AS TO THE ADMISSIBILITY OF

Application No. 27741/95
by C. B.
against Switzerland

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. S. TRECHSEL
M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 20 April 1995 by C. B. against Switzerland and registered on 28 June 1995 under file No. 27741/95;

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, a Swiss citizen born in 1932, is a bank employee residing in Riehen in Switzerland.

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

The applicant was the director of the S. AG bank which administered fortunes. He was suspected by the Federal Tax Administration (Eidgenössische Steuerverwaltung) of having evaded taxes.

On 9 December 1983 the Administration for Direct Federal Taxes of the Canton of Basel-Stadt (Kantonale Verwaltung für die direkte Bundessteuer, hereafter: Cantonal Administration) instituted tax evasion proceedings against the applicant.

On 12 September 1984 the Federal Tax Administration closed its investigations, and on 8 February 1985 the applicant was informed of the outcome.

Following further investigations of his private tax matters, the

Federal Tax Administration informed the Cantonal Administration in its report of 9 December 1986 of the results obtained.

On 13 September 1989 the Cantonal Administration informed the applicant of the taxes and fines due, the latter amounting to 150-200 % of the taxes due. In a statement of 3 October 1989 the Cantonal Administration explained the details of the various fines. The various sums evaded concerned amounts of the years 1979-1984 and ranged from 2,400 to 2,059,000 Swiss Frances (CHF).

On 16 October 1989 the applicant filed an appeal with the Appeals Commission for Federal Taxes (Kantonale Rekurskommission für eidgenössische Abgaben, hereafter: Appeals Commission).

On 17 November 1992 the Appeals Commission held a hearing at which E. acted as Secretary. On the same day, the Appeals Commission partly upheld the applicant's appeal and reduced the fines to 100 % of the taxes due. The case was referred to the Cantonal Administration for renewed examination.

The applicant filed an administrative law appeal (Verwaltungs-gerichtsbeschwerde) with the Federal Court. In his appeal he complained, inter alia, that the Appeals Commission was not an independent judicial body. Under the heading "absolute prescription" (absolute Verjährung) he complained that the proceedings had meanwhile lasted more than ten years. He further complained that he had not been able fully to consult the case-file and that an expert opinion had been refused concerning the value of certain shares. He also analysed statements, inter alia, of N., a member of the tax administration of the Canton of Basel-Stadt, in respect of certain remunerations.

In administrative law proceedings before the Federal Court, the President may order a hearing with the parties according to S. 112 of the Federal Judiciary Act (Organisationsgesetz).

The applicant's administrative law appeal was transmitted to the Cantonal Tax Administration and to the Federal Tax Administration both of which filed observations thereupon on 9 and 23 November 1993, respectively. The Cantonal Tax Administration stated, inter alia, that one statement of, and one particular document signed by, the applicant were "untrue, as the applicant's tax declarations ... demonstrate" ("wahrheitswidrig, wie die Steuererklärungen des Beschwerdeführers ... aufzeigen"). The Federal Tax Administration stated, inter alia, that the applicant "constantly made unproven or even incorrect statements, for instance that he had not been granted a legal hearing" ("laufend unbewiesene oder gar falsche Behauptungen <aufgestellt>, so z.B., dass ihm das rechtliche Gehör nicht gewährt worden sei").

On 7 February 1994 the applicant wrote to the Federal Court, stating that the observations of the Cantonal Administration and the Federal Tax Administration contained many new statements and arguments and that he would like to reply thereto, as criminal tax proceedings were at issue.

On 9 February 1994 the President of the Federal Court informed the applicant that for the time being his request could not be granted, though later a second round of observations might become necessary.

On 18 February 1994 the applicant submitted further observations in which he substantiated his allegations as to the incorrect statements in the observations concerned.

On 21 November 1994 the Federal Court dismissed the applicant's administrative law appeal. He was informed of the decision on 22 November. On 6 December 1994, upon the applicant's inquiry, he was informed that no public session had taken place in his case. The reasons of the decision were served on him on 20 January 1995.

In its decision, the Federal Court summarised the facts of the case and the applicant's observations of 18 February 1994. In respect of its own jurisdiction the Federal Court found that the Appeals Commission was a judicial body for which reason the Federal Court's jurisdiction was limited to the question whether federal law had been breached and whether the previous instance had incorrectly established the facts.

The Federal Court further noted that E. had acted as Secretary to the Appeals Commission. Insofar as the applicant complained that this breached his right to an independent and impartial tribunal, the Court found that the applicant had failed to raise this complaint at the latest at the oral hearing on 17 November 1992 before the Appeals Commission when it became clear that E. was acting as Secretary.

