AS TO THE ADMISSIBILITY OF

Application No. 16052/90
by K.H.
against the Federal Republic of Germany

The European Commission of Human Rights (First Chamber) sitting in private on 9 December 1991, the following members being present:

MM. F. ERMACORA, Acting President of the First Chamber
J.A. FROWEIN
E. BUSUTTIL
A. S. GÖZÜBÜYÜK
H. DANELIUS
Sir Basil HALL
MM. C.L. ROZAKIS
L. LOUCAIDES
A.V. ALMEIDA RIBEIRO
B. MARXER

Mr. M. de SALVIA, Secretary to the First 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 19 October 1989 by K.H. against the Federal Republic of Germany and registered on 25 January 1990 under file No. 16052/90;

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

A.Particular circumstances of the case

The facts of the case, as they have been submitted by the parties, may be summarised as follows:

The applicant, born in 1917, is a German national and resident in Hamburg. He is a businessman by profession. Before the Commission he is represented by Mr. V. Westphal, a lawyer practising in Hamburg.

On 16 January 1984 the Hamburg Fiscal Investigation Office (Steuerfahndungsstelle) started investigations against the applicant on the suspicion of having evaded taxes concerning his capital abroad. The Office had been informed, apparently by the applicant's brother, that the applicant had a place of residence relevant for tax purposes in Hamburg, contrary to his declaration in 1975 that he had moved to Freeport/Bahamas. If so, he would in principle have had to pay income tax in respect of his capital gains abroad.

On 4 April 1984 the applicant filed a declaration with the Investigation Office that his place of residence was in Costa Rica.

On 21 September 1984 the Investigation Office formally instituted preliminary investigations against the applicant. It transferred the proceedings to the Hamburg Public Prosecutor's Office (Staats-anwaltschaft) on 27 September 1984.

On 26 November 1984 the Hamburg District Court (Amtsgericht) issued a warrant of arrest. The District Court found that, according

to the investigations of the Fiscal Investigation Office, there was a strong suspicion that the applicant had evaded tax in the years 1974 until 1982 in that he had pretended not to have a place of residence and thus no taxable income in the Federal Republic of Germany.

The applicant was arrested on 22 January 1985 and detained on remand. On 15 February 1985 his detention was suspended on bail, apparently in view of his bad health. On 7 November 1985 the Hamburg District Court set both decisions aside for lack of reasonable suspicion. The District Court found, that although the applicant continued to have a place of residence in the Federal Republic of Germany, there was no sufficient evidence of taxable income abroad.

On 16 January 1988 the applicant filed a hierarchical complaint (Dienstaufsichtsbeschwerde) with the Hamburg Public Prosecutor's Office (Staatsanwaltschaft) about the continuing proceedings and also complained about the public prosecutor and the two investigators involved in the proceedings against him.

On 21 June 1988 the applicant requested the Public Prosecutor's Office to discontinue the investigations against him for lack of suspicion. On 18 July and 18 August 1988 he filed complaints about the further conduct of the proceedings. On 23 August 1988 the Public Prosecutor's Office refused to discontinue the proceedings on the ground that there was still a reasonable suspicion of a criminal offence.

On 11 May 1989 the Hamburg District Court acquitted the applicant of defamation in relation to his allegations of corruption in his complaint of 16 January 1988. The District Court considered that he had acted in protection of his own interests.

The investigation proceedings concerning tax evasion are still pending. The authorities, in particular in rogatory proceedings, seek to establish in how far the applicant had taxable income abroad. It is not clear whether and, if so, when the investigations against the applicant can be expected to be terminated and an indictment to be preferred.

B. Relevant domestic law and practice

SS. 112 to 131 of the Code of Criminal Procedure (Strafprozeß-ordnung) concern the arrest and detention of a person on reasonable suspicion of having committed an offence.

SS. 151 to 177 of the Code of Criminal Procedure regulate the principles of criminal prosecution and the preparation of the indictment. S. 151 provides that the opening of a trial presupposes an indictment. According to S. 152 the indictment is preferred by the Public Prosecutor's Office which is, unless otherwise provided, obliged to investigate any criminal offence of which there is a reasonable suspicion.

Preliminary investigations are conducted by the Public Prosecutor's Office according to SS. 160 and 161 of the Code of Criminal Procedure. On the basis of these investigations the Public Prosecutor's Office decides under S. 170 whether to prefer an indictment or to discontinue the proceedings.

