AS TO THE ADMISSIBILITY OF

Application No. 17601/91
by Bernhard SENN
against Switzerland

The European Commission of Human Rights (First Chamber) sitting in private on 7 April 1994, the following members being present:

MM. A. WEITZEL, President
S. TRECHSEL
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

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 20 November 1990 by Bernhard Senn against Switzerland and registered on 7 January 1991 under file No. 17601/91;

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 1948, is a real property agent. Before the Commission he is represented by Mr. R. Bühler, a lawyer practising in Lucerne.

In the 1960s and 1970s the applicant and his brothers founded various companies in the Canton of Uri dealing mainly with real property. In 1977 and 1978 these companies merged with two building firms and became the C. AG with its seat in the Canton of Lucerne. Further companies were founded of which many went bankrupt after 1981.

Proceedings leading to the Federal Court's decisions of 29 March 1990

On 18 May 1981 the Investigation Office (Verhöramt) of the Canton of Uri instituted criminal investigations against the applicant and his brother on suspicion of their having committed various economic offences. In December 1981 the Investigation Office appointed the R. AG, a consultancy firm, to prepare an

expert opinion as to whether the various files disclosed a conduct which appeared punishable. At the end of December 1983 the applicant appointed a lawyer. As from 27 April 1984 onwards the applicant was permitted to consult part of the case-file.

On 21 March 1986 the Uri Public Prosecutor's Office (Staatsan-waltschaft) indicted the applicant and other persons of various economic offences. On 17 June 1986 the Uri Regional Court (Landgericht) held a preparatory meeting at which it decided on the applicant's requests for the taking of evidence.

On 17 November 1986 the trial began before the Uri Regional Court. Various hearings were held, inter alia on 20 January 1987. On 12 March 1987 the Court pronounced its judgment in which it convicted the applicant inter alia of fraud, false declaration of companies, disloyal management, negligent bankruptcy, the failure to keep accounts and the forgery of documents. The applicant was sentenced to a prison sentence of five years and 10 months and to a fine of 4,000 SFr. A period of detention on remand of six days was deducted from the sentence.

In its judgment the Court listed the charges raised by the Public Prosecutor's Office, the requests of the defence, and the final statements of the accused. The Court dismissed the applicant's request to have incriminating witnesses examined, as he had failed to specify the nature and relevance of the questions; and as he had already had sufficient opportunity to examine the case-file and to submit such requests during the investigations.

The applicant filed an appeal (Berufung) against this judgment with the Court of Appeal (Obergericht) of the Canton of Uri. In its judgment dated 31 May, 15 and 29 June 1988 the Court upheld the conviction, while sentencing the applicant to six years and 10 months' imprisonment and to a fine of 6,000 SFr. The Court dismissed inter alia the applicant's request to have altogether 24 witnesses examined and to have further evidence taken as the facts had been sufficiently established. The Court was composed of judge A., the President, judge I., the Vice-president, judge M., and other judges.

The applicant filed a plea of nullity (Nichtigkeitsbeschwerde) and a public law appeal (staatsrechtliche Beschwerde) on which the Federal Court (Bundesgericht) pronounced itself in two decisions dated 29 March 1990 and served on the applicant on 19 May 1990.

In its decision on the public law appeal the Federal Court first dealt with the applicant's complaints about the proceedings before the Regional Court and Court of Appeal. Insofar as he complained that he had not been informed of his right to have a lawyer, and indeed had not been granted an officially appointed lawyer, the Court found inter alia that the applicant had previously had many contacts with lawyers and should have known that it was possible also in criminal proceedings to consult a lawyer. To the extent that the judgment of the Court of Appeal had dealt with these complaints summarily, the Court found that it sufficed if it now itself gave sufficient reasons.

Insofar as the applicant complained that he had only been able to consult part of the case-file and this only on 27 April 1984, the Court found that it sufficed if the applicant could consult the entire case-file once the investigations had been terminated; the applicant had not claimed that after termination of the investigations on 25 April 1984 he was refused consultation.

