AS TO THE ADMISSIBILITY OF

Application No. 13942/88
by K.
against Switzerland

The European Commission of Human Rights sitting in private on 4 October 1990, the following members being present:

MM. C.A. NØRGAARD, President
F. ERMACORA
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ RUIZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ

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 2 April 1988 by K. against Switzerland and registered on 15 June 1988 under file No. 13942/88;

Having regard to:

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

- the observations submitted by the respondent Government on 22 December 1989 and the observations in reply submitted by the applicant on 21 January 1990;

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 1950, is a doctor residing at Brissago in Switzerland.

A. Particular circumstances of the case

I.

After successfully passing the required examinations, the

applicant obtained his diploma in medicine in 1981. Since then he has been working inter alia as an assistant doctor (Assistenzarzt). In respect of this activity he does not require an additional authorisation in the Canton of Zurich.

On 19 October 1982 the applicant was further granted the authorisation independently to work as a doctor in the Canton of Zurich. On 26 April 1983 the authorisation was withdrawn by the Zurich Health Direction (Gesundheitsdirektion) on the ground that he had not made use of this authorisation, in particular as he had moved to another area in Switzerland.

The applicant's appeal (Rekurs) against this decision was dismissed by the Zurich Council of State (Regierungsrat) on 17 August 1983. The Council of State found that the mere fact that the applicant's authorisation had been terminated and that, on payment of a small fee, it could again be granted once the applicant resumed his practice in Zurich, did not suffice to create for the applicant a legally protected interest to obtain an appeal decision. The Council of State further found that in any event the authorisation independently to practise as a doctor was not a general authorisation to practise at an undetermined moment in time. Rather, it concerned a concrete activity. The applicant however no longer lived in the Canton of Zurich.

II.

Between 6 August and 17 September 1984 the Emergency Service of the Medical Association of the Zurich District (Ärztlicher Not-falldienst des Ärzteverbandes des Bezirks Zürich) employed the applicant as an assistant doctor.

On 28 August 1984 the applicant fetched the patient Mrs E. de V., who was partly paralysed and residing at a private old persons' home, and brought her into her flat in Zurich where he organised her treatment. On 29 August 1984 the Emergency Service requested the applicant to treat Mrs E. de V. The applicant subsequently prepared on a form of the Emergency Service of the Medical Association his bill for the treatment of Mrs E. de V., amounting to 7,447.80 SFr. The applicant transmitted the bill to the curator (gesetzlicher Vertreter) of Mrs E. de V. who on 13 September 1984 was provisionally placed under tutelage. The bill was to be paid directly into the applicant's postal account (Postscheckkonto) rather than the account of the Medical Association.

The applicant was then charged with fraud and certain contraventions of the Zurich Health Act (Gesetz über das Gesundheits-wesen) of 1962. He was accused inter alia of having treated Mrs E. de V. without being in the possession of authorisation independently to practise as a doctor, as required by Section 7 para. 1 (a) of the Health Act (see below, Relevant domestic law).

On 13 January 1986 the Zurich District Court (Bezirksgericht) acquitted the applicant, noting inter alia that the bill of indictment had not stated with sufficient precision which medical treatment the applicant had undertaken without the authorisation independently to practise as a doctor.

III.

On 31 January 1985 the applicant applied for the authorisation independently to practise as a doctor. This was rejected by the Zurich Health Direction on 11 September 1985 on the ground that the applicant was not "trustworthy" as required by the Health Act (Gesundheitsgesetz) for this authorisation. The Health Direction found that the applicant, by bringing Mrs. E. de V. to her flat, had in fact undertaken a medical act within the meaning of Section 7 of

the Act.

The applicant's appeal (Rekurs) was on 1 October 1986 dismissed by the Zurich Council of State (Regierungsrat) which found that the applicant, by writing out bills for his treatment of Mrs. E. de V., had violated Section 7 para. 1 (a) of the Health Act. This finding was not affected by the fact that the District Court had on 13 January 1986 acquitted the applicant. The Council of State noted in particular that the applicant himself had in his bill referred to his treatment as instances of medical work.

The applicant filed a further appeal (Beschwerde) with the Zurich Administrative Court (Verwaltungsgericht) in which he requested the authorisation independently to practise as a doctor. On 11 March 1987 the Court dismissed the appeal, though it determined a waiting period for the applicant until the beginning of 1988 for applying for a new authorisation.

The applicant's then lawyer subsequently filed a public law appeal numbering 73 pages on which the Federal Court (Bundesgericht) deliberated in public on 22 October 1987. According to the subsequent decision of the Federal Court of that date, five judges participated at the deliberations and later in the decision on the applicant's public law appeal (see below, Relevant domestic law).

The applicant's lawyer, who was present, later described the deliberations in a statement to the applicant. According to this statement, judge X., as Rapporteur, proposed to uphold as a whole the applicant's public law appeal and to grant him the authorisation to practise.

According to the lawyer's statement, judge Y., who acted as Co-Rapporteur, was upset about the extraordinary length of the public law appeal statement. As it had been far too long for him, he had only read it up to about page 30. He had also not been able to study the documents, as due to an error on the part of the Court Chancellery these had only been at his disposal one day before the deliberations.

On 22 October 1987 the Federal Court gave its decision in which it quashed the waiting period imposed on the applicant. The remainder of the public law appeal was dismissed. According to a letter which Dr. B., a friend of the applicant, wrote to judge X. on 28 December 1987, the Federal Court took its decision by four votes to one, namely the vote of the judge Rapporteur.

In its decision the Federal Court first rejected certain complaints as being inadmissible though it noted that exceptionally it could in such cases, if the public law appeal was successful, not only quash the contested decision but also order the granting of the authorisation requested if all the other conditions were met. The Federal Court then dealt inter alia with the authorities' reproach that the applicant had treated Mrs E. de V. without the necessary permission. The decision states:

<Translation>

"This reproach is justified. In summer 1984 the applicant was only permitted to work in the framework of the Emergency Service of the Medical Association of the Zurich District, but not independently. He did not conduct the transport of the patient (de V.) as emergency doctor.

Nevertheless, it was materially necessary for him to consider whether the patient should have been advised on medical grounds not to return home. However, according to S. 7 (a) of the Health Act the determination for remuneration of illnesses or health disturbances already

amounts to a medical activity which requires permission. Such an authorisation the applicant did not possess...

The penal judge has acquitted the applicant of the charge of attempted fraud... Nevertheless, he himself subsequently reduced the bill for medical services from 23 to 31 August 1984 from 7,447.80 Fr. to 2,063.40 Fr. Thus the conduct of the applicant does in fact astonish. He has, as the Administrative Court showed in its reply, employed a form of the Emergency Service for services of a non-medical, daily nature lying largely outside the Medical Emergency Service. Without giving a reason he filled it out according to the code of the medical insurances. He thus created the impression that he had undertaken all these services as an emergency doctor. This is incorrect and must not be tolerated...

In sum, at least two reproaches levelled against the applicant appear relevant in respect of his trustworthiness: in one case he has exercised a medical activity without the permission to practise. Also, when issuing the bill he mixed medical and non-medical activities, and he employed a form of the Emergency Service, thereby creating the impression that it concerned exclusively medical services, in fact medical emergency services" (pp. 10 et seq.).

<German>

"Dieser Vorwurf ist begründet. Dem Beschwerdeführer war im Sommer 1984 lediglich erlaubt, im Rahmen des Notfalldienstes des Ärzteverbandes des Bezirkes Zürich, nicht aber selbständig, ärztlich tätig zu sein. Die Rückführung der Patientin (de V.) hat er nicht als Notfallarzt durchgeführt. Sachnotwendig hat er sich aber im Rahmen seiner ärztlichen Sorgfaltspflicht Rechenschaft darüber geben müssen, ob der Patientin aus medizinischen Gründen nicht von einer Heimkehr abzuraten sei. Die Feststellung von Krankheiten oder gesundheitlichen Störungen gegen Entgelt stellt aber nach § 7 lit. a GesundheitsG bereits eine bewilligungspflichtige ärztliche Tätigkeit dar. Eine solche Bewilligung besass der Beschwerdeführer nicht...

Vom Vorwurf des Betrugsversuchs hat ihn der Strafrichter freigesprochen... Freilich reduzierte er in der Folge selber die Rechnung für ärztliche Leistungen vom 23. bis 31. August 1984 von Fr. 7'447.80 auf Fr. 2'063.40. Deshalb befremdet das Vorgehen des Beschwerdeführers gleichwohl. Er hat, wie das Verwaltungsgericht in seiner Vernehmlassung zutreffend darlegt, für grossenteils ausserhalb des ärztlichen Notfalldienstes erbrachte Leistungen nicht medizinischer, alltäglicher Natur ein Formular des Notfalldienstes verwendet, es ohne Grundangabe nach Krankenkasse-Code ausgefüllt und dadurch den Eindruck erweckt, er habe diese Leistungen allesamt als Notfallarzt verrichtet. Dies ist unlauter und darf nicht toleriert werden...

Zusammenfassend erscheinen mindestens zwei der gegenüber dem Beschwerdeführer erhobenen Vorwürfe im Hinblick auf dessen Vertrauenswürdigkeit von Belang: er hat in einem Fall ohne Praxisbewilligung eine ärztliche Tätigkeit ausgeübt, und er hat bei der Rechnungstellung ärztliche und nichtärztliche Tätigkeiten vermengt, ein Formular des Notfalldienstes verwendet und dadurch den Eindruck erweckt, es handle sich ausschliesslich um ärztliche, und zwar notfallärztliche Leistungen" (S. 10 ff).

IV.

The applicant then filed a request for reopening the proceedings before the Federal Court on the ground that the Court had

given a decision without knowing the case-file. On 14 March 1988 the Court dismissed this request. Its decision first summarised the deliberations on 22 October 1987 as follows:

<Translation>

"At the public deliberation one judge expressed his dissatisfaction that the documents had not been available for a sufficiently long period of time [beforehand they had been transmitted to a supplementary judge participating at the session]; therefore, he had been able to read thoroughly only the first 35 pages of the - much too long - public law appeal statement which numbered 73 pages."

<German>

"Anlässlich der öffentlichen Beratung äusserte ein Richter seinen Unmut darüber, dass die Akten nicht genügend lange auflagen [sie waren zuvor dem an der Sitzung teilnehmenden Ersatzrichter zugesandt worden]; er habe deswegen nur die ersten 35 Seiten der - viel zu langen - 73 Seiten umfassenden Beschwerdeschrift gründlich lesen können."

The Court then considered that the applicant's complaint did not correspond to any of the statutory reasons for reopening the proceedings and therefore dismissed the applicant's request.

The applicant submitted three further requests for the reopening of the Federal Court's proceedings which were dismissed by the Federal Court in decisions of 5 May and 23 August 1988 and 6 June 1989, respectively. He also attempted to introduce criminal proceedings against a judge and a public prosecutor.

B. Relevant domestic law

Section 7 para. 1 (a) of the Zurich Health Act requires an authorisation from the Health Direction if it is intended, against remuneration or professionally, to determine or to treat illnesses, injuries or other health disturbances or generally to undertake medical acts (medizinische Verrichtungen). Section 8 para. 1 states:

<Translation>

"The Health Direction will grant the authorisation if the applicant meets the professional requirements of this Act, if he is trustworthy and if he is not suffering from a mental or bodily disorder which renders him manifestly unable to exercise his profession."

<German>

"Die Direktion des Gesundheitswesens erteilt die Bewilligung, wenn der Gesuchsteller die durch dieses Gesetz verlangten fachlichen Anforderungen erfüllt, vertrauenswürdig ist und nicht an einem geistigen oder körperlichen Gebrechen leidet, das ihn zur Berufsausübung offensichtlich unfähig macht."

As regards the proceedings before the Federal Court, Section 17 para. 1 of the Federal Judiciary Act (Organisationsgesetz) states that, with exception of penal, bankruptcy and disciplinary matters, the proceedings with the parties (Parteiverhandlungen) before the Court as well as its deliberations and votes are as a rule conducted in public.

According to Section 9 of the Federal Court's Regulations (Reglement für das Schweizerische Bundesgericht), the Presidents of the Divisions (Abteilungen) of the Federal Court distribute the cases

among the judges of their Divisions who will undertake the task of judge Rapporteur (Berichterstattung) in a certain number of cases.

Section 11 of the Regulations determines that the President of the Division concerned convenes the sessions by means of agenda lists (Traktandenlisten) which must be distributed at least six days in advance. The files of the cases stated on the agenda lists must be available for consultation at the latest when the sessions are convened.

Section 12 of the Regulations states that at the deliberations the President first gives the floor to the judge Rapporteur, then to the other members. The President speaks last.

COMPLAINTS

The applicant complains under Article 6 para. 1 of the Convention that the Federal Court judge Y. decided on 22 October 1987 on his public law appeal without knowing the case-file.

The applicant further complains that the Federal Court, in its decision of 22 October 1987, contravened Article 6 para. 2 of the Convention by finding a violation of the Health Act, although he had been acquitted of the relevant criminal charges.

The applicant, who furthermore generally complains about the proceedings, also relies on Article 3 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 April 1988 and registered on 15 June 1988.

On 8 September 1989 the Commission decided to communicate the application to the respondent Government and invite them to submit written observations on the admissibility and merits of the application limited to the issue under Article 6 para. 1 of the Convention.

The Government's observations were received by letter dated 22 December 1989 and the applicant's observations were dated 21 January 1990.

THE LAW

1. The applicant complains that a Federal Court judge decided on 22 October 1987 on his public law appeal without knowing the case-file. The applicant relies on Article 6 para. 1 (Art. 6-1) of the Convention which states, insofar as it is relevant:

> "In the determination of his civil rights and obligations or 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."

The Government submit that, rather than concentrating on an isolated incidence, due consideration must be given to the fact that the applicant's new request for an authorisation was dealt with thoroughly by various instances, namely the Zurich Health Direction and the Zurich Council of State each in a decision of 9 pages, the Zurich Administrative Court in a decision of 27 pages, and the Federal Court in a decision of 16 pages.

The Government further submit that Article 6 para. 1 (Art. 6-1) of the Convention is not applicable in the present case. The European Court of Human Rights has so far not dealt with the issue whether the request to exercise the medical profession falls under the scope of Article 6 para. 1 (Art. 6-1) of the Convention. With

reference to the Commission's Report in the Karni case (see Karni v. Sweden, Comm. Report 15.12.88) the Government submit that such an authorisation is an administrative act, subject to certain conditions, and does not grant any subjective right. In the present case, the authorisation was refused as the applicant was not trustworthy, which is a matter of appreciation. As a result, his request for an authorisation did not concern a "right" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. Even if it did, it would fall into the domain of public law and not concern a "civil" right.

As regards the proceedings before the Federal Court the Government submit that the complaint is in any case manifestly ill-founded. The Government distinguish between the file of the Federal Court, consisting of the public law appeal statement, the contested decision and the further submissions of the parties, and the Cantonal file. The latter may be consulted a number of days before the hearing at the Federal Court's Chancellery. Knowledge of the Rapporteur's Report and the Cantonal file will suffice for a judge to be in a position to decide on the allegations. Moreover judge Y. did not avail himself of the opportunity to request adjournment of the decision which he could have done if he did not feel at ease with regard to the case-file.

The Commission, having regard to the parties' submissions under Article 6 para. 1 (Art. 6-1) of the Convention, considers that this complaint raises complex issues of fact and law which can only be resolved by an examination of the merits. This part of the application cannot, therefore, be declared manifestly ill-founded. No other grounds for inadmissibility have been established.

2. The applicant also complains that the Federal Court, in its decision of 22 October 1987, contravened Article 6 para. 2 (Art. 6-1) of the Convention by finding a violation of the Health Act, although he had previously been acquitted of the relevant criminal charges.

Article 6 para. 2 (Art. 6-2) guarantees that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

The Commission recalls that the presumption of innocence enshrined in Article 6 para. 2 (Art. 6-2) of the Convention will be violated if without the accused having previously been proved guilty according to law a judicial decision concerning him reflects an opinion that he is guilty (Eur. Court H.R., Minelli judgment of 25 March 1983, Series A no. 62, p. 18 para. 37; mutatis mutandis, Eur. Court H.R., Lutz/Englert/ Nölkenbockhoff judgments of 25 August 1987, Series A no. 123, p. 25 para. 60, pp. 54-55 para. 37, and p. 79 para. 37, respectively).

In the present case the Commission notes that on 13 January 1986 the Zurich District Court acquitted the applicant of various criminal charges. However, in the subsequent proceedings concerning the authorisation to practise independently as a doctor the Federal Court in its decision of 22 October 1987 assessed the issue of the applicant's trustworthiness, as required by the Zurich Health Act for the granting of the authorisation concerned.

In this respect the Commission considers that different standards apply to the assessment whether a criminal offence has been committed, and whether the requirements for an authorisation independently to practise as a doctor have been met, the latter requirements being necessarily stricter and going beyond the limits of criminal law. This distinction also lay at the basis of the Federal Court's decision in which it furthermore expressly noted that the applicant had been acquitted in the criminal proceedings.

In this respect therefore the application is manifestly

ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Insofar as the applicant generally complains about the proceedings and thereby also relies on Article 3 (Art. 3) of the Convention, the Commission finds no issue under this provision. It follows that this part of the application is 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 ADMISSIBLE, without prejudging the merits of the case, the applicant's complaint under Article 6 para. 1 (Art. 6-1) of the Convention concerning the proceedings before the Federal Court;

unanimously DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)