AS TO THE ADMISSIBILITY OF

Application No. 19801/92
by C.K. G.
against Austria

The European Commission of Human Rights sitting in private on 2 March 1994, the following members being present:

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

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 29 January 1992 by C.K. G. against Austria and registered on 6 April 1992 under file No. 19801/92;

Having regard to the observations submitted by the respondent Government, after an extension on the time-limit, on 6 November 1992 and a corrected version on 13 November 1992, and the observations in reply submitted by the applicant on 13 April 1993 ;

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 facts of the case, as they have been submitted by the parties, may be summarised as follows.

The applicant, born in 1928, has double nationality, namely that of Austria and the United States of America. When lodging her application, she was detained at a prison in Schwarzau. Since August 1992 the applicant has been represented by Mr. G. Winterstein, a lawyer practising in Vienna.

A. Particular circumstances of the case

It appears that in 1970 the applicant was sentenced to five years' imprisonment. The enforcement of the sentence was suspended in 1973 on the ground that she was not fit to serve a prison sentence (strafvollzugsuntauglich). In 1985 she was detained in order to serve the remainder of the said sentence, and in January 1986 again released for health reasons. A new examination of her state of health did not take place, the applicant having left Austria.

On 23 September 1988 the Investigating Judge at the Vienna Regional Court (Landesgericht) instituted preliminary investigations against the applicant on suspicion of grave fraud, and issued a warrant for her arrest.

On 20 October 1989 the Vienna Neustadt Regional Court (Kreisgericht), competent for the enforcement of the applicant's sentence (Vollzugsgericht), issued an order for bringing her before the court (Vorführbefehl), as she still had to serve the remainder of the prison sentence imposed in 1970. On 1 June 1990 the applicant came back to Austria where she was arrested and taken into detention.

In the course of this detention, the Vienna Neustadt Regional Court ordered an expert opinion regarding the applicant's state of health. According to the expert opinion of 30 October 1990, the applicant was suffering from wide skin wounds on her extremities which were not healing, as well as from a rupture of her abdominal wall. She was not fully capable of moving her spine and her right hand. Due to an abdominal operation, she was suffering from abdominal coalescence with a risk of intestinal obstruction and also possibly acute serious complications such as peritonitis. The applicant could not, therefore, be requested to accomplish manual work and thus not be integrated in the educative part of a prison sentence. The expert, having also regard to the chronic nature of her diseases, concluded that the applicant was unfit to serve her prison sentence.

On 21 December 1990 the Vienna Neustadt Regional Court suspended the enforcement of the applicant's prison sentence under S. 5 para. 1, in conjunction with S. 133, of the Enforcement of Sentences Act (Strafvollzugsgesetz). The Regional Court, referring in detail to the expert opinion of 30 October 1990, noted that the applicant was severely ill, and found that, due to her illness, her sentence could not be enforced in conformity with the aims of a prison sentence.

On 21 December 1990 the Duty Judge (Journalrichter) at the Vienna Regional Court, in the context of the new investigation proceedings against the applicant, ordered her detention on remand. The Judge, referring to S. 180 para. 2 (1) and para. 3 (c) of the Code of Criminal Procedure (Strafprozeßordnung), found that the applicant was reasonably suspected of having committed fraud to the disadvantage of a banking institute by unlawful debiting of her banking account in the period from June 1986 until April 1987, as well as fraud to the disadvantage of a further banking institute in April 1988. The Judge considered that there was a risk of the applicant's absconding, as she had been in hiding at the beginning of the investigations against her, and also a risk of her committing further criminal offences.

On 31 January 1991 the Vienna Prosecutor's Office (Staatsanwaltschaft) charged the applicant with grave fraud on several counts and requested her prosecution (Strafantrag).

On 8 February 1991 the Judges' Chamber (Ratskammer) at the Vienna Regional Court dismissed the applicant's request for release, in which she had, inter alia, invoked her bad state of health.

The Judges' Chamber, referring to the request of the Prosecutor's Office of 31 January 1991, considered that the applicant was reasonably suspected of grave fraud on several counts. In a detailed reasoning, it also confirmed that there was a considerable risk of her absconding, as well as a considerable risk that, upon her release, she would commit further criminal offences to the detriment of third persons' property. Less strict measures were not likely to remove these risks. The Judges' Chamber further considered that the applicant's submissions as to her illness could not, from a legal point of view, hinder her detention on remand. It noted that her alleged illness had not prevented her from committing the offences of which she was reasonably suspected. Finally, the length of her detention on remand did not appear disproportionate.