The Court then dealt with the applicant's complaint that in the proceedings the R. AG, a consultancy firm, was employed as expert although the firm also acted as administrator (Sachwalter) in the bankruptcy proceedings of several of the applicant's companies; thus it would have biased views on the matter. The Court found that the firm had not acted as an expert who assisted the judge in preparing his judgment in matters in which the judge had insufficient specialised knowledge. Rather, the firm had only been invited to submit additional facts and indications which, rather than assisting the judge, had first to be assessed by the investigating authorities.

Next, the Court dealt with the applicant's complaint that judge A., the President of the Court of Appeal, was biased as he had advised the applicant as a lawyer and had acted as his notary between 1972 and 1976; and that he had presided over the Uri municipal water corporation which in 1976, as a neighbour, had introduced a property action against the applicant. The Court noted that judge A.'s activities as a lawyer and notary had occurred long ago; that the applicant had admitted the claim introduced against him; and that the applicant had not shown any concrete grounds for doubting the judge's impartiality.

Insofar as the applicant complained that judge I., the vice-president of the Court of Appeal, had been biased as in 1975 he had written a critical letter to a newspaper editor about the water situation in the Canton of Uri, the Court noted that the applicant had as a result instituted defamation proceedings against the judge, though he had later withdrawn his action; moreover, the applicant had not shown in what respect judge I.'s letter to the newspaper now called in question his impartiality.

Insofar as the applicant complained that judge K. had slept during the trial before the Regional Court, the Federal Court referred to a newspaper article according to which it had not been clear at the trial "whether the closed eyes of a judge implied that he was thinking particularly intensively, or having a short dream about credits coincidentally spouting millions of Francs" ("ob die geschlossenen Augen eines Richters von besonders intensivem Nachdenken oder von einem kurzen Traum über zufällig sprudelnde Millionenkredite zeugen"). The Court found that the mere fact that the judge closed his eyes for a few moments did not imply that he slept.

The applicant's complaint that the composition of judges of the Uri Regional Court constantly changed was declared inadmissible by the Federal Court as the applicant had not complied with the requirement of the exhaustion of cantonal remedies.

Insofar as the applicant complained about the insufficient assessment of evidence and that he had not been able to put questions to witnesses, the Court found that the applicant had not contested that, as required by the Constitution, he been granted this opportunity at least once during the hearing. Moreover, the Court noted that the Court of Appeal had regarded the applicant's requests for the taking of evidence as irrelevant to the established facts.

The Federal Court then dealt extensively with the grounds leading to the applicant's conviction and in respect of most complaints dismissed the public law appeal.

It upheld the public law appeal in respect of two complaints. First, insofar as the applicant complained that he had been convicted in respect of the forgery of documents, the Court found that no such charge had been raised in the bill of indictment.

Second, in respect of another set of facts the applicant complained that he had been acquitted by the Uri Regional Court of the offence of obtaining a false registration, and at the trial before the Uri Regional Court the Public Prosecutor had not requested the applicant's conviction in this respect; the Court of Appeal had nevertheless convicted him thereof.

In respect of these two complaints the Federal Court quashed the judgment of the Uri Regional Court of 31 May, 15 and 29 June 1988 and referred the case back for renewed decision. The Court further found that the applicant should be reimbursed for costs to a reduced extent, as only two of many complaints had been successful. The Court found that it was justified to compensate this amount with other court costs to be imposed on the applicant and, therefore, neither reimbursed the applicant for his costs, nor imposed court costs on him.

Also on 29 March 1990 the Federal Court struck the applicant's plea of nullity off its list as being without object (gegenstandslos).

Proceedings leading to the Federal Court's decisions of 3 July 1991

Proceedings were resumed before the Uri Court of Appeal. The applicant requested the taking of further evidence and the questioning of those witnesses the examination of which he had already requested in the first set of proceedings.

In its judgment dated 10 and 11 October 1990 the Court of Appeal largely confirmed its previous judgment of 31 May, 15 and 29 June 1988. However, it terminated the proceedings in respect of the charge of giving false information on commercial companies on account of prescription (Verjährung) and acquitted the applicant of two charges of obtaining a false registration and of one charge of forgery of documents. He was sentenced to imprisonment of five years and six months and a fine of 4,000 SFr. The Court found that the Federal Court had already dealt with many of the applicant's complaints about the unfairness of the proceedings. The Court of Appeal admitted some documents submitted as evidence, but regarded as irrelevant further witnesses whom the applicant wished to be examined. The Court was composed by judge A., the President, judge I., the Vice-president, judge M. and other judges.

The applicant filed a public law appeal and a plea of nullity, which were partly upheld by the Federal Court on 3 July 1991.

The Court dismissed the applicant's complaints about the composition of the Uri Regional Court in the first set of proceedings. It noted that two substitute judges who had not been present at all the trial hearings had not participated in the preparation of the judgment. Two other judges involved in the preparation of the judgment had not been present on 17 June 1986, though at that session only preliminary questions had been discussed and a request filed by the applicant had indeed been upheld. At the hearing of 12 March 1987, with one judge missing, the judgment had been pronounced. Finally, insofar as a further judge had not participated at the Regional Court's session of 20 January 1987, the Federal Court declared this complaint inadmissible as being lodged out of time.

The Federal Court upheld the public law appeal to the extent that the Court of Appeal in its judgment of 10 and 11 October 1990 had terminated the proceedings or acquitted the applicant in

respect of certain charges; it had nevertheless not reimbursed the applicant's costs arising out of the second set of proceedings, although the latter had become necessary after the Federal Court partly quashed the Court of Appeal's judgment of 31 May, 15 and 29 June 1988.

In its other decision of 3 July 1991 the Federal Court upheld the applicant's plea of nullity to the extent that the judgment of the Court of Appeal contained insufficient motivation as to his conviction in respect of charges of forgery and false registration.

Proceedings leading to the Federal Court's decisions of 16 December 1991

In the proceedings resumed before the Uri Court of Appeal the applicant challenged judge M. The applicant complained in particular that judge M. had participated in the previous proceedings before the Court of Appeal where that Court had dismissed the applicant's request to have certain witnesses heard; the Court had explained that the statements of these witnesses could not change its opinion as to the applicant's guilt.

In its judgment of 19 September 1991 the Court of Appeal mainly confirmed its previous judgments; it found the applicant guilty of certain charges and acquitted him of others. The applicant was sentenced to imprisonment of three years and six months and to a fine of 4,000 SFr. The Court further decided that the applicant had to pay three quarters of the court costs imposed by the Regional Court, i.e. 65,741 SFr, and the court costs for the first set of the proceedings before the Court of Appeal amounting to 4,570 SFr. The Court of Appeal further dismissed the applicant's challenge of judge M.; it also dismissed his further requests for the taking of evidence as they were irrelevant or the facts were known.

The applicant's public law appeal and plea of nullity against this decision were dismissed by the Federal Court in two decisions dated 16 December 1991. It dismissed the applicant's challenge of judge M. of the Uri Court of Appeal, referring in particular to that Court's conclusions that in the first set of proceedings M. had refused to consider certain documents about the execution of debts (Betreibungs- und Konkursakten) as being irrelevant; that in the second set of proceedings the Court of Appeal had in fact considered mitigating grounds; and that the applicant himself stated that he had no concrete grounds to doubt the impartiality of judge M.

COMPLAINTS

Proceedings leading to the Federal Court's decisions of 29 March 1990

Under Article 6 para. 1 of the Convention the applicant complains that the President and Vice-President of the Uri Court of Appeal had "disregarded the grounds for abstaining from participation" ("die Ausstandsgründe missachtet"); the expert of the R. Consultancy Company and their employees had also disregarded the principles of abstention.

Under Article 6 para. 1 of the Convention the applicant complains that before the Regional Court the judges constantly changed. Judges G. and E. who participated in the judgment did not participate at the trial hearing of 17 June 1986; judge G. also did not participate at the hearing of 20 January 1987 where

a substitute took part.

