AS TO THE ADMISSIBILITY OF

Application No. 20960/92
by Alf Oddmund ANTONSEN
against Norway

The European Commission of Human Rights (Second Chamber) sitting in private on 15 January 1997, the following members being present:

Mr. J.-C. GEUS, Acting President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 30 June 1992 by Alf Oddmund Antonsen against Norway and registered on 18 November 1992 under file No. 20960/92;

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

Having regard to the observations submitted by the respondent Government on 3 October 1994 and 30 April 1996 and the observations in reply submitted by the applicant on 2 November 1994 and 12 March and 1 July 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Norwegian citizen, born in 1942. He resides at Romset, situated in the northern part of Norway. Before the Commission the applicant is represented by Mrs Synnøve Fjellbakk Taftø of Storforshei, Norway.

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

A. Particular circumstances of the case

On 23 and 24 February 1991 the applicant went fishing near Klöholman in northern Norway. He caught 300 kg of cod of which he intended to give 100 kg to his daughter, living at Bodø, and 200 kg to his son, living in Trondheim.

Due to the long distances involved the applicant agreed to meet his son at Sortland on 25 February 1991 in order to hand over the fish.

However, there they were met by an inspector from the Directorate of Fisheries (Fiskeridirektoratet) and the police who informed them that it would be contrary to the applicable legislation to give the fish even to close relatives since recreational fishing (fritidsfiske) in that particular area of Norwegian maritime territory was limited to the need of household consumption. It was agreed that the applicant could keep the 300 kg of cod himself. However, when the inspector and the police subsequently visited the applicant it turned out that he had nevertheless given the fish to his children as intended.

In these circumstances the public prosecutor of Lofoten and Vesterålen decided, on 3 July 1991, to present the applicant with the option of accepting a fine of 1,000 NOK and the confiscation of 4,050 NOK, equivalent to the value of the fish in question. This option was based on an alleged violation of section 53 of the Act relating to sea-water fisheries (saltvannsfiskeloven) and the Regulation (forskrift) of 16 November 1990 concerning cod fishing with conventional tools in the particular area of Norwegian maritime territory, which inter alia limited cod fishing to the need of household consumption.

The applicant did not accept the option and the public prosecutor therefore instituted proceedings against him in the District Court (herredsrett) of Vesterålen where he was accused of having infringed the above mentioned Act and Regulation as his children allegedly no longer belonged to his household.

The trial before the District Court took place on 4 September 1991. The applicant was heard and two witnesses gave evidence. On the basis of the facts established and after an evaluation of the available evidence the Court acquitted the applicant by judgment of 5 September 1991. The Court stated inter alia as follows.

(Translation)

"The Court finds that [the applicant] fished for cod from his boat off Klöholman, ... on 23 and 24 February this year. He caught a total of some 300 kg of cod which he intended to give to his daughter in Bodø (100 kg) and his son in Trondheim (200 kg).

Shortly thereafter, the fish was delivered to his son, who was in Sortland with a truck. An inspector from the Directorate of Fisheries and a police officer turned up in response to a tip-off. It was agreed that [the applicant] would unload the fish from the truck and take it home for his own use. However, after a short time the fish was handed over to his son and daughter as originally intended. These facts have been acknowledged by [the applicant].

According to section 11 subsection A of Regulation No. 994 relating to the regulation of cod fisheries using conventional gear north of 62° 11.2 N lat. in 1991, issued by the Ministry of Fisheries on 14 December 1990 recreational fishing may be carried out with a rod and hand line and a net the length of which does not exceed 30 metres and a line with a maximum of 100 hooks per household. The fishery must be limited to the quantity of fish needed for the household's own consumption.

Although the wording of the provision may be unfortunate, in the Court's view there can be no doubt that [the applicant] violated the general prohibition against fishing for cod, and that the exception set out in the provision does not apply to him. His children live elsewhere in the country and are not part of his household, and the purpose of the fishing was to provide them with fish. Even if one

takes a liberal view in the matter, 300 kg of fish is a larger quantity than may be caught, according to a reasonable interpretation of the regulations, for close relatives who have their own households.

[The applicant] was aware of the purely factual aspects, but he claims that he was not aware that this fishery was in contravention of the provisions applicable ('ignorance of the law'). The Court is of the view that it has not been established that he was familiar with the substance of the provisions, even though he stated that he knew he was not permitted to sell the fish. As regards the question whether he should be acquitted pursuant to section 57 of the Penal Code on grounds of ignorance of the law, the Court is divided in a majority comprising the lay judges and a minority comprising the presiding judge.

The majority is of the view that [the applicant] was of such excusable ignorance [unnskyldelig villfarelse] of the scope of the exception that he must be acquitted. The majority points out that there is a long-standing culture and tradition in the district, and for that matter in this part of the country, that those who go to sea to fish give some of their catch to those who have no opportunity to do so and who therefore have no fish. Furthermore, there are still a number of people who regard the extended family as a unit, even if the members live in different places. In the majority's view, it is probable that such ideas are particularly prevalent in small communities such as Romset, which is where [the applicant] lives. The majority further points out that the provision on recreational fishing has in part been practised fairly liberally, and that this gives grounds for misconstruing the scope of the provision.

The majority attributes no significance to the fact that he handed the fish over to his son and daughter after having been given a warning by the inspector. The majority is of the view that what was unlawful was the fishing itself, not the subsequent act of handing over the fish to others. Thus, such subsequent knowledge has no significance as regards the question of guilt.

The minority is of the view that this ignorance of the law was not excusable, even if one agrees that the circumstances mentioned by the majority may be fitted to render ignorance excusable. However, the provision on fishing for household use has been subject to some criticism and public discussion, for example in the local newspapers. Moreover, the provision was the same in 1991 as in 1990. The accused also gives an impression of being reasonably intelligent. Since he has a boat which he uses for fishing, the minority is of the view that he ought to have acquainted himself more closely with current provisions, for example by calling [the Directorate of Fisheries] or the Fisheries Guidance Officer.

Since the accused is not liable to a penalty because he has not been found guilty, confiscation of the catch is not applicable either ... ."

On 18 September 1991 the public prosecutor of Lofoten and Vesterålen asked the Supreme Court (Høyesterett) for leave to appeal against this judgment. The request was based on points of law. The prosecutor submitted that the District Court's judgment was based on a wrongful interpretation of the applicable legislation and requested the Supreme Court to pronounce a new judgment and to convict the applicant instead of quashing the judgment and referring the case back

for a new trial in the District Court.

Leave to appeal was granted by the Appeals Selection Committee of the Supreme Court (Høyesteretts kjæremålsutvalg) on 4 October 1991. On 26 November 1991 the applicant was contacted by a lawyer who had been appointed as his counsel. Counsel enclosed a copy of a 31-page extract of documents concerning the case compiled by the public prosecutor and informed the applicant that in so far as he had information of relevance to the case which was not already in the file counsel would like to hear from him. Counsel furthermore explained that only counsel and the prosecutor could take the floor during the proceedings in the Supreme Court whereas the applicant had the possibility of being present but would not be heard. The applicant was requested to inform counsel whether he wished to be present during the hearing in which case his counsel would inform him of the date of the hearing. The applicant would in any event be informed of the final result.

In these circumstances, and having regard to the fact that he lived almost 2000 km from Oslo where the Supreme Court sits, the applicant decided not to contact counsel.

It appears that the case was heard in the Supreme Court in March 1992. The Court had at its disposal the 31-page extract containing the documentary evidence used in the District Court, the court transcript and the District Court judgment. The applicant was not present but was represented by counsel who, like the public prosecutor, had the opportunity to address the Court twice. The Supreme Court pronounced judgment in the case on 3 April 1992. On behalf of the unanimous court Justice Hellesylt stated inter alia as follows:

(Translation)

"On 5 September 1991 [the applicant] was acquitted in a judgment pronounced by the District Court of Vesterålen.

The judgment was subject to dissent. The entire court found that there had been a violation of the provision of the regulations prescribing that the catch must be limited to the amount needed to meet the fisherman's own household's need for fish for consumption. The majority - the lay judges - who nonetheless voted in favour of acquittal, justified this by finding that there was an excusable ignorance of the law. The presiding judge disagreed with this.

The facts of the case and the personal circumstances of [the applicant] are set out in the judgment.

The prosecuting authority has appealed against the application of the law, which is maintained to be erroneous since the majority has found that there was an excusable ignorance of the law, cf. section 57 of the Penal Code. The Supreme Court has been requested to pronounce a new judgment.

I find that the appeal must be allowed.

Counsel for the defence, who disputes that the majority's application of the law is erroneous, has also raised the question whether [the applicant's] case comes under the regulations at all. I do not regard this as doubtful. As may be seen from the judgment, [the applicant] caught 300 kg of cod 'which were intended for his daughter in Bodø (100 kg) and his son in Trondheim (200 kg)'. The fish was to be transported to these places by [the applicant's] son, who was driving the truck. Thus, it was not a matter of

fish for the [applicant's] own household's needs.

As to the question whether there was an excusable ignorance of the law, it appears from the judgment that [the applicant] was aware that provisions on recreational fishing had been made, but he was not familiar with the substance of these provisions. In my view, the grounds given by the majority for regarding [the applicant's] ignorance of the law as excusable are not tenable. The accused had a boat with which he used to do some fishing. Thus, he had a duty to acquaint himself with the provisions concerning recreational fishing. Moreover, it is clear from the grounds given by the minority that the provisions on fishing to meet the needs of one's household had been discussed publicly, for example in the local newspapers.

It is clear that [the applicant] has, objectively speaking, contravened the regulations and that the subjective conditions for imposing a penalty have also been fulfilled.

The Supreme Court may thus pronounce a new, convicting judgment, cf. section 362 subsection 2 of the Code of Criminal Procedure. I find that the prosecuting authority's plea, which corresponds to the writ giving the option of a fine, should be allowed.

I vote in favour of the following judgment:

[The applicant] is fined NOK 1,000 with 5 days' imprisonment in default of payment, for contravening section 53 of the Act relating to sea-water fisheries, cf. sections 4 and 5, cf. section 12 of the Regulations of 24 January 1991, cf. section 11.

He is sentenced to submit to the confiscation of NOK 4,050, cf. section 54 of the Act relating to sea-water fisheries."

The applicant was informed of the judgment on 10 April 1992.

B. Relevant domestic law

Under section 278 of the Code of Criminal Procedure, proceedings during the main hearing in the District or City Court are oral. Written evidence is read out by the person producing the evidence unless the court decides otherwise (section 302). After the examination of each individual witness and after the reading out of each piece of written evidence, the accused has to be given an opportunity to speak (section 303). The court must see to it that the facts of the case are fully established (section 294).

When the production of evidence (bevisførselen) is completed, the prosecutor and then defence counsel may make a speech. Each of them is entitled to speak twice. When defence counsel has finished, the person indicted is asked whether he has any further comment to make (section 304). In deciding what is deemed to be proved, only the evidence produced at the main hearing shall be taken into consideration by the court (section 305).

Under section 40 of the Code of Criminal Procedure, if the City Court decides to convict the accused it must, in giving its verdict, state in its judgment in a specific and exhaustive manner the facts of the case which it has found to be proved and on which its verdict is based. It must also refer to the penal provision under which the accused has been convicted. In addition the judgment must state the reasons to which the court has attached importance in determining the sanctions.

If the person charged is acquitted, the grounds of the judgment must, in accordance with section 40, indicate which conditions for a finding of guilt are deemed not to be satisfied, or the circumstances which exclude a sanction called for by the prosecution.

Under the Code of Criminal Procedure, as applicable at the material time, a party in a criminal case seeking to challenge a judgment of the District or City Court could, depending on the nature of the point disputed, either request a new trial (fornyet behandling) in the High Court (lagmannsretten) or appeal (anke) to the Supreme Court. If the object was to contest the City Court's assessment of evidence in relation to the question of guilt (bevisbedømmelsen under skyldspørsmålet, section 369, as applicable at the relevant time), the appellant party could, with leave from the Appeals Selection Committee of the Supreme Court apply for a new trial in the High Court (section 370, as applicable at the relevant time).

On the other hand, an appeal on grounds of errors of law going to the verdict (rettsanvendelsen under skyldspørsmålet), on procedural defects (saksbehandling) and as to sentence (straffutmåling) could be lodged with the Supreme Court (section 335, as applicable at the relevant time). The Supreme Court thus had no competence to review questions of facts which go to the question of guilt but had to base itself on the findings of the City Court in this respect. No such limitation applied to the Supreme Court's jurisdiction with regard to sentencing, which comprised both questions of facts and of law.

Both parties may in principle lodge an appeal against a judgment of the District or City Court (section 335, as applicable at the time). However, an acquitted person may not appeal unless the court has found it proved that he committed the unlawful act referred to in the indictment (section 336, as applicable at the time).

The appeal proceedings are prepared and conducted according to the rules applicable to the hearing at first instance in so far as such rules are appropriate and it is not otherwise provided (section 352, as applicable at the relevant time).

The proceedings in the Supreme Court are oral and public and both parties are allowed to speak twice. The appellant party is entitled to address the court first. The accused may be allowed to address the court during the hearing (section 356, as applicable at the relevant time). Evidence is submitted to the court by reading out from the documents relating to the case (section 357, as applicable at the time).

Section 362 (as applicable at the time) read:

(Translation)

> "If the court finds no reason to vary or set aside the judgment appealed against, the appeal shall be dismissed by court order.
>
> In the alternative the court shall pronounce a new judgment if the necessary conditions are fulfilled; otherwise the judgment appealed against shall be set aside by court order."

In determining whether the "necessary conditions are fulfilled", the Supreme Court will concentrate on the question whether the facts as ascertained in the judgment appealed against are sufficient to render a new decision on the merits. Case-law under section 362 confirms that the Supreme Court is reluctant to pronounce a new judgment.

Prior to the entry into force of the 1981 Code of Criminal

Procedure on 1 January 1986, the Supreme Court had, under section 396 of the 1887 Code of Criminal Procedure, power to give a new judgment convicting the accused only when the question of guilt had been decided against the defendant in the lower court. The 1981 Code removed this limitation on the Supreme Court's competence.

Since 1 August 1995, when the 1993 Act Amending the Code of Criminal Procedure (Lov av 11 juni 1993 nr. 80 om endringer i straffeprosessloven m.v. (toinstansbehandling, anke og juryordning)) entered into force, an appeal against the District or City Court lies ordinarily with the High Court, which has power to review points of fact, law and procedure (sections 5, 306 and 345 as amended). As a consequence, to a greater extent than before, the High Court will act as a court of second instance, and the Supreme Court as a court of third instance, in criminal cases.

On the other hand, the above-mentioned provisions in sections 336, 356, 357 and 362, which have been replaced respectively by sections 307, 339, 340 and 345, remain essentially unchanged.

In an opinion appended to the bill proposing to amend the Code (Ot prp nr. 78 (1992-93), p. 25), the Supreme Court stated:

(Translation)

"The present system, where the Supreme Court acts as the ordinary court of second instance in criminal cases, is internationally unique. This arrangement has enabled a speedy hearing of appeal cases and has given the Supreme Court a considerable influence on the practice of criminal law. However, in recent years - given current developments - the present system has demonstrated that it is no longer satisfactory. It does not fulfil the standards of legal safeguards which ought to be met and, at the same time, with the increased number of criminal cases in present-day society, the arrangement creates working conditions in the Supreme Court which prevent it from performing its functions in a fully satisfactory manner. The proposal that one should have two ordinary court levels below the Supreme Court would bring the appeal system in criminal cases in line with that in civil cases and with the appeal systems in most countries. It would give the Supreme Court the opportunity to concentrate its work to a greater extent on cases where its decision will concern matters of principle, or where there are other particular reasons for obtaining a decision from the Supreme Court."

COMPLAINTS

1. The applicant complains, under Article 6 of the Convention, that he did not have a fair hearing before the Supreme Court because he was convicted following an acquittal without being heard by this court.

2. He also considers that the Supreme Court was neither an independent nor an impartial tribunal.

3. Furthermore he complains, under Article 8 of the Convention, that the authorities in their actions interfered with his relations vis-à-vis his family.4. Finally, the applicant claims to have an inherited economic right to go fishing and dispose of the catch as he wishes. When restricting his alleged fishing rights the authorities actually confiscated his property contrary to Article 1 of Protocol No. 1 to the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 30 June 1992 and registered on 18 November 1992.

On 5 July 1994 the Commission (Second Chamber) decided that notice of the application should be given to the respondent Government and invited them to submit written observations on the admissibility and merits of the complaint of the lack of a fair hearing as submitted under Article 6 of the Convention.

The Government's observations were submitted on 4 October 1994 and the applicant's observations in reply were submitted on 2 November 1994.

On 7 December 1994 the Commission decided to grant the applicant legal aid.

On 28 February 1995 the Commission decided to adjourn the further examination of the application pending the outcome of the case of Botten v. Norway which had been referred to the European Court of Human Rights.

Judgment was pronounced on 19 February 1996 (Eur. Court HR, Botten v. Norway judgment to be published in the Reports and Decisions 1996) following which the parties were invited, on 1 March 1996, to submit additional observations on the admissibility and merits of the application.

The Government submitted such observations on 30 April 1996. The applicant's additional observations were submitted on 12 March and 1 July 1996.

THE LAW

1. The applicant complains that he did not have a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention which reads as far as relevant as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

The applicant maintains that the proceedings in the Supreme Court did not comply with the above provisions. The Government dispute this.

The Commission considers, in the light of the parties' submissions, that this part of the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

2. Under Article 6 (Art. 6) of the Convention the applicant furthermore maintains that the Supreme Court was neither impartial nor independent.

The Commission has not found this part of the application to be substantiated in any way. It follows that this particular complaint is manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also complains of an interference with his rights under Article 8 (Art. 8) of the Convention following from the authorities' actions in relation to his fishing rights.

The Commission has examined this part of the application as submitted by the applicant. However, it considers that it does not disclose any appearance of a violation of Article 8 (Art. 8) of the Convention.

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.

4. Finally, the applicant claims to have an inherited economic right to go fishing and dispose of the catch as he wishes. When restricting his alleged fishing rights the authorities actually confiscated his property contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Commission recalls that Article 1 of Protocol No. 1(P1-1) protects existing ownership and an applicant who alleges a violation of the above provision must produce evidence showing that he was in fact the owner of the "possession" of which he claims to have been deprived (cf. e.g. No. 7742/76, Dec. 7.7.78, D.R. 14 p. 146 at p. 168).

In the present case the Commission does not find it established that the applicant has any property right concerning fishing which might entitle him to invoke the right to peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 (P1-1) to the Convention. In these circumstances there is no basis upon which it could be held that his rights secured to him by this provision have been violated. 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.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint that he did not have a fair hearing;

DECLARES INADMISSIBLE the remainder of the application.

M.-T. SCHOEPFER	J.-C. GEUS
Secretary	Acting President
to the Second Chamber	of the Second Chamber