On 26 February 1991 the Vienna Court of Appeal (Oberlandes-gericht) dismissed the applicant's appeal against the decision of 8 February 1991. The Court of Appeal confirmed the findings of the Judges' Chamber as regards the reasonable suspicion against the applicant as well as the risk of her absconding and of her committing further criminal offences. The Court also found that the question whether a person was fit to serve a prison sentence within the meaning of S. 5 of the Enforcement of Sentences Act could not be considered in deciding upon detention on remand.

On 6 May 1992 the Judges' Chamber at the Vienna Regional Court dismissed the applicant's renewed application for her release.

In the course of her detention on remand, the applicant's medical surveillance was ensured by a prison doctor, and further therapy of her ailments was possible at a nearby hospital. It appears that the applicant did not accept therapies recommended to her and did not comply with the prescribed medication. On the inspection of her prison cell in September 1991, large quantities of medicine had been found.

On 11 May 1992 the Vienna Regional Court, having conducted hearings on 8 April and 17 September 1991, as well as on 9 January and 11 May 1992, convicted the applicant of grave fraud and sentenced her to three years and six months' imprisonment. The applicant lodged a plea of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung).

On 10 June 1992 the Vienna Court of Appeal dismissed the applicant's appeal against the decision of the Judges' Chamber of 6 May 1992, and ordered the continuation of her detention. The Court of Appeal referred to a new medical expert opinion dated 6 May 1992 according to which the applicant was meanwhile able to serve a prison sentence, if there was no physical strain.

On 21 October 1992 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity. Upon her appeal it reduced the prison term to three years.

On 18 December 1992 the Vienna Neustadt Regional Court dismissed the applicant's request that the enforcement of the prison sentence be postponed, pursuant to S. 133 para. 1 in conjunction with S. 5 para. 1 of the Enforcement of Sentences Act. The Regional Court, having regard to the medical expert opinion of 6 May 1992, found that the applicant was fit to serve her sentence. It also noted that according to the expert opinion the applicant had not suffered a deterioration of her illness during her preceding detention.

Following a successful appeal in this respect, the matter was resumed before the Regional Court, and a new expert opinion on the applicant's state of health prepared. On 27 September 1993 the Vienna Neustadt Regional Court confirmed its previous decision. The Regional Court thereby considered the opinion of the Institute for Forensic Medicine dated 21 September 1993 according to which there was no objection against the execution of her sentence, if constant medical surveillance was provided for.

B. Relevant domestic law

Under S. 180 paras. 1 and 2 of the Code of Criminal Procedure, a person may be held in detention on remand if he is seriously suspected of having committed a criminal offence and if there is a risk of his absconding, of collusion or of repetition of the offences. According to S. 184 of the Code of Criminal Procedure, detention on remand is designed to encounter the risks set out in S. 180 para. 2.

SS. 183 to 189 of the Code of Criminal Procedure govern the treatment of remand prisoners. In particular, S. 184 provides that the

detention on remand is designed to avoid the risks set out in S. 180 para. 2, and that only such restrictions may be imposed upon them as are necessary achieve this aim or to prevent disorder in the prison. S. 186 regulates in detail the circumstances of detention in remand, including the voluntary work of remand detainees.

S. 5 para. 1 of the Enforcement of Sentences Act provides that enforcement of prison sentences is to be postponed as long as illness or other physical or mental condition do not make possible an enforcement in accordance with the nature of the prison sentence. According to S. 20 para. 1 of the Enforcement of Sentences Act, the enforcement of prison sentences is designed to help convicted persons lead a life-style that is compatible with ethical standards and the requirements of community life and to prevent them from pursuing harmful activities, as well as to make them aware of the unworthiness of the behaviour underlying the conviction.

S. 133 para. 1 of the Enforcement of Sentences Act provides for a suspension of the enforcement of a sentence at a later stage, if enforcement should have been postponed due to an illness, injury, disability or other physical or mental condition that had already existed at the time of admission, and if these conditions persist.

COMPLAINTS

1. The applicant complains about her detention on remand despite her serious illness. She alleges that the competent judge at the Vienna Regional Court delayed the trial against her in order to prolong her detention on remand.

