissementsrechtbank*) of Amsterdam on 8 December 1992 of having intentionally failed to comply on 20 November 1992 with the prohibition order imposed by the Burgomaster on 6 November 1992. Under Article 184 of the Criminal Code (*Wetboek van Strafrecht*), this failure constituted a criminal offence. He was sentenced to four weeks' imprisonment. Following an appeal to the Amsterdam Court of Appeal (*gerechtshof*), which also convicted the applicant, an appeal on points of law was lodged with the Supreme Court (*Hoge Raad*). The Supreme Court dismissed the applicant's appeal on 8 December 1998.

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Applicable statutory provisions

22. At the material time section 219 of the Municipality Act (*Gemeentewet*) 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.
>
> ..."

23. Article 184 of the Criminal Code (*Wetboek van Strafrecht*), in its relevant parts, 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.
>
> ...
>
> 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 one-third."

24. In the Netherlands, the Burgomaster of a town or city is appointed by the Queen (section 65 of the former Municipality Act). Municipal regulations, such as general municipal by-laws, are adopted by the

Municipal Council (section 168 of the former 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

25. By a 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 issue orders, based on section 219 of the Municipality Act as in force at the time, for people to leave a particular area within the city centre and not to return to it for eight hours.

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

27. By a letter of 17 October 1989 the Burgomaster amended 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, and/or dealing in, hard drugs. The attendant 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."

28. The Burgomaster's instructions were further amended by a letter of 13 November 1989 under the terms of which fourteen-day prohibition orders could no longer be issued by the police on behalf of the Burgomaster but only by the Burgomaster himself.

29. A fourteen-day prohibition order 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*:

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

(ii) dealing on the public highway in addictive substances appearing in Annex 1 to the Opium Act;

(iii) overt possession of knives or other banned objects in so far as this constituted a criminal offence under the General Municipal By-Law or the Arms and Ammunition Act (*Wet Wapens en Munitie*);

(iv) committing the offence defined in Article 184 of the Criminal Code where the order not complied with was an eight-hour prohibition order;

(v) 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.

30. 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 fourteen-day prohibition order.

31. It is undisputed that the aforementioned Burgomaster's letters 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

32. In a decision of 11 January 1989 (*Administratiefrechtelijke Beslissingen* (Administrative Law Reports) 1989, no. 424), the President of the Judicial Division of the *Raad van 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 that of being a residential and commercial area. However, the situation threatens all the time to become unbearable.
>
> The extent to which matters have deteriorated for the residents is again 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, amphetamines, LSD, heroin and other mind-altering substances. In this area especially, street dealers 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 attendant criminality, seriously affect the area.
>
> As a result, among other things, of 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. Its 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."

33. 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 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 Protocol No. 4 to the Convention, 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 upheld a judgment of the Amsterdam Court of Appeal sentencing the defendant in that case to two weeks' imprisonment.

D. Procedure

34. Section 7 of the Act on Administrative Jurisdiction as to Decisions of the Administration (*Wet administrative rechtspraak overheidsbeschikkingen* – "the AROB Act") provided that a person directly affected by an administrative decision (certain categories of decisions, not relevant to the present case, excepted) could submit an objection to the administrative body that had taken the decision. The objector was entitled to be heard; the administrative body could delegate the hearing to an advisory committee (section 14(1)).

35. An appeal against the decision of the administrative body lay to the Judicial Division of the *Raad van State*, an administrative tribunal (section 8 of the AROB Act).

36. The AROB Act was repealed on 1 January 1994 when the General Administrative Law Act (*Algemene wet bestuursrecht*) came into force.

37. Also as of 1 January 1994 the Judicial Division of the *Raad van State* was replaced by the Administrative Jurisdiction Division (sections 26 et seq. of the *Raad van State* Act (*Wet op de Raad van State*), as amended). The new Division took over the undecided appeals still pending before the Judicial Division.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

38. The applicant, who did not complain about the eight-hour prohibition orders imposed on him, alleged 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 its relevant parts, as follows:

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

...

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. Whether there was a "restriction" of the applicant's liberty of movement

39. The Government did not dispute that there had been a restriction of the applicant's rights as set forth in the first paragraph of Article 2 of Protocol No. 4. The Court so finds.

B. Whether the restriction complained of was "in accordance with law"

40. 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. He drew attention in this connection to the Administrative Jurisdiction Division's criticism in the present case of the continued lack, since 1983, of any legal basis in a municipal by-law (see paragraph 19 above).

41. 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 not therefore 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 form 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 those circumstances, the foreseeability requirement enshrined in the concept of "law" had not been met.

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

43. The Government, in their observations submitted at the stage of the examination of the admissibility of the application, considered that section 219 of the Municipality Act, as in force at the relevant time, provided a sufficient legal basis. They pointed to the relevant domestic case-law, which confirmed the existence of an emergency situation in the districts of Amsterdam concerned by the measures in question and defined the scope of application of prohibition orders.

44. 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 issued with 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 issuing of a fourteen-day prohibition order could not therefore have come as a 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.

45. 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.

46. 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 drug users 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 or to pick up his mail, that the applicant's movements and activities were in no way restricted outside the centre of Amsterdam, 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.

47. 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).

48. In the instant case the Court notes that section 219 of the Municipality Act, as in force at the relevant time, conferred upon the

Burgomaster a discretion to issue the orders which he deemed necessary in order to quell or prevent serious disturbances of public order.

49. In the present case both the Supreme Court – in a judgment which concerned eight-hour prohibition orders (see paragraph 33 above) – and the Administrative Jurisdiction Division of the *Raad van State* in the present case (see paragraph 19 above) found section 219 of the Municipality Act, as it then applied, 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.

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

51. 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, while the case-law concerning its interpretation was published in domestic law reports (see paragraphs 32 and 33 above).

52. 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 *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67; see also, more recently, *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II, and *Rotaru*, 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 ..."

53. Section 219 of the former Municipality Act is admittedly rather general in terms and provides for intervention by the Burgomaster when he deems it to be necessary in order to quell or prevent serious disturbances of public order.

54. 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.

55. 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 given to the effect that any further breach could result in

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

56. In its decisions of 11 January 1989 and 31 July 1989 the *Raad van State* ruled that, at that time, the situation in the relevant area in the centre of Amsterdam could be considered an "emergency situation" within the meaning of section 219 of the former Municipality Act because of the public trafficking in and use of hard drugs.

57. It is not in dispute that in the instant case the applicant, 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 fourteen-day prohibition order 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 did in fact issue a fourteen-day prohibition order.

58. 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 fourteen-day prohibition order was imposed on him. Taking also into consideration that the applicant could institute objection proceedings and file a subsequent appeal with the *Raad van State*, of which possibilities he did avail himself, adequate safeguards were afforded against possible abuse.

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

C. Whether the restriction complained of was "justified by the public interest in a democratic society"

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

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

62. In the applicant's view, whatever might have been the situation when the Burgomaster first gave the impugned instructions to the police, after

approximately twelve years it could no longer be said that so serious a restriction without an adequate legal basis corresponded to a "pressing social need". Moreover, the applicant had been ordered to stay out of a large part of the Amsterdam city centre, which was where he had the habit of meeting all his friends and acquaintances and where places of importance were located. The fourteen-day prohibition order imposed on him was therefore disproportionate.

63. The Government contended that there was a "pressing social need" to remove drug users from the part of Amsterdam covered by the prohibition order so as to protect the general public against the nuisance they caused. Before applying such a measure 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 did not have his post office box there. The measure was limited in time, and the applicant was moreover not prevented from meeting his friends elsewhere. It could not therefore be said that the restriction on the applicant's freedom of movement was disproportionate.

64. The Court cannot agree with the applicant that the restriction imposed on him was disproportionate. The Court accepts that special measures might have had to be taken to overcome the emergency situation in the area concerned at the relevant time (see paragraph 32 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 imposed a prohibition order on the applicant.

65. Taking into account that the applicant had already been issued with several eight-hour prohibition orders 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 fourteen-day prohibition order, and that he did not live or work in the area in question and did not have a post office box there, the Court finds that the restriction on the applicant's freedom of movement was not disproportionate.

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

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

67. 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 centre of Amsterdam. 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."

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

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

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three 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.

Done in English, and notified in writing on 4 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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.

E.P.
M.O'B.

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 to the Convention. 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 section 219 of the former Municipality Act. It was based on delegated legislation – namely, instructions under that provision 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 by-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 stated by the Government and noted by the majority, 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 *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, pp. 33 and 35-36, §§ 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 provision 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.

The only accessible legal provision on which the restriction at issue was based was thus Section 219 of the former Municipality Act. As noted, it conferred on the Burgomaster a large measure of discretion to issue 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, *Margareta and Roger Andersson v. Sweden*, 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, section 219 of the Municipality Act, as in force at the time, did not satisfy these requirements in the circumstances of the present case. It was 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 issue 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. It 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 to the Convention.