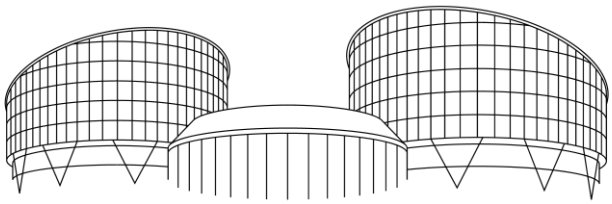

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 49458/06
Ferdinand Jozef COLON
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 15 May 2012 as a Chamber composed of:

Josep Casadevall, *President*,
Corneliu Bîrsan,
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Nona Tsotsoria,
Kristina Pardalos, *judges*,
and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above application lodged on 28 November 2006,

Having regard to the observations submitted by the respondent Government and the observations submitted in reply by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ferdinand Jozef Colon, is a Netherlands national born in 1947 who lives in Amsterdam. He was represented before the Court by Mr H.A. Sarolea, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Deputy Agent, Ms L. Egmond, of the Netherlands Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties and as apparent from documents available to the public, may be summarised as follows.

1. Designation orders and ensuing criminal proceedings

a. The designation orders

3. In response to a rise in violent crime in the city of Amsterdam the Burgomaster (*Burgemeester*) of that city gave an order designating certain areas as security risk areas (*veiligheidsrisicogebieden*). Relying on section 151b of the Municipalities Act (*Gemeentewet*), the Burgomaster designated most of the old centre of Amsterdam as a security risk area for a period of six months on 20 November 2002. By virtue of such a decision, a public prosecutor (*Officier van Justitie*) was empowered, in accordance with section 52(3) of the Arms and Ammunition Act (*Wet Wapens en Munitie*), to order that for a randomly selected period of twelve hours any persons present in the designated area might be subjected to a search for the presence of weapons. The process came to be known as "preventive searching" (*preventief fouilleren*).

4. The reasoning on which the order was based referred to statistics of incidents involving the use of weapons (shootings, knifings, robberies, fatal and non-fatal casualties) in each of the areas concerned. It was observed that such incidents occurred most often in the old centre of the city, especially around the Wallen (the red-light district), the central station and around the concentrations of restaurants, bars and places of entertainment.

5. By order of 26 June 2003 the Burgomaster designated the same area as a security risk area for another twelve months based on the fact that weapons were still being confiscated during searches and there had been insufficient decrease in the number of violent crimes.

b. The applicant's arrest

6. On 19 February 2004 the applicant, while in the designated security risk area, was stopped by police acting on orders of the public prosecutor to conduct searches of every person present in the security risk area. The applicant refused to submit to a search. He was then arrested (*aangehouden*) and taken to a police station, where he refused to give a statement (*verklaring*).

c. Proceedings at first instance

7. On 27 January 2005 a single-judge chamber (*politierechter*) of the Amsterdam Regional Court (*rechtbank*) convicted the applicant of failing to

obey a lawful order under article 184 of the Criminal Code (*Wetboek van Strafrecht*). He was sentenced to a fine of 150 euros (EUR).

d. Proceedings in appeal

8. The applicant lodged an appeal with the Amsterdam Court of Appeal (*gerechtshof*), which acquitted him of all charges on 23 September 2005. The Court of Appeal considered that section 151b of the Municipalities Act imposed stringent requirements with regard to the decision to designate an area as a security risk area, especially in the light of individuals' freedom of movement and respect for the right to privacy. The Burgomaster's decisions (including the one dated 26 June 2003) did not meet the requirements of section 151b as the Burgomaster had failed to give any reasons why the security risk area had to be designated for such lengthy periods and cover such a large area. Accordingly, the decisions were not in conformity with Articles 5 and 8 of the Convention either.

e. Proceedings in appeal on points of law

9. The Advocate General (*Advocaat-Generaal*) at the Amsterdam Court of Appeal lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*) against the judgment of the Court of Appeal.

10. After the applicant submitted his application to the Court, the Supreme Court, on 20 February 2007, granted the appeal lodged by the Advocate General. The Supreme Court held that in considering the validity of the designation order the criminal judge should follow the approach of administrative courts in the matter. On that basis, and quoting from a judgment of the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) of 9 November 2005 (Administrative Law Reports (*AB Rechtspraak Bestuursrecht*) 2006, no. 90), it found that the Burgomaster had a wide margin of appreciation (*beoordelingsmarge*) in assessing the need for any such order after consultation with the public prosecutor. It was for him or her to balance the interests involved, including public order and individual private life, against each other. The designation order should be limited in time and in area to what was necessary (*noodzakelijk*) to maintain public order. The Burgomaster's choices had to be properly reasoned and proportionate to the interference with the private life of anyone present in the area concerned. The role of the criminal courts was limited to assessing the lawfulness and reasonableness of the Burgomaster's decision.

