AS TO THE ADMISSIBILITY OF

Application No. 18468/91
by D.
against Switzerland

The European Commission of Human Rights (First Chamber) sitting in private on 30 June 1993, the following members being present:

MM. F. ERMACORA, Acting President of the First Chamber
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY
MM. M. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI

Mrs. M.F. BUQUICCHIO, Secretary to the First 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 15 April 1991 by D. against Switzerland and registered on 8 July 1991 under file No. 18468/91;

Having regard to the Government's observations submitted on 13 November 1992 and the applicant's observations submitted in reply on 9 February 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 submitted by the parties, may be summarised as follows:

The applicant, a Swiss citizen born in 1955, is a businessman residing at Däniken in Switzerland.

I.

On 3 January 1989 the applicant, when driving a car, was stopped by the police who suspected that he was driving under the influence of alcohol. His driving licence was withdrawn. The applicant agreed to go to the Zofingen hospital where a blood sample was taken. The blood test, which was eventually analysed by the Aarau Cantonal Hospital, disclosed an alcohol level between 2,92 and 3,23 promille.

Administrative proceedings were then conducted before the Solothurn Police concerning the withdrawal of the applicant's driving licence.

On 20 February 1989 the applicant was questioned by the Solothurn Cantonal Police. He was told that he had been informed of the Report of the Cantonal Police and the blood analysis, and he was asked whether

he had comments to make. The applicant replied that he did not contest the Report, though he found the result of the blood analysis too high.

Subsequently, the applicant contested the correct result of the blood test analysis and requested a second analysis. This was prepared, at the applicant's costs, on 14 March 1989 by the Forensic Medicine Institute (Gerichtsmedizinisches Institut) at the University of Zurich. The second analysis reached approximately the same result, namely that the applicant's blood alcohol level had reached between 2,86 and 3,16 promille. The Institute pointed out that the different result was due to the storing and repeated opening of the blood sample taken.

The applicant suspected that the blood sample had been confused with another sample and therefore requested a comparative examination of the blood tests. On 22 May 1989 the authorities instructed the Forensic Medicine Institute at the University of Zurich to undertake such an examination. In its report of 24 August 1989, the Institute concluded that the blood test of 3 January 1989 stemmed with certainty from the applicant.

II.

Criminal proceedings were then instituted before the Zofingen District Court (Bezirksgericht).

On 26 May and 6 June 1989 the Public Prosecutor's Office (Staatsanwaltschaft) of the Canton of Aargau indicted the applicant of the offence of driving under the influence of alcohol. The applicant, who was represented by the lawyer R., contested the accusations as he had not drunk the amount claimed. According to the applicant's submissions, throughout these proceedings he had requested to see the two blood analyses of the Aarau Hospital and the Zurich Institute. According to the subsequent judgment of the Zofingen District Court he requested the hearing of five witnesses, a further analysis undertaken by a German University, and insight into "a detailed analysis of the Zurich Medical Institute" ("detaillierte Analyse vom Medizinischen Institut Zürich").

By letter of 20 July 1989 the applicant's lawyer R. requested consultation of the case-file. This was then transmitted to him. The case-file included the police report of 3 January 1989, the blood analysis of the Aarau Cantonal Hospital, and the analysis of the Forensic Medicine Institute at the University of Zurich. The case-file was returned to the District Court on 14 August 1989.

On 12 October 1989 a hearing was held before the Zofingen District Court at which the applicant was heard. He requested in particular a more lenient sentence.

On the same day, the District Court convicted the applicant of driving under the influence of alcohol and sentenced him unconditionally to three months' imprisonment and a fine of 1.000 SFr. The decision states that the applicant was represented by R. and that it would be served on R.

In its decision the Court noted the applicant's requests for the taking of evidence but did not deal with them. It found that, virtually without exception, blood analyses could be considered as being of very reliable objective evidential value. The Court concluded on the basis of the two blood analyses and the comparative examination that the applicant had indeed committed the offence at issue.

On 26 October 1989 the Police Department of the Canton of Solothurn decided that the applicant's driving licence was to remain withdrawn until 2 May 1990. The decision stated that the applicant was

represented by the lawyer R.

