SUR LA RECEVABILITÉ

Application No. 22596/93
by Stefán EINARSSON
against Iceland

The European Commission of Human Rights (Second Chamber) sitting in private on 5 April 1995, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
S. TRECHSEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, 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 23 August 1993 by Stefán EINARSSON against Iceland and registered on 8 September 1993 under file No. 22596/93;

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 is an Icelandic citizen, born in 1948. He resides in Reykjavík. Before the Commission he is represented by Mr. Eiríkur Tómasson, a lawyer practising in Reykjavík.

By 1987 the Reykjavík Police Department had obtained information from various sources indicating that the applicant was involved in drug trafficking. The police discovered that large quantities of hashish were being imported to Iceland concealed in cans of paint and that the applicant's travel and business activities appeared to be related thereto. The applicant was kept under surveillance and search warrants were issued by the Criminal Court for the homes of the applicant and another suspect, H.

On 16 November 1987 H was arrested while he was placing cans of paint, which also contained approximately ten kilogrammes of hashish, in a garage. The applicant was arrested the same day outside his home. They were both charged with drug trafficking and brought before a court the following day. Counsel was appointed and they were detained on remand.

The applicant was subsequently interrogated by the police on 20, 25 and 30 November as well as 2, 8 and 9 December 1987. He admitted having imported hashish to Iceland on nine occasions, having bought it from a person, M, in the Netherlands. Reports were drawn up in respect of all the interrogations. They were read out to or read by the applicant who subsequently signed them, except the report of 9 December 1987 which, therefore, only had the interrogator's note on it indicating that the applicant had confirmed it as correct.

The applicant was interrogated again by the police on 22 and 28 December 1987 and 2 January 1988. On 4 January 1988 he was interrogated in court. He then denied the contents of the police reports made so far and maintained that he had neither read them nor had them read out to him. He furthermore denied that he had been involved in drug trafficking, but confirmed that he had travelled to, inter alia, the Netherlands where he had purchased paint through M.

The applicant was again interrogated by the police on 7, 9, 10 and 11 January 1988. He then maintained that he had not been involved in drug trafficking. He was interrogated in court again on 12 January 1988. He confirmed that he had been involved in transporting paint to Iceland and that he had a suspicion that these shipments of paint were related to drug offences. He maintained, however, that he had nothing to do with it, nor did he feel that it was any of his business.

The applicant was again interrogated by the police on 14, 16, 18, 20, 21 and 22 January 1988 following which he was released from detention on remand.

During the above interrogations the Icelandic police requested, in December 1987, the Dutch police to question M in respect of his involvement in the case and his connections with the applicant. The Dutch police, however, refused the request as M at that time was under surveillance in connection with a major drug case in the Netherlands and because of the sensitive stage of that investigation. It does not appear that the police made further attempts to obtain the testimony of M before the applicant's trial in the Reykjavík District Court.

On 18 and 19 January 1988 the Icelandic police went to Antwerp and interrogated four individuals in order to clarify how the applicant had purchased the paint and shipped it from the Netherlands to Iceland.

Following the applicant's release from detention on remand on 22 January 1988 the police concluded the investigations and forwarded the case to the State Prosecutor's Office in July 1988. Having evaluated the available evidence the State Prosecutor's Office drew up an indictment on 27 July 1990 according to which the applicant and the co-accused, H, were charged with having jointly imported a total of 67-70 kilogrammes of hashish into Iceland from December 1985 until November 1987 contrary to section 173a of the Penal Code. The indictment was served on the applicant on 17 December 1990.

On 16 October 1992 the applicant was summoned to appear before the Reykjavík District Court and the examination of the case commenced in that court on 2 November 1992.

The applicant and the co-accused, H, were heard. H admitted having participated, together with the applicant, in importing hashish. He maintained, however, that it concerned less than 67-70 kilogrammes. The applicant maintained, on the other hand, his innocence and contended that his previous confessions to the police as set out in the available police reports had been made under duress. In order to clarify this the Court heard six police officers who had participated in the interrogations of the applicant. Furthermore, two additional witnesses were heard. The applicant did not submit any requests to the District Court for the hearing of additional witnesses.

