AS TO THE ADMISSIBILITY OF

Application No. 22401/93
by D.F.
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 24 October 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
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 11 June 1993 by Mr. D.F. against the United Kingdom and registered on 2 August 1993 under file No. 22401/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 28 July 1994 and the observations in reply submitted by the applicant on 1 December 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom citizen born in 1942. He is a pharmacist, and is represented before the Commission by Mr. J.P. Gardner, solicitor, of London.

The particular circumstances of the case

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

On 1 November 1987 the applicant was visited at his business by two policemen who questioned him concerning the purchase of pharmaceutical products from a third person ("Mr. X") and dealings with three companies. The dealings involved a scheme which may have been set up with a view to circumventing the Pharmaceutical Price Scheme, an arrangement which is intended to fix prices for drugs available only on prescription. The applicant made a witness statement in the context

of the investigations against Mr. X on 5 November 1987.

The applicant states that he heard through contacts that the police were investigating him, and adds that the police asked him to attend an interview in March 1988. The applicant states that he contacted his solicitor, who advised that the applicant was likely to be arrested and accompanied him. At the interview, it was agreed that the police would consider not bringing proceedings against the applicant if he would assist the police.

The Government state that they have no record of the above-mentioned conversations in March 1988, but submit copies of a request for an interview from the applicant's solicitors of 5 April 1988 and a refusal from the Crown Prosecution Service of 29 April 1988. The reply read: "This matter is now under investigation by the police. The police will see your client in due course. I do not consider that any useful purpose would be served by having a meeting at this stage."

The Government continue that by February 1988 the police had identified 9 wholesalers, including the applicant, who had been involved with Mr. X, but that the decision to treat the wholesalers as potential defendants was only taken in the summer or autumn of 1989, by which time it had become apparent that there would be considerable difficulties in extraditing Mr. X from France.

The applicant was arrested on 9 January 1990 and released on bail.

The Government state that it was decided at a conference with counsel in January 1991 to prosecute the applicant and three other individuals. On 13 May 1991 the applicant was charged with 17 offences of obtaining a pecuniary advantage by deception, contrary to Section 15(1) of the Theft Act 1968.

On 19 June 1991 the Cheshunt Magistrates' Court was informed that it was likely that a notice of transfer would be issued with the result that the case would be transferred to the Crown Court under Section 4 of the Criminal Justice Act 1987 rather than by way of committal proceedings. The case was adjourned on the prosecution's request to 14 August 1991, when it was then further adjourned to 9 October. The bulk of the prosecution evidence had been served on the defence on 9 August. On 9 October 1991 the prosecution requested and were granted a further four-week adjournment. The case was transferred to Chelmsford Crown Court by a notice of transfer dated 30 October 1991, on which date further prosecution evidence was served on the applicant.

A substantive preparatory hearing before the Chelmsford Crown Court was held on 23 and 24 July 1992, after an earlier hearing on 12 June at which the judge informed the parties that he had not read the papers, but at which the prosecution and defence nevertheless agreed certain procedural matters.

At the preparatory meeting on 23 and 24 July the number of transactions on which the prosecution sought to rely was reduced from 183 to 26. The defence also requested witness summonses on the pharmaceutical manufacturers concerned.

The applicant's trial began on 9 November 1992. The prosecution's case lasted five weeks, and at the close of the prosecution case the applicant's counsel made a submission to the judge that there was no case to answer. On 21 December 1992 the judge ruled that the evidence produced by the prosecution had been so undermined by the evidence from the one of the witnesses from the manufacturers in particular, that it would not be proper to leave to the jury the question of whether the manufacturers of the pharmaceutical in question had been deceived, as they knew about, or took commercial decisions not to find out about, what was actually happening to the drugs.

Accordingly, there was no deception, and he directed the jury to acquit. The applicant was duly acquitted.

The applicant applied for a defendant's costs order under Section 16 of the Prosecution of Offenders Act 1985. The judge indicated that his preliminary view was that "if ever a man brought a prosecution upon himself it was [the applicant]" and gave time for the applicant's representatives to formulate their arguments. The applicant's counsel then submitted, inter alia, that when the Lord Chief Justice, in his Practice Direction, said that an order should be made unless the applicant has brought suspicion on himself and misled the prosecution into thinking the case was stronger that it was, both criteria had to be present if the judge was to refuse a costs order. They also submitted that the reason the prosecution had failed was because the manufacturers of the pharmaceutical had known and approved of the arrangements, and the costs involved in contesting that had been very substantial. The judge said "... there is certainly a view that is capable of being formed about this case, whichever way you turn to examine the motive that prompted the parties, it stinks of greed, greed in the hands of ... [the applicant], greed in the hands of the pharmaceutical companies ...". Counsel for the applicant pointed out that commercial life may be like that, but the applicant had spent a great deal of time and money clearing himself since 1987.

