AS TO THE ADMISSIBILITY OF

Application No. 22542/93
by Abdul Kadir SATIR
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 6 September 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 January 1993 by Abdul Kadir SATIR against Austria and registered on 27 August 1993 under file No. 22542/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen, born in 1931 and presently detained in Krems (Austria).

A. The particular circumstances of the case

By a judgment of 3 October 1980 the Munich Regional Court (Landgericht München I) convicted the applicant of drug trafficking and sentenced him to seven years' and six months' imprisonment.

In 1990 the Austrian police obtained information from various sources, in connection with preliminary investigations against two Turkish citizens, indicating that the applicant was involved in drug trafficking. In November 1990 the police intercepted and recorded the applicant's telephone conversations. On 13 December 1990 the applicant and 15 other Turkish nationals were arrested.

On 15 December 1990 the Salzburg Regional Court (Landesgericht) ordered the applicant's detention on remand on the grounds set out in Section 180 paras. 1 and 2 subparas. 1, 2 and 3 (a) of the Code of Criminal Procedure (Strafprozeßordnung). Referring to the investigations of the Salzburg police and the results of the telephone tapping, the Regional Court considered that there was a strong suspicion that the applicant was dealing with large quantities of heroin. He was suspected in particular of having transferred the drugs

to Austria with the help of third persons. The applicant, who had contacts abroad, had been convicted of similar offences and in the present case important investigations had still to be carried out. There was therefore also a danger of the applicant's absconding, of collusion and of committing offences.

The applicant's appeal lodged on 27 December 1990 against this decision was dismissed by the Linz Court of Appeal (Oberlandesgericht) on 9 January 1991.

On 3 June 1991 the Public Prosecutor in Salzburg preferred an indictement against the applicant and four other persons charging them with drug offences.

On 25 and 26 September 1991 the trial took place before the Salzburg Regional Court sitting with a jury (Schöffengericht), i.e. two judges, one of them as presiding judge, and two lay assessors. The applicant was assisted by defence counsel and an interpreter for the Turkish language appointed by the Court.

By a judgment of 26 September 1991 the Salzburg Regional Court convicted the applicant inter alia under the Drug Offences Act (Suchtgiftgesetz) of having participated as a member of a criminal association in smuggling heroin from Turkey via Austria to Germany and sentenced him to 13 years' imprisonment. It further imposed a fine of 20 000 000 AS on him, respectively two months' imprisonment in case of failure to pay the fine (Ersatzfreiheitsstrafe).

The Regional Court found that the applicant, as the manager of a hotel and a travel agency near the Austrian-German border, assisted the members of a well organised criminal organisation in smuggling large quantities of heroin from Turkey to Germany. The judgment was based on various items of evidence and testimony, namely the declarations of members of the organisation who had been arrested in Austria and Germany, the contents of the applicant's telephone conversations with H.S., the head of the organisation, and the applicant's efforts during his detention to incite a co-accused to withdraw his confessions.

With regard to the sentence, the Regional Court considered as mitigating circumstances the partial confiscation of circa 3 kg heroin and the solely attempted importation of 16,9 g heroin, and as aggravating circumstance, the applicant's previous conviction for drug offences in Germany.

The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) with respect to his conviction and an appeal (Berufung) against the sentence.

On 3 September 1992 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity and referred the applicant's appeal for decision to the Linz Court of Appeal.

The Supreme Court accepted the Regional Court's reasoning for its refusal to obtain the evidence requested by the applicant, who had proposed to submit his passport in order to show that he had not been several times in Bulgaria at the end of 1989 and the beginning of 1990. The Supreme Court pointed out that this evidence was not relevant for the determination of the charges against him and that the Regional Court had not referred to any such visits. According to the Supreme Court, the Regional Court had carefully examined the evidence and the declarations of the co-accused and had taken into account certain contradictions in their statements. There was no indication that the Regional Court's conclusions were illogical or arbitrary.