The Court further found that the applicant's complaint about "prescription" was unfounded, the time-limit in respect of the applicant's offences expiring at the latest on 31 December 1995. It also considered that the case-file had been open for consultation and that the applicant had had sufficient occasion in the proceedings orally and in writing to comment on the various issues. The Court did not regard it as established that the minutes of the Appeals Commission omitted important statements of the applicant. There was also no obligation of the Cantonal Administration to order the preparation of external expert opinions as the Administration itself was called upon to establish the facts.

The Federal Court also dealt extensively with the applicant's submissions as to various amounts allegedly evaded and the manner in which the various taxes and fines had been calculated, inter alia, concerning certain remunerations.

On 16 February 1995 the Tax Administration of the Canton of Basel-Stadt (Steuerverwaltung des Kantons Basel-Stadt) wrote to the applicant, noting that the Federal Court had confirmed the decision of the Appeals Commission of 17 November 1992. On the basis of the latter decision, the amounts due had to be amended; the sums now ranged from 27,456 to 591,566 CHF, and amounted to more than three million CHF.

On 2 March 1995 the applicant filed an appeal against the decision of 16 February 1995 which was dismissed by the Tax Administration of the Canton of Basel-Stadt on 30 March 1995.

On 10 April 1995 the applicant filed an appeal against this decision with the Appeals Commission. The proceedings are apparently still pending.

COMPLAINTS

1. The applicant complains that the Cantonal Administration did not permit his lawyer to take the case-file to his office. As it turned out before the Appeals Commission, the Cantonal Administration also did not let him consult certain "unfavourable" ("ungünstige") documents of the case-file.

2. The applicant complains under Article 6 para. 1 of the Convention that the Appeals Commission is not an independent and impartial court established by law within the meaning of Article 6 para. 1 of the Convention. The members are appointed by the administration and only act part-time as they are all busy lawyers. Furthermore, the Commission is based only on an ordinance, not a statute, and its Secretary is not independent in that he is a member of the Government of the Canton of Basel-Stadt.

The applicant also submits that the minutes of the Appeals Commission were insufficient; and that he was not invited to

participate when the Appeals Commission deliberated his case.

3. The applicant complains under Article 6 subpara. 3 (b) of the Convention that he only had 30 days' time to prepare his remedy against the decision of the Appeals Commission, whereas the latter took one year to prepare its decision.

4. The applicant complains that in the proceedings before the Federal Court he was not permitted to reply to the observations of the Cantonal Administration and Federal Tax Administration.

5. Under Article 6 para. 2 of the Convention the applicant complains that the observations filed with the Federal Court breached the presumption of innocence. The Cantonal Administration stated in particular that a document submitted by him proved to be "untrue" ("wahrheitswidrig"). The Federal Tax Administration stated that the applicant had "constantly made unproven or even incorrect statements" ("laufend unbewiesene oder gar falsche Behauptungen <aufgestellt>").

6. The applicant complains under Article 6 para. 1 of the Convention that the Federal Court decided without public deliberation (ohne öffentliche Beratung entschieden).

7. The applicant complains under Article 6 subpara. 3 (d) of the Convention that throughout the proceedings his request was refused for the preparation of an expert opinion as to the market value of a stock corporation. He was also not permitted to have N., a member of the tax administration of the Canton of Basel-Stadt, heard in respect of certain remunerations.

8. The applicant complains under Article 6 para. 1 of the Convention of the length of the proceedings. He submits that the proceedings commenced in 1983. The decision of the Appeals Commission was only served a year later. He did not contribute to the length of the proceedings. On the other hand, the authorities were overburdened, and the case was not particularly complex.

THE LAW

1. The applicant complains under Article 6 paras. 1, 2 and 3 subparas. (b) and (d) (Art. 6-1, 6-2, 6-3-b, 6-3-d) of the Convention of the proceedings in which he was involved. These provisions state, insofar as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
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> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights: ...
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> b. to have adequate time and facilities for the preparation of his defence; ...
>
> 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 notes that the applicant was accused of the criminal offence of tax evasion. Article 6 (Art. 6) of the Convention is therefore applicable to the present proceedings.

2. The applicant complains under Article 6 (Art. 6) of the

Convention that in the proceedings before the Cantonal Administration and the Appeals Commission he could not consult "unfavourable" documents and that the Appeals Commission was not an independent and impartial court established by law within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

Insofar as the applicant complains that in the proceedings before the Cantonal Administration and the Appeals Commission he was not permitted to consult certain documents of the case-file, the Commission cannot find any indication as to the documents which were allegedly missing. Moreover, the applicant has not claimed that he could not duly defend himself in respect of these documents.