11. Considering the case in this light, the Supreme Court held that the Court of Appeal had correctly considered that the Burgomaster's decision of 26 June 2003 had to be read in conjunction with his original decision of 20 November 2002. Nevertheless, in finding that insufficient reasons had been given for the decision of 26 June 2003 the Court of Appeal had failed to take into account the extensive report which had formed the basis for the

20 November 2002 decision. The Supreme Court therefore quashed the judgment of the Court of Appeal and remitted the case to the Court of Appeal for re-hearing.

f. Proceedings following remittal

12. In a judgment of 12 December 2007, the Amsterdam Court of Appeal found that the Burgomaster had given sufficient reasons for his decision of 26 June 2003 by referring to the considerations contained in the original decision of 20 November 2002. The Court of Appeal further considered that any interference with the applicant's rights under Article 8 of the Convention and Article 2 of Protocol No. 4 had taken place in the interests of the protection of public order and in accordance with the margin of appreciation awarded to States. For those reasons the Court of Appeal found the applicant guilty of failing to obey a lawful order, but imposed no sentence on him.

13. The applicant did not lodge an appeal on points of law against this judgment.

2. Further designation orders and ensuing administrative proceedings

14. By decision of 24 June 2004 the Burgomaster again designated the same area as a security risk area for the next twelve months as weapons were still being confiscated even though the number of violent crimes had decreased significantly.

15. On 16 June 2005 the Burgomaster again designated the same area of the centre of Amsterdam as a security risk area, this time for a period of twenty-four months.

16. On 7 October 2005, the Burgomaster, taking into account the judgment of the Court of Appeal (see paragraph 8 above), issued a decision altering the original decision of 16 June 2005 by designating the same area as a security risk area for twelve months instead of the original twenty-four. The Burgomaster also set out more extensive reasons for his decision, including a breakdown of the decrease in weapon-related crimes following the introduction of preventive searching in the security risk areas. For Amsterdam city centre alone, it was noted that numbers of weapons-related incidents had dropped to 728 between 1 November 2002 and 1 July 2003, down from 773; between 1 July 2003 and 1 July 2004, from 728 to 640; between 1 July 2004 and 1 July 2005, from 640 to 500. In 95% of all preventive search operations until then at least one weapon had been found.

17. On 2 November 2005 the applicant lodged an objection (*bezwaar*) against the decision of the Burgomaster of 7 October 2005. The applicant submitted that the designated security risk area was too large and that there were insufficient reasons for including the different districts, considering the impact on people's right to respect for their privacy and freedom of movement. The applicant further alleged that the percentages used by the

Burgomaster to support his decision had been calculated in such a way as to make his policy seem more effective than it really was.

18. On 1 February 2006, whilst awaiting the outcome of his objection, the applicant also applied for a provisional measure (*voorlopige voorziening*) on the same grounds as his objection.

19. On 9 March 2006 the provisional-measures judge (*voorzieningenrechter*) of the Amsterdam Regional Court declared the applicant's request inadmissible on the ground that the applicant did not appear to have a direct interest in the decision of the Burgomaster dated 7 October 2005 and that presumably the applicant's objection would be declared inadmissible for the same reason.

20. On 1 June 2006 the Burgomaster declared the applicant's objection inadmissible as the applicant could not be regarded as a person with a direct interest (*belanghebbende*) as required by article 1:2 of the General Administrative Law Act (*Algemene wet bestuursrecht*). The Burgomaster held that a person could only be said to have a direct interest if that interest was strictly personal, real and direct and could be identified objectively. According to the Burgomaster, the applicant neither lived in the security risk area nor had a paid job which required him to be in the area at regular set times. The fact that the applicant claimed to be engaged in volunteer work and paid social visits to friends in the designated area did not suffice to give him a direct interest.

21. The applicant did not appeal against this decision to the Regional Court; the reason he gives is that the designation order of 7 October 2005 was due to expire on 30 June 2006.

3. The evaluation reports of the COT Institute for Safety and Crisis Management

22. The municipality of Amsterdam commissioned the COT Institute for Safety and Crisis Management (*COT Instituut voor Veiligheids- en Crisismanagement*), a body based in The Hague, to produce a series of evaluation reports on preventive searches in the security risk areas. The Court has studied two of these, which contain data pertaining to the time of the events complained of.

a. The report of May 2006

23. On 11 May 2006 the COT Institute for Safety and Crisis Management published a report entitled "Evaluation of preventive body searches in Amsterdam: The current situation" (*Evaluatie Preventief Fouilleren in Amsterdam: De stand van zaken*). It covered the period between November 2002 and March 2006.

