COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 2257/64

Lodged by

Dr. Michael Graf Soltikow

against

the Federal Republic Germany

Report of the Commission

(Adopted on 3rd February 1970)

Strasbourg

Table of Contents

./.

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 applicant, Dr. Michael Graf Soltikow, is a German citizen, born in 1902, living in Munich and having a further residence at St. Jean-Cap-Ferrat in France. He is a journalist and writer. From January 1969 the applicant has been represented before the Commission by Rechtsanwalt Karlernst Geier, a lawyer practising in Munich.

On the basis of documentation assembled by the applicant, a Nuremberg weekly magazine published in April 1952, two articles on the assassination of Ernst vom Rath, an official at the German Embassy in Paris in 1938. This event was taken as a pretext for the Nazi action against the Jewish community in Germany known as "Reichskristallnacht". It was stated in these articles that the assassin, the 17 year old Herschel Grynspan, had not acted for political motives as an agent of world Jewry as alleged by the Nazi authorities. According to Grynspan's own defence, his reasons had in fact been purely personal as Ernst vom Rath had refused to pay him for his assistance in procuring homosexual contacts.

On 4th July, 1952, Dr. Günter vom Rath, a brother of the deceased, brought a charge against the applicant and the editor of the paper for defamation of the memory of the deceased (Verunglimpfung des Andenkens Verstorbener) under Article 189 of the German Penal Code (Strafgesetzbuch). The applicant was indicted on this charge by the Public Prosecutor (Staatsanwaltschaft) on 23rd March, 1954. But, after a preliminary investigation, the Regional Court (Landgericht) of Munich I on 10th July, 1957, refused to proceed further on the ground that there was not sufficient evidence for it. On an appeal lodged by Günter vom Rath, however, the Court of Appeal (Oberlandesgericht) of Munich, on 27th January, 1958, ordered trial proceedings to be opened before the Regional Court of Munich.

./.

In this trial, held from 14th November to 21st December, 1960 the applicant was found guilty and sentenced to five months' imprisonment, the sentence being, however, suspended on probation. The applicant appealed from this decision (Revision) and on 3rd October, 1961, the Federal Court (Bundesgerichtshof) set aside the judgment, inter alia, on the ground that certain witnesses for the applicant had not been called, and referred the case back to the Regional Court of Augsburg for a new trial.

The Regional Court, after having heard a number of witnesses at Augsburg and, by rogatory commissions in France, Italy and Israel, decided on 13th March, 1964, to discontinue the proceedings under the Amnesty Act (Straffreiheitsgesetz) of 1954. Upon the request of the applicant, however, the proceedings were obliged to be resumed according to the provisions of the Amnesty Act.

The Court then fixed 9th June, 1964, as the date for the commencement of the trial in which more than 60 witnesses were to be heard. However, when the applicant requested before the trial that additional evidence, mostly from abroad, should be examined, the Court decided on 21st May, 1964 not to hold the trial and on 8th July, 1964 it decided to discontinue the proceedings in pursuance of Article 153, paragraph (3), of the Code of Criminal Procedure (Strafprozessordnung) on the grounds, inter alia, that the applicant's guilt was minimal (geriag) and the consequences of his acts were insignificant (unbedeutend). The Court also considered that the case did not justify any further time-consuming and expensive investigations and proceedings. It should be noted that at that time the files contained already more than 3,700 pages. The expenses of the proceedings were declared to be at the charge of the State but the applicant had to bear his lawyer's fees.

2. The present application was lodged with the Commission on 11th September, 1962, and registered on 27th July, 1964, after the applicant has completed the necessary formalities.

By partial decision of 7th October, 1966, the Commission rejected certain parts of the application as being inadmissible (1).

./.

(1) Appendix II of this Report, page 33.

On 5th April, 1968, after having obtained written and, subsequently, oral submissions, from the parties, the Commission, declared admissible the applicant's complaint under Article 6, paragraph (1), of the Convention concerning the length of the criminal proceedings but inadmissible the remainder of the application which related to the discontinuance of the proceedings under Article 153, paragraph (3), of the Code of Criminal Procedure (1).

On 17th and 18th July, 1969, the Sub-Commission heard the oral arguments of the parties on the merits of the case. At the end of the hearing the Sub-Commission decided to deliberate on the submissions already before it and not for the time being to obtain further evidence or to invite the parties to make further submissions. However, the applicant subsequently raised a number of procedural questions and applied for further evidence to be taken. These questions were duly dealt with by the Sub-Commission. The Commission also itself rejected the applicant's request for a reconsideration of its final decision on admissibility.

The present Report, which was adopted by the Commission on 3rd February, 1970, has been drawn up in pursuance of Article 31 of the Convention and is now transmitted to the Committee of Ministers in accordance with paragraph (2) of that Article.

A friendly settlement of the case has not been reached and the purpose of the Commission in the present Report, as provided in paragraph (1) of Article 3, 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 its obligations under the Convention.

A schedule setting out the history of the proceedings before the Commission and the Sub-Commission, and the Commission's decisions on the admissibility of the application are attached as Appendices I, II and III of this Report; and a detailed schedule showing the course of the criminal proceedings against the applicant in the Federal Republic of Germany is attached as Appendix IV. An account of the Sub-Commission's unsuccessful attempts to reach a friendly settlement has been produced as a separate document.

./.

(1) Appendix III of this Report, page 41.

The full text of the oral and written pleadings of the parties together with documents handed in as exhibits are held in the archives of the Commission and are available if required.

