AS TO THE ADMISSIBILITY OF

Application No. 18613/91
by H.
against Belgium

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

MM. S. TRECHSEL, President of the Second Chamber
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO

Mr. K. ROGGE, Secretary to the Second 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 1991 by H. against Belgium and registered on 29 July 1991 under file No. 18613/91;

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 is a Belgian citizen, born in 1940 and residing at Antwerp, Belgium. He is a notary public by profession. Before the Commission he is represented by Mr. H. Vandenberghe, a lawyer practising in Brussels.

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

As suspicions had arisen that the applicant and eight other persons had been involved in fraud and related offences in a certain set of international financial operations, the Procureur général's Department (Openbaar Ministerie) decided to open an investigation. Since one of the suspects was a judge, the special proceedings referred to in Sections 479ff of the Code of Criminal Procedure (Wetboek van Strafvordering), which contain rules on proceedings against persons who benefit from an exemption of jurisdiction, were applied. Section 479 of the Code of Criminal Procedure gives the Court of Appeal (Hof van Beroep) jurisdiction in proceedings against judges, on a summons issued by the Procureur général (Procureur-generaal) attached to the Court of Appeal.

On 5 April 1988 the Antwerp Court of Appeal's Indictments Chamber (Kamer van Inbeschuldigingstelling van het Hof van Beroep), in proceedings concerning the review of the arrest warrant, dismissed the applicant's complaint that he had been refused access to the case-file. After the close of the investigation the defence was granted access.

On 11 March 1988 the Procureur général's Department requested the President of the Court of Appeal (Hof van Beroep) of Antwerp to appoint an investigating judge (onderzoeksrechter). On 16 March 1988 the President appointed a judge of the Court of Appeal as investigating judge.

Following the investigation the Procureur général's Department brought criminal proceedings against the applicant and five other suspects.

In its decision of 15 September 1989 the Antwerp Court of Appeal's Indictments Chamber rejected the applicant's request to put a preliminary question (prejudiciële vraag) on the constitutionality of the proceedings at issue to the Court of Arbitration (Arbitragehof), considering that this request was based on factually and legally incorrect assumptions. The Indictments Chamber considered that the facts at issue fell in the category of felony but that the sentence should be one for a misdemeanour because of mitigating circumstances.

By summons of 5 October 1989 the applicant and the five other co-accused, including the judge, were charged with fraud, forgery and use of forged documents and summoned to appear before the Court of Appeal of Antwerp.

By letter of 6 October 1989 the Procureur général informed the applicant's lawyer that the prosecution would summon an expert, and that if the applicant wished the prosecution to summon witnesses, he should indicate their names and addresses so that they could be summoned to appear.

By letter of 20 November 1989 the applicant's lawyer informed the Procureur général that, in the applicant's opinion, it was for the prosecution to summon witnesses whose evidence it considered relevant.

By letter of 10 January 1990 the applicant's lawyer requested the Procureur général's Department to inform him whether the prosecution would summon as witnesses those persons whose declarations it would use against the applicant. By letter of 15 January 1990 the Procureur général informed the applicant's lawyer that he had no intention to summon other persons than the one mentioned in his letter of 6 October 1989, unless he would be explicitly requested to do so, which at that moment had not been the case.

In a memorandum of 9 February 1990, sent to the applicant's lawyer, the Procureur général's Department referred to a number of persons whose statements it would use against the applicant.

The Court of Appeal joined the proceedings against the six accused, since they concerned a set of interrelated facts. Between 19 February 1990 and 6 March 1990 several hearings before the Court of Appeal took place. After having considered numerous documents, and after having heard the accused and the expert for the prosecution, the Court of Appeal by judgment of 11 June 1990 convicted the six accused. Taking into consideration that the applicant had not acted in his capacity of notary public, the Court convicted the applicant of fraud, forgery and the use of forged documents and sentenced him to three years' imprisonment and a fine of 180,000 Belgian Francs.

Referring to the Indictments Chamber's reasoning on this point, the Court of Appeal rejected the applicant's renewed request to put a

preliminary question to the Court of Arbitration. The Court also rejected the applicant's complaint that, in view of Sections 479ff of the Code of Criminal Procedure, he could not challenge the Procureur général's conclusion that there were sufficient elements for his prosecution. The Court considered that in the circumstances of the present case the Indictments Chamber did not have competence to judge whether or not there were sufficient elements for the applicant's prosecution. On the same grounds the Court of Appeal rejected the applicant's complaint concerning the Procureur général's decision to prosecute only six of the initially nine suspects.

The Court of Appeal rejected the applicant's complaint that the proceedings before the Court of Appeal were unfair in respect of the evidence and the rights of the defence. It considered that the applicant had had ample opportunity to consult the case-file and to request copies; that he had been given adequate time to seek the assistance of a lawyer and to prepare his defence; that the conviction was based on lawfully obtained evidence which the accused had been able to challenge in the course of adversarial and public proceedings before the Court;
that it is not contrary to the principle of a fair trial to read out before the Court of Appeal statements contained in the case-file without the authors of these statements being present in person before the Court; that the applicant had been given the opportunity to put questions to the expert heard by the Court; that there was equality of arms between the prosecution and the defence in respect of the evidence; that, before the trial started, the Procureur général's Department had informed the accused of the statements it would use as evidence and had invited them to name any persons they wished to summon in order to hear them before the Court; that the applicant had failed to avail himself of this opportunity; that during the examination of the evidence before the Court of Appeal the applicant had had the right to request the appearance before the Court of authors of statements submitted as evidence, but that he had only formulated such a request, however without mentioning specific names, in his final submissions to the Court of Appeal of 6 March 1990; that the applicant had had the opportunity before the Court of Appeal to challenge the findings of the expert, appointed by the investigating judge in order to examine the complicated financial methods used by the accused, and that the applicant had failed to request the appointment of a counter expert; and that the applicant's allegation that the Judicial Police (Gerechtelijke Politie) had possibly drafted confidential reports for the Procureur général's Department was irrelevant as such reports did not form part of the Court of Appeal's case-file and had not been introduced at the trial before the Court.

The applicant's appeal in cassation against the decision of 15 September 1989 of the Indictments Chamber and the Court of Appeal's judgment of 11 June 1990 respectively was examined by the Court of Cassation (Hof van Cassatie). A member of the Procureur général's department participated in the Court of Cassation's deliberations on the appeal. The appeal was rejected by the Court of Cassation in its judgment of 11 December 1990.

In respect of the applicant's complaints under Article 6 paras. 1, 2 and 3 and Article 14 of the Convention concerning the Indictments Chamber's decision of 15 September 1989, the Court of Cassation considered that the Indictments Chamber had not decided on the merits; that the applicant had no interest in challenging the Indictments Chamber's decision to reduce the charge from a felony to a misdemeanour because of mitigating circumstances and that he had no interest in complaining that the Indictments Chamber had not decided whether or not there were sufficient elements for his prosecution or that of any other suspect, as he could challenge this and other elements and exercise his defence rights before the Court of Appeal; that the proceedings followed had been in conformity with the formal requirements under Belgian law; and that the applicant's request to put a preliminary

question to the Court of Arbitration had been rightly rejected by the Indictments Chamber on procedural grounds derived from norms which did not form the object of the request at issue.

As to the applicant's complaints under Article 6 of the Convention concerning his conviction and sentence by the Court of Appeal's judgment of 11 June 1990, the Court of Cassation considered as baseless the applicant's allegation that he had been unable to have examined or to examine witnesses for the prosecution and the defence. The Court of Cassation further considered that the Court of Appeal was

at liberty to found its opinion on all lawfully obtained evidence, which had been the subject of adversarial proceedings, and that it could base its findings on the case-file; that no violation of Article 6 of the Convention could be derived from the fact that the investigation by an expert in criminal cases does not take place in the course of adversarial proceedings and that the applicant had only been given access to his case-file at the end of the investigation; and that the possibility that the Judicial Police had drafted reports for the prosecution did not violate the applicant's right to a fair trial or his defence rights, considering that such reports were not included in the case-file and were not used by the Court of Appeal.