24. In Amsterdam city centre, between November 2002 and May 2003 one weapon had been found for every 28 persons searched. Between July 2003 and May 2004 one weapon had been found for every 37 persons

searched; between July 2004 and June 2005, again, one weapon for every 37 persons searched; and between July 2005 and March 2006, one weapon for every 40 persons searched. In Amsterdam South-East, which has a far more modern and open layout than the old city centre, there were generally far fewer weapons found until the search operations were planned to cover times and places at which the risk of violent incidents was highest; the number of weapons found then rose to one per 28 persons searched. The report mentioned that the operations that had had the greatest effect in relation to the police manpower invested had lasted for five hours or less, which could be explained by the loss of the advantage of surprise as an operation dragged on for longer.

25. The number of incidents involving the use of weapons had dropped during this period. In Amsterdam city centre, between November 2002 and May 2003 there had been 747 such incidents; between July 2005 and March 2006, only 488, or 34.7% fewer. The number of muggings in this area dropped from 254 to 130, a reduction of 48.8%. In Amsterdam South-East, the number of weapons-related incidents had dropped by 29.4% in comparison of the same periods. Within the area of jurisdiction of the Amsterdam-Amstelland Police Force as a whole, the total decrease had been 14.3%; if the security risk areas were excluded, it had been 6.6%.

26. The evaluation report mentions the applicant's case, which at the time the report was published was still pending before the Supreme Court.

27. The report recommended that random searches be continued in the same two areas, given their obvious effectiveness. It also made further proposals aimed at increasing efficiency.

b. The report of May 2007

28. In May 2007 the COT Institute for Safety and Crisis Management published a report entitled "Evaluation of preventive body searches in Amsterdam: Gains, incidents involving weapons and hot spots" (*Evaluatie Preventief Fouilleren in Amsterdam: Opbrengsten, wapenincidenten en hot spots*). It was noted that searches had become more efficient, which had allowed more persons to be searched within a given time. Between July 2006 and April 2007 one weapon had been found for every 52 persons searched in Amsterdam city centre; in Amsterdam South-East, the corresponding figure was one weapon for every 40 persons searched.

29. Numbers of weapons-related incidents had continued to decline. As compared to the period from April 2003 until March 2004, between April 2006 and March 2007 there were 35% fewer such incidents (565, down from 864); in Amsterdam South-East, 16.5% fewer (532, down from 591).

30. The frequency of weapons-related incidents had increased by 6.4% in Amsterdam outside the security risk areas; within the area of jurisdiction

of the Amsterdam-Amstelland Police Force as a whole, there had been a reduction of 4.4%.

31. The report identified seven "hot spots" outside the existing security risk areas where incidents involving the use of weapons were frequent. In two of them the problem was so serious that preventive searches should be carried out there too.

4. Subsequent designation order

32. By letter dated 27 May 2009 the applicant informed the Court that the same area had been designated as a security risk area for the seventh consecutive time.

B. Relevant domestic law

1. Statute

a. The Criminal Code

33. Article 184 of the Criminal Code, in its relevant part, provides:

"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. ..."

b. The Municipalities Act

34. Section 151b of the Municipalities Act provides:

"1. The local council (*raad*) may by municipal bye-law authorise the Burgomaster to designate an area, including buildings open to the public (and their grounds) situated therein, as a security risk area in the event of a public order disturbance caused by the presence of weapons, or if there is a serious fear of such a disturbance occurring. In a security risk area a public prosecutor may exercise the powers referred to in section 50, subsection 3, section 51, subsection 3 and section 52, subsection 3 of the Arms and Ammunition Act.

2. The Burgomaster shall not designate a security risk area without first consulting with the public prosecutor in the consultations referred to in section 14 of the 1993 Police Act (*Politiewet 1993*).

3. The designation of a security risk area is of a limited duration and covers a geographical area that is no greater than strictly necessary for maintaining public order.

4. The decision to designate a security risk area must be recorded in writing and state both the area to which it applies and its period of validity. If the situation is so urgent that the Burgomaster is unable to record the decision in writing in advance, he or she must both record the decision in writing and make it public as quickly as possible.

5. The Burgomaster shall notify the local council and the public prosecutor referred to in subsection 2 of the designation of a security risk area as quickly as possible.

6. As soon as the public order disturbance caused by the presence of weapons or the serious fear of such a disturbance occurring as referred to in subsection 1 has abated, the Burgomaster shall revoke the designation of the security risk area. Subsection 5 applies *mutatis mutandis*."

