COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

(Or. English)

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 8544/79

Abdulbaki ÖZTÜRK

against

FEDERAL REPUBLIC OF GERMANY

Report of the Commission

(Adopted on 12 May 1982)

STRASBOURG

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06.

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the applicant's complaints

2. The applicant is a Turkish citizen, born in 1934 and residing at Bad Rappenau-Heinsheim (Federal Republic of Germany).

3. On 27 January 1978 he drove into a parked car and caused damage of approximately DM 5000.- to his and the other car. By a notice of a regulatory fine (Bussgeldbescheid) the competent administrative authorities imposed a fine of DM 60 on the applicant on the ground that he had committed a road traffic offence. The applicant lodged an objection (Einspruch). At a hearing before the District Court (Amtsgericht) at Heilbronn the applicant withdrew his objection and the notice became final. The applicant had been assisted by an interpreter at the hearing. By a bill of costs of the Heilbronn Cash Office (Gerichtskasse) he was ordered to pay the costs of the proceedings, including the interpreter's fees of an amount of DM 63.90. Thereafter he unsuccessfully lodged an objection (Erinnerung) as regards payment of the interpreter's fees.

4. The applicant complains before the Commission that the obligation to pay the interpretation costs as imposed on him in the proceedings under the Contravention of Regulations Act (Ordnungswidrigkeitengesetz) for a road traffic violation was in breach of Art. 6 (3)(e) of the Convention which provides that "everyone charged with a criminal offence has the following minimum rights: ... to have the free assistance of an interpreter if he cannot understand or speak the language used in court". In his view the proceedings under the said Act have to be considered as criminal proceedings with all the guarantees of Art. 6 of the Convention.

Proceedings before the Commission

5. The application was introduced on 14 February 1979 and registered on 16 February 1979.

On 13 July 1979 the Commission decided in accordance with Rule 42 (2)(b) of the Rules of Procedure to give notice to the Government of the Federal Republic of Germany of the application and to invite them to submit observations in writing on its admissibility under Art. 6 (3)(e) of the Convention. The Government submitted their observations on 22 October 1980. The applicant made his submission in reply on 22 April 1981.

On 14 May 1981 the Commission decided to invite the parties to an

oral hearing on the admissibility and on the merits of the application in accordance with Rule 42 (3)(b) of the Rules of Procedure.

6. The hearing was held on 15 December 1981. On the same day the Commission declared the application admissible. At the hearing the parties were represented as follows: the applicant by Rechtsanwalt Norbert Wingerter, a lawyer practising in Stuttgart, the Government by Ministerialdirigentin Irene Maier, as Agent, and Ministerialrat Dr. Erich Göhler and Regierungsdirektor Kurt Kemper as Advisers.

7. Following the decision on admissibility, the Commission, acting in accordance with Art. 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

The present Report

8. The present Report was prepared by the Commission in pursuance of Art. 31 of the Convention, after deliberations and votes in plenary session, the following members being present:

MM. C.A. NORGAARD, President
J.A. FROWEIN, Second Vice-President
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
M. MELCHIOR
J. SAMPAIO
J.A. CARRILLO
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER

9. The text of the Report was adopted by the Commission on 12 May 1982 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

10. A friendly settlement of the case having not been reached, the purpose of the present Report, pursuant to Art. 31 of the Convention is accordingly:

(1) to establish the facts; and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of their obligations under the Convention.

11. A schedule setting out the history of proceedings before the Commission and the Commission's decision on admissibility in the case are attached thereto as Appendices I and II.

12. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

II. ESTABLISHMENT OF THE FACTS

13. The facts of the case as they have been submitted by the parties may be summarised as follows:

14. On 27 January 1978 the applicant drove into a parked car and caused damage of approximately DM 5.000.- to his and the other car whose owner informed the Neckarsulm police station of the accident. The policemen showed the applicant a notice by which he was informed, i.a. in the Turkish language, of his right to refuse to make any statement and to consult a lawyer. The applicant made use of this right. A traffic accident report was then transmitted by the police to the administrative authorities (Landratsamt) at Heilbronn.

15. By a notice of regulatory fine (Bussgeldbescheid) dated 6 April 1978 the administrative authorities at Heilbronn imposed a fine of DM 60 on the applicant on the ground that he had committed a road traffic offence as a result of careless driving.

On 11 April 1978 the applicant, represented by counsel, lodged an objection (Einspruch) against this decision and stated that he did not waive his right to a public hearing before a court.

In accordance with the provisions of the Contravention of Regulations Act (Ordnungswidrigkeitengesetz) the applicant's file was transmitted to the Public Prosecutor (Staatsanwaltschaft) at the Heilbronn Regional Court (Landgericht). The prosecution authorities declared that they would not take part in any court proceedings. At the hearing of 3 August 1978 before the District Court (Amtsgericht) at Heilbronn the applicant withdrew his objection and the notice of fine became final.

16. By a bill for costs of the Heilbronn Cash Office (Gerichtskasse) the applicant was ordered to pay the costs of the proceedings of DM 184.70. The costs included an amount of DM 63.90 for interpreter's fees. On 4 October 1978 the applicant lodged an objection (Erinnerung) against the bill for costs. He complained of the imposition of the interpreter's fees invoking Art. 6 (3)(e) of the Convention and referred to the Commission's report of 18 May 1977 in the case of Luedicke, Belkacem and Koç against the Federal Republic of Germany.

17. By a decision (Beschluss) of 25 October 1978 the Heilbronn District Court rejected the applicant's objection stating that the costs including the interpreter's fees were awarded against him in accordance with Art. 464 (a) of the German Code of Criminal Procedure (Strafprozessordnung)(1) and Art. 46 of the Contravention of Regulations Act(2) and that Art. 6 (3)(e) of the Convention does not exclude that an accused be charged with interpreter's fees(3).

The court costs, including the interpreter's fees, were paid by a legal costs insurance company with which the applicant had previously concluded a contract.

(1) Art. 464 a (1), first sentence: "Costs of the proceedings are made up of the fees (Gebühren) and expenses of the Treasury."

(2) In accordance with Art. 46 (1) the provisions of the Code of Criminal Procedure are applicable in proceedings under the Contravention of Regulations Act.

(3) This decision was given before the European Court of Human Rights issued its judgment in the case of Luedicke, Belkacem and Koç on 28 November 1978.

III. SUBMISSION OF THE PARTIES

A. The applicant

18. The applicant maintains that the obligation to pay the interpretation costs incurred in the proceedings under the Contravention of Regulations Act was in breach of Art. 6 (3)(e) of the Convention.

19. Not conversant with German, the applicant signed after the accident the Turkish translation of a declaration according to which the police had informed him of his rights and duties. Thereafter he went in the company of an interpreter to the office of his defence counsel. At the Heilbronn District Court an interpreter was present until the end of the trial. Had the judge gained the impression that the applicant knew the German language sufficiently well in order to speak or understand the language used in court he would not have relied on the services of the interpreter. The fact that the applicant has passed a German driving test is no indication of his knowledge of German since the theoretical part of the test can be done in another language.

20. Contravention of Regulations provisions were introduced into the German legal system after 1945. Since the Middle Ages, many attempts have unsuccessfully been made to distinguish those breaches of law which are crimes from those which must be treated in another branch of the law of wrongs.

The Diet of the German Reich was of the opinion when issuing the Criminal Code of 1871 that there existed no clear distinction between acts which give rise to police prosecution and criminal acts. All illegal acts which were subject to punishment were classified as criminal offences. When the Convention entered into force a violation of road traffic provisions was a criminal offence. Before the Contravention of Regulations Act of 1968 came into force nobody would have thought not to apply Art. 6 of the Convention to this kind of offence.

