AS TO THE ADMISSIBILITY OF

Application No. 20695/92
by Josef NELLES
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 6 September 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

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 2 July 1992 by Josef NELLES against Germany and registered on 4 September 1992 under file No. 20695/92;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 31 March 1993 to communicate the application;

- the observations submitted by the respondent Government on 26 August 1993 and the observations in reply submitted by the applicant on 11 January 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a German citizen, born in 1956 and was detained on remand at the prison in Düsseldorf when he lodged the application. He is represented by Mrs. S. Oster, a lawyer practising in Essen.

The facts as submitted by the parties are as follows:

The applicant was arrested on 13 June 1991 and remanded in prison on suspicion of murder and other crimes.

On 17 December 1991 the Düsseldorf Court of Appeal (Oberlandesgericht) ordered the detention on remand to continue. The Court stated that in view of the nature of the crime it was not necessary that there existed danger of absconding or of collusion. It further considered that the length of the detention was not

disproportionate but justified in view of the difficulties and complexity of the investigations.

On 7 February 1992 the Federal Constitutional Court (Bundesverfassungsgericht) quashed the Court of Appeal's decision and sent the case back for reconsideration on the ground that the reasons stated in the appellate court's decision were insufficient.

On 25 February 1992 the Court of Appeal again decided that the applicant's detention on remand should continue. This time the Court pointed out that the confession of a co-accused T. had been corroborated by other witnesses such as P. and the applicant's wife U.N. The Court furthermore pointed out that in view of the severe sentence which the applicant had to expect and also in view of the possible revocation of a conditional release granted in another matter, there was a danger that the applicant would abscond. Finally the Court stated that the purpose of detention on remand could not be realised by less stringent measures. Difficult detective investigations were necessary as the applicant denied his participation contrary to the statements of the co-accused T. In these circumstances the public interest in solving the crime and prosecuting the perpetrators prevailed over the applicant's right to liberty.

A constitutional complaint against this decision was rejected by a panel of three judges of the Federal Constitutional Court on 11 May 1992 as being clearly ill-founded. It is stated in the Constitutional Court's decision that the reasons given in the Court of Appeal's order were unobjectionable.

On 11 May 1992 an indictment dated 17 April 1992 was submitted to the competent Düsseldorf Regional Court (Große Strafkammer des Landgerichts). The applicant and his half brother R.T. were accused of having robbed and murdered Mrs. F. in her house. His friend L. was accused of having aided and abetted.

On 9 June 1992 the Court of Appeal in Düsseldorf again ordered that the applicant's detention on remand should continue. This time the Court stated that there was no violation of the right to a speedy trial as the investigations were complex and difficult necessitating the hearing of a great number of witnesses and other criminal examinations. Therefore the indictment could not have been terminated before 17 April 1992. In addition the Court referred to the reasons already stated in the order of 25 February 1992.

On 29 June 1993 R.T.'s defence counsel requested that his client be examined by a psychiatric expert.

On 17 July 1992 the trial court ordered that both the applicant and R.T. be examined by an expert.

On 23 July 1992 the Federal Constitutional Court again rejected another constitutional complaint lodged by the applicant. This time the Constitutional Court underlined however that the Court of Appeal, when examining the necessity of the applicant's detention on remand, would have to take into account that the weight of the applicant's request for release increased with the length of his detention on remand. Therefore it was not very satisfactory that the Court of Appeal limited itself to saying that the indictment had been submitted on 17 April 1992 without carefully examining what happened thereafter in the proceedings against the applicant. The Court of Appeal was consequently instructed to examine at the next occasion whether any delays had occurred in the proceedings and whether such delays had subsequently been corrected by particular diligence.

On 23 July 1992 applicant's counsel requested that the indictment against his client not be admitted. At the same time he challenged the judges of the trial court. The observations of the challenged judges

were communicated to the counsel on 7 August 1992 and a reply was submitted on 14 August 1992. On 19 August 1992 the motion of challenge was rejected. An appeal against this decision was dismissed on 17 September 1992.

Having been admonished by the trial court, the expert wrote on 18 October 1992 that his work had been delayed because he had been awaiting a report from another expert who had examined R.T. in 1990 in connection with other criminal proceedings. He expected however to submit his report at the latest at the end of November 1992.

On 10 December 1992 Mrs. S.O. advised the trial court that she was the applicant's defence counsel and requested to be appointed ex officio counsel. On 15 December 1992 she was given the opportunity to inspect the files and on 18 January 1993 she was appointed as official defence counsel.

On 15 January 1993 the expert, being admonished by the trial court, informed the court that for private reasons his work had been delayed. He further stated that he had visited the applicant in prison on 18 September 1992 but the applicant had refused to co-operate. He could however only prepare an expert opinion if the applicant replied to his questions. On the other hand he had prepared the expert opinion on the other accused, R.T.

On 20 January 1993 the court of appeal again ordered that the applicant's detention on remand continue. The court considered that the length of the proceedings and the applicant's detention was not excessive taking into account that an expert opinion was still outstanding. While the expert opinion concerning the co-accused R.T. was expected to be available within ten days the applicant had, contrary to his own allegations, refused to undergo a medical examination when he was visited in prison by the expert in October 1992. The presiding judge had furthermore stated that the trial was scheduled to begin in March 1993.