On the basis of an evaluation of the above evidence as well as the documentary evidence submitted, the Court found H and the applicant guilty of the charges brought against them. By judgment of 14 December 1992 they were both sentenced to four years' imprisonment and a fine of ISK 500,000. In its judgment the Court stated inter alia as follows:

(translation)

"It has been established that the defendants confessed during an investigation by the Drug Squad of the Reykjavík Police Department to the import with which they are being charged in the indictment, and also that H arranged the selling of the hashish in Iceland, its import being clearly for financial gain.

During a court session held on 17 November 1987 counsel was appointed to protect the defendants' rights. Neither of the defendants, however, requested that the attorneys be present during interrogations.

Already on 19 November 1987 H admitted during the police interrogation that the defendants had discussed that (the applicant) intended to purchase paint and narcotics when he travelled abroad...
...

During the interrogation on 1 December and later interrogations the defendant H admitted that the defendants had imported hashish which had been concealed in shipments of paint and mentioned the nine shipments which are referred to in the indictment. In later interrogations by the police the defendant testified in the same manner and in more detail as has been mentioned above. ...

During five interrogations on 20, 25, and 30 November and 2 and 8 December 1987 (the applicant) gave an account of his participation in the case consistent with his part in the case as described in the indictment... The reports concerning (the applicant) dated 22 and 28 December 1987 differ from this and on 2 January 1988 (the applicant) claimed during the police interrogation that all his confessions to drug offences were incorrect.

The defendants have previously explained their altered testimony and there is no proof that they were coerced and threatened to confess to the charges brought against them. Both defendants had access to counsel to whom they could turn if they thought they were subject to duress. Neither of them did so and the defendant H admitted to all the charges brought against the defendants in two interrogations in court in December 1987. The testimony of the defendant H corresponds to the testimony of (the applicant) during five interrogations by the police. ...

The Court rejects (the applicant's) explanation that he has undertaken the unusual errands of bringing money to M for shipments of paint to Iceland without knowing what was going on. The behaviour of the defendant of renting facilities all over Reykjavík and Kopavogur under false names furthermore firmly indicates that he knew that narcotics were imported in the nine shipments of paint and that he participated fully in the import. ...

Taking all circumstances into consideration it is proven by the confession of the defendant H to the police and in

court prior to the indictment and by (the applicant's) five confessions to the police which are supported by other evidence pertaining to the case described above that the defendants are guilty of having jointly imported to Iceland hashish for financial gain from December 1985 to November 1987. ...

Punishment of both defendants will be determined taking into consideration section 77 of the Penal Code. It is considered aggravating that they are both adults who jointly imported and sold a great quantity of narcotics in the hope of a great financial gain. The method used by the defendants in committing their offence was not decided upon in haste but was well planned. The defendants are found to have played an equal part in the offence even though there is reason to believe that (the applicant) came up with the idea to commit it. Nevertheless the defendant H participated and enjoyed the financial gain resulting therefrom. It is not known what the defendants' net profit was from this offence, but there is reason to believe that the profits were considerable. This shall also be taken into consideration in determining the punishment of the defendants and it is decided that they shall be subject to fines as well as to imprisonment, cf. subsection 2 of section 49 of the Penal Code. It is, however, considered proper to take into consideration in determining the punishment to be imposed on the defendants the delay which has occurred in pronouncing judgment in this case as the defendants are in no way responsible for this delay.

Taking into consideration all of the above the suitable punishment for each of the defendants is four years imprisonment and a fine of 500,000 ISK, payable within four weeks from this judgment; otherwise an imprisonment of 90 days replaces the fines."

Both the prosecutor and the applicant appealed against the judgment to the Supreme Court and the appeal was sent to the Court in January 1993.

It appears that the applicant wanted to obtain a statement from M in the Netherlands. Accordingly, on 5 March 1993, the Director of Public Prosecutions submitted a letter rogatory to the Dutch authorities requesting their assistance in accordance with the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

On 11 March 1993 M was accordingly interviewed by the Dutch police and his statement, in which he maintained that the applicant had nothing to do with drug trafficking, was transmitted to the Supreme Court.

On 1 April 1993 the Supreme Court held a hearing in the case. It did not, however, hear any witnesses. The Court upheld the judgment of the District Court and stated as follows:

(translation)

"The facts of the case are clearly set out in the judgment under appeal. With reference to the facts of the aforementioned judgment the evaluation of the District Court judge of the defendants' guilt and the applicable penalty clauses is confirmed. The provisions of the judgment regarding confiscation and legal costs are also confirmed.

A considerable delay occurred in the proceedings of this case before it was brought before the judge who rendered

the judgment of the District Court. The police concluded its investigation in July 1988 and the case was then referred to the public prosecutor. Indictments were, however, not issued until 27 July 1990. The indictment was served on (the applicant) on 17 December 1990. The case was not examined, however, until 2 November 1992. The indictment was first served on the defendant H on 19 October of that year. Taking this into consideration the decision of the District Court judge regarding the punishment of both defendants is confirmed.

The defendants are sentenced to pay all the costs of the appeal according to the conclusion of this judgment.

According to the reports of the Department of Criminal Investigation a witness was not always present during interrogation or reading of the reports of the defendants but only witnessed the signing. This is not in accordance with section 37 of the Code of Criminal Procedure no. 74/1974 then in force, cf. now subsection 2 of section 72 of the Code of Criminal Procedure no. 19/1991.

Conclusion of the judgment: the judgment under appeal shall stand."

COMPLAINTS

The applicant complains that the criminal charge against him was not determined within a reasonable time within the meaning of Article 6 para. 1 of the Convention.

He furthermore complains that the District Court and the Supreme Court violated Article 6 para. 3 (d) of the Convention by drawing conclusions from police reports without examining witnesses on his behalf. He refers in this respect to the witness M from the Netherlands.

Finally, the applicant complains that the review by the Supreme Court was not in accordance with Article 2 of Protocol No. 7 to the Convention as the Court did not hear any witnesses.

THE LAW

1. The applicant complains that the criminal charge against him was not determined within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention, in so far as relevant, reads:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ... ."

The Commission notes that the proceedings complained of commenced on 16 November 1987 when the applicant was arrested and detained on remand and ended on 1 April 1993 when the Supreme Court pronounced judgment in the case. They thus lasted approximately five years and four and a half months.

The question arises, however, whether the applicant may still claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention of a violation of the provision invoked given the fact that the courts took into account the delays which had occurred when meting out the sentence.

The Commission recalls the Convention organs' case-law according

to which an applicant's status as a "victim" within the meaning of Article 25 (Art. 25) of the Convention may depend on compensation being awarded on the basis of the facts about which he/she complains before the Commission. In cases concerning complaints of length of proceedings the domestic authorities must have acknowledged either expressly or in substance the alleged infringement of the Convention and, if necessary, provide redress in relation thereto. Only when these two conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, p. 32, paras. 69 et seq.; No. 10868/84, Dec. 21.1.87, Woukam Moudefo v. France, D.R. 51 p. 62; No. 10884/84, Dec. 13.12.84, H. v. Federal Republic of Germany, D.R. 41 p. 252).

In the present case the District Court expressly acknowledged that delays had occurred for which the applicant was in no way responsible and for that reason afforded some redress by reducing the prison sentence imposed. The same position was adopted by the Supreme Court which set out in its judgment the various periods of delay which were open to criticism and on this basis confirmed the sentence imposed. In these circumstances the Commission finds that the domestic courts in substance acknowledged a breach of Article 6 para. 1 (Art. 6-1) of the Convention in respect of the right to a hearing within a reasonable time and afforded redress therefor by the mitigation of the sentence imposed.

It follows that the applicant may no longer claim to be a victim of a violation of his right to a hearing within a reasonable time as guaranteed by Article 6 para. 1 (Art. 6-1) of the Convention and this part of the application must, therefore, be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that the District Court and the Supreme Court violated Article 6 para. 3 (d) (Art. 6-3-d) of the Convention by drawing conclusions from police reports without examining witnesses on his behalf. He refers in this respect to the witness M from the Netherlands.

The Commission recalls that the applicant did not request the District Court to hear M as a witness. Nor has he submitted evidence which could substantiate that the District Court failed to comply with requests for the hearing of other witnesses on his behalf, but it is true that part of the documentary evidence in the case consisted of police reports concerning the applicant's own statements to the police, the contents of which he contested.

In this respect the Commission recalls that 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 Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (cf. for example Eur. Court H.R., Kostovski judgment of 20 November 1989, Series A no. 166).

The Commission finds that the police reports were not the only evidence in the case. In the course of the main proceedings in the District Court witnesses were heard as well as the applicant and the co-accused. The Commission finds nothing which could give rise to any misgivings as regards the fairness of the applicant's trial or his right to a proper defence in this respect. Moreover, the Commission recalls that the question concerning the contents of the police reports was thoroughly examined by the Court and both sides had the opportunity to express their views to the Court. In these circumstances the Commission finds that it was clear to the Court how the reports had been made, that the applicant denied any knowledge of their contents, and that, therefore, they could not be considered to be a reliable first-hand source of information.

As regards the proceedings in the Supreme Court the Commission recalls that a public hearing was held during which the applicant could be present and could address the Court. It is true that the Supreme Court did not hear the witnesses in the case but, where necessary, relied on their statements as these appeared from the District Court's transcripts. However, the use of such statements is not in itself inconsistent with Article 6 (Art. 6) of the Convention. Although in principle the evidence must be produced in the presence of an accused the Commission and the European Court of Human Rights have consistently held that the use of statements obtained even at a pre-trial stage may be accepted, provided the rights of the defence have been respected (cf. for example Eur. Court H.R., Delta judgment of 19 December 1990, Series A no. 191). These rights require that the accused had the opportunity, either at the time the witness made the statement or at some later stage of the proceedings, to challenge and question the witness. It is clear that the applicant had such an opportunity.

Nevertheless, the Commission cannot exclude that situations may occur where the appeal proceedings before a court with jurisdiction as to both the facts and the law require that an accused's guilt or innocence could only, as a matter of fair trial, be properly determined with a direct assessment of the evidence given by a witness, namely where the crucial question concerns the credibility of the person involved (cf. Eur. Court H.R., Ekbatani judgment of 26 May 1988, Series A no. 134). The present case, as submitted by the applicant, does not, however, give the Commission any reason to conclude that the case, as it stood before the Supreme Court, raised questions of fact which could not be adequately resolved on the basis of the available material. In this respect the Commission has also noted that the applicant did not avail himself of the possibility under section 46 of the Supreme Court Act to request the Supreme Court, in special circumstances, to hear witnesses.

Having referred to the above the Commission finds no appearance of a violation of Article 6 para. 3 (d) (Art. 6-3-d) 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. Finally, the applicant complains that the review by the Supreme Court was not in conformity with Article 2 of Protocol No. 7 (P7-2) to the Convention as the Court did not hear any witnesses.

Article 2 of Protocol No. 7 (P7-2) to the Convention reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the higher tribunal or was convicted following an appeal against acquittal."

The Commission recalls that the Supreme Court held a hearing in the case and that the Court had the competence to consider both points of fact and law. In these circumstances, and having regard to its conclusion in respect of Article 6 para. 3 (d) (Art. 6-3-d) of the Convention, the Commission finds that the review afforded fulfilled the requirements of Article 2 of Protocol No. 7 (P7-2) to the Convention.

It follows that this part of the application is also 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 Second Chamber — President of the Second Chamber

(K. ROGGE) — (H. DANELIUS)