21. There are no essential differences between proceedings under the Contravention of Regulations Act in connection with road traffic violations and criminal proceedings.

In this connection, the applicant refers to the competence of the prosecution authorities in regulatory fine proceedings, to the co-operation of these authorities with the administrative authorities, to the inclusion of offences under the Contravention of Regulations Act in the preparatory proceedings concerning a criminal offence, to the extension of an indictment to an offence under the Contravention of Regulations Act, to the proceedings following an objection against a notice of regulatory fine. Furthermore with regard to the close resemblance of criminal proceedings and regulatory fine proceedings uniform directives for both of these proceedings have been set up.

22. However, even if there were substantial differences between

regulatory fine proceedings and criminal proceedings Art. 6 (3) of the Convention would be applicable. Art. 46 (1) of the Contravention of Regulations Act provides that the general laws of criminal proceedings, in particular the Code of Criminal Procedure, the Judicature Act and the Juveniles' Court Act are applicable to regulatory fine proceedings. Art. 6 of the Convention as a procedural provision and part of German domestic law is consequently also applicable in accordance with the above mentioned provision of the Contravention of Regulations Act.

In accordance with Art. 74 No. 1 of the Basic Law concurrent legislative powers shall extend inter alia to criminal law. In a decision of 16 July 1969 the Federal Constitutional Court held that these legislative powers do not only comprise criminal law in its traditional meaning but also regulatory fine provisions.

23. Referring to the Government's opinion according to which it would be contrary to human rights to treat petty offences under the criminal law the applicant points out that until 1969 road traffic offences were criminal offences. This does not mean that until 1969 human rights were violated in the Federal Republic of Germany. Art. 6 (1) of the Convention was applicable and it is difficult to understand why this provision should not apply any longer. Apart from a simplification in the proceedings no substantial changes have been made. The Regional Court in Ansbach (NJW 1979, p. 2484) has decided that Art. 6 of the Convention was applicable in regulatory fine proceedings. Whether or not an act was classified as a criminal or a purely regulatory offence depended on the current views of society and was not treated in the same way by the Member States to the Convention. The legislator sanctioned human behaviour by imposing a pecuniary fine or a criminal penalty according to considerations of opportunity. However, Art. 6 of the Convention had the purpose of guaranteeing a fair trial irrespective of the classification of an act as criminal or non criminal.

24. The applicant concludes that he was the subject of "criminal charges" and Art. 6 (3)(e) of the Convention applied to the proceedings in his case.

B. The Government

25. In the Government's opinion the application has to be rejected as being incompatible ratione materiae since in the proceedings under the Contravention of Regulations Act the applicant was not "charged with a criminal offence" within the meaning of Art. 6 (3)(e) of the Convention.

26. Consequently the principle enunciated in the judgment given by the European Court of Human Rights on 28 November 1978 in the case of Luedicke, Belkacem and Koç cannot be applied in the present case. It may be recalled that in that case the Court held "that the right protected by Art. 6 (3)(e) entails for anyone who cannot speak or understand the language of the court, the right to receive the free assistance of an interpreter, without subsequently having claimed back

from him payment of costs thereby incurred" (§ 46).

27. It is true that in application No. 1169/61 (Yearbook 6, pp. 520-590) the Commission had applied Art. 6 of the Convention in proceedings under the Contravention of Regulations Act and rejected the application as manifestly ill-founded.

However, the Commission had not examined the question to what extent the proceedings concerned could have been distinguished from criminal proceedings stricto sensu. Moreover, this decision cannot be considered as a precedent since the examination of a concrete case by the Commission should as far as possible be limited to the issues raised by it (see Eur.CourtH.R., Deweer judgment of 27 February 1980, § 40).

28. The European Court of Human Rights has confirmed that the concept of "criminal charge' is autonomous and has to be understood within the meaning of the Convention (case of Engel and others, judgment of 8 June 1976, § 81 with further references, and Deweer judgment, § 42). It draws the limits of the Convention States' free discretion either to classify a violation as a criminal offence or to impose punishment in a non-criminal manner where "the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will". The non-criminal penalties may "not improperly encroach upon the criminal" (Engel and others judgment, § 81, sub-para 5).

29. When determining whether the provision defining the offence charged counts as "criminal" within the meaning of Article 6 (3) of the Convention the Court has examined in the Engel and others case whether this provision belongs, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently.

In the present case the offence in question was an offence against the Contravention of Regulations Act which under the German legal system is not criminal law.

30. The Contravention of Regulations Act of 1968 on the basis of which the regulatory fine proceedings were conducted against the applicant is based on the idea that not all legal provisions, which as commandments and prohibitions of public law are ensured by the threat of punishment, may be treated as criminal law (Strafrecht). Rather, it is necessary to distinguish between criminal law (Kriminalstrafrecht) and non-criminal law for the enforcement of public order. This distinction has a long-standing tradition in German law although its delimitation in some respects has not always been clear-cut.

As a result of the economic and social developments during the last two hundred years the administration of the State has extended to more and more spheres of life in order to ensure by statutory rules public order, defence against dangers, and welfare.

31. In the course of this development, the greater the number of commandments and prohibitions and administrative acts required for the implementation of these tasks incumbent upon the administration, the more necessary became, in a liberal order of society, the restriction

of the criminal law as the most incisive compulsory means available to the State for the punishment of criminal wrong. It has also become necessary to remove mere infractions of regulations from the criminal law and to devise the punishment of such infractions in proceedings especially designed for this administrative wrong. The same applies to petty criminality and certain offences which injure or place in jeopardy persons, rights or interests protected by law (Gefährdungstatbestände) and which are in the forefront of the protection of individual rights or of communal interests. The removal of such offences from the criminal procedure and their prosecution in simplified, summary regulatory fine proceedings has, of course, played a considerable part in relieving the courts of work which, properly speaking, should not be incumbent upon them, and it has thereby maintained their effectiveness.

32. Maintaining good order in road traffic is a striking example of this development and of the necessity of dealing with a vast number of violations of the legal provisions concerning road traffic in an adequate, but effective way; 90 % of regulatory fines concern in fact road traffic violations. In the Federal Republic of Germany about 300,000 road traffic offences a year are adjudicated as criminal wrongs. In regulatory fine proceedings, such as were applied to the applicant, annually far more than 4 million notices of regulatory fines for road traffic violations and more than 13 million admonitions (Verwarnungen) with admonitory fines (Verwarnungsgeld) of between DM 2 and DM 40 are issued. As is shown by the annual statistics, in the cases of road traffic violations, in 41 % to 48 % of all the cases regulatory fines up to DM 40 are imposed, in a further 41 % to 45 % of cases, regulatory fines of between DM 41 and DM 100 are imposed. In all, the proportion of regulatory fines of up to DM 100 is between 86 % and 89 %. These figures indicate not only the proportion of traffic violations dealt with as criminal offences on the one hand, and regulatory fines on the other, they also show clearly that in a democratic society, the mere transgression of regulatory law, the punishment of which is necessary to maintain public order and to avert danger, must not be described as a criminal wrong because otherwise a great part of the population would have to be regarded as criminal offenders which would mean their moral stigmatisation.

33. However, the legislator is bound by the Basic Law which reserves the traditional central sphere of the administration of criminal law, in particular the punishment of violations of the rights founded in the Basic Law, to the criminal courts.

