AS TO THE ADMISSIBILITY OF

Application No. 13467/87
by J.
against Switzerland

The European Commission of Human Rights sitting in private on 10 July 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
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 27 November 1987 by J. against Switzerland and registered on 16 December 1987 under file No. 13467/87;

Having regard to

- the observations submitted by the respondent Government on 19 July 1988 and the observations in reply submitted by the applicant on 4 and 25 October 1988;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, a Swiss citizen born in 1942, is a restaurant proprietor resident in Herisau/Canton Appenzell Ausserrhoden (A.Rh.) in Switzerland. Before the Commission he is represented by Dr. F. Oesch, a lawyer practising in St. Gallen.

A. PARTICULAR CIRCUMSTANCES OF THE CASE&S

I.

On 14 November 1985 the District Police Office (Verhöramt) of Canton Appenzell A.Rh. at Trogen imposed a fine of 400.-Sfr on the

applicant on the ground that he had employed foreign musicians in his restaurant without a sufficient work permit. He had therefore contravened Article 3 para. 3 of the Federal Act on the presence and residence of aliens (Bundegesetz über den Aufenthalt und die Niederlassung der Ausländer, the Aliens' Act). In particular, he had hired a music group consisting of five Austrian musicans. When two musicians eventually cancelled their trip, the band leader hired two further musicians, a fact which the applicant did not notify to the Aliens' Police.

The applicant filed an objection (Widerspruch) against this fine whereupon on 12 March 1986 the Cantonal Court (Kantonsgericht) of Appenzell A.Rh. acquitted him of having contravened the Aliens' Act. The Court found, inter alia, that the applicant had not acted undiligently by not controlling in detail the identity of all musicians upon their arrival, and that in the case of very light culpability the Aliens' Act did not require a conviction.

II.

The Public Prosecutor's Office appealed against this decision to the Appenzell A.Rh. Court of Appeal (Obergericht). The trial took place on 1 July 1986. Contrary to the usual practice, the Court did not pass judgment on the same day. According to the reasons of its subsequent decision of 18 November 1986 the Court then found it necessary to call for some supplementary reports.

Thus, on 8 July 1986 the Appenzell A.Rh. Court of Appeal filed requests for information to the Aliens' Police of Appenzell A.Rh. and the Secretariat of a company organising the employment of musicians (Schweizerischer paritätischer Facharbeiternachweis für Musiker). The replies thereto were submitted to the Court on 11 and 14 July 1986, respectively. Upon a further request of the Court of 21 October 1986, the Secretariat organising the employment of musicians submitted additional information on 22 October 1986.

On 18 November 1986 the Court of Appeal gave its decision. In the operative part of this decision, it found that the applicant had negligently contravened (fahrlässige Zuwiderhandlung) Article 3 para. 3 of the Aliens' Act, and it imposed a fine of 400.-Sfr on him. The applicant was also ordered to pay the costs of the first and second instance proceedings.

The operative part of the decision was served in writing on the applicant on 19 November 1986 and received by his lawyer on 21 November 1986. This decision contained at the end a printed note that a Federal plea of nullity (Eidgenössische Nichtigkeits-beschwerde) could be filed against this decision with the Federal Court (Bundesgericht).

The applicant announced by letter of 27 November 1986 to the Court of Appeal that he would file a plea of nullity, though he later failed to submit the substantiation therefor.

On 30 April 1987 the Court of Appeal served the written reasons of its decision of 18 November 1986. The Court referred in particular to the second report of 22 October 1986 of the Secretariat of the company organising the employment of musicians. Therein it was stated that the applicant had paid the salary for all musicians to the band leader, and had also arranged social security matters for them. The Secretariat concluded in its report that the present case constituted procurement of labour (Arbeitsvermittlung). The Court further referred to the report of the Aliens' Police according to which the Secretariat of the company had submitted with the Aliens' police upon the applicant's instruction an application for a work permit for the musicians on 2 September 1985.

The Court of Appeal found that an opportunity for commenting on these supplementary reports need not be granted to the applicant since they concerned issues of which he was well aware (zur Genüge bekannt). In particular, he knew that he had to settle social security matters with the competent office, and that the Secretariat of the company concerned had upon his instructions applied for a work permit. As an employer he had also been aware for many years of the distinction between the procurement of labour and the hiring out of labour (Personalverleih).

The Court of Appeal then discussed whether the applicant could be regarded as being an employer within the meaning of the Aliens' Act. It found that the present case qualified as procurement of labour since it was the applicant who had paid the salary to the musicians and dealt with the social security matters. Accordingly, the applicant had to be regarded as an employer. By not controlling whether the musicians were in fact the persons in respect of whom he had been granted a work permit, he had contravened the Aliens' Act.

The Court of Appeal concluded that the applicant's culpability was not particularly serious, though he had already been fined for contravening the Aliens' Act on three previous occasions. The Court thus considered a fine of 400.-Sfr as being appropriate.

III.

On 26 May 1987 the applicant filed a public law appeal (staats-rechtliche Beschwerde) with the Federal Court against this decision. Therein he complained of a breach of his right to a fair hearing (Verletzung des rechtlichen Gehörs) as guaranteed by Article 4 of the Swiss Constitution. He alleged in particular that the Appenzell A.Rh. Court of Appeal had relied for his conviction on reports submitted after the trial on which he had not been able to comment.

On 22 September 1987 the Federal Court rejected the applicant's appeal as being inadmissible. The Court found in particular that the public law appeal had not been filed within 30 days after the date which was relevant under cantonal law in this respect. The Federal Court recalled that if cantonal law provided that the reasons of a decision were in each case automatically (von Amtes wegen) served, without further request, the time-limit commenced once the reasons were served. However, in Appenzell A.Rh. the cantonal law provided that the relevant date for the serving of a decision in the case of a criminal conviction was the date when the operative part of the decision was served. The reasons for the decision were served only upon request, not automatically. The Federal Court also noted that this practice was applied consistently by the cantonal authorities. Thus, the public law appeal should have been filed within 30 days after the operative part of the decision had been served, i.e. on 19 November 1987.

B. RELEVANT DOMESTIC LAW AND PRACTICE&S

The applicant could contest the decision of the Appenzell A.Rh. Court of Appeal before the Federal Court by means of two remedies which can be filed simultaneously, namely the plea of nullity and the public law appeal.

According to Article 269 para. 1 of the Federal Code of Criminal Procedure (Bundesstrafprozessordnung) the plea of nullity can be employed to complain of a violation of Federal law. Article 269 para. 2 reserves the public law appeal for complaints about the violation of constitutional rights (verfassungsmässige Rechte).

As regards the public law appeal, Article 84 para. 1(a) of the Federal Judiciary Act (Organisationsgesetz) states that it can be directed inter alia against cantonal court decisions on the grounds of

a violation of constitutional rights of citizens.

According to Article 89 para. 1 of the Federal Judiciary Act, a public law appeal must be filed within 30 days as from the date which is relevant under cantonal law for the pronouncement or serving of the decision.

In this respect, the relevant cantonal law, namely Article 174 para. 1 of the Appenzell A.Rh. Code of Criminal Procedure, states that the operative part of a decision may be pronounced orally and is subsequently served in writing. According to Article 175 para. 1, the entire decision containing also the reasons is served in writing upon request.

With regard to a public law appeal, Article 35 para. 1 of the Federal Judiciary Act provides for the reinstitution (Wiederherstellung) of a time-limit, if the latter has lapsed on account of an impediment on the part of the applicant for which he cannot be made responsible (unverschuldet) and which prevented him from acting within the time-limit. In this case the request for reinstitution must be filed within ten days after the impediment has ceased.

In this context the Government refer to an unpublished decision of the Federal Court of 2 November 1984 in the case of R. v. the Appenzell A.Rh. Public Prosecutor's Office and Court of Appeal. Therein, R.'s lawyer contested a decision of the Appenzell A.Rh. Court of Appeal of 29 May 1984, the reasons of which were served on 5 June 1984. When the lawyer filed his public law appeal on 6 July 1984 the Federal Court declared it as being out of time as it should have been filed within 30 days after the operative part of the decision had been served, since this was the relevant date under Appenzell A.Rh. cantonal law.

The Federal Court pointed out that the applicant was free immediately to file a public law appeal and thereafter, upon receipt of the written reasons, to request leave to supplement the public law appeal, which the Federal Court would grant in such cases.

The Federal Court then dealt independently with R.'s request for reinstitution of the time-limit according to Article 35 of the Federal Judiciary Act. Insofar as R. maintained that a secretary had made a mistake in respect of the time-limit, the Federal Court found that this did not constitute a mistake for which the applicant could not be made responsible within the meaning of Article 35 of the Federal Judiciary Act.

COMPLAINTS

The applicant complains that the Appenzell A.Rh. Court of Appeal based its conviction on supplementary reports submitted after the trial. He submits that he knew nothing of these reports and was not invited to comment thereupon. He was only informed of the contents in particular of the documents of 11 and 14 July and 22 October 1986 in the proceedings before the Commission. It was incorrect of the Court of Appeal to state that he had been aware of the issues.

The applicant submits that he has not been given a fair hearing within the meaning of Article 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 November 1987 and registered on 16 December 1987.

On 7 May 1988 the Commission decided to bring the application to the notice of the respondent Government and to invite them to

submit observations on its admissibility and merits, pursuant to Rule 42 para. 2 (b) of the Rules of Procedure.

The respondent Government's observations were submitted on 19 July 1988 and the reply thereto by the applicant on 4 and 25 October 1988.

THE LAW

1. The applicant complains that the Appenzell A.Rh. Court of Appeal convicted him on the basis of supplementary reports of which he was unaware and upon which he could not comment. He relies on Article 6 para. 1 (Art. 6-1) of the Convention which states insofar as it is relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

2. In respect of the conditions under Article 26 (Art. 26) of the Convention in particular as to the exhaustion of domestic remedies, the applicant contends that, if the time-limit of 30 days for filing a public law appeal commences already when the operative part of the decision is served, this in effect deprived him of the possibility of filing a remedy.

The applicant further submits that the Federal Court's judgment in the case of R. of 2 November 1984 demonstrates that the Court is strict in the application of Article 35 of the Federal Judiciary Act (see above RELEVANT DOMESTIC LAW AND PRACTICE). The judgment, which concerned the mistake of a secretary, further demonstrates that the special situation in Appenzell A.Rh. as to the necessity of filing a public law appeal before the reasons of the decision are known does not suffice for the Federal Court to apply Article 35.

The Government rely on the judgment of the Federal Court of 2 November 1984 in the R. case and contend that the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention, as the applicant filed his public law appeal with the Federal Court out of time. Thus, according to the constant practice of the Federal Court he should have filed his public law appeal within thirty days after receiving the operative part of the judgment.

The Government further submit that the applicant failed to request reinstitution of the time-limit according to the Federal Judiciary Act. Therein he could have claimed that he was prevented through no fault of his own from acting within the time-limit set.

Under Article 26 (Art. 26) of the Convention the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law. However, Article 26 (Art. 26) of the Convention does not require a person to pursue ineffective remedies offering no prospects of success (see No. 7308/75, Dec. 12.10.78, D.R. 16 p. 32).

The Commission has first examined the Government's submissions according to which the applicant did not observe the procedural requirements for filing a public law appeal. In this respect, the Commission recalls its constant case-law according to which there is no exhaustion of domestic remedies where a domestic appeal is not admitted because of a procedural mistake (see No. 6878/75, Dec. 6.10.76, D.R. 6 p. 79).

In the present case the Commission notes that the Federal Court on 22 September 1987 declared the applicant's public law appeal

inadmissible as being out of time since it had not been filed within thirty days after the operative part of the decision of the Appenzell A.Rh. Court of Appeal of 18 November 1986 had been served.

The Commission observes that when the applicant was served the operative part of the decision there was no indication of the violation of Article 6 para. 1 (Art. 6-1) of the Convention which he now alleges before the Commission. The operative part only stated the offence of which the applicant was convicted and the costs he had to pay.

Only five months later, on 30 April 1987 when the reasons of the decision of the Court of Appeal were served, did the applicant become aware of the fact that the Court relied for his conviction on documents on which he had not been able to comment beforehand.

The Commission considers that the applicant could not be expected, under Article 26 (Art. 26) of the Convention, to employ a remedy at a stage when he was unaware of the violation of the Convention which he now alleges before the Commission.

Thus, under the specific circumstances of the present case the Commission considers that the remedy employed by the applicant cannot be regarded as being effective. The present application therefore discloses the existence of special circumstances that absolve the applicant according to the generally recognised rules of international law from complying with the time-limit of the domestic remedy concerned.

The Government further submit that the applicant should have filed a request with the Federal Court according to Article 35 of the Federal Judiciary Act for the reinstitution of the time-limit.

In the Commission's opinion it transpires from the decision of the Federal Court of 2 November 1984 in the R. case that it first considered that in such cases the public law appeal should always be filed when the operative part of the decision has been served. Only thereafter and on other grounds did the Federal Court examine and eventually reject that applicant's request for reinstitution of the time-limit.

The Commission is therefore not satisfied that the grounds for the present applicant's failure to comply with the time-limit would have sufficed for the Federal Court to grant reinstitution of the time-limit according to Article 35 of the Federal Judiciary Act. The Commission therefore finds that in the circumstances of the present case such a request would not have constituted an effective remedy within the meaning of Article 26 (Art. 26) of the Convention.

The application cannot therefore be rejected under Article 26 (Art. 26) of the Convention for non-exhaustion of domestic remedies.

3. As regards compliance with the time-limit of six months as required by Article 26 (Art. 26) of the Convention, the Commission notes that the applicant filed his application with the Commission on 27 November 1987, that is within six months after the Federal Court decided on 22 September 1987 to reject his public law appeal. In the circumstances of the present case the applicant cannot in the Commission's opinion be made responsible for the fact that the remedy which he employed was not an effective one within the meaning of Article 26 (Art. 26) of the Convention.

The Commission is therefore satisfied that in respect of the time-limit of six months the applicant has complied with Article 26 (Art. 26) of the Convention.

4. The Commission considers that the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention raise 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)