The Court of Cassation also rejected the applicant's complaint under Article 5 para. 4 and Article 6 of the Convention concerning access to the case-file in the detention proceedings considering that the defence he had presented to the Indictments Chamber on the question of his detention on remand had no relation with the exercise of his defence rights in the criminal proceedings before the Court of Appeal and that, in view of his statement that his defence concerning his detention on remand rested on Article 5 of the Convention, the applicant had not substantiated that at that point in time he wished to prepare his defence before the court examining the merits of the case. The Court of Cassation considered that the link between the examination of the necessity of detention on remand and the ulterior assessment of guilt may render a refusal to an accused to have access to his case-file unlawful, but that this issue did not arise in the applicant's case as the refusal does not automatically render the proceedings on the merits before the Court of Appeal unlawful since, before the latter proceedings started, the applicant had been given access to his case-file.

COMPLAINTS

1. The applicant complains under Article 5 para. 4 and Article 6 para. 1 of the Convention that by decision of 5 April 1988 the Indictments Chamber, in the proceedings concerning the review of his arrest warrant, rejected his complaint that he had been refused access to his case-file. He submits that an appeal in cassation on this point would have no chance of success in view of the Court of Cassation's constant case-law.

2. The applicant complains under Article 6 para. 1 and Article 14 of the Convention that the Procureur général assessed the suspicions against him and that he was summoned directly before the Court of Appeal by the Procureur général, instead of being committed by an independent investigating authority. He further complains that, on the basis of the Procureur général's request, the Indictments Chamber only decided on the existence of mitigating circumstances in respect of six of the nine suspects, whereas the case concerned an interrelated set of facts.

3. The applicant complains under Article 6 and Article 14 of the Convention of the application of the special procedure for judges, as set out in Sections 479ff of the Code of Criminal Procedure, which he considers did not apply to him since he does not enjoy jurisdictional privileges. He complains that the special procedure applied deprived

him of an appeal possibility.

4. The applicant complains under Article 6 paras. 1 and 3 of the Convention that his defence rights have not been respected in the criminal proceedings against him. In particular the Court of Appeal based its finding of guilt on statements of persons who had not been heard at the trial. He could not be expected to name the witnesses for the prosecution and summon them to appear before the Court of Appeal. When he did submit his request that those persons be heard whose statements were used by the prosecution, the Court of Appeal rejected this request.

5. The applicant complains under Article 6 paras. 1 and 3(d) that the expert, as a witness for the prosecution, was placed in a more advantageous position vis-à-vis the applicant in the proceedings against him, since during the investigation phase the expert had access to the case-file and was present at the questioning of the suspects and a number of witnesses, whereas the applicant did not have access to his case-file during the investigation and was not enabled to question the witnesses for the prosecution before the Court of Appeal in order to challenge their statements.

6. The applicant complains under Article 6 of the Convention that the prosecution had certain confidential reports by the Judicial Police at its disposal, which were not disclosed to the defence.

7. The applicant finally complains under Article 6 para. 1 of the Convention that a member of the Procureur général's Department at the Court of Cassation participated in the latter's deliberation on his appeal in cassation.

THE LAW

1. The applicant complains under Article 5 para. 4 and Article 6 para. 1 (Art. (5-4, 6-1) of the Convention that by decision of 5 April 1988 the Indictments Chamber in proceedings concerning the review of his arrest warrant rejected his complaint that he was refused access to his case-file.

However, the Commission is not required to decide whether the facts alleged by the applicant reveal any appearance of a violation of these provisions since, under Article 26 (Art. 26) of the Convention, it may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Commission recalls that the rule of exhaustion of domestic remedies requires the exhaustion of those remedies that relate to the breaches alleged and that are available and sufficient. It does not require that an appeal be introduced which would have no chance of success (cf. No. 11681/85, Dec. 11.12.87, D.R. 54 p. 101). The applicant states that an appeal in cassation on this point would have no chance of success in view of the Court of Cassation's constant case-law. The Commission notes that the applicant has not submitted any information on the proceedings on the review of his arrest warrant and has failed to substantiate his argument that such an appeal would be unsuccessful.