The exchange continued:

"Judge Beaumont:

... Let us look at it from the viewpoint of the prosecution. Along comes the police inspector, investigating what presumably is drawn to his attention by one manufacturer. He gets [the applicant's name], as the recipient of what he is looking into, goods are only going as far as Antwerp and coming back and he receives a statement couched in these terms, which deals with three transactions only, and that is the end of it as far as Mr. X is concerned, he signs off and this remains the witness statement. The prosecution inquiries continue and they discover what in fact has been happening is not just Mr. X's three ... transactions with [the applicant], but that this is the tip of a very considerable iceberg and the decision is then made to prosecute [the applicant] and he stands on his right not to say a further word until these proceedings are deployed and the case statement, at my order in 1992, filed in the way it is.

Mr. Swift:

... Your Honour, ... there is a gap between the making of the witness statement and charging him and your Honour, I know, with the greatest possible respect, you are not holding against him in any way at all he relied on the rights he was entitled to rely on. So that your Honour would not take that view, he was entitled to silence and advised to keep silent and that does not come into the issue at all. So that he brought suspicion on himself, as any defendant would, but it is not by his positive conduct, your Honour, and that has to be set off against all the other material, and the two areas of material which we submit are relevant to this position are first, that there is now that when he spoke he told his understanding, and that is the issue upon which the defence succeeded at half time, it is not a different issue, it is understanding in terms conveyed to the officers, that he understood it was with the approval of the manufacturers And ... the other side of the coin was that all the documentation we obtained could have been available to the Crown.
...

Judge Beaumont:
In the light of all the evidence I have listened to in this case

> and in particular putting the terms of the witness statements Exhibit No. 240 onwards into the context of that evidence, I ... am of the view that the defendant's own conduct has brought suspicion on himself and misled the prosecution into thinking the case against him is stronger that it is. Accordingly ... I refuse the application for the award of the defendant's costs order in this case, save and insofar as the defence have brought to my attention the costs of what Mr. Swift has called the witness summonses material ...
>
> ... May I say, leaving the application, that the interests of justice have been well served by the time and the expertise and the experience which both sides have put into a far from simple case, and the public has been greatly served by the commitment that both the prosecution and the defence showed in obtaining that objective. If all of these transfer cases could be conducted with the same degree of cooperation which was apparent to the court existed between the prosecution and the defence here, then the public would be well served.
> ...
>
> I hope my remarks will be considered by the taxing authorities in respect of both prosecution and defence, because the time that has been given to the proper consideration of the evidence in this case is certainly, in my experience, virtually unequalled."

The applicant's costs up until 1 October 1992, when his personal resources were exhausted and he was granted legal aid for the future proceedings, amounted to £118,362.25. The costs which the applicant was entitled to recover as relating to the witness summonses he had applied for were taxed on 11 June 1993 at £7,000.

Leading counsel advised that, in the light of Section 29(3) of the Supreme Court Act 1981 as applied by the House of Lords in the case of Re Sampson [1987] 1 WLR 194 judicial review of the decision to refuse the costs order would not lie.

Relevant domestic law and practice

Section 16 of the Prosecution of Offences Act 1985 provides, so far as relevant, as follows:

> "(2) Where -
> (b) any person is tried on indictment and acquitted on any count in the indictment;
> the Crown Court may make a defendant's costs order in favour of the accused."

On 3 May 1991 Lord Lane, the Lord Chief Justice, gave a Practice Direction of the Court of Appeal (Criminal Division) which is binding on the Crown Court and which included the following:

> "In the Crown Court.
>
> 2.2 Where a person ... has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should usually be made ... unless there are positive reasons for not doing so. Examples of such reasons are: (a) the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case is stronger than it is; (b) there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit." (Practice Direction (Crime: Costs) [1991] 1 WLR 498).

Section 29(3) of the Supreme Court Act 1981 provides that the High Court has the same powers of judicial review over the Crown Court

as over an inferior court save in respect of the Crown Court's "jurisdiction in matters relating to trial on indictment".

In the case of Re Sampson [1987] 1 WLR 194, a case concerning a legal aid contribution order at the end of a trial on indictment, Lord Bridge of Harwich said:

> "... certain orders made at the conclusion of a trial on indictment are excluded from judicial review as 'relating to trial on indictment' not because they affect the conduct of the trial, but rather because they are themselves an integral part of the trial process."

In that case, the question of the judge's order could not, therefore, be judicially reviewed.

In the case of Re Ashton and Others ([1993] 2 WLR 846) the House of Lords rejected a suggestion that the above proposition in Re Sampson was wrong.

Section 4 of the Criminal Justice Act 1987 provides that a matter may be transferred to the Crown Court without committal proceedings if it "reveals a case of fraud of such seriousness and complexity that it is appropriate that the management of the case should without delay be taken over by the Crown Court".

COMPLAINTS

The applicant alleges violations of Articles 6 and 13 of the Convention and of Article 1 of Protocol No. 1.

In connection with Article 6 of the Convention the applicant complains of the length of the proceedings, and also of the overall fairness arising from the ambiguity of the police investigations. The applicant points out that he offered to co-operate with the investigation but was then criticised for exercising his right to silence and then massively penalised by being refused a defendant's costs order after his acquittal.

The applicant also alleges a violation of his right to be presumed innocent by the refusal to award him his costs.

In connection with Article 1 of Protocol No. 1, the applicant considers that, given the unlawfulness of the refusal to make a full defendant's costs order in his favour, the order could not be lawful for the purposes of Article 1.

Finally, the applicant alleges a violation of Article 13 of the Convention in connection with the above.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 June 1993 and registered on 2 August 1993.

On 6 April 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 28 July 1994, after an extension of the time-limit fixed for that purpose. The applicant replied on 1 December 1994, also after an extension of the time-limit.

On 19 January 1995 the Government informed the Commission that they intended make a brief response to the applicant's reply. No response was, in the event, submitted.

THE LAW

1. The applicant alleges a violation of Article 6 para. 2 (Art. 6-2) of the Convention, which provides as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government consider that cases involving acquittal should be considered in the same way as cases involving discontinuance for the purposes of Article 6 para. 2 (Art. 6-2). They note that the Convention does not give the right for a successful defendant to be granted his costs, and consider that the judge nowhere stated or implied that the applicant was, although acquitted, in fact guilty of the crimes as charged or of other crimes.

The applicant disagrees. Referring to the Sekanina case (Eur. Court H.R., judgment of 25 August 1993, Series A no. 266) he underlines that there was no case against him, considers that the consequential orders by the courts should have reflected that fact, and notes that the Government have failed to recognise the distinction between the problems caused by the discretionary nature of the order, and those caused by the grounds on which it was refused. He also sees a clear distinction between discontinuance and acquittal for the purposes of the assessment of judicial statements imputing guilt or continuing suspicion to a defendant. For the applicant, it is implicit in the Sekanina reasoning that Article 6 para. 2 (Art. 6-2) of the Convention does give a successful defendant the right to reimbursement of his costs. The applicant also considers that the statements made by the judge were in violation of Article 6 para. 2 (Art. 6-2) in that they penalised the applicant for not giving fuller evidence at an earlier stage of the proceedings. In his opinion, this penalisation renders nugatory the right to silence which is part of the principle that the prosecution must be put to proof of any criminal allegation without the defendant being compelled to contribute to that process.

The applicant stresses that the weaknesses in the prosecution's case were the responsibility of the prosecution, and it was not right for the trial judge to regard them as amounting to the applicant bringing suspicion upon himself or misleading the prosecution. In particular, the judge should not have used the coloured language he did use ("it stinks of greed ..."), and he must ultimately have reached his decision not to award costs on the basis of the prosecution evidence alone.

The Commission recalls that neither Article 6 para. 2 (Art. 6-2) nor any other provision of the Convention contains an express right for a successful defendant to be awarded the costs incurred in defending a prosecution (cf. Eur. Court H.R., Masson and Van Zon judgment of 28 September 1995, Series A no. 327, para. 49). The Commission does not accept the applicant's argument that it is implicit in Article 6 para. 2 (Art. 6-2) of the Convention that an acquitted defendant must be reimbursed his own costs. The question is based on the principles laid down by the European Court of Human Rights in the above-mentioned Sekanina case:

> " The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final."

The question for the Commission under Article 6 para. 2 (Art. 6-2) of the Convention is therefore whether the trial judge in the applicant's case relied on suspicions after the applicant had been acquitted.

The Commission would first note that there is no question in the present case of the judge refusing to make a full defendant's costs order because he disagreed with the verdict of the jury: it was the judge who stopped the trial from continuing because he considered the evidence insufficient.

Next, the Commission would note that the judge did in fact make a limited defendant's costs order. The order he made covered the expense incurred by the applicant in calling witnesses from the drugs manufacturers. This did, it is true, only cover some £7,000 of the applicant's stated costs expenditure of some £118,000, but it is nevertheless an indication that the judge did not continue to harbour suspicion as to the defendant's guilt.

Further, the domestic law in the present case does not require a judge to harbour continuing suspicion against an acquitted defendant if he is to refuse a defendant's costs order. Whilst Section 16 (2) (b) of the Prosecution of Offences Act 1985 provides for a simple discretion for the Crown Court to make a defendant's cost's order, the statutory framework has been supplemented by a Practice Direction which provides that an order should normally be made unless there are positive reasons for not doing so. The Practice Direction gives as example that the "defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is".

Paragraph 2.2.(a) of the Practice Direction relates purely to questions of the defendant's conduct in relation to the prosecution: it does not as such call for any assessment of continuing suspicion before a defendant's costs order can be refused. The mere application of the provision cannot therefore give rise to issues under Article 6 para. 2 (Art. 6-2) of the Convention. The Commission must consider what the judge actually said.

The applicant takes particular exception to the judge's statements "... there is certainly a view that is capable of being formed about this case, whichever way you turn to examine the motive that prompted the parties, it stinks of greed, ... greed in the hands of [the applicant] ...". However, greed is not a criminal offence, and the Commission does not agree with the applicant that this statement indicates that the judge voiced or otherwise relied on any continuing suspicions against the applicant. This view is confirmed by the reply of the applicant's counsel at the hearing before the judge: "...it may be that commercial life is like that".

The applicant draws attention to the fact that in their observations the Government refer to the applicant's involvement in a "dishonest trade". The Commission notes that the Government use the phrase "a dishonest trade" in their observations in the following context: "To the extent that the judge's comments imply that the applicant was involved in a dishonest trade, ... that was ... clear on facts and evidence not disputed by the defence ...".

If the judge had used phrases referring to, or implying, dishonesty in his ruling, it may indeed have been difficult to separate those phrases from an assessment of guilt, given that dishonesty is a common element in criminal offences, and that the absence of "deception" - a concept linked in many cases to "dishonesty" - was the crucial factor in the applicant's acquittal. The judge did not, however, use any phrases which could permit the imputation by the judge of dishonesty or deception to the applicant in the present case.

Finally, the Commission notes the applicant's argument to the effect that in not making a full defendant's costs order in the applicant's favour, the judge was penalising the applicant for not bringing exculpatory evidence earlier, and that the Commission should

bear in mind the right to silence in this context.

The Commission recalls that it has previously held that the indirect pressure put on an accused where adverse inferences may be drawn from an accused's silence is not necessarily in violation of Article 6 para. 2 (Art. 6-2) of the Convention (cf. No. 18731/91, Murray v. the United Kingdom, Comm. Report 27.6.94). In the absence of a right to reimbursement of costs for a successful defendant, it is inevitable that in certain circumstances a defendant who declines to produce any evidence until trial will incur costs until trial, and that those costs will then have to be borne by the defendant. In the present case, the weakness in the prosecution case only became apparent when the applicant was served with evidence in August 1991 and witness summonses were made. That the applicant had to bear his costs until 1 October 1992, when he received legal aid, does not therefore affect the presumption of innocence guaranteed by Article 6 para. 2 (Art. 6-2) of the Convention. Moreover, as the judge made clear, his refusal to award the defendant his full costs was based not on the ground that the applicant had failed to bring forward exculpatory evidence earlier, but on the ground that, by his conduct in making a statement to the police which was less than candid, he had brought suspicion on himself and misled the prosecution into thinking the case against him was stronger that it was.

Taking these considerations together, the Commission finds that these complaints are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention as regards the length of the proceedings. Article 6 (Art. 6) of the Convention provides so far 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."

The Government consider that the period to be considered for the purposes of Article 6 (Art. 6) of the Convention is 9 January 1990, when the applicant was arrested and charged, and that it ended on 21 December 1992, when he was acquitted. They do not accept that the period to be considered began on an earlier date as the applicant was no more than a potential witness in the case against Mr. X, and mere suspicions and rumours do not suffice to constitute a "criminal charge" within the meaning of Article 6 (Art. 6) of the Convention. They point out that the investigations were very complex as they related to over 100 transactions which had to be reconstructed, and furthermore Mr. X, the suspect and potential defendant, was abroad. They also point out that the judicial proceedings lasted approximately 18 months, which is less than the average for this type of proceedings.

The applicant considers that the proceedings against him began on 5 November 1987, when he made a witness statement in the context of the proceedings against Mr. X, or at the latest in February 1988, when his business dealings were affected by the police investigations, and those with whom he was dealing in the ordinary course of his business referred to the investigations and to the fact that he was being referred to by the police as a "crook". The applicant does not accept that the case was complex, and considers that to the extent that it was complex, it was so rendered by the prosecution insistence on pursuing 183 counts on the indictment, even though this was ultimately reduced to 26 two months before the trial. The applicant accepts that there was no culpable delay on the part of the judicial authorities, but considers that there were substantial periods of inactivity on the part of the prosecution for which the Government are responsible. He concludes that the period of four and three-quarter years it took for the case to be dealt with the conclusion of the first instance exceeds

the reasonable time requirement of Article 6 (Art. 6) of the Convention.

The Commission recalls that in criminal cases, the "'reasonable time' referred to in Article 6 para. 1 (Art. 6-1) begins to run as soon as a person is 'charged' .... 'Charge' ... may be defined as 'the official notification given to an individual ... of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected ...'" (Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, p. 33, para. 73).

The first official notification the applicant received of criminal proceedings against him was when he was arrested on 9 January 1990. The applicant was, however, aware of the allegations against Mr. X as early as November 1987, and states that he became aware of the police investigations in the course of early 1988 and that this amounted to being "substantially affected" such that the period to be considered ran from then.

The Commission accepts that the applicant may have been aware that the police were considering bringing proceedings against him at some point in 1988. Indeed, if he knew that Mr. X had left the country, he may have expected the police to evince an interest in him and other wholesalers, even without being told by third parties in his business dealings.

To be substantially affected by the actions of the prosecution authorities within the meaning of the Convention involves being directly affected by official action concerning a prosecution. Merely being aware of investigations is not sufficient on its own: although a direct step such as a search of premises, the arrest of the person concerned, the seizure of goods, or even a less direct matter such as the questioning of third parties by the police with reference to the "defendant", may well substantially affect a person, it cannot be said that becoming aware of possible police interest can be equated with the bringing of a "criminal charge" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

In the present case the applicant does not allege that he was affected by any direct action on the part of the police until he was arrested on 9 January 1990, and the Commission finds that the existence of rumours as to the existence of an investigation - which is in substance what he contends - is not sufficient to mark the beginning of the period referred to in Article 6 (Art. 6) of the Convention. The period to be taken into consideration thus began on 9 January 1990 with the applicant's arrest.

The proceedings, which uncontestedly determined a criminal charge, therefore lasted from 9 January 1990 to 21 December 1992, a total of a little under three years.

The Commission recalls that the reasonableness of proceedings must be assessed in the light of the following criteria: the complexity of the case, the conduct of the parties and the conduct of the authorities dealing with the case (see Eur. Court H.R., Ferraro judgment of 19 February 1991, Series A no 197, p. 9, paras. 16 - 17).

The Commission notes that the proceedings were not simple, and that they fell within the provisions of Section 4 of the Criminal Justice Act 1987 as revealing "a case of fraud of such seriousness and complexity that it is appropriate that the management of the case should without delay be taken over by the Crown Court". The Commission finds nothing in the applicant's behaviour which could be said to have delayed the proceedings, but also accepts that the investigations into a fraud case will inevitably take some time. It sees nothing inherently unreasonable in the period of 16 months between the

applicant's arrest on 9 January 1990 and the charge on 13 May 1991, and the applicant accepts that the judicial authorities did not cause undue delay.

Taking the proceedings as a whole, the Commission considers that they did not exceed the "reasonable time" permitted by Article 6 para. 1 (Art. 6-1) 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.

3. The applicant also alleges further violations of Article 6 (Art. 6) of the Convention by reason of the way in which the police investigations were carried out and the failure to give a full defendant's costs order, and violations of Article 1 of Protocol No. 1 (P1-1) to the Convention.

The Commission has commented on the applicant's complaints concerning the defendant's costs order above. It has considered the remainder of the applicant's complaints as they have been submitted and finds that they do not disclose any appearance of a violation of the Convention.

The remainder of the application is therefore 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 First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)