A. POINT AT ISSUE

3. After the final decision on admissibility of 5th April, 1968, the only remaining point at issue in the present case is the question whether or not the length of the criminal proceedings against the applicant violated Article 6, paragraph (1), of the Convention which stipulates that in "the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within reasonable time ..."

B. SUBMISSIONS OF THE PARTIES

I. Arguments of the parties as to the period to be considered

4. The parties did not specifically deal with the problem as to what period should be taken into consideration for the purpose of deciding whether the proceedings against the applicant exceeded a "reasonable time" within the meaning of Article 6, paragraph (1), of the Convention.

However, the applicant himself repeatedly referred to 12 years of proceedings against him and thereby implied that the whole period from 1952 until 1964 should be taken into consideration. According to his counsel, the delay which constituted a violation of the Convention started already in 1952 when the Public Prosecutor learned that the applicant was the author of the articles concerned.

The Government did not make any submissions with regard to the period to be taken into account when applying the provisions concerned.

II. As to the manner in which the case was conducted by the judicial authorities

(1) General observations

5. During the proceedings on admissibility and subsequently, the applicant never presented his case in a clear and concise manner. Following the decision on admissibility, he frequently and at great length discussed matters which were not immediately connected with the only remaining issue. In particular, he dealt

./.

extensively with the character of Ernst vom Rath and other persons involved in the affair, his own experience as a member of the German Intelligence Service (Abwehr) during the war and previous proceedings against him (criminal proceedings instituted by Gestapo in 1943 and denazification proceedings in 1949-52). He also repeated many of the complaints which had been declared inadmissible by the Commission.

Subsequent to the Sub-Commission's recommendation that the applicant should present his case through a lawyer, the applicant instructed Mr. Geier to represent him. However, in his various memorials Mr. Geier only made comparatively limited submissions with regard to the length of the proceedings although both parties made frequent references to the extensive German case-file.

The submissions made by the parties can, as regards the stage of admissibility, be found first by reference to pages 45 to 55 of the Commission's final decision of 5th April, 1968 (Appendix III) and, in particular, to the quotations from the Government's analysis of the different stages of the proceedings and the applicant's submissions in reply. The essential part of the submissions made before the Sub-Commission after admissibility are summarised below:

(2) Main arguments of the parties

(a) General character of the proceedings

6. The applicant alleged that the proceedings against him were conducted for political reasons, in particular, because of his revelations of the Nazi past of a number of officials. In this connection he claimed that the prosecution officers were influenced by irrelevant considerations in the conduct of the proceedings particular because he had at a previous stage given evidence against their administrative superior, the then Minister of Justice of Land Bavaria. The persons behind the proceedings wished to muzzle him during the period of proceedings and to discredit him professionally in such a manner that his books would not be published. They feared, inter alia, that the applicant would otherwise give unwelcome publicity to matters of which he had learned during his war-time service in the Intelligence Service.

./.

The applicant further alleged that the judges responsible for his case showed clear signs of prejudice against him or delayed the proceedings in the hope that they would thereby escape having to decide the case themselves. A further source of prejudice was the unfounded rumour that the applicant belonged to a Jewish family as this gave the proceedings an anti-Semitic character.

(b) Should the proceedings ever have been instituted?

7. The applicant argued that this should not have happened as the publication of his articles was in the public interest and falls under the freedom of research guaranteed by Article 5 of the Basic Law. The articles tried to establish the truth about an important historic event. Furthermore, Article 193 of the Penal Code provides that a statement to another person's detriment is not in any way punishable if it was made in defence of legitimate interests or was concerned with the results of scientific or professional activities.

The Government submitted that the Public Prosecutor was obliged to institute investigations before a decision could be taken as to whether the applicant had acted in preservation of rightful interests (berechtigte Interessen). In deciding that the public interest called for a public charge the Public Prosecutor properly exercised his discretion. It should be noted that the articles had been published in a magazine with a large circulation and that the allegations were of a serious nature. As regards the applicability of Article 193 of the Penal Code, the Federal Court held in its judgment of 3rd October, 1961, that the applicant could not claim any rightful interests.

(c) The manuscript questions

8. The applicant maintained that the prosecution, the Investigating Judge and the courts all failed to consider whether the applicant's manuscript had before publication been altered by the editors of the magazine concerned although it was notorious that such alterations are usually made. Not until 1960 was the manuscript itself made part of the files, although the applicant had in 1952 already emphasised the importance of the original text. Due to the fact that he was not allowed to consult the files during the investigations, he was not able to ascertain whether the manuscript had been included.

./.

The Government left open the question whether such a general practice existed in the publishing world but submitted that in any event the applicant himself had never alleged that his manuscript had been reproduced in an incomplete or altered form. On the contrary, he was deliberately silent on this point and documents in the files contradicted assertions that he asked for the manuscripts to be included in the files. The Government also pointed out that the applicant's defence counsel had the files in his office between August 1958 and January 1959.

(d) The conduct of the preliminary investigations

9. According to the applicant, the failure to consider whether his manuscript had been altered led to the proceedings being conducted in an entirely false direction. An examination of the manuscript showed that the applicant had emphasised that vom Rath's homosexuality had been referred to by Grynspan as a defence, although it could not be proved true. In view of an amendment of the Penal Code in 1953 the applicant could not even have been punished as an accessory since he was unaware of the alterations even if one assumed that the editors themselves were guilty. The proceedings should therefore have been discontinued as soon as this provision came into force. Instead, the applicant was forced to produce evidence to establish his innocence, although under German law the accused was not bound to offer any evidence in his defence or to provide any witnesses. This was the exclusive task of the Public Prosecutor's Office and the Investigating Judge.