By a judgment of 14 December 1992 the Linz Court of Appeal dismissed the applicant's appeal. It considered in particular that the

Salzburg Regional Court had correctly assessed the mitigating and aggravating circumstances. With regard to the increasing drug criminality at international level and the dangerousness of trafficking in hard drugs, the first instance court had pronounced an adequate sentence taking duly into account the social disturbance caused and the applicant's personal criminal responsibility. As to the fine, the Court of Appeal found that the Regional Court had not misused its power of assessment and that there was no ground for reducing the amount of the fine.

B. Relevant domestic law

Section 113 para. 1 of the Code of Criminal Procedure provides that a person claiming to be affected by decisions given or delays caused by the investigation judge in the course of the preliminary investigations is entitled to appeal to the Review Chamber (Ratskammer).

Section 180 para. 1 of the Code of Criminal Procedure provides that a person may only be taken in detention on remand if there is strong suspicion against him of having committed a particular offence and if one of the reasons laid down in paras. 1 or 2 is given. According to paragraph 2 detention on remand may be ordered if there is a danger of absconding (subpara. 1), a danger of collusion (subpara. 2) or a danger that the suspect might commit offences (subpara. 3).

COMPLAINTS

1. The applicant complains under Article 5 para. 1 c) of the Convention that he was arrested without any reasonable suspicion against him.

2. The applicant, who maintains to be innocent, complains also of his conviction and sentence and the alleged unfairness of the proceedings in several respects.

a) The applicant complains in particular that he was refused the assistance of a defence counsel when being interrogated by the investigating judge and that he was refused access to the court file before the end of the trial.

b) He next complains that the Regional Court was not an impartial tribunal established by law and that the judges have unduly influenced the lay assessors. According to him, his case should have been submitted to an assize court (Geschworenengericht) with fuller guarantees of impartiality than a jury (Schöffengericht).

c) The applicant further complains that he was not presumed innocent until proven guilty in accordance with the law, since from the beginning the Regional Court has refused to obtain the evidence requested by him and considered him as a drug addict. He invokes Article 6 para. 2 of the Convention.

d) The applicant also complains under Article 6 para. 3 of the Convention that his conviction was based on an erroneous assessment of evidence. He submits in this context that the translation of the reports of his telephone conversations was incorrect.

e) The applicant next complains that the court decisions have not been notified to him in Turkish and that a co-accused acted as an interpreter.

3. Under Article 7 of the Convention the applicant complains that he was convicted and sentenced for his activity as an undercover agent of the German authorities. These acts did not constitute criminal offences.

4. The applicant further complains under Article 8 of the Convention that the alleged illegal criminal proceedings against him constitute a breach of the right to respect for his private and family life.

5. The applicant finally complains under Article 13 of the Convention that there was no neutral and efficient control of violations of the Convention and no effective remedy in Austria.

THE LAW

1. The applicant complains under Article 5 para. 1 c) (Art. 5-1-c) of the Convention that his detention on remand was unlawful in that there were no reasonable suspicions against him.

Article 5 para. 1 c) (Art. 5-1-c) reads as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so (...)"

The Commission recalls that the reasonable suspicion in Article 5 para. 1 c) (Art. 5-1-c) of the Convention does not mean that the suspected person's guilt must at that stage be established and proven, and it cannot be a condition for arrest and detention pending trial that the commission of the offence with which the person concerned is charged has been established. It is precisely the purpose of the official investigation, which detention is intended to facilitate, to prove the reality and nature of the offenses charged (see No. 8224/78, Dec. 5.12.78, D.R. 15 p. 211; No. 9627/81, Dec. 14.3.84, D.R. 37 p. 15; No. 10803/84, Dec. 16.12.87, D.R. 54 p. 35; Eur. Court H.R., Murray judgment of 28 October 1994, Series A no. 300, para. 55).

In the present case the applicant was taken into detention on remand by order of the Salzburg Regional Court of 15 December 1990 on the strong suspicion of having committed drug offences. This suspicion was largely based on the police investigations carried out and on the results of the telephone tapping. The Commission notes that Section 180 para. 1 of the Austrian Code of Criminal Procedure allows to put a person in detention on remand, if there is strong suspicion against him of having committed an offence. Furthermore, the decision of the Salzburg Regional Court was confirmed by the Linz Court of Appeal on 9 January 1991.