Even assuming that the applicant is exempted from the obligation to exhaust domestic remedies in view of the Court of Cassation's case-law (cf. Eur. Court H.R., Lamy judgment of 30 March 1989, Series A no. 151, p. 11, paras. 14-15), the Commission notes that the final decision on the applicant's arrest warrant was taken on 5 April 1988 by the Indictments Chamber, whereas the application was introduced on 11 June 1991, which is more than six months later. The Commission observes

that the Court of Cassation referred to this complaint in its judgment of 11 December 1990 as being not relevant for the determination of the appeal in cassation against the conviction. This judgment, therefore, cannot be taken into consideration for the calculation of the six months time-limit provided for in Article 26 (Art. 26).

In these circumstances the Commission, assuming that the applicant is exempted from the obligation to exhaust domestic remedies, finds that he has failed to submit this complaint to the Commission within six months after the final decision. This complaint must therefore be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant complains under Article 6 para. 1 and Article 14 (Art. 6-1, 14) of the Convention that the Procureur général assessed the suspicion against him and that he was summoned directly before the Court of Appeal by the Procureur général, instead of being committed by an independent investigating authority. Moreover, on the basis of the Procureur général's request, the Indictments Chamber only considered mitigating circumstances in respect of six of the nine suspects, whereas the case concerned an interrelated set of facts.

The applicant also complains under Article 6 and Article 14 (Art. 6, 14) of the Convention of the application of the special procedure for judges, as set out in Sections 479ff of the Code of Criminal Procedure, which he considers did not apply to him since he does not enjoy jurisdictional privileges. He complains that the special procedure applied deprived him of an appeal possibility.

The Commission notes that the charges against the applicant were not determined by the Procureur général or the Indictments Chamber but by the Court of Appeal following the applicant's trial before the Court.

With regard to the procedure before the Court of Appeal, including the application of Sections 479ff of the Code of Criminal Procedure, 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 in 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. 458/59, 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 pp. 31, 45). Accordingly, it cannot examine the applicant's complaint that the procedure pursuant to Sections 479ff of the Code of Criminal Procedure was wrongly applied in his case.

As to the applicant's complaint that the application of this procedure deprived him of an appeal possibility as he was directly committed to the Court of Appeal, the Commission recalls its constant case-law according to which Article 6 para. 1 (Art. 6-1) of the Convention does not guarantee a right to appeal (cf. No. 13135/87, Dec. 4.7.88, D.R. 56 p. 268 and No. 11941/86, Dec. 5.10.88, D.R. 57 p. 100). The Commission also notes that the applicant had the possibility to file an appeal in cassation, of which possibility he availed himself. It follows that the above complaints raise no issue under Article 6 (Art. 6) of the Convention.

Article 14 (Art. 14) has no independent existence in that it covers only "rights and freedoms recognised in the Convention" (cf. Eur. Court H.R., Belgian Linguistic judgment of 23 July 1968, Series A No. 6, p. 3, para. 9). Having found no issue under Article 6 (Art. 6) with regard to the application of Sections 479ff of the Code

of Criminal Procedure the Commission, therefore, also finds no issue of discrimination, contrary to Article 14 (Art. 14), in the enjoyment of any of the applicant's rights under Article 6 (Art. 6) with regard to the above complaints.

It follows that these complaints are manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains under Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention that his defence rights have not been respected in the criminal proceedings against him in that the Court of Appeal based its finding of guilt on statements of persons who had not been heard by the Court of Appeal. The applicant submits that he could not be expected to name the witnesses for the prosecution and summon them to appear before the Court of Appeal and that, when he did submit his request that those persons be heard whose statements were used by the prosecution at the trial, the Court of Appeal rejected this request.