The Government submitted that the applicant was himself responsible for any delay caused by the proceedings being conducted on the assumption that he was responsible for the articles as actually published. It was true that the burden of proof as to the truth of the applicant's statement did not lie with him. Authoritative legal opinion was, however, to the effect that failure to produce evidence weighed against the accused and it was therefore in his interest to assist the court by providing any relevant evidence. The applicant did not claim that his original article had been distorted but repeatedly stated that he wished to prove the truth of his assertions. The Government did not, however, reply to the applicant's submissions with regard to the above amendment of the Penal Code.

./.

(e) Application of the Amnesty Act

10. The applicant claimed that the proceedings could have been discontinued under the Amnesty Act, 1954, when this legislation came into force. When he was actually offered this possibility in 1960, it was essential for him to clear his name after eight years of proceedings which received extensive publicity.

The Government referred to the fact that the applicant on 8th December, 1960, i.e. during the trial, stated that despite any personal costs he wished the proceedings to be continued in order to establish his innocence.

(f) Heiber's inspection of the files

11. The applicant claimed that the proceedings were delayed as a journalist called Helmuth Heiber was allowed to inspect the file. While the case was still pending, Heiber, who was only acting for his own commercial purposes, published his version of the Grynspan affair which distorted the truth and by influencing witnesses served the cause of vom Rath's brother and former Nazis behind him. He also emphasised that Heiber had not only reasons but also the opportunity for removing documents from the file.

The Government replied that the Presiding Judge at the Munich Court had the discretionary right to grant Dr. Heiber, who was a member of the staff of the Institute for Contempory History, access to the file but denied that the file was handed to him for weeks or months as alleged by the applicant or that, in fact, any delay was caused by Heiber's study of the files.

(g) Suppression of motions for evidence

12. The applicant alleged that a number of his written motions for evidence to be taken had now disappeared from the file whereas others which were missing at the trial had later reappeared. In this connection the applicant commented on the dilapidated state of the file and maintained that this had led to delays. He referred to a large number of particular pages in the files and pointed out that the pagination of certain sheets in the file had been altered on several occasions.

The Government stated that there was no evidence to show that documents which were not in the file during the trial and appeal proceedings had now reappeared. With regard to certain documents of which the applicant had submitted copies during

./.

the proceedings before the Sub-Commission (1), it was denied that the originals had ever been submitted. Reference was made to allegedly conflicting statements made by the applicant in documents which were in the file. It was further pointed out that only evidence actually taken at the trial could serve as a basis for the judgment. The applicant knew exactly what evidence was heard and could have applied for the taking of additional evidence. The trial transcript showed, however, that no such requests were made. As regards the state of the file, the Government claimed that it was able to be used at the trial and that its present condition was of no significance as it had frequently been sent to various authorities for reference.

(h) The Statute of Limitation

13. The applicant complained that the repeated interruptions of the period of limitation for prosecution of the press offence concerned were contrary to the principles of German law as such interruptions were only permissible if calculated to accelerate the proceedings. He also referred to the fact that the proceedings against one of the editors (Miss Krakauer) were allowed to become statute-barred.

The Government submitted that the judges concerned were obliged to prevent the action from becoming statute-barred. The proceedings were only pursued against the applicant because the intervenor (Nebenkläger) had objected to the decision of 10th July, 1957, not to open the main proceedings against him. Furthermore, the Federal Court carefully considered the question of limitation and found that the action against the applicant had not become statute-barred. Contrary to the applicant's assertion, this procedural question was of a fundamental nature which the Federal Court could and must examine.

./.

(1) - Statement on oath by Hanz Wolfgang Notzik of 11th December, 1954;
- Letter from the applicant comprising 12 pages and dated 15th August, 1955;
- Letter from the applicant dated 9th September, 1955;
- Letter from the applicant dated 14th November, 1955;
- Letter from the applicant dated 14th March, 1956, all requesting evidence to be taken.

(i) Allegation that, for improper reasons, witnesses were not heard

14. According to the applicant a series of important witnesses, including Dr. Heinrich Jagusch, a Presiding Judge at the Federal Court, were not heard although they could have established the applicant's innocence. Similarly, the courts refused to produce certain files concerning the Grynspan-vom Rath affair which also could prove his innocence. In fact the evidence offered by the applicant in this respect should properly have led to the proceedings being discontinued within three months. The trial court deliberately delayed the proceedings by a breach of its legal duty to elucidate the facts even when the result was in favour of the accused. In his own submissions the applicant particularly dealt with the Jagusch question and maintained that the courts tried every means to avoid the hearing of the judge as this would have revealed his alleged Nazi past and caused a world-wide political scandal.

The Government described as mere guesswork the applicant's submissions with regard to the possible conclusion of the courts if the witnesses concerned had been heard. Insofar as the Court declined to hear any particular witness at the Munich trial it gave reasons therefor. There was, however, no evidence to show that the Court intentionally delayed the proceedings. As regards the hearing of Dr. Jagusch, the Government referred to the written statements made by Jagusch to the Regional Court in answer to a summons to appear as a witness. In these statements he explained that he had no relevant information to give.

(j) Allegation that Grynspan is alive

15. The applicant complained that the courts did not take action on a letter which had been received and which showed that Grynspan was alive. Nor did they allow the applicant's request for the granting of a safe conduct in order to enable Grynspan to give evidence. On the contrary the Public Prosecutor made statements in public to the effect that he would arrest Grynspan for murder if he appeared. The applicant claimed that the courts had also received other information to the effect that Grynspan was alive.