In a decision of 16 July 1969 the Federal Constitutional Court (Bundesverfassungsgericht) held in particular that the central sphere of criminal law, in which the judges were called upon by Article 92 of the Basic Law without exception and exclusively to administer the law in order to produce a deterrent effect on other potential offenders, comprised all important offences. The sphere of illegal acts where a repressive administration of justice sufficed, comprised violations of the law which, according to the general concepts of the society, were not deemed (criminally) culpable, cases which were less blameworthy, which were distinguished from criminal offences by the degree of ethical unworthiness. The weight of an offence, the extent of social disapproval attributed to it in the legislator's binding evaluation,

usually could be taken only from the severity of punishment provided. It was only when one started from a differentiating evaluation of the extent of the unworthiness of the various offences that the gradation of the criminal law penalties became understandable and justified.

The Federal Constitutional Court held that the change of criminal road traffic offences into offences under the Contravention of Regulations Act amounted to a change in the punishment for an offence as well as a change in its description. It is true that a criminal fine (Geldstrafe) and a non-criminal fine (Geldbusse) have the same financial effect on the perpetrator. Nevertheless they are distinguishable in the way in which they are generally regarded. The imposition of a criminal punishment involves the making of an authoritative critical judgment of condemnation on the accused's behaviour, which arises from the allegation of having broken the law and the substantiation of that allegation. By contrast the imposition of a non-criminal fine (Geldbusse) under the Contravention of Regulations Act is regarded as and associated with the emphatic reinforcement of a duty which does not imply a serious criticism of the perpetrator's character, even though its financial consequences may be just as serious as those of a criminal fine (Geldstrafe). The regulatory penalty (Busse) lacks the seriousness of a criminal punishment (Strafe) imposed by the State (Federal Constitutional Court, decision of 16 July 1969, BVerfGE 27, 18 (28-33).

34. In the Government's view this jurisprudence of the Federal Constitutional Court is in accordance with the principles established by the European Court of Human Rights in the case of Engel and others in order to ensure that a person accused of a criminal offence may enjoy the fundamental guarantees provided for in Articles 6 and 7 of the Convention.

It follows clearly from the differences which exist between the provisions of criminal law and the provisions of the Contravention of Regulations Act that the very nature of the offence in question is essentially non criminal in character.

35. Furthermore the degree of severity of the penalty which the person concerned risks incurring under the Contravention of Regulations Act shows that regulatory fine proceedings are not in practice disguised criminal proceedings. Thus under the Contravention of Regulations Act the offender can only be given a pecuniary fine. Other penalties like the deprivation of liberty or a criminal fine cannot be inflicted.

On the other hand, if the person concerned refuses to pay the fine, detention might be ordered for a period not exceeding six weeks. Such imprisonment is, however, not punitive but merely coercive, for he will be at once released if he consents to pay the fine or to inform the authorities of his financial situation. Only in one per cent of 170,000 or 200,000 cases in which coercive detention has been ordered it is executed. In general the fine will be paid when the police appears with a warrant of arrest.

36. Furthermore, a regulatory fine cannot be replaced by imprisonment as it is possible in cases where a criminal fine has been imposed.

While the criminal fine is imposed according to a daily fine system by which the number of units characterises the gravity of the wrong and the amount of each unit is determined by the offender's financial circumstances, the regulatory fine - in accordance with its different character - is not so split up into different components. It is true that, in addition to the seriousness of the contravention, the reproach to which the person concerned is exposed also determines the regulatory fine. However, since the regulatory fine is mainly directed toward the future observance of obligations and prohibitions, the assessment of the regulatory fines, especially in the lower range, may be made schematically, according to the various types of the contraventions, which appears to be indicated in the interest of equal treatment in cases of widespread contraventions such as traffic violations.

Traffic offences can in principle be fined DM 1000 at the most. The comparatively small amount of the regulatory fine makes it possible not to attribute to the financial situation of the person concerned the same weight as in the case of the assessment of a criminal fine. Therefore, in the lower ranges of the regulatory fines the authorities do not have to clarify the financial situation of the person concerned. Consequently, an admonitory fine (Verwarnungsgeld) is determined according to a fixed catalogue, the admonitory fines catalogue (Verwarnungsgeldkatalog), which provides for fines between DM 20 and DM 40. Likewise, in cases of road traffic offences, the regulatory fines are fixed in accordance with the regulatory fines catalogues (Bussgeldkataloge). The great mass of these contraventions (about 90 %) is punished with regulatory fines not exceeding DM 100.

37. The ethical stigma connected with the final and binding criminal conviction upon a person is expressed especially by the entry of the conviction on his criminal record in the Federal Central Register (Bundeszentralregister). Information of such entries is given in conduct certificates (Führungszeugnisse) which in many cases are required for submission to public authorities, for instance, in proceedings on an application for the granting of a licence. Moreover, a number of public authorities must be given information of the entry. Regulatory fines are not recorded in this Federal Central Register.

38. Regulatory fines imposed for traffic violations in excess of a certain amount are recorded merely in a Central Traffic Register (Verkehrszentralregister). This registration, however, serves only the purpose of road traffic law. It is, therefore, not comparable with the entries in the Federal Central Register. Moreover, these registers are kept by different public authorities: the Federal Central Register in Berlin is under the jurisdiction of the Federal Minister of Justice, the Central Traffic Register in Flensburg under the jurisdiction of the Federal Minister of Transport.

39. There is a difference also as regards the limitation period. While the limitation period of prosecution, according to the maximum term of imprisonment provided for each offence, varies between 3 and 30 years (Art. 78 of the German Criminal Code), this limitation in the cases of offences against the Contravention of Regulations Act varies, according to the maximum regulatory fine, between 6 months

and 3 years. Since in the cases of most traffic offences only a regulatory fine not exceeding DM 1000 may be imposed, prosecution is limited by lapse of time after 6 months, as a rule.

40. This survey of the German legislation with regard to the legal and personal consequences in criminal and regulatory fine proceedings shows that there exists a considerable difference between the two. The regulatory fine lacks the seriousness of a criminal punishment. It is not substantially detrimental to the person concerned as can be the case even with a conviction for a smaller criminal offence.

This view is in accordance with the findings of the European Court of Human Rights in the case of Engel and others where the Court held that solely charges come into the "criminal" sphere whose aims are the imposition of serious punishments involving deprivation of liberty.

41. There are also important differences in the proceedings under criminal law and regulatory fine provisions.

The notice of a regulatory fine is issued by an administrative authority which is also competent for the prosecution and imposition of penalties in cases of road traffic violations.

The proceedings before the administrative authorities are divested of the formalities of criminal proceedings. Although there is no hearing, the facts have to be established ex officio and the person concerned has the right to be heard.

Contrary to an indictment the notice of fine does not contain a charge with a criminal offence; terms such as "person charged" (Angeschuldigter), "defendant" (Beschuldigter), or "accused" (Angeklagter) are not used in regulatory fine proceedings.

The prosecution of offences under the Contravention of Regulations Act is in the reasonable discretion of the competent administrative authorities, not of the prosecution authorities of the criminal courts. This rule is based on the consideration that the purpose pursued with a regulatory fine, i.e. to enforce a certain order, sometimes may be achieved in a different way, for instance, by an admonition, or by the threat of a prosecution if the act were to be repeated. Moreover it may be better achieved by a limited, but specially directed, prosecution of certain contraventions than by the duty to prosecute all contraventions.

In contrast to criminal proceedings, in regulatory fines proceedings physical interference with the offender is permissible only to a very limited extent. Detention in an institution, arrest and preliminary custody, seizure of postal matters and telegrams, as well as requests for information on circumstances subject to the secrecy of the postal telecommunications service are inadmissible in the prosecution of offences under the Contravention of Regulations Act. Apart from a taking of a blood test and such other interventions, bodily examination is forbidden. Thus, in regulatory fine proceedings the person concerned is never threatened with any substantial interference with his fundamental rights, in particular with deprivation

of liberty, apart from measures necessary for his identification. Therefore the protection of the Convention guarantees is not required.

