AS TO THE ADMISSIBILITY OF

Application No. 18877/91
by Sadik AHMET
against Greece

The European Commission of Human Rights sitting in private on 1st July 1994, the following members being present:

MM. C.A. NØRGAARD, President
F. ERMACORA
A.S. GÖZÜBÜYÜK
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
B. CONFORTI
I. BÉKÉS
E. KONSTANTINOV
D. SVÁBY
G. RESS

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 11 July 1991 by Sadik AHMET against Greece and registered on 27 September 1991 under file No. 18877/91;

Having regard to:

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 8 and 29 October 1993 and the observations in reply submitted by the applicant on 18 November 1993;

- the parties' oral submissions at the hearing on 1st July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Greek national born in 1947. He is a physician and resides in Komotini.

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

The applicant was elected Member of Parliament in June 1989 and was a potential candidate at the election on 5 November 1989. In October 1989, the applicant and B., another candidate, distributed leaflets which, inter alia, referred to the "Turkish minority" of Western Thrace.

The applicant and B. were subsequently charged with misinforming the electoral body, an offence established by Article 162 of the Greek Penal Code, because in the leaflet they had stated that the candidates of the main political parties had created a climate of terror and anarchy among the Moslem population. They were further charged with "disrupting public peace" (diataraxi koinis eirinis), an offence under Article 192 of the Penal Code, by openly and indirectly inciting citizens to violence or by creating rifts among the population by the use of the words "Turk(s)" or "Turkish" to identify the Moslems of Western Thrace.

On 25 January 1990 the applicant appeared before the Criminal Court (Trimeles Plimmeleiodikeio) of Rhodopi charged with the above offences. While the interrogation of witnesses was taking place the applicant requested that one of the judges be discharged because the way in which he put questions indicated that he was biased. This request was rejected.

The applicant alleges that at one stage he requested the proceedings to be adjourned because of the absence of his lawyer, but that his request was also rejected. However this event does not appear in the records of the hearing.

On 26 January 1990 the applicant was acquitted of misinformation but found guilty of disrupting public peace. The Court held that by the end of October 1989 the applicant had distributed to the population of Komotini and other places in the District of Rhodopi printed material which repeatedly contained the terms "Turk", "Turkish Moslem", and the "Turkish Moslem minority of Western Thrace", referring to the Greek Moslem citizens of Rhodopi. The Court held that the applicant had thereby aimed at creating feelings of hatred and enmity and at dividing the population. According to the judgment, his purpose was to incite the population of each community to act violently against the other and to disrupt, as he actually did, the peaceful co-existence of the Greek Christian and the Greek Moslem communities.

The applicant was sentenced by the Criminal Court to 18 months' imprisonment, not convertible into a fine. His request to the Court to suspend the sentence pending his eventual appeal was rejected, inter alia, on the ground that the applicant was dangerous and that there was a risk that he would flee to Turkey.

The applicant was detained from 26 January to 30 March 1990.

On 27 January 1990 the applicant appealed against the above judgment.

By the end of January 1990 violence erupted in Komotini which resulted in damage to numerous businesses and shops. A Christian was killed by a Moslem in a hospital.

On 30 March 1990 the Court of Appeal (Trimeles Efeteio) of Patras confirmed the first instance judgment, declaring the applicant guilty of disrupting public peace.

The Court found that the applicant had deliberately described the Greek Moslems of Western Thrace as "Turks", although he knew that the 1923 Treaty of Lausanne refers and recognises only a religious (Moslem) minority and not a Turkish (ethnic) minority. It held that the applicant aimed at creating feelings of hatred and hostility within the Moslem community towards the Greek Christians, and that he had succeeded in disrupting public peace in Komotini, as well as creating violent events in this town. However, the Court of Appeal reduced the sentence to 15 months' imprisonment, convertible to a fine.

On 8 April 1990, after his release from prison, the applicant was

re-elected to the Greek Parliament.

On 24 October 1990 the applicant appealed to the Court of Cassation (Areios Pagos).

In his appeal he complained that the charges against him were vague and that the courts should have declared the prosecution case inadmissible. He further complained that the judgment of the Court of Appeal was not sufficiently reasoned as required by the Constitution and the law. In this respect he complained that the Court did not indicate in what way the use of the word "Turk" or "Turkish" was capable of creating a climate of hatred or of disrupting public peace. He also complained that the judgment gave no concrete examples of any event having actually occurred by the end of October 1989 which could have been regarded as a genuine disruption of public peace or a disturbance of public order.