The Government rejected the applicant's allegation as mere speculation and pointed out that investigations in Germany and France had not given any reason to believe that Grynspan was alive.

./.

(k) Conclusions of the parties

16. The Government submitted that the length of the proceedings was explained, on the one hand, by the difficulty in clarifying facts that happened abroad in 1938, namely 15 years after the event; on the other hand by the applicant's conduct of the proceedings as he had at least for eight years asserted that he was going to prove the allegations of fact set out in his article. The Government referred in this context to the "incalculable" number of complaints, submissions and applications made by the applicant during the course of the proceedings. In the special circumstances of the case, the 12 years of proceedings could not be regarded as being contrary to Article 6, paragraph (1), of the Convention.

The applicant alleged that the length of proceedings was unjustified and that there had been a violation of Article 6, paragraph (1), of the Convention. He claimed that he had sufficiently proved that the proceedings were improperly conducted without his being in any way responsible. In the circumstances, the extent of his submissions to the courts could not be held against him as he had had to use every opportunity to defend himself, in particular, since he was frequently forced to appeal to higher courts before his various requests were granted.

C. ESTABLISHMENT OF THE FACTS

17. A detailed schedule recording the dates of the criminal proceedings against the applicant is set out in Appendix IV. On the basis of this schedule and an examination of the German case-files, which were put at the disposal of the Commission and the Sub-Commission by the respondent Government, the following facts have been established.

I. Investigations by the Public Prosecutor

18. On 4th July, 1952, Dr. Günter vom Rath laid charges (Strafantrag) with the Public Prosecutor's Office in Nuremberg against the applicant and Miss LiselotteeKrakauer, the editor of the magazine "Wochenend", for defamation of

./.

memory of his deceased brother, under Article 189 of the Penal Code (1). In the course of the investigations instituted by the Public Prosecutor, written statements were obtained from two persons and a number of witnesses were heard by or requested to appear before eight different courts in the Federal Republic. Three other witnesses were heard by a court in France under a rogatory commission. The applicant himself was heard by a judge for the first time on 23rd October, 1953, after several attempts by the authorities to arrange for his appearance had failed.

From the beginning the applicant objected to the institution of the investigations but his complaints were rejected by the Attorney-General and, finally, on 22nd December, 1952, by the Bavarian Minister of Justice.

On 23rd March, 1954, the Public Prosecutor preferred the indictment (Anklageschrift) against the applicant and Miss Krakauer before the 1st Penal Chamber (Strafkammer) of the Regional Court of Munich I and requested that the trial should be ordered.

II. Proceedings relating to request for preliminary investigation and to certain other questions of procedure

19. On 26th and 29th April, 1954, respectively, Miss Krakauer and the applicant submitted applications for the opening of a formal preliminary investigation (gerichtliche Voruntersuchung) and requested that a large number of witnesses should be heard. The applicant also challenged the Court on the ground of bias.

On 24th June, 1954, the Court admitted Günter vom Rath as an intervenor (Nebenkläger) in the proceedings. The applicant lodged, however, an appeal against this decision.

./.

---

(1) Article 189 (Defamation of the memory of a deceased person)

(1) Anybody who defames the memory of a deceased person shall be punished by imprisonment for a term not to exceed two years or a fine.

(2) Prosecution shall be commenced only upon petition of the parents, the children, the spouse or the brothers or sisters of the deceased

(3) ....

Artikel 189 (Verunglimpfung des Andenkens Verstorbener)

(1) Wer das Andenken eines Verstorbenen verunglimpft, wird mit Gefängnis bis zu zwei Jahren oder mit Geldstrafe bestraft.

(2) Die Verfolgung tritt nur auf Antrag der Eltern, der Kinder, des Ehegatten oder der Geschwister des Verstorbenen ein.

(3) ....

On 26th July, 1954, the 1st Penal Chamber declared inadmissible the applicant's challenge of the Court and a renewed challenge was rejected as being unfounded by the 2nd Penal Chamber on 21st September, 1954. The applicant's appeals regarding the admission of the intervenor and his last challenge of the judges were finally rejected by the Bavarian Supreme Court (Bayerisches Oberstes Landesgericht) on 7th December, 1954.

On 22nd January, 1955, the Regional Court refused the applicant's and Miss Krakauer's applications for a preliminary investigation. This decision was, however, on the applicant's appeal, set aside by the Bavarian Supreme Court on 7th April, 1955, on the ground that difficulties regarding evidence and the necessity of clarifying the facts called for such judicial investigation.

III. Preliminary investigation by the Court

20. The first phase of the preliminary investigation by the Investigating Judge at the Regional Court lasted from 2nd May, 1955 to 13th March, 1956. During this period 14 witnesses were heard in the Federal Republic, one witness gave evidence at the Embassy in Paris and two persons were heard by a French court.

The supplementary preliminary investigations subsequently applied for by the Public Prosecutor lasted from 18th July, 1956 to 5th February, 1957. The reason given for this application was that it was necessary to hear three further witnesses named by the applicant. Two witnesses were heard at this stage and the Investigating Judge also requested information from the Institute for Contempory History and a written statement from one witness who was living abroad.