The applicant appealed against his conviction and sentence, requesting inter alia to be handed out (Herausgabe) the police report in his case, the report of the Zofingen hospital and the detailed analyses of the Aarau hospital and of the Zurich University Institute. He further requested the hearing of the witnesses. The applicant also complained that the District Court had not dealt with his requests to be given the blood analyses.

On 25 March 1990 the Court of Appeal (Obergericht) of the Canton of Aargau rejected the appeal, while reducing the applicant's imprisonment to two months. The decision stated that the applicant was represented by the lawyer R.

In its decision the Court regarded the applicant's request to be handed out various documents as being inadmissible. The Court considered that the handing out of documents had not been part of the previous decision (bildeten nicht Gegenstand des vorinstanzlichen Urteils) and could not therefore be the object of an appeal. As regards the hearing of witnesses the Court found that a blood analysis constituted the most importance evidence to prove driving under the influence of alcohol, and that it was unlikely that the hearing of witnesses would produce more favourable evidence.

The applicant lodged with the Federal Court a plea of nullity (Nichtigkeitsbeschwerde) and a public law appeal (staatsrechtliche Beschwerde) in which he complained of his conviction. He also complained that he did not have a fair hearing as he was never handed out all documents of the case-file and that the witnesses were not heard. In his public law appeal he quoted verbatim from the comparative analysis of the Forensic Institute of 24 August 1989. He also stated that "the contested decision had been served on 1990 to his lawyer" ("das angefochtene Urteil wurde am 15.6.1990 meinem Anwalt zugestellt").

On 19 September 1990 the Federal Court rejected both the plea of nullity and the public law appeal. The Federal Court did not deal with the applicant's complaint that he was never handed out all documents of the case-file.

COMPLAINTS

The applicant complains under Article 6 of the Convention of the unfairness and the outcome of these proceedings. He complains inter alia that he was never given the police report, the report of the Zofingen hospital or the blood analyses and that for this reason he could not defend himself properly. He further complains that no witnesses were heard; thus, various persons could have explained how much alcohol he had drunk on the day concerned and whether he had been drunk when stopped by the police or when blood had been taken at the hospital.

The applicant also complains under Articles 2 and 3 of the Convention of the treatment suffered, and under Article 5 of the Convention of the withdrawal of his driving licence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 April 1991 and registered on 8 July 1991.

On 2 September 1992 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application

insofar as it concerned the applicant's complaints under Article 6 para. 1 of the Convention about the consultation of the case-file.

The Government's observations were submitted on 13 November 1992 and the applicant's observations in reply on 9 February 1993.

THE LAW

1. The applicant complains under Article 6 (Art. 6) of the Convention of the outcome of these proceedings and their unfairness.

a) The Commission recalls 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 to the Convention. In particular, it is not competent to deal with 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. The Commission refers on this point to its established case-law (see e.g. No. 458/89, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 p. 31, 45).

It is true that the applicant has also raised complaints under Article 6 (Art. 6) of the Convention about the unfairness of the proceedings.

b) The applicant complains that he could not defend himself properly as in the criminal proceedings conducted against him he was never given the police report; the report of the Zofingen hospital; or the blood analyses.

The Government submit that in respect of this complaint the applicant has not complied with the requirement under Article 26 (Art. 26) of the Convention of the exhaustion of domestic remedies. On 25 March 1990 the Court of Appeal declared inadmissible the applicant's request to be handed out various documents, as this complaint had not been part of the previous decision. Thus, there was no cantonal decision of last instance. As a result, the applicant had not complied with the requirement under Section 86 para. 2 of the Organisation of Justice Act according to which, in order to file a public law appeal before the Federal Court, the applicant must have exhausted all cantonal remedies. As he did not do so, the Federal Court could not examine the issue, and indeed, in its decision of 19 September 1990 did not do so.

Under Article 26 (Art. 26) of the Convention "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...". According to the Commission's case-law, domestic remedies have not been exhausted where a domestic remedy is not admitted because of a procedural omission or mistake (see No. 6878/75, Dec. 6.10.76, D.R. 6 p. 79).

