AS TO THE ADMISSIBILITY OF

Application No. 17298/90
by A.A.
against Switzerland

The European Commission of Human Rights sitting in private on 11 January 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 1 October 1990 by A.A. against Switzerland and registered on 15 October 1990 under file No. 17298/90;

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

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant, a Swiss citizen and businessman, resided at Buttisholz in Switzerland. He died in 1991. His heirs are the widow, Mrs. R.A.-W., and his four children, M.H.-A., R.A.A., S.A. and E.A.

The applicant was represented before the Commission by Mr. L.A. Minelli, a lawyer residing at Forch in Switzerland, who is now also representing the applicant's heirs before the Commission.

A. Particular circumstances of the case

In 1977/78 various companies, which the three S. brothers had founded in the Canton of Uri, merged with two building firms, A.B. AG and C.B. AG in the Canton of Lucerne whose board members were the applicant and a certain R.B.

In May 1981 the Investigating Office (Verhöramt) of the Canton of Uri instituted criminal investigations against various persons involved in the new company.

On 21 March 1986 the Uri Public Prosecutor's Office (Staatsanwaltschaft) indicted altogether 14 persons, among them the applicant. The latter was indicted of forging documents (Urkundenfälschung), obtaining a false registration (Erschleichung einer falschen Beurkundung), fraud (Betrug) and misappropriation of funds (Veruntreuung).

According to a time-table issued on 28 October 1986 by the Uri Regional Court (Landgericht), the trial began on 17 November 1986. The applicant was heard on 18 November, 2 December 1986 and 19 January 1987. At this last hearing the applicant put forward various requests for the taking of evidence.

On 12 March 1987 the Uri Regional Court convicted the applicant of forging documents, obtaining a false registration and misappropriation of funds, and sentenced him to four years' imprisonment. The other co-accused were convicted and received prison sentences of between four months and five years and 10 months.

The judgment counted 136 pages. It listed in detail the final requests of the Public Prosecutor's Office and the defence as well as the final statements (Schlussanträge) of the accused.

With regard to the applicant's requests at the hearing for the taking of further evidence the Court found, with reference to Section 180 of the Code of Criminal Procedure of the Canton of Uri (Strafprozessordnung; see below Relevant domestic law), that these requests had been filed out of time. The Court further noted that all the parties to the proceedings had had the possibility to be present when the co-accused were interrogated, and themselves to put questions.

II.

On 6 August 1987 the applicant filed an appeal (Berufung) against this decision with the Court of Appeal (Obergericht) of the Canton of Uri. Therein he requested inter alia that certain persons be questioned, certain documents be handed out, and the preparation of an expert opinion be ordered.

On 28 October 1987 the applicant filed a further request for the taking of evidence.

In the ensuing appeal proceedings the Court of Appeal first heard twelve other co-accused. Each co-accused was heard individually, the Public Prosecutor, the accused and his lawyer being present. The subject of each hearing concerned the charges brought against the respective co-accused. According to Section 33 para. 2 of the Code of Criminal Procedure of the Canton of Uri the oral submissions of the Public Prosecutor and the defence were not recorded in the minutes (Protokoll).

The applicant was heard on 1 June 1988. During the hearing the Public Prosecutor relied on statements made by the applicant or the other co-accused when they had been heard.

By dates of 1, 15 and 29 June 1988 the Court of Appeal of the Canton of Uri gave its judgment. It convicted the applicant of the offences of forging documents, obtaining a false registration, fraud and embezzlement of funds, and sentenced him to five years'

imprisonment.

The judgment stated at the outset that on grounds of practicability the applicant's appeal proceedings had been separated from those concerning other accused.

Under the heading "Requests for the taking of evidence according to statement of 6 August 1987" ("Beweisergänzungsbegehren gemäss Eingabe vom 6. August 1987"), p. 5 the Court of Appeal found that it was permissible for a Canton to enact a provision such as Section 180 of the Code of Criminal Procedure which required the compliance with certain formal conditions. The Court found that in any event defects of the right to a fair hearing in the first instance proceedings could be healed in the course of the appeal hearing if the appeal court enjoyed full jurisdiction. The Court then explained with regard to the requests for the taking of evidence why they had to be rejected, inter alia, as the matter was clear ("das Beweisthema gilt als erstellt").