35. Section 155 of the Municipalities Act, in its relevant part, provides:

"1. Any member of the council may put questions orally or in writing to the Burgomaster and Aldermen or the Burgomaster as the case may be (*Een lid van de raad kan het college of de burgemeester mondeling of schriftelijk vragen stellen*.) ..."

36. Section 155a of the Municipalities Act, in its relevant part, provides:

"1. The council may, at the proposal of one or more of its members, order an investigation into the administration carried out by the Burgomaster and Aldermen or the Burgomaster as the case may be (*het door het college of de burgemeester gevoerde bestuur*). ..."

c. The 1993 Police Act

37. Section 14 of the 1993 Police Act provides:

"The Burgomaster and the public prosecutor shall hold regular consultations with the head of the territorial unit of the regional police force within whose territory the municipality or part of it is located, and if necessary with the regional police force commander (*korpschef*), about the discharge by the police of their duties."

d. The Arms and Ammunition Act

38. Section 52(3) of the Arms and Ammunition Act provides:

"In areas that have been designated by the Burgomaster as security risk areas in accordance with section 151b, subsection 1 of the Municipalities Act, the public prosecutor may order that any individual can be subjected to a search of his clothing to establish whether he has firearms, ammunition or offensive weapons in his possession. The public prosecutor's order shall describe the designated area and state the order's period of validity, which may not exceed twelve hours. The order shall also explain the facts and circumstances that form the basis for concluding that it is necessary to exercise the power to subject any individual to a search of his clothing to establish whether he has weapons or ammunition in his possession."

2. Bye-law

39. At the relevant time, the 1994 general municipal bye-law (*Algemene Plaatselijke Verordening*) of Amsterdam applied. Its section 2.5A provided:

"In the event of a public order disturbance caused by the presence of weapons, or if there is a serious fear of such a disturbance occurring, the Burgomaster may designate public highways and buildings (and their grounds) situated along them as a security risk area."

3. Administrative procedure

40. According to section 8:1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*), anyone with a legal interest may challenge an administrative decision before the Regional Court, provided that he or she has first lodged an objection with the administrative body that has taken the decision in issue (section 7:1). A further appeal lies to the Administrative Jurisdiction Division of the Council of State (at the relevant time, section 37 of the Council of State Act (*Wet op de Raad van State*)).

4. Case-law

a. Supreme Court

41. The Supreme Court has held that a conviction under Article 184 § 1 of the Criminal Code is possible only if the order disobeyed by the accused was given by an official within the limits of his or her lawful authority (see its judgment of 11 December 1990, Netherlands Law Reports (*Nederlandse Jurisprudentie*) 1990, no. 423). From this it follows that the criminal court has a responsibility of its own to determine whether the statutory regulation on which the order is based is actually binding, and whether the order has been lawfully given; if the issue is raised by the defence, the criminal court must answer it, irrespective of whether or not the accused has first addressed these matters before the competent administrative tribunals (see the Supreme Court's judgment of 24 September 2002, Netherlands Law Reports 2003, no. 80).

b. Administrative Jurisdiction Division of the Council of State

i. Den Helder

42. In a decision of 9 March 2005, Administrative Law Reports 2005, no. 251, the Administrative Jurisdiction Division of the Council of State dismissed an appeal lodged against the designation of much of the centre of the town of Den Helder as a security risk area on Friday and Saturday nights. Identifying the designation order as delegated legislation (*besluit van algemene strekking*), it held that persons wishing to contest such an order had to demonstrate an individual interest which sufficiently distinguished them from others. It noted that the appellant did not reside, or work, or carry on a business in that area; was not compelled for any other reason to remain there for any length of time; and had no rights to immovable property there

either. In view of, in particular, the times at which the designation order was in force, the stated fact that the appellant had been a resident of Den Helder for many years; went out in the area concerned; and was wont to visit friends and family there was insufficient to distinguish her individual interest from that of others.

43. Moreover, no violation of Article 8 of the Convention or Article 2 of Protocol No. 4 to the Convention could be found since there was no certainty that the appellant would ever actually be searched, and since in any case there was no particular need for the appellant to be within the area concerned with any regularity; any interference with her rights was therefore so uncertain that it could not be considered a reasonably foreseeable consequence of the designation order. That being so, there was no "arguable claim" for the purposes of Article 13 of the Convention either.

ii. Utrecht

44. In its above-mentioned decision of 9 November 2005 (Administrative Law Reports 2006, no. 90), the Administrative Jurisdiction Division allowed an appeal brought by the Burgomaster of Utrecht against the suspension of a designation order by the provisional measures judge (*voorzieningenrechter*) pending reconsideration of the order on its merits. It found that the Burgomaster had a wide margin of appreciation in assessing the need for any such order after consultation with the public prosecutor. It was for him or her to balance the interests involved, including public order against individual private life, against each other. The designation order should be limited in time and in area to what was necessary to maintain public order. The Burgomaster's choices had to be properly reasoned and proportionate to the interference with the private life of anyone present in the area concerned.

