AS TO THE ADMISSIBILITY OF

Application No. 13926/88
by N.
against Denmark

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

MM. S. TRECHSEL, Acting President
C.A. NØRGAARD,
F. ERMACORA
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 5 May 1988 by N. against Denmark and registered on 9 June 1988 under file No. 13926/88;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 28 December 1989 and the observations submitted in reply by the applicant on 16 March 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 is an Iraqi citizen, born in 1957. When introducing his application he was serving an eight year prison sentence at Vestre Faengsel, Copenhagen, Denmark. Before the Commission the applicant is represented by his lawyer, Mr. Jørgen Jacobsen, Copenhagen.

A. The particular facts of the case

The applicant came to Denmark in 1986 and was granted asylum. On 31 October 1987 he was arrested and charged with homicide under

Section 237 of the Danish Penal Code (Straffeloven). The trial took place from 2 to 4 March 1988 before the High Court of Eastern Denmark (Østre Landsret) sitting with a jury and three professional judges.

During the trial in the High Court the applicant was heard. Furthermore the Court heard fourteen witnesses and written evidence was submitted, including certain medical expert opinions. After the hearing of evidence had finished the prosecutor, counsel for the applicant as well as the applicant himself had the opportunity to submit their conclusions to the Court, and the questions to be put to the jury were agreed upon by the parties. The jury was asked to consider four primary and six secondary questions. The presiding judge then summed up the circumstances of the case and its legal aspects to the jury in accordance with Section 893 of the Administration of Justice Act (Retsplejeloven) after which the jury retreated to the jury room to deliberate.

From the court transcripts it appears that the presiding judge was called to the jury room in accordance with Section 895 of the Administration of Justice Act. In this respect the court transcripts state as follows:

(translation)

"The presiding judge was called to the jury room at 11.13 hours and answered questions from the jury who wished to have an elaboration of the term criminal intent.

The presiding judge left the jury room at 11.25 hours.

The presiding judge was called to the jury room at 13.25 hours.

The jury wished to know whether the possibilities of reducing the sentence, as set out in Section 84 of the Penal Code, would allow a sentence below the statutory minimum of the law.

The presiding judge left the jury room at 13.40 hours.

The presiding judge was called to the jury room again at 14.25 hours.

The jury wished to have further details concerning the voting procedure.

The presiding judge left the jury room at 14.40 hours.

The jury returned to the court room at 15.00 hours.

The presiding judge announced that he had been called to the jury room three times and answered questions concerning the interpretation of criminal intent, concerning the question whether the possibilities of reducing the sentence, as set out in Section 84 of the Penal Code, would allow a sentence below the statutory minimum of the law and concerning the voting procedure."

Having deliberated the jury found the applicant guilty of homicide under Section 237 of the Penal Code. Furthermore they answered one question in the affirmative as regards the reduction of the sentence in accordance with Section 84 subsection 1 no. 1 of the Penal Code. The applicant was subsequently sentenced to eight years' imprisonment, a sentence meted out jointly by the jury and the professional judges.

The applicant appealed against the judgment to the Supreme Court (Højesteret). He requested the Court to quash the judgment and to send the case back to the High Court for renewed consideration. In

the alternative the applicant requested a reduction of the sentence imposed.

On 4 May 1988 the Supreme Court rejected the appeal for the following reasons:

(translation)

"Counsel, who has submitted that the presiding judge's summing up was very neutral, has in support of his plea in particular referred to the fact that the important parts of the presiding judge's statements in the jury room must be entered in the court records in accordance with Section 895 subsection 1, 4th sentence. An important aspect of the case was the question whether (the applicant) had the intention to kill or whether it was to be considered as bodily harm resulting in death. As the court records do not indicate anything about the presiding judge's answers to the jury's questions, in particular the question concerning the interpretation of the term criminal intent, the defence has been prevented from evaluating whether the jury's verdict was based on a wrongful legal instruction. Due to this procedural error the case should be sent back to the High Court for renewed consideration.

Four judges ... find:

The passages in the High Court transcripts do not fulfil the requirements set out in Section 895 subsection 1, 4th sentence regarding the entering in the records of the presiding judge's statements. Having regard to this, compared with the circumstances of the case, there is, however, no reason to assume that fulfilling this requirement would have led to another outcome of the case as required by Section 946 subsection 1. ... (T)hese judges therefore decide to reject the request to quash the judgment.

As the sentence is found to be appropriate they vote in favour of upholding the judgment.
Judge ... agrees with the majority that the entering in the records does not fulfil the requirements of Section 895 subsection 1, 4th sentence of the Administration of Justice Act and finds furthermore:

Section 895 subsection 1 of the Administration of Justice Act was introduced as an exception to Section 898 regarding the possibility to put questions to the presiding judge during the court hearing with a right for the parties to demand that the presiding judge's answer be entered in the records. From (the travaux préparatoires) it appears that Section 895 subsection 1 was considered 'not to cause any problem when it is observed ... that the important parts of the presiding judge's statements in the jury room are entered in the records and may constitute a basis for appeal like statements made during his actual summing up of the case under Section 893 ...'.