The Court of Appeal further addressed the applicant's complaint that he had not been present when the co-accused were heard, and that therefore their statements should not be used against him. The Court found that the applicant had had the possibility during the investigations, in the framework of the right to consult the case-file, to submit further written questions and to ask for the questioning of further witnesses. This the applicant had in fact done, though some of the requests had been filed out of time.

In its judgment the Court of Appeal then dealt in detail with the various points raised by the applicant in his appeal against the conviction and sentence of the Regional Court.

III.

The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) against the decision of the Court of Appeal which was dismissed by the Federal Court (Bundesgericht) on 29 March 1990.

The applicant also filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court. Therein he complained inter alia that no minutes had been prepared of the Court of Appeal hearing; it was impossible many months later when preparing the Court judgment to remember what had been said by the Prosecutor also in favour of the applicant.

The applicant further complained that the Court of Appeal had regarded the requests for the taking of evidence at the Regional Court hearing as being out of time. With reference to Article 6 of the Convention, he stated that the Court of Appeal had been excessively formal when distinguishing, according to Section 180 para. 1 of the Code of Criminal Procedure, which requests for the taking of evidence could be made before entering into the merits of the case, and which could be made during the oral submissions.

The applicant also complained that as he never had had the possibility to put complementary questions to the co-accused, and yet the lower courts had relied on their statements when assessing the evidence, the decision was unjust.

The Federal Court dismissed the applicant's public law appeal on 29 March 1990. The decision, numbering 59 pages, was served on the applicant on 18 May 1990.

In respect of the applicant's complaint that the Court of Appeal had applied Section 180 of the Code of Criminal Procedure with excessive formalism, the Federal Court considered that any defect in the right to a fair hearing was healed if the person concerned had the possibility to express himself before an appeal body which had the

jurisdiction freely to examine all those questions which could have been put before the lower court.

With regard to the applicant's complaints that no minutes had been prepared on the hearing before the Court of Appeal, the Federal Court found that the Court of Appeal had acted in accordance with the law, namely Section 33 of the Uri Code of Criminal Procedure. According to the constant practice of the Court of Appeal, only the requests (Anträge) of the parties to the proceedings were recorded in the minutes; no violation of constitutional rights could be seen therein. The Court continued:

[Translation]

> "If the rule mentioned complies with the Constitution, it does not become unconstitutional if criminal proceedings are conducted against a number of participants... The applicant maintains that due to the absence of any minutes he was unable to ascertain what was stated in the proceedings against the co-accused. To this the reply must be given that according to the practice of the Court of Appeal he could have learned about the requests of the parties from the minutes and about the respective oral submissions from the notes of the pleadings of the other lawyers, if due to time constraints he could not, or did not want to, participate in all the hearings. There was in any event no violation of constitutional rights."

[German]

> "Hält die erwähnte Regelung vor der Verfassung stand, so wird sie nicht dadurch verfassungswidrig, dass ein Strafverfahren gegen mehrere Beteiligte geführt wird ... Wenn der Beschwerdeführer vorbringt, er habe wegen Fehlens des Protokolls nicht feststellen können, was in den Verfahren gegen die Mitangeklagten vorgetragen worden sei, so ist ihm entgegenzuhalten, dass er nach der erwähnten Praxis des Obergerichts die Anträge der Verfahrensbeteiligten dem Protokoll und die dazu gemachten mündlichen Ausführungen den Plädoyernotizen der andern Anwälte entnehmen konnte, wenn er wegen zeitlicher Überforderung nicht allen Verhandlungen beiwohnen konnte oder wollte. Eine Verletzung verfassungsmässiger Rechte liegt jedenfalls nicht vor." (p. 9).

With regard to the applicant's complaints that he had never had the possibility at least once to be present when the co-accused were questioned and to put complementary questions to them, the Federal Court found that in view of the extraordinary complexity of the case it was understandable that the applicant was not personally invited to every questioning of every co-accused. The Court noted that the applicant actually admitted having been able to consult the statements of the co-accused. The Court concluded (p. 20) that "as long as he had the possibility to put complementary questions in writing and to call up new witnesses, (Article 6 para. 3 <d> of the Convention) is not violated" ("Hatte er aber die Möglichkeit, schriftliche Ergänzungsfragen zu stellen und neue Zeugen anzurufen, so ist (Artikel 6 Abs. 3 lit. d EMRK) nicht verletzt").

