AS TO THE ADMISSIBILITY OF

Application No. 26352/95
by G. G.
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 17 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

Mrs. M.F. BUQUICCHIO, 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 3 January 1995 by G. G. against Germany and registered on 30 January 1995 under file No. 26352/95;

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 applicant, a German citizen born in 1917, is a pensioner residing in Volsheim in Germany.

The facts of the case, as submitted by the applicant, may be summarised as follows.

Particular circumstances of the case

The applicant owns a house in Nürnberg which in 1983 he let to the P. couple. In 1989 the tenants complained of deficiencies in the house. When the repairs were not undertaken, the tenants introduced an action against the applicant for damages before the Nürnberg District Court (Amtsgericht).

During these proceedings it transpired that the state of the house had deteriorated, and in 1991 the applicant introduced two actions against the tenants before the Nürnberg District Court. The District Court proceedings were conducted by judge Z.

In the first action, filed on 26 March 1991, the applicant

claimed damages of 11,345 DM. After conducting an oral hearing on 2 December 1991, the District Court on 23 April 1992 partly upheld the action, awarding the applicant 7,298 DM.

In the second action, filed on 20 November 1991, the applicant claimed damages of 6,210 DM. The District Court rejected the action on 14 May 1992, without having conducted an oral hearing as the applicant had not duly paid the court costs.

Appeals were filed by the tenants against the judgment of 23 April 1992, and by the applicant against the judgment of 14 May 1992.

The appeal proceedings were conducted before the Nürnberg Regional Court (Landgericht).

On 11 August 1992 the case was referred to the single judge (Einzelrichter) St. of the Regional Court.

A hearing took place before the Regional Court on 28 October 1992. According to the minutes, it was considered that the applicant had in fact duly paid the court costs for his second action before the District Court, but that the case need not be sent back to that court. Rather, both actions could be joined. The minutes also stated that the hearing was conducted by single judge K., and that judge St. agreed to the joining of the actions.

By order of 3 November 1992 judge St. invited the parties to an oral hearing on 24 November 1992. At the hearing, conducted by judge St., the parties submitted further documents and named a witness to be heard by the court.

Judge St. then heard altogether 16 witnesses and one expert at hearings conducted on 9 February, 23 March, 20 April and 15 June 1993.

It appears that judge St. was then transferred to another court.

According to the plan for Distribution of Business (Geschäftsverteilung) of the Nürnberg Regional Court, issued by its Presiding Committee for the years 1992-1994, District judge C., would be sitting on the bench of the Chamber dealing with tenancy matters in second instance as from 1 February 1994. The plan referred to the Presiding Committee's decisions (Präsidialbeschlüsse) of 31 January and 23 February 1994.

On 26 April 1994 a hearing took place which was conducted by judge C. According to the minutes, judge C. announced the decision for 31 May 1994; the parties "were in agreement with a decision by the single judge" (i.e. by judge C.).

By letter of 26 April 1994, transmitted to the Regional Court on 3 May, the applicant suggested in respect of the decisions of 28 October and 3 November 1992 that the two proceedings should be separated and the second action should be referred back to the District Court. The applicant substantiated his request by pointing out that judge St. who had obtained an intimate knowledge of the facts of the case had been transferred to another court; it would be much easier for the new judge to familiarise himself with the complex facts of the case if the two cases were again separated.

On 31 May 1994 the Nürnberg Regional Court gave its judgment which was signed by "C., Judge at the District Court" ("C., Richter am Amtsgericht"). The judgment partly upheld the applicant's appeal and ordered the tenants to pay 869 DM plus interests to the applicant.

The applicant filed a constitutional complaint (Verfassungsbeschwerde) in which he complained that the Regional Court had not

referred the case back to the District Court, thus depriving him of two instances which examined the facts of the case. In this respect he referred to S. 29a of the Code of Civil Procedure (Zivilprozessordnung) which provides that tenancy disputes shall be dealt with by a District Court.

In his constitutional complaint the applicant further complained that judge St. who had participated at various hearings of witnesses had not issued the judgment. On the other hand, judge C., who had issued the judgment, had not heard any witnesses. In this respect the applicant referred to S. 309 of the Code of Civil Procedure according to which a judgment may only be issued by a judge who has participated in the hearing leading to the judgment (der dem Urteil zugrunde liegenden Verhandlung beigewohnt). The applicant also complained that C., a District Court judge, had signed a judgment of the Regional Court.

On 7 November 1994 the Federal Constitutional Court (Bundesverfassungsgericht) decided not to accept the constitutional complaint for examination.

Relevant domestic law

According to S. 309 of the Code of Civil Procedure (Zivilprozessordnung) a judgment may only be issued by judges who participated at the final hearing leading to the decision (welche der dem Urteil zugrunde liegenden Verhandlung beigewohnt haben).

According to S. 21e of the Courts' Organisation Act (Gerichtsverfassungsgesetz), the Presiding Committee of a court determines before the beginning of the relevant year, inter alia, the composition of the benches, the replacement of judges and the allocation of work. These rules can exceptionally be changed during the year concerned, if this is necessary, inter alia, in view of the excessive work-load of a judge or bench.

S. 295 of the Code of Civil Procedure provides that a complaint about a breach of procedure or the form of a procedural act can no longer be raised if the party has renounced compliance with the provision (auf die Befolgung der Vorschrift verzichtet).

COMPLAINTS

The applicant raises various complaints under Article 6 para. 1 of the Convention.

1. The applicant complains that, once it was found that he had duly paid in the costs before the District Court, the Regional Court should have referred his case back to the District Court. As it did not do so, he did not have two court instances deciding on the facts of his case.

2. He further complains that he did not have a judge established by law. In particular, the judgment of 31 May 1994 of the Nürnberg Regional Court was signed by judge C. who was a District judge and thus not entitled to issue a judgment of the Regional Court.

3. The applicant also complains that in the Regional Court proceedings judge C., who issued the judgment, had not participated at the hearings of the witnesses. These hearings had been conducted by judge St. who had personally heard altogether 16 witnesses but had nevertheless not issued the judgment. The applicant submits that this was contrary to S. 309 of the Code of Civil Procedure.

4. Finally, in submissions filed with the Commission on 10 October 1996, the applicant also complains of the length of the proceedings

before the Regional Court.

THE LAW

1. The applicant raises various complaints about the Nürnberg Regional Court and its proceedings. He relies on Article 6 para. 1 (Art. 6-1) of the Convention which states:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by (a) tribunal established by law."

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that he did not have two court instances deciding on the facts of his case.

However, according to the Convention organs' case-law, the right to appeal is not as such guaranteed by the Convention (see Eur. Court HR, Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11, p. 14, para. 25).

This part of the application is, therefore, incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant complains that he did not have a tribunal established by law within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. In particular, the judgment of 31 May 1994 of the Nürnberg Regional Court was signed by judge C. who was a District judge and thus not entitled to issue a judgment of the Regional Court.

According to the Convention organs' case-law, the purpose of the requirement in Article 6 para. 1 (Art. 6-1) that courts shall be "established by law" is that the judicial organisation in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, Article 6 para. 1 (Art. 6-1) does not require the legislature to regulate every detail in this area by formal Act of Parliament if the legislature establishes at least the organisational framework for the judicial organisation (cf. Zand v. Austria, Comm. Report 12.10.78, D.R. 15, p. 80; see also Eur. Court HR, Piersack v. Belgium judgment of 1 October 1982, Series A no. 53, p. 16, para. 33).

The present case concerned a tenancy matter in second instance. According to the plan for the Distribution of Business of the Nürnberg Regional Court, issued by its Presiding Committee for the years 1992-1994, District judge C. would be sitting on the bench of the Chamber dealing with tenancy matters in second instance as from 1 February 1994. The Plan referred to the Presiding Committee's decisions (Präsidialbeschluss) of 31 January and 23 February 1994.

The Commission considers that the Presiding Committee thereby exercised its functions under Section 21e of the Courts' Organisation Act, namely to organise the distribution of cases and the placement of judges or benches and, if necessary in view of the excessive workload of a bench, to change in between the rules governing a particular year.

Thus, the decision of the Presiding Committee according to which District judge C. would decide the applicant's case, was taken on the basis of the relevant legislation. The Court deciding on the applicant's case was, hence, a "tribunal established by law" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

4. The applicant complains that in the Regional Court proceedings judge C., who issued the judgment, had not participated at the hearings of the witnesses. These hearings had been conducted by judge St. who had nevertheless not issued the judgment.

It is true that in the present case, judge St. first heard altogether 16 witnesses, and that, after his transfer to another court, judge. C. issued the Regional Court's decision on 31 May 1994.

The issue arises, however, whether the applicant, by failing to complain before the Nürnberg Regional Court that judge C. had not heard the witnesses, waived his rights under Article 6 para. 1 (Art. 6-1) of the Convention.

According to the Convention organs' case-law, such a waiver is not excluded, but it must be established in an unequivocal manner. Moreover, in the case of procedural rights, as in the present case, the waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance (see Eur. Court HR, Pfeifer and Plankl v. Austria judgment of 25 February 1992, Series A no. 227, pp. 16-17, para. 37). In the Pfeifer and Plankl case, for instance, it was found that a waiver was not envisaged by law; moreover, the judges concerned had acted unlawfully, and undue pressure had been put on the applicant (op. cit., p. 17, para. 38).

In the present case, the parties were made aware at the hearing of 26 April 1994 that single judge C., who had not heard the witnesses, would be issuing the judgment on 31 May 1994. According to the minutes, the applicant was in agreement therewith.

Moreover, in his letter of 26 April 1994, in which the applicant referred to judge St.'s transfer to another court, he did not complain that judge C. had not heard the witnesses. Rather, he suggested that for practical purposes the two cases pending before the Regional Court should be separated.

The present case also differs from the above cited Pfeifer and Plankl case in that S. 295 of the Code of Civil Procedure expressly envisages the possibility of a waiver of an alleged breach of rules of procedure. Moreover, no undue pressure was placed on the present applicant to waive his rights. Finally, judge C. had not acted unlawfully. On the one hand, the Commission has just found that the Nürnberg Regional Court deciding on the applicant's case was a "tribunal established by law." On the other hand, S. 309 of the Code of Civil Procedure was complied with in that judge C. participated in the final hearing on 26 April 1994 before issuing the judgment.

In these circumstances, the applicant could have been expected to complain that judge C. had not heard the witnesses, if he attached importance to it. As he failed to do so, it may be considered that he unequivocally waived his rights under Article 6 para. 1 (Art. 6-1) of the Convention.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention of the length of the proceedings.

According to Article 26 (Art. 26) of the Convention, the Commission may only deal with a case "within a period of six months from the date on which the final decision was taken".

In the present case, the Federal Constitutional Court gave its final decision on the case on 7 November 1994. The complaint at issue, however, was only introduced before the Commission on 10 October 1996.

The remainder of the application has, therefore, been introduced out of time, and it must be declared inadmissible within the meaning of Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber