AS TO THE ADMISSIBILITY OF

Application No. 23931/94
by Laserbert Mohammed Olayinka BAKARE
against Belgium

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

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, 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 8 March 1994 by Laserbert Mohammed Olayinka BAKARE against Belgium and registered on 20 April 1994 under file No. 23931/94;

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 citizen of the United Kingdom, born in 1964, and at present serving a prison sentence in Belgium. Before the Commission he is represented by Mr. M. Wallace, a lawyer practising in Aalst (Belgium), and by Mr. Y. Werbrouck, a lawyer practising in Roeselaere (Belgium).

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

On 8 April 1992 the Belgian police observed a delivery of narcotics, i.e. 10 kilogrammes of "speed" and 6,5 kilogrammes of "XTC". The applicant and five other persons, amongst whom H.H., were suspected of having been involved in this drug traffic.

On 22 May 1992 the Belgian authorities issued a warrant for the applicant's arrest. On 4 September 1992 the Judges Chamber of the Court of First Instance (Raadkamer van de Rechtbank van Eerste Aanleg) of Brugge committed the applicant and four other co-suspects for trial before the Correctional Court of First Instance (Correctionele Rechtbank van Eerste Aanleg) of Brugge. They were charged with narcotics offences and membership of a criminal organisation.

On 15 October 1992, following adversarial proceedings, the co-suspect H.H. was convicted and sentenced by the Correctional Court of First Instance in respect of the drug traffic at issue. On

16 February 1993 the Court of Appeal (Hof van Beroep), following proceedings in absentia, rejected his appeal and upheld the judgment of 15 October 1992. On 11 March 1993 H.H. filed an objection (verzet) against his conviction in absentia.

The applicant was arrested in Germany and, on 10 February 1993, extradited to Belgium. He alleges that, already while being detained and questioned in Germany in connection with the drug traffic at issue, he unsuccessfully requested the examination of certain witnesses in order to prove that he was in England when the facts with which he was charged had taken place.

The applicant's appeal against his committal for trial of 4 September 1992 was rejected by the Indictment Chamber of the Court of Appeal (Kamer van Inbeschuldigingstelling van het Hof van Beroep) on 23 February 1993.

Following adversarial proceedings in which he was represented by a lawyer, the Correctional Court of First Instance, on 15 March 1993, convicted the applicant of the charges against him and sentenced him to eight years' imprisonment and a fine. The Court rejected as unfounded, without giving any reasons, the applicant's request to examine Mr. and Mrs. M. and the co-accused R.A. Both the applicant and the prosecution filed an appeal against this judgment.

Following adversarial proceedings in which it had joined the cases of H.H. - whose objection of 11 March 1993 had been declared admissible - and the applicant, who were both represented by lawyers, the Court of Appeal (Hof van Beroep) at Gent, in its judgment of 29 June 1993, upheld the judgment of 15 March 1993 in the case of the applicant and the judgment of 15 October 1992 in the case of H.H.

The Court of Appeal rejected the applicant's request to examine further witnesses, holding that it was sufficiently informed as regards the facts and the applicant's person. It further held that an examination of further witnesses, more than one year after the facts of the case, would not be possible in an objective way and was thus not useful ("het horen van bijkomende getuigen, meer dan een jaar na de feiten, kan dan ook niet meer objektief gebeuren en is derhalve niet dienend").

As regards the substance of both cases, the Court of Appeal noted that the police had observed the entire narcotics transaction, including the presence of the applicant and the co-suspect H.H. in a grey Renault 18 with Dutch number plates.