B. Relevant domestic law

Section 33 para. 2 of the Code of Criminal Procedure of the Canton of Uri states that the minutes of the hearing must "record its course and the essential result and must contain the requests made and decisions taken during the hearing, and the judgment" ("deren Gang und Ergebnis im wesentlichen wiedergeben sowie die im Laufe der Verhandlung gestellten Anträge, ergangenen Entscheide und den Urteilsspruch enthalten").

Section 180 para. 1 of the Code of Criminal Procedure of the Canton of Uri states:

[Translation]

> "1. Before entering into the substantial issues of the case, preliminary questions may be put with regard to jurisdiction, the composition of the court, the standing down of judges and the exclusion of the public. Requests may also be made with regard to complementing the investigations, admitting new documents of evidence, hearing, by the court, of previous or new witnesses and experts, and taking evidence at the scene ...."

[German]

> "1. Vor dem Eintreten in die Hauptsachen können Vorfragen über die Zuständigkeit, die Besetzung des Gerichts, den Ausstand, den Ausschluss der Öffentlichkeit sowie Begehren um Ergänzung der Untersuchung, um Zulassung neuer Beweisurkunden, um gerichtliche Einvernahme bisheriger oder neuer Zeugen und Sachverständigen und um Durchführung eines gerichtlichen Augenscheins gestellt werden ...."

COMPLAINTS

1. When introducing the application the applicant complained that he was not able duly to gather, before the Court of Appeal hearing took place in his case, from official court minutes what the co-accused, the prosecution and the defence had said.

He submitted that it was impossible to reply in the Court of Appeal hearing to the submissions of the prosecution to the extent that these referred to submissions made in proceedings against other co-accused.

He complained that due to the lack of extensive court minutes the courts, when reaching their decision, could only occasionally rely on minutes; for the rest they had to attempt to reconstruct from memory the course of the many hearings and the oral submissions of the prosecution and the defence.

The applicant also complained that the lack of court minutes did not allow him duly to prepare his defence.

The applicant, who relied in respect of these complaints on Article 6 paras. 1 and 3 (b) of the Convention, submitted that comprehensive court minutes would have been particularly important in a complex court case such as the present one, involving altogether 14 co-accused.

2. The applicant also complained under Article 6 para. 1 of the Convention that he was not able to make additional requests during the Court of Appeal hearing for the taking of evidence. This should have been possible at least until the Public Prosecutor spoke.

3. Under Article 6 para. 3 (d) of the Convention the applicant complained that it was not possible to put questions to the co-accused, as he only learned from the Public Prosecutor's submissions what they had said about the applicant at their trials. For instance, the applicant was not informed when the co-accused S. would be questioned for which reason it was not possible for him to be present.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 1 October 1990 and registered

on 15 October 1990.

On 27 May 1991 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application.

The Government's observations were received by letter dated 16 September 1991 and the applicant's observations were dated 28 October 1991.

On 11 December 1991 the Government informed the Commission of the applicant's decease.

On 27 January 1992 the applicant's heirs informed the Commission that they intended to pursue the application.

On 15 February 1992 the Commission decided to invite the Government to comment on the question whether the applicant's heirs could pursue the application.

The Government's observations were received by letter dated 27 March and communicated to the applicant's heirs on 6 April 1992.

THE LAW

1. When filing the application the applicant complained under Article 6 paras. 1 and 3 (b) and (d) (Art. 6-1, 6-3-b, 6-3-d) that in the criminal proceedings instituted against him certain court minutes were not prepared; that he was not able to make additional requests for the taking of evidence during the Court of Appeal hearing; and that he could not put questions to the co-accused.

By letter of 11 December 1992 the Government informed the Commission of the applicant's death. By letter of 27 January 1991 the applicant's wife and children informed the Commission that they were the applicant's heirs and wished to continue the application.

The applicant's heirs submit that during the criminal proceedings instituted against the applicant, lasting more than ten years, they suffered severe disadvantages. Reference is made to the applicant's unemployment and press reports. Moreover, the outcome of the proceedings implied enormous court costs and costs for the defence. If the Convention organs uphold the present application, the heirs can claim compensation.

The Government consider that the disadvantages suffered by the applicant's heirs do not directly relate to the facts giving rise to the application. Moreover, the damages claimed do not concern the object of the application. The applicant's heirs cannot claim the costs of the Regional Court or Court of Appeal proceedings; solely the costs of the Federal Court proceedings may be considered. There is no general interest warranting continuation of the application.

