AS TO THE ADMISSIBILITY OF

Application No. 26246/95
by H. W. K.
against Switzerland

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997 the following members being present:

Mrs. J. LIDDY, President
MM. S. TRECHSEL
M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 7 December 1994 by H. W. K. against Switzerland and registered on 19 January 1995 under file No. 26246/95;

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 Swiss citizen born in 1931, is a lawyer residing in Zumikon in Switzerland. Before the Commission he is represented by MM. Poledna and Stickelberger, lawyers practising in Zürich.

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

On 7 December 1989 the Zürich Public Prosecutor's Office indicted the applicant of various offences in connection with the increase of stock capital of the T. company. In the ensuing criminal proceedings, the applicant was represented by two lawyers.

The applicant contested the bill of indictment in particular as the various items therein did not sufficiently describe the offences with which he was charged.

On 2 August 1990 the Indictment Chamber of the Court of Appeal (Anklagekammer des Obergerichts) of the Canton of Zürich preferred the indictment (Zulassung der Anklage) and referred the case for trial to the Court of Appeal. In its decision, the Indictment Chamber found,

inter alia, that the facts of the case (Sachverhalt) had been described in a sufficiently clear manner to enable the applicant to determine all the offences with which he had been charged.

At the trial before the Court of Appeal which commenced on 21 August 1991 the applicant unsuccessfully requested the hearing of certain witnesses.

On 3 September 1991 the Court of Appeal, after deliberating in public, convicted the applicant, inter alia, of certain charges of fraud and of falsifying documents and sentenced him to one year's imprisonment, suspended on probation; he was acquitted of certain other charges. The judgment numbering 224 pages was served on the applicant on 27 January 1992.

According to the then applicable S. 431 of the Code of Criminal Procedure (Strafprozessordnung) of the Canton of Zürich, the applicant had at his disposal a time-limit of ten days for filing a plea of nullity (Nichtigkeitsbeschwerde) with the Court of Cassation (Kassationsgericht) of the Canton of Zürich, and a time-limit of 20 days for filing a plea of nullity with the Federal Court (Bundesgericht). The applicant then employed both remedies.

The applicant's plea of nullity was dismissed by the Court of Cassation on 25 March 1993.

The applicant then filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court.

In two judgments of 20 May 1994, numbering 23 and 25 pages, respectively, the Federal Court dismissed the applicant's plea of nullity and his public law appeal.

In its judgment on the plea of nullity the Federal Court dealt, inter alia, with the applicant's complaint that the time-limit of 20 days for filing a plea of nullity with the Federal Court was too short. It considered it unnecessary to examine whether or not a prolongation should have been ordered, as the time-limit had been sufficient. Thus, the applicant had been represented by two lawyers who were both very familiar with the case.

In its judgment on the public law appeal, the Federal Court found that the time-limit of ten days for filing a plea of nullity with the Court of Cassation of the Canton of Zürich complied with the requirements of Article 6 of the Convention. Thus, the deliberations of the Court of Appeal had been public and the applicant had been made aware of the reasons of the judgment. His lawyers were, furthermore, very familiar with the files. Moreover, all the complaints in the applicant's public law appeal had already been raised in the proceedings before the Court of Appeal.

The Federal Court then dealt with the applicant's complaint that the bill of indictment had not sufficiently explained the facts underlying the charges. The Court reviewed the various items of the bill of indictment which, in its view, was "on the whole rather imprecise ... In particular, the closer circumstances of the charges raised are not described very precisely." In the Court's opinion, however, the bill of indictment had to be read as a whole, and the general sections at the beginning to be considered. Then, the object of the indictment transpired with sufficient clarity for the applicant. In this context the Federal Court also analysed the applicant's complaints about individual items of the bill of indictment. It considered that the passages complained of were in fact clear.

Finally, the Federal Court did not regard as arbitrary the Court of Appeal's refusal to hear certain witnesses. In respect of one witness, even if the Court of Appeal in doubt accepted a version

favourable to the applicant, the events concerned dated back ten years and no reliable statements could be expected. The other witness was not heard as the Court of Appeal had already duly considered his statements made in separate proceedings. In respect of further witnesses the Federal Court found that the applicant had insufficiently explained the necessity to question them (was sie im einzelnen hätten bekunden können).

COMPLAINTS

1. The applicant complains under Article 6 para. 3 (a) of the Convention that the bill of indictment insufficiently set out the charges brought against him. Items nos. 8-11 contained vague formulations which state nothing about the precise personal role of the applicant. Thus, the Court of Appeal could fill in the gaps as it wished, and the applicant could not properly prepare the defence. Insofar as items nos. 2-12 of the bill of indictment related to item no. 1, the fact that the applicant was acquitted in respect of item no. 1 should have implied his acquittal in respect of all other items.