42. However, when an objection (Einspruch) has been lodged against a notice of regulatory fine, the further proceedings take place before a court in accordance with the provisions of the Code of Criminal Procedure. Nevertheless, between criminal court proceedings and court proceedings concerning regulatory fines fundamental differences exist.

Cases under the Contravention of Regulations Act are generally dealt with by way of summary proceedings. Not criminal courts but special chambers decide. The public prosecutor is not obliged to take part in the proceedings. This applies also to the person concerned, unless he has been ordered to appear in person. On the other hand he has a right to be present.

The public prosecutor can also decide to discontinue the proceedings if for instance time limits have not been observed. He shall, however, take part in the proceedings when the facts of a particular case could constitute a criminal offence. In such a case the judge has to inform the person concerned of that possibility.

The presence of the prosecutor is necessary if a person has not only committed an offence under the Contravention of Regulations Act but is at the same time accused of a criminal offence. These offences will be dealt with in the same proceedings. However, the penalty under the Contravention of Regulations Act will always be a regulatory fine and will never constitute a sanction under criminal law. In cases in which both criminal and regulatory fine proceedings are instituted against a person, the regulatory fine proceedings are in general discontinued because of their minor importance compared with the criminal penalty.

43. An accused person may be acquitted of a criminal offence for lack of evidence. Nevertheless a regulatory fine will be imposed if he has contravened a provision of the Contravention of Regulations Act.

The court may also decide on the basis of written proceedings, unless the public prosecutor or the person concerned objects. In petty cases when fines can be given amounting up to DM 200 an appeal against a court decision is generally not possible.

44. It follows from this examination of the regulatory fine proceedings that they are administrative proceedings. The proceedings before a court following an objection are more similar to administrative court proceedings than to ordinary criminal proceedings.

45. A study of comparative law has shown that other European countries have no similar regulatory fine system. In Austria where regulatory fines can be given it is the competence of the administrative authorities and administrative courts to deal with these kind of offences.

46. Furthermore it would not be justified to reintegrate offences of the Contravention of Regulations Act into the criminal law solely

because of the question of interpreters' fees. That would run counter to the case of Dudgeon where the European Court of Human Rights has found a violation of the Convention because a Member State had failed to decriminalise certain acts which in other countries were not punishable any longer.

47. Foreigners who live for a longer period in the Federal Republic of Germany and take part in road traffic should adapt themselves to a certain extent to the day to day life and to the language of that country. They cannot expect to find there the same living conditions as in their home country.

48. The European Court of Human Rights held in its judgment of 28 November 1978 in the case of Luedicke, Belkacem and Koç that it could not be excluded that the obligation for a convicted person to pay interpretation costs may have repercussions on the exercise of his right to a fair trial in particular by fear of financial consequences. In regulatory fine proceedings the interpreter's fees may be higher than the fine. However, the interpreter's fees are less important than the fees claimed by defence counsel. Consequently financial implications would not arise out of the interpreter's fees.

49. There is a significant increase in the number of objections made in regulatory fine proceedings, in particular in cases where the person concerned is insured against the risk to pay legal fees. 60 % of car drivers are insured with legal cost insurance companies which, as in the applicant's case, pay the costs of the proceedings including the interpreter's fees.

50. The Government conclude that in the present case Art. 6 (3)(e) of the Convention is not applicable to the proceedings under the Contravention of Regulations Act and that the application is therefore incompatible ratione materiae within the meaning of Art. 27 (2) of the Convention.

IV. OPINION OF THE COMMISSION

Point at issue

51. In the present case the following point is at issue:

> whether in the proceedings under the Contravention of Regulations Act concerning a road traffic offence the applicant was "charged with a criminal offence" (in the French text: "accusé") within the meaning of Art. 6 (3) of the Convention with the consequence that the obligation to pay interpretation costs imposed on him was in breach of sub-paragraph (e) of that provision.

52. Art. 6 (3)(e) provides:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> ...

to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

The Commission has first had regard to the provisions of German law governing the payment of costs in regulatory fine proceedings:

- Art. 109 of the Contravention of Regulations Act

The person concerned shall bear the costs of the proceedings when he withdraws his objection or when the objection is dismissed.

- Art. 46 (1) of the Contravention of Regulations Act

In regulatory fine proceedings the general laws of criminal proceedings are applicable by analogy, namely the Code of Criminal Procedure (Strafprozessordnung), the Judicature Act (Gerichtsverfassungsgesetz) and the Juveniles' Court Act (Jugendgerichtsgesetz).

- Art. 185 (1) first sentence of the Judicature Act

If the proceedings before the court involve the participation of persons who do not have command of the German language, an interpreter shall be employed.

The obligation to employ an interpreter is, however, subject to one exeption, namely when all the participants are familiar with the foreign language (Art. 185 (2) of the said Act).

- Art. 464 a (1) first sentence of the Code of Criminal Procedure

The costs of the proceedings are made up of the fees and expenses of the Treasury.

The latter are listed in the Court Costs Act (Gerichtskostengesetz) which in turn refers to the Witnesses and Experts (Expenses) Act (Gesetz über die Entschädigung von Zeugen und Sachverständigen).

- Art. 17 (2) of the Witnesses and Experts (Expenses) Act

For the purposes of compensation, interpreters shall be treated as experts.

The Commission notes that these legal provisions were also applied by the German courts in the cases of Luedicke, Belkacem and Koç.

In the meantime, after the European Court of Human Rights had given its judgment in the case of the above applicants on 28 November 1978, the German legislature has amended the Court Costs Act by a law of 18 July 1980 being in force since 1 January 1981.

No. 1904 of Annex I of this Act which contains a list of costs, provides that expenses shall be claimed in accordance with the Witnesses and Experts (Expenses) Act. However, expenses for

interpreters and translators having been incurred in criminal proceedings are exempted.

By a circular letter dated 8 March 1979 the Federal Minister of Justice had already informed the competent judicial authorities that regulatory fine proceedings were not to be considered as criminal proceedings and consequently interpreters' costs should not be reimbursed.

Since then the above provisions have not been interpreted and applied by the German courts in a uniform way with respect to the question of the interpretation costs in regulatory fine proceedings.

53. In the Government's submissions Art. 6 (3)(e) was not applicable in the present case since the regulatory fine proceedings instituted against the applicant do not belong to "criminal" law. This view is contested by the applicant. The Commission has thus to examine the applicant's situation under the domestic legal rules in force in the light of the object and purpose of Article 6 of the Convention, and to ascertain whether he was "charged with a criminal offence" within the meaning of that provision.

54. The Commission refers first to its decision of 24 September 1963 on the admissibility of Application No. 1169/61 (Yearbook 6, pp. 520-590) where it has applied Art. 6 of the Convention to proceedings under the Contravention of Regulations Act.

In that case the applicant alleged, i.a., a breach of Art. 6 of the Convention. The Commission rejected that part of the application as manifestly ill-founded. In its decision, it did not examine the question to what extent the proceedings concerned could have been distinguished from criminal proceedings strictu sensu, that question not then having been raised by the German Government in their observations on admissibility.

The Commission therefore considers that its above decision cannot be relied upon as a precedent in the present case.

