AS TO THE ADMISSIBILITY OF

Application No. 17722/91
by S.
against Switzerland

The European Commission of Human Rights sitting in private on 8 April 1991, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
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
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 October 1990 by S. against Switzerland and registered on 24 January 1991 under file No. 17722/91;

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, a Swiss citizen born in 1918, is a doctor residing at U. in Switzerland.

I. Particular circumstances of the case

In 1985 the Bözberg Agricultural Consumers' Cooperative (Landwirtschaftliche Konsumgenossenschaft) decided to enter liquidation. A loss of approximately 100,000 SFr. was calculated, entailing the obligation for each cooperative member to pay a supplementary contribution (Nachschusspflicht) of 1500 SFr.

The issue arose whether the applicant was a member of the Cooperative and therefore obliged to pay. The applicant disputed this whereupon the Cooperative instituted proceedings requesting execution (Betreibung) of its claim against the applicant to the amount of 1500 SFr. The applicant objected thereto. The Cooperative then requested the Brugg District Court (Bezirksgericht) provisionally to proceed with the execution (provisorische Rechtsöffnung; see below, Relevant

domestic law).

On 20 March 1987 the President of the Brugg District Court decided in summary proceedings provisionally to grant the execution. The applicant then filed an appeal. On 29 September 1987 the Aargau Court of Appeal upheld the appeal and dismissed the request to proceed with the execution.

In 1988 the Cooperative introduced an action against the applicant before the Brugg District Court for payment of 1500 SFr. In the ensuing proceedings the applicant complained that the President of the Brugg District Court lacked impartiality as he had previously decided on the Cooperative's provisional request to proceed with the execution.

In his decision of 5 December 1988 the President of the Brugg District Court upheld the action. With regard to the applicant's complaint about the lack of impartiality of the Brugg District Court President, the decision noted that according to constant case-law there was no obligation for a judge to step down if he had first dealt with a matter in summary execution proceedings and later as a single judge in ordinary proceedings.

The applicant's appeal against this decision was dismissed by the Aargau Court of Appeal on 25 September 1989.

On 12 March 1990 the Federal Court (Bundesgericht) declared the applicant's public law appeal (staatsrechtliche Beschwerde) in part inadmissible, in part it dismissed the appeal as being unfounded. The Federal Court sent the decision out on 29 March 1990; according to a statement of the Unterbözberg post office the applicant received it on 6 April 1990.

With regard to the impartiality of the District Court judge the Federal Court found:

<Translation>
"He furthermore insists that the District Court President was partial. The contested decision states that the mere circumstance that the Court President also acted as a judge in the execution proceedings does not according to the cantonal procedure constitute a ground to step down. The applicant does not discuss this reasoning and he does not mention any other relevant ground indicating partiality."

<German>
"Sodann hält er an der Befangenheit des Bezirksgerichtspräsidenten fest. Nach dem angefochtenen Entscheid stellt allein der Umstand, dass der Gerichtspräsident auch als Rechtsöffnungsrichter gewirkt hat, gemäss der kantonalen Prozessordnung keinen Ausstandsgrund dar. Der Beschwerdeführer setzt sich mit dieser Begründung nicht auseinander und tut auch sonst keinen stichhaltigen Grund für eine Befangenheit dar."

With regard to the supplementary contribution the Court found that it was not arbitrary to assume that the applicant had originally been sufficiently informed of this obligation.

II. Relevant domestic law

According to the Swiss Code of Execution and Bankruptcy (Schuldbetreibungs- und Konkursgesetz) a creditor wishing execution of a claim must file an execution request (Betreibungsbegehren, Section 67 of the Code). Thereupon, a payment order (Zahlungsbefehl) is issued. If the debtor raises an objection (Rechtsvorschlag), the execution is in principle terminated and the creditor must institute

regular court proceedings (Section 79).

Nevertheless, if upon the debtor's objection the creditor can substantiate his claim with a judicial decision, he may request the court to cancel the objection and to proceed with the execution (Rechtsöffnungsbegehren, Section 80). This request is normally dealt with in summary proceedings; the judge must decide after hearing the parties and within five days after the creditor has filed his request (Section 84). The parties do not have all regular means of application and defence.