According to Article 93 para. 1 (4a) of the Basic Law (Grund-gesetz) the Federal Constitutional Court (Bundesverfassungsgericht) shall decide on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph 4 of Article 20, under Articles 33, 101, 103, or 104 has been violated by public authority. S. 90 para. 2 (2) of the

Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz) provides that the constitutional complaint has a subsidiary character and may, in principle, only be lodged after exhaustion of ordinary remedies.

According to the case-law of the Federal Constitutional Court, the necessary conclusions of a violation of a person's right to a speedy determination of any criminal charge against him have first to be drawn by the criminal courts applying and interpreting the penal and procedural law (Dec. 24.11.83, 2 BvR 121/83, Neue Juristische Wochenschrift 1984 p. 967).

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention about the length of the preliminary investigations against him. He also invokes his right to security under Article 5 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 October 1989 and registered on 25 January 1990.

On 7 January 1991 the Commission decided to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits.

The Government's observations were submitted on 2 May 1991. On 23 May 1991 the applicant submitted his observations in reply.

On 27 May 1991 the Commission referred the application to the First Chamber.

THE LAW

1.The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of preliminary investigations against him concerning tax evasion. He also invokes Article 5 (Art. 5) of the Convention.

Article 6 para. 1 (Art. 6-1) provides, inter alia, that, in the determination of any criminal charge against him, everyone is entitled to a hearing within a reasonable time.

2.The Government submit that the applicant's complaint about the length of the preliminary investigations against him is incompatible ratione materiae with the provisions of the Convention. They consider that Article 6 para. 1 (Art. 6-1) does not grant a right to preliminary investigations by the Public Prosecutor's Office "within a reasonable time", but only applies to proceedings before the trial court. Only in such cases, the relevant period to be considered could start at an earlier date. In the particular situation that a person suspected of a criminal offence was arrested and detained on remand, Article 5 para. 3 (Art. 5-3), second sentence, of the Convention secured the right to trial within a reasonable time or to release pending trial.

The Commission finds that the applicant's complaint about the length of the criminal proceedings against him does not clearly fall outside the provisions of the Convention (cf., mutatis mutandis, Eur. Court H.R., "Belgian Linguistic" judgment of 9 February 1967, Series A no. 5, p. 18). The question whether or not Article 6 para. 1 (Art. 6-1) of the Convention applies to the preliminary investigations conducted by the Hamburg Public Prosecutor's Office against the applicant therefore goes to the merits of the application.

It follows that the application is not incompatible with the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

3.Furthermore, the Government consider that the applicant failed to exhaust the remedies available to him under German law, as required by Article 26 (Art. 26) of the Convention, in that he did not lodge a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court (Bundesverfassungsgericht). They submit that the Federal Constitutional Court has already decided about complaints concerning the refusal of information pending preliminary investigations, and concerning the complaint that an arrest warrant was upheld for an excessive period.

The Commission recalls that the only remedies which Article 26 (Art. 26) of the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. It falls to the respondent Government to establish that these various conditions are satisfied (Eur. Court H.R., De Jong, Baljet and Van Den Brink judgment of 22 May 1984, Series A no. 77, p. 19, para. 39).

The Commission observes that the constitutional complaint with the Federal Consitutional Court is a remedy with a subsidiary character. According to the case-law of the Federal Constitutional Court, the necessary conclusions of a violation of a person's right to a speedy determination of any criminal charge against him have first to be drawn by the criminal courts applying and interpreting the penal and procedural law (Dec. 24.11.83, cit. op.). The Government have not cited any decision of the Federal Constitutional Court considering the merits of a complaint about the unreasonable length of pending criminal proceedings.

In these circumstances, the Government have failed to prove that a constitutional complaint with the Federal Consitutional Court could constitute an available and sufficient remedy which the applicant ought to have exhausted.

The Commission concludes that the applicant has complied with the condition as to the exhaustion of domestic remedies.

4.Finally, the respondent Government have submitted that the investigations against the applicant are especially difficult on the ground that they involve rogatory proceedings in order to establish the applicant's capital gains abroad, which were very time-consuming and difficult because they concerned tax offences.

The Commission considers that the applicant's complaint about the preliminary investigations against him on the suspicion of tax offences raises questions of fact and of law, which can only be determined on the basis of an examination of the merits. The application cannot, therefore, be declared manifestly ill-founded under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE
without prejudging the merits of the case.

Secretary to Acting President of
the First Chamber the First Chamber

(M. de SALVIA) (F. ERMACORA)