IV. Conclusion of the preliminary investigation and opening of the main proceedings

21. On 5th February, 1957, the Investigating Judge decided to terminate the investigations. The applicant appealed against this decision and applied for further evidence to be taken. On 10th July, 1957, the Regional Court rejected the Public Prosecutor's application for the main proceedings (Hauptverfahren) to be opened. Insofar as Miss Krakauer was concerned, the Court found that prosecution was barred

./.

by the statute of limitation. As regards the applicant the Court refused the application on the ground that there was no evidence proving that "subjectively", i.e. from the applicant's point of view, the conditions of Article 189 of the Penal Code were fulfilled. On an immediate objection (sofortige Beschwerde) by the intervenor this decision was reversed on 27th January, 1958, by the Court of Appeal insofar as the applicant was concerned and the opening of the main proceedings against him were ordered. The applicant's subsequent requests for a correction of this decision were rejected by the Court of Appeal on 19th and 21st February, 1958, respectively.

On 18th March, 1958, the applicant applied for the appointment of an official defence counsel (Pflichtverteidiger) and for the taking of certain new evidence. On 14th May, 1958, the Presiding Judge of the Regional Court refused his application for appointment of counsel and dismissed his application for taking of evidence as it did not precisely indicate the subject matter. On 6th June, 1957, the Penal Chamber upheld the Presiding Judge's refusal to appoint counsel. On the applicant's appeal, the Court of Appeal on 17th July, 1958, set aside this decision and ordered the appointment of counsel. On 28th August, 1958, Rechtsanwalt Götz of Munich was appointed and the following day the case files were transmitted to his office where they remained until 27th January, 1959.

A further request by the applicant for a re-opening of the preliminary investigations had been rejected by the Regional Court on 19th June, 1958. Before fixing a date for the trial, the Court ordered the hearing of eight witnesses, between February 1959 and February 1960, by the competent District Courts. Out of these witnesses seven were heard upon oath whereas one witness, Dr. Auer, who had already been heard in 1955, was not examined after the Court had been informed that he lived in Colombo.

On 4th July, 1960, the Presiding Judge ordered that the trial should begin on 14th November, 1960.

V. The trial before the Regional Court of Munich I

22. The trial was held over a period of twelve days, i.e. 14th, 15th, 16th, 18th, 22nd, 25th and 30th November and 3rd, 8th, 14th, 20th, 21st December, 1960. During the trial 23 witnesses were heard and a large amount of written evidence was examined. The records of the evidence of certain witnesses

./.

who had been heard at an earlier date was read out in Court. During the trial the applicant's counsel repeatedly applied for further witnesses to be heard and further documents to be produced. These applications were mostly refused. The Regional Court also declared inadmissible the applicant's challenge of the Presiding Judge on grounds of bias.

On 21st December, 1960, the applicant was convicted of the charge under Article 189 of the Penal Code and sentenced to five months' imprisonment, the sentence being suspended on probation.

VI. Appeal proceedings

23. On 23rd December, 1960, the applicant lodged through counsel assigned to him an appeal (Revision) with the Federal Court. The Regional Court's judgment was served on the applicant on 24th March, 1961. On 7th April, 1961, Rechtsanwalt Freiherr von Stackelberg, a lawyer practising in Karlsruhe, who the applicant had in the meanwhile instructed, submitted the grounds of appeal. On the same day, the applicant himself orally submitted his grounds of appeal to be recorded at the Regional Court together with an application for a restitutio in integrum on the ground that he had further complaints justifying an appeal. A further challenge of the judges who had taken part in the trial made by the applicant on the ground of bias was rejected by the Regional Court on 21st April.

On 19th September, 1961, the Federal Court declared inadmissible the applicant's request for a restitutio in integrum. On 3rd October, 1961, the Court gave its judgment whereby the Regional Court's judgment was set aside, inter alia, on the grounds that the Regional Court had wrongly refused to call six witnesses requested by the applicant and to allow the reading out in court of the whole manuscript on which the articles concerned had been based. The Federal Court rejected, however, a number of other complaints on which the applicant based his appeal, including his claim that the action against him had been barred by the statute of limitation. The Federal Court remitted the case to the Regional Court of Augsburg for a new trial.

./.

VII. Proceedings before the Regional Court of Augsburg

24. The files were received by the Public Prosecutor at the Regional Court in Augsburg on 19th December, 1961. In preparation of the trial the Court ordered the hearing of three witnesses in the Federal Republic and of 15 witnesses abroad. In addition, a commissioned judge of the Regional Court took the testimonies of four other witnesses, while a fifth witness, Rechtsanwalt Werner Jagusch, was requested by the judge to make a statement in writing. The hearing of these witnesses took place between March 1962 and January 1963. Out of the witnesses to be heard by rogatory commission in France only seven were heard, however, since one had died, two could not be traced and one had moved from Paris. Three further witnesses were heard in Israel and one in Italy.

The Court also called for the production of the "Grynspan files" of the Federal Ministry of Justice, of the Document Centre and of the Attorney General (Generalstaatsanwalt) in East Berlin.

At the applicant's request Dr. Johannes, a lawyer practising in Augsburg, was appointed as his counsel in February, 1962. On 29th August, 1963, the latter was, however, at his own request released from his duties. A new counsel was appointed in December, 1963.

On 13th March, 1964, the Court terminated the proceedings against the applicant under the Amnesty Act, 1954, on the ground that a sentence of more than three months' imprisonment was not to be expected. But at the request of the applicant, who claimed to be innocent, the proceedings were necessarily resumed.

On 18th April, 1964, the Court informed the applicant's counsel that the trial was fixed for June 1964 and it requested him to submit precise applications with regard to the evidence which he wished to be examined during the trial.