On 15 February 1991 the Court of Cassation rejected the appeal. The Court found that the judgment of the Court of Appeal had been sufficiently reasoned.

COMPLAINTS

1. The applicant alleges that he was unlawfully deprived of his liberty between 26 January and 30 March 1990 and invokes Article 5 paras. 1, 3 and 4 of the Convention.

2. The applicant complains under Article 6 para. 1 of the Convention that insufficient reasons were given by the courts to justify his conviction.

3. The applicant complains that the proceedings against him were not fair and invokes Article 6 paras. 1, 2, 3 and Article 14 of the Convention.

4. The applicant submits that his conviction for disrupting public peace, by distributing printed material referring to the Moslem population of Western Thrace as "Turks", amounts to a violation of his freedom of thought, expression and assembly, and is discriminatory. He invokes Articles 9, 10, 11 and 14 of the Convention.

5. Finally, the applicant complains, under Article 3 of Protocol No. 1, that due to his imprisonment in February and March 1990 he was unable to participate in the campaign for the legislative election of April 1990.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 July 1991 and registered on 27 September 1991.

On 3 May 1993 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the application, limited to the issue under Article 10 of Convention.

The Government submitted their observations on 8 October 1993 and their supplementary observations on 29 October 1993.

The applicant submitted observations in reply on 18 November 1993.

On 14 April 1994 the Commission decided to hear the parties as to the admissibility and merits of the case.

At the oral hearing, which was held on 1 July 1994, the parties were represented as follows :

For the Government :

Mr. Vassilios KONTOLAIMOS — Legal Assessor at the Legal Council of State, Agent

Ms. Vassilia PELEKOU — Legal Representative at the Legal Council of State, Adviser

For the applicant :

Prof. Tekin AKKILIOGLOU — Lawyer practising in Ankara,

The applicant was also present at the hearing.

THE LAW

1. The applicant, who was detained between 26 January and 30 March 1990, complains that this deprivation of liberty was contrary to Article 5 paras. 1, 3 and 4 (Art. 5-1, 5-3, 5-4) of the Convention.

Article 5 para. 1 (Art. 5-1) of the Convention guarantees the right to liberty and security of person, subject to certain exceptions, such as the lawful detention of a person after conviction by a competent court, within the meaning of sub-paragraph (a) of the provision. Article 5 paras. 3 and 4 (Art. 5-3, 5-4) provide certain guarantees of judicial control of provisional release or detention on remand pending trial.

The Commission notes that the applicant was detained after having been sentenced by the first instance court to 18 months' imprisonment. He was released after the Court of Appeal reviewed this sentence, reducing it to 15 months' imprisonment, convertible to a fine. The Commission finds that the applicant was deprived of his liberty "after conviction by a competent court" within the meaning of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention.

The Commission also finds no evidence in the case to suggest an infringement of paragraphs 3 and 4 of Article 5 (Art. 5-3, 5-4): The applicant was not detained on remand prior to his trial and the judicial control of the lawfulness of his subsequent detention after conviction was provided by the first instance court (cf. Eur. Court H.R., De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 40, para. 76).

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant next complains under Article 6 para. 1 (Art. 6-1) of the Convention of an unfair hearing in the determination of the criminal charges against him, in that , allegedly, insufficient reasons were given by the courts to justify his conviction.

However, again, the Commission finds no evidence in the case to substantiate this complaint.

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

3. The applicant further complains of the attitude of some of the judges and of not having received a written copy of the first instance judgment in time for the preparation of his appeal. He alleges that witnesses on his behalf were not duly heard by the courts.

The appliacnt invokes Article 6 paras. 1, 2, 3 (b) and (d)

(Art. 6-1, 6-2, 6-3-b, 6-3-d) of the Convention, which provides certain guarantees to the defence in a criminal case, and Article 14 (Art. 14), which prohibits discrimination in the securement of Convention rights and freedoms.

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

For this condition to be fulfilled, it is not sufficient for the applicant merely to have presented his case to the various courts competent to deal with it. The complaint made before the Commission must also have been raised, at least in substance, during the proceedings in question. On this point, the Commission refers to its constant case-law (see, for example, No. 12164/86, Dec. 12.10.88, Agneessens v. Belgium, D.R. 58 p. 63).

In the present case, the Commission notes that none of these complaints has been raised either formally or even in substance during the proceedings before the Court of Cassation. In addition, the examination of the case has disclosed no circumstance which, according to the generally recognised principles of international law, might have absolved the applicant from raising these complaints during the cassation proceedings.

It follows that this part of the application must be rejected for non-exhaustion of domestic remedies, in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant also complains that his conviction for disrupting public peace, by distributing printed material referring to the Moslem population of Western Thrace as "Turks", amounts to a violation of his freedom of thought, expression and assembly, and is discriminatory. He invokes Articles 9, 10, 11 and 14 (Art. 8, 10, 11, 14) of the Convention, which guarantee these freedoms and prohibit discrimination respectively.

The Commission notes that the applicant's conviction involved his writings. Consequently, it is essentially the exercise of the applicant's freedom of expression with which there has been an interference.

The relevant part of Article 10 (Art. 10) of the Convention provides as follows:

> "1. Everyone has the right to the freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers ...
>
> 2. The exercice of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime ...".

The respondent Government considers that the applicant submitted his application out of time on 27 September 1991, which is more than six months after the date on which the final decision regarding the applicant's case was given by the Court of Cassation on 15 February 1991.

However, the application was lodged with the Commission on 11

July 1991, five months after the cassation decision, and therefore within the six month time-limit provided for by Article 26 (Art. 26) of the Convention.

The Government next submits, in respect of Article 26 (Art. 26) of the Convention, that the applicant has not exhausted domestic remedies because at no time at first instance, on appeal or in cassation did the applicant raise the issues under the Convention, even in substance.

In reply the applicant maintains that the breach of which he is complaining consists of a continuing violation, and that therefore he was absolved from the obligation of raising the complaint before the Greek courts.

The Commission observes that Article 26 (Art. 26) of the Convention "should be applied with some degree of flexibility and without excessive formalism ; it is sufficient that the complaints intended to be made subsequently before the Convention organs should have been raised at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law" (Eur. Court H.R., Castells judgment of 23 April 1992, Series A no. 236, p. 19, para. 27).

It is true that before the Court of Cassation the applicant did not rely expressly on Article 10 (Art. 10) of the Convention, which is directly applicable under Greek law; nor did he invoke the provisions of Article 14 of the Greek Constitution, which also guarantees the right to freedom of expression. However, while basing his case on the narrower domestic criminal law provision of Article 192 of the Greek Penal Code, the applicant claimed the right to use the words "Turk(s)" or "Turkish" to identify the Moslems of Western Thrace.

The Commission considers that this indicates an issue falling within the scope of freedom of expression. In claiming a right to use these terms the applicant was formulating a complaint which was linked to the alleged violation of Article 10 (Art. 10) of the Convention. Therefore, "he provided the national courts with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (Art. 26), namely the opportunity of putting right the violations alleged against them" (Eur. Court H.R., Guzzardi judgment of 6 November 1980, Series A no. 39, p. 27, para. 72).

Accordingly, the Commission considers that the applicant did invoke before the Greek courts, at least in substance, the complaints relating to Article 10 (Art. 10) of the Convention which he now puts to the Commision. He may therefore be said to have exhausted domestic remedies.

The Commission concludes that the applicant has complied with the requirements of Article 26 (Art. 26) of the Convention.

As regards the merits of the complaint, the Government maintains that the interference was prescribed by law, in this case Article 192 of the Penal Code. The Government asserts that the proceedings instituted against the applicant and his ensuing conviction pursued the legitimate aim of protecting public order, within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

The applicant does not dispute the existence of a legal basis for his conviction, but he maintains that the conviction and punishment inflicted upon him were without any legitimate purpose under the Convention and alleges that they constituted a kind of reprisal for his assertion of his Turkish ethnic origin. He also maintains that his conviction and the penal sanctions inflicted upon him were not necessary in a democratic society. He stresses the key role played by freedom of expression in a democratic society. The importance of this

freedom is even greater for an elected representative whose mandate is to act as spokesman for the opinions and concerns of his constituents.

The Commission considers that the applicant's complaints, that his conviction for disrupting public peace amounts to a violation of his rights under the Convention, raise complex issues of fact and law, the determination of which should depend on a full examination of the merits. These complaints cannot therefore be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring this part of the case inadmissible has been established.

5. Finally, the applicant complains, under Article 3 of Protocol No. 1 (P1-3), that he was prevented from participating in the campaign for the legislative election of April 1990 because of his detention.

Article 3 of Protocol No. 1 (P1-3) provides for free elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The Commission notes that this matter was not submitted to the competent court, which is the Special Supreme Court, and consequently this part of the application is inadmissible for non-exhaustion of domestic remedies.

It follows that this part of the application must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that his conviction for having disrupted public peace amounts to a violation of his rights set forth in the Convention;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)