45. In the particular case, these requirements had been met, given the frequency of incidents involving the use of firearms in the area and the number of weapons found during earlier searches. Although searches constituted an interference with the right to respect for "private life" within the meaning of Article 8 of the Convention, given the margin of appreciation of the domestic authorities the Burgomaster could reasonably consider such measures in pursuit of the interests of public safety and the prevention of disorder or crime to answer a "pressing social need" and to meet the requirement of proportionality.

COMPLAINTS

46. The applicant complained under Article 8 of the Convention that the designation of a security risk area by the Burgomaster violated his right to

respect for privacy as it enabled a public prosecutor to conduct random searches of people over an extensive period in a large area without this mandate being subject to any judicial review.

47. The applicant further complained of a violation of Article 2 of Protocol No. 4, alleging that his freedom of movement was unlawfully restricted by the Burgomaster's decisions.

48. Finally, the applicant complained under Article 14 that he had been discriminated against as he was considered not to have a direct interest in the Burgomaster's decision because he merely carried out volunteer work and maintained social contacts in the security risk area, unlike those who had paid jobs in the area.

THE LAW

A. The Government's preliminary objections

1. Non-exhaustion

49. The Government pointed to the fact that the applicant had not lodged any appeal against the Burgomaster's decision of 1 June 2006 dismissing his objection against the renewal of the designation of the relevant part of Amsterdam as a security risk area. While admittedly the designation order there in issue was due to run for only the rest of the month, until 30 June 2006, so that it was unlikely that domestic remedies could be pursued to a conclusion within that time, it followed from the relevant case-law that the Administrative Jurisdiction Division had not considered itself prevented from considering the merits of designation orders after they had lost their validity.

50. In the Government's view also, established case-law should not stand in the way of the requirement that domestic remedies be exhausted. It was right and proper for domestic tribunals to maintain consistency in their case-law; however, arguments might differ from case to case, and it did not follow that existing precedent would have predetermined the outcome of any appeal that the applicant might have lodged.

51. Furthermore, the applicant had invoked Article 14 for the first time before the Court; he had not relied on that provision at any time in the domestic proceedings.

52. The applicant countered that administrative tribunals in the Netherlands were generally reluctant to make statements of principle on decisions that had lost their force; in any case, the Administrative Jurisdiction Division had been dismissive of cases very like his own, even

denying them an effective remedy within the meaning of Article 13 of the Convention. In this connection, the applicant cited the Administrative Jurisdiction Division's decision in the Den Helder case (paragraphs 42 and 43 above).

53. The Court has summed up the applicable principles as follows (*Akdivar and Others v. Turkey* [GC], 16 September 1996, §§ 66-69, *Reports of Judgments and Decisions* 1996-IV, case-law references omitted):

> "66. Under [former] Article 26 [now Article 35 § 1] normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (...).
>
> Article 26 [now Article 35 § 1] also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (...).
>
> 67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the 'generally recognised rules of international law' there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (...). The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (...).
>
> 68. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (...). One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.
>
> 69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 [now Article 35 § 1] must be applied with some degree of flexibility and without excessive formalism (...). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied

> automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (...). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

54. It is worth adding that the European Court of Human Rights is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008).

55. Turning to the present case, the Court first notes that, as the Government correctly point out, the applicant failed to raise any discrimination complaint in the domestic proceedings. It follows that in so far as it is based on Article 14 of the Convention, the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

56. As to the remaining complaints, the Court accepts that a remedy was available to the applicant in the sense that he might have appealed against the Burgomaster's decision to the Regional Court and then to the Administrative Jurisdiction Division of the Council of State. It is not convinced, however, that such proceedings would have offered him any real prospect of success. The Court cannot ignore either the similarity between the present applicant's complaints under Article 8 of the Convention and Article 2 of Protocol No. 4, dismissed by the Administrative Jurisdiction Division in the Den Helder case (paragraphs 42 and 43 above), or the wide margin of appreciation under Article 8 which the Administrative Jurisdiction Division leaves to the Burgomaster in the Utrecht case (paragraphs 44 and 45 above).

57. The Court has held many times that an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (see, among many other authorities, *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI). Such is the case here; it follows that the Government's preliminary objection of non-exhaustion must be dismissed for the remainder.

2. Victim status

58. The Government argued in the alternative that the designation of a security risk area or the issuing of a stop-and-search order had not in itself constituted an interference with the applicant's private life or liberty of movement. Since the event complained of, several preventive search operations had been conducted; in none of them, apparently, had the applicant been subjected to further attempts to search him. This was enough to show that the likelihood of an interference with the applicant's rights was so minimal as to deprive him of the status of victim.