On 22nd April, 1964, the date of the trial was fixed for 9th June, 1964. It was intended to summon 68 witnesses 11 of whom were living abroad.

On 21st May, 1964, the Court adjourned the date of the trial as the addresses of several witnesses were unknown and also because the applicant had applied for the hearing of further witnesses whose names had not all been given. The Court considered that it could not dispense with an examination of these witnesses and that a confrontation of certain witnesses was also necessary. The applicant's appeal against that decision was declared inadmissible by the Court of Appeal on 11th June, 1964.

./.

On 8th July, 1964, the Regional Court decided finally to discontinue the case under Article 153, paragraph (3), of the Code of Criminal Procedure on the ground that, in any event, the applicant's guilt was minimal and the consequences of his acts were insignificant. The Court held, inter alia, that the case did not justify any further time-consuming and expensive investigations and proceedings.

D. OPINION OF THE COMMISSION

25. A preliminary question arises as to the period which is relevant for deciding whether or not the length of the criminal proceedings has exceeded a reasonable time.

It is recalled that the charges against the applicant were first brought by Günter vom Rath on 4th July, 1952. On 28th July, 1953, the Public Prosecutor requested that the applicant should be heard by a judge on these charges, and he was so heard on 23rd October the same year. The indictment was preferred against the applicant on 23rd March, 1954.

26. The provisions of Article 6, paragraph (1), are generally to be understood as implying that the relevant period begins with the day on which a person is charged (European Court of Human Rights, Neumeister Case, judgment of 27th June, 1968, page 41, para. 18).

In determining the point at which a person can be considered as having been charged within the meaning of Article 6, paragraph (1), of the Convention, regard must be had to the particular case concerned. On the one hand the word "charge" in the said Article cannot be construed in the terms of the domestic law of any of the Contracting States but must be interpreted independently. On the other hand, it may be necessary to have regard to the whole system of criminal procedure of the State concerned in order to interpret and thus delimit the notion of "charge" for the purpose of applying that notion to the facts of a particular case.

In this connection it is to be observed that under the relevant provisions of the German Code of Criminal Procedure (Article 170) the public charge is preferred (Erhebung der öffentlichen Klage) when the Public Prosecutor submits to the competent court either a request for the opening of a formal preliminary investigation (gerichtliche Voruntersuchung) or the bill of indictment (Anklageschrift). Under German law the suspected person becomes charged (angeschuldigt) at this moment.

./.

Having examined the particular circumstances of the present case in this light, the Commission has come to the conclusion that the applicant was not charged within the meaning of Article 6, paragraph (1), until 23rd March, 1954, being the date on which the indictment was preferred. Although proceedings with regard to the information laid by Günter vom Rath had in fact commenced almost one year and eight months earlier, no preliminary investigation (gerichtliche Voruntersuchung) had been requested before the date of the indictment. It is also noted that the applicant was not under arrest at this stage, or indeed at any other stage of the proceedings.

The Commission is, therefore, of the opinion that 23rd March, 1954, is the date on which the period started to run in the present case.

27. The period ended on 8th July, 1964, the date on which the Regional Court of Augsburg decided to discontinue the proceedings.

28. The relevant period thus extended over slightly more than 10 years and three months. This is undoubtedly an exceptionally long period. In deciding whether or not it was unreasonably long within the meaning of Article 6, paragraph (1), of the Convention, regard must be had to the particular circumstances of the case.

In this respect there is no doubt that this case was of considerable complexity because of the difficulties in obtaining evidence from several different sources concerning events which took place many years earlier in a foreign country. This, in itself, however, could not have justified the length of the proceedings.

29. The Commission finds, however, that the German judicial or other competent authorities at no stage of the proceedings seem to have neglected their duty to advance the course of the proceedings. It reserts clearly from the schedule in Appendix IV that at no stage during the ten years in question did any considerable period elapse without some procedural step being taken. The case passed up and down in the judicial hierarchy several times, and many procedural issues were singled out for separate consideration at the request of the applicant. In its submissions the respondent Government has argued that the length of the proceedings are due primarily to the "incalculable" number of complaints, submissions and applications made by the applicant during the course of the proceedings.

./.

30. The Commission shares this view. It wishes also to refer to its own experiences with the applicant. In the conduct of his case before the Commission and the Sub-Commission, the applicant has been unable to concentrate on the relevant issues. He has submitted lengthy written pleadings outside the course of proceedings ordered by the Commission and the Sub-Commission. This has had the result of considerably complicating and protracting the proceedings before the Commission and Sub-Commission. Although the conduct of an applicant before the Commission cannot as such be relevant to the question whether or not the respondent Government has violated the Convention, such conduct may nevertheless, as in the present case, throw some light on the difficulties which the national judicial authorities have experienced in furthering the proceedings without undue delay.

Conclusion

31. For the reasons indicated above, the Commission, by eight votes to four, concludes that in the particular circumstances of the present case the length of the criminal proceedings against the applicant before the German courts did not exceed a reasonable time within the meaning of Article 6, paragraph (1), of the Convention.

Secretary to the European Commission of Human Rights

(A. B. McNULTY)

President of the European Commission of Human Rights

(M. SØRENSEN)

./.