With regard to item no. 8, the bill of indictment did not state exactly how the applicant was meant to have prepared (erstellen) and enabled access to a particular document. Similarly, in respect of item no. 9 it had not been stated exactly how the applicant had prepared (anfertigen) a particular prospectus for publication. With regard to item no. 10 the bill of indictment had not sufficiently specified a particular conduct (Vorgehen) of his in respect of company shares. In item no. 11 it was not explained how the applicant had prompted (veranlassen) one particular notary to undertake certain acts of registration (Verbriefung). Item no. 12 insufficiently claimed that the applicant had committed fraud.

2. Under Article 6 para. 3 (b) of the Convention the applicant complains of the insufficient time-limit of ten days to file a plea of nullity with the Court of Cassation of the Canton of Zürich. Thus, the Court of Appeal had had 20 weeks time to prepare its voluminous judgment. Moreover, there are often big differences between the oral deliberations of judgment and the ensuing reasons. Thus, while the judge Rapporteur of the Court of Appeal spent seven hours at the hearing explaining his proposal for the judgment, the Court of Appeal itself discussed the judgment only during one hour, and the written reasons were based on different grounds. Moreover, while the time-limit of ten days was running, the applicant also had a further time-limit of 20 days to file a plea of nullity with the Federal Court.

3. Under Article 6 para. 3 (d) of the Convention, the applicant complains that certain witnesses were not heard.

THE LAW

1. The applicant raises various complaints about the criminal proceedings in which he was involved. He invokes Article 6 para. 3 (a), (b) and (d) (Art. 6-3-a, 6-3-b, 6-3-d) of the Convention which states:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b. to have adequate time and facilities for the preparation of his defence; (and)

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

2. Under Article 6 para. 3 (a) (Art. 6-3-a) of the Convention the applicant complains in detail that the bill of indictment insufficiently set out the charges brought against him.

The Commission recalls that Article 6 para. 3 (a) (Art. 6-3-a) of the Convention gives an accused person the right to be informed of the cause of the accusation, i.e. the acts with which he is charged and on which his indictment is based, and of the nature of the accusation, i.e. the legal classification of the acts in question. In addition, because of the logical link between paragraphs 3 (a) and 3 (b) of Article 6 (Art. 6-3-a, 6-3-b) , the information about the nature and cause of the accusation must be adequate to enable the accused to prepare his defence accordingly (see No. 10857/84, Dec. 15.7.86, D.R. 48, p. 149).

In the present case, the Commission notes that the applicant raised this complaint three times before the domestic courts. Already before the trial began, the Court of Appeal explained in its decision of 2 August 1990 that the bill of indictment was sufficiently concrete to enable the applicant to determine the offences with which he was charged. In its judgment of 3 September 1991, by which the Court of Appeal convicted the applicant, it again carefully dealt with the applicant's complaints. The applicant was then able to challenge these conclusions in his plea of nullity and his public law appeal before the Federal Court. Finally, in its decision of 20 May 1994, the Federal Court again considered that, while the bill of indictment was somewhat imprecise, it became sufficiently clear for the applicant if read as a whole.

The Commission does not find that the various courts incorrectly considered that the bill of indictment was sufficiently precise to enable the applicant to defend himself, as required by Article 6 para. 3 (a) (Art. 6-3-a) 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.

3. The applicant further complains under Article 6 para. 3 (b) (Art. 6-3-b) of the Convention of the insufficient time-limit of ten days to file a plea of nullity with the Court of Cassation of the Canton of Zürich.

The Commission notes that this time-limit is envisaged by S. 431 of the then applicable Code of Criminal Procedure of the Canton of Zürich. It is moreover true that the Court of Appeal's judgment was voluminous, numbering 224 pages.

The Commission considers, however, that the applicant was represented by two lawyers who were very familiar with his case. Moreover, the deliberations of the Court of Appeal were conducted in public, and the applicant had, therefore, been aware of the essential contents of the judgment of 3 September 1991 well before the latter was served on him on 27 January 1992. Finally, as the Federal Court noted in its decision of 20 May 1994, all the complaints which the applicant subsequently raised in his public law appeal had already been raised in the proceedings before the Court of Appeal.

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

4. Under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention the

applicant complains that certain witnesses were not heard.

The Commission recalls that, as a rule, it is for the national courts to assess the evidence before them. The Convention organs' task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case, the Commission does not consider it unfair if the domestic courts refused to hear the witnesses proposed by the applicant. In respect of one witness it found that, even if the Court of Appeal had in doubt accepted a version favourable to the applicant, no reliable statements could be concerned as the events concerned dated back ten years. Another witness was not heard as the Court of Appeal had already duly considered his statements made in separate proceedings. In respect of further witnesses the applicant had insufficiently explained the necessity to question them.

The Commission furthermore finds no indication that in these proceedings the applicant could not sufficiently put forward his point of view.

The remainder of the application is, therefore, also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) 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