It also noted the full and detailed confession of the co-suspect R.A., concerning, inter alia, the role of the applicant and H.H., whom he had both formally identified, in the drug traffic and that R.A.'s statement fully coincided with the observations made by the police. As regards the statements of the witnesses examined at the request of H.H., the Court of Appeal held:

[Dutch]

> "Het alibi van H.H. bij dewelke hij op 8.4.1992 in Nederland verbleef werd door de door hem opgeroepen getuigen (...) niet bewezen. Het is opvallend dat omtrent het tijdsgebruik op 8.4.1992 (...) alle ondervraagde personen een nogal uiteenlopende versie verstrekken (...). Vooral het tijdsverloop van 8.4.1992 en de aan de dag gelegde aktiviteiten (...) staan in schril contrast tot wat H.H. heeft verklaard en de verklaringen van de andere getuigen.
> Bovendien kunnen deze getuigenissen, afgelegd door de familie en goede vrienden, 8 maanden na de feiten en meer dan een maand na het eerste vonnis niet meer als objektief worden aanzien en kunnen zij in ieder geval niet opwegen

tegen hoger vermelde en vaststaande en objectieve gegevens."

[Translation]
"The alibi of H.H. according to which he was in the Netherlands on 8.4.1992 has not been proven by the witnesses summoned by him (...). It is striking that as regards the use of time on 8.4.1992 (...) all persons questioned provide a rather divergent version (...). In particular the passage of time of 8.4.1992 and the activities displayed (...) sharply contrast with what H.H. has declared and the statements of the other witnesses. In addition these witness statements, made by the family and good friends, 8 months after the facts and more than a month after the first judgment, can no longer be regarded as objective and in any event they cannot counterbalance the above mentioned established and objective data."

As regards the alibi submitted by the applicant, the Court of Appeal held:

[Dutch]
"Het alibi van Bakare bij dewelke hij op 8.4.1992 in Engeland vertoefde en hij om 17 uur zich zou hebben aangeboden bij de werkloosheidsdienst "Tooting Employment Agency", wordt volledig tegengesproken door het bericht van Interpol dd. 13.4.1993.
Bovendien is er in gans het dossier geen enkele aanwijzing (..) dat een zekere M. in de wagen Renault zou plaats genomen hebben in de plaats van Bakare."

[Translation]
"The alibi of Bakare according to which he was in England on 8.4.1992 and would have presented himself at 17 hours at the unemployment service "Tooting Employment Agency", is fully refuted by the Interpol report dated 13.4.1993.
In addition, in the entire file there is not a single indication (..) that a certain M. would have taken a seat in the Renault car in the place of Bakare."

As regards certain statements by co-accused the Court of Appeal concluded that:

[Dutch]
"Rekening houdend met al deze objektieve gegevens, kan dan ook geen rekening worden gehouden met de gewijzigde verklaringen van [A.]S. en [R.]A., die in schril contrast staan met de eerder gedane vaststellingen en diverse verklaringen afgelegd voor de aanhouding van H.H. en Bakare."

[Translation]
"Taking all these objective data into account, no account can be taken of the altered statements of [A.]S. and [R.]A, which sharply contrast with the conclusions already reached and several statements made before the apprehension of H.H. and Bakare."

The applicant's subsequent appeal in cassation was rejected on 12 October 1993 by the Court of Cassation (Hof van Cassatie). The Court of Cassation considered his complaint under Article 6 paras. 1 and 3 (d) of the Convention that the Court of Appeal had rejected his request to hear further witnesses in connection with his alibi, whereas it had granted the request of H.H. to examine witnesses in connection with the latter's alibi, but it held that Article 6 of the Convention had not been violated by the mere fact that the Court of Appeal had not found that a hearing of these witnesses was necessary for its determination

of the applicant's case and that, moreover, the applicant had submitted written statements by these witnesses to the Court of Appeal.

The Court of Cassation also rejected the applicant's complaint under Article 14 of the Convention that he had been discriminated against as the Court of Appeal had granted H.H.'s request to hear witnesses in connection with his alibi, eight months after the facts had occurred, whereas it had rejected the applicant's request to hear certain witnesses in connection with his alibi.

COMPLAINTS

1. The applicant complains under Article 6 paras. 1 and 3 (d) of the Convention that the domestic courts' refusal to examine witnesses, who could confirm that when the facts with which he was charged took place he was in fact in England, deprived him of a fair trial.