The Commission recalls the case-law of the Convention organs according to which the fact that an applicant dies does not in itself dispose of his complaint. In principle, it falls to the Convention organ before which the case is pending to decide whether the application should be further examined or whether it should be struck off the list of cases. Special consideration should thereby be given to the intentions expressed by the applicant's legal successor and to the nature of the complaint (see Eur. Court H.R., Deweer judgment of 27 February 1980, Series A no. 35, p. 19 et seq., paras. 37 et seq.; No. 8261/78, Dec. 9.10.82, D.R. 30 p. 5; No. 10300/83, Dec. 12.12.84, D.R. 40 p. 180; Mathes v. Austria, Comm. Report 13.1.92, paras. 17 et seq.).

The Court has accepted the wish of members of the family upon the applicant's death, to have the proceedings continued without examining the legal interest of the heirs in this continuation (see Eur. Court H.R., Colozza judgment of 12 February 1985, Series A no. 89, p. 7, para. 6 (concerning criminal proceedings); Vocaturo judgment of 24 May 1991, Series A no. 206-C, p. 29, para.2; G. v. Italy judgment of 27 February 1992, Series A no. 228-F, p. 65, para. 2; Pandolfelli and Palumbo judgment of 27 February 1992, Series A no. 231-B, para. 2; X. v. France judgment of 31 March 1992, Series A no. 236, para. 26).

In the present case the applicant complained under Article 6 paras. 1 and 3 (b) and (d) (Art. 6-1, 6-3-b, 6-3-d) of the Convention of unfairness of the criminal proceedings instituted against him. In these proceedings he was convicted of forging documents, obtaining a false registration, fraud and embezzlement and sentenced to five years' imprisonment.

The applicant's heirs are close family members, i.e. his wife and his children. The Commission accepts that they were so affected by the outcome of the criminal proceedings instituted against their husband and father, respectively, in particular the conviction and comparatively severe prison sentence imposed on him, that they can claim to have themselves a sufficient legal interest justifying the further examination of the application on their behalf.

The Commission is therefore called upon to deal with the separate complaints raised in the application.

2. The first complaint, under Article 6 paras. 1 and 3 (a) and (b) (Art. 6-1, 6-3-a, 6-3-b) of the Convention, is that before the Court of Appeal the applicant was not able duly to gather from official court minutes what the co-accused, the prosecution and the defence had said at the hearings concerning the co-accused. Thus, he was not able duly to prepare his defence. Moreover, the courts when reaching their judgments had to attempt to reconstruct from memory the course of the oral submissions.

a) The Government submit that the applicant did not exhaust domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. Thus, he never expressly raised before the domestic authorities the complaint that the Court of Appeal in its judgment had to reconstruct from memory the course of the proceedings.

The Commission observes that in his public law appeal to the Federal Court the applicant complained that no minutes had been prepared of the Court of Appeal hearing, and that the Court when preparing its judgment could not remember many months later what had previously been stated.

Thus, the applicant sufficiently raised before the Federal Court the complaint he is now raising before the Commission. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

b) The Government submit that the submissions during the Court of Appeal proceedings concerning the applicant's case were reproduced in that Court's judgment. In respect of the proceedings concerning the other accused, the written statements of the Public Prosecutor and the defence were in the case-file and thus accessible to the applicant. While the time between the hearings was brief the Government contend that the case was complex and had to be conducted in such a manner as to enable the judges to grasp the case as a whole.

Article 6 para. 1 (Art. 6-1) of the Convention states, insofar as
relevant:

"In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ..."

Article 6 para. 3 (a) and (b) (Art. 6-3-a, 6-3-b) state:

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

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence ..."

The Commission considers that, under the above provisions the applicant was entitled to be informed of the charges brought against him and to comment upon, and if necessary challenge, those facts and elements of evidence upon which the judgment would eventually rely.

In the present case, the complaint about the lack of minutes is directed against the Court of Appeal and relates to appeal proceedings. At that stage the applicant must have been well aware of the charges brought against him and the co-accused. Furthermore, the applicant's lawyer had access to the case-file containing written statements of the co-accused and the Public Prosecutor's Office. Moreover, as the Federal Court stated in its decision of 29 March 1990, the lawyer was able to be present at the hearings concerning the various co-accused and to take notes of any statements made by the parties which he considered relevant to the applicant's case. Finally, it has not been contended that during the hearing concerning his own case the applicant or his lawyer could not put questions to the Public Prosecutor, for instance when the latter referred to statements made in other hearings.

