

COURT (CHAMBER)

**CASE OF X AND Y v. THE NETHERLANDS**

*(Application no. 8978/80)*

JUDGMENT

STRASBOURG

26 March 1985

**In the case of X and Y v. the Netherlands\***,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,

Mr. G. WIARDA,

Mr. B. WALSH,

Sir Vincent EVANS,

Mr. C. RUSSO,

Mr. R. BERNHARDT,

Mr. J. GERSING,

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

Having deliberated in private on 28 November 1984 and 27 February 1985,

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

## PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1983, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 8978/80) against the Kingdom of the Netherlands lodged with the Commission on 10 January 1980 under Article 25 (art. 25) by Mr. X, on behalf of himself and of his daughter, Y. The applicants, who are both of Netherlands nationality, asked for their identity not to be disclosed.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3, 8, 13 and 14 (art. 3, art. 8, art. 13, art. 14).

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

4. The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. G. Wiarda, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the Vice-President of the Court (Rule 21 para. 3 (b)). On 25 January 1984, Mr. Wiarda, acting as the President of the Court, drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. B. Walsh, Sir Vincent Evans, Mr. C. Russo, Mr. R. Bernhardt and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 para. 5), ascertained, through the Registrar, the views of the Agent of the Netherlands Government ("the Government"), the Delegate of the Commission and the representatives of the applicants regarding the need for a written procedure.

On 16 March 1984, he noted that the applicants did not wish to file a memorial, and directed that the Agent should have until 16 May 1984 to do so and that the Delegate should be entitled to reply in writing within two months from the date of the transmission to him by the Registrar of the Government's memorial (Rule 37 para. 1). On 3 April 1984, the President extended the first of these time-limits until 15 June 1984.

The Government's memorial was received at the registry on 18 June 1984. On 31 August 1984, the Secretary to the Commission notified the Registrar that the Delegate would be presenting his comments at the hearings.

On 5 July, the President directed that the oral proceedings should open on 26 November 1984 (Rule 38). On 23 August, he granted to the applicants' representatives leave to use the Dutch language (Rule 27 para. 3).

On 29 August 1984, Ms. van Westerlaak, the applicants' advokate, notified the Court of her clients' observations on the application of Article 50 (art. 50) of the Convention. Subsequently, those observations were supplemented by means of two letters which she filed during the hearings.

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

There appeared before the Court:

- for the Government

Mr. C. J. SCHNEIDER, Permanent Representative  
of the Netherlands to the Council of Europe,  
*Delegate of the Agent,*

Mr. E. KORTHALS ALTES, Landsavocaat, *Counsel,*

Mrs. W. G. SCHIMMEL-BONDER, Ministry of Justice, *Adviser;*

- for the Commission

Mr. S. TRECHSEL, *Delegate;*

- for the applicants

Ms. I. van WESTERLAAK, advokate,

Mr. E. A. ALKEMA, Professor

at the University of Groningen, *Counsel.*

The Court heard addresses by Mr. Korthals Altes for the Government, by Mr. Trechsel for the Commission and by Ms. van Westerlaak and Mr. Alkema for the applicants, as well as their replies to its questions.

## AS TO THE FACTS

### I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr. X and his daughter Y were born in 1929 and on 13 December 1961 respectively. The daughter, who is mentally handicapped, had been living since 1970 in a privately-run home for mentally handicapped children.

8. During the night of 14 to 15 December 1977, Miss Y was woken up by a certain Mr. B, the son-in-law of the directress; he lived with his wife on the premises of the institution although he was not employed there. Mr. B forced the girl to follow him to his room, to undress and to have sexual intercourse with him.

This incident, which occurred on the day after Miss Y's sixteenth birthday, had traumatic consequences for her, causing her major mental disturbance.

9. On 16 December 1977, Mr. X went to the local police station to file a complaint and to ask for criminal proceedings to be instituted.

