AS TO THE ADMISSIBILITY OF

Application No. 25534/94
by Wilfried POTTS
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 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
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

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 1 September 1994 by Wilfried Potts against Germany and registered on 4 November 1994 under file No. 25534/94;

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, as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1945, is a German national. When lodging his application he was detained in a prison in Celle.

Between 10 February and 3 March 1993 the Stade Regional Court (Landgericht) tried the applicant on a charge of murder, namely of having killed his wife, a teacher. In these and the following proceedings, the applicant was assisted by defence counsel of his own choosing. It appears that the applicant's mother-in-law joined the proceedings as associated prosecutor (Nebenklägerin).

At the hearing of 22 February 1993 the Regional Court decided to hear as witnesses three pupils, all born in 1985, who had been present in the class room when the crime at issue was committed. The Presiding Judge informed the parties that the Court, having heard the parents of the children concerned and a school psychologist, intended to exclude the public during the questioning of the children.

Having heard the parties, the Regional Court decided to exclude the public during the questioning of the children. In its decision,

the Regional Court stated that the exclusion of the public was necessary in the interest of the children, in accordance with S. 172 (4) of the Court Organisation Act (Gerichtsverfassungsgesetz). In this respect, the Regional Court considered in particular that there was a risk that, due to the publicity of the case in the press and the audience, the children might be at the centre of public interest which would be harmful to their development. Furthermore, the establishment of the truth was easier as the children would most likely give evidence without feeling any constraints. In agreement with the parties, the parents of the children concerned, the school psychologist as well as three legal trainees were permitted to attend the questioning.

After having excluded the public, the Presiding Judge informed the parties that the school psychologist had expressed the view that the applicant should not be present while the children were giving evidence. The applicant's defence counsel objected. Having deliberated, the Regional Court decided to exclude the applicant during the questioning of the three children concerned. Referring to S. 247 of the Code of Criminal Procedure (Strafprozeßordnung), the Court considered that, according to the opinion of the school psychologist, the children were still suffering from the events at issue. If questioned in the applicant's presence, the children might not feel free to give evidence, and furthermore their old fears might be revived.

The applicant was removed from the court room during the questioning of the first of the three children. The child's mother was heard as to her son's personal data, i.e. his name, date of birth and any relationship to the applicant, after which the child gave his testimony. The applicant was afterwards brought back and informed about the statements made by the witness. The applicant declared that he did not have any questions. The same course of action was followed as regards the second witness. The third witness had not appeared. Thereupon the public and the applicant were again admitted, and the trial continued.

On 3 March 1993 the Stade Regional Court convicted the applicant of homicide (Totschlag) and unlawful possession of firearms and sentenced him to ten years' imprisonment. The Court found that the applicant had shot his wife, who had instituted divorce proceedings, in the course of a lesson at the school premises. The Court, in establishing the facts, had regard to the applicant's own statements, in particular admitting the offence as such. Furthermore, the Court, having heard a forensic expert, a psychiatric expert and a sociologist, considered that the applicant had been criminally responsible at the time of the events. In particular, despite the applicant's high blood alcohol content level, his appearance and conduct at the relevant time, as described by several witnesses, excluded the possibility of a total intoxication. However, due to deficiencies in his personality the applicant had not been capable of understanding the reprehensible nature of his actions. His offence could not, therefore, be qualified as murder, but only as homicide.

The applicant lodged an appeal on points of law (Revision) with the Federal Court of Justice (Bundesgerichtshof). He submitted in particular that at the trial the public had been unlawfully excluded during the part of the proceedings relating to the question whether he should be present during the questioning of the children. He also complained that he had not been present during parts of the proceedings not covered by the Regional Court's decision to remove him, such as the questioning of the parents as to the personalities of their children. He finally challenged the Regional Court's findings as to his criminal responsibility.

The associated prosecutor also appealed on points of law, challenging the Regional Court's finding that the applicant had not committed murder as well as the fixing of the sentence.

The General Prosecutor (Generalbundesanwalt), in his written observations of 26 November 1993 on the above appeals, considered that, as far as the question of the applicant's presence during the questioning of the children had been discussed and his removal had been decided, the public had been excluded to an extent not covered by the Court Organisation Act.

On 21 December 1993 the Federal Court of Justice rejected the associated prosecutor's appeal on points of law.

On 22 December 1993 the Federal Court of Justice issued a summons for the hearing on the applicant's appeal on points of law which had been scheduled for 25 January 1994, indicating that the applicant, being incarcerated, was not entitled to be present.

On 25 January 1994 the Federal Court of Justice held the hearing on the applicant's appeal on points of law in the presence of a representative of the General Prosecutor's Office, the applicant's two defence counsel, but in the absence of the applicant.

At the hearing, Mrs. B., the sister of the victim, presented herself as representative of the associated prosecutor, claiming to be orally appointed. In agreement with the defence counsel and the representative of the General Prosecutor's Office, the Federal Court of Justice granted Mrs. B. the right to make oral observations.

On 25 January 1994 the Federal Court of Justice rejected the applicant's appeal on points of law.

In its decision, the Federal Court of Justice considered in particular the exclusion of the public during the questioning of minors as witnesses pursuant to S. 172 (4) of the Court Organisation Act covered all procedural steps closely related to the questioning or resulting from the questioning and therefore forming part of that phase of the proceedings. These considerations applied in particular to the decision under S. 247 of the Code of Criminal Procedure, i.e. on whether the accused was to be removed from court during the questioning concerned, and the preceding discussion of this question as well as the information of the accused on the contents of the testimony given by the minor witness. Moreover, the parents had not been heard as independent witnesses but only as regards the personal data of the children. The Federal Court of Justice also confirmed the Regional Court's findings as to the applicant's criminal responsibility.