One of the questions answered by the presiding judge concerned the interpretation of the term criminal intent. This was of central importance for the outcome of the case.

In these circumstances the non-observance of Section 895 subsection 1, 4th sentence should lead to the quashing of the judgment and to the case being referred back to the High Court."

B. Relevant domestic law

The relevant Sections of the Administration of Justice Act read as follows (in translation):

Section 893:

"When the questions have been agreed upon the presiding judge sums up the case and explains, where necessary, the questions and the legal principles which shall form the basis for the answers. Where the presiding judge finds it necessary copies of the questions are given to the jury before he starts his summing up.

After the presiding judge has finished his summing up of the case and before the jury retreats for their deliberations, both parties may demand that particular parts of the presiding judge's explanations as regards the legal principles are entered in the records."

Section 895 subsection 1 :

"When the jury chairman finds that the jury has had appropriate time for a preliminary discussion of the case, the actual deliberations start. During these deliberations the presiding judge shall be present in the jury room if at least five members of the jury express such a wish in order to answer questions the jury might wish to put to him concerning the case. In such circumstances he is furthermore entitled to take the floor when he finds it necessary in order to prevent the jury from making mistakes. When the presiding judge takes the floor in accordance with these rules the clerk of the court shall be called and enter the important parts of the statements in (the records) of which the state prosecutor and the defence counsel may demand a copy once the court has pronounced judgment. Where the presiding judge finds it more appropriate he may decide to give the jury the necessary information in accordance with the procedure set out in Section 898."

Section 898:

"If doubts arise among members of the jury as regards the way in which they shall proceed or regarding the meaning of the questions asked or regarding the way in which their answers should be submitted, or if they consider it necessary that further or amended questions are asked, they may, in addition to putting questions to the presiding judge in accordance with Section 895 subsection 1, request him in the court room to inform them as required or see to it that the necessary requests are taken care of. If it becomes necessary to decide upon changes in or supplements to the questions or if the presiding judge otherwise finds it necessary, the court proceedings shall be resumed and the parties shall have the opportunity to submit comments."

Section 946:

"The non-observance or the incorrect application of procedural rules shall not lead to the annulment of a judgment appealed against unless it is considered very likely that the observance of the rule in question could have led to a different outcome of the case."

COMPLAINTS

The applicant invokes Article 6 para. 1 of the Convention. He is of the opinion that he did not get a fair trial due to the procedural error committed by the High Court.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 May 1988 and registered on 9 June 1988.

The Commission decided on 12 October 1989 to bring the application to the notice of the respondent Government, inviting them to submit written observations on the admissibility and merits of the case.

The Government's observations were submitted on 28 December 1989 and the applicant's observations in reply were submitted on 16 March 1990.

Legal aid was granted to the applicant by the Commission on 18 May 1990.

THE LAW

The applicant has complained of his conviction by the High Court of Eastern Denmark, a conviction which in his opinion was based on such a procedural error that his right to a fair trial secured to him under Article 6 (Art. 6) of the Convention has been violated.

Article 6 para. 1 (Art. 6-1) of the Convention reads as follows:

"1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The Government contend that the applicant received a trial fully consonant with the provisions of the Administration of Justice Act since the Supreme Court, while dealing with the applicant's appeal, looked specifically into the question of whether the missing entry of the presiding judge's statements to the jurors should call for remission of the case for re-trial by the High Court.

The Government do not consider themselves better qualified than the Supreme Court when it comes to evaluating the legal aspects of the case and conclude, therefore, that the error committed has not led to an outcome different from what would have emerged had the rule of the Administration of Justice Act been observed.

The Government submit, moreover, that while recording pursuant to section 895 subsection 1 of the Administration of Justice Act is a technicality meant to offer protection under the law the rule is over and above what is required to fulfil the conditions set out in Article 6 (Art. 6) of the Convention regarding fair trial. The legislation of individual Member States features a range of procedural rules, stemming from historic, practical, technical or economic factors, aimed at providing guarantees of a fair trial. But not every rule is a necessary element of Article 6 (Art. 6). In Denmark, the vast majority of criminal cases is heard by courts of lay assessors where a legally trained judge together with two lay judges, or three legally trained judges and three lay judges, jointly decide on legal and evidentiary issues. The Administration of Justice Act requires a voting procedure in these trials according to which the lay judges shall always vote first and the presiding judge last. The reason for this rule is to safeguard the integrity of the lay judges but the parties of the case are left ignorant of whether the rule is complied with since the voting records are, as in cases heard by a jury, not open to the public. There is, in other words, no record for inspection by the

public. As a result it will be difficult for the parties to substantiate any infringement of the said rule.

This demonstrates, so the Government maintain, that procedural errors do not always lead to the reversal of a judgment, nor should they, and that failure to comply is not necessarily of relevance for an evaluation based on Article 6 (Art. 6).

The applicant submits that the case-law of the Commission and the European Court of Human Rights shows the central importance of Article 6 (Art. 6) of the Convention. The essential principle is that not only shall the accused receive a fair trial de facto, but the trial shall also appear fair, i.e. justice must be seen to be done. The purpose of the rule regarding the recording of the presiding judge's statements under Section 895 subsection 1 of the Administration of Justice Act is to guarantee an accused a fair trial and it cannot be ascertained in advance whether a given rule generally speaking goes further than what is required to meet the requirements of Article 6 (Art. 6). The decisive point is whether the accused received in concrete terms a fair trial.

The applicant further maintains that the main issue in the present case, as it stood before the national courts, was the understanding of the term criminal intent and disregarding the Administration of Justice Act when examining this question was not a mere formality but resulted in a materially unjust outcome since no evidence was produced to justify interpreting the term criminal intent in such a way that intent to kill could legitimately be deduced.

The importance of the rule of receiving the presiding judge's statements is also exemplified, the applicant submits, by the fact that his statements may constitute the basis for an appeal, a possibility which the applicant was deprived of. It is undisputed that a procedural error was committed, an error in the application of procedural rules enacted to secure to an accused a fair trial. The "secret" guidance given to the jury and the circumstances of the case as a whole accordingly meant that the applicant did not receive a fair trial within the meaning of Article 6 (Art. 6) of the Convention.

The Commission recalls that according to Article 19 (Art. 19) of the Convention, the duty of the Commission and of the European Court of Human Rights is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not their function to deal with errors of fact or of law allegedly committed by a national court unless and insofar as they may have infringed rights and freedoms protected by the Convention (cf. Eur. Court H.R., Schenk judgment of 12 July 1988, Series A no. 140, p. 29, para. 45).

While Article 6 (Art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules concerning the national courts' internal procedure, which is therefore primarily a matter for regulation under national law. In particular, none of the Convention's provisions expressly requires that the presiding judge's statements to a jury be entered in the court transcripts. Nevertheless the Commission cannot exclude that the non-observance of such national rules may raise an issue under Article 6 (Art. 6) of the Convention for which reason the Commission must ascertain whether the applicant's trial was fair within the meaning of this provision.

In this connection the Commission refers to its consistently held view that the conformity of a trial with the rules laid down in paragraph 1 of the above-mentioned Article 6 (Art. 6-1) should be examined in the light of the entire trial. It is true that one particular aspect or incident could have been influential or assumed such importance as to constitute a decisive factor in a general appraisal of the trial as a whole. But it is important to note in

this regard that, even in such an event, it is on the basis of an appraisal of the whole trial that the question of whether the case was given a fair hearing should be decided (cf. for example No. 9000/80, Dec. 11.3.82, D.R. 28 p. 127).

In the present case the Commission recalls that the applicant's trial lasted from 2 to 4 March 1988 during which time the High Court of Eastern Denmark sitting with a jury heard fourteen witnesses. In addition the applicant, who was represented by counsel, had the opportunity to address the Court and to submit whatever he found relevant to the outcome of his case. Nothing has emerged during the Commission's examination of the case which could lead to the conclusion that the hearing of evidence was in any way contrary to the concepts of a fair trial as envisaged by Article 6 (Art. 6) of the Convention. Nor has it been alleged that the subsequent summing up of the case by the presiding judge infringed the applicant's rights under this provision.

What remains at issue is the fact that the presiding judge at the request of the jury for a period of 12 minutes explained to the jury in camera the term criminal intent within the meaning of the Danish Penal Code without this being properly recorded as prescribed in the Administration of Justice Act.

As regards the question of any influence this might have had on the jury, the Commission finds that it cannot deal directly with this point under the Convention, as it is impossible to ascertain why the jury replied as it did to the questions concerning the applicant's guilt. Furthermore, whether the jury appraised the evidence and the law correctly or incorrectly is, as already indicated above, a question which lies beyond the competence of the Commission as established by the Convention.

It cannot be inferred from the fact that the recording of the presiding judge's explanations to the jury is made mandatory in Danish law, that a non-observance of this rule would be contrary to Article 6 para. 1 (Art. 6-1) of the Convention. Furthermore, the legal concept of criminal intent, which is entirely a matter for the national courts to determine, was not decided upon by the jury in circumstances where the applicant was at any disadvantage vis-à-vis the prosecution. Accordingly, the Commission's examination of the case as a whole has established that the evidence produced for or against the applicant was presented in such a way as to ensure a fair trial and that, in particular, the equality of arms in this respect was respected.

In these circumstances the Commission finds that the applicant's trial, when regarded as a whole, cannot be considered to have been conducted in a manner contrary to Article 6 para. 1 (Art. 6-1) 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, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — Acting President of the Commission

(H. C. KRUGER) — (S. TRECHSEL)