2. The applicant further complains about the length of her detention on remand and, in general, about the length of the proceedings to determine whether she was fit to serve her prison term sentence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 January 1992 and registered on 6 April 1992.

On 13 May 1992 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 6 November 1992, after an extension of the time-limit, the Government submitted their observations, and a corrected version on 13 November 1992.

On 8 January 1993 the applicant was granted legal aid.

The observations in reply were submitted by the applicant on 13 April 1993. In these observations she raised her complaints about the length of her detention on remand, and of the proceedings regarding her request to postpone the execution of her sentence of 11 May 1992.

THE LAW

1. The applicant complains that she was detained on remand despite her serious illness. In this respect, she refers to the decision of the Vienna Neustadt Regional Court of 21 December 1990 which declared her unfit to serve her previous prison sentence.

The Commission has examined this complaint under Article 3 (Art. 3) of the Convention. Article 3 (Art. 3) provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The Government contend that the applicant's detention on remand did not constitute treatment contrary to Article 3 (Art. 3) of the

Convention. They point out that detention on remand and enforcement of prison sentences serve different purposes. They also submit that the necessary medical treatment was offered to the applicant in prison and, in case of an emergency, at the hospital nearby. However, she refused to accept therapies recommended to her, and failed to take the medication prescribed to her.

The applicant contends that, in the course of her detention on remand, her state of health deteriorated. She denies the efficiency of her medical surveillance at the Schwarzau prison.

The Commission recalls that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative, it depends on all circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and stage of health of the victim, etc." (Eur. Court H.R., Ireland v. The United Kingdom judgment of 18 January 1978, Series A no. 25, page 65, para. 162). Moreover, even the lawful detention of a sick person may, in certain circumstances, raise problems in regard to Article 3 (Art. 3) of the Convention, especially by virtue of the way in which it is being enforced (cf., Bonnechaux v. Switzerland, Comm. Report of 5.12.79, para. 88, D.R. 18 p. 148).

The Commission notes that on 21 December 1990, while the enforcement of the applicant's prison sentence was suspended for health reasons, she was taken into detention on remand pursuant to S. 180 of the Code of Criminal Procedure. She continued to be detained on remand until her conviction on 11 May 1992, when she was sentenced to imprisonment.

The Vienna Neustadt Regional Court of 21 December 1990, when deciding to suspend the execution of the previous prison sentence, proceeded from the findings of an expert opinion according to which the applicant, due to her serious diseases, could not be requested to accomplish manual work, which formed part of the enforcement of a prison sentence. Her sentence could not, therefore, be enforced in conformity with the aims of a prison sentence, pursuant to S. 5 of the Enforcement of Sentences Act. The Commission, having regard to the Vienna Court of Appeal's decision of 26 February 1991, observes that such considerations were not relevant for the question of the applicant's detention on remand.

Moreover, the Commission finds no indication that, in the course of her detention, the applicant was not offered adequate medical surveillance and treatment. Rather, there are circumstances showing negligence on the part of the applicant in accepting the medical treatment offered to her. Furthermore, expert opinions of 6 May 1992 and 21 September 1993 confirm that the applicant's state of health had not deteriorated during her preceding detention.

In these circumstances, the Commission, on the basis of all material at its disposal, considers that the applicant's detention did not amount to inhuman or degrading treatment within the meaning of Article 3 (Art. 3) 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.

2. The applicant further complains under Article 5 para. 3 (Art. 5-3) of the Convention about the length of the detention on remand.

The Commission notes that the applicant's detention on remand ended, for the purpose of Article 5 para. 3 (Art. 5-3) of the Convention, on 11 May 1992, when she was convicted by the Vienna Regional Court (see, Eur. Court H.R., B. v. Austria judgment of 28 March 1990, Series A no. 175, p. 14, para. 36). However, the applicant only submitted this

complaint in her observations in reply dated 13 April 1993, which is more than six months after that decision.

This part of the application must, therefore, be rejected under Article 26, in conjunction with Article 27 para. 3 (Art. 26+27-3), of the Convention.

3. Moreover, the applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings regarding her request to postpone the execution of the sentence imposed on 11 May 1992.

The Commission notes that the proceedings in question concerned the execution of the applicant's prison sentence, and did no longer involve the determination a criminal charge against her. Thus, these proceedings fall outside the scope of Article 6 (Art. 6) of the Convention.

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention 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 First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (A. WEITZEL)