AS TO THE ADMISSIBILITY OF

Applications Nos. 1) 15252/89 2) 15628/89
3) 17384/90
by K.N.
against Switzerland

The European Commission of Human Rights sitting in private on 11 May 1992, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

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 applications introduced on 1) 23 April 1987, 2) 25 July 1989 and 3) 10 September 1990 by K.N. against Switzerland and registered on 1) 20 July 1989, 2) 4 October 1989 and 3) 31 October 1990 under file Nos. 1) 15252/89, 2) 15628/89 and 3) 17384/90;

Having regard to:

- the Commission's decision of 8 April 1991 to join Applications Nos. 15252/89, 15628/89, 15629/89, 15630/89, 15857/89 and 17384/90; to communicate certain of the applicant's complaints in so far as they concern Applications Nos. 15252/89, 15628/89 and 17384/90; and to declare inadmissible the remainder of the applications;

- the observations submitted by the respondent Government on 19 July 1991 and the observations in reply submitted by the applicant on 18 September 1991;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, a Swiss citizen born in 1935, is a pig-breeder residing at Oberbüren in Switzerland.

A. Proceedings instituted against the Canton of St. Gallen

I.

In 1965/1966 the applicant's pigs became ill and had to be killed. The applicant was of the opinion that the illness had been caused by manure which had entered the drinking water supply. In 1966 he unsuccessfully introduced an action against the Oberbüren municipal and water corporation, claiming damages of 150,000 SFr. Following further appeals, the St. Gallen Cantonal Court (Kantonsgericht) in 1975 upheld the action to the amount of 85,844 SFr.

On 24 June 1981 the applicant introduced a responsibility action (Verantwortlichkeitsklage) against the Canton of St. Gallen, claiming damages of 653,273.60 SFr on account of the long duration of the previous proceedings. The action was dismissed on 10 December 1982 by the Federal Court (Bundesgericht) on account of forfeiture (Verwirkung).

II.

On 12 December 1983 the applicant introduced with the Federal Court a responsibility action, numbering three pages, against the Canton of St. Gallen. Complaining of a denial of justice by the St. Gallen authorities, he claimed damages of 1,505,156.85 SFr.

According to Section 42 of the Federal Judiciary Act (Organisationsgesetz) the Federal Court decides as the only instance in civil litigation between Cantons and private persons.

On 6 January 1984 the Federal Court invited the applicant to consult a lawyer and introduce an improved action. Mr. T., a lawyer, then represented the applicant. On 6 February and on 7 May 1984 T. asked for a prolongation of the time-limit to file the improved action.

On 7 May 1984 T. filed a request for legal aid (Armenrecht). In a letter of 25 May 1984 the Court saw no responsibility of the Canton of St. Gallen for the damages claimed. The applicant then withdrew T.'s power of attorney.

On 3 September 1984 the applicant filed an improved action, numbering 110 pages, in which he claimed 1,320,783.20 SFr.

The Court held a preparatory hearing on 20 February 1985. On 26 February 1985 the Court granted the applicant legal aid and, upon his request, appointed H. as his lawyer.

On 23 August 1985, following a friendly settlement with his previous lawyers, the applicant withdrew various claims amounting to 653,273.60 SFr from his above action.

Thereupon, the applicant unsuccessfully attempted to negotiate a friendly settlement with the Canton of St. Gallen.

On 6 August 1986 B., a substitute for the lawyer H., introduced with the Federal Court an ameliorated action. Therein he claimed under Item No. (1) 256,501.40 SFr damages for the consequences of the polluted drinking water on the applicant's pig-breeding. Under Items Nos. (2) - (4) he further requested approximately 400,000 SFr.

On 11 August 1986 the Federal Court invited the Canton of St. Gallen to reply to the action before 30 September 1986. The time-limit was prolonged. On 30 September 1986 the Federal Court decided to limit the proceedings to Item No. (1) of the applicant's action of 6 August 1986. The Canton of St. Gallen filed its reply on

15 December 1986.

On 23 October 1987 H. informed the Federal Court that the applicant had withdrawn his power of attorney. By letter of 2 November 1987 the Federal Court replied that in view of the conditions of legal aid granted on 26 February 1985 this was not possible. On 26 November 1987 the Court rejected the applicant's request for a new lawyer.

On 15 December 1987, at a preparatory hearing, the parties could not agree on a friendly settlement. The Court then requested the parties to submit further written statements.

On 1 February 1988 the applicant requested suspension of the proceedings as the parliament of the Canton of St. Gallen was dealing with the case. This was refused by the Court on 19 February 1988.

