AS TO THE ADMISSIBILITY OF

Application No. 18242/91
by E.E.
against Switzerland

Application No. 19629/92
by E.E.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 13 May 1992, the following members being present:

MM. G. JÖRUNDSSON, Acting President of the Second Chamber
S. TRECHSEL,
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO

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 applications introduced on 27 March 1991 and 20 February 1992 by E.E. against Switzerland and registered on 23 May 1991 and 12 March 1992 under file Nos. 18242/91 and 19629/92;

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 applicant, may be summarised as follows.

The applicant, a Swiss citizen born in 1937, is a businessman residing at P. in Switzerland. Before the Commission he is represented by Mr. Nicolas Deiss, a lawyer practising in Fribourg in Switzerland.

The background of the applications is the sinking of a ship, the "Lucona", off the Maldives in the Indian Ocean on 23 January 1977, causing the death of six persons. The freight going down with the ship allegedly consisted of a uranium recycling plant, insured by Mr. P., an Austrian citizen, to the amount of 125,000,000 FF.

Doubts arose as to the circumstances of the accident and the nature of the freight. Criminal proceedings were instituted in Austria against Mr. P.

An Austrian journalist, Mr. Pretterebner, subsequently wrote a book, "The Lucona Case" ("Der Fall Lucona"), in which he investigated the affair and critically assessed the role of various persons involved.

Application No. 18242/91

In 1985 criminal proceedings were instituted in Switzerland against the applicant, a business partner of Mr. P., on suspicion of forging documents and of fraud.

Between 17 April 1990 and 1 June 1990 the trial took place before the Sense District Court (Bezirksgericht). The Court consisted of five judges.

During the trial the five judges travelled to Vienna to hear witnesses. One such hearing, at which an Austrian judge presided, took place on 25 April 1990.

After this hearing, the Austrian judge asked the five Swiss judges to sign a book belonging to his secretary. The book at issue was a copy of Mr. Pretterebner's "The Lucona Case". The Austrian judge explained this request with the fact that his secretary collected the signatures of every person involved in the case. As a result, all five Swiss judges signed their names in the book.

On 30 April 1990, during the trial before the Sense District Court, the applicant challenged the five judges. He claimed in particular that the judges were biased, or at least that doubts arose as to their impartiality, as they had signed a book which was well-known for inculpating both Mr. P. and the applicant.

On the same day, 30 April 1990, five substitute judges examined and then dismissed the challenge. Judge H. presided.

On 1 June 1990 the Sense District Court convicted the applicant of forging documents and of assisting in an attempt of fraud. He was sentenced to three years' imprisonment.

The applicant filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court (Bundesgericht) in which he complained of the lack of impartiality of the District Court judges. He claimed that the book was so well-known that the judges must have had knowledge of it.

On 10 September 1990 the Federal Court dismissed the applicant's public law appeal, the decision being served on the applicant on 3 October 1990.

In its decision the Federal Court found that there was no reason to doubt the District Court judges' statement according to which, when they signed the book in Vienna, they had not read it and were not aware of its contents or the author's conclusions. In the Court's opinion, if the District Court judges complied out of politeness with the request to sign the book, this only constituted an autograph (Autogramm) and not an opinion given by the judges.

The Court further considered that "objectively seen, a third person, having knowledge of the signing of the book, would not necessarily have to assume that the judges were thereby agreeing with the assessment of the case by the author" ("Ein Dritter, der von der Signierung Kenntnis erhielt, musste bei objektiver Betrachtung nicht den Eindruck erhalten, die Richter hätten damit die Beurteilung der Sache durch den Verfasser zu ihrer eigenen gemacht").

Application No. 19629/92

Against the judgment of the Sense District Court of 1 June 1990 the applicant filed a plea of nullity (Strafkassationsbeschwerde) with

the Cantonal Court (Kantonsgericht) of the Canton of Freiburg.

On 26 February 1991 the Cantonal Court partly dismissed the plea of nullity in so far as it concerned the applicant's conviction of complicity in attempted fraud; upheld the remainder of the plea of nullity and sent the case back to the Lake District Criminal Court (Kriminalgericht des Seebezirks).

Proceedings were then resumed before the Lake District Court which consisted of five judges, Judge H. presiding.

On 9 October 1991 the applicant challenged Judge H. as he had previously participated in the decision of 30 April 1990 which dismissed the applicant's previous challenge (see above Application No. 18242/91).

On 17 October 1991 the District Court dismissed the challenge. The applicant's public law appeal was dismissed by the Federal Court on 15 November 1991. The decision was served on the same day.

In its decision the Federal Court found that Judge H. had not previously decided in the same matter. In the previous decision Judge H. had been confronted with the question whether the five judges of the Sense District Court were biased. At present Judge H. was deciding on the different issue of the applicant's guilt. A judge was not biased as soon as he had taken a decision unfavourable to a party.

At the time when the application was filed the proceedings before the Lake District Court had not yet been terminated.

COMPLAINTS

In both applications the applicant complains that he was not heard by an "independent and impartial tribunal" within the meaning of Article 6 para. 1 of the Convention.

In Application No. 18242/91 he complains in particular that the signing of the book at issue, which was a well-known bestseller, at least raised doubts as to the impartiality of the District Court judges, since it could be interpreted as endorsing the assessment of the case by the author.

In Application No. 19629/92 the applicant complains of the bias of Judge H. who had previously participated in the decision of 30 April 1990 and was now acting as trial judge. In the previous decision he had had access to the case-file. The applicant submits that the procedure in which a judge is challenged is closely related to the subsequent trial.

THE LAW

1. The applicant complains of the lack of impartiality of the District Court judges who had signed the book at issue, as well as of Judge H. who first decided on the challenge of the District Court judges and later acted as trial judge. The applicant relies on Article 6 para. 1 (Art. 6-1) of the Convention which states, in so far as relevant:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

2. The Commission finds it convenient to join Applications Nos. 18242/91 and 19629/92.

3. The Commission recalls that the existence of impartiality must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubts in this respect (see Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A No. 86, pp. 13-14, para. 24).

As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary. In the present case the personal impartiality of the various judges has not been contested.

Under the objective test, it must be determined whether, apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings. Accordingly, any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw (see De Cubber judgment, loc. cit., p. 14, para. 26). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the view of the complaining party is important but not decisive. What is decisive is whether this fear can be said to be objectively justified.

The Commission has first examined the applicant's complaint about the judges at the Sense District Court. In the applicant's submissions, the fact that they signed a book which inculpated the applicant at least raised doubts as to their impartiality.

The Commission observes that the District Court judges, when signing the book, thereby apparently complied out of politeness with a request of their Austrian colleague. The latter told them that the book belonged to his secretary who, in her private capacity, collected the signatures of all persons involved with the case. It is understandable that misgivings should arise, in the mind of the applicant, about the appropriateness of members of the judiciary giving such signatures which, in the Commission's view, indicates a certain lack of sensitivity. Nevertheless, objectively seen, the District Court judges were not expressing their opinions for or against the views contained in the book; they were not even considering its merits. Rather, all judges were merely giving their autographs.

It follows that the mere fact that the judges signed the book at issue cannot in itself justify fears as to their lack of impartiality.

The Commission has next examined the applicant's complaint about Judge H. who first participated in the decision of 30 April 1990 and later acted as trial judge.

The Commission observes that Judge H., when participating in the decision of 30 April 1990, was only deciding on the applicant's challenge of the District Court judges. In particular, he was examining whether or not the fact that the District Court judges had signed the book called in question their impartiality. He was therefore not concerned with the charges brought against the applicant, either as regards the establishment of the facts or as regards the applicant's guilt. Objectively seen, Judge H. could not therefore have formed a preconceived opinion as to the applicant's guilt.

As a result, the applicant's complaints do not disclose any appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention. His applications must therefore be declared 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 APPLICATIONS INADMISSIBLE.

Secretary to the Second Chamber Acting President of the Second Chamber

(K. ROGGE) (G. JÖRUNDSSON)