APPENDIX I

History of proceedings

Item	Date	Note
Examination of admissibility (Commission)		
Receipt of applicant's first enquiry while his case is pending in Germany asking, inter alia, for an observer to be sent to the trial in Germany	12th December, 1960	
Introduction of complaint regarding the length of the proceedings	11th September, 1962	
Application forms sent to the applicant	25th September, 1962 7th March, 1963	
Completed form returned and registration of application	27th July, 1964	
Request for priority refused by the President (Rule 38 of Rules of Procedure)	17th December, 1964	
Examination by group of three members (Rules 34, 45 of Rules of Procedure)	28th September, 1966	MM. Fawcett, Balta and O'Donoghue
Partial decision on admissibility and decision to communicate complaints concerning: (a) final dismissal as trifling (b) length of proceedings	7th October, 1966	MM. Petrén, Eustathiades, Süsterhenn, Sørensen, Castberg, Sperduti, Fawcett, Triantafyllides, Balta, Fortman, O'Donoghue, Delahaye

Item	Date	Note
Receipt of Government's observations on the admissibility	1st March, 1967	Time-limit 10th December, 1966 extended to 1st February and subsequently to 28th February, 1967
Receipt of applicant's observations in reply	6th April, 1967	
Examination by group of three members	10th May, 1967	MM. Fawcett, Balta and O'Donoghue
Receipt of further submissions from applicant and request for free legal aid	8th, 16th, 23rd and 29th May, 1967	
Receipt of further observations from Government	26th May, 1967	
Commission's deliberations and decision to invite Government to submit further information. Applicant's request for legal aid rejected	31st May, 1967	MM. Sørensen, Süsterhenn, Petren, Ermacora, Castberg, Sperduti, Fawcett, Triantafyllides, Welter, Balta, Fortman, O'Donoghue, Delahaye, Lindal, Busuttil.
Receipt of new submissions from applicant	18th July, 1967	
Receipt of Government's further observations	31st July, 1967	
Receipt of applicant's observations in reply	17th August, 1967	

./.

Item	Date	Note
Examination by group of three members	6th September, 1967	MM. Sperduti, Balta and O'Donoghue
Receipt of further submissions from applicant	2rd, 20th and 28th September, 1967	
Commission invites applicant to withdraw or amend certain abusive terms in his submission of 12th August, 1967	4th October, 1967	MM. Sørensen, Süsterhenn, Petrén, Ermacora, Castberg, Fawcett, Triantafyllides, Welter, Balta, Fortman, O'Donoghue Delahaye, Lindal, Busuttil.
Receipt of letter in which applicant withdraws abusive terms and makes further observations	23rd October, 1967	
Examination by group of three members	20th November, 1967	MM. Ermacora, Castberg and O'Donoghue
Receipt of further submissions from applicant	24th November, 1967 and 1st December, 1967	
Commission decides, inter alia: (a) to hold oral hearing on the question of exhaustion of domestic remedies against dismissal of the case as trifling; (b) to start legal aid procedure; (c) to adjourn decision as to the length of proceedings	15th December, 1967	MM. Sørensen, Eustathiades, Petrén, Ermacora, Castberg, Fawcett, Balta, O'Donoghue, Busuttil.

./.

Item	Date	Note
Receipt of letter in which applicant withdraws request for legal aid and makes further submissions	4th January, 1968	
Receipt of further submissions from Government	15th March, 1968	
Receipt of further submissions from applicant including request to admit press to oral hearing.	19th and 26th March, 1968	
Hearing of the parties (Rule 46, paragraph (1) of the Rules of Procedure) and Commission's deliberations	2nd and 3rd April, 1968	As to members present see Appendix II Parties represented: applicant in person Government by MM. Bertram, Agent, and van Ginkel.
Commission's continued deliberations and final decision on admissibility	5th April, 1968	As to members present - see above
Ascertaining of facts (Sub-Commission)		
Receipt of applicant's preliminary pleadings on the merits and request for access to German case-files	2nd May, 1968	
Receipt of Government's comments on applicant's request regarding files	24th May, 1968	

./.

Item	Date	Note
Establishment of Sub-Commission after appointment of member by each party (Article 29 of the Convention). Sub-Commission decides that applicant should be given access to files	30th May, 1968	Members: MM. Sørensen, Castberg, (appointed by applicant) Süsterhenn, (appointed by Government), Triantafyllides, Welter, Fortman, Busuttil. Substitute members: MM. Sperduti, Balta, Delahaye, Lindal, Eustathiades, O'Donoghue, Ermacora Petrén, Fawcett.
Receipt of further submissions by applicant	11th June, 1968	
Applicant consults files at Commission's Secretariat	11th and 12th June, 1968	
Applicant's supplementary pleadings on the merits	12th July, 1968	
Receipt of request for certain photocopies and further submissions from applicant	13th August, 1968	
Receipt of further submissions from applicant including various procedural requests	23rd September, 1968	

./.

Item	Date	Note
Decision by Sub-Commission's President rejecting request for replacement of Government's Agent	3rd October, 1968	
Receipt of Government's pleadings on the merits	14th October, 1968	
Receipt of letter from Government regarding applicant's complaint to Federal Minister of Justice concerning the conduct of proceedings by Government's Agent	25th October, 1968	
Receipt of memorial, dated 8th November, 1968 from applicant	27th November, 1968	
Receipt of further memorial dated 10th December, 1968, from applicant	12th December, 1968	
In view of abusive expressions contained in applicant's memorial of 8th November, the Sub-Commission decides, inter alia:		
(a) not to accept his submissions of 8th November and 10th December, 1968;		
(b) suspend its examination pending receipt of new memorial presented in proper terms and coherent form.		

./.

