AS TO THE ADMISSIBILITY OF

Application No. 16155/90
by T.C.
against Cyprus

The European Commission of Human Rights sitting in private on 11 February 1992, the following members being present:

MM.C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
H. DANELIUS
Mrs.G. H. THUNE
SirBasil HALL
MM.F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs.J. LIDDY
MM.L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 25 October 1989 by T.C. against Cyprus and registered on 13 February 1990 under file No. 16155/90;

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

Having regard to the observations submitted by the respondent Government on 21 March 1991 and to the applicant's observations in reply presented on 23 May 1991;

Having regard to the parties' submissions in view of and at the oral hearing of 11 February 1992;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Cypriot citizen born in 1914. He is a pensioner residing in Nicosia. In the proceedings before the Commission he is represented by Mr. Andreas Eftychiou, a lawyer practising in Nicosia.

On 13 June 1983 the District Court of Nicosia gave a judgment whereby an amount of £550 plus interest and costs was awarded to the Popular Cyprus Bank Ltd. against a certain A, as primary debtor, and against the applicant as guarantor.

On 20 September 1984 the same court ordered that the debt be paid by monthly instalments of £35, the first instalment being payable on 1 April 1985.

As the debtors failed to pay, the bank asked the District Court to issue an order of imprisonment against the debtors according to Article 82 of Part VIII of the Civil Procedure Act, Chapter 6, which provides as follows:

"Where upon any investigation by the Court respecting the ability of a judgment debtor to pay the amount due under a judgment or order, it appears to the Court that the creditor has been unable to obtain satisfaction of his judgment by the sale of the debtor's property or by attachment of property in the hand of some third party; and

(a) that the debtor then has or since the making of the judgment or order has had sufficient means to pay the money directed to be paid by him, or some part thereof which still remains unpaid, and that he refuses or neglects to pay it according to the judgment or order; or

(b) that he has made or suffered to be made any gift, delivery, or transfer of any property, or changed, removed or concealed any property and has thereby prevented the creditor from obtaining payment of the judgment debt or any part thereof,

the Court may on the application of the creditor commit the debtor to prison for any term not exceeding twelve months, or until the payment of the sum due, subject to the provisions hereinafter contained; but may at any subsequent time order his release on the request of the creditor."

In an affidavit in support of their application, the bank submitted that "to the best of their knowledge and belief" the defendants had no attachable property but that they had had since the making of the judgment order sufficient income to pay the debt but refused to comply with the court order.

The applicant opposed the above request. In two affidavits he submitted he stated that he was 74 years old, that he was earning £74 per month, that due to his age and health condition he was unable to work regularly and that he and his wife were financially supported by their daughter. He concluded that he was unable to pay.

The District Court summoned the applicant to appear before it in order to examine whether he had sufficient means to pay and, if so, to order the imprisonment of the applicant for contempt of court.

On 14 February 1987 the applicant and his counsel appeared before the judge of the District Court in the latter's office. The applicant's counsel declared that the applicant had already paid part of the debt, that he was a guarantor and was awaiting the main debtor to pay and that he still needed four months. On 19 April 1987 the District Court ordered the imprisonment of the applicant for sixty days unless he paid the debt within ninety days.

The main debtor died on 3 November 1987 and an administratrix of her estate was appointed.

On 28 December 1988, on application by the applicant, a judge of the Supreme Court granted leave for filing an application for an order of certiorari.

On 12 April 1989 Judge J. Kourris issued an order of certiorari quashing the judgment of the District Court. The judge recalled that "a court, before committing a debtor to prison for any term, must be satisfied that the debtor then, or since the making of the judgment order, has sufficient money to pay the money directed to be paid by him, or some part thereof which still remains unpaid, and that he refuses or neglects to pay it according to the judgment order". In the present case the judge found that the District Court judge proceeded to issue the order committing the applicant to prison "without holding an inquiry to satisfy himself that the judgment debtor (had) sufficient means to pay the monthly instalments, and that he refused or neglected to pay same". The judge found that the District Court "acted in excess or abuse of jurisdiction".

In the context of these proceedings the applicant had initially complained that the order of imprisonment infringed Article 11 of the Cypriot constitution which guarantees the right to liberty. However the order of certiorari did not consider this point since the applicant withdrew this complaint in the course of the proceedings.

