AS TO THE ADMISSIBILITY OF

Application No. 19011/91
by M.T.J.
against Denmark

The European Commission of Human Rights (Second Chamber) sitting in private on 31 March 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
C.A. NØRGAARD
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
MM. F. MARTINEZ
J.-C. GEUS
M. NOWICKI

Mr. K. ROGGE, Secretary to the Second 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 16 September 1991 by M.T.J. against Denmark and registered on 29 October 1991 under file No. 19011/91;

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 is an Iranian citizen, born in 1948. He is at present serving a twelve year prison sentence at Vestre fængsel, Denmark.

The applicant came from Iran to Denmark in 1984. He applied for and obtained asylum in 1985.

On 14 September 1989 the applicant was arrested suspected of drug trafficking. The following police investigations inter alia included the interrogation of a witness, A, who was detained on remand in Germany, being involved in drug trafficking as well. From 5 to 7 February 1990 A was interrogated in the remand prison in Germany by a representative of the Danish prosecution authority. The applicant's counsel attended the interrogation. It was agreed between the prosecution and counsel for the defence that the statements obtained from A could be used in court during the applicant's forthcoming trial in Denmark. After 2 1/2 days of interrogation by the prosecutor, A said that he was unable to answer further questions for the time being. No

additional interrogations of A were arranged.

On 9 July 1990 the applicant was formally charged with two counts of drug trafficking, having smuggled a total of approximately 42 kilogrammes of heroin from Germany to Denmark. His case was heard, together with those of two co-accused, from 19 November to 11 December 1990 in the High Court of Eastern Denmark (Østre Landsret) sitting with a jury. During the trial the applicant and the co-accused were heard. They were all represented by counsel. Furthermore, a total of 5 witnesses were heard, 49 taped telephone conversations were examined and a number of documents were submitted as evidence, including the statements obtained in Germany from the witness A. The applicant did not at any moment during the trial object to the way in which the evidence was produced and presented, nor did he request the hearing of further witnesses or the submission of other evidence.

After the taking of evidence the prosecutor and counsel for the defence pleaded the case. Subsequently, the presiding judge summed up the case and instructed the jury. In respect of the statements submitted by A he stated:

(Translation)

> "... The interrogations in Germany.
> The interrogations which took place in Germany are a substitute for the proper hearing of the witness here in court. Such substitution is never as good as the real thing. It would have been an advantage if the person in question had appeared here before us to give evidence, in order to allow the jury and the rest of us to see and hear him. But that was not possible. The detainee could not be moved to Denmark. Therefore the prosecution and counsel for the defence agreed to use the substitute and we must take it as it is.
>
> The interrogations in Germany did not take place in court, but in the remand prison. [The applicant's counsel] ... personally attended the interrogation. The witness was not obliged to make statements and [he] did not do so under criminal liability. This is quite the same as would have applied had the interrogation at the time taken place in a Danish court...
>
> In his pleadings here [the applicant's] counsel complained that [he] did not have the opportunity to put questions to [A] and alleged that this reduces the value of the interrogations...
>
> As regards [A] it is correct that he refused to answer counsel's questions. This is of course unfortunate and must be taken into consideration, when one evaluates his statements. In this I agree with counsel for the defence.
>
> But I would like to recall - as did the prosecutor - that even if [A] had appeared as a witness here in court he could have answered the prosecutor's questions and subsequently refused to answer the questions put by counsel for the defence."

After the presiding judge's summing up and after the jury's deliberations in camera the applicant was, on the basis of the available evidence, found guilty of the charges brought against him. As it was a jury trial the judgment contained no reasons. The applicant was sentenced to twelve years' imprisonment and his expulsion from Denmark was ordered after serving his sentence. One of the co-accused was acquitted whereas the other was sentenced to thirteen years' imprisonment.

On 20 December 1990 the applicant appealed against the judgment to the Supreme Court (Højesteret). In his appeal he referred inter alia to Article 6 para. 3 (d) of the Convention and requested the Court either to quash the judgment because of procedural errors committed or to reduce the sentence.

By judgment of 29 May 1991 the Supreme Court upheld the judgment of the High Court in its entirety. In respect of the interrogation of the witness in Germany the Court stated:

(Translation)

> "The interrogation of [A] took place in the presence of [the applicant's counsel] with whom it was agreed in advance that the statements could be used during the trial, which also happened without objection from counsel. In the instruction to the jury it is stated that [A's] refusal to answer counsel's questions must be taken into account when considering the value of the statement. At least in these circumstances the Court does not find that the use of the statements was contrary to Section 877, subsection 3, of the Administration of Justice Act (Retsplejeloven), as interpreted in the light of Article 6 para. 3 (d) of the Convention.
>
> Neither has any procedural error been committed in respect of the list of evidence or the summing up and instruction to the jury."

COMPLAINTS

The applicant complains that he did not get a fair trial by an impartial tribunal. In this respect he maintains that the presiding judge's instruction to the jury was contrary to Danish law and that the Supreme Court judges were partial since they did not correct the procedural error allegedly made, but rather covered it up. The applicant relies on Article 6 para. 1 of the Convention.

The applicant furthermore invokes Article 6 para. 3 (c) of the Convention maintaining that his defence counsel did not defend him adequately, since he did not object to the use of the witness A's statements as evidence and did not request the hearing of this witness in court.

Finally, the applicant complains, with reference to Article 6 para. 3 (d) of the Convention, that he had no opportunity to cross-examine the witness A.

THE LAW

The applicant complains that he did not get a fair trial by an impartial tribunal, that his counsel did not defend him adequately and that he did not have the opportunity to cross-examine a witness whose statements were used against him during the trial. The applicant invokes Article 6 paras. 1 and 3 (c) and (d) (Art. 6-1, 6-3-c, 6-3-d) of the Convention which read in so far as relevant:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial ... tribunal ...
> ...
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...

(c) to defend himself in person or through legal assistance of his own choosing ...;

(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; ..."

As the guarantees in paragraph 3 of Article 6 (Art. 6-3) are specific aspects of the right to a fair trial set forth in paragraph 1, the Commission will consider the complaints under the respective provisions of para. 3 taken together with para. 1 of Article 6 (Art. 6-3+6-1).

a. In respect of the applicant's complaint that his case was not heard by an impartial tribunal the Commission recalls that the existence of impartiality for the purpose of Article 6 para. 1 (Art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, for example, Eur. Court H.R., Piersack judgment of 1 October 1982, Series A no. 53, p. 14, para. 30).

When considering these elements in the circumstances of the present case, and in the light of the applicant's submissions in respect of the alleged partiality of the presiding judge in the High Court and of the Supreme Court judges, the Commission has not found any substantiated allegations which would merit a further examination of this complaint.

b. As regards the applicant's complaint concerning the performance of his defence counsel the Commission recalls first of all that it may not, under Article 25 (Art. 25) of the Convention, receive applications directed against private individuals, including lawyers (cf. for example No. 9022/80, Dec. 13.7.83, D.R. 33 p. 21). However, it has nevertheless considered whether the High Court failed, by reason of the alleged negligence of the applicant's lawyer, to ensure that the applicant had a fair hearing. In this respect the Commission recalls that the applicant did not at any stage of the proceedings before the domestic courts express any misgivings towards his defence counsel who assisted him before and during the trial in the High Court. Furthermore, there is in the Commission's view nothing in the applicant's submissions which indicates that counsel was prevented from acting or that he failed in his duties. The question concerning the use of the statements of the witness A was thoroughly examined (see below) and its determination does not disclose elements which could lead the Commission to conclude that the applicant did not receive effective legal assistance in the proceedings before the High Court.

c. Finally, as regards the applicant's complaint that he could not cross-examine the witness A the Commission recalls that according to its own case-law, and that of the European Court of Human Rights, all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence; in particular, this may prove impossible in certain cases. The use of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (Art. 6-3-d, 6-1), provided that the rights of the defence have been respected. As a rule, these rights

require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he is making his statement or at a later stage of the proceedings (cf. Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 27).

In the present case the Commission recalls that it was clear to all parties concerned that A could not appear in court in Denmark due to his situation in Germany. Therefore interrogations were arranged there with the participation of the applicant's counsel. It is true that counsel did not receive answers to all questions as A, after 2 1/2 days of interrogation, felt unable to continue for the time being, but it does not appear from the applicant's submissions that further interrogations were requested.

During the applicant's trial, however, counsel raised the issue of the strength of the evidence submitted by A in such circumstances and in this respect the Commission recalls that, as a rule, it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (Eur. Court H.R., ibid., p. 10, para. 26).

As stated above A's evidence was obtained in Germany with the participation of the applicant's defence counsel and the statements were considered by the presiding judge in his summing up and instructions to the jury. It was pointed out by the presiding judge that account should be taken of the way in which A's statements were obtained and that A had been under no obligation to make statements under criminal liability. He agreed with counsel for the defence that the situation was unfortunate. However, the Commission recalls that A's statements were not the only evidence in the case. In the course of the main proceedings in the High Court several witnesses were heard as well as the applicant and his co-accused. Other documentary evidence and 49 taped telephone conversations were also produced. It is undisputed that in this respect nothing could give rise to any misgivings as regards the fairness of the applicant's trial or his right to a proper defence.

Having regard to the above, and considering the case as a whole, the Commission finds that none of the applicant's complaints could lead to the conclusion that he did not get a fair trial within the meaning of Article 6 (Art. 6) of the Convention.

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 Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)