Insofar as it has been alleged that the courts when preparing their judgments had to attempt to reconstruct from memory the various submissions at the hearing as they had no minutes at their disposal, no reference is made to a particular court or to any particular omissions. In the Commission's opinion, it suffices therefore to note that both the Regional Court and the Court of Appeal in their respective judgments carefully referred to, and dealt with, the various points raised by the applicant.

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

3. The second complaint, also relating to Article 6 para. 1 (Art. 6-1) of the Convention, is that the applicant was not able to make additional requests during the Court of Appeal hearing for the taking of evidence. This should have been possible at least until the Public Prosecutor spoke.

The Government submit that this complaint in fact refers to the proceedings before the Regional Court which found that certain requests for evidence had been filed out of time. On the other hand, the Court of Appeal did not refuse to admit supplementary evidence as being out of time. In any event the applicant did not raise this complaint in the domestic remedies, for which reason in this respect the application did not comply with Article 26 (Art. 26) of the Convention.

The Commission has assessed the facts relating to this complaint as follows.

On 12 March 1987 the Uri Regional Court decided, with reference to Section 180 of the Code of Criminal Procedure of the Canton of Uri, that the applicant's requests for the taking of evidence had been filed

out of time. The present application is not directed against this decision.

The application also does not concern the decision of the Court of Appeal of 1, 15 and 29 June 1988 which dismissed the applicant's requests in his appeal for the taking of evidence. In any event, according to the Convention organs' case-law, it is as a rule for the national courts to assess the evidence before them. The Commission's task under Article 6 para. 1 (Art. 6-1) of the Convention is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26). In the present case it does not appear unfair if the Court of Appeal dismissed the applicant's requests inter alia as it regarded the matter as being clear.

Finally, insofar as it is alleged that contrary to Article 6 para. 1 (Art. 6-1) of the Convention the applicant was not able to make additional requests during the Court of Appeal hearing for the taking of evidence, the Commission finds that this complaint is not supported by the facts. In particular, it has not been shown that the applicant filed a particular request, and that the Court of Appeal rejected it on the basis of Section 180 as being out of time.

This part of the application is therefore also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The third complaint, under Article 6 para. 3 (d) (Art. 6-3-b) of the Convention, is that it was not possible for the applicant to put questions to the co-accused, as he only learned from the Public Prosecutor's submissions what they had said about the applicant at their trials.

The Government recall that before the Regional Court all the accused had the possibility to be present when the co-accused were being questioned and themselves to put questions. The Court of Appeal regarded the applicant's request to put questions to the co-accused partly as being out of time. In any event that Court found that the applicant had had the possibility to comment on all the documents of the investigation in the case-file. Reference is further made to the decision of the Federal Court according to which the applicant had had the possibility to put supplementary questions and to call new witnesses.

Article 6 para. 3 (d) (Art. 6-3-d) of the Convention states:

> "3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

The guarantees in Article 6 para. 3 (Art. 6-3) are specific aspects of the right to a fair trial set forth in para. 1 and the Commission will consider the complaint under the two provisions taken together (see Eur. Court H.R., Asch judgment, loc. cit. p. 10, para. 25).

According to the Convention organs' case-law, all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in certain cases this may prove impossible. Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) require that the defendant be given an adequate and proper opportunity to

challenge and question a witness against him, either when he was making his statement or at a later stage of the proceedings (Eur. Court H.R., Asch judgment, loc. cit. p. 10, para. 27).

In the present case the complaint at issue does not indicate during which particular proceedings it was not possible for the applicant to put questions to the co-accused.

Insofar as the complaint may be directed against the proceedings before the Regional Court, the Commission notes the decision of that Court of 12 March 1987 according to which all the parties to the proceedings had the possibility to be present when the co-accused were interrogated, and themselves to put questions.

Insofar as the complaint may be directed against the proceedings before the Court of Appeal, the Commission notes the decision of the Federal Court of 29 March 1990 according to which, even if the applicant was not issued with a personal invitation, he or his lawyer could in fact be present when the other co-accused were questioned. Moreover, according to the decision of the Federal Court the applicant had actually consulted the written statements of the co-accused and he had had the possibility to put supplementary questions in writing and to call new witnesses.

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

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. Krüger) — (C.A. Nørgaard)