Article 6 (Art. 6) of the Convention, insofar as relevant, provides as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...
> (...).
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (...)
> 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 applicant's complaint that in the proceedings before the Court of Appeal his defence rights were not respected is a matter falling within the scope of the guarantees laid down in para. 3 of Article 6 (Art. 6) of the Convention, which guarantees are specific aspects of the right to a fair trial ensured by para. 1 of this provision. The Commission will examine the complaint under the two provisions taken together (cf. Eur. Court. H.R., Isgrò judgment of 19 February 1991, Series A No. 194-A, p. 12, para. 31).

The Commission recalls that Article 6 (Art. 6) does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (cf. No. 10563/83, Dec. 5.7.85, D.R. 44 p. 113, and Eur. Court H.R., Bricmont judgment of 7 July 1989, Series A No. 158, p. 31, para. 89). The Commission further recalls that, as a rule, it is for the national courts to assess the evidence before them (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A No. 203, p. 10, para. 26). The Commission's task is to ascertain whether the proceedings considered as a whole, including the way the evidence was taken, were fair.

The Commission finally recalls that the right to a fair hearing, which includes the principle of equality of arms, entails that everyone who is a party to the proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent (cf. No. 10938/84, Dec. 9.12.86, D.R. 50 p. 98 at p. 115).

In the present case, the Commission notes that the Court of Appeal based the applicant's conviction on, inter alia, statements made by witnesses before investigating authorities. These statements were contained in the case-file, which could be consulted by the defence as

from the close of the investigation. The case-file also contained, and the Court of Appeal also considered, the findings of an expert and statements by the accused. Before the hearings before the Court of Appeal the applicant was informed by the prosecution about the statements of witnesses on which it intended to rely at the hearings and he was given the opportunity to summon these witnesses, of which possibility he did not avail himself at that stage, and to challenge the statements by the expert, who gave evidence before the Court of Appeal, and the other evidence before the Court, of which opportunity he availed himself.

Only in his final submissions of 6 March 1990 before the Court of Appeal the applicant requested that the witnesses, whose statements were relied on by the prosecution, be heard by the Court. The Commission does not find that the Court's refusal of this request violated the applicant's right to a fair trial given that he had failed to make such a request at an earlier stage of the trial.

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.

4. The applicant complains under Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) that the expert appointed during the investigation was placed in a more advantageous position vis-à-vis the defence, since during the investigation he had access to the case-file and was present at the questioning of the suspects and a number of witnesses, whereas the applicant did not have access to his case-file during the investigation and was not enabled to question the witnesses for the prosecution before the Court of Appeal in order to challenge their statements.

The Commission recalls that the applicant, after the closure of the investigation, had full access to his case-file and that he was given every opportunity to challenge the findings of the expert in the course of the proceedings before the Court of Appeal.

It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. With regard to his trial the applicant finally complains under Article 6 (Art. 6) that the prosecution had at its disposal confidential reports by the Judicial Police, which were not disclosed to the defence.

The Court of Cassation held on this point that the possibility that the Judicial Police drafted reports for the prosecution did not violate the applicant's right to a fair trial considering that such reports were not included in the case-file and were not used by the Court of Appeal.

The Commission considers that the applicant has failed to show that such confidential reports by the Judicial Police were relied on by the Procureur général's Department and taken into consideration by the domestic courts in the determination of the criminal charges against him.

It follows that this complaint is again manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. With regard to the proceedings before the Court of Cassation the applicant complains under Article 6 para. 1 (Art. 6-1) that a member of the Procureur général's Department at the Court of Cassation participated in the Court's deliberations.

On this issue, the Commission refers to the judgment of the European Court of Human Rights in the Borgers case (judgment of 30 October 1991, Series A No. 214-B). It decides to give notice of this

complaint to the respondent Government in accordance with Rule 48 para. 2(b) of its Rules of Procedure and to invite them to submit their observations in writing on the admissibility and merits this part of the application.

For these reasons, the Commission, unanimously

DECIDES TO ADJOURN the examination of the applicant's complaint concerning the proceedings before the Court of Cassation;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)