59. The applicant replied that the designation orders and the preventive search orders applied to almost the entire old city centre of Amsterdam, not merely the areas where incidents involving the use of arms were most to be expected. It remained possible that he might again walk into "a trap set by the police" and made to undergo a further attempt to search him.

60. The Court reiterates that Article 34 of the Convention does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against legislation *in abstracto* simply because they feel that it contravenes the Convention. In principle, it is not sufficient for individual applicants to claim that the mere existence of the legislation violates their rights under the Convention; it is necessary that the law should have been applied to their detriment (principle stated in *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28; see as a recent authority and *mutatis mutandis Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010 (extracts), with further references). Nevertheless, Article 34 entitles individuals to contend that legislation violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it; that is, if they are required either to modify their conduct or risk being prosecuted, or if they are members of a class of people who risk being directly affected by the legislation (see *Marckx v. Belgium*, 13 June 1979, § 27, Series A no. 31, and *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 44, Series A no. 246-A; see as a recent authority *Tănase*, cited above, *loc. cit.*).

61. The Court is not disposed to doubt that the applicant was engaged in lawful pursuits for which he might reasonably wish to visit the part of Amsterdam city centre designated as a security risk area. This made him liable to be subjected to search orders should these happen to coincide with his visits there. The events of 19 February 2004 (see paragraph 6 above), followed by the criminal prosecution occasioned by the applicant's refusal to submit to a search, leave no room for doubt on this point. It follows that the applicant can claim to be a "victim" within the meaning of Article 34 of the Convention and the Government's alternative preliminary objection must be rejected also.

B. Article 8 of the Convention

62. The applicant complained that the public prosecutor had been given the power, within the part of Amsterdam city centre designated as a security risk area and for up to twelve hours at a time, to invade his privacy without any form of prior judicial control. He argued that this constituted a violation of Article 8 which, in its relevant part, provides as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 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."

1. Existence of an "interference"

63. The Government denied the existence of an "interference" with the applicant's right to respect for his private life since he had never been subjected to a search order issued under the designation order in issue.

64. The applicant disagreed.

65. The Court again observes that within the security risk area the applicant, like any member of the public, could be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search. It follows that there has been an "interference" with the applicant's rights under Article 8 and that that Article is thus applicable (see *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 64, ECHR 2010 (extracts)).

2. Whether the interference is "in accordance with the law"

66. The Government stressed the differences between the present case and that of *Gillan and Quinton,* in which the Court had found a violation of Article 8 of the Convention on the ground that the stop-and-search powers there in issue were not "in accordance with the law".

67. The basis in domestic law was constituted by section 151b of the Municipalities Act, taken together with section 52 of the Arms and Ammunition Act. Both these texts, as well as the municipality bye-laws of Amsterdam, were public and therefore sufficiently accessible. Finally, there were safeguards in place, namely in that a municipality bye-law, subject to democratic control, was required to authorise the Burgomaster to give designation orders; in that the Burgomaster had to consult the public prosecutor and the chief of police before giving a designation order; and in that the local council and the public prosecutor must be kept informed of the issuing and revocation of any designation order.

68. As to its practical implementation, a further order, given by the public prosecutor, was required for the designation order to be put into effect; and in that the public prosecutor's order was limited in time, to a maximum of twelve hours which could not be extended. Furthermore, the order of the public prosecutor had to explain the facts and circumstances on which it was based, making reference to recent reports. Police officers tasked with stopping and searching individuals were briefed beforehand and debriefed afterwards; they were given no latitude in deciding when to exercise their powers, which ruled out any risk of arbitrariness.

69. Legal protection was available to the individual in the form of an objection to the Burgomaster, followed if needed by appeals to administrative tribunals. Furthermore, any person who refused to be searched might be prosecuted under Article 184 § 1 of the Criminal Code, but this required the criminal courts to assess the lawfulness of both the prosecutor's preventive search order and the Burgomaster's designation order.

70. Finally, external evaluations were held – annually, in Amsterdam – to review the need, application and effects of these instruments.

71. The applicant complained in general terms of the ineffectiveness of the judicial review available, whether by the administrative tribunals or the criminal courts.

72. The Court reiterates its well-established case-law that the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his or her conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, among many other authorities, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 95-96, ECHR 2008; see also *Gillan and Quinton*, cited above, §§ 76-77, with further references).