2. The applicant complains under Article 14 in conjunction with Article 6 of the Convention that he was discriminated against by the Court of Appeal's decision to grant H.H.'s request to examine witnesses confirming H.H.'s alibi, whereas the applicant's request to hear witnesses, who could confirm his alibi, was rejected by the Court of Appeal.

THE LAW

1. The applicant complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention that the domestic courts' refusal to examine certain witnesses for the defence deprived him of a fair trial.

Article 6 (Art. 6) of the Convention, insofar as relevant, provides:

> "1. In the determination of (...) any criminal charge against him, everyone is entitled to a fair (...) hearing (...).
> (...)
>
> 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;
> (...)."

As the guarantees in para. 3 of Article 6 (Art. 6-3) of the Convention are specific aspects of the right to a fair trial set forth in para. 1, the Commission will consider the complaint under the two provisions taken together (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 25).

The Commission recalls that Article 6 para. 3 (d) (Art. 6-3-d) of the Convention does not give an accused an unlimited right to obtain the examination of witnesses. It is in principle within the discretionary power of domestic courts to establish whether the hearing of witnesses is likely to be of assistance for discovering the truth and, if not, to refuse the calling of such witnesses (cf. No. 8231/78, Dec. 6.3.82, D.R. 28 p. 5; No. 10486/83, Dec. 9.10.86, D.R. 49 p. 86; and Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A no. 158, p. 31, para. 89).

The Commission further recalls that the taking of evidence is governed primarily by the rules of domestic law and that it is in principle for the domestic courts to assess the evidence before them. Where a court is confronted with a contradiction between an earlier statement and subsequent evidence at the trial, it is the task of this

court to consider the credibility of the declarations of the witness involved (cf. No. 8414/78, Dec. 4.7.79, D.R. 17 p. 231). The task of the Convention organs in this respect is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.

The Commission notes that the applicant, who was represented by a lawyer, was provided with ample opportunity to convince the trial courts of the necessity to have certain persons examined as witnesses in connection with his alibi. Moreover, the applicant did in fact submit written statements of those persons to the Court of Appeal. The Court, however, found the applicant's alleged alibi fully refuted by an Interpol report and the other evidence against him.

Noting that the applicant's conviction was based, inter alia, on observations made by the police and the statement of the co-suspect R.A., and that it has not appeared nor been argued that the applicant was placed at a disadvantage vis-à-vis the prosecution as regards the examination of the witnesses examined in the course of the adversarial criminal proceedings against him or that he was given insufficient opportunities to challenge the evidence against him, the Commission cannot find that the refusal of his request at the appeal stage to have certain witnesses examined in connection with his alleged whereabouts on 8 April 1992 deprived the applicant of a fair hearing within the meaning of Article 6 (Art. 6) of the Convention.

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

2. The applicant further complains that the Court of Appeal's refusal to hear witnesses in connection with his alibi was contrary to Article 14 in conjunction with Article 6 (Art. 14+6) of the Convention as a similar request by his co-accused H.H. was granted.

Article 14 (Art. 14) of the Convention reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The applicant complains that he has been discriminated against in the enjoyment of his right to a fair trial guaranteed by Article 6 (Art. 6) of the Convention in that he was treated differently from a co-accused. This complaint falls within the scope of Article 14 (Art. 14) of the Convention.

The Commission, recalling the domestic trial courts' discretionary power as regards the question whether the hearing of witnesses is likely to be of assistance for discovering the truth and, if not, to refuse the calling of such witnesses, finds that the domestic trial courts were in the best position to evaluate whether in criminal proceedings against the applicant it was required to examine the witnesses proposed in order to establish the truth.

The Commission does not find it established that the situation of H.H., with whom the applicant compares himself, was analogous to that of the applicant himself insofar as their alleged whereabouts on 8 April 1992 are concerned.

In these circumstances, the Commission cannot find that in the criminal proceedings against him the applicant has been subjected to discriminatory treatment contrary to Article 14 (Art. 14) of the Convention.

It follows that also this part of the application is 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 Second Chamber — President of the Second Chamber

(K. ROGGE) — (H. DANELIUS)