AS TO THE ADMISSIBILITY OF

Application No. 16060/90
by F.G.
against Austria

The European Commission of Human Rights sitting in private on 8 February 1993, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI

Mr. M. de SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 12 January 1990 by F.G. against Austria and registered on 25 January 1990 under file No. 16060/90;

Having regard to

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

- the observations submitted by the respondent Government on 20 July 1990 and the observations in reply submitted by the applicant on 14 September 1990;

- the further observations in reply to the Commission's further questions of 10 October 1991, submitted by the Government on 20 December 1991 and by the applicant on 25 February 1992;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1940. He lives in Pretoria, South Africa, and is represented before the Commission by Mr. A. Frischenschlager, lawyer practising in Linz. The facts of the case,

as submitted by the parties, may be summarised as follows.

On 30 July 1987 the Vienna prosecuting authorities requested a warrant for the applicant's arrest. The Vienna Regional Court (Landesgericht) issued such a warrant on the same day. On 27 October 1987 the prosecuting authorities requested the introduction of preliminary proceedings against the applicant for suspected offences under Section 12 of the Drugs Act (Suchtgiftgesetz). The Vienna Regional Court granted this application on 30 October 1987.

In August 1988 the applicant, who had taken his passport to the Austrian embassy in Pretoria for it to be extended, was informed that criminal proceedings were pending against him, and that he was being sought.

On 14 October 1988 the warrant for the applicant's arrest was revoked and a writ was issued to ascertain his whereabouts if he returned to Austria (Ausschreibung zur Aufenhaltsermittlung im Inland).

The applicant, in the meantime, had instructed his lawyer in Austria to request inspection of the case-file. Notwithstanding Article 45 of the Code of Criminal Procedure (Strafprozessordnung), which provides for the removal from the case-file of specific documents which a lawyer is permitted to inspect, the Vienna Regional Court rejected the application on 14 October 1988. The applicant's appeal to the Review Chamber of the Regional Court (Ratskammer des Landesgerichtes) was rejected on 30 November 1988. The Review Chamber found that Article 45 para. 2 of the Code of Criminal Procedure did not preclude a refusal of permission to inspect the entire case-file. The Court considered that the applicant, who was not the subject of a warrant for arrest, could have requested to be heard by the Court and would then be informed of the nature and cause of the allegation.

The applicant next requested the information to which he considered he was entitled under Article 6 para. 3 (a) of the Convention. The Vienna Regional Court rejected the request on 23 May 1989, on the ground that the applicant was not "charged with a criminal offence" within the meaning of Article 6 para. 3 (a). On 28 July 1989 the Review Chamber of the Regional Court rejected the applicant's appeal against the decision of 23 May 1989. The Review Chamber found:

(Translation)

> "... in any event, the applicant, as a person affected by criminal proceedings, has the right to be informed of the nature and cause of the accusations against him but, contrary to his opinion, the current state of the proceedings only permits the disclosure of those details which would not hinder the proceedings if revealed (Article 45 para. 1 of the Code of Criminal Procedure)... The applicant could have requested the police for the disclosure of such information [as to the nature and cause of the accusations] from the very beginning, and such information can also be given by the investigating judge - but not 'all details' as requested in the present application, as that would run contrary to the present aim of the proceedings."

(Original)

> "... hat [der Beschwerdeführer] als ein grundsätzlich durch ein Strafverfahren Betroffener jedenfalls das Recht, über Art und Grund der gegen ihn erhobenen Beschuldigung in Kenntnis gesetzt zu werden, entgegen der Auffassung des Beschwerdeführers lässt der derzeitige Verfahrensstand aber nur eine Information über alle jene Einzelheiten zu, hinsichtlich deren keine Erschwerung der Verfahrensführung bei Kenntnisnahme zu befürchten ist. (§ 45 Absatz 1 StPO). ... Eine diesbezügliche Auskunftserteilung [über Art und

Grund der erhobenen Anschuldigung] wäre dem Beschwerdeführer von Anfang im Wege der Sicherheitsbehörden möglich gewesen und kann diese auch durch den Untersuchungsrichter erfolgen, nicht jedoch die vorliegend angestrebte Mitteilung der Beschuldigung 'in allen Einzelheiten', da dies dem derzeitigen Verfahrenszweck widersprechen würde."

The applicant points out that the police are under the authority of the investigating judge and that, as his request to inspect the case-file had been rejected in toto, there was no reason to consider that a request to the police would result in more information being supplied. Moreover, a request to the police would have been futile as the police never permit a case-file to be inspected when proceedings are pending before a domestic court.

On 3 August 1990, that is, after the case had been communicated to them in the context of the present application before the Commission, the respondent Government submitted a copy of the writ to ascertain the applicant's whereabouts which had been issued on 14 October 1988. It is addressed to the Ministry of the Interior and provides, inter alia, as follows:

(Translation):

"F.G. is suspected of involvement in South Africa since 1983 in the manufacture and distribution of methaqualone tablets by having established a mobile tablet factory and setting up contacts with German pharmaceutical firms, together with Johann JUHITZER. The offence provided for in Section 12 of the Drugs Act was thereby committed."

(Original):

"F.G. steht im Verdacht, seit 1983 in Südafrika im Zusammenwirken mit Johann JUHITZER mit der Herstellung und den Vertrieb von Methaqualontabletten durch die Errichtung einer fahrbaren Tablettenfabrik und Kontakte zu deutschen Pharmafirmen beschäftigt gewesen zu sein und hiedurch das Verbrechen nach § 12 SGG begangen zu haben."

By a letter from the Federal Ministry of Justice, received by the applicant's representative on 12 March 1991, the applicant was granted safe-conduct. He was in Austria and informed the Court that he was available for questioning from 9 to 23 April 1991. On 12 April 1991 he attended the judge's chambers at the Vienna Regional Court. He was informed, however, that he could not be questioned because documents written in Afrikaans which had been received by the Vienna Regional Court in April 1990 had not been translated.

On 17 April 1991 a further request to examine the case-file was rejected by the investigating judge, but this decision was quashed by the Review Chamber of the Vienna Regional Court on 24 July 1991. A new decision of 11 October 1991 permitted access to specified parts of the file. The applicant's complaint against the new decision was rejected on 20 November 1991.

On 2 September 1991 the writ to establish the applicant's whereabouts in Austria was withdrawn.

COMPLAINTS

The applicant originally alleged a violation of Article 6 para. 3 (a) of the Convention in respect of a failure to provide, or to provide "promptly ... and in detail ..." the information to which he is entitled under that provision. He now also alleges a violation of

Article 6 para. 1 of the Convention in respect of the length of the proceedings.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 January 1990 and registered on 25 January 1990.

On 7 May 1990 the Commission decided to request the parties to submit their written observations on the admissibility and merits of the application. The respondent Government submitted their observations on 20 July 1990 and an addition thereto on 3 August 1990, which was forwarded to the applicant on 5 September 1990. The applicant submitted his observations in reply on 14 September 1990.

On 30 September 1991 the applicant furnished further information to the Commission and added to his initial complaint a complaint under Article 6 para. 1 of the Convention that the proceedings had lasted more than a reasonable time.

On 10 October 1991 the Commission decided to put further questions to the parties. The respondent Government submitted their additional observations on 20 December 1991 and the applicant submitted his additional observations on 25 February 1992.

THE LAW

1. The applicant alleges violation of Article 6 para. 3 (a) (Art. 6-3-a) of the Convention on the ground first, that he was not informed at all of the nature and cause of the accusation against him, and secondly that, even when he had received, in the course of the proceedings before the Commission, the writ to establish his whereabouts of 14 October 1988, that information was neither "prompt" nor "in detail".

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

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence ..."

The applicant submits that he initially received no information as to the accusation against him, and that the information he has now received is inadequate. The Government contend that this part of the application is premature, and that in any event the information that the applicant has received is sufficient to comply with Article 6 para. 3 (a) (Art. 6-3-a) of the Convention because he agrees that the writ to establish his whereabouts gives information as to the nature and cause of the accusation, and that as, at the time of communication at least, he had not been formally indicted, he was in any event not entitled to the right guaranteed by Article 6 para. 3 (a) (Art. 6-3-a). They add that, as by 19 December 1991 the applicant had not even been formally questioned by the Vienna Regional Court (Landesgericht), and as the purpose of Article 6 para. 3 (a) (Art. 6-3-a) is to secure the

right under Article 6 para. 3 (b) (Art. 6-3-b), the information forwarded to the applicant by the Commission on 5 September 1990 was in any event sufficiently "prompt".

The Commission notes that the proceedings against the applicant are still pending, and recalls that it can only assess the fairness of criminal proceedings when it is able to consider them in their entirety (cf. No. 9000/80, Dec. 11.3.82, D.R. 28 p. 127, with further references). Moreover, an acquittal will normally be regarded as rectifying procedural errors alleged to have violated the Convention (cf. No. 8083/77, Dec. 13.3.80, D.R. 19 p. 223). Until the relevant proceedings have finished, when it may become apparent that the applicant cannot claim to be a victim of a violation, the Commission is therefore unable to consider this complaint.

This part of the Convention is therefore premature and must be rejected as being manifestly ill-founded in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also alleges that the proceedings against him have lasted beyond the "reasonable time" prescribed by Article 6 para. 1 (Art. 6-1) of the Convention.

The Government consider that the applicant has not been charged within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention, so that the "reasonable time" has not yet begun to run. They point out that the arrest warrant issued on 30 July 1987 was not executed and, indeed, was withdrawn on 14 October 1988, before the applicant even knew of its existence, and that the writ to establish his whereabouts was also subsequently withdrawn. They consider that the mere issue of an arrest warrant cannot constitute the starting point of the "reasonable time", and they submit that, if the starting point were to be the date when the applicant was told of the existence of criminal proceedings by the embassy in Pretoria, the time has not been excessive given that the applicant first presented himself to the court on 12 April 1991.

The applicant considers that the latest starting point for the "reasonable time" is 27 October 1987, when the prosecution requested the introduction of preliminary proceedings against the applicant, but does not exclude the possibility that the period began with the issue of the arrest warrant on 30 July 1987. He points out that he has still not been questioned - even though he presented himself at court on 12 April 1991 - but considers that that fact is not relevant to the period to be considered which, in his view, has already been excessive.

The Commission finds that this complaint raises questions of fact and law which require an examination of the merits. It cannot therefore be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission,

by a majority
DECLARES THE APPLICATION ADMISSIBLE as regards the length of the criminal proceedings against the applicant, without prejudging the merits,

unanimously
DECLARES INADMISSIBLE the remainder of the application.

Deputy Secretary to the Commission President of the Commission

(M. de SALVIA) (C.A. NØRGAARD)