AS TO THE ADMISSIBILITY OF

Application No. 13627/88
by H.F.
against Switzerland

The European Commission of Human Rights sitting in private on 6 July 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

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 24 November 1986 by H.F. against Switzerland and registered on 24 February 1988 under file No. 13627/88;

Having regard to the report provided for in Rule 40 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 German citizen born in 1922, is a car mechanic residing in Lingen/Ems in the Federal Republic of Germany.

On 17 August 1985 the applicant was arrested in Frutigen in Canton Bern on suspicion of fraud, and remanded in custody.

On 3 February 1986 judge Sch., the investigating judge of the Frutigen District committed the applicant for trial before the Frutigen District Court for criminal matters (Strafamtsgericht) in respect of 55 instances of professional fraud or attempts thereto, amounting to a total of 25,265.- SFr, and nine instances of theft, amounting to a total of 12,539.- SFr.

The instances of fraud referred to were perpetrated between

1979 and 1985 and concerned inter alia various nights spent in different hotels, the renting of various holiday apartments, clothing, sport equipment, electrical appliances such as televisions, tape-recorders and typewriters, a roll of plastic bags, food and petrol. The instances of theft concerned inter alia electrical equipment, household appliances, bed linen, clothing, a hotel handtowel, and three bottles of wine.

The trial took place on 18 March 1986 before the Frutigen District Court. Judge Sch. now presided over the trial court. The applicant pleaded not guilty in respect of only four instances of fraud and theft.

On the same day the applicant was convicted of 55 instances of fraud and eight instances of theft. He was further convicted of having entered Switzerland despite a prohibition of entry and of not having had his driving licence with him when driving a car. He was acquitted of one count of theft and of not having filled in an arrival form at an hotel. The applicant was sentenced to two and a half years' imprisonment and a fine of 200.-SFr. He was prohibited from entering Switzerland for the rest of his life, and ordered to pay the costs of the procedure amounting to 6,017.95.-SFr.

The applicant's appeal against this judgment, in which he complained inter alia that the same person had acted as investigating judge and trial judge, was dismissed by the Bern Court of Appeal (Obergericht) on 10 July 1986. The Court was presided over by judge W.

The Court of Appeal held that the judgment of the Frutigen District Court had obtained legal force to the extent that the applicant had been convicted of 52 instances of fraud and eight instances of theft, as in respect of these charges he had not claimed his acquittal at first instance. The Court then confirmed the applicant's conviction of three additional instances of fraud, of entering Switzerland despite a prohibition and of driving a car without carrying a driving licence. The sentence remained the same as that determined by the Frutigen District Court on 18 March 1986, though the applicant was further ordered to pay the costs of the appeal proceedings of 780.- SFr.

The applicant was transferred to the Thorberg Prison for convicted offenders.

The applicant filed a public law appeal (staatsrechtliche Beschwerde) and a plea of nullity (Nichtigkeitsbeschwerde) which were dismissed by the Federal Court (Bundesgericht) on 23 September 1986 as being either inadmissible or unfounded.

On 9 November 1986 the applicant again filed a public law appeal which the Federal Court upheld on 9 January 1987, quashing the decision of the Court of Appeal. The Court saw a violation, inter alia, of Article 6 para. 1 of the Convention in that, in the criminal proceedings instituted against the applicant, the same person had acted as investigating judge and trial judge. As a result, the Federal Court quashed the decision of the Bern Court of Appeal of 10 July 1986.

The applicant then filed a request to be released from detention on remand.

By announcement of 27 January 1987 judge W. of the Bern Court of Appeal informed the applicant that an appeal hearing was fixed for 5 February 1987 though it would be limited to the issue of setting aside the first instance decision insofar as the latter had not obtained legal force.

Also on 27 January 1987, judge W. dismissed the applicant's

request to be released from detention on remand on the ground that the first instance court, when again fixing the sentence, would have to assume that the applicant had been convicted with legal force of 52 instances of fraud and eight instances of theft.

On 28 January 1987 judge W. issued a correction (Berichtigung) of his decision of 27 January 1987, stating that it had been overlooked that in fact the entire first instance decision was at issue, and it could not therefore be said that the conviction for various offences had obtained legal force.

However, judge W. maintained his decision to continue to remand the applicant in custody. He stated that there were serious indications that the applicant had committed the offences since in the first instance proceedings the applicant had only requested acquittal in respect of a few charges. There was a danger of absconding in that the applicant did not have a place of residence in Switzerland. Judge W. concluded that the length of the new prison sentence to be imposed would not be prejudiced by the applicant's continuing detention on remand.

The applicant was thereafter transferred from Thorberg prison to the Bern District prison.

On 5 February 1987 the Bern Court of Appeal, with judge W. presiding, decided on the basis of the Federal Court's decision of 9 January 1987 to set aside the Frutigen District Court's decision of 18 March 1986, insofar as it did not acquit the applicant, and to refer the case for retrial to the Niedersimmental District Court for criminal matters.

In a separate part of this decision the Court of Appeal further dismissed the applicant's request to be released from detention on remand on the ground that there was an urgent suspicion that he had committed the offences in view of the fact that before the Frutigen District Court he had requested acquittal only in respect of a few charges. Moreover, the Court of Appeal found that there was danger of absconding in as much as the applicant did not have his residence in Switzerland. The Court regarded as unconvincing the applicant's submission that he had previously during his imprisonment worked externally without having absconded.

Also on 5 February 1987 the Court of Appeal dismissed the applicant's challenge of judge W. who, after the Federal Court's decision of 9 January 1987, had continued to sit on the case. The Court of Appeal found that judge W., when deciding to set aside the decision of 18 March 1986 of the Frutigen District Court, had not determined the merits of the case.

Against these decisions the applicant filed a public law appeal with the Federal Court.

Proceedings were then resumed before the Niedersimmental District Court. A hearing was fixed for 7 May 1987.

On 16 March 1987 the Federal Court dismissed the applicant's public law appeal. The Court found in particular that partiality could not be established merely on the basis that the Court of Appeal judge again sat on the case after the Federal Court had given its decision on 9 January 1987. The Court also saw no issue in the fact that on 27 January 1987 judge W. had extended the applicant's detention on remand.

With regard to the length of the applicant's detention on remand, the Federal Court noted the Court of Appeal's conclusion that there was a serious suspicion that the applicant had committed the offences at issue and that there existed a danger of absconding.

However, in the Court's opinion an issue arose whether the 629 days of detention on remand as of 7 May 1987, i.e. the new date fixed for the trial hearing, exceeded the maximum permissible length, as compared with the possible length of sentence. The decision of the Federal Court continues:

<German>

"Die lange Haftdauer fällt nicht dem Beschwerdeführer zur Last; er hat das Verfahren nicht erschwert. Indessen trifft auch die Behörden des Kantons Bern kein Vorwurf; vielmehr ist die überdurchschnittlich lange Prozess- und Haftdauer auf die vorstehend dargelegten Umstände (Praxisänderung des Bundesgerichtes in Befolgung einer neuen Auslegung der EMRK durch die Konventionsorgane) zurückzuführen. Unter solchen Umständen ist einzig noch zu prüfen, ob die Haftdauer, objektiv betrachtet, das Mass des Zulässigen nicht übersteige ...

Die bisher erstandenen und bis zur erstinstanzlichen Hauptverhandlung noch zu erstehenden insgesamt 629 Tage Untersuchungshaft ... erreichen ... noch nicht eine Dauer, bei der konkret die Gefahr bestünde, der Sachrichter lasse sich dadurch von der Ausfällung einer sonst allenfalls in Betracht zu ziehenden milderen Strafe abhalten."

<English translation>

"The lengthy period of detention on remand is not the responsibility of the applicant; he has not hindered the proceedings. Nevertheless, the authorities of Canton Bern can also not be reproached; rather, the extraordinary length of the proceedings and of detention on remand was caused by the above mentioned circumstances (change of case-law of the Federal Court in complying with a new interpretation by the Convention organs of the Convention). Under such circumstances it need only be examined whether the length of detention, objectively seen, has exceeded the permissible duration. ...

The altogether 629 days length of detention on remand which have so far been, or will until the trial hearing be, undergone ... do not yet amount to a duration in respect of which there would exist a concrete danger that the trial judge would let himself be influenced by it in respect of a possibly more lenient sentence ..."

Meanwhile, the applicant filed a renewed request for release from detention on remand which was dismissed on 24 March 1987 by the President of the Niedersimmental District Court who referred in his reasoning to the grounds mentioned by the Federal Court on 16 March 1987.

On 21 April 1987 the Federal Court rejected the applicant's request for reopening of the proceedings leading to its decision of 16 March 1987.

The new trial commenced on 7 May 1987, though it was suspended on the same day and a new date envisaged for the end of June 1987.

On 13 May 1987 the President of the Niedersimmental District Court decided to release the applicant from detention on remand. The applicant was then brought to the border and expelled from Switzerland.

On 3 July 1987 the applicant was convicted by the Niedersimmental District Court in absentia and sentenced to 28 months' imprisonment.

COMPLAINTS

The applicant complains that the same person, judge Sch., acted in his case both as investigating judge and trial judge, and that this was upheld by the Court of Appeal. Moreover, judge W. prolonged the applicant's detention on remand on 27 and 28 January 1987 and participated in the decision of 5 February 1987 although he had been involved in the previous appeal proceedings leading to the Court of Appeal's decision of 10 July 1986. Furthermore, on 5 February 1987 the Court of Appeal only set aside part of the first instance judgment.

The applicant further complains that, while the Federal Court gave its decision on 9 January 1987, the Court of Appeal only quashed the first instance judgment on 5 February 1987, thus obliging him in the meantime to be detained as a convicted offender with the obligation to work. He further complains of the length of detention on remand lasting 636 days. Finally, he alleges that the Niedersimmental District Court had no jurisdiction to try him.

The applicant relies on Articles 5 and 6 of the Convention.

THE LAW

1. The applicant complains that judge Sch. acted both as investigating judge and trial judge. Later, judge W. participated in the decision of the Court of Appeal of 5 February 1987 which set aside the first instance decision, although he had already participated in the decision of the Court of Appeal of 10 July 1986. Finally, not the entire first instance decision was set aside.

The Commission notes that in its decision of 5 February 1987 the Bern Court of Appeal only did not set aside the judgment of the Frutigen District Court of 18 March 1986 only to the extent that the applicant had been acquitted. Insofar as the Frutigen District Court had convicted the applicant, the Court of Appeal set aside that decision and referred the case for retrial to another court.

In these circumstances the applicant can no longer claim to be a victim of the alleged violations of the Convention within the meaning of Article 25 (Art. 25) of the Convention. It follows that in this respect the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains under Article 6 (Art. 6) of the Convention that the Niedersimmental District Court had no jurisdiction to try him.

However, the Commission is not required to decide whether or not the complaints alleged by the applicant disclose any appearance of a violation of this provision as, under Article 26 (Art. 26) of the Convention, it may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

In the present case the applicant has not shown that he obtained by means of a public law appeal a decision of the Federal Court on this complaint and has therefore not shown that he exhausted the remedies available to him under Swiss law. Moreover, his complaints do not disclose the existence of any special circumstances which might have absolved him, according to the generally recognised rules of international law, from exhausting the domestic remedies at his disposal.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and this part of the application must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant also complains of the length of his detention on remand. He relies on Article 5 para. 3 (Art. 5-3) of the Convention which states:

"3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The period to be considered under Article 5 para. 3 (Art. 5-3) of the Convention commences with the applicant's arrest and detention. It ends with the day on which the charge is determined by a court of first instance. Thereafter the person is in a position provided for by Article 5 para. 1 (a) (Art. 5-1-a) of the Convention which authorises deprivation of liberty "after conviction" (see Eur. Court H.R., Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 23-24 para. 9).

The present applicant was arrested on 17 August 1985. The judgment of the Frutigen District Court was given on 18 March 1986, i.e. after seven months and one day. Subsequently, after the Federal Court had given its decision on 9 January 1987, the Bern Court of Appeal quashed on 5 February 1987 the decision of the Frutigen District Court. Thus, as from this last mentioned date a further three months and eight days lapsed until the applicant was released from detention on 13 May 1987.

The total period to be considered under Article 5 para. 3 (Art. 5-3) of the Convention is therefore 10 months and 9 days.

According to the Convention organs' case-law, in determining whether in a given case the detention of an accused person exceeds a reasonable limit, it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty. Moreover, even if the grounds cited by the national judicial authorities are pertinent, this does not exempt them from their obligation under the Convention if they themselves are seen to have prolonged the detention unreasonably (see the Wemhoff judgment, ibid. p. 21 et seq. paras. 1 et seq.).

In the present case the Swiss authorities referred to the urgent suspicion that the applicant had committed the offences at issue as well as to a danger of absconding in view of the fact that he had no place of residence in Switzerland. In its decision of 16 March 1987 the Federal Court explained the duration as resulting from the fact that the applicant's public law appeal had been successful in that the Federal Court had changed its case-law concerning the role under Article 6 para. 1 (Art. 6-1) of the Convention of the investigating judge in trial proceedings.

Furthermore, the Commission finds that the case in question concerned over 60 charges relating to completed or attempted fraud and theft. The charges related to damages of altogether 37,804.- SFr allegedly caused between 1979 and 1985 on many occasions in various towns in Switzerland. In the Commission's opinion the case could therefore be regarded as complex.

It remains to be considered whether the Swiss authorities displayed the diligence required by the Convention in the case of a detained person. In this respect, the applicant has not alleged that during any particular time there were undue delays on the part of the authorities conducting the proceedings. The Commission notes here the

following.

After the applicant had been remanded in custody on 17 August 1985 he was committed for trial after approximately five and a half months on 3 February 1986. The trial took place six weeks later on 18 March 1986 on which day the applicant was convicted. When the proceedings were resumed before the Niedersimmental District Court on 5 February 1987 a hearing was fixed three months later for 7 May 1987. When on that date the trial had to be postponed the applicant was released six days later on 13 May 1987.

Moreover, in its decision of 16 March 1987 the Federal Court carefully reviewed the necessity for the continuation of the applicant's detention on remand and concluded that detention would not yet exceed the permissible length if the trial hearing was held on 7 May 1987. In this respect the Commission notes that, when the trial was postponed on that date, the applicant was released shortly thereafter.

The Commission considers therefore that the Swiss authorities persistently pursued the investigations in a complex case and did not unreasonably prolong the detention. As a result, the period of the applicant's detention on remand did not exceed what can be considered reasonable within the meaning of Article 5 para. 3 (Art. 5-3) 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.

4. The applicant complains under Articles 5 and 6 (Art. 5, 6) of the Convention that judge W. lacked impartiality when he decided to prolong the applicant's detention on remand on 27 and 28 January 1987 and, as presiding judge of the Court of Appeal, on 5 February 1987, although he had previously presided over the Court of Appeal when it decided on 10 July 1986 on his appeal.

Insofar as the applicant may be understood as complaining under Article 5 (Art. 5) of the Convention, the Commission notes that according to its above-mentioned case-law the applicant was at this stage detained "following conviction" within the meaning of Article 5 para. 1 (a) (Art. 5-1-a), and that the court under Article 5 para. 4 (Art. 5-4) does not have to review the correctness of a criminal conviction under Article 5 para. 1 (a) (Art. 5-1-a) (see Caprino v. the United Kingdom, Comm. Report 17.7.80, D.R. 22 p. 13, para. 66).

In this respect the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

Insofar as the applicant may be understood as complaining under Article 6 para. 1 (Art. 6-1) of the Convention, the Commission notes that the prolongation of the applicant's detention on remand does not amount to a "determination ... of any criminal charge" against the applicant within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application must therefore be rejected as being incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Articles 5 and 6 (Art. 5, 6) of the Convention that after the Federal Court had given its decision on 9 January 1987 the Court of Appeal set aside the first instance judgment only on 5 February 1987, thus obliging him in the meantime to be detained as a convicted offender with the obligation to work. However the Commission finds no issue under these provisions. It follows that this last 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

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)