AS TO THE ADMISSIBILITY OF

Application No. 12748/87
by G.
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private on 14 March 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
A.S. GÖZÜBÜYÜK
A. WEITZEL
H.G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
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 5 February 1987 by G. against the Federal Republic of Germany and registered on 20 February 1987 under file No. 12748/87;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to :

- the observations submitted by the respondent Government on 14 March 1988 and the observations in reply submitted by the applicant on 13 May 1988;

- the submissions made by the parties at the hearing on 14 March 1989.

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, which do not appear to be in dispute between the parties, may be summarised as follows.

The applicant, born in 1951, is a German national and resident in Dortmund. He is a mechanic by profession. Before the Commission he is represented by Mr. P. Budde, a lawyer practising in Dortmund.

On 23 July 1981 the Dortmund District Court (Amtsgericht) convicted the applicant of an offence under the Narcotics Act (Gesetz über den Verkehr mit Betäubungsmitteln) and sentenced him to one year's imprisonment. The execution of the sentence was suspended on probation.

At the end of 1985 the Dortmund Prosecutor's Office (Staatsanwaltschaft) began preliminary investigations against the applicant on the charge that on 29 October 1985 he had dealt in heroin of a considerable quantity. On 10 January 1986 the applicant, represented by counsel, denied that he had heroin with him on 29 October 1985.

On 21 April 1986 the Dortmund Regional Court (Landgericht), acting as court supervising the execution of sentences (Vollstreckungsgericht), revoked the suspension of 23 July 1981.

In the reasons given for its decision the Court referred in particular to S. 56(f) para. 1 (1) of the German Penal Code (Strafgesetzbuch) according to which the court supervising the execution of sentences revokes the suspension of a sentence if the convicted person commits another criminal offence during the period of probation and, thereby, shows that he did not fulfil the expectations upon which the suspension of the sentence was based ("Das Gericht widerruft die Strafaussetzung, wenn der Verurteilte in der Bewährungszeit eine Straftat begeht und dadurch zeigt, dass die Erwartung, die der Strafaussetzung zugrunde lag, sich nicht erfüllt hat, ...").

The Regional Court found that the applicant had committed another criminal offence of the same kind during the period of probation. ("Der Verurteilte ist in der Bewährungszeit erneut einschlägig straffällig geworden".) It considered that on 29 October 1985 he had dealt in drugs of a significant quantity and that according to a chemical expert opinion of 26 February 1986 it was heroin. He had, therefore, committed an offence under the Narcotics Act and shown that he did not fulfil the expectations upon which the suspension of his sentence was based. He had not submitted any reasons which could excuse his conduct. ("Es liegt mithin eine Straftat ... <nach dem> Gesetz über den Verkehr mit Betäubungsmitteln vor. Durch sein Verhalten hat der Verurteilte gezeigt, dass sich die Erwartungen, die der Strafaussetzung zugrunde liegen, nicht erfüllt haben. Der Verurteilte hat keine Umstände vorgetragen, die sein Verhalten entschuldigen könnten.")

On 9 July 1986 the Hamm Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal (sofortige Beschwerde) against the decision of 29 October 1985 on the ground that the reasons given in that decision were in their conclusion correct. The Court left the question open whether or not the applicant had dealt in drugs. It stated that, having regard to the results of the preliminary investigations in the recent criminal proceedings before the Dortmund District Court, it was convinced that on 29 October 1985 the applicant, in any event, unlawfully possessed 30 mg of a mixture of various drugs. This repeated criminal conduct of the applicant in respect of a similar kind of criminal offence during his probationary period would justify and require that the suspension of his sentence be revoked without, on the evidence before the Court, a final conviction being necessary. ("Nach dem Ergebnis der Ermittlungen in dem neuerlichen Strafverfahren ... <vor dem> AG Dortmund ist der Senat davon überzeugt, dass der Verurteilte am 29. Oktober 1985 jedenfalls ohne Erlaubnis 30 mg eines Gemisches aus <verschiedenen Rauschgiften> in Besitz gehabt hat. Auch dieses erneute und einschlägige strafbare Verhalten des <Beschwerdeführers>, das er innerhalb der Bewährungszeit aus dem vorliegenden Verfahren begangen hat, rechtfertigt und erfordert nunmehr den Widerruf der Strafaussetzung, ohne dass es bei der gegebenen Beweislage zuvor einer entsprechenden rechtskräftigen Verurteilung bedarf.")

On 1 December 1986 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde) on the ground that it offered no prospect to success. The Court found in particular that the presumption of innocence derived from the principle of the rule of law was not violated. It considered that by virtue of this principle no

measures amounting to a penalty may be taken against a defendant without his guilt having been established according to law. However, not every finding of guilt would contravene the principle of the rule of law. According to constant jurisprudence S. 56(f) para. 1 (1) of the Penal Code did not require that the defendant had already been convicted, but the court supervising the execution of sentences, upon the basis of its own assessment, must be convinced that he committed the offence in question. This jurisprudence could not be objected to from a constitutional point of view. The revocation of a suspension constituted the consequence of the positive decisions to suspend the sentence. It deprived the defendant of an advantage which was based on a prognosis as to his future conduct and, in any event, subject to certain insecurities. The court supervising the execution of sentences could not be prevented from revoking a suspension in circumstances which would have given it reason not to suspend the sentence at the time of its initial decision.

In the criminal proceedings before the Dortmund District Court the applicant was convicted on 14 January 1987 of unlawful possession of drugs and sentenced to ten months' imprisonment. The execution of the sentence was suspended on probation. The applicant did not pursue his appeal (Berufung).

On 12 March 1987 the Dortmund Regional Court, deciding on matters of grace (Gnadenstelle), suspended the remainder of the applicant's sentence on probation until 10 March 1990.

COMPLAINTS

The applicant complains under Article 6 para. 2 of the Convention that the German court decisions revoking the suspension of his sentence violated the presumption of innocence. He considers that the courts, on the evidence before them, could not be convinced of the applicant's guilt as required under S. 56(f) of the Penal Code. The revocation of a suspension was not only a provisional measure but in fact amounted to a penalty.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 February 1987 and registered on 20 February 1987.

On 9 December 1987 the Commission decided in accordance with Rule 42 para. 2 (b) of its Rules of Procedure to give notice of the application to the respondent Government and to invite them to present before 11 March 1987 their observations in writing on the admissibility and merits of the application.

The Government's observations were dated 14 March 1988 and received on 21 March 1988. The applicant's reply of 13 May 1988 was received on 20 May 1988.

On 24 March 1988 the President of the Commission decided that legal aid should be granted to the applicant for the representation of his case before the Commission.

At the hearing the parties were represented as follows:

For the Government:

Mr. Stöcker	Ministerialrat Federal Ministry of Justice,	Agent
Mr. Berg	Richter am Landgericht, Federal Ministry of Justice,	Adviser

For the applicant

Mr. Budde Lawyer, Representative

Mr. Vogler Law Professor, Adviser

The applicant was present at the hearing.

THE LAW

The applicant complains that the decisions of the Dortmund Regional Court dated 21 April 1986 and the Hamm Court of Appeal dated 9 July 1986 reflect the opinion that he had committed a new criminal offence although this charge had not yet been determined by the competent trial court. He considers that they amount to a violation of Article 6 para. 2 (Art. 6-2) of the Convention which reads:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The respondent Government contend that the application is incompatible ratione materiae with the provisions of the Convention. They compare the present case with proceedings concerning only the kind or level of punishment and refer to the Convention organs' case-law in this respect (Eur. Court H.R., Engel and others judgment of 8 June 1976, Series A No. 22, para. 90; Eur. Commission H.R., No. 5620/72, Dec. 18.7.74 ; No. 7058/75, Dec. 12.7.76).

The Commission recalls that a case may raise an issue under Article 6 para. 2 (Art. 6-2) if a court expresses an opinion as to an accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise his rights of defence (cf. Eur. Court H.R., Minelli judgment of 25 March 1983, Series A no. 62, p. 18 para. 37; mutatis mutandis, Eur. Court H.R., Lutz/Englert/Nölkenbockhoff judgments of 25 August 1987, Series A no. 123, p. 25 para. 60, p. 54 - 55 para. 37 and p. 79 para. 37, respectively; cf. also Eur. Commission H.R., No. 7986/78, Dec. 3.10.78, D.R. 13 p. 73).

The Commission notes that in the present case the court decisions complained of related to a criminal charge against the applicant under the Narcotics Act in respect of which preliminary investigations were conducted by the Dortmund Public Prosecutor's Office since the end of 1985.

As regards the Government's submission that the applicant can no longer claim to be a victim of a violation of the Convention, in the sense of Article 25 (Art. 25) of the Convention, the Commission finds that the decision of the Dortmund Regional Court of 12 March 1987 to suspend the sentence as a matter of grace and to prolong the period of probation did not remedy the possible violation of Article 6 para. 2 (Art. 6-2) (cf. Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, pp. 30 - 31 para. 66).

The Government also contend that S. 56 (f) para. 1(1) of the German Penal Code, as applied in the present case, is in conformity with the principles laid down by the European Court and Commission of Human Rights as regards the presumption of innocence. They submit in particular that both the Dortmund Regional Court and the Hamm Court of Appeal arrived at the conclusion that the applicant had committed another criminal offence during his period of probation, in judicial proceedings (justizförmiges Verfahren), in which he had the opportunity to exercise his rights of defence.

The Commission, however, considers that the applicant's

complaint raises complex issues of fact and law which can only be resolved by an examination of the merits. The application cannot, therefore, be declared manifestly ill-founded. No other grounds for inadmissibility have been established.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE
without prejudging the merits of the case

Secretary to the Commission — President of the Commission

(H. C. KRÜGER) — (C. A. NØRGAARD)