The police officer said that since Mr. X considered his daughter unable to sign the complaint because of her mental condition, he could do so himself. The statement lodged by Mr. X read as follows: "In my capacity as father I denounce the offences committed by Mr. B on the person of my daughter. I am doing this because she cannot do so herself, since, although sixteen years of age, she is mentally and intellectually still a child."

10. The police officer drew up a report and it was signed by Mr. X (Articles 163 and 164 of the Code of Criminal Procedure). The officer subsequently informed the public prosecutor's office that in the light of the father's statement and of his own observations concerning the girl's mental condition, she did not seem to him capable of filing a complaint herself. According to the headmaster of the school she was

attending and another teacher there, she was unable to express her wishes concerning the institution of proceedings.

11. On 29 May 1978, the public prosecutor's office provisionally decided not to open proceedings against Mr. B, provided that he did not commit a similar offence within the next two years. The official in charge of the case so informed Mr. X at a meeting on 27 September 1978.

12. On 4 December 1978, Mr. X appealed against the decision of the public prosecutor's office to the Arnhem Court of Appeal, under Article 12 of the Code of Criminal Procedure; he requested the court to direct that criminal proceedings be instituted.

In a supplementary memorial of 10 January 1979, he pointed out that subject to an exhaustive list of exceptions none of which applied in the instant case, a legal representative was entitled to act on behalf of the complainant.

The Court of Appeal dismissed the appeal on 12 July 1979. In fact, it considered it doubtful whether a charge of rape (Article 242 of the Criminal Code; see paragraph 14 below) could be proved. As for Article 248 ter (see paragraph 16 below), it would have been applicable in the instant case, but only if the victim herself had taken action. In the Court of Appeal's view, the father's complaint (Article 64 para. 1 of the Criminal Code; see paragraph 16 below) could not be regarded as a substitute for the complaint which the girl, being over the age of sixteen, should have lodged herself, although the police had regarded her as incapable of doing so; since in the instant case no one was legally empowered to file a complaint, there was on this point a gap in the law, but it could not be filled by means of a broad interpretation to the detriment of Mr. B.

13. By virtue of Article 445 of the Code of Criminal Procedure, there was no possibility of appealing on a point of law to the Supreme Court (Hoge Raad) against this decision.

## II. RELEVANT DOMESTIC LAW

14. As regards sexual offences, the Netherlands Criminal Code makes a distinction between rape (Article 242) and indecent assault (Article 246), recourse to physical violence also being a constituent element of the latter offence.

15. Other more specific provisions afford in this area protection to certain categories of persons whose age, position of dependence or physical incapacity renders it difficult or impossible for them to determine or impose their wishes.

Articles 244 and 245, respectively, make it a criminal offence to have sexual intercourse with a girl under the age of twelve or with a girl between the ages of twelve and sixteen, and under Article 247 it is a criminal offence to commit an indecent assault on boys or girls under the age of sixteen.

Articles 243 and 247 concern, respectively, sexual intercourse with, and indecent assault on, a woman known to the offender to be unconscious or helpless. According to the Supreme Court, however, the word "helpless" refers only to physical incapacity.

Article 249 relates to indecent acts committed with a minor who is in a position of dependence vis-à-vis the perpetrator.

Finally, Article 239 concerns indecency, either in public or while another person is present against his will.

Save for Article 245, none of these provisions makes the institution of criminal proceedings conditional on the filing of a complaint by the victim.

16. The same does not apply to Article 248 ter, whereby a sentence of not more than four years' imprisonment may be imposed on any person who, "through gifts or promises ..., through abuse of a dominant position resulting from factual circumstances, or through deceit, deliberately causes a minor of blameless conduct to commit indecent acts with him or to suffer such acts from him": in a case of this kind, the offender can be prosecuted only on complaint by the actual victim.

Under Article 64 para. 1, however, the legal representative may lodge the complaint on behalf of the victim if the latter is under the age of sixteen or is placed under guardianship (*curatele*); this latter institution exists only for persons who have reached the age of majority, namely twenty-one (Article

378, Book I, of the Civil Code).