55. The distinction between those acts which are "crimes" and those which while being illegal carry only other than criminal sanctions depends upon the legal system of the Contracting States to the Convention. Under German law offences of the Contravention of Regulations Act do not belong to "criminal law". However the concept of "charged with a criminal offence" cannot be interpreted solely by reference to the domestic law of the respondent State. The Commission recalls that the problem of the "autonomy" of the meaning of the expressions used in the Convention, compared with their meaning in domestic law, has been raised before the European Court of Human Rights on several occasions. Recently the Court has confirmed its case-law in that respect in its judgment of 26 March 1982 in the case of Adolf. Thus it held that the expressions "criminal charge" (accusation en matière pénale", Art. 6 § 1), "charged with a criminal offence" ("accusé d'une infraction" and "accusé", Art. 6 §§ 2 and 3) are to be interpreted as having an "autonomous" meaning in the context of the Convention and not on the basis of their meaning in domestic law. The Court added that the legislation of the State concerned is

certainly relevant, but it provides no more than a starting point in ascertaining whether the applicant was "charged with a criminal offence". The prominent place held in a democratic society by the right to a fair trial favours a "substantive", rather than a "formal" conception of the "charge" referred to by Art. 6 (see the above-mentioned Adolf judgment, § 30 with further references).

56. In the case of Engel and others (judgment of 8 June 1976, § 82) the European Court of Human Rights established three criteria with which to determine whether proceedings in the sphere of military service which are ostensibly disciplinary, encroach on the criminal sphere and thus become subject to the guarantees of Art. 6, namely:

1. Whether the provision defining the offence charged belongs, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently;

2. The very nature of the offence;

3. The degree of severity of the penalty which the person concerned risks incurring.

The Commission has since applied the same criteria in the sphere of prison discipline in the case of Kiss v the United Kingdom (Application No. 6224/73, D.R. 7, p. 55; see also J.J. Campbell v the United Kingdom, Application No. 7819/77, D.R. 14, p. 186).

57. The above mentioned cases concerned offences against discipline, internal order or proper conduct in the armed forces or in prisons, that is in a situation where the persons concerned were in a particular relationship of dependency in which they had to comply with specific obligations and duties.

The present case does not have this particularity. The rules in question have the purpose of protecting public interests. It is therefore necessary to consider whether there exist sufficient reasons to exclude regulatory fine offences from the sphere of criminal law and thus from the guarantees of Art. 6 of the Convention. The Commission will examine this question on the basis of the three above criteria.

58. For a long time many attempts have been made in the Federal Republic of Germany to distinguish regulatory fine offences from those breaches of law which are crimes by an evaluation of the moral wrongfulness of the offences. It is fair to say that these attempts had obtained no convincing results since the dividing line between "criminal" and "non-criminal" depends on the evaluation of the moral wrongfulness of certain human conduct in a particular social order. Furthermore similar offences are sometimes treated by the German law both as criminal offences and as non-criminal (regulatory fine) offences. In this connection the Commission refers to Art. 24 (a) of the Road Traffic Act which sanctions drunken driving and is subsidiary to the provisions of the Penal Code relating also to drunken driving, namely Arts. 316, 315 (c)(1) No. 1 (a).

Therefore only a quantitative distinction between criminal

offences and regulatory fine offences can be made insofar as regulatory fine offences apply to less important interferences with legally protected interests and entail more limited consequences since offenders are solely liable to pecuniary fines but not to "criminal" punishment, like criminal fines or imprisonment.

59. All the Contracting States are faced with the problem of dealing with a vast number of petty violations of various legal provisions in an efficient and adequate way. The solutions adopted in this connection at the national level involve the establishment of different categories of "crimes and offences".

The question of the applicability of Art. 6 of the Convention to certain offences of a trivial nature has already been raised before the Commission and the European Court of Human Rights on several occasions, in particular in the cases of Deweer and Adolf. Art. 6 of the Convention has been considered to cover the proceedings relating to petty offences.

60. The Federal Republic of Germany has chosen a different solution in order to cope with petty offences. A characteristic element of the recent legal development is to be seen in the replacement by regulatory fine offences of certain minor offences under the Penal Code (Ubertretungen) - at that time the lowest category of criminal offences for which penalties amounting to six weeks imprisonment or a fine amounting to DM 500 could be incurred. This development started with the Introductory Act to the Contravention of Regulations Act (Einführungsgesetz zum Ordnungswidrigkeitengesetz) of 24 May 1968 (BGBl I, 503). The purpose of this Act was to decriminalise petty offences, in particular road traffic offences.

With the Introductory Act to the Penal Code (Einführungsgesetz zum Strafgesetzbuch) of 2 March 1974 (BGBl I, 496) various criminal provisions concerning petty offences disappeared from the Penal Code and were not replaced whilst a number of these provisions became regulatory fine provisions (Arts. 111-128 of the Contravention of Regulations Act) and others were transformed into more repressive provisions of criminal law.

The Contravention of Regulations Act consists of three parts and contains substantive and procedural provisions. The first part (Arts. 1 to 34) corresponds to the General Part of the Penal Code and the wording of its provisions is similar to that of the provisions of the General Part of the Penal Code. They concern the basic conditions for prosecution (Arts. 1 to 16), the legal consequences of regulatory fine offences (Art. 17 to 30) and limitation (Art. 31 to 34). The second part (Arts. 35 to 110) contains provisions concerning the regulatory fine proceedings which in certain essential points differ from criminal proceedings, although in accordance with Art. 46 (1) the provisions of the Code of Criminal Procedure, the Judicature Act and the Juveniles' Court Act are applicable by analogy. The differences which exist between regulatory fine proceedings and proceedings under the Code of Criminal Procedure can be summarised as follows:

- no possibility of prosecution enforcement proceedings (Art. 43 (3)),

- the prosecution of regulatory fine offences is within the reasonable discretion of the authorities (Art. 47),

- possibility of deciding without an oral hearing after an objection has been lodged if the person concerned and the prosecutor agree (Art. 73),

- no obligation on the prosecutor to take part in a hearing (Art. 75) (he is entitled to do so if he deems it necessary),

- possibility of limiting the taking of evidence (Art. 77).

These distinctions are based on the consideration that in proceedings concerning a criminal offence investigations have to be carried out with far more care and to a greater extent than in regulatory fine proceedings.

The third part of the Contravention of Regulations Act contains a number of offences which are not dealt with in other statutes.

61. The question arises whether a distinction can be found which justifies excluding the German regulatory fine provisions from the guarantees of Art. 6 of the Convention.

A particularity of the regulatory fine offence consists in the punishment which is provided for: the person concerned is only liable to a pecuniary fine. Under the Road Traffic Act this fine does not exceed DM 1000, except in two cases where the fine is DM 3000 (cf Arts 23 and 24 b of the Act).

Furthermore regulatory fines, especially in the lower range and as distinct from criminal fines, are calculated without reference to the financial circumstances of the person concerned, and are often fixed in accordance with special fines catalogues.

As a general rule such a punishment cannot be appreciably detrimental. However, this is not conclusive for the applicability of Art. 6, quite apart from the fact that under the Contravention of Regulations Act very high fines can be imposed, e.g. in accordance with Art. 41 (2) of the Explosives Act (Sprengstoffgesetz) and Art. 28 (3) of the Restaurant Act (Gaststättengesetz) up to DM 10,000, Art. 405 of the Act on Shares (Aktiengesetz) up to DM 50,000 and Art. 18 of the Act on the Disposal of Waste (Abfallbeseitigungsgesetz) up to DM 100,000. Furthermore Art. 17 (4) of the Contravention of Regulations Act provides that the fine shall exceed the economical advantage which the offender has obtained as a result of committing the regulatory fine offence, and if this exceeds the normal legal maximum penalty, the penalty may be raised.