Item	Date	Note
(c) to urge applicant to instruct lawyer for presentation of his case.		
Receipt of letter and power-of-attorney from Rechtsanwalt Geier, withdrawing abusive statements by applicant.	10th January, 1969	
Receipt of written submissions from applicant and renewed request for legal aid	15th January, 1969	
Receipt of memorial from applicant's lawyer and supplementary submission. Applicant's request for legal aid withdrawn	30th January, 1969 and 3rd and 5th February, 1969	
Sub-Commission decides, inter alia,: (a) to refer to Commission applicant's request for "restitutio in integrum and/or re-opening of the proceedings" on admissibility.	7th February, 1969	MM. Sørensen, Castberg, Welter and Fortman, members. MM. Balta, Delahaye and Lindal, substitute members.
(b) to invite applicant's lawyer to submit single self-sufficient memorial containing no reference to applicant's previous submissions which had been excluded from the pleadings.		

./.

Item	Date	Note
Commission decides to reject applicant's request for reconsideration of final decision of admissibility of 5th April, 1968	7th February, 1969	MM. Sørensen, Eustathiades, Castberg, Welter, Balta, Fortman, O'Donoghue, Delahaye, and Lindal.
Receipt of applicant's amended memorial in pursuance of Sub-Commission's decision of 7th February, 1969	27th February, 1969	
President of Sub-Commission invites Government to submit pleadings in reply	5th March, 1969	
Receipt of further submissions from applicant's lawyer.	12th March, 1969	
Receipt of Government's observations	10th May, 1969	
Sub-Commission decides to invite the parties to make oral submissions	22nd May, 1969	MM. Sørensen, Castberg, Welter members. MM. Balta, Delahaye, Lindal, Eustathiades, substitute members O'Donoghue, Ermacora and Fawcett, observers
Receipt of further submissions from applicant	9th July, 1969	

./.

Item	Date	Note
Receipt of summary of oral pleading from applicant's lawyer	10th July, 1969	
Receipt of Government's summary of oral pleading	11th July, 1969	
Applicant consults German case files at the Secretariat	17th July, 1969	
Hearing of parties. Sub-Commission informs parties of its decisions to deliberate on the submissions already before it and not, for the time being, obtain further evidence or invite the parties to make further submissions Parties consulted as regards friendly settlement	17th - 18th July, 1969	MM. Sørensen, Castberg, Süsterhenn Welter, Fortman, Büsuttil, members. Sperduti substitute member, Balta, Delahaye and Lindal observers. Applicant represented by Mr. Geier and also appearing in person; Government represented by MM. Bertram, Agent, Deyhle and van Ginkel.
Receipt of further submissions from applicant's lawyer - dated 7th August, 1969	8th August, 1969	
Receipt of letter from applicant dated 10th September, 1969, challenging the President on grounds of bias and requesting opening of criminal proceedings against Mr. van Ginkel	8th August, 1969	

./.

Appendix I

Item	Date	Note
Receipt of request from Government to hear Dr. Heinrich Jagusch as witness	26th September, 1969	
Receipt of further letter dated 22nd September, 1969 from applicant regarding questions of procedure	30th September, 1969	
Sub-Commission decides, inter alia: (a) to reject as being completely without foundation applicant's challenge of the President; (b) to reject applicant's request that it should transmit to Government application for criminal proceedings against van Ginkel; (c) not to take into consideration applicant's submissions of 10th and 22nd September, 1969 insofar as they related to the merits of the case; (d) not to take into consideration submission of 7th August, 1969 by applicant's lawyer; (e) not to transmit any of the above submissions to respondent Government.	10th October, 1969	MM. Sørensen, Castberg, Süsterhenn, Welter, Fortman, Busuttil - members, Sperduti, Substitute member Malta observer

Item	Date	Note
Receipt of submissions dated 24th October, 1969, from applicant appealing against the Sub-Commission's decision of 10th October	31st October, 1969	
Receipt of communication from Government concerning friendly settlement	6th November, 1969	Mr. Sørensen, Government represented by Mr. Bertram
Receipt of submissions dated 17th November, 1969, from applicant's lawyer, asking for permission to study German case-files in his office and enclosing list of further evidence	18th November, 1969	
Receipt of letter, dated 27th November, 1969, from applicant asking Sub-Commission to examine files in the possession of German Ministry for Foreign Affairs	27th November, 1969	
Receipt of submissions dated 28th November, 1969, from Government concerning criminal charges laid by applicant against the editor of a German magazine	1st December, 1969	
Receipt of applicant's correspondence with President of European Court of Human Rights asking, inter alia, the latter to intervene with Sub-Commission on his behalf	8th December, 1969	

Item	Date	Note
Sub-Commission decides, inter alia: (a) not to amend its decision of 10th October, 1969; (b) to maintain previous decision not to invite parties to make further submissions and, accordingly, not to take into account recent submissions made by applicant and his lawyer insofar as they related to the merits of the case; (c) for the same reason not to take into account Government's submission of 28th November, 1969;	19th December, 1969	MM. Sørensen, Süsterhenn, Fortman, members, Sperduti, Delahaye, Lindal, Eustathiades, substitute members, Ermacora and Fawcett, observers
Sub-Commission's deliberations and adoption of its Report	3rd February, 1970	MM. Sørensen, Castberg, Welter, Fortman, Busuttil members, Sperduti and Balta substitute members, Delahaye, Lindal, O'Donoghue, Fawcett and Kellberg observers

./.

Item	Date	Note
Commission's deliberations and adoption of Report	3rd February, 1970	MM. Sørensen, Fawcett, Castberg Sperduti, Welter, Balta, Fortman, O'Donoghue, Delahaye, Lindal, Busuttil and Kellberg.

./.