17. At the hearings, counsel for the Government informed the Court that the Ministry of Justice had prepared a Bill modifying the provisions of the Criminal Code that related to sexual offences. Under the Bill, it would be an offence to make sexual advances to a mentally handicapped person.

## PROCEEDINGS BEFORE THE COMMISSION

18. Mr. X applied to the Commission on 10 January 1980 (application no. 8978/80). He claimed that his daughter had been subjected to inhuman and degrading treatment, within the meaning of Article 3 (art. 3) of the Convention, and that the right of both his daughter and himself to respect for their private life, guaranteed by Article 8 (art. 8), had been infringed. He further maintained that the right to respect for family life, also guaranteed by the same Article, meant that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse, particularly if the children were minors and if the father was their legal representative. In addition, Mr. X claimed that he and his daughter had not had an effective remedy before a national authority as required by Article 13 (art. 13), and that the situation complained of was discriminatory and contrary to Article 14 (art. 14).

19. The Commission declared the application admissible on 17 December 1981. In its report of 5 July 1983 (Article 31) (art. 31), it expressed the opinion:

- as regards Miss Y,

that there had been a breach of Article 8 (art. 8) of the Convention (unanimously), but not of Article 3 (art. 3) (fifteen votes against one);

that it was not necessary to examine the application either under Article 14 taken in conjunction with Article 8 (art. 14+8) or Article 3 (art. 14+3), or under Article 13 (art. 13);

- as regards Mr. X, that no separate issue arose concerning his right to respect for family life.

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

## FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

20. In their memorial of 18 June 1984, the Government "respectfully request the Court to hold that there has been no violation of the Convention in the present case".

## AS TO THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8), TAKEN ALONE, AS REGARDS MISS Y

21. According to the applicants, the impossibility of having criminal proceedings instituted against Mr. B violated Article 8 (art. 8) of the Convention, which reads:

"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."

The Government contested this claim; the Commission, on the other hand, agreed with it in its essentials.

22. There was no dispute as to the applicability of Article 8 (art. 8): the facts underlying the application to the Commission concern a matter of "private life", a concept which covers the physical and moral integrity of the person, including his or her sexual life.

23. The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

### *1. Necessity for criminal-law provisions*

24. The applicants argued that, for a young girl like Miss Y, the requisite degree of protection against the wrongdoing in question would have been provided only by means of the criminal law. In the Government's view, the Convention left it to each State to decide upon the means to be utilised and did not prevent it from opting for civil-law provisions.

The Court, which on this point agrees in substance with the opinion of the Commission, observes that the choice of the means calculated to secure compliance with Article 8 (art. 8) in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer.

25. The Government cited the difficulty encountered by the legislature in laying down criminal-law provisions calculated to afford the best possible protection of the physical integrity of the mentally handicapped: to go too far in this direction might lead to unacceptable paternalism and occasion an inadmissible interference by the State with the individual's right to respect for his or her sexual life.

The Government stated that under Article 1401 of the Civil Code, taken together with Article 1407, it would have been possible to bring before or file with the Netherlands courts, on behalf of Miss Y:

- an action for damages against Mr. B, for pecuniary or non-pecuniary damage;
- an application for an injunction against Mr. B, to prevent repetition of the offence;
- a similar action or application against the directress of the children's home.

The applicants considered that these civil-law remedies were unsuitable. They submitted that, amongst other things, the absence of any criminal investigation made it harder to furnish evidence on the four matters that had to be established under Article 1401, namely a wrongful act, fault, damage and a causal link between the act and the damage. Furthermore, such proceedings were lengthy and involved difficulties of an emotional nature for the victim, since he or she had to play an active part therein.

26. At the hearings, the Commission's Delegate adopted the applicants' submissions in their essentials; he also doubted whether Article 1401 could provide a proper basis for an award of compensation for non-pecuniary damage. He added that the need for protection existed erga omnes, whilst an injunction could only be directed to a limited circle of persons. Finally, the civil law lacked the deterrent effect that was inherent in the criminal law.

