AS TO THE ADMISSIBILITY OF

Application No. 22648/93
by Heinrich WIEDEMANN
against Germany

The European Commission of Human Rights sitting in private on 7 April 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

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 18 May 1993 by Heinrich WIEDEMANN against Germany and registered on 17 September 1993 under file No. 22648/93;

Having regard to :

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

- the observations submitted by the respondent Government on 6 May 1996 after an extension of the time-limit and the observations in reply submitted by the applicant on 2 July 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a German citizen, born in 1937, and living in Bebra. He is represented by Mr. W. Both, a lawyer practising in Rotenburg.

The facts, as submitted by the parties, may be summarised as follows.

On 21 January 1991 the Rotenburg District Court (Amtsgericht) convicted the applicant of unauthorised use of a waste destruction installation (Betreiben einer Abfallbeseitigungsanlage ohne Genehmigung) and imposed a fine amounting to DEM 6,000.

The Court found that in 1972/73 the applicant, a businessman dealing with furniture, constructed a warehouse after having received a building permit. In addition to the warehouse he built, using the concrete slabs left over from the warehouse construction, a fireplace which he then used to burn waste such as cardboard and wood. He thus saved money as otherwise he would have had to use containers for transporting the waste to authorised destruction installations.

Upon the applicant's defence that two officials had allegedly inspected his premises and not objected to the fireplace, the two officials in question were heard as witnesses and denied having seen the fireplace and approved its use. Consequently the Court considered that the applicant had no excuse for having used the fireplace over a period of years without worrying about whether or not this was allowed under the existing environmental regulations.

On 10 June 1991 the 8th Criminal Chamber (Kleine Strafkammer) of the Kassel Regional Court (Landgericht), sitting with the Presiding Judge S., rejected the applicant's appeal (Berufung). Upon the appeal of the Public Prosecutor, it quashed the District Court's sentence and imposed a fine amounting to DEM 13,500. In the trial record, it was erroneously stated that the parties to the proceedings had waived their right to appeal. The Regional Court therefore abbreviated the text of its judgment in accordance with S. 267 para. 4 of the Code of Criminal Procedure (Strafprozeßordnung). The record was corrected upon the request of the applicant's defence counsel of 31 July 1991.

On 30 October 1991 the Frankfurt Court of Appeal (Oberlandesgericht) granted the applicant's request for leave to appeal out of time as his appeal submissions allegedly filed in time could not be found at the Kassel Regional Court. The Court of Appeal also decided that the time limit for the submission of the reasons of appeal should start to run as from the service of the amended judgment.

On 19 December 1991 the full text of the Regional Court's judgment was communicated to the applicant. The Regional Court, in the amended judgment, found that the requirement of a permit for the fireplace had existed already at the relevant time. The Regional Court considered that the applicant should have been aware that the burning of waste was illegal. He also had a duty to enquire whether he was allowed to burn waste. As he failed to do so he was guilty of the offence in question.

On 5 May 1992 the Frankfurt Court of Appeal confirmed the conviction, but quashed the sentence and sent the matter back to another bench of the Regional Court. The Court of Appeal noted that the Regional Court had, in an unobjectionable manner, found that the applicant had no excuse in using his fireplace, as his alleged error relating to the requirement of a permit was avoidable. However, the Regional Court should also have taken this element into account in fixing the sentence as being possibly a mitigating factor.

S. 345 para. 2 of the Code of Criminal Procedure generally provides that, where a case is referred back upon an appeal on points of law, the new set of trial proceedings is conducted before another bench (Spruchkörper) of the same court or another court of the same level. According to the internal organisation of work (richterliche Geschäftsverteilung) at the Kassel Regional Court in 1992, the 7th Criminal Chamber was competent to decide in cases where a judgment of the 8th Criminal Chamber had been quashed and the matter was sent back for further action. In 1992 Presiding Judge S. was assigned to the 7th Criminal Chamber.

On 30 June 1992 the 7th Criminal Chamber, sitting with Presiding Judge S. and two lay assessors who had not been involved in the first set of appeal proceedings, rejected the applicant's appeal. Upon the Public Prosecutor's appeal, it fixed a fine of DEM 13,500. In fixing the sentence, the Regional Court noted that according to S. 327 para. 3 (2) of the Penal Code (Strafgesetzbuch) the offence in question was punishable with up to two years' imprisonment or a fine. The Regional Court considered that the applicant's alleged error in believing that he did not need a special permit, did not constitute a mitigating factor. As a businessman the applicant should have enquired whether or not he needed a permit for the fireplace. Furthermore, complaints raised by third persons about the use of the fireplace should have prompted him to find out whether he acted lawfully in using it. Instead he had used the fireplace over a period of years in order to save money without caring about whether this was lawful. Therefore the fine imposed was adequate.