73. In *Gillan and Quinton*, the Court found the applicable law deficient in several respects. Thus, within all of his jurisdiction or part of it a senior police officer could authorise stop-and-search measures for reasons of "expediency" rather than "necessity". Such orders, while subject to confirmation by the Secretary of State, in practice were always confirmed

unaltered. Although the exercise of the powers of authorisation and confirmation was subject to judicial review, the width of the statutory powers "[was] such that applicants [faced] formidable obstacles in showing that any authorisation and confirmation [were] *ultra vires* or an abuse of power" (*loc. cit.*, § 80). The validity of an authorisation, while limited in time, was renewable indefinitely – and at least one authorisation had been renewed again and again. The temporal and geographical limits provided by the legislature failed in practice to act as any real check on the issuing of authorisations by the executive (*loc. cit.*, § 81). An Independent Reviewer had the power only to report on the general operation of the statutory provisions but not the right to cancel or alter authorisations (*loc. cit.*, § 82). Finally, and in the Court's view most strikingly, it was left to the discretion of the individual police officer to decide whether to search any particular person; no reasonable suspicion of wrongdoing was required. This had made possible the arbitrary use of the powers in question; statistics showed that there had been cases of this (*loc. cit.*, §§ 83-86).

74. In so far as the applicant complains that the interference with his right to respect for his private life was not "in accordance with the law", his complaint is limited to what he submits is the ineffectiveness of the judicial remedies available. In particular, he argues that an essential guarantee in the form of prior judicial control was missing.

75. The Court has accepted in past cases that prior judicial control, although desirable in principle where there is to be interference with a right guaranteed by Article 8, may not always be feasible in practice; in such cases, it may be dispensed with provided that sufficient other safeguards are in place (see, *mutatis mutandis*, *Klass and Others*, cited above, § 56; and *Rotaru v. Romania* [GC], no. 28341/95, § 59, ECHR 2000-V). In certain cases, an aggregate of non-judicial remedies may replace judicial control (see, *mutatis mutandis*, *Leander v. Sweden*, 26 March 1987, §§ 64-65, Series A no. 116).

76. In the Netherlands, all pertinent legal texts are in the public domain (compare and contrast § 30 of *Gillan and Quinton*). Before the public prosecutor can order police to carry out a search operation, a prior order designating the area concerned must be given by an administrative authority of the municipality, the Burgomaster. That order must in turn be based on a bye-law adopted by an elected representative body, the local council, which has powers to investigate the use made by the Burgomaster of his or her authority (see paragraphs 34-36 above).

77. Review of a designation order, once it has been given, is available in the form of an objection to the Burgomaster, followed if necessary by an appeal to the Regional Court and a further appeal to the Administrative Jurisdiction Division of the Council of State (see paragraph 40 above).

78. The criminal courts have a responsibility of their own to examine the lawfulness of the order and the scope of the authority of the official who

gave it. It is a defence for anyone charged with failing to comply with a search order issued by or on behalf of the public prosecutor to state that the order was not lawfully given; the criminal court must answer it in its judgment (see paragraph 41 above).

79. The above is sufficient for the Court to conclude that the interference complained of was "in accordance with the law".

3. Whether the interference pursued a "legitimate aim"

80. It is not in dispute that the "legitimate aims" pursued by the interference found are public safety and the prevention of disorder or crime.

4. Whether the interference was "necessary in a democratic society"

81. The Government stated that every year Amsterdam was the scene of large numbers of crimes involving the use of firearms and other weapons. These included attempted and actual murder and manslaughter, robberies and muggings, threats, assault and unlawful possession of firearms.

82. Among the measures taken to remedy the situation were a general amnesty for persons who handed in their illegal weapons, the use of surveillance cameras, and a robust policy to tackle antisocial behaviour by young people. Borough supervisors worked closely with street coaches, housing associations' community representatives and neighbourhood co-ordinators. All this had helped to reduce crimes involving firearms and other weapons in Amsterdam, but it had not been sufficient: the incidence of violent crime remained high. There was thus a pressing social need for further, more far-reaching measures.

83. The designation of the most affected parts of Amsterdam as security risk areas within which, during non-renewable periods of up to twelve hours, members of the public might be searched for weapons could not be seen as a disproportionate interference with individual rights. The Government observed that although the applicant had been ordered to submit to a search and prosecuted for failing to do so, he had been spared punishment or a non-punitive order; moreover, he had never been searched pursuant to the designation order here in issue, that of 7 October 2005.

84. The applicant countered that the incidence of violent crime was largely limited to certain areas, such as the red-light district, the central station and the concentrations of restaurants, pubs and places of entertainment. He accepted that there might be a need for security measures in those parts of the city, but he questioned the need to designate almost all of the old centre of Amsterdam as a security risk area in which he might be ordered to undergo a search. In particular, he questioned the accuracy and pertinence of the statistics on which the designation order was based. He claimed in addition to suffer from shyness and anxiety, which led him to avoid public places for fear of running into a police trap a second time.