62. The payment of a fine imposed under the Contravention of Regulations Act is not regarded in German law as a "penalty". Consequently, it cannot be taken into consideration when dealing with further regulatory fine offences and is not entered on the judicial record with the Federal Central Register in Berlin. In the case of road traffic offences it is nevertheless notified to the

Central Traffic Register in Flensburg. The offender will be awarded a number of points depending on the importance of the offence and if he accumulates a certain number of these points within a determined time the administrative authorities may withdraw his driving licence either for a period from one to three months (Art. 25 of the Road Traffic Act) or absolutely (Art. 15 (b) of the Act on the Admission to Road Traffic (Strassenverkehrs-Zulassungsordnung). Furthermore, in accordance with Art. 21 (3) of the Road Traffic Act a motor vehicle can be confiscated.

In the Commission's view these measures have to be considered as an accessory to the regulatory fine which can have serious effects on the life of the person concerned.

63. The Commission next refers to Art. 96 of the Contravention of Regulations Act which provides that the Court may order coercive detention if:

- the regulatory fine or part of it, has not been paid,

- the person concerned has not shown himself to be unable to pay,

- the person concerned has been informed of the possibility that coercive detention may be imposed upon him and

- there is no indication that the offender is insolvent.

Paragraphs 2 and 3 of this provision read as follows:

"If it appears that as a result of his financial situation the person concerned cannot be expected to pay the amount of the fine immediately, the court or the enforcement authorities may agree to payment facilities. If a detention order has already been made, it will be withdrawn."

"The length of coercive detention for an administrative fine shall not exceed six weeks, or, where several fines are given in one notice three months. The duration of the detention is calculated in days with regard to the sum due and cannot be prolonged, although it may be reduced. Coercive detention shall not be repeated in respect of the same sum."

In accordance with Art. 97 (1) of the Act the execution of the detention follows the rules of the German Code of Criminal Procedure. Specific provisions are applicable to juveniles.

The Government have submitted that coercive detention has been ordered in 170.000 or 220.000 cases per year, but has only been executed in one per cent of the cases. The Commission observes, as did the Government that coercive detention is not punitive imprisonment and does not constitute a "punishment involving deprivation of liberty". Such detention would be authorised by Art. 5 (1)(b) of the Convention. The Commission notes that in the German legal system coercive detention is also provided for, inter alia, in civil enforcement proceedings in accordance with Art. 888 of the Code of Civil Procedure and in criminal proceedings in accordance with Art. 70

(2) of the Code of Criminal Procedure if a witness refuses to make statements. The fact nonetheless remains that in practice a regulatory fine under the Contravention of Regulations Act may lead to a deprivation of liberty.

64. Although bodily examination is forbidden in regulatory fine proceedings, Art. 46 (4) of the Contravention of Regulations Act provides for the possibility of taking a blood test. That may happen if a person drives a car in a state of drunkeness although without committing any driving faults.

65. These factors lead the Commission to the conclusion that the very nature of regulatory fine offences is criminal in character even if in the German legal system they do not belong to the criminal law. There is no substantial difference between regulatory fine offences and criminal offences which could justify placing regulatory fine proceedings outside the scope of Art. 6 of the Convention.

The Commission far from criticising the efforts made by the German legislature to decriminalise road traffic offences considers its conclusion does not imply a "recriminalisation" of regulatory fine offences, as was submitted by the Government. The classification as non-criminal law at the national level would not be affected by the applying of guarantees of Art. 6 (3)(e) of the Convention to the said proceedings.

As a result of the great number of road traffic offences when they were still part of the German Penal Code the criminal courts were faced with a very heavy burden of work. In order to redress this situation the German legislature has removed these offences characterised by their large number, minor wrongfulness and the limited severity of the penalties from the Penal Code.

However, in the German legal system the regulatory fine offences are still very close to criminal law, in particular because:

- Art. 46 of the Contravention of Regulations Act refers to the provisions governing criminal proceedings,

- in accordance with Art. 81 of the Contravention of Regulations Act regulatory fine proceedings may be changed into criminal proceedings if the facts of a case could constitute a criminal offence and

- in accordance with Art. 84 (2) of the Contravention of Regulations Act a final judgment closing regulatory fine proceedings prevents the same offence being prosecuted as a criminal offence,

- in accordance with the jurisprudence of the Federal Constitutional Court (BVerfGE 27, p. 18, 32) the regulatory fine offences belong to the criminal law within the meaning of Art. 74 (1) of the Basic Law, a provision which concerns concurring legislative powers.

It cannot be maintained in these circumstances that Art. 6 of the Convention is not applicable.

66. On the contrary, it appears that, as previously in criminal

proceedings, the guarantees of a fair trial are in principle respected in regulatory fine proceedings. This results from the following considerations:

Regulatory fine proceedings, which in 90 % of the cases concern road traffic offences, are characterised by a summary investigation of the facts in order to pursue these proceedings speedily and without unnecessary formalities. Detention in an institution, arrest and preliminary custody, seizure of postal matters and telegrams, as well as requests for information on circumstances subject to the secrecy of the postal telecommunications service are inadmissible in the prosecution of regulatory fine offences.

Seizure and search possibilities are governed by the principle of proportionality.

Contrary to Art. 163 a of the Code of Criminal Procedure the person concerned has not necessarily to be interrogated. He has, however, the right to be heard.

The prosecution of regulatory fine proceedings, unlike in criminal proceedings, is in the reasonable discretion of the administrative authorities (Art. 53 of the Contravention of Regulations Act).

Furthermore, the person concerned has the right to a fair hearing before a court and in the court proceedings he is given the possibility to request the taking of evidence. If there is no sufficient evidence he will be acquitted, the principles of presumption of innocence and in dubio pro reo being part of regulatory fine proceedings.

Unlike in disciplinary law, the principle of legality (nulla poena sine lege) is embodied in Art. 3 of the Contravention of Regulations Act.

Regulatory fine proceedings which take place before the district court are public. The person concerned has to be informed of the offence he is pursued for, has the right to have adequate time and facilities for the preparation of his defence and is entitled to be represented by a lawyer. He also has the right to the calling and examination of witnesses. Already in the investigation proceedings before the administrative authorities the person concerned may be assisted by a lawyer (Art. 60 of the Contravention of Regulations Act).

The Commission further refers to a decision of the Court of Appeal (Oberlandesgericht) in Hamm dated 13 December 1979 where the Court was concerned with the question whether or not in regulatory fine proceedings the hearing has to be adjourned or commenced at a later time when the defence counsel is prevented from appearing at the trial. The Court held that this question had to be decided on the basis of the principle of a fair trial (see Göhler, NStZ 1981, p. 56).

67. The Commission observes that the only matter which is in conflict

with the guarantees of a fair trial in regulatory fine proceedings is the payment of interpretation costs. This exception cannot be considered as an indication that the German legislature intended not to apply Art. 6 of the Convention to regulatory fine proceedings. In this connection the Commission recalls that in the case of Luedicke, Belkacem and Koç the respondent Government were of the opinion that the definite exemption from interpretation costs was not guaranteed by the Convention at all. The Commission considers, that in the present case, the reason given by the Government, are not sufficient to exclude the right to the free assistance on an interpreter provided for by Art. 6 (3)(e) of the Convention from regulatory fine proceedings.

68. In following the view of the respondent Government the Commission would not only have to exempt regulatory fine proceedings from the applicability of Article 6 (3)(e), but also from the totality of the guarantees of a fair trial including, e.g. the right to a fair and public hearing before an independent and impartial tribunal, the presumption of innocence and the right to counsel. This, however, would in effect run contrary to the intentions of the German legislature who was clearly very careful to grant the right to a fair trial without exception to persons charged with a regulatory fine offence.