The applicant lodged an appeal on points of law (Revision), complaining inter alia that Presiding Judge S. had again decided his case when it was sent back by the Frankfurt Court of Appeal for the purpose of fixing a new sentence.

On 30 June 1992 the Frankfurt Court of Appeal dismissed the applicant's appeal on points of law.

On 31 March 1993 the Federal Constitutional Court (Bundes-verfassungsgericht) refused to admit his constitutional complaint on the ground that it offered no prospect of success. The Constitutional Court considered that there existed no constitutional norm which required that in the case of an appellate court sending a matter back for reconsideration by the first instance court other judges than those who formerly dealt with the case had to decide in the matter. It is further pointed out that the situation in question was to be distinguished from the Hauschildt v. Denmark case decided by the European Court of Human Rights (judgment of 24 May 1989, Series A no. 154) because in that case a judge had been considered no longer to qualify as an impartial trial judge on account of his pre-trial activities in the investigation phase. Furthermore, it is noted that according to the Hauschildt judgment not all pre-trial activities of a judge exclude him from participating in the later trial.

COMPLAINTS

The applicant considers that he had justified reason to doubt the impartiality of Judge S. when she decided his case again after it was sent back by the Frankfurt Court of Appeal. This all the more so as she signed a trial record erroneously stating that he had waived his right to appeal and had recommended him at the oral hearing of 30 June 1992 to withdraw his appeal. He invokes Article 6 para. 1 and Article 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 18 May 1993 and registered on 17 September 1993.

On 22 January 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 6 May 1996, after an extension of the time-limit. The applicant submitted observations in reply on 2 July 1996.

THE LAW

The applicant complains that he did not receive a fair hearing by an "impartial tribunal" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

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

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ..."

The Government claim that to the extent that the applicant's complaint about the alleged lack of impartiality of the Presiding Judge S. are based on other circumstances than her participation in the first set of appeal proceedings, he failed to exhaust the domestic remedies. They point out that he did not challenge the Presiding Judge for bias at the hearing concerned. Moreover, in the Government's view, the mere participation of a judge in a further set of proceedings following successful appeal proceedings does not justify any doubts as to his impartiality. The provision of S. 345 para. 2 of the Code of Criminal Procedure did not generally exclude any judge from sitting again on a case sent back by a superior court. Moreover, even assuming compliance with Article 26 (Art. 26), the applicant's further submissions did not disclose any lack of impartiality on the part of the Presiding Judge S.

The applicant disagrees with the Government's views. He points out that the Frankfurt Court of Appeal expressly remitted the case to another bench of the Kassel Regional Court.

The Commission recalls that impartiality for the purposes of Article 6 para. 1 (Art. 6-1) 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 ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (cf. Eur. Court HR, De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 14, paras. 25, 26; Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 46; Thomann v. Switzerland judgment of 10 June 1996, para. 30, to be published in Reports of Judgments and Decisions 1996).

As regards the subjective test, the Commission, assuming compliance with Article 26 (Art. 26) of the Convention, finds that there was nothing to indicate any prejudice or bias on the part of Judge S., who presided over the Regional Court when dealing with the applicant's appeal against the first instance judgment. The fact that the Presiding Judge S. erroneously assumed a waiver of the parties' right to appeal and established first an abbreviated text of the judgment as well as the applicant's allegation that, in the second set of appeal proceedings, she advised him to withdraw his appeal do not in themselves indicate bias. In these circumstances, the Commission cannot but presume her personal impartiality (Thomann judgment, op. cit., para. 31).

It remains to be examined whether the impartiality of Judge S. can also be affirmed under the objective test.

Under this test it must be determined whether, quite 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, as far as criminal proceedings are concerned, in the accused. It follows that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the opinion of the accused is important, but not decisive. What is decisive is whether his fear can be regarded as objectively justified (cf. Hauschildt judgment, op. cit., para. 48; Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, p. 15, para. 33).

In its judgments in the cases of Ringeisen v. Austria and Diennet v. France, the Court held that "it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority". The Court observed that "no ground for legitimate suspicion can be discerned in the fact that" judges who "had taken part in the first decision" also participate in the second (cf. Eur. Court HR, Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 40, para. 97; Diennet judgment of 26 September 1995, Series A no. 325-A, pp. 16-17, paras. 37-38; Thomann judgment, op. cit., para. 33).

In the present case, the applicant's conviction by the Regional Court had been confirmed by the Court of Appeal which only considered it necessary that the lower court reconsider the fixing of the sentence to be imposed upon him. The Court of Appeal, in sending the case back to the Regional Court, indicated which circumstances had to be taken into account in this context. The decision to be taken by the Regional Court was thus limited in scope and in particular no longer related to the question of the applicant's guilt.

In the light of the above principles, the participation of Judge S. in the first set of appeal proceedings is not sufficient to cast doubt on her impartiality, once the case had been remitted for reconsