AS TO THE ADMISSIBILITY OF

Application No. 21227/93
by George TSALOUHIDIS
against Greece

The European Commission of Human Rights (First Chamber) sitting in private on 31 August 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
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 11 September 1992 by George TSALOUHIDIS against Greece and registered on 22 January 1993 under file No. 21227/93;

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 applicant is a Greek citizen born in 1932 and living in Dionysos, Attica. He is a pilot by profession. Before the Commission he is represented by Mr. I. Stamoulis, a lawyer practising in Athens.

The facts of the case as they have been submitted by the applicant may be summarized as follows:

A. Particular circumstances of the case

On 7 November 1987 the applicant requested permission to travel gratis between Athens and Frankfurt on a scheduled flight of "Olympic Airways", the company he worked for. He also persuaded one of the captains of that flight to carry for him a package, allegedly containing cutlery. He asked for the package to be placed in the briefcase containing the official flight documents which would not be subject to customs control. The applicant eventually did not board the plane. During the flight the captain unwrapped the package and discovered antiquities which he handed over to the police authorities at Corfu airport.

Following this event a police enquiry was opened. In the course of the investigation, other antiquities were found in the applicant's apartment during a police search.

The applicant claimed that he was the lawful owner of a private

collection, that he had imported the antiquities legally in Greece and that, as a result, he was allowed to export them freely in accordance with Greek law. The prosecuting authorities, on the other hand, considered that he had forged the customs documents and that, in any event, he had not fully complied with the formalities prescribed by law in order to acquire lawful possession. As a result, he was not allowed to export the antiquities. His attempt to export the antiquities surreptitiously on 7 November 1987 indicated that he was aware of the illegal character of his actions.

On 27 April 1990 the Indictments Chamber of the First Instance Court of Athens (Symvoulio Plimeliodikon) committed the applicant for trial under the charges of embezzlement of particularly valuable objects belonging to the Greek state, export of antiquities, attempted smuggling of goods and failure to declare antiquities with a view to disposing illegally of them. The charge of forgery and use of forged documents with a view to making financial gains to the detriment of a third person was subsequently joined to the indictment.

Due to the particularly grave nature of the charges the applicant was committed before the three-member Athens Court of Appeal (Trimeles Efeteio).

The applicant appealed against the decision of the Chamber before the Indictments Chamber of the Athens Court of Appeal (Symvoulio Efeton), which ordered further investigations and appointed an expert-graphologist (decision 2287/90). Upon completion of the investigation, the Indictments Chamber of the First Instance Court of Athens committed the applicant again before the same court under the same charges (decision 1353/90).

On 27 April 1990 the applicant appealed against the decision before the Indictments Chamber of the Athens Court of Appeal. On 14 May 1990 and 10 April 1992 he asked to be heard in person.

On 22 July 1992 the Indictments Chamber issued decision 1780/92 committing the applicant before the three member First Instance Criminal Court of Athens (Trimeles Plimeliodikeio), amending the indictment to embezzlement of particularly valuable objects which came to the applicant's possession by means unknown, failure to declare antiquities with a view to disposing illegally of them, attempted exportation of the above-mentioned antiquities and attempted smuggling of goods. By the same decision the Chamber rejected his application to be heard in person at the proceedings.

On 17 August 1992 the applicant filed an appeal in cassation against the decision of the Indictments Chamber of the Court of Appeal, claiming that the law concerning the importation of antiquities had been wrongfully interpreted and applied in his case. On 9 September 1992 the applicant requested the Court of Cassation (Areios Pagos) to authorize him to take part in person and be represented by counsel in the proceedings in order to make submissions on the issue of the admissibility of his appeal. More in particular, the applicant wished to invoke Article 6 of the Convention, which was allegedly violated in that Greek law gives the Public Prosecutor the right to appeal in cassation against the indictment, something which the applicant was not allowed to do in the circumstances of the case.