The applicant filed his statement on 18 April 1988. He then wrote to the Court on 27 May 1988, insisting on the withdrawal of H.'s power of attorney. On 31 May 1988 H. filed a separate statement. On 11 July 1988 the applicant complained to the Court that he had received no reply to his letter of 27 May 1988, and that the proceedings lasted too long.

The Canton of St. Gallen filed its reply on 22 August 1988. On 2 September 1988 the written proceedings were closed.

Following a hearing on 25 September 1988 the Federal Court dismissed the applicant's action on 25 October 1988. The judgment numbering ten pages was served on the applicant on 18 November 1988. Therein the Court found that in view of the legal aid granted to the applicant on 26 February 1985 it could only consider the submissions presented by his lawyer to whom no reproach could be made about careless representation. The Court further considered that the action had to be dismissed as the Canton of St. Gallen lacked standing.

A further decision of the Federal Court of 25 October 1988 concerned legal aid. The Court noted therein that it had dismissed the applicant's claims as to Item No. (1) of his ameliorated action of 6 August 1986. The remaining items lacked prospects of success inter alia as certain issues had already definitely been decided on 10 December 1982. As a result, the legal aid granted to the applicant was withdrawn. The Court requested the applicant to pay advance costs of 6,000 SFr. If this sum was not paid, the Court threatened to declare inadmissible the remaining items of the applicant's action.

By letter of 16 December 1988 the applicant wrote to the Federal Court that he did not have the means to pay the sum of 6,000 SFr.

On 6 January 1989 the Federal Court declared inadmissible the remaining items of the applicant's action on the ground that he had failed to pay the advance costs.

B. Criminal proceedings instituted against the applicant

I.

On 15 December 1982 the police stopped the applicant in his car. As he was suspected of driving under the influence of alcohol, he underwent a breath analysis the result of which was positive. A blood test was ordered in respect of which the St. Gallen Forensic Medicine Institute (gerichtsmedizinisches Institut) concluded that the applicant had had a blood alcohol concentration of between 1.4 and 1.5 °/oo.

On 4 March 1983 criminal proceedings were instituted against the applicant. On 8 October 1985 the investigating judge questioned him.

On 27 October 1985 the Wil District Office (Bezirksamt) informed the applicant of its intention to issue a penal order (Strafbefehl) against him. The applicant was given a time-limit of eight days to consult the case-file and submit any further evidence.

On 5 November 1985 the applicant's lawyer asked for leave to consult the case-file. On 6 November 1985 the investigating judge replied that the time-limit had expired on 4 November 1985; he enclosed a penal order, dated 6 November 1985, in which the Wil District Office convicted the applicant of driving under the influence of alcohol and obstruction of official acts, and sentenced him to a fine of 200 SFr and two weeks' suspended imprisonment.

The applicant filed an appeal claiming in particular that he had received the letter of 27 October 1985 only on 29 October, for which reason the time-limit had expired only on 6 November 1985. The appeal was dismissed by the Indictment Chamber (Anklagekammer) of the Canton of St. Gallen on 3 February 1986. The applicant's further public law appeal was rejected by the Federal Court on 14 January 1987.

II.

Meanwhile, on 21 November 1985, the applicant filed an objection against the penal order. The case was referred to the Wil Judicial Commission (Gerichtskommission) which on 1 September 1987 confirmed the previous conviction. The applicant's appeal was dismissed on 8 March 1988 by the St. Gallen Cantonal Court (Kantonsgericht). On 16 December 1988 the Court of Cassation of the Canton of St. Gallen dismissed his plea of nullity. His subsequent plea of nullity to the Federal Court was dismissed on 28 February 1989.

Against the decision of the Court of Cassation of 16 December 1988 the applicant also filed a public law appeal, complaining inter alia that he did not have a fair trial. He also pointed out "by the way" ("am Rande") that "it appears more than strange if an investigating authority requires nearly three years to ... undertake a criminal investigation" ("dass es mehr als merkwürdig anmutet, wenn eine Untersuchungsbehörde beinahe drei Jahre braucht, bis sie ... eine untersuchungsrichterliche Handlung vornimmt").

The Federal Court dismissed the applicant's public law appeal on 3 May 1989. With regard to the period of three years required for the investigation, the Court found that this comparatively lengthy delay had not caused the applicant any prejudice.

C. Proceedings instituted against the Swiss Confederation

Following the decision of the Federal Court of 25 October 1988 (see above A), the applicant introduced with the Federal Finance Department (Eidgenössisches Finanzdepartement) a claim for damages, resulting from the Court's decision (see above A). The Department dismissed the claim on 23 March 1989.

The applicant then introduced with the Federal Court a claim for damages, amounting to 671,554.90 SFr against the Swiss Confederation (Schweizerische Eidgenossenschaft). On 14 December 1989 the Federal Court dismissed the applicant's challenge of Federal Court judges and his request for legal aid, as the decisions of the Federal Court of which the applicant complained had become definite and could not be made the object of a claim for damages. The Court therefore invited him to pay advance court costs amounting to 6,500 SFr.

The applicant then requested the reopening of the previous proceedings. On 6 March 1990 the Federal Court rejected this request and again invited the applicant to pay advance court costs amounting

to 6,500 SFr.

In a further decision of 4 May 1990 the Federal Court noted that the applicant had failed to pay the advance court costs and declared his action inadmissible.

COMPLAINTS

In Application No. 15252/89 the applicant complains under Article 6 of the Convention of the length of the proceedings instituted against the Canton of St. Gallen before the Federal Court.

In Application No. 15252/89 the applicant further complains under Article 6 para. 1 of the Convention of the length of the criminal proceedings instituted against him on account of driving under the influence of alcohol. In Application No. 15628/89 the applicant again refers to his complaints made in Application No. 15252/89.

In Application No. 17384/90 the applicant complains under Article 6 of the Convention of the Federal Court's decision of 4 May 1990 and the court costs of 6,500 SFr which he should have paid in advance.

PROCEEDINGS BEFORE THE COMMISSION

The applicant filed six applications which were introduced as follows: 1) Application No. 15252/89 on 23 April 1987; 2) No. 15628/89 on 25 July 1989; 3) No. 15629/89 on 18 May 1989; 4) No. 15630/89 on 18 May 1989; 5) No. 15857/89 on 3 October 1989; and 6) No. 17384/90 on 10 September 1990.

These applications were registered as follows: 1) 20 July 1989; 2) 4 October 1989; 3) 16 October 1989; 4) 16 October 1989; 5) 4 December 1989; and 6) 31 October 1990.

In his statement of 23 April 1987, leading to Application No. 15252/89, the applicant complained that the criminal proceedings instituted against him were not being conducted within a reasonable time as required by Article 6 para. 1 of the Convention. In the application form leading to Application No. 15628/89, which concerned the criminal proceedings instituted against the applicant, he again referred to the complaint in the statement of 23 April 1987 concerning the length of the proceedings.

On 8 April 1991 the Commission decided to join the applications; to communicate them in so far as they concerned the complaints about the length of the proceedings instituted against the Canton of St. Gallen, the length of the criminal proceedings instituted against the applicant, and the court costs of 6,500 SFr which the applicant was asked to pay in the proceedings against the Swiss Confederation; and to declare inadmissible the remainder of the applications.

The Government's observations were received by letter dated 19 July 1991, the applicant's observations were dated 18 September 1991.

THE LAW

1. The applicant complains about the length of the proceedings instituted against the Canton of St. Gallen, and of the criminal proceedings in which he was involved. He also complains that he was ordered to pay 6,500 SFr as advance court costs in the proceedings instituted against the Swiss Confederation.

2. The Commission recalls that the applicant originally introduced Applications Nos. 15252/89; 15628/89; 15629/89; 15630/89; 15857/89; and 17384/90. On 8 April 1991 the Commission communicated the complaints mentioned above to the respondent Government and declared inadmissible the remainder of the applications.

The communicated complaints were raised in Applications Nos. 15252/89, 15628/89 and 17384/90. It follows that only these applications are still before the Commission.

3. The Government contest the admissibility of these applications.

a) The Government's first objection relates to the complaint about the length of the criminal proceedings instituted against the applicant on account of driving under the influence of alcohol.

The Government contend that the applicant did not raise this complaint before the Commission. Thus, Application No. 15252/89 only concerned the criminal proceedings instituted against the applicant in so far as he complained of the decision of the Federal Court of 14 January 1987. In his subsequent Application No. 15628/89, which was mainly directed against the decisions of the Federal Court concerning his driving under the influence of alcohol, the applicant again did not complain of the length of the proceedings within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission observes that in his first letter to the Commission of 23 April 1987, leading to Application No. 15252/89, the applicant complained that the criminal proceedings instituted against him were not being conducted within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention. Subsequently, he reiterated this complaint. Thus, in Application No. 15628/89, which concerned the criminal proceedings, he referred to the complaint made in the statement of 23 April 1987 concerning the length of the proceedings.

The Commission therefore considers that the applicant raised the complaint at issue.

b) The Government's next objection also relates to the complaint about the criminal proceedings instituted against the applicant.

The Government submit that, even if the applicant did raise the complaint at issue, he in any event did not exhaust domestic remedies according to Article 26 (Art. 26) of the Convention. He did not raise a complaint based on Article 4 of the Federal Constitution or Article 6 para. 1 (Art. 6-1) of the Convention before the domestic courts. Thus, he complained in his public law appeal before the Federal Court about the difficulties in assessing the facts which had occurred three years before, but he never referred to the length of the proceedings. For this reason, the Court never dealt with his complaint.