27. The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.

Moreover, as was pointed out by the Commission, this is in fact an area in which the Netherlands has generally opted for a system of protection based on the criminal law. The only gap, so far as the Commission and the Court have been made aware, is as regards persons in the situation of Miss Y; in such cases, this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen.

## 2. *Compatibility of the Netherlands legislation with Article 8 (art. 8)*

28. According to the Government, it was the exceptional nature of the facts of the case which disclosed the gap in the law and it could not be said that there had been any failure on the part of the legislature. The Criminal Code admittedly contained no specific provision to the effect that it was an offence to make sexual advances to the mentally handicapped. However, criminal proceedings could in certain circumstances be instituted on the basis of Article 239 para. 2 of the Criminal Code, with or without a complaint by the victim, against anyone who violated the sexual integrity of a mentally handicapped person. Under this Article, it was an offence to commit an act of indecency "while another person is present against his will", a phrase which the Supreme Court had interpreted as also covering a person who was the actual victim of an indecent act.

According to the applicants, on the other hand, the current Criminal Code offered insufficient protection (see paragraphs 41-43 of the Commission's report).

29. Two provisions of the Criminal Code are relevant to the present case, namely Article 248 ter and Article 239 para. 2.

Article 248 ter requires a complaint by the actual victim before criminal proceedings can be instituted against someone who has contravened this provision (see paragraph 16 above). The Arnhem Court of Appeal held that, in the case of an individual like Miss Y, the legal representative could not act on the victim's behalf for this purpose. The Court of Appeal did not feel able to fill this gap in the law by means of a broad interpretation to the detriment of Mr. B. It is in no way the task of the European Court of Human Rights to take the place of the competent national courts in the interpretation of domestic law (see, *mutatis mutandis*, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 50); it regards it as established that in the case in question criminal proceedings could not be instituted on the basis of Article 248 ter.

As for Article 239 para. 2 (see paragraph 15 above), this is apparently designed to penalise indecent exposure and not indecent assault, and was not clearly applicable to the present case. Indeed, no one, even the public prosecutor's office, seems to have considered utilising this provision at the time, or even referring to it at the outset of the Strasbourg proceedings.

30. Thus, neither Article 248 ter nor Article 239 para. 2 of the Criminal Code provided Miss Y with practical and effective protection. It must therefore be concluded, taking account of the nature of the wrongdoing in question, that she was the victim of a violation of Article 8 (art. 8) of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 14, TAKEN IN CONJUNCTION WITH ARTICLE 8 (art. 14+8), AS REGARDS MISS Y

31. The applicants contended that the difference of treatment established by the legislature between the various categories of persons deserving of special protection against sexual assaults amounted to discrimination contrary to Article 14 (art. 14) of the Convention, which reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government disputed this contention. The Commission considered that no separate issue arose.

32. Article 14 (art. 14) has no independent existence; it constitutes one particular element (non-discrimination) of each of the rights safeguarded by the Convention. The Articles enshrining those rights may be violated alone or in conjunction with Article 14 (art. 14). An examination of the case under Article 14 (art. 14) is not generally required when the Court finds a violation of one of the former Articles taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case, but this does not apply to the breach of Article 8 (art. 8) found in the present proceedings (see, *mutatis mutandis*, the above-mentioned Airey judgment, Series A no. 32, p. 16, para. 30).

The Court accordingly does not deem it necessary to examine the case under Article 14 as well.

### III. ALLEGED VIOLATION OF ARTICLE 3, TAKEN ALONE (art. 3) OR IN CONJUNCTION WITH ARTICLE 14 (art. 14+3), AS REGARDS MISS Y

33. According to the applicants, Miss Y suffered at the hands of Mr. B "inhuman and degrading treatment" contrary to Article 3 (art. 3) of the Convention. They maintained that, for the purposes of this provision, the State was in certain circumstances responsible for the acts of third parties and that the chronic psychological trauma caused to Miss Y had attained such a level as to fall within the ambit of that Article (art. 3).