85. The Court is faced, not for the first time, with the need to balance two interests protected by Article 8 against each other. The first is the protection of the individual against arbitrary interference by public authority, which the Court has consistently held to be the essential object of Article 8. The second is constituted by the protection of "private life" in the sense of the physical and moral integrity of those within the jurisdiction of the Contracting States, which imposes on the Contracting States not merely the right but the duty to take positive action (principle stated in *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; see, among many other authorities, *Murray v. the United Kingdom*, 28 October 1994, § 91, Series A no. 300-A; and as a recent example, *Sandra Janković v. Croatia*, no. 38478/05, § 44, 5 March 2009). Indeed the very wording of Article 8 recognises this in that "public safety" and "the prevention of disorder or crime" are listed in Article 8 § 2 as "legitimate aims" which, subject to a necessity test, exceptionally justify interferences with the rights set out in the first paragraph.

86. The Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII); moreover, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133; *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; *A, B and C v. Ireland* [GC], no. 25579/05, § 223, ECHR 2010-...).

87. It is therefore primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in assessing the need for an interference in the public interest with individuals' rights under Article 8 of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests (see *Odièvre v. France* [GC], no. 42326/98, § 49, ECHR 2003-III).

88. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient". While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see, among other

authorities, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 90, ECHR 2001-I; and *S. and Marper*, cited above, § 101).

89. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference.

90. The Court will consider firstly the factual and legal framework within which the preventive search system operates.

91. The Court accepts, as the Government have stated and the applicant has not denied, that the designation of security risk areas within which preventive searches are possible is complementary to other measures aimed at forestalling violent crime, including a general amnesty for persons who handed in their illegal weapons, the use of surveillance cameras, and a robust policy to tackle antisocial behaviour by young people.

92. Section 151b of the Municipalities Act (see paragraph 34 above) makes the powers of the Burgomaster to designate a security risk area dependent on the prior adoption of a bye-law by the local council. It further provides that such an area shall be no greater than strictly necessary and that the order shall be revoked when it is no longer needed. The use which the Burgomaster makes of his or her powers remains subject to review and control by the local council, an elected representative body (sections 155 and 155a of the Municipalities Act; see paragraphs 35 and 36 above).

93. Before a designation order is given, the Burgomaster must consult with the public prosecutor and the local police commander. Preventive search operations must be ordered by the public prosecutor, whose powers are defined by section 52(3) of the Arms and Ammunition Act. The public prosecutor must issue an order defining the area within which preventive searching is to be carried out. No single executive authority can therefore alone order a preventive search operation. Furthermore, the public prosecutor's order may be valid for no more than twelve hours, and is not renewable (see paragraph 38 above).

94. Finally, the Court cannot but have regard to the level of crime in the area concerned. The Court is not disposed to doubt the numbers of weapons-related incidents stated by the Burgomaster in the designation order of 7 October 2005 (see paragraph 16 above). It is apparent from the figures given by the Burgomaster, and also from the information contained in the evaluation reports of the COT Institute for Safety and Crisis Management (see paragraphs 22-31 above), that preventive searches are having their intended effect of helping to reduce violent crime in Amsterdam.

95. For the applicant there was always a possibility that, whenever he ventured into the part of the city centre of Amsterdam designated as a security risk area, he could, while the designation order remained in force,

be subjected to a preventive search which he might well have found unpleasant and inconvenient at the very least. However, given the legal framework surrounding such searches and above all the fact, as apparent, that they were effective for their intended purpose, the Court finds that the reasons given by the Government are "relevant" and "sufficient". The domestic authorities were entitled to consider that the public interest outweighed the subjective disadvantage which the interference with his private life caused to the applicant.

96. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Article 2 of Protocol No. 4

97. The applicant alleged a violation of his freedom of movement within the part of Amsterdam city centre subject to the designation order. He submitted that, after the events of 19 February 2004 (see paragraph 6 above), he felt inhibited by his fear of being again forced to undergo the same humiliating treatment. He relied on Article 2 of Protocol No. 4 to the Convention, which, in its relevant part, provides 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."

98. The Government argued that there had been no restriction placed on the applicant's liberty of movement in the area concerned. The applicant's complaint stemmed solely from his fear that he might be stopped and searched by the police if he entered the security risk area; he was however free to come and go as he pleased.

99. The applicant did not respond to this argument.

100. The Court agrees with the Government that while there was a chance that the applicant might be put to the inconvenience of being ordered to undergo a search by the police within the security risk area, he was in no way prevented from entering that area, moving within it and leaving it again. His liberty of movement was therefore not affected.

101. It follows that this complaint too is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President