AS TO THE ADMISSIBILITY OF

Application No. 22463/93
by René MÜLLER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 28 June 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN

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 3 January 1993 by René MÜLLER against Austria and registered on 17 August 1993 under file No. 22463/93;

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 is a Swiss national, born in 1954, and currently detained in Austria at the Karlau prison. Before the Commission he is represented by Mr. M. Rath, a lawyer practising in Graz.

On 16 January 1992 the Vienna Regional Criminal Court (Landesgericht für Strafsachen) convicted the applicant and five co-accused, G.K., C.S., H.A., V.B. and T.M., under the Drug Offenses Act (Suchtgiftgesetz) of having in April 1991, together with his accomplices G.K., C.S. and V.B., and in June 1991, together with the accomplice V.B., attempted to sell a large quantity of drugs in Graz and Bregenz respectively. The Court sentenced the applicant to six and half a years' imprisonment and to a fine of 1,4 million AS or 6 months' imprisonment in default.

The Regional Court found that in December 1990 G.K., a dutch national who knew drug suppliers in the Netherlands, had contacted the applicant in Switzerland. They agreed that G.K. would procure drugs in the Netherlands while the applicant would look for potential buyers. The applicant, when looking for potential buyers, contacted V.B whom

he knew from previous drug transactions. V.B. informed him about potential buyers in Graz. Subsequently, between 22 and 27 April 1991 negotiations between V.B., acting for these potential buyers, the applicant, who financed the transaction, and G.K. and C.S., who procured the drugs in the Netherlands, took place. It was agreed to bring the drugs to Germany close to the Austrian border and to meet the potential buyers in Graz on 28 April 1991. As the potential buyers insisted that the drugs be brought to Graz the transaction did not take place and the drugs were sent back to the Netherlands. After further negotiations a new meeting in Graz was arranged for 30 April 1991. On that day H.A. brought the drugs by car to Graz, where also G.K.and C.S. were present. At the meeting with the potential buyers they were arrested by the police. In June 1991 the applicant organised a further drug transaction with potential buyers who V.B. had met in Bregenz. He procured the drugs in Switzerland and hired T.M. as courier for the transport. On 3 June 1991, when attempting to hand over the drugs to the presumed buyers, the applicant, V.B. and T.M. were arrested.

In establishing these facts, the Regional Court relied on the statements of the accused, given in the course of the pre-trial investigations and at the trial, and also on a written police report in regard to which police officer G.T. was heard by the court. The Regional Court had also regard to a report drawn up by the Dutch police.

At the trial the Regional Court rejected the applicant's request to hear the police officers, including the Federal Minister for Internal Affairs (Bundesminister für Inneres), who were responsible for the measures of undercover investigation, the undercover agents and the police informants for proving that the accused had been instigated by the police authorities to commit the offences they were charged with. The Regional Court found that the evidence requested was irrelevant to the proceedings. It was apparent from the police reports and the statements of witness police officer G.T. that the drug offences had been discovered by means of undercover investigation. Furthermore, the applicant, V.B., C.S. and G.K. were already engaged in drug trafficking before V.B. put them in contact with presumed Austrian drug buyers. All the accused - apart from T.M. and H.A. who only had acted as drug couriers - and in particular the applicant had admitted this when questioned by the police and the investigating judge in the course of the pre-trial investigations. In such circumstances it could not be said that their intention to engage in drug trafficking was merely a result of measures of undercover investigation. In any event, even the fact that someone had been incited to an offence by officials carrying out investigations could not lead to exemption of punishment for these offences.

On 20 May 1992 the applicant lodged a plea of nullity and an appeal as regards the sentence against the Regional Court's judgment. He complained that the Regional Court had refused to hear as witnesses the persons responsible for the ordering of the undercover investigations and the police informants. Their evidence would have proven that the criminal offence had been committed on the instigation of the Austrian police. He further submitted that the Regional Court had failed to take mitigating circumstances into account, in particular that the offence had been provoked by the Austrian authorities and that he had made a complete confession which allowed for the discovery of further drug trafficking.

On 16 September 1992 the Supreme Court rejected the plea of nullity. The Supreme Court found that the Regional Court had acted correctly when it refused the applicant's requests for taking of further evidence. The requested evidence was irrelevant to the proceedings as it had already been clarified at the trial that the offences in question had been discovered by measures of undercover investigation. Furthermore, the question to which extent these measures had incited the accused to the commit the offences at issue

was of no importance for the proceedings as it did not concern any fact of relevance for the finding of guilt. The offence of drug trafficking is also committed if the potential buyer of the drugs cooperates with the police.

On 21 December 1992 the Graz Court of Appeal dismissed the applicant's appeal. The Court of Appeal found that the mitigating circumstance of Section 34 para. 4 of the Penal Code (Strafgesetzbuch), namely that the accused had been instigated to commit the offence by a third person, did not apply to the applicant.

The Court of Appeal observed that measures of undercover investigation were an indispensable means for fighting organised crime as it enabled the police to accede to the men who pull the strings (Hintermänner) in such an organisation. Nevertheless, the instigation by police authorities to commit an offence made in the course of undercover investigations would, if not being unlawful, at least be considered as problematic. However, there is no place for such hesitations, if a person who is already inclined to commit a certain kind of criminal offences comes across a police informant. In the present case, the applicant, according to his own statements, had already been selling drugs before he committed the offences at issue. In committing these offences he was only deluded as to the seriousness of the intention of the potential drug buyers to conclude the drug transactions. He therefore could not rely on the mitigating circumstance of Section 34 para. 4 of the Penal Code. This decision was served on the applicant on 11 March 1993.

COMPLAINTS

The applicant complains that he had been instigated by the Austrian authorities by use of undercover agents to commit the offences he had been convicted for. He further complains that the Regional Court refused to hear the police informants and undercover agents on this issue as witnesses at the trial. The applicant invokes Article 6 para. 1 and 3 (d) and Articles 7, 8 and 13 of the Convention.

THE LAW

1. The applicant complains that he had been instigated by the Austrian authorities by use of undercover agents to commit the offences he had been convicted for. He further complains that the Regional Court refused to hear the police informants and undercover agents on this issue as witnesses at the trial. He invokes Articles 6, 7, 8 and 13 (Art. 6, 7, 8, 13) of the Convention.

The Commission finds that these complaints fall to be examined under Article 6 para. 1 and para. 3 (d) (Art. 6-1, 6-3-d) of the Convention which, as 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 ... 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 in order to determine whether the aim of Article 6 (Art. 6) - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (Eur. Court H.R., Imbroscia judgment of 24 November 1993, Series

A no. 275, p. 14, para. 38; Lüdi judgment of 15 June 1992, Series A no. 238, p. 20, para. 43).

a. As regards the applicant's submission that undercover agents had been involved in the criminal investigations against him, the Commission recalls that the conduct of prosecution authorities in the prevention and investigation of criminal offences is primarily a matter for regulation by domestic law. In particular, in the field of dangerous delinquency the prosecution authorities may consider it necessary, in some circumstances, to rely on police informers and undercover agents. In such cases, the Commission has to determine whether the subsequent criminal proceedings, considered as a whole, were fair as required by Article 6 para. 1 (Art. 6-1). The fairness of criminal proceedings may be affected by the fact that an undercover agent of the police authorities played an important part in bringing about the offence which is the basis of the criminal charge (see Radermacher and Pferrer v. Germany, Comm. Report of 11 October 1990, para. 75, unpublished).

In this respect the Commission observes that the Regional Court, in its judgment of 16 January 1992, as well as the Supreme Court and the Court of Appeal, in their respective judgments, found that the applicant already dealt with drugs before the co-accused V.B. came into contact with police informers and undercover agents. The Austrian courts concluded that in such circumstances, namely when a person was already prepared to commit offences of a certain kind, the acting of an undercover agent could not be considered as undue incitement to commit such offences.

Having regard to these findings of the Austrian courts the Commission is satisfied that in the circumstances of the present case there are no indications that the fairness of the proceedings at issue was affected by the activities of undercover agents.

b. The applicant further submits that the Regional Court refused to examine the police informants and undercover agents as witnesses at the trial against him.

In this respect, the Commission recalls that as a general rule it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (Eur. Court H.R., Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). Article 6 para. 3 of the Convention does not give the accused an unlimited right to have witnesses called (No. 8417/78, Dec. 4.5.79, D.R. 15 p. 200). In particular a court is justified in refusing to summon witnesses when it considers that their statements could not be of any relevance to the case (No. 10486/83, Dec. 9.10.86, D.R. 49 p. 86 at p. 102). Domestic courts may thus exercise some discretion, provided that the Convention and particularly the right to a fair hearing are respected in deciding whether the hearing of a defence witness is likely to help to establish the truth (No. 8231/78, Dec. 6.3.82, D.R. 28 p. 5).

In the present case, the Regional Court refused to take evidence requested by the applicant as it found the proposed evidence irrelevant to the case. In the course of the pre-trial investigation and the trial the applicant, and also the co-accused, had admitted to have committed the offences they have been charged with. The issue of the requested evidence was whether they had been incited to do so by police informants and undercover agents. The Regional Court found that this question was of no relevance to the proceedings as, even assuming that such incitement had occurred this would have had no effect for establishing the guilt of the applicant.

Having regard to the above finding that the involvement of undercover agents did not as such affect the fairness of the criminal

proceedings, and taking into account the particular circumstances of the present case, the Commission finds that there is no appearance of a violation of the applicant's rights under Article 6 para. 1 and para. 3 (d) (Art. 6-1, 6-3-d)of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Insofar the applicant appears to complain that the involvement of an undercover agent in the police investigations violated his right to respect for private life as guaranteed by Article 8 (Art. 8) of the Convention, the Commission recalls that the use of an undercover agent in circumstances such as in the present case does not affect private life within the meaning of Article 8 (Art. 8) of the Convention (see Eur. Court H.R., Lüdi judgment of 15 June 1992, Series A no. 238, p. 19, para. 40; No. 10747/84, Dec. 7.10.85, unpublished).

Accordingly, the Commission finds that there is no appearance of a violation of the applicant's rights under Article 8 (Art. 8) of the Convention.

It follows that also this part of 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) — (L. ROZAKIS)