In conclusion, the Commission finds that the applicant was lawfully detained and that there were reasonable grounds for suspecting him of having committed an offence within the meaning of Article 5 para. 1 (c) (Art. 5-1-c).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains of his conviction and sentence.

With regard to the judicial decisions of which the applicant complains, the Commission recalls that under Article 19 (Art. 19) of the Convention its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular,

it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers on this point to its established case-law (see, e.g., No. 21283/93, Dec. 5.4.94, D.R. 77-A pp. 81, 82 and 88).

It is true that in the present case the applicant complains under Article 6 (Art. 6) of the Convention also of the fairness of the criminal proceedings which led to his conviction.

Article 6 (Art. 6) of the Convention provides, so far as relevant to the present case, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

The applicant has referred not only to Article 6 para. 1 (Art. 6-1) of the Convention but also to paras. 2 and 3 of this provision. In this respect the Commission recalls that the requirements of para. 3 of Article 6 (Art. 6-3) are specific aspects of the general concept of a fair hearing guaranteed in para. 1 of the same Article (Art. 6-1) (cf., e.g., Eur. Court H.R., F.C.B. v. Italy judgment of 28 August 1991, Series A no. 208-B, p. 20, para. 29). The Commission will therefore examine the applicant's complaints from the point of view of these two provisions in conjunction.

a) The applicant submits that he had been questioned by the investigating judge in the absence of a defence counsel and that he was refused access to the file.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of Article 6 (Art. 6) of the Convention as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The Commission notes that the applicant has failed to raise in an appeal to the Review Chamber (Ratskammer) of the Salzburg Regional Court the above complaints in pursuance of Section 113 para. 1 of the Code of Criminal procedure.

It follows that the applicant has not complied with the requirement as to the exhaustion of domestic remedies contained in Article 26 (Art. 26) of the Convention.

This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

b) The applicant also complains that the professional judges at the Regional Court have unduly influenced the lay assessors and that the Regional Court sitting with a jury (Schöffengericht) was not an impartial tribunal established by law. According to him, his case should have been submitted to an assize court (Geschworenengericht).

Even assuming that the applicant has exhausted domestic remedies in this respect as required by Article 26 (Art. 26) of the Convention, the Commission recalls that the existence of impartiality for the purposes of Article 6 para. 1 (Art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (cf., inter alia, Eur. Court H.R., Padovani judgment of 26 February 1993, Series A no. 257-B, p. 20, para. 25).

As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (Padovani judgment, loc. cit., para. 26).

Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. What is decisive are not the subjective apprehensions of the suspect, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (cf.,e.g.,Eur. Court H.R., Nortier judgment of 24 August 1993, Series A no. 267, p. 15, para. 33).

However, the Commission finds that the applicant's complaints as to the lack of impartiality of the judges in question or to the competence of the Regional Court sitting with a jury have not been substantiated. The Commission observes in particular that the applicant has failed to show that the Regional Court sitting with a jury did not meet the requirements as to a "tribunal established by law" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. In the light of this finding the Commission need not examine the applicant's complaint that his case has not been submitted to an assize court.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

c) The applicant complains that he was not presumed innocent until proven guilty in accordance with the law. He invokes Article 6 para. 2 (Art. 6-2) of the Convention.

The Commission recalls that the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty (Eur. Court H.R., Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 67 et seq.).

In the present case the applicant does not adduce any argument which would indicate that the presumption of innocence was disregarded in the proceedings at issue, other than the assessment of evidence made by the Regional Court. It does not appear from the case-file that during the proceedings the Regional Court, before finding the applicant guilty on the basis of the evidence, took decisions reflecting the opinion that the applicant had committed the acts which he was charged with.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

d) The applicant complains that the assessment of evidence made throughout the proceedings was arbitrary. He submits that he was convicted on insufficient evidence, contrary to the principle that the guilt must be firmly established.