69. The Commission finally refers to the fact that when the Convention first became applicable in the Federal Republic of Germany, Art. 6 clearly applied to petty offences such as the present offence against the Road Traffic Act. The respondent Government's view would then amount to a licence for governments to withdraw the protection of Art. 6 from a large category of offences without substantially altering the sanctions incurred. In this context the Commission refers to the Adolf judgment which also concerned issues under Art. 6 in connection with efforts of "decriminalisation" and where the European Court of Human rights held that Art. 6 of the Convention does not distinguish between non-punishable or unpunished criminal offences and others.

Conclusion

70. For these reasons the Commission concludes by 8 votes to 4 that Art. 6 (3)(e) of the Convention was applicable to the proceedings in question and furthermore, by 8 votes to 4 that there was a breach of that provision.

Secretary to the Commission — President of the Commission

(H.C. KRUGER) — (C.A. NORGAARD)

Or. French

Dissenting opinion of Mr SPERDUTI(1)

1. The basic question to be resolved in the case of Öztürk v the Federal Republic of Germany is whether the applicant was or was not, under the Convention, charged with a criminal offence in the Federal Republic of Germany thereby entitling him to claim the right to the "free" assistance of an interpreter in proceedings before the Heilbronn District Court (Amtsgericht), a right conferred by Article 6 (3)(e) on everyone charged with a criminal offence if he cannot understand or speak the language used in court. The applicant, who by lodging an objection to the decision of the administrative authorities imposing a notice of regulatory fine (Bussgeldbescheid), had himself instituted judicial proceedings before that court, then withdrew his objection whereby the proceedings were terminated and the obligation to pay the fine became final. The applicant's complaint is based on the fact that the interpretation costs were included in the cost of the proceedings awarded against him under the relevant provisions of the German Code of Criminal Procedure (Strafprozess-ordnung, Article 464 a), read together with Article 46 of the Contravention of Regulations Act (Ordnungswidrigkeitengesetz). He alleges that he had been charged with a criminal offence and therefore should have been granted the free assistance of an interpreter.

2. One should firstly draw the attention to the legal theory behind Article 6 which may be described by reference to the philosophy of the "rule of law", an English term. States parties to the Convention retain a wide freedom as regards the regulation of "civil rights and obligations", and of the duties, which if breached, constitute a criminal offence. However, it is an essential requirement of a certain level of legal culture and a requirement with which Article 6 aims to comply that a decision on civil disputes and on criminal charges should be accompanied by proper judicial guarantees. It is no longer possible to speak of the freedom of States in this context. They must ensure that the administration of justice complies fully with the Convention.

The freedom of States, in principle, to provide or not to provide that certain human behaviour shall be treated as criminal is made especially clear in the caselaw of the European Court of Human Rights. The Court emphasises the role of States as "guardians of the public interest", a role which is duly taken into account by the Convention, which "leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court" (judgment of 8 June 1976 in the case of Engel and others, para 81).

(1) Mr Sperduti was not present when the final votes were taken. The Commission decided, in accordance with Rule 52 (3) of its Rules of Procedure, to permit him to express a separate opinion in this Report.

3. However, the mere finding that the laws of a State do not classify as "criminal" certain offences on which it nevertheless imposes sanctions is not sufficient to justify the conclusion that Article 6, at least in respect of its provisions concerning criminal "charges", does not apply to a person charged with having committed such offences. The domestic legislature's classification of an offence as non-criminal must be reviewed to ascertain whether it is merely a formal one which does not result from an absence of the factors which are decisive in defining the criminal sphere. Such supervision is required by the concept of the "rule of law" according to which the guarantees of a fair trial must correspond to the real nature of the case. This line of reasoning was adopted by the European Court in the above-mentioned judgment of 8 June 1976, when it emphasised particularly the importance of considering, when deciding whether an act is criminal, the "degree of severity of the penalty that the person concerned risks incurring". It went on to state that "in a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment" (para 82 of the judgment).

4. The "autonomy" of the notion of the criminal sphere under the Convention must naturally be approached in a reasonable manner. This notion must be defined "in the light of the common denominator of the respective legislation of the various Contracting States" (above-mentioned judgment of the Court), but does not encroach upon the freedom of States to determine themselves, in their role as guardians of the public interest, both the obligations they intend to impose on persons coming within their jurisdiction and the penalties incurred by offenders. The function of this notion in the context of Article 6 is to approach the objective of the proper administration of justice in a particular way. The notion operates as follows: it leads to a presumption of the applicability of the provisions of that Article dealing with a fair trial in criminal cases, namely the existence of a criminal charge, even though the charge against a person may not be regarded as coming within the criminal sphere in the State in question, in cases where, in the light of the fundamental legal doctrine which is part of the common heritage - as underlined in the preamble of the Convention - of European States, the nature of the offence in question requires that the accused person be entitled to all the guarantees of such a trial.

5. Let us pursue our line of reasoning. The limits of the power conferred on the organs of the Convention to modify these definitions in the above-mentioned manner are soon obvious. Insofar as the limited repercussion on the hierarchy of social values of offences punishable by fine is not regarded as sufficient to justify - if only as an alternative - the deprivation of liberty, Contracting States remain free to classify such offences as they wish and in accordance with the criteria they choose. As the wide range of fines may, under the relevant legislation in the different domestic legal systems, come within both the criminal sphere and the administrative sphere, it is

clear that there are no fundamental and clear-cut criteria for distinguishing and classifying them. An attempt to fill this vacuum by looking for criteria which do not exist in the legal institutions in the States parties to the Convention might be taxed as arbitrary.

6. It is quite a different matter to ascertain whether uniform tendencies can be detected in the techniques employed in the different countries when giving legal form to the legislature's decision to classify offences punished by fines as criminal or administrative.

The following observations, inter alia, may be made:

In the case of a criminal offence the order to pay the fine is issued by a judicial authority following proceedings dealing with the facts and the legal submissions presented by the prosecution and the defence. The accused may avoid conviction by paying, within a certain period, a sum of money fixed in accordance with specific criteria. For example, under Article 162 of the Italian Criminal Code "with regard to summary offences punishable only by a fine, the offender may, before the commencement of the hearing, or before conviction pay a sum of money equal to 1/3 of the maximum fine prescribed by law for the offence committed, in addition to the costs of the proceedings. Payment shall extinguish the offence".

On the other hand, a notice to pay the administrative fine is issued by the administrative authority itself after duly receiving a report of the offence and, under Italian law, after hearing the parties concerned where the latter so request. Here too, it is possible to make an advance payment resulting in a discharge, which is the equivalent of a voluntary payment ("oblazione") in respect of minor criminal offences. Legal proceedings may be instituted under the principle that a person is always entitled to the protection of the courts against the acts of the public administrative authorities affecting his rights. A person on whom an administrative penalty is imposed may always raise an objection to the payment order within the time and in accordance with the formalities prescribed by law. After the hearing and at any other stage of the proceedings, the court hearing the case may either reject the objection and award the costs of the proceedings against the person who lodged it, or accept it by setting aside all or part of the administrative authority's order or by modifying certain parts of that order.

