AS TO THE ADMISSIBILITY OF

Application No. 21365/93
by Josua ARTEAGA-SIERRA
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 6 September 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC

Mrs. M.F. BUQUICCHIO, 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 9 December 1992 by Josua ARTEAGA-SIERRA against Germany and registered on 10 February 1993 under file No. 21365/93;

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 applicant is a Columbian citizen born in 1951 and presently detained in Straubing, Germany. The applicant is represented by Mr. H. Wächtler, a lawyer practising in Munich.

It follows from his statements and the documents submitted that on 28 October 1991 the applicant was convicted by the Munich Regional Court (Landgericht) of drug trafficking and sentenced to ten years' imprisonment.

According to the findings of the court, the applicant came to Munich in April 1990 in order to assist one A.CH. who was prosecuted against in separate proceedings, in drug dealings. A.CH. and another co-accused, likewise prosecuted against in separate proceedings, one N.G., had contacts with a police undercover agent called Uli who pretended to be interested in buying a large quantity of cocaine. A police informer called Peter was also involved in the negotiations and had a personal and economic interest in the cocaine deal.

The applicant subsequently travelled to Columbia where he got to know one S.H. who was willing to deliver a large quantity of cocaine to Munich. The applicant returned to Munich accompanied by S.H. and entered into negotiations with Uli and Peter. An agreement was reached and S.H. returned to Columbia while the applicant remained in Munich

in order to await the shipment of cocaine. On 4 June 1990 the applicant informed Uli that the cocaine would arrive on the freighter ship "Andez" which was expected to arrive in Bremen on 16 or 17 June 1990. On 10 June 1990 the applicant informed Uli that S.H. was sending two travelling bags, each containing twenty kilos of cocaine. These bags would be smuggled onto an aeroplane disguised as the luggage of one of the passengers. This sale was meant by S.H. as a test in order to see whether the buyers kept their promises.

On 15 June 1990 the applicant went to Munich airport to supervise the arrival and receipt of the specially marked luggage containing the cocaine by persons sent by the buyer Uli.

On 19 June 1990 the ship "Andez" arrived in Bremen and the police found one hundred packages with a total of nearly one hundred kilos of cocaine among its cargo.

On 20 June 1990 the applicant was arrested and confronted with the cocaine which had been seized by the police. The applicant was immediately charged with drug trafficking and tried to conceal his identity pretending that his name was Ramirez.

The applicant had defended himself alleging that Peter had told him at their first meeting that he was collaborating with the police. The applicant therefore considered that his participation in the cocaine trafficking was not punishable. The court considered this allegation to be incredible and unproven. The court relied on the evidence given by the undercover agent Uli who was heard as a witness. The court also noted that N.G., when heard as a witness, had not confirmed the applicant's allegations. This witness claimed himself that Peter had asked him to collaborate with the police but that according to him no such offer had been made to the applicant.

The informant Peter was not heard by the court because the Bavarian Ministry of the Interior and State Security had refused to reveal the present address of this informant on the ground that this would put his life in danger. Therefore the court only heard a police officer, who had interrogated Peter in relation to the events in question.

The court noted that Peter was a dubious character with an extensive criminal record. Nevertheless the court considered that in the circumstances of the case it was unlikely that contrary to the evidence given by Uli, the police undercover agent, the applicant had been informed by Peter of the fact that the cocaine deal was in reality a deal concluded with a police agent. The court noted in this context that at his arrest the applicant tried to conceal his real identity which would have been unnecessary if he had been aware that he was involved in the police plot. The court also noted that the applicant had neither before the police or during the first hearings before the court alleged to have been aware of the fact that the buyer Uli was a police undercover agent. Furthermore the court considered that it was against any logic to assume that the police informer Peter had revealed to the applicant his collaboration with the police. He did not know the applicant at all and would have risked the applicant warning the Columbian dealers.

The applicant lodged an appeal on points of law (Revision) which was dismissed by the Federal Court (Bundesgerichtshof) on 27 May 1992.

The applicant submits that he did not lodge a constitutional complaint as in view of the constitutional court's jurisprudence such a complaint would not offer any prospects of success.

COMPLAINTS

The applicant submits that the police informer Peter was the key

figure in the negotiations between the police undercover agent and the Columbian citizens, including himself, who were suspected to be drug traffickers. Peter was the only one on the German side who could speak Spanish. The applicant therefore considers that Peter should have been heard as a witness in the trial against him and he should have been given the possibility to put questions to this witness. As he did not have this possibility, he considers that Articles 6 para. 1 and 3 (d) were violated in his case.

THE LAW

The applicant complains that he did not receive a fair trial because a certain police informer called Peter was not heard in his case. He relies mainly on the following provisions of Article 6 (Art. 6) of the Convention:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

...

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 Commission first recalls that in accordance with Article 26 (Art. 26) of the Convention, it may not deal with an application unless all domestic remedies have been exhausted. The applicant has failed to lodge a constitutional complaint (Verfassungsbeschwerde) alleging that it would not have offered any prospects of success.

This question can however be left undecided as even assuming that domestic remedies were exhausted, the application has to be rejected for the following reasons.

The admissibility of evidence is primarily a matter for regulation by national law (see Eur. Court H.R., Schenk judgment of 12 July 1988, Series A no. 140, p. 29, para. 46). As a general rule it is for the national courts to assess the evidence before them (see Eur. Court H.R., Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 68).

The Commission's task therefore is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (ibid.). It will consider the applicant's complaint also having regard to the specific aspects of the right to a fair trial as set out in Article 6 para. 3 (d) (Art. 6-3-d).

The Commission further recalls that in principle all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument (see the above-mentioned Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 34 para. 78). Also, the accused has a right that witnesses for the defence are heard by the trial court which has however, as was pointed out above, the competence to decide whether or not evidence suggested by the defence is at all relevant.

The Commission notes that in the present case an important amount of cocaine was seized which, according to the finding of the domestic trial court together with the evidence given in court by a police undercover agent, Uli, and further statements of witnesses, proved that the applicant was involved in the trafficking of these drugs.

The trial court also took into consideration the applicant's allegation that he was involved in the police plot against the drug traffickers. However, the trial court considered this allegation to be contradicted by the evidence given by a police officer who had questioned the police informer, Peter, but also by the applicant's own behaviour at his arrest and subsequent to the arrest when he never claimed to have been on the side of the police but rather tried to conceal his identity in order to avoid being related to the drug trafficking matter at all.

The Commission cannot, in these circumstances, find that the trial court assessed the available evidence in an arbitrary manner nor that the impossibility for the trial court to hear the police informer, Peter, affected the trial proceedings in such a manner as to deprive the applicant of his right to a fair hearing.

It follows that there is no appearance of a violation of Article 6 (Art. 6) and the application has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

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For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)