On 19 February 1993 the medical expert opinion on R.T. was submitted to the trial court.

On 8 March 1993 the indictment was admitted and the trial fixed to take place on 13, 14, 18 and 21 May 1993. The trial court also ordered that the applicant's detention on remand continue.

On 14 May 1993 the trial court set aside the applicant's warrant of arrest as the co-accused had admitted having robbed and murdered Mrs. F. alone.

On 21 May 1993 the Düsseldorf Regional Court convicted R.T. and imposed on him a life sentence. The applicant and L. were acquitted and granted compensation for their detention on remand. According to the findings of the court R.T., a person with an extensive criminal record, had absconded from prison and found refuge in the applicant's apartment. The applicant also had a criminal record, in particular several cases of theft but the court did not exclude that R.T. had exerted pressure on the applicant in order to be offered shelter by him. While during the investigations R.T. had alleged to have robbed Mrs. F. together with the applicant and that the applicant had committed the murder, he admitted at the trial that he had acted alone and had incriminated the applicant as an act of revenge.

COMPLAINTS

The applicant is of the opinion that his detention on remand exceeded a reasonable time. He invokes violations of Articles 5 para. 3 and 6 para. 1 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 2 July 1992 and registered on 28 September 1992.

On 31 March 1993 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 26 August 1993. The applicant replied on 11 January 1994.

On 17 May 1994 the Commission granted the applicant legal aid.

THE LAW

The applicant complains of the length of his detention on remand which began on 13 June 1991 and ended on 14 May 1993, i.e. one year and eleven months. He considers in particular that the trial court should have taken measures to oblige the psychiatric expert to submit his request on time or should have charged another expert. The applicant invokes Article 5 para. 3 (Art. 5-3) and Article 6 para. 1 (Art. 6-1) of the Convention.

The Commission considers that this complaint falls to be examined under Article 5 para. 3 (Art. 5-3) only.

The respondent Government point out that the applicant will receive compensation for his detention on remand and question whether in these circumstances he can still be considered to be a victim of the alleged violation. In any event the Government consider that the length of the detention was justified in the circumstances of the case and given the complexity of the matter.

a) The Commission first observes that payment under domestic law of compensation for detention on remand which turns out to have been unjustified does not constitute reparation for an alleged violation of Article 5 para. 3 (Art. 5-3) on account of an excessive length of such detention (cf. Eur. Court H.R., Tomasi judgment of 27 August 1992, Series A no. 241, p. 34, paras. 79-81).

b) The Commission recalls that it is in the first place for the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals that the Convention organs are called upon to decide whether or not there has been a violation of Article 5 para. 3 (Art. 5-3) of the Convention (cf. Eur. Court H.R., Neumeister judgment of 27 June 1968, Series A No. 8, p.37, paras. 4-5).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention (cf. Eur. Court H.R., Stögmuller judgment of 10 November 1969, Series A No. 9, p. 40, para. 4).

The grounds invoked by the national judicial authorities may be sufficient to justify keeping a person in detention pending trial but with time they will diminish in pertinence when balanced against the right to liberty guaranteed by Article 5 (Art. 5) of the Convention to the person provisionally detained, and even where such grounds are "relevant" and "sufficient" the Convention organs must ascertain whether the competent national authorities displayed diligence in the

conduct of the proceedings (cf. Eur. Court of H.R., Letellier judgment of 26 June 1991, Series A No. 207, p. 18, para. 35)

c) As to the reasons given by the domestic authorities the Commission considers that they justified the continued detention in view of the initial evidence against the applicant which strengthened the suspicion against him. Also, the fact that the applicant had to expect a severe sentence and in addition risked the revocation of a conditional release granted in another matter could reasonably lead the authorities to assume that there was danger of absconding. The Commission further notes that the Court also considered the possible use of less stringent measures. In these circumstances the Commission is of the opinion that the present matter is distinguishable from the Yagci and Sargin case which related to a comparable period of detention on remand on account of however charges of a different nature (Eur. Court H.R., judgment of 8 June 1995, Series A no. 319).

d) As to the handling of the case by the authorities the Commission notes that the applicant himself has not alleged any particular circumstances tending to show that the authorities delayed the investigations. In fact the matter has been of a complex nature given that difficult detective investigations were necessary according to the uncontested finding of the Court of Appeal. It is true that the psychiatric expert exceeded the time-limits within which he was supposed to submit his report. However, in view of the applicant's refusal to co-operate and the necessity to obtain a prior expert report relating to the co-accused R.T., the delays in the preparation of the expert opinion are sufficiently explained. The Commission cannot therefore in the circumstances find that the authorities did not actively pursue their investigations.

e) Assessing the period in question generally the Commission finds in view of the foregoing that the period of detention on remand does not appear to be unreasonable so as to amount to a possible violation of Article 5 para. 3 (Art. 5-3) of the Convention. The Commission also notes in this context that the trial court ordered the applicant's release and also granted him compensation immediately after R.T.'s confession that he committed the murder alone.

It follows that in these circumstances the application has to be rejected as being manifestly ill-founded in accordance with 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 First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)