The applicant further complains under Article 6 para. 1 of the Convention that judge K. of the Uri Regional Court slept during the entire hearing (während der gesamten Landgerichtsverhandlung).

The applicant also complains under Article 6 para. 1 of the Convention of the insufficient reasoning given in the judgments of the Uri Regional Court and Court of Appeal.

Under Article 6 paras. 1 and 2 of the Convention the applicant complains that the Federal Court quashed the judgment of the Regional Court of 31 May, 15 and 25 June 1988, yet he received no compensation for court costs.

Under Article 6 paras. 1 and 3 (b) the applicant complains that he and his lawyer could only consult part of the case-file, and this only on 27 April 1984, i.e. three years after the investigations commenced.

Under Article 6 paras. 1 and 3 (c) the applicant complains that he should have been given an officially appointed lawyer, yet he was not even informed of the possibility to have a lawyer. While the criminal investigations commenced on 18 May 1981, the accused himself obtained a lawyer only in December 1983.

Under Article 6 paras. 1 and 3 (d) of the Convention the applicant complains that he could not question incriminating witnesses or have exonerating witnesses questioned. He was not informed in advance of the questioning of witnesses. There was no possibility to put supplementary questions. The applicant could not put forward evidence and have evidence taken.

Proceedings leading to the Federal Court's decisions of 3 July 1991

The applicant reiterates his complaints previously made under Article 6 of the Convention. He also complains under Article 6 para. 1 of the Convention that the Federal Court dismissed his public law appeal insofar as it concerned the composition of the Uri Regional Court.

Under Article 6 paras. 1 and 2 of the Convention the applicant complains that, although the Federal Court again partly upheld his public law appeal, he was not granted compensation.

Proceedings leading to the Federal Court's decisions of 16 December 1991

The applicant reiterates the complaints previously raised under Article 6 para. 1 of the Convention. He also complains under Article 6 para. 1 of the Convention that "in respect of Court of Appeal judge M. the ground of abstention from the proceedings was not considered" ("indem bezüglich Oberrichter M. der gegebene Ausstandsgrund missachtet wurde").

Under Article 6 paras. 1 and 2 of the Convention the applicant complains that he was awarded compensation for the court costs amounting to 5,000 SFr, although he had spent 70 hours preparing the second set, and 35 hours for the third set, of the proceedings.

THE LAW

1. The applicant raises various complaints under Article 6 (Art. 6) of the Convention and its various subparagraphs. Article 6 (Art. 6), insofar as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."
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> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights: ...
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> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

The guarantees contained in para. 3 of Article 6 (Art. 6-3) are specific aspects of the general concept of a fair trial set forth in para. 1 (Art. 6-1) of the same Article, and the Commission will examine the applicant's complaints under the general rule of para. 1 (Art. 6-1) (see Eur. Court H.R., Bönisch judgment of 6 May 1985, Series A no. 92, p. 14 et seq., para. 29; No. 12391/86, Dec. 13.4.89, D.R. 60, p. 182).

Furthermore, the question whether a trial is in conformity with the requirements of Article 6 para. 1 (Art. 6-1) of the Convention must be considered on the basis of an examination of the proceedings as a whole (see No. 11058/84, Dec. 13.5.86, D.R. 47, p. 230). The Commission has accordingly looked at the applicant's trial as a whole.

2. a) The applicant submits that before the Uri Regional Court the judges constantly changed. However, the Commission notes the Federal Court's decision of 3 July 1991, not contradicted by the applicant, that two judges who had not been present at all hearings before the Regional Court were substitute judges not participating in the preparation of the judgment; that a further hearing where two judges had not participated only concerned preliminary issues; and that the final hearing, where one judge had not been present, only concerned the pronouncement of judgment. In respect of a further hearing where one judge had been absent the Federal Court declared the applicant's complaint inadmissible as being out of time.

The applicant complains that judge K. slept during the entire trial before the Regional Court. The Commission notes the Federal Court's decision of 29 March 1990, referring to a newspaper article on the trial, according to which the mere fact that the judge closed his eyes for a few moments during the trial did not show that he slept.