On 15 October 1992 the Court of Cassation dismissed the applicant's appeal as inadmissible on the ground that the Code of Criminal Procedure did not grant the applicant the right to appeal in cassation against the indictment. According ot the Court of Cassation, the relevant provisions did not raise any issues under Article 6 of the Convention or Article 20(1) of the Constitution, which enshrines the right of the individual to seek protection by the courts. The Court considered that Parliament was allowed to limit the right of appeal in cassation against an indictment in view of the lack of severity of the

crime or of the general interest in a speedy conclusion of the proceedings. The persons affected could present arguments in their defence during trial or when appealing against the decision of the trial court. Although an issue could arise if the law had made unjustified distinctions in the enjoyment of procedural rights between the parties, the Public Prosecutor could not be treated as a party to the proceedings.

On 6 April 1993 the First Instance Criminal Court of Athens acquitted the applicant of the charges.

B. Relevant domestic law

According to Article 482 para. 1 of the Greek Code of Criminal Procedure the accused has no right to appeal in cassation against a decision of the Indictments Chamber except (a) when the Chamber terminates provisionally the criminal action against the accused and (b) when it considers that the accused should not be prosecuted after he has demonstrated genuine repentance and repaired the damage he may have caused. Article 483 of the same Code provides that the Public Prosecutors of the First and Second Instance Courts have the right to appeal in cassation against a decision of the Indictments Chamber of the court to which they are attached which either commits the accused for trial for one of the more serious crimes (kakourgima), or considers that no charges should be brought, or orders that the criminal action should be definitively or provisionally terminated, or rules that it is inadmissible. The same provision gives the Public Prosecutor of the Court of Cassation the right to appeal in cassation against any decision of any Indictments Chamber.

COMPLAINTS

The applicant complains that he has been deprived of his right to equality of arms as a result of legislation which excludes the accused from appealing in cassation against a decision of the Indictments Chamber while this right rests with the Public Prosecutor. He also claims that the relevant Articles 482 para. 1 and 483 of the Greek Code of Criminal Procedure are in themselves incompatible with the Convention. Despite his acquittal, the applicant wishes to pursue his application so that Greece will be forced to repeal the above-mentioned provisions. He invokes Article 6 paras. 1 and 3 (d) of the Convention.

THE LAW

1. The applicant claims that the provisions in the Code of Criminal Procedure which introduce a distinction between the accused and the Public Prosecutor as regards the right to appeal in cassation against the indictment violate Article 6 (Art. 6) of the Convention.

The Commission recalls its constant case-law to the effect that it is competent to examine the compatibility of domestic legislation with the Convention only with respect to its application in a concrete case, while it is not competent to examine in abstracto its compatibility with the Convention (No. 7045/75, Dec. 10.2.76, D.R. 7 p. 87).

This part of the application is, therefore, incompatible ratione personae with the provisions of the Convention and must be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains that the principle of equality of arms was not observed in his case, since he, contrary to the Public Prosecutor, did not have the right to appeal in cassation against his indictment. He invokes in this connection Article 6 paras. 1 and 3 (d) (Art. 6-1, 6-3-d) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing."

Para. 3 (d) of the same article guarantees the right of every person who is charged with a criminal offence

"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 Commission first points out that the aim of Article 6 para. 3 (d) (Art. 6-3-d) is to guarantee certain rights for the accused in connection with the examination of witnesses. Equality of arms is one of these rights (Eur. Court H.R., Engel judgment of 23 November 1976, Series A no. 22, p. 39, para. 91). The applicant, however, does not complain of procedural inequality in the examination of witnesses. As a result, Article 6 para. 3 (d) (Art. 6-3-d) is irrelevant in the context of the present application.

It is true, on the other hand, that the second provision invoked by the applicant, Article 6 para. 1 (Art. 6-1), guarantees the principle of equality of arms inherent in the notion of fairness under Article 6 para. 1 (art. 6-1) (cf. Delcourt judgment Series A no. 11, p. 15 para. 28).

The Commission notes, however, that at the end of the proceedings the applicant was acquitted of the offences with which he had been charged. The outcome of the trial could not have been more favourable for the applicant and any defects the proceedings might have had must be considered to be remedied. It follows that the applicant can no longer claim to be a victim, within the meaning of Article 25 (Art. 25), of a violation of Article 6 (Art. 6) of the Convention (cf. No. 8083/77, Dec. 13.3.80, D.R. 19 p. 223 and No. 15831/89, Dec. 25.2.91, D.R. 69 p. 317). His complaint is therefore manifestly ill-founded and must be rejected, pursuant to 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) — (A. WEITZEL)