Insofar as the applicant complains that the Appeals Commission was not a "tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, the Commission notes that the Federal Court, in its decision of 21 November 1994, referred to the Appeals Commission as a judicial body. The Commission need nevertheless not decide this issue for the following reasons.

On the one hand, the Commission notes that, upon the applicant's administrative law appeal, a further instance which undoubtedly is a court, i.e. the Federal Court, reviewed the decision of the Appeals Commission. The applicant has not claimed that the Federal Court's jurisdiction was limited in that it declined to examine, for instance, any factual aspects of the applicant's complaints (see Eur. Court HR, Zumtobel v. Austria judgment of 21 September 1993, Series A no. 268-A, p. 14, para. 32).

On the other hand, the applicant may be understood as complaining that, as the Appeals Commission was not a court, the Federal Court should have conducted a hearing. However, S. 112 of the Federal Judiciary Act expressly envisages the possibility of a hearing before the Federal Court, and the applicant could have been expected to apply for one if he attached importance to it. As he did not do so, it may reasonably be considered that the applicant unequivocally waived his right hereto (see Eur. Court HR, Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 20, para. 58).

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

3. The applicant complains under Article 6 paras. 1 and 3 (b) of the (Art. 6-1, 6-3-b) Convention that he only had 30 days' time to prepare his administrative law appeal against the decision of the Appeals Commission, and that in the proceedings before the Federal Court he was not permitted to reply to the observations of the Cantonal Administration and the Federal Tax Administration to his administrative law appeal.

The Commission notes, first, that the applicant has not explained why the time-limit of 30 days did not suffice for him to prepare his administrative law appeal. The applicant himself has stated before the Commission that the matters at issue were not particularly complex.

Second, it is true that the Federal Court on 9 February 1994 informed the applicant that it would not grant his request to submit a reply to the observations of the Cantonal Administration and the Federal Tax Administration. However, the applicant nevertheless filed a reply on 18 February 1994, and the Federal Court, in its decision of 21 November 1994, duly noted its content.

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.

4. The applicant complains under Article 6 subpara. 3 (d) (Art. 6-3-d) of the Convention of the refusal of his requests for the preparation of an expert opinion and for the hearing of N., a member of the tax administration of the Canton of Basel-Stadt, in respect of certain remunerations.

According to the Convention organs' case-law, the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Convention organs' task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case, the Federal Court found in its decision of 21 November 1994 that such an expert opinion was unnecessary. The applicant was furthermore free to put forward the results of any private expert opinion which he considered pertinent to his defence.

As regards the witness N., the applicant has, on the one hand, not shown that he sufficiently raised this complaint in his administrative law appeal before the Federal Court. On the other hand, as his administrative law appeal demonstrates he was able therein to refer to, and to analyse, various statements of N. The Federal Court subsequently examined the applicant's submissions as to various amounts allegedly evaded and the manner in which the various taxes and fines had been calculated, inter alia, concerning certain remunerations.

As a result, there is no indication that in the proceedings the applicant could not sufficiently put forward his point of view or any evidence which he regarded as being pertinent.

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

5. The applicant further complains under Article 6 para. 2 (Art. 6-2) of the Convention that the observations filed by the Cantonal Administration and the Federal Tax Administration with the Federal Court contained statements which breached the presumption of innocence.

Article 6 para. 2 (Art. 6-2) of the Convention requires that no representative of the State declares that a person is guilty of having committed an offence, before that guilt is established by a court (see No. 7986/77, Dec. 3.10.78, Krause v. Switzerland, D.R. 13, p. 73).

In the present case, the Cantonal Administration, in its observations to the Federal Court, wrote inter alia, that one statement of, and one particular document signed by, the applicant proved to be "untrue, as the applicant's tax declarations ... demonstrate". The Federal Tax Administration stated, inter alia, that the applicant "constantly made unproven or even incorrect statements, for instance that he had not been granted a legal hearing".

In the Commission's opinion, these statements disclose that the authorities considered certain of the applicant's statements as being incorrect and not corresponding to the facts. It does not transpire therefrom that the applicant was found guilty of having committed an offence within the meaning of Article 6 para. 2 (Art. 6-2) of the Convention.

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

6. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention of the length of the proceedings.

The Commission considers that it cannot on the basis of the file determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Commission's Rules of Procedure to give notice of the complaint to the respondent Government.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaint under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings;

by a majority,
DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber