AS TO THE ADMISSIBILITY OF

Application No. 19929/92
by H.Ö.
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 1 September 1993, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
G.B. REFFI
N. BRATZA

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 21 February 1992 by H.Ö. against Germany and registered on 16 April 1992 under file No. 19929/92;

Having regard to:

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

- the observations submitted by the respondent Government on 27 October 1992 and the observations in reply submitted by the applicant on 25 January 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen, born in 1945 and presently detained in prison in Koblenz. He is represented by Mr. M. Enders, a lawyer practising in Koblenz.

The applicant complains of his detention on remand.

It follows from his statements and the documents submitted that on 24 July 1991 the District Court (Amtsgericht) in Koblenz issued a warrant of arrest against the applicant who was suspected of tax evasion. The applicant had been provisionally arrested the previous day, i.e. 23 July 1991.

On 24 October 1991 the District Court ordered that the applicant's detention on remand should continue.

On 4 November 1991 the Koblenz Regional Court (Landgericht) rejected the applicant's appeal against the order of 24 October 1991. It is stated in the decision that on the basis of the result of the investigations and in particular the seized documents, there was strong

suspicion that the applicant as manager of the firm API GmbH (company with limited liability) had evaded taxes. The company had according to the findings of the investigation authorities been acting as an employment agency and had not paid taxes and social security contributions due in connection with the wages paid by it.

The court further considered that there was danger of absconding as the applicant had to expect serious punishment and might therefore be tempted to return to Turkey despite the fact that his family lived in Germany and two of his children went to school there. Furthermore his company had gone bankrupt and the applicant no longer had any regular income. The court noted that it was unnecessary to decide whether the danger of suppression of evidence, mentioned in the arrest warrant of 24 July 1991, still existed.

On 2 December 1991 the Koblenz Court of Appeal (Oberlandesgericht) rejected the applicant's further appeal. The court considered that in view of the evidence given by the applicant's former employee H. there was evidence that the applicant had knowingly evaded taxes in the amount of some 836,000 DM and social security contributions in the amount of some 407,000 DM. He therefore had to expect a severe sentence and consequently there was a risk of absconding in that he returned with his family to Turkey in order to live there under a new identity to avoid extradition. According to the courts, however, no danger of suppression of evidence could be established.

The applicant then lodged a constitutional complaint.

On 29 January 1992 a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) rejected this complaint as offering no prospects of success. The court considered that the decisions complained of did not disclose any violation of constitutional rights or arbitrariness. The continuing detention on remand was also not disproportionate as the applicant had to expect a severe sentence.

On 7 February 1992 the Koblenz Court of Appeal ordered that the applicant's detention should continue and that the question of whether or not it should be maintained should again be examined on 7 May 1992.

The court stated further evidence taken in the meantime confirmed the strong suspicion against the applicant. Contrary to the arguments of the defence, the courts considered that the finance authorities' decision of 16 January 1992 suspending the execution of a tax payment order dated 28 August 1991 did not prove that the claims raised by the tax authorities against the applicant were unfounded. The suspension had been ordered in consequence of an appeal lodged by the applicant and had only been ordered provisionally pending the outcome of the examination of the applicant's appeal. This did not mean that the appeal and the applicant's objections against his tax liability were well-founded. The court further stated that in view of the complexity of the case and the necessity to hear a large number of witnesses it had not yet been possible to terminate the investigation proceedings. According to information given by the public prosecution a further month was necessary to hear witnesses. Furthermore the final report of the finance authorities had not yet been established. Consequently it was necessary to prolong the detention on remand for three more months as danger of absconding also continued to exist for the reasons expressed in the previous decision of 2 December 1991. This did not violate the principle of proportionality.

The applicant again lodged a constitutional complaint which was rejected by a group of three judges of the Federal Constitutional Court on 10 March 1992 as offering no prospects of success. It is stated in the decision that there was nothing to show that the existence of strong suspicion against the applicant was arbitrarily assumed. In

view of the difficulty and complexity of the investigations no violation of the right to speedy proceedings was manifest and the length of detention on remand was proportionate in view of the sentence which the applicant had to expect.

On 14 May 1992 the Koblenz Court of Appeal again prolonged detention on remand.

On 11 June 1992 an indictment was filed and the main proceedings were opened on 10 July 1992.

Requests made by the defense on 15 July 1992 to suspend the proceedings pending proceedings before the finance courts and to suspend enforcement of the arrest warrant were rejected on 21 July 1992.

After several hearings the applicant was convicted on 27 August 1992 of fraud and tax evasion (Betrug und Steuerhinterziehung) and sentenced to three years imprisonment. According to the findings of the trial court the applicant had evaded wage taxes in the amount of at least DM 700,000. He had also caused damages to the social security authorities but had, to a great extent, repaired them in the meantime. The offences had been admitted by the applicant who accepted the judgment waiving his right to appeal on the day the judgment was pronounced.

Also on the same day the warrant of arrest was set aside and the applicant set free.

At the trial the applicant was defended by Mr. B, a defence counsel from Munich.

On 31 October 1992 the applicant was invited to start serving the remaining part of sentence, deduction being made of the period he had spent in prison on remand. A request to stay the execution of sentence was rejected by the Public Prosecution and this decision was confirmed on 9 November 1992 by the Regional Court. A further appeal was rejected by the Koblenz Court of Appeal on 8 December 1992. Insofar as the applicant had submitted that he needed time to propose an action against the tax authorities - action which would prove his innocence - it is stated by the appellate court that in view of the existing results of the tax authorities' investigations this action could as well be prepared while the applicant served his sentence, the stay of execution could be granted only in conjunction with a request for a retrial - if such request appeared to offer any chance of success.

The applicant thereupon returned to Turkey in order to avoid further imprisonment.

COMPLAINTS

The applicant mainly complains under Article 5 paras. 1 (c) and 3 of the Convention that his detention on remand was unjustified and unreasonably prolonged. He submits that he admitted the charges laid against him only in order to get free and obtain access to the seized documents needed for the preparation of his action against the tax authorities. He further submits that had he been released before his trial and given enough time and opportunity to prepare his defense he would not have fled. After conviction as a result of an unfair trial he had however no other choice than to leave Germany provisionally and leave his family behind. He now also complains of the alleged unfairness of the criminal proceedings.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 February 1992 and registered on 16 April 1992.

On 7 July 1992 the Commission decided that notice of the complaint on the length of detention should be given to the respondent Government, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure, and that the parties should be invited to submit their written observations on the admissibility and merits of this complaint.

The Government sent their written observations on 27 October 1992. The applicant's representative submitted observations in reply on 25 January 1993.

THE LAW

1. The applicant mainly questions the lawfulness and length of his detention on remand.

The applicant points out that once he was made to "confess" during the trial he was immediately released and there was no longer question of any danger of absconding.

The Government submit, that in the course of the investigations first of all a great number of documents had to be sifted and examined, then a number of witnesses had to be heard and an audit report of the tax authorities had to be awaited. In view of the difficulty and complexity of the matter it had been handled with adequate diligence, and a detailed and uncontested calendar of proceedings was submitted by the Government in support of the latter submission.

It is in the first place the task of the national judicial authorities to ensure that pre-trial detention does not exceed a reasonable time. Convention organs decide the question of whether or not the "reasonable time" exigency was respected essentially on the basis of the reasons given in the decisions of the domestic courts and of the true facts mentioned by the applicant in his applications for release.

The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of continued detention, but, after a certain lapse of time, it no longer suffices. The Commission must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty and whether the competent national authorities displayed adequate diligence in the conduct of the proceedings (Eur. Court H.R., W. v. Switzerland, judgment of 26 January 1993, Series A No. 254, para. 30) which lasted from 23 July 1991 until 27 August 1992 when the applicant was convicted and sentenced. He thus spent a little more than thirteen months in detention on remand.

The Commission notes that the applicant's detention on remand was, in accordance with German law, prolonged at regular intervals by the Koblenz Court of Appeal on the ground that not only was there strong suspicion against the applicant but also, at the first stage of proceedings, danger of collusion and throughout the applicant's detention danger of absconding. The Federal Constitutional Court twice examined complaints against these decisions and found that the complaints were unfounded the matter being dealt with by the competent authorities with adequate diligence and the length of detention being proportionate to the sentence the applicant had to expect.

The Commission cannot find that these reasons are arbitrary or unwarranted by the underlying facts . It follows in fact from the uncontested submissions of the respondent Government and the calendar of the proceedings that the length of detention on remand was due to the complexity and difficulty of the investigations and that throughout the period in question the competent authorities pursued the matter with the necessary and required diligence.

It follows that this part of the application does not disclose any appearance of a violation of Article 5 para. 1 (c) or 3 (Art. 5-1-c, 5-3) of the Convention and therefore has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complained that he was denied a fair trial and has alleged, subsequent to his conviction, that he was brought to admit the charges laid against him and to accept the judgment in order to be set free and to have access to documents necessary to prove that he had not evaded taxes.

However, the Commission is not called upon to examine this complaint as under Article 26 (Art. 26) of the Convention it may only deal with an application after all domestic remedies have been exhausted.

It is true that the applicant alleged that he accepted the judgment under pressure. However his allegations in this respect are unsubstantiated and unsupported by any kind of at least prima facie evidence. There is consequently nothing to show that the applicant, who was assisted at his trial by a defense counsel, was in any objectionable manner prevented from appealing against conviction and sentence. The applicant has not therefore, in accordance with Article 26 (Art. 26) of the Convention, complied with the condition as to the exhaustion of domestic remedies.

It follows that this part of the application has to be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber President of the First Chamber

(M.F. BUQUICCHIO) (A. WEITZEL)