AS TO THE ADMISSIBILITY OF

Application No. 21155/93
by M. K.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 September 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 14 September 1992 by M. K. against Austria and registered on 14 January 1993 under file No. 21155/93;

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

The applicant, born in 1952, is a Slovak national. He is currently detained at the Stein Prison in Austria. In the proceedings before the Commission he is represented by Mr. Soyer, a lawyer practising in Vienna.

On 4 September 1991 the Vienna Regional Criminal Court (Landesgericht für Strafsachen) convicted the applicant inter alia under the Drug Offences Act (Suchtgiftgesetz) of having, on 28 March 1990, together with his accomplice R., attempted to sell a large quantity of drugs. The Court further convicted the applicant of having attempted to resist the exercise of official authority (Widerstand gegen die Staatsgewalt) upon his arrest, and of having caused bodily harm. The Court sentenced the applicant to seven years' imprisonment.

The Court found that the applicant, who planned to sell heroin in Austria, came into contact with a police informer (S.), and with his assistance arranged a meeting with a potential buyer for 28 March 1990. The applicant's accomplice R. brought two kilograms of heroin to the meeting point, the parking place of a shopping centre in Vienna. The Drug Enforcement Group of the Ministry for the Interior, had received notice of the planned deal from their informer. Thus, on 28 March 1990,

the applicant met the police informer S. who was accompanied by an undercover agent who appeared as the potential buyer. Following price negotiations, the applicant went to R.'s car and returned with a bag containing the heroin. The undercover agent carried out a test which showed that the substance the applicant had offered was actually heroin. Upon approaching the undercover agent's car where the applicant was supposed to be paid, the agent gave a sign to plain cloths' policemen, who were waiting at close distance, to arrest the applicant. The applicant, who still carried the bag with the heroin, hit police officer B. with this bag and wounded his hand, before he could be arrested.

The Court, establishing the relevant facts, considered in particular that the applicant had made a confession before the police, when he, assisted by an interpreter, was questioned after his arrest. He had admitted that he, following R.'s instructions, had tried to hand over the bag which according to his knowledge contained two or three kilograms of heroin. He had repeated his confession before the Investigating Judge, where he had also been assisted by an interpreter. Though at the trial the applicant had pleaded not guilty, he had still admitted that he handed over the bag. While claiming that he did not know it contained heroin, he had made partly contradictory statements during the trial. He repeated first that he had come to Vienna with R., who also instructed him to hand over the bag; at a later hearing he stated that he had met the police informer S. a few days before 28 March 1990 and had arranged the meeting with him and that, at the meeting place, S. had asked him to carry the bag.

As regards the applicant's allegation that the police interpreter and the interpreter assisting him at the questioning before the Investigating Judge had not understood him correctly, the Court, proceeding from the statements of the police officer, who had questioned the applicant, and the police interpreter, found that the applicant had not claimed any misunderstandings during his questioning at the police. Moreover, the Investigating Judge had recorded that the applicant was assisted by a sworn police interpreter, as no court appointed interpreter was available.

The Court also referred to a report of 19 August 1991 which, at the Public Prosecutor's request, had been drawn up on the basis of the undercover agent's submissions by his superior, Major D., a senior official of the Drug Enforcement Group of the Ministry for the Interior. The report stated that the Drug Enforcement Group were informed that Slovak dealers were planning to offer drugs in Austria by a police informer, and that the police informer subsequently arranged the meeting of 28 March 1990. It further stated that the police informer and the undercover agent had come together to the meeting point, that the latter had negotiated the price with the applicant, who had then taken the bag with the heroin from a car. After having tested the drugs offered, the undercover agent had given the sign to arrest the applicant. The Court found that the contents of the report had been confirmed inter alia by the statements of two witnesses heard, namely Major D. and Police Officer B., who had both observed at the scene of the attempted sale from some distance. Major D., in particular, had stated that he saw the applicant approaching the police informer and the undercover agent, going to a car and coming back with a bag. The Court considered that the defence had had the opportunity to question the reliability of this report during trial.

At the trial the Court had rejected the request by the applicant's counsel that he be allowed to be present at the drawing up of the report and to put questions to the undercover agent, on the ground that it would be contrary to the police authorities' refusal to disclose his identity. Subsequently, the applicant's counsel had, unsuccessfully, requested that the report should not be used as evidence, as this would be contrary to the principles of a fair trial.

Finally the Court referred to the statements of the police informer S., who, summoned on the defence counsel's request, had admitted to have arranged a heroin deal. Moreover, he had contradicted the statement of the applicant's life companion, that he had believed in the applicant's innocence and had told her so after the applicant's arrest. In these and the following proceedings the applicant was assisted by counsel.

The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) and an appeal (Berufung) against his conviction. In his plea of nullity he complained inter alia that the Court had proceeded from the undercover agent's report. He submitted in particular that his counsel was not allowed to be present and to question the agent when the report was filed. Therefore, he alleged that his right under Article 6 para. 3 (d) of the Convention had been violated. In his appeal the applicant complained that the Court had neglected some mitigating circumstances.

On 13 October 1992 the Supreme Court (Oberster Gerichtshof) dismissed the applicant's plea of nullity, insofar as relevant in the present case. However, upon his appeal, the Court reduced the sentence to five years' imprisonment.

The Supreme Court considered that the identity of the undercover agent could not be disclosed for reasons of his personal safety and in the interest of his further employment in the Drug Enforcement Group. For the same reasons it had been impossible to allow the applicant's counsel to be present and to question the undercover agent when he filed his report. As the Court was prevented from hearing the undercover agent, it had to take resort to reading out Major D.'s report, containing the agent's submissions. In addition, there had been a possibility to question Major D. on the report.

The Supreme Court further considered that the Regional Court also proceeded from other evidence, in particular from the applicant's confession before the police and the Investigating Judge taken together with the fact that he had been in possession of the heroin when he was arrested. Moreover, there was no indication that the undercover agent had in any way induced the applicant to offer the drugs or to make the deal. Finally the Court had not dismissed any other request for taking of evidence submitted by the defence.

COMPLAINTS

The applicant complains under Article 6 para. 1 and para. 3 (d) of the Convention about the unfairness of criminal proceedings which led to his conviction of attempted sale of drugs. He submits in particular that the Regional Court proceeded mainly from the written submissions made by the undercover agent involved in the case, whom he could not examine as a witness, as the police authorities refused to disclose his identity.

THE LAW

The applicant complains under Article 6 para. 1 and para. 3 (d) (Art. 6-1, 6-3-d) about the unfairness of criminal proceedings which led to his conviction under the Drug Offences Act. He submits in particular that he did not have the possibility to question the undercover agent involved in the case.

Article 6 (Art. 6), so far as relevant, reads as follows:

> "1. 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.
> ...

3. Everyone charged with a criminal offence has the following minimum rights:
...
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; ..."

The Commission recalls that the admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to asses the evidence before them. The Commission's task is to ascertain whether the proceedings, considered as a whole, including the way in which the evidence was submitted, were fair (see Eur. Court H.R., Lüdi judgment of 15 June 1992, Series A. no 238, p. 23, para. 43).

As the requirements of paragraph 3 of Article 6 (Art. 6-3) represent particular aspects of the right to a fair trial guaranteed in paragraph 1, the Commission will examine the complaint from the point of view of these two provisions taken together (see Lüdi judgment, loc. cit).

According to the Court's case-law, all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule paragraphs 3 (d) and 1 of Article 6 (Art. 6-1, 6-4-d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage of the proceedings (see the above mentioned Lüdi judgment, loc. cit. p. 21, para. 47; Eur. Court H.R., Isgró judgment of 19 February 1991, Series A no. 194-A, p. 12, para. 34; Eur. Court H.R., Saïdi judgment of 20 September 1993, Series A no. 261-C, p.56, para. 43).

In the present case the Vienna Regional Criminal Court proceeded from the applicant's confession before the police and the Investigating Judge, as well as from his submissions in court. It further considered the statements of several witnesses heard, in particular Major D., the Police Officer B., and the police informer S. It also had regard to the report of 19 August 1991 drawn up by the police officer Major D. upon the submissions of an undercover agent, setting out the arrangement for the meeting of 28 March 1990 by a police informer, and the course of this meeting.

It is true that the applicant could not examine the undercover agent as a witness. However, in ascertaining whether the requirements of Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) were met, a decisive element is whether the conviction of the applicant was based solely or mainly on evidence in respect of which his defence rights have been restricted, or whether there was other independent incriminating evidence (see the above mentioned Isgró judgment, loc cit., p. 12 et seq., para. 35).

The Commission notes that the Supreme Court dealt with the applicant's complaint that his right under Article 6 para. 3 (d) (Art. 6-3-d) had been violated. The Supreme Court considered that the Regional Court was prevented from hearing the undercover agent, as his identity could not be disclosed for reasons of his personal safety and in the interest of his further employment in the Drug Enforcement Group. The Supreme Court found that the Regional Court had not proceeded only or mainly from the agent's report, but also from the applicant's confession together with the fact that he carried the heroin when he was arrested, and the statements of the witnesses heard.

The Commission considers that the Vienna Regional Court based the applicant's conviction on independent incriminating evidence other than

the report drawn up by Major D. on the submissions of the undercover agent. Firstly, as also the Supreme Court pointed out, it was not disputed that the applicant was in the possession of a bag with two kilograms of heroin when he was arrested at the scene of the attempted sale. Moreover, the applicant made a confession before the police and before the Investigating Judge. Two witnesses heard by the Court did not confirm the applicant's allegation that he had been misunderstood when admitting that he knew he was trying to sell heroin. At the trial the applicant admitted that he arranged the meeting of 28 March 1990 with the police informer S. and that he wanted to hand over a bag to the undercover agent. He only denied that he knew of its contents. Finally the Regional Court had, at the request of the defence, heard the police informer S., who confirmed that he arranged the deal and denied to have made any statements that he had believed in the applicant's innocence. Moreover, the report drawn up by Major D. on the undercover agent's submissions was confirmed by the statements of the applicant and of the police informer S. and by the statements of Major D. and Police Officer B., who had observed the meeting from some distance.

In these circumstances, the Commission finds that the applicant's conviction regarding the attempted sale of drugs was not based solely or mainly on the report containing the submissions of the undercover agent, whom he could not examine as a witness. There was independent incriminating evidence and the Regional Court was in a position to evaluate the consistency of the said report with the necessary caution.

In conclusion, any limitations which may have been imposed on the rights of the defence where not such as to deprive the applicant on the whole of a fair trial.

It follows that the application is 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.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)