34. According to the Commission, Article 3 (art. 3) had not been violated since there was no close and direct link between the gap in the Netherlands law and "the field of protection covered" by the Article.

At the hearings, the Government adopted this opinion and submitted that they were not answerable for the treatment inflicted on Miss Y.

Having found that Article 8 (art. 8) was violated, the Court does not consider that it has also to examine the case under Article 3, taken alone (art. 3) or in conjunction with Article 14 (art. 14+3).

### IV. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) AS REGARDS MISS Y

35. The applicants alleged that they had had no effective remedy in the Netherlands for Miss Y's complaints. On this account they invoked Article 13 (art. 13), which reads:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

They maintained, in particular, that the possibility of appealing, under Article 12 of the Code of Criminal Procedure, to the Arnhem Court of Appeal did not constitute a remedy of this description.

For the Government, on the other hand, this was a procedure designed to ensure that the criminal law was being correctly applied. The fact that the procedure did not serve the particular purpose did not mean that it did not exist.

The Commission expressed the opinion that it could not be deduced from Article 13 (art. 13) that there had to be a remedy against legislation as such which was considered not to be in conformity with the Convention.

36. The Court has already considered, in the context of Article 8 (art. 8), whether an adequate means of obtaining a remedy was available to Miss Y. Its finding that there was no such means was one of the factors which led it to conclude that Article 8 (art. 8) had been violated.

This being so, the Court does not have to examine the same issue under Article 13 (art. 13).

### V. THE COMPLAINTS OF MR. X

37. Initially, Mr. X also alleged that the gap in the Netherlands law had violated his own rights under Articles 8 and 13 (art. 8, art. 13) of the Convention.

The Commission considered that no separate issue arose in this respect.

Counsel for the applicants did not revert to this aspect of the case at the hearings. The Court therefore sees no necessity to give a decision thereon.

### VI. ARTICLE 50 (art. 50)

38. Under Article 50 (art. 50) of the Convention,



"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

In her letter of 27 August 1984, Ms. van Westerlaak explained that "approximately seven years after the event, the girl in question is still experiencing daily the consequences of the indecent assault of which she was the victim" and that "this is the source of much tension within the family". Ms. van Westerlaak stated at the hearings that non-pecuniary damage was still being suffered.

The Commission did not comment on these allegations.

The Government also did not challenge the allegations as such, but they argued that the suffering was the result of the act committed by Mr. B and not of the violation of the Convention. Accordingly, there was no reason to afford just satisfaction.

39. The Court notes that the claim is confined to non-pecuniary damage and does not relate to the costs of the proceedings.

40. No one contests that Miss Y suffered damage. In addition, it is hardly deniable that the Netherlands authorities have a degree of responsibility resulting from the deficiency in the legislation which gave rise to the violation of Article 8 (art. 8).

The applicants left it to the Court's discretion to determine a standard for compensation.

The damage in question does not lend itself even to an approximate process of calculation. Assessing it on an equitable basis, as is required by Article 50 (art. 50), the Court considers that Miss Y should be afforded just satisfaction which it fixes at 3,000 Dutch Guilders.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 (art. 8) as regards Miss Y;
2. Holds that it is not necessary to give a separate decision:
  - (a) on her other complaints;
  - (b) on the complaints of Mr. X;
3. Holds that the respondent State is to pay to Miss Y three thousand (3,000) Dutch Guilders under Article 50 (art. 50).

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 26 March 1985.

Rolv RYSSDAL  
President

Marc-André EISSEN  
Registrar

\* Note by the Registrar: The case is numbered 16/1983/72/110. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

MALONE v. THE UNITED KINGDOM JUGDMENT

X AND Y v. THE NETHERLANDS JUGDMENT

X AND Y v. THE NETHERLANDS JUDGMENT