7. Another factor which must be taken into account is the modern trend towards the decriminalisation of minor offences, particularly the replacement of the criminal penalty of a fine by a penalty defined as "administrative", although the effect of this penalty is also to oblige a person to pay a sum of money to the State. At the same time as the Contravention of Regulations Act (Ordnungswidrigkeiten-gesetz) of the Federal Republic of Germany of 1968, the Italian Parliament enacted a bill amending the system of sanctions applying to road traffic penalties and breaches of local regulations. Section 1 of this Act of 3 May 1967 reads as follows: "Violations of the rules hereinafter specified shall, in cases where only a fine is prescribed, not constitute criminal offences and shall be subject only to the administrative penalty of payment of a sum of money." Another Act with similar provisions but much wider in scope has recently been passed: the "Criminal Justice (Amendment) Act", Act No 689 of 24 November 1981.

8. It is hardly necessary to add that the freedom retained by the States parties to the Convention as regards the legal classification of certain offences must also be understood as a freedom to make different regulations in respect of these offences, involving replacing a system of criminal punishment by a system of administrative punishment, or even, as in the present case, replacing the latter by the former. This possibility must not be confused with another, to which a prominent Italian author and professor of adminstrative law in the University of Rome drew attention when he remarked that proceedings which begin "as administrative proceedings to punish an illegal act which has the appearance of an administrative act", may "lead to criminal proceedings and a redefinition of the act as criminal instead of illegal" (Giannini, Diritti amministrativo, II, Milan 1970, p. 1310). Of course this possibility is rationally quite acceptable if it means that a certain act, initially defined as an illegal administrative act, may on the basis of other circumstances which emerge in the course of the administrative proceedings require to be redefined, and in particular redefined as a criminal act, resulting in a criminal charge falling within the jurisdiction of the criminal courts. In any case, it must be pointed out in this context that possible changes in the systems of punishment in a State along the above lines are compatible with the system of the Convention.

9. This line of reasoning is clearly incomplete without adding that the consequences of decisions by administrative authorities concerning a person's civil rights, particularly the effect on the right of ownership of imposing administrative fines, entitle the person concerned to challenge these decisions and claim a right to trial by a court as recognised by Article 6 (1) of the Convention in respect of any dispute concerning civil rights.

It is not necessary to repeat in detail a line of reasoning already developed some time ago in respect of disciplinary proceedings, under Article 6 of the Convention. There is great force in a phrase used several times by the European Court whereby the French wording of Article 6 (1) of the Convention "contestations sur (des) droits de caractère civil" covers "any proceedings the result of which is decisive" for such rights. This phrase must be understood to mean logically that any dispute dealing inter alia with the following type of proceedings, falls within the legal category specified by those terms: where a public administrative organ has found that an offence punishable only by a fine, and defined by statute as an administrative offence, has been committed, "proceedings" are held before the competent administrative authorities, the "result" of which is the imposition of that penalty. Whether the person concerned challenges the truthfulness of the facts on which the administrative authorities base the decision to impose the penalty or challenges for one reason or another the lawfulness of the penalty imposed, the right conferred by Article 6 (1) applies to the decision on disputes involving civil rights.

10. In conclusion, I would like to say that firstly, since the guarantee in Article 6 (3)(e), whether interpreted literally or logically, only concerns a fair trial in criminal matters, and secondly, as the judicial proceedings in the present case at no stage concerned a criminal "charge", the applicant's complaint must be regarded as falling outside the scope of the system of guarantees established by that Article of the Convention.

Dissenting opinion of Mr. Frowein with which Mr. Jörundsson, Kiernan and Soyer concurred

1. The Convention contains in Art. 6, paras. 1-3 specific guarantees applying to each procedure which leads to the "determination " of a "criminal charge". These are much more detailed than those included in Art. 6, para. 1 for judicial procedures about civil rights. The Court and the Commission have held that the notion of "criminal charge" under the Convention is autonomous and the Commission rightly confirms that in this respect (para. 55). However, for the classification under the Convention the national definition of the procedure concerned must always be the starting point. This, again, is in line with the decisions of the Court and the Commission (para. 56). The classification of the petty violations of traffic regulations with which the Commission is concerned here is clear in German law. They are not criminal acts.

2. The decision of the German legislature to "decriminalise" this area is well understandable and is in conformity with a widespread tendency in modern penal policy. Criminal courts as other courts are overburdened in many countries. A less formal administrative procedure should facilitate the repression of these rather petty violations of the law. This could give the criminal courts better possibilities to deal with real criminality which is unfortunately increasing in most countries. Of course, an administrative procedure could never, under the Convention, lead to typically criminal sanctions, for instance a prison sentence. But a procedure which at the maximum can have the result of a money fine of DM 1.000.- would not seem criminal by its very nature. The Commission is only concerned with the procedure in the case of Öztürk in which the court could impose a fine of more than DM 60.- but there is not the slightest indication that the fine would in fact even have come anywhere near to DM 1.000.-, had the objection not been withdrawn.

3. It seems that the Commission was influenced to some extent by the fact that the statute provides for a procedure very similar to the normal criminal trial where the person concerned has lodged an objection (Einspruch) (para. 67, 68). But this cannot be decisive. The procedure following the objection can be regulated in different ways. It would for instance be open to provide only for written submissions if Art. 6 does not apply to the matter because of its nature. The decision to introduce an oral hearing after the objection cannot be relevant for the classification of the charge as a criminal one.

4. It does not seem necessary to discuss whether or not in general the distinction between criminal and non-criminal behaviour in the German legal system is sound. As far as petty road traffic violations are concerned there is no reason to classify them as necessarily "criminal" under the Convention. The rare possibility that someone be detained for not paying the fine is to be seen as a measure falling under Art. 5, para. 1 (b) and has nothing to do with a deprivation of liberty after conviction by a court for criminal behaviour (Art. 5, para. 1 (a).

5. One may well ask whether good reasons exist not to grant foreigners a free interpreter if an oral hearing after objection takes place. However, the Commission must limit itself to applying the Convention. There exist many administrative procedures to which the guarantee of Art. 6, para. 3 (e) does not apply although their outcome may be of great importance for the person concerned. The procedure in the case of Öztürk was an administrative procedure of a rather unimportant nature.

A P P E N D I X I

HISTORY OF PROCEEDINGS

Item	Date	Note
1. Examination of admissibility		
Introduction of the application	14 February 1979	
Registration of the application	16 February 1979	
Commission's deliberations and decision to give notice of the application to the respondent Government and to invite the parties to submit their written observations on the admissibility (Rule 42 (2)(b) of the Rules of Procedure)	13 July 1979	MM Norgaard Busuttil Daver Opsahl Polak Frowein Tenekides Trechsel Kiernan
Extension to 30 November 1979 of the time-limit for the submission of the Government's observations on admissibility granted by the President of the Commission on the Government's request	18 October 1979	Mr Fawcett
Further extension to 1 February 1980 of the time-limit for the submission of the Government's observations on admissibility granted by the President of the Commission on the Government's request	22 January 1980	Mr Fawcett
Date of Government's observations on admissibility	22 October 1980	
Communication of Government's observations to applicant's lawyer and invitation to submit observations in reply before 3 December 1980	4 November 1980	
Date of applicant's observations on admissibility in reply	22 April 1981	

Item	Date	Note
Commission's deliberations and decision to invite the parties to an oral hearing on the admissibility and on the merits (Rule 42 (3)(b) of the Rules of Procedure	14 May 1981	MM Fawcett Norgaard Busuttil Daver Opsahl Frowein Tenekides Kiernan Melchior Carrillo
Hearing on admissibility and merits. Commission's deliberations and decision to declare the application admissible	14 December 1981	MM Norgaard Sperduti Frowein Kellberg Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers
2. Examination of merits		
Commission's deliberations, final votus and adoption of the Report	12 May 1982	MM Norgaard Frowein Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer