AS TO THE ADMISSIBILITY OF

Application No. 23871/94
by K.R.L.
against Denmark

The European Commission of Human Rights (Second Chamber) sitting in private on 16 October 1996, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, 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 23 February 1994 by K.R.L. against Denmark and registered on 14 April 1994 under file No. 23871/94;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 22 December 1995 and the observations in reply submitted by the applicant on 20 February 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Danish citizen, born in 1935. He is a businessman and resides at Risskov, Denmark. Before the Commission the applicant is represented by Mr. Jesper Berning, a lawyer practising in Copenhagen.

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

A. The particular circumstances of the case

In 1988 the local tax authority commenced an investigation into certain presumed irregularities in the applicant's and his companies' tax declarations. Following certain correspondence and meetings between the applicant and the tax authority, the latter submitted a report to the police on 27 June 1989 and requested assistance as it considered that the applicant had committed tax fraud (skattesvig) contrary to section 13 of the Tax Control Act (skattekontrolloven). On the basis

of this material and its own preliminary investigations the police submitted a request for a search warrant to the Århus City Court (Retten i Århus) on 4 October 1989.

On 6 October 1989 the City Court issued the search warrant involving the applicant's home and the offices of his companies, having established that the formal requirements of such a step had been fulfilled.

The search of the applicant's premises was carried out by the police and representatives of the tax authority on 7 November 1989 during which a substantial quantity of accounts material was seized. The applicant was on that date informed of the charges against him and he was interrogated by the police the following day. He was interrogated again on 8 December 1989 and on 16 March 1990.

It appears that the local tax authority completed its audit report and its assessment of the matter by 18 June 1991. On 8 July 1991 it submitted its final request for prosecution to the police. It concerned alleged violations of section 289 of the Penal Code in conjunction with section 13 of the Tax Control Act and related to alleged tax evasion regarding company tax and personal tax in the amount of approximately 2,000,000 DKK as well as alleged violations of various Acts on excise duties.

On 9 September 1991 the case was sent to the public prosecutor for assessment as to the question of whether or not to prosecute.

On 1 April 1992 the public prosecutor submitted a report to the Århus City Court for an investigative examination (efterforsknings-forhør) in court. A court meeting to that effect was held on 27 May 1992 following which the case was adjourned pending the prosecutor's decision as to whether or not to prosecute and, if so, on what charges.

On 26 April 1993 the indictment was served whereby the applicant was charged with tax fraud contrary to section 289 of the Penal Code in conjunction with section 13 of the Tax Control Act as well as with violations of a number of other Acts on excise duties. The case was sent to the Århus City Court with a request for the opening of the trial against the applicant.

The Court scheduled the case for hearing as from 11 August 1993 on which date the trial also commenced. It ended on 26 August 1993 and judgment was pronounced on 2 September 1993.

On the basis of the available evidence the applicant was found guilty of the charges brought against him and sentenced to one year's imprisonment and a fine of 2,000,000 DKK. In respect of the sentence the Court stated as follows:

(Translation)

> "In meting out the sentence the Court has taken into consideration the amount of duties and taxes which has been evaded but also the character of the dispositions made. On the other hand the Court has also taken into consideration the lengthy period of time the case, seen as a whole, has been pending before the tax authorities and the prosecuting authority since the search and seizure of 7 November 1989, almost one year having passed from the court meeting of 27 May 1992 until the indictment was served on 26 April 1993."

The applicant immediately appealed against the judgment to the High Court of Western Denmark (Vestre Landsret). The public prosecutor appealed against the judgment on 13 September 1993.

The case was heard in the High Court from 16 to 18 May 1994. By judgment of 25 May 1994 the High Court upheld the applicant's conviction and sentence while reducing, however, the fine to 1,900,000 DKK. As regards the sentence the High Court stated:

(Translation)

"The term of imprisonment is found to be appropriate. Having regard to the fact that the acts have been committed over a period of several years, to their systematic character and to the amount of evaded tax and duties there is no basis for making the term of imprisonment conditional.

As there is no reason to deviate from the usual principles for calculating additional fines, this will be fixed in view of the tax evasion in question to 1,900,000 DKK."

On 30 May 1994 the applicant applied to the Ministry of Justice for leave to appeal to the Supreme Court (Højesteret). The Ministry obtained written observations from the prosecuting authority. The applicant's written observations in reply were submitted on 29 August 1994.

On 5 April 1995 the Ministry of Justice refused leave to appeal.

On 6 April 1995 the applicant requested the Ministry to reconsider the matter. He also submitted a request to the Special Court of Revision (Den særlige Klageret) for a re-opening of the case.

On 13 June 1995 the Ministry of Justice informed the applicant that the decision of 5 April 1995 to refuse leave to appeal to the Supreme Court was maintained for the reasons already stated in that decision.

On 5 October 1995 the Special Court of Revision rejected the request for a re-opening of the criminal case.

B. Relevant domestic law

The Danish administration of justice in criminal cases is based on the accusatorial principle. The police and the public prosecutor are in charge of the investigation, the question of prosecution and the presentation of the case in court. As a point of departure, the courts are not involved in the actual criminal case during the period of investigation. Thus, the court does not itself take any initiative during the investigation, but only acts if requested to do so by the police or the defence counsel, and only in case of disagreement between the police and the defence counsel, or in case of certain specific coercive measures. The court can also take action at the stage of investigation if the public prosecutor or the defence counsel requests that evidence be secured already at the preliminary stage of the case. Thus, the police and the public prosecutor, and not the court, are responsible for the elucidation of the case.

Section 96 subsection 2 of the Administration of Justice Act (retsplejeloven) establishes that the prosecutor must expedite the proceedings in all cases to the extent permitted by the nature of the case. Although a corresponding duty for the police is not stipulated by law, the same principle is presumed to apply to the police as well, as the police investigation is the basis of the prosecutor's assessment of whether to prosecute a person.

The proceedings in a criminal case can be divided into three stages: the investigation, the decision to prosecute and the trial. Pursuant to section 743 of the Administration of Justice Act, the

object of the investigation is to establish whether the conditions for imposing criminal liability or any other penal consequence exist, to provide information for the purpose of deciding in the case and to prepare the case for trial.

The decision whether to prosecute is made by the prosecutor. The courts have no part in this in any way. Thus, the decision to prosecute is not subject to approval by any court, and the courts do not assist in or check the phrasing of the indictment.

The trial is held before the court trying the case, normally with the participation of lay judges. According to section 850 of the Administration of Justice Act the trial should continue without interruption to the extent possible, until a final decision is reached.

When a major criminal case has been decided by the City Court both the prosecutor and the accused can appeal against the judgment to the competent High Court.

No direct appeal lies against the judgment of the High Court in an appeal case. However, the Ministry of Justice can grant leave to appeal to the Supreme Court (after 1 January 1995 with permission from a special board (Procesbevillingsnævnet)), if the case concerns a matter of principle, or there are other special reasons therefor, cf. section 966 of the Administration of Justice Act.

COMPLAINTS

The applicant complains that the criminal case against him was not determined within a reasonable time. He invokes Article 6 para. 1 of the Convention.

By letter of 9 November 1995 the applicant furthermore complained that his conviction and sentence disclosed a violation of Article 6 para. 2 of the Convention in that the principle of in dubio pro reo had been set aside.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 23 February 1994 and registered on 14 April 1994.

On 7 September 1995 the Commission (Second Chamber) decided that notice of the application should be given to the respondent Government and invited them to submit written observations on the admissibility and merits of the application.

Following an extension of the time-limit fixed for this purpose the Government submitted their observations on 22 December 1995.

The applicant submitted his observations in reply on 20 February 1996.

THE LAW

1. The applicant complains that the criminal case against him was not determined within a reasonable time. He invokes Article 6 para. 1 (Art. 6-1) of the Convention which in so far as relevant reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ..."

a) The Government have raised a preliminary objection, pleading that the applicant can no longer claim to be a victim in respect of the alleged excessive length of the proceedings due to the fact that the courts expressly took this into account and for this reason imposed a relatively lenient sentence.

The Commission recalls the Convention organs' case-law according to which an applicant's status as a "victim" within the meaning of Article 25 (Art. 25) of the Convention may depend on compensation being awarded on the basis of the facts about which he or she complains before the Commission. In cases concerning complaints of length of proceedings a mitigation of sentence does not as such deprive the individual concerned of his status as a "victim" but is to be taken into consideration solely for the purposes of assessing the extent of the damage he has allegedly suffered unless the domestic authorities have acknowledged, either expressly or in substance, the alleged infringement of the Convention and, if necessary, provided redress in relation thereto. Only when these two conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see Eur. Court HR, Eckle v. Germany judgment of 15 July 1982, Series A no. 51, p. 32, paras. 69 et seq.; No. 10868/84, Dec. 21.1.87, Woukam Moudefo v. France, D.R. 51 p. 62; No. 10884/84, Dec. 13.12.84, H. v. Federal Republic of Germany, D.R. 41 p. 252).

The Commission does not find that the above conditions are satisfied in the present case. Neither the City Court nor the High Court expressly acknowledged the alleged infringement of the Convention and the Commission does not consider that the mitigation of sentence, which the applicant disputes, in the circumstances can be accepted as such an acknowledgement in substance either. Furthermore, the Commission recalls that the High Court's decision to reduce the fine was not based on considerations related to the length of the proceedings but was only due to the fact that the fine eventually imposed ought to follow "the usual principles for calculating additional fines".

Accordingly, the Commission finds that the sentence imposed on the applicant cannot be considered, either directly or implied, as a recognition of a violation of Article 6 (Art. 6) or as reparation for the damage allegedly caused to the applicant by the length of the proceedings. He may therefore claim to be a "victim" of a violation of Article 6 para. 1 within the meaning of Article 25 (Art. 25) of the Convention.

b) With regard to the period of time to be considered the applicant maintains that it commenced in April 1988 when the local tax authority started its investigations on the basis of his tax returns. The Government do not specify a date which in their view should be considered the starting point of the proceedings in question, but submit that on 27 June 1989 the tax authority contacted the police in the matter.

The Commission recalls that according to the case-law of the Convention organs the period to be taken into consideration under Article 6 para. 1 (Art. 6-1) of the Convention must be determined autonomously. It begins at the time when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of a suspicion against him (cf. for example the above-mentioned Eckle v. Germany judgment, p. 33, para. 73).

In the present case the Commission does not consider that the investigations made by the tax authorities on the basis of the applicant's tax returns were such that he thereby can be considered as having been "charged" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. It was not until 7 November 1989, when

the applicant's home and his companies' offices were searched that he became directly involved in the police investigations. From that date onwards the Commission finds that he may be considered as having been substantially affected by the criminal investigation. Consequently, the applicant was "charged" for the purposes of Article 6 para. 1 (Art. 6-1) of the Convention as from 7 November 1989 and the "reasonable time" referred to in Article 6 (Art. 6) of the Convention began to run from that moment.

The Commission finds that the proceedings should be regarded as having been terminated on 5 April 1995 when the applicant's request for leave to appeal to the Supreme Court was rejected. Thus, the total length of the proceedings which the Commission must assess under Article 6 para. 1 (Art. 6-1) of the Convention was five years and five months.

The Commission considers, in the light of the criteria established by the case-law of the Convention organs on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities) and having regard to all the information in its possession, that the complaint concerning the length of the proceedings cannot be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention but requires an examination on its merits as no other ground for declaring it inadmissible has been established.

2. The applicant also complains of an infringement of his right to be presumed innocent as the courts allegedly disregarded the principle of in dubio pro reo when finding him guilty of the charges brought against him. He invokes in this respect Article 6 para. 2 (Art. 6-2) of the Convention which reads as follows:

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

The Commission finds that the complaint made under the above provision cannot be considered as further legal submissions in respect of the applicant's complaint concerning the length of the proceedings. It should accordingly be considered as a separate complaint for the purposes of calculating the six month rule referred to in Article 26 (Art. 26) of the Convention.

In this respect the Commission recalls that the final decision to be taken into consideration is the rejection of the request for leave to appeal to the Supreme Court, which was given on 5 April 1995. However, the Commission recalls that the complaint under Article 6 para. 2 (Art. 6-2) of the Convention was not introduced before 9 November 1995 which is more than six months later.

It follows that the complaint has been introduced out of time and must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint concerning the length of the criminal proceedings;

DECLARES INADMISSIBLE, the remainder of the application.

M.-T. SCHOEPFER	G.H. THUNE
Secretary	President
to the Second Chamber	of the Second Chamber