On 29 September 1989 the Full Bench of the Supreme Court admitted an appeal by the bank against the above order of certiorari. The Court found the following:

"It is obvious from the statement of the counsel of the respondent, which was made in his presence, that he admitted that he paid an amount and that he awaited, as guarantor, that the debtor would settle the judgment debt. In other words, once she did not comply, the respondent would pay but needed four months therefor ... This statement gave the clear impression that all the allegations contained in the affidavits filed in support of the opposition to the order of imprisonment were abandoned. Therefore the Judge made the order of imprisonment justifying it in a due manner, since it relied not only on the above statement of the counsel, but also on the affidavit made on behalf of the bank in support of its application, which affidavit remained unchallenged. Undoubtedly, the order of imprisonment could have been given as imprisonment could have been ordered after a confession by the accused."

In a dissenting judgment Judge Stylianides upheld the order of certiorari. He found that an imprisonment according to Article 82 of Part VIII of the Civil Procedure Act, Chapter 6 had a punitive character and that the debtor's guilt should be proven beyond any reasonable doubt. In his opinion, the conviction of the applicant violated the latter's right to a fair trial and to be presumed innocent until proved guilty.

The applicant has not been detained since he paid the debt at issue.

COMPLAINTS

The applicant complains that in the context of the above proceedings he did not have a fair and public trial, and, in particular, that he was not allowed to defend himself effectively since the courts completely disregarded his submissions. He moreover submits that due to the alleged unfairness of the said proceedings the order of imprisonment given by the Cypriot courts violates his rights under the Convention. The applicant invokes Articles 5, 6 and 14 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 October 1989 and registered on 13 February 1990.

On 3 April 1990 the applicant requested the Commisison to take measures to stay execution of the order of imprisonment against him.

On 6 April 1990 the Commission considered this request under Rule 36 of its Rules of Procedure. It decided not to indicate to the respondent Government the measure suggested by the applicant.

On 10 December 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the application before 22 February 1991.

After extension of the above time limit, granted by the President, the Government submitted their observations on 21 March 1991.

On 19 April 1991 the Commission granted legal aid to the applicant.

The applicant submitted observations in reply on 23 May 1991.

On 5 September 1991 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

At the hearing which took place on 11 February 1992 the parties were represented as follows:

For the Government

Mr. Michael Triantafyllides, Attorney General of the Republic,
Agent of the Government

Ms. Toula Polychronidou, Counsel of the Republic (A), Counsel

For the applicant

Mr. Andreas Eftychiou, Lawyer in Nicosia

THE LAW

1. The applicant complains that he did not have a fair trial in the determination of the charge of contempt of court against him. He submits that he has not been given the opportunity to defend himself since his submissions were disregarded by the courts. He invokes Article 6 (Art. 6) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention guarantees, inter alia, the right to a fair hearing in the determination of a criminal charge. Under Article 6 para. 2 (Art. 6-2) of the Convention everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Article 6 para. 3 (Art. 6-3) guarantees certain minimum rights to everyone charged with a criminal offence.

The Government first submit that the order which constitutes the subject-matter of the application was issued before 1 January 1989, the date on which the Commission's competence to receive individual applications against Cyprus took effect. They argue that the application should be declared inadmissible as incompatible ratione temporis with the provisions of the Convention.

The Commission does not share this view. It is true that the application concerns an order for imprisonment issued on 19 April 1987. However, the legality of this order under domestic law was determined by a final decision of the Full Bench of the Supreme Court on 29 September 1989. This final domestic decision, which should be regarded as the subject matter of the present claim, falls within the Commission's competence ratione temporis.

It follows that the Government's objection on this point must be rejected.

The Government further submit that this complaint is incompatible ratione materiae with the provisions of the Convention. The order for the applicant's imprisonment is a means of execution of a civil judgment and cannot be regarded as a decision on a "criminal charge" against him. Consequently, Article 6 (Art. 6) of the Convention is not applicable to the proceedings complained of.

Moreover, the Government argue that the applicant has not exhausted the domestic remedies at his disposal according to the generally recognised rules of international law. The Government note that the applicant failed to appeal against the litigation order.

Finally, the Government submit that in the present case the guarantees of Article 6 (Art. 6) have been observed.

The applicant contends that the order for his imprisonment had a punitive character and that Article 6 (Art. 6) applies to the proceedings concerned. He further points out that he filed a successful application for an order of certiorari. He considers that he pursued an effective remedy under Cypriot law and has, thus, complied with the requirements of Article 26 (Art. 26) of the Convention. Finally, the applicant submits that the district judge's decision wholly ignored his submissions and affidavits. Consequently, his right to a fair trial under Article 6 (Art. 6) was violated.

The Commission notes that notwithstanding the purpose of the order for the applicant's imprisonment which was primarily the execution of the civil court's order, the decision made by the district judge could have resulted in the applicant's imprisonment for sixty days. In these circumstances and having regard in particular to the nature and severity of this measure (Eur. Court H.R. case of Engel and others, judgment of 8 June 1976, Series A no. 22, pp. 34-35, para. 82) the Commission cannot exclude that the proceedings complained of were decisive of a "criminal charge" against the applicant within the meaning of the above provisions of the Convention.

However, the Commission does not have to decide on this point, nor to examine the Government's objection as to the exhaustion of domestic remedies, since it finds that the examination of the application, as it has been submitted, does not disclose any appearance of a violation of the rights guaranteed under the provisions invoked.

The Commission recalls in this respect that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. It is not competent to examine an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (cf. e.g. No. 7987/77, Dec. 13.12.79, D.R. 18, p. 31). Moreover, it is not for the Commission to decide whether or not domestic courts have correctly assessed evidence, but only whether evidence for and against the accused has been presented in such a manner and the proceedings in general have been conducted in such a way that he has had a fair trial (Barbera, Messegué and Jabardo v. Spain, Comm. Report 16.10.86, Eur. Court H.R., Series A no. 146, pp. 48-49,

para. 102).

The Commission observes that in the present case the applicant appeared before the competent judicial authorities assisted by his counsel and that he could submit his arguments and allegations in the way he wished. The decisions of the judicial authorities relied on the evidence submitted and the statements made by the parties in the course of fair hearings. The Commission does not find any indication that the assessment of the evidence by the national courts was arbitrary. It finds no appearance of a violation of the provisions invoked by the applicant.
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 that the District Court did not deal with his case in a public hearing as required by Article 6 para. 1 (Art. 6-1) of the Convention.

However, the Commission is not required to decide whether or not the facts alleged by the applicant disclose any appearance of a violation of this provision as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law. The mere fact that the applicant has submitted his case to the various competent courts does not itself constitute compliance with this rule. It is also required that the substance of any complaint made before the Commission should have been raised during the proceedings concerned (c.f. e.g. No. 10307/83, Dec. 6.3.84, D.R. 37, p. 113).

In the present case the applicant did not raise, either in form or in substance, in the proceedings before the Supreme Court the complaint concerning the lack of a public hearing he now makes before the Commission.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and his application must in this respect be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3.Moreover, the applicant alleges that the order for his imprisonment is contrary to the right to liberty and security of person guaranteed under Article 5 (Art. 5) of the Convention.

The Government submit that Article 5 (Art. 5) does not apply to the present case since the applicant has been neither arrested nor detained. The Government further argue that the applicant has not raised this complaint before the Cypriot tribunals and that he has not therefore exhausted the domestic remedies at his disposal, according to the generally recognised rules of international law. In any event, the litigation order was in conformity with Article 5 para. 1 (b) (Art. 5-1-b) of the Convention which permits to arrest and detain a person "for non-compliance with the lawful order of a court".

The applicant argues that Article 5 (Art. 5) does not only apply when actual deprivation of liberty has taken place but also where an order for such deprivation has been issued.

The Commission finds that it is not required to decide whether the provision invoked applied in the present case, since this complaint must be declared inadmissible for the following reasons.

The Commission notes that the applicant withdrew his complaint concerning the alleged violation of his right to liberty under Article 11 of the Constitution of Cyprus. An examination of the case does not

disclose the existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from pursuing the complaint concerned in the proceedings before the Supreme Court of Cyprus.

It follows that in this respect he did not exhaust the domestic remedies and that his complaint must be declared inadmissible, in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant finally invokes Article 14 (Art. 14) of the Convention.

However, the Commission finds that the applicant has failed to substantiate this complaint.

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.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)