The applicant complains that the consultancy firm R. AG which acted as administrator in the bankruptcy proceedings of various of the applicant's companies gave an expert opinion before the

Regional Court. However, the Commission notes the distinction made by the Federal Court in its decision of 29 March 1990 according to which this company was only called upon to submit additional facts which had first to be assessed by the investigating authorities.

The applicant complains of the bias of judge A., the President, and of judge I., the Vice-President of the Uri Court of Appeal. The Commission notes that A. acted as his lawyer and notary and also presided over a water corporation which introduced a property action against the applicant; I. had written a letter to a newspaper about the water situation in Uri. However, the Federal Court found in its decision of 29 March 1990 that A.'s activities as a lawyer and notary had occurred long ago, that the applicant had admitted the claim, and that he had not substantiated his complaint in respect of I.'s letter to a newspaper. In the view thereof and lacking further submissions on the applicant's part the Commission finds no indication to call in question the impartiality of judges A. and I.

The applicant complains that judge M. was biased in the third set of the proceedings as he had already participated in the first and second sets. The Commission notes the Federal Court's decision of 22 November 1991 that while judge M. and other judges had in the first set of proceedings regarded certain documents as being irrelevant as evidence, in the second set the Court of Appeal even accepted mitigating grounds in respect of the applicant's punishment; and that the applicant mentioned no other grounds calling in question the impartiality of judge M. In the Commission's opinion the applicant has not sufficiently established doubts warranting the conclusion that M. had a preconceived opinion as to his guilt.

b) The applicant complains of the insufficient reasoning in the judgments of the Uri Regional Court and of the Uri Court of Appeal. However, even assuming that an issue could arise under Article 6
(Art. 6) of the Convention, the applicant has not substantiated this complaint. In its decision of 29 March 1990 the Federal Court gave its own substantial reasons in respect of the applicant's complaints, and the applicant does not claim before the Commission that these reasons were insufficient.

c) The applicant complains that he could only consult part of the case-file, and only three years after the investigations commenced. However, he has not shown in what respect the refusal to consult the case-file at the early stage of the investigations hindered his right to an effective defence. The Commission is furthermore satisfied that, as pointed out by the Federal Court in its decision of 29 March 1990, once the final report of the Uri Investigation Office was prepared the applicant had the right to consult the full case-file.

d) The applicant complains that he was not given an officially appointed lawyer; that he was not even informed of the possibility to have a lawyer; and that he only obtained a lawyer in December 1983. However, the Commission notes that during the investigations the applicant was remanded in custody for only six days. Thus, he was at any time free to consult a lawyer of his own choosing, or to file a request to obtain an officially appointed lawyer.

e) The applicant complains that he could not question incriminating witnesses or have exonerating witnesses questioned; that neither he nor his lawyer were informed of the questioning of witnesses; and that he could not put forward evidence or have evidence taken.

As a rule it is for the national courts to assess the evidence before them. The Convention organs' task is to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 203, p. 10, para. 26). In the present case the applicant has not shown that the domestic courts arbitrarily decided that certain evidence was irrelevant to the facts, and he has not mentioned any hearings of witnesses to which he was not invited. The Commission further notes the Federal Court's decision of 29 March 1990, not contradicted by the applicant, that he had the right at least once during the proceedings to put questions to witnesses.

f) The applicant complains that the Federal Court in its decision of 29 March 1990 quashed the judgment of the Regional Court of 31 May, 15 and 25 June 1988, yet he received no compensation for court costs. He also received no compensation when on 3 July 1991 the Federal Court again partly upheld his public law appeal. On 22 November 1991 the Federal Court only awarded 5000 SFr as compensation, although he spent 105 hours preparing the second and third set of the proceedings. However, Article 6 (Art. 6) of the Convention does not as such guarantee a right to reimbursement of court costs, and the applicant has not alleged any other breach of this provision, for instance that the calculation of court costs rendered the proceedings unfair, restricted his access to court or contained an appraisal of his guilt.

3. The Commission finds that none of the above complaints disclose any appearance of a violation of the rights set out in Article 6 (Art. 6) 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 First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)