On 18 August 1994 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde).

By letter of 1 February 1995, one of the applicant's defence counsel present at the hearing before the Federal Court of Justice, upon the applicant's inquiry as regards the course of the hearing, explained to him that doubts had been raised as to allowing Mrs. B. to comment at the hearing. However, the defence had finally considered it appropriate not to object to the hearing of Mrs. B.

COMPLAINTS

1. The applicant complains under Article 6 para. 1 of the Convention that at the trial before the Stade Regional Court the public was excluded to an extent which was not covered by the Court's decision which only related to the questioning of minor witnesses, and was not strictly necessary.

2. The applicant further complains under Article 6 para. 3 (d) of the Convention that, while Mrs. B., a witness against him, had been given the opportunity to be heard at the hearing on his appeal on

points of law, he had not been entitled to be personally present, and the defence could not therefore effectively put questions to Mrs. B.

THE LAW

1. The applicant complains that the trial before the Stade Regional Court did not comply with the requirement as to a public hearing pursuant to Article 6 para. 1 (Art. 6-1) of the Convention.

Article 6 para. 1 (Art. 6-1), as far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... public hearing ... by [a] ... tribunal ... the press and public may be excluded from all or part of the trial ... where the interests of juveniles ... 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 Commission notes that the Stade Regional Court, at the hearing of 22 February 1992, decided to hear as witnesses three pupils, born in 1985, who had been present in the class room when the crime was committed. Having heard the parents of the children concerned and a school psychologist as well as the parties, the Regional Court decided to exclude the public during the questioning of the children, finding such exclusion necessary in the interest of the children and also for the purpose of establishing the truth. After having excluded the public, the Regional Court dealt with the question of the applicant's presence during the questioning of the children, and, having heard the parties, decided to exclude the applicant during the questioning of the three children concerned. Following the applicant's removal from the court room, the two children present at court were heard successively, the children's personal data being indicated by their parents. After each questioning, the applicant was brought back into court and informed about the statements made. Subsequently the public was again admitted, and the trial continued.

The Commission finds that in these circumstances the public was excluded from part of the applicant's trial in the interest of juveniles who at the time of their questioning were seven years old and were supposed to give testimony on incidents relating to a charge of murder. Taking into account the reasons advanced by the Regional Court, there is no indication that the interests of the minor witnesses did not require the exclusion of the public from this part of the trial.

The Commission has further considered the applicant's argument that the public was excluded for more than the "extent strictly necessary" within the meaning of Article 6 para. 1 (Art. 6-1). The Commission observes that this test of "strict necessity" is limited to the case where in the opinion of the court, in special circumstances, publicity would prejudice the interests of justice. Furthermore, the Commission notes the findings of the Federal Court of Justice that, while the Regional Court's decision to exclude the public related to the questioning of the children, it also covered any other procedural step closely linked to the questioning of the children such as the procedural question of the applicant's presence. In this context, the Commission had also regard to the absence of any request by the defence to have the public admitted during this part of the proceedings.

In these circumstances, the Commission finds that there were sufficient reasons justifying the exclusion of the public during the part of the hearing before the Stade Regional Court which followed the decision to hear the children concerned as witnesses until the completion of their testimony.

Accordingly, there is no appearance of a violation of Article 6

para. 1 (Art. 6-1) in this respect.

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.

2. The applicant further complains under Article 6 para. 3 (d) (Art. 6-3-d) of the Convention that, while Mrs. B., a witness against him, had been given the opportunity to be heard at the hearing on his appeal on points of law, he had not been entitled to be personally present, and the defence could not therefore effectively put questions to Mrs. B.

The Commission observes that the applicant's submissions relate both to the issue of his presence at the hearing before the Federal Court of Justice as well as the intervention of a person on behalf of the associated prosecutor. It seems appropriate to look at these complaints from the points of view of paragraphs 1 and 3 of Article 6 taken together (Art. 6-1+6-3), especially as the guarantees in paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (Eur. Court H.R., Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29).

As regards the question of the applicant's presence at the hearing on his appeal on points of law, the Commission considers that, having regard to the nature of review exercised by the Federal Court of Justice, the presence of the accused, who is legally represented, is not generally required either by paragraph 1 or 3 (c) of Article 6 (Art. 6-1, 6-3-c) (cf., mutatis mutandis, Eur. Court H.R., Kremzow judgment of 21 September 1993, Series A no. 268-B, p. 44, para. 63).

In the present case, the hearing before the Federal Court of Justice related to the applicant's appeal on points of law - the appeal lodged by the associated prosecutor having been rejected at an earlier date - and was confined to legal questions relating to procedural matters, namely the exclusion of the public during part of the trial, and to the question whether the Regional Court had correctly found him criminally responsible. No matters relating to the applicant's character or otherwise necessitating his personal presence were at issue (cf., Eur. Court H.R., Kremzow judgment, loc. cit., p. 45, paras. 67-68).

The Commission also noted that Mrs. B., the sister of the victim, was given, as representative of the associated prosecutor, the opportunity to make oral submissions at the hearing concerned. However, bearing in mind the legal nature of the issues to be decided by the Federal Court of Justice and the presence of his two defence counsel, who were consulted and did not object to Mrs. B. being heard, the Commission finds no indication that the applicant's absence on the occasion of these submissions infringed his defence rights.

In these circumstances, the applicant's submissions do not disclose any appearance of a violation of his right to a fair trial within the meaning of Article 6 paras. 1 and 3 (Art. 6-1, 6-3) in the proceedings before the Federal Court of Justice.

It follows that this part of the application is likewise 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) (C.L. ROZAKIS)