The Commission recalls that it is primarily for the national courts to assess the evidence before them. The Convention organs' task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case there is no indication that the proceedings were unfairly conducted or that the applicant, who was represented by a lawyer, could not adduce any evidence which he regarded as being pertinent or to put forward any argument he considered relevant. The Supreme Court undertook a detailed analysis of the applicant's complaints, addressing the issue of the assessment of evidence by the first instance court. It concluded that the lower court had not overstepped the limits of appreciation of evidence or established facts in a arbitrary manner in excluding other hypotheses as to the applicant's guilt. The Commission does not find these conclusions arbitrary or otherwise unfair. Furthermore, according to the Supreme Court, the evidence proposed by the applicant was irrelevant. The Commission does not see how in these circumstances this evidence could have assisted the applicant.

Accordingly, this part of the application does not disclose any appearance of a violation of Article 6 para. 1 and Article 6 para. 3 (d) (Art. 6-1, 6-3-d) of the Convention. It follows that it is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

e) The applicant complains that the court decisions have not been notified to him in Turkish and that a co-accused has acted as an interpreter.

Even assuming the applicant has exhausted domestic remedies in this respect, the Commission recalls that Article 6 para. 3 (e) (Art. 6-3-e) of the Convention guarantees the assistance of an interpreter if the person charged with a criminal offence "cannot understand or speak the language used in court".

In the present case, it appears from the file that the applicant has a good knowledge of the German language. The Commission further notes that an interpreter for the Turkish language appointed by the Salzburg Regional Court was present during his trial and that the applicant was assisted by a German speaking defence counsel.

It follows that this part of the application is again manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant complains under Article 7 (Art. 7) of the

Convention that he was acting as an undercover agent for the German authorities and that the charges brought against him did therefore not constitute criminal offences.

Article 7 (Art. 7) of the Convention provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

However, the Commission recalls that under the terms of Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. This condition is not met by the mere fact that an applicant has submitted his case to the various competent courts. It recalls that domestic remedies within the meaning of Article 26 (Art. 26) of the Convention have only been exhausted if, before the highest domestic body, the applicant has submitted, at least in substance, his complaint he puts before the Commission, even without particular reference to the Convention (cf., e.g., No. 6861/75, Dec. 14.7.75, D.R. 3 p. 147; Nos. 5573/72 and 5670/72, Dec. 16.7.76, D.R. 7 p. 8; No. 7299/75 and 7496/76, Dec. 4.12.79, D.R. 18 p. 5; No. 12164/86, Dec. 12.10.88, D.R. 58 p. 63).

In this case the applicant failed to raise the issues mentioned above in his plea of nullity before the Supreme Court. Furthermore, an examination of the case does not disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from raising his complaints in the proceedings referred to.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and this part of the application must accordingly be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant further alleges that as a result of the criminal proceedings his right to respect for his private life as guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention was violated.

However, the Commission finds that, to the extent that these proceedings constituted an interference with the applicant's right to respect for private life, this interference was justified as being necessary for the prevention of crime which was the principal aim of the aforesaid proceedings.

It follows that this part of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant also invokes Article 13 (Art. 13) of the Convention, which provides that:

> "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."

Insofar as the applicant's complaints could raise an issue of inadequate review procedure for his detention on remand, the Commission finds that the absence of any remedy falls rather to be dealt with under Article 5 paras. 4 and 5 (Art. 5-4, 5-5) which form the lex specialis for complaints under the provisions of Article 5 (Art. 5). However, the applicant does not adduce any argument which would

indicate that these provisions were disregarded in the present case.

Insofar as issues may arise under Article 6 (Art. 6) of the Convention with regard to the criminal proceedings brought against the applicant, the Commission recalls that the requirements of Article 13 (Art. 13) of the Convention are less strict than, and accordingly absorbed by Article 6 (Art. 6) of the Convention (see Eur. Court H.R., Philis judgment of 27 August 1991, Series A no. 209, p. 23, para. 67). It follows that no separate issue arises under Article 13 (Art. 13) of the Convention.

Moreover, insofar as the applicant complains of the judgment of the Salzburg Regional Court, the Commission finds that he had the possibility of appealing to the Supreme Court, an appellate body with jurisdiction to quash or modify the orders of the lower courts. There is no indication on the facts as presented in this case that this avenue of appeal is not an effective remedy for the purposes of Article 13 (Art. 13) of the Convention.

It follows that this complaint must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (L. ROZAKIS)