The Commission recalls that in previous cases against Switzerland concerning the length of proceedings it has found that, in order to comply with the requirements under Article 26 (Art. 26) of the Convention, the applicant had to file with the authority concerned a complaint based on Article 4 of the Federal Constitution or Article 6 para. 1 (Art. 6-1) of the Convention. However, these cases concerned pending proceedings. The Commission also found that the situation was different if the applicant complained about the length of proceedings which had been terminated and where Swiss law envisaged no further remedy (see No. 13523/88, Dec. 4.10.90, to be published in D.R., with further references).

In the present case the Commission need not examine whether the applicant raised this complaint in his public law appeal before the Federal Court. The Commission has just found that in Application

No. 15628/89 the applicant, by referring to a previous statement, complained before the Commission about the length of the proceedings at issue. However, at that stage the domestic proceedings were already terminated, and no further remedy was at the applicant's disposal under Swiss law.

The applicant's complaint cannot therefore be rejected under Article 27 para. 3 in conjunction with Article 26 (Art. 27-3+26) of the Convention for non-exhaustion of domestic remedies.

c) The Government's third objection relates to the applicant's complaint about the order to pay advance court costs in the proceedings instituted against the Swiss Confederation.

The Government submit that the Commission is not called upon to examine this complaint. Thus, while the applicant complains in Application No. 17384/90 of the decision of the Federal Court of 4 May 1990, in fact the order of the Federal Court concerning the advance court costs of 6,500 SFr were dated 14 December 1989 and 6 March 1990. The Government consider that the applicant did not in his applications contest the last two decisions.

The Commission observes that the applicant is contesting the obligation to advance court costs which the Federal Court imposed on the applicant if he wished to pursue his action. In its decision of 4 May 1990 the Federal Court took note of the fact that the applicant had not paid the court costs in advance and for this reason it declared his action inadmissible. Thus, the decision of the Federal Court of 4 May 1990 was the final decision concerning this complaint.

The Commission is therefore called upon to examine this complaint.

4. The parties submit the following observations on the substance of the complaints.

a) In respect of the proceedings which he instituted against the Canton of St. Gallen the applicant submits that even if the case-file was voluminous the case could not be considered complex. He points out that the Federal Court often did not speedily decide on his requests, for instance to be afforded legal aid, or waited two years until it transmitted his statement of 3 September 1984 to the opposite party.

The Government submit that these proceedings were conducted within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention. The applicant was largely responsible for any delay by requesting five times in 1984 and once in 1988 a prolongation of time-limits for filing a statement. The frequent change of lawyers also slowed down proceedings. The Federal Court afforded the applicant's case particular care, for instance by drawing his attention to the possibility of improving his action. It attempted to accelerate the proceedings while having due regard to the applicant's rights.

b) The parties have made no submissions on the length of the criminal proceedings instituted against the applicant.

c) In respect of the complaint concerning the obligation to advance court costs, the applicant submits that his case against the Swiss Confederation was not deprived of prospects of success.

The Government submit that this complaint is manifestly ill-founded. They refer to Section 153 para. 1 b of the Federal Judiciary Act (Organisationsgesetz) according to which the amount of advance court costs may vary between 200 and 20,000 SFr, depending on the special circumstances of the case, e.g. its particular volume or complexity. In this light the amount fixed in the present case was not

disproportionate.

The Government also submit that according to Section 152 para. 1 of the Federal Judiciary Act the Federal Court may exempt an indigent party, whose case does not appear without prospects of success, upon request from paying the court costs and from paying a security for the costs of the opposing party. The Federal Court had already granted legal aid to the applicant, and appointed a lawyer, in the proceedings against the Canton of St. Gallen leading to the decision of 25 October 1988. The applicant was indigent, but his action was without any prospects of success. Thus, the applicant was introducing the responsibility action with regard to decisions of the Federal Court which had already become final.

5. The Commission, having regard to the parties' submissions under Article 6 para. 1 (Art. 6-1) of the Convention, considers that these complaints raise serious issues of fact and law which require an examination of the merits. The applications cannot now be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission:

DECLARES THE REMAINDER OF APPLICATIONS NOS. 15252/89, 15628/89 AND 17384/90 ADMISSIBLE, without prejudging the merits of the case:

- unanimously, as regards the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings instituted against the Canton of St. Gallen, and the length of the criminal proceedings instituted against the applicant;

- by a majority, as regards the applicant's complaints under Article 6 para. 1 (Art. 6-1) of the Convention about the advance court costs.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)