If the claim is only based on an official document (öffentliche Urkunde) or can be substantiated by a signed statement of the debtor, the creditor may request the provisional execution (provisorisches Rechtsöffnungsbegehren, Section 82).

Once provisional execution has been granted, the creditor may request the provisional impounding (provisorische Pfändung) of the debtor's fortune. The debtor, on the other hand, may within ten days introduce court proceedings in which he requests the claim to be disallowed (Aberkennung; Section 83). If the debtor fails to do so,

the execution becomes definitive. The debtor who then pays the claim still has the possibility within one year to institute court proceedings to reclaim the payment (Rückforderungsklage, Section 86).

COMPLAINTS

The applicant complains that the President of the Brugg District Court lacked impartiality as he first decided on the Cooperative's request to grant execution, and later on the Cooperative's action. The applicant further complains that the Federal Court refused to prolong the time-limit for filing his public law appeal although he was suffering from the results of a car accident. The applicant also appears to complain about the obligation to pay the supplementary contribution. He relies on Article 6 of the Convention.

THE LAW

The applicant complains under Article 6 (Art. 6) of the Convention of the various proceedings and the ensuing decisions.

The Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with applications alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (see e.g. No. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45).

It is true that the applicant also complains under Article 6 (Art. 6) of the Convention of the alleged lack of impartiality of the District Court judge and that he was not given sufficient time for preparing his public law appeal statement.

Article 6 para. 1 (Art. 6-1) of the Convention states insofar as it is relevant:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

As regards the applicant's complaint about the alleged lack of impartiality of the District Court judge, the Commission recalls that the existence of impartiality must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubts in this respect (see, amongst other authorities, Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A No. 86, pp. 13-14, para. 24).

As to the subjective test, the personal impartiality of a judge must be presumed until there is a proof to the contrary. The applicant has in no way shown that the judge concerned acted with personal bias.

Under the objective test, it must be determined whether, apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings. Accordingly, any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw (cf. De Cubber judgment, loc. cit., p. 14, para. 26).

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the view of the complaining party is important but not decisive. What is decisive is whether this fear can be said to be objectively justified.

In the present case, the fear of lack of impartiality was based on the fact that the District Court judge who decided on the action introduced by the Cooperative against the applicant had previously decided in the summary proceedings on the Cooperative's request to grant execution.

This kind of situation may occasion misgivings on the part of a party as to the impartiality of a judge, misgivings which are understandable but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.

In the present case, the Commission observes that the District Court judge was first called upon to examine whether the Cooperative could provide sufficient substantiation in order to grant provisional execution (see above, Relevant domestic law). Moreover, the decision had to be given within five days after the request had been filed. The judge thus only undertook a summary and formal assessment of the available material. This examination was different from the subsequent full examination of the well-foundedness of the Cooperative's action in the regular court proceedings by the District Court judge.

The provisional nature of the summary proceedings is in the Commission's view further emphasised by the fact that, if provisional execution is granted, the debtor has the possibility within ten days to institute ordinary court proceedings in which he may request the claim to be disallowed. If these proceedings fail and his fortune is impounded, he again has the possibility within one year to institute court proceedings in which he may reclaim the payment made.

In the Commission's opinion the mere fact that a judge has first summarily and provisionally determined a request for execution and later decides on a subsequent action raising the same issue cannot in itself justify fears as to his impartiality.

The Commission is therefore of the view that in the circumstances of the case the role of the judge was not capable of giving rise to doubt as to his impartiality and that the applicant's fear cannot be considered to be objectively justified.

With regard to the contention that the applicant had insufficient time to prepare his public law appeal statement, as he was suffering from the results of a car accident, the Commission considers that Article 6 para. 3 (b) (Art. 6-3-b) of the Convention guarantees to a person charged with a criminal offence the right to have adequate time and facilities to prepare his defence. However, such a right may also be inherent in Article 6 para. 1 (Art. 6-1) of the Convention which guarantees a fair and public hearing in the determination of a person's civil rights and obligations. Nevertheless, in the present case, the Commission considers that the applicant has not sufficiently substantiated the degree and possible effects of his injuries.

As a result, the application must be declared inadmissible as being 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 Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)