AS TO THE ADMISSIBILITY OF

Application No. 26382/95
by K. W.
against Switzerland

The European Commission of Human Rights (Second Chamber) sitting in private on 3 December 1997, the following members being present:

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

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 20 January 1995 by K. W. against Switzerland and registered on 1 February 1995 under file No. 26382/95;

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 is a Swiss citizen born in 1933 and residing in Zürich in Switzerland. Before the Commission he is represented by Mr K. Mäder, a lawyer practising in Zürich.

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

The applicant was detained in psychiatric institutions in Switzerland during 23 years until 1984.

Upon his release, the applicant introduced actions for satisfaction against the Zürich municipality (Stadtgemeinde) and the Canton of Zürich.

His action against the Canton of Zürich was upheld in 1993 in that he was granted compensation, as from 1 January 1985, of 130,000 Swiss Francs (CHF), plus 5% interest, from the Canton of Zürich. Of the sum granted, 50,000 CHF were awarded in respect of incorrect

treatment with neuroleptica and 80,000 CHF in respect of unlawful detention from 1982-1984. In view of the accumulated interest, the sum to be awarded eventually amounted to 189,583 CHF.

Of this sum, 159,583 CHF were paid out to the applicant. The subsequent proceedings concern the remaining amount of 30,000 CHF.

The applicant's separate action against the Zürich municipality was dismissed, and he was ordered to pay court costs to the Zürich municipality amounting to 30,000 CHF. The Zürich municipality transferred this claim to the Canton of Zürich. The latter regarded the claim as compensated (Verrechnung) with the remaining amount of 30,000 CHF which it still owed to the applicant.

In 1994 the applicant brought proceedings against the Canton of Zürich claiming 30,000 CHF and a breach of Article 5 para. 5 of the Convention. On 2 June 1994 the Zürich District Court (Bezirksgericht) dismissed the applicant's claim. In its decision the Court found, inter alia, that Article 5 para. 5 of the Convention did not determine in what manner compensation had to be paid. The decision continued, inter alia:

<Translation>

> "The applicant will in principle also obtain satisfaction - i.e. satisfaction for immaterial damage which he suffered - if his claim succeeds, but is redeemed by means other than by payment. In particular, he may not be able to dispose of the sum awarded by using it, but he will be alleviated of his debts which will correspondingly diminish.

<Original>

> "Genugtuung - nämlich der Ausgleich von erlittener immaterieller Unbill - wird dem Kläger grundsätzlich auch dann zuteil, wenn seine Forderung geschützt, aber anders als durch Zahlung getilgt wird, insbesondere wenn er zwar nicht über die ihm zugesprochene Summe zum Zwecke des Verbrauchs verfügen kann, aber sich seine Schulden entsprechend vermindern und er von diesen entlastet ist."

On 23 September 1994 the Court of Appeal (Obergericht) of the Canton of Zürich dismissed (abgewiesen) the applicant's claim of a breach of Article 5 para. 5 of the Convention, and declared inadmissible his plea of nullity.

The applicant filed a public law appeal (staatsrechtliche Beschwerde) with the Federal Court (Bundesgericht). According to the Federal Court's case-law, this remedy serves to complain of a breach of the Swiss Federal Constitution (Bundesverfassung) and of the Convention (see Arrêts du Tribunal Fédéral 101 Ia 67 et seq.).

The Federal Court rejected the applicant's public law appeal on 11 January 1995 as the applicant had not complied with the statutory requirements for filing a public law appeal. However, the Court also considered that the previous court had correctly found that Article 5 para. 5 of the Convention was not breached. In particular, this provision did not determine that claims could only be redeemed by payment and not by compensating them with other claims.

COMPLAINTS

1. The applicant complains under Article 5 para. 5 of the Convention that his claim of 30,000 CHF, arising from ill-treatment and unlawful detention, was compensated with a claim of the Canton of Zürich resulting from the imposition of court costs. With reference to the

decisions of the various courts he submits that his claim for satisfaction was of a special nature and should be redeemed directly.

2. Under Article 13 of the Convention the applicant submits that he did not have an effective remedy to raise his complaints.

THE LAW

1. The applicant complains under Article 5 para. 5 (Art. 5-5) of the Convention that his claim of 30,000 CHF, arising from ill-treatment and unlawful detention, was compensated with a claim of the Canton of Zürich resulting from the imposition of court costs.

Article 5 para. 5 (Art. 5-5) of the Convention states:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

In the present case, the applicant was awarded altogether 189,583 CHF of which 159,583 CHF were paid out to him. Part of this sum amounted to compensation for "detention in contravention of the provisions" within the meaning of Article 5 (Art. 5) of the Convention. The question arises whether this provision could prevent the Canton of Zürich from compensating the amount of 30,000 CHF which it still owed to the applicant, with its own claim of 30,000 CHF towards the applicant.

The Commission has had regard to the Court's case-law on just satisfaction to be awarded under Article 50 (Art. 50) of the Convention. Thus, in the Ringeisen v. Austria case the Court referred to "the principle whereby debts of this kind are free from attachment" (see Eur. Court HR, Judgment of 23 June 1973, Series A no. 16, p. 9, para. 15). On the other hand, in the Allenet de Ribemont v. France case, the Court held that the question whether or not the sum of money awarded to the applicant was free from attachment was left to the national authorities acting under the relevant domestic law (Eur. Court HR, Judgment of 7 August 1996, Reports 1996-III, No. 12, p. 910, para. 19).

The Commission considers that this case-law can only be of indirect relevance to the interpretation of Article 5 para. 5 (Art. 5-5) of the Convention. Thus, Article 50 (Art. 50) of the Convention concerns an international claim, arising from a judgment of the Court, whereas the claims under Article 5 para. 5 (Art. 5-5) of the Convention arise in the domestic sphere on the basis of judgments of national courts.

The question arises whether Article 5 para. 5 (Art. 5-5) of the Convention determines the manner in which compensation should be awarded.

The wording of this provision requires "an enforceable right to compensation".

In the Commission's opinion, this wording leaves it to the Contracting State concerned to determine how it is to comply with its obligations. In this context it recalls, however, that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Eur. Court HR, Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 16, para. 33).

The Commission finds a confirmation for this interpretation in the Wassink v. the Netherlands case where the Court held that Article 5 para. 5 (Art. 5-5) of the Convention "does not prohibit the Contracting States from making the award of compensation dependent upon the ability

of the person concerned to show damage resulting from the breach" (see Eur. Court HR, Judgment of 27 September 1990, Series A no. 185-A, p. 14, para. 38). The Commission has furthermore found that Article 5 para. 5 (Art. 5-5) does not grant the right to a particular amount of compensation (see No. 28779/75, Dec. 27.11.96, unpublished).

In the present case, the applicant had an enforceable right to compensation as he sought and eventually obtained damages for the wrongful detention. It is true that in respect of the amount of 30,000 CHF his claim was compensated with a claim of the Canton of Zürich.

However, the Commission notes that in fact a large part of the satisfaction awarded, namely 159,583 CHF out of 189,583 CHF was paid out to the applicant. In respect of the remaining amount, the Commission notes the decision of the Zürich District Court of 2 June 1994 according to which the applicant, while not being able to dispose of the sum awarded by using it, had in fact been alleviated of his debts which would correspondingly diminish.

In view thereof the domestic authorities did not, in the Commission's opinion, render the guarantee in Article 5 para. 5 (Art. 5-5) of the Convention "theoretical or illusory" within the meaning of the Convention organs' case-law (see Eur. Court HR, Artico v. Italy judgment, op. cit.).

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

2. Under Article 13 (Art. 13) of the Convention the applicant submits that he did not have an effective remedy to raise his complaints.

Article 13 (Art. 13) of the Convention states:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission notes that the applicant had various remedies at his disposal, i.e. the claim filed with the Zürich District Court, a further claim and a plea of nullity to the Court of Appeal of the Canton of Zürich, and a public law appeal in which according to the Federal Court's case-law he could have complained, inter alia, of a breach of his Convention rights.

It is true that the applicant's public law appeal was declared inadmissible. However, this occurred through the applicant's own fault as he had failed to comply with the statutory requirements for filing such an appeal. Moreover, the Federal Court in fact dealt in substance with the applicant's complaint when it found that Article 5 para. 5 (Art. 5-5) of the Convention did not determine that claims could only be redeemed by payment and not by compensating them with other claims.

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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

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