AS TO THE ADMISSIBILITY OF

Application No. 14396/88
by F.
against Austria

The European Commission of Human Rights sitting in private on 9 October 1990, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

Mr. H.C. KRÜGER, 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 10 November 1988 by F. against Austria and registered on 24 November 1988 under file No. 14396/88;

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 22 December 1989 and the observations in reply submitted by the applicant on 14 February 1990;

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 German citizen born in 1922, is a pensioner residing at G. in the Federal Republic of Germany. Before the Commission he is represented by Dr. M. Orgler, a lawyer practising at Innsbruck in Austria. The present application does not concern the facts of the applicant's previous Application No. 13627/88 against Switzerland which the Commission declared inadmissible on 6 July 1989.

A. Particular circumstances of the case

According to the subsequent judgment of the Zell am Ziller District Court (Bezirksgericht) of 24 March 1988, the applicant rented a room in Mayrhofen in Austria from a certain Mrs R.K. from 17 to 27 January 1988. He then told Mrs R.K. that his wife was very ill and in an Innsbruck hospital, and that he was expecting a pension payment from Germany. Thereupon, on 16 January 1988 Mrs R.K. handed him the amount of 2,500 AS and waived the rent amounting to 1,500 AS.

On 19 January 1988, the applicant opened for the prospective pension payments an account at a Mayrhofen bank. On 22 January 1988 Mrs R.K. handed the applicant further 600 AS.

On 27 January 1988 Mrs R.K. reported the applicant to the police.

On 4 February 1988 the applicant was detained at Innsbruck awaiting extradition to the Federal Republic of Germany with regard to another offence.

On 8 February 1988 the Innsbruck Public Prosecutor's Office (Staatsanwaltschaft) asked the investigating judge of the Innsbruck Regional Court (Landesgericht) to institute preliminary investigations against the applicant on suspicion of fraud in respect of Mrs R.K., and to order his detention on remand on the ground of a danger of his absconding.

Detention on remand was imposed on the applicant on 10 February 1988. The criminal proceedings were then conducted by the Innsbruck Regional Court in view of a second charge of fraud brought against the applicant.

On 12 February 1988 the Innsbruck Regional Court filed a letter rogatory (Rechtshilfeersuchen) with the Zell District Court for the questioning of Mrs R.K. as a witness. Thereupon, Dr. A.K., a judge at the Zell District Court, questioned Mrs R.K. on 25 February 1988.

On 1 March 1988 the Innsbruck Public Prosecutor's Office terminated the investigations in respect of the second charge of fraud, and requested the transfer of the proceedings to the Zell District Court. The latter had jurisdiction in respect of the charge of fraud concerning Mrs R.K. On 4 March 1988 the Zell District Court received the case-file.

On 6 March 1988 the applicant, who was in a prison in Innsbruck, requested to be released from detention on remand. Two further requests were filed on 12 and 15 March 1988.

During the ensuing period until 24 March 1988 judge A.K. wrote to a court in Osnabrück in the Federal Republic of Germany as to the reasons why part of a prison sentence concerning the applicant had been suspended. Judge A.K. also transmitted the case-file to the Innsbruck District Court which was asked further to question the applicant, in particular as to the expected payment of pension in January 1988, and as to the details of his pension.

Judge A.K. furthermore telephoned two German insurance companies to establish whether the applicant had applied for, or received, a pension payment. She telephoned a bank in Mayrhofen to establish whether money had been paid into the bank account opened by the applicant on 19 January 1988.

On 18 March 1988 judge A.K. fixed the trial for 24 March 1988.

The trial took place on 24 March 1988 before the Zell District Court. According to the minutes of the trial, a District Prosecutor (Bezirksanwalt) was present as Prosecutor (Ankläger). After evidence

had been taken the latter requested the applicant's punishment.

The applicant submits that he challenged Dr A.K. at the beginning of the trial, claiming that, since she had participated in the investigations, she was not impartial. The Government have referred to the minutes of the trial which do not disclose such a challenge.