It is true that in the present case the Court of Appeal in its decision of 25 March 1990 declared inadmissible the applicant's complaint as it had not been part of the previous decision.

However, the Commission notes, on the one hand, that no grounds were given in the domestic proceedings why the complaint at issue had not been part of the decision. On the other hand, it transpires clearly from the facts of the case that the applicant filed the request to be handed out these documents before the District Court, the Court of Appeal and the Federal Court.

The applicant's complaints cannot therefore be rejected under Article 26 (Art. 26) of the Convention for non-exhaustion of domestic remedies.

As regards the well-foundedness of the complaint, the Government submit that the applicant in fact was made aware of the police report of 3 January 1989 and the analysis of the Aarau Cantonal Hospital when questioned on 20 February 1990. Moreover, upon the request of the lawyer R. of 20 July 1989, the case-file, including the analysis of the Forensic Medicine Institute at the University of Zurich of 14 March 1989, was transmitted to the lawyer. It appears from the applicant's public law appeal to the Federal Court that, when filing this appeal, he was also aware of the comparative analysis of the Forensic Institute of 24 August 1989. On the other hand, the absence of the Zofingen Hospital report from the case-file did not breach the applicant's rights under Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant submits that he had not instructed the lawyer R. to represent him in these proceedings, and it is inexplicable why R. was nevertheless active. Moreover, on 20 February 1989 he was only informed of the content of the police report and the blood analysis, though they were not handed out to him. He accepts that he was given a copy of the comparative analysis of 24 August 1989, but submits that it did not contain the precise results of the analysis.

The Commission finds it established that the applicant obtained the comparative analysis of 24 August 1989, and that the report of the Zofingen District Hospital was never in the case-file.

The Commission further notes, on the one hand, that the applicant denies having seen a copy of the police report or the blood analysis of the Aarau Cantonal Hospital, though he was informed of the content thereof. On the other hand, it is not disputed that the lawyer R. could consult the case-file during the proceedings before the Zofingen District Court.

It is true that the applicant denies having instructed lawyer R. to represent him in these proceedings.

However, the Commission observes that the lawyer R. is referred to as the applicant's representative in the decision of the Zofingen District Court of 12 October 1989; the decision of the Solothurn Police Department of 26 October 1989; and the decision of 25 March 1990 of the Court of Appeal of the Canton of Aargau. The applicant has not provided any explanation therefor, and has also not shown, for instance, that he complained to these courts, claiming that in fact R. was not his lawyer. Moreover, the judgment of the Zofingen District Court of 12 October 1989 was served on R. for the applicant. In his public law appeal to the Federal Court the applicant referred to R. as "my lawyer". In such circumstances, the Commission considers that the lawyer R. was in fact representing the applicant.

The applicant or his lawyer thus had knowledge of the police report of 3 January 1989; the analysis of the Aarau Cantonal Hospital; the analysis of the Zurich Forensic Institute of 14 March 1989; and the analysis of the Zurich Forensic Institute of 24 August 1989.

It follows that the applicant or his lawyer had all relevant documents at their disposal to prepare their defence. They were in particular in a position effectively to contest the blood analyses, either that the sample analysed did not stem from him, or that the results were incorrect.

Insofar as the report of the Zofingen District Hospital of 3 January 1989 was not in the case-file, the applicant has not shown that in view of the other documents in the file the absence of this report diminished his rights of defence.

c) Insofar as the applicant further complains that no witnesses were heard in the criminal proceedings instituted against him, the Commission recalls the Convention organs' case-law according to which the admissibility of evidence is primarily a matter for regulation by national law. 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 H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case the Commission does not find it unreasonable if the courts concerned concluded on the basis of two blood analyses and the comparative examination that the applicant had indeed committed the offence at issue, and considered it unnecessary to take further evidence.

d) It follows that these complaints do not disclose any appearance of a violation of the rights set out in Article 6 (Art. 6) of the Convention. This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. Insofar as the applicant raises complaints under Articles 2 and 5 (Art. 2, 5) of the Convention, the Commission finds no issue under these provisions. The remainder of the application is therefore also 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 — Acting President of the First Chamber

(M.F. BUQUICCHIO) — (F. ERMACORA)