On 24 March 1988 the Zell District Court convicted the applicant of fraud, namely for having induced Mrs R.K. to hand him 2,500 AS and to waive the rent of 1,500 AS, and sentenced him to three months' imprisonment. The period of detention awaiting extradition and of detention on remand was deducted from the applicant's prison sentence. The applicant was also ordered to pay Mrs R.K. 4,000 AS. The judgment was signed by judge A.K.

The judgment relied inter alia on the testimony of Mrs R.K. and the information submitted by the Mayrhofen bank and German insurance companies. According to the latter the applicant had never filed an application which could have led to the payment of a pension.

The applicant appealed against the judgment to the Innsbruck Regional Court, complaining in particular that trial judge A.K. had previously undertaken investigations. He also complained about the sentence.

On 20 April 1988 the Review Chamber (Ratskammer) at the Innsbruck Regional Court dismissed the applicant's complaints about his detention on remand of 6, 12 and 15 March 1988. The Chamber, with judges F., P. and W. participating, found "an urgent suspicion of the offence of fraud; in this respect reference may essentially be made to the decision of first instance" ("[E]in dringender Tatverdacht des Vergehens des Betruges ist zu bejahen; diesbezüglich kann im wesentlichen auf das in erster Instanz ergangene Urteil verwiesen werden."). It also assumed a danger of absconding and found that more lenient measures than detention would not suffice.

The applicant then challenged judges F., P. and W. as appeal judges on the ground that they had participated in the decision of the Review Chamber of 20 April 1988.

On 9 May 1988, judge S., the President of the Regional Court, dismissed the challenge. He considered that the three judges concerned had themselves declared that they were not partial. Moreover, no objective grounds calling in question the judges' impartiality could be seen in the decision of the Review Chamber which had not evaluated the decision of the first instance court.

On 13 May 1988 the Innsbruck Regional Court, composed of judges F., P. and W., dismissed the applicant's appeal. As to the applicant's complaint that the trial judge had previously undertaken investigations the judgment stated:

<Translation>

"As a reply thereto, reference may be made to the legal view derived from SS. 451 and 452 of the Code of Criminal Procedure, according to which in the District Court proceedings the trial judge may also undertake preliminary inquiries, and the preliminary inquiries judge will nevertheless not be excluded from the trial... Equally, if a judge participates in a penal case as a judge in proceedings under letters rogatory, this will not exclude him from participating at the trial... A detailed examination as to the extent to which this legal view, which is generally applied, corresponds to Article 6 of the Convention on Human Rights ... is unnecessary in the present case for the Appeal Court, since the accused, who became aware of the

[alleged] ground of nullity at the latest at the beginning of the trial did not ... immediately raise this ground before the Zell am Ziller District Court."

<German>

"Dem ist die aus den Bestimmungen der §§ 451 und 452 StPO abgeleitete herrschende Rechtsansicht entgegenzuhalten, wonach im bezirksgerichtlichen Verfahren der Erkenntnisrichter auch Vorerhebungen pflegen kann und der Vorerhebungsrichter daher nicht von der Hauptverhandlung ausgeschlossen ist ... Ebenso schließt auch die Beteiligung eines Richters als Rechtshilfe-richter an einer Strafsache diesen nicht von der Teilnahme an der Hauptverhandlung aus ... Eine eingehende Prüfung dahin, inwieweit diese allgemeine geübte Rechtsauffassung mit Artikel 6 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten ... im Einklang steht, erübrigt sich im vorliegenden Fall für das Berufungsgericht deshalb, weil der Angeklagte den ihm spätestens bei Beginn der Hauptverhandlung bekannt gewordenen [angeblichen] Nichtigkeitsgrund ... nicht sofort vor dem Bezirksgericht Zell am Ziller geltend gemacht hat."

B. Relevant domestic law and practice

Section 9 of the Austrian Code of Criminal Procedure (Strafprozessordnung) provides for the jurisdiction of the District Court in respect of all offences the threatened punishment of which does not exceed six months.

Proceedings before the District Court are instituted on the basis of an informal request for prosecution by the District Prosecutor.

According to Section 451 para. 1, in District Court proceedings there are no formal preliminary investigations (Voruntersuchung). Preliminary inquiries (Vorerhebungen) are possible, though these do not correspond to the preliminary inquiries before the other first instance courts.

According to legal practice, the trial judge himself will in District Court proceedings conduct the preliminary proceedings. In particular, Section 68 para. 2 of the Code of Criminal Procedure, which excludes the investigating judge from participating at the trial, does not apply (see E. Foregger/E. Serini, Die österreichische Strafprozessordnung, Vienna 1982, 3rd ed., p. 534).

Paragraph 1 of Section 452 of the Code of Criminal Procedure which concerns "Rights of the judge during preliminary investigations" ("Befugnisse des Richters bei Vorerhebungen") states that the District Court judge has in principle to comply with all provisions applying to the investigating judge though a number of exceptions are mentioned. For instance, according to Section 452 para. 3, detention on remand may only be imposed on the grounds of a danger of absconding and of collusion.

Under Section 194 para. 1 of the Code of Criminal Procedure, the District Court judge may order a person's release from detention on remand if the latter and the District Prosecutor agree that the grounds for detention no longer exist.

According to Section 451 paras. 1 and 4, there is no special procedure for the committal to trial (Versetzung in den Anklagestand). Once the preliminary inquiries deemed necessary have been undertaken, the trial must be fixed. The evidence previously collected is presented at the trial, and the accused can comment thereupon.

Section 12 of the Code of Criminal Procedure provides that the

Review Chamber will supervise all preliminary inquiries and investigations in its district. It consists of a chamber of three judges of the Regional Court. The Review Chamber is the appeal body against orders or delays on the part of the investigating judge (Section 113). In District Court proceedings the Review Chamber of the Regional Court will also examine complaints about detention on remand.

COMPLAINTS

The applicant complains that the criminal charge raised against him was not determined by an impartial tribunal within the meaning of Article 6 para. 1 of the Convention, in that:

- the trial judge of the District Court, Dr. A.K., had first undertaken preliminary investigations concerning his case and later conducted the trial. Thus, upon a letter rogatory, she had heard Mrs R.K. as witness and also obtained information from a bank and insurance companies. Dr. A.K. was also competent to prolong the applicant's detention on remand;

- the judges of the Review Chamber, who on 20 April 1988 decided to prolong his detention on remand, had thereby formed an opinion (as to the applicant's guilt). Nevertheless, on 13 May 1988 they also decided on his appeal.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 November 1988 and registered on 24 November 1988.

On 2 October 1989 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 limited to the issue under Article 6 para. 1 of the Convention.

The Government's observations were submitted on 22 December 1989 and the applicant's observations in reply on 14 February 1990.

THE LAW

1. The applicant complains that his case was not decided by an impartial tribunal, either in the Zell District Court or in the Innsbruck Regional Court. He relies on Article 6 para. 1 (Art. 6-1) of the Convention, which, insofar as it is relevant, states:

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

2. The Commission recalls that the guarantee of impartiality required by Article 6 (Art. 6) of the Convention is two-fold: first, the subjective requirement that the judge shall be unbiased, and second, an objective requirement that the situation must be such as to exclude any legitimate doubts about his impartiality (see Eur. Court H.R., Piersack judgment of 1 October 1982, Series A no. 53, p. 14, para. 30).

As regards the subjective requirement, the Commission finds no element which could raise doubts. It also recalls that the personal impartiality of a judge must be presumed until the contrary is established (see Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 25, para. 58).

As regards the objective requirement, account must be taken of the functions exercised. In this regard, even appearances may be

important. What is at stake is the confidence which the courts in a democratic society must inspire in the public and in the accused (see the Piersack judgment, ibid. p. 14 et seq., para. 30). In particular, the judge concerned must not appear to have formed, at a previous occasion, an opinion which will weigh in the balance at the moment of decision (see Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A no. 86, p. 16, para. 29).

3. The Commission has first considered the applicant's complaint concerning partiality of the District Court judge.

In the applicant's view, while there are certain formal differences between the District Court proceedings and those before other first instance courts the District Court judge nevertheless exercises in the preliminary proceedings largely the same functions as those of an investigating judge. Contrary to the first instance court proceedings, where the Public Prosecutor's Office applies for preliminary inquiries, the District Court judge undertakes these inquiries on his own authority. Judge A.K.'s investigations in fact corresponded to those of an investigating judge.

The Government submit that for organisational reasons District Court proceedings are less complex. Often, the courts are widely dispersed and comprise only one or two judges. It would hardly be possible to conduct proceedings consisting of sharply separated stages.

The Government contend that the preliminary proceedings before District Courts differ from those before other courts where the preliminary inquiries provide the foundation for the decision to commit an accused to trial. Here, after the District Prosecutor has instituted the proceedings the preliminary inquiries of the District Court judge serve the purpose of preparing the trial. These preliminary inquiries correspond to the stage of proceedings before a first instance court when the accused has been committed for trial and the judge is preparing the trial.

The Government further recall that in the present case judge A.K. undertook only a limited number of investigations. She did not decide the applicant's detention on remand and she did not see him before the trial. The applicant could not assume that she had such a considerable knowledge of his case as to have a predetermined view on his guilt. Rather, the basis for the applicant's conviction was the trial hearing which is of overriding importance for District Court proceedings. The Government conclude that the impartiality of judge A.K. could not be called in question.

The Commission, having regard to the parties' submissions under Article 6 para. 1 (Art. 6-1) of the Convention concerning the position of the District Court judge, considers that this complaint raises complex issues of fact and law which can only be resolved by an examination of the merits. This part of the application cannot, therefore, be declared manifestly ill-founded. No other grounds for inadmissibility have been established.

4. The Commission has next examined the applicant's complaint that the Regional Court judges who prolonged his detention on remand later decided on his appeal.

The applicant submits that the Regional Court judges could not be regarded as being impartial since they had already formed an opinion on him.

The Government contend, with reference to the Hauschildt case (see Eur. Court H.R., judgment of 24 May 1989, Series A no. 154) that, if a judge has previously taken a decision as to whether the defendant was suspected of having committed a criminal offence, this does not in

itself call in question his impartiality. In the present case the reasons of the Review Chamber's decision did not bring it sufficiently close to a formal finding of guilt and did not put in doubt the impartiality of the judges concerned.

The Commission observes that the applicant's complaint relating to the District Court proceedings concerned a judge who first undertook investigations concerning the applicant and later acted as trial judge. The present complaint differs in that it concerns the position of judges who first prolonged the applicant's detention on remand, and later decided on his appeal.

The Commission recalls that, in the Hauschildt case, the mere fact that an appeal judge had also made a pre-trial decision in the case concerning detention on remand was not held as in itself justifying fears as to his impartiality (see Eur. Court H.R., Hauschildt judgment, ibid. para. 50). In particular, as the Commission found in its Report in that case, it is a well-known distinction that, while a reasonable suspicion is usually sufficient to detain on remand, much stronger evidence is required for a finding of guilt (Hauschildt v. Denmark, Comm. Report 16.7.87, para. 110, Eur. Court H.R., Series A no. 154 p. 136).

In the present case the decision of the Review Chamber of 20 April 1988 found "an urgent suspicion of ... fraud" with reference to the first instance conviction. It also found a danger of absconding. Thus, the Chamber was not holding the applicant guilty, but merely considering the conditions for upholding detention on remand.

In the Commission's opinion, it cannot therefore be said that the Regional Court judges subsequently had a preconceived opinion as to the applicant's guilt when the appeal came before them. It follows that, in the circumstances of the present case, the impartiality of the Innsbruck Regional Court cannot be in doubt.

Accordingly, the examination of the applicant's complaint concerning the position of the Regional Court judges fails to disclose any appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention. It follows that the remainder of the application is 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 ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint under Article 6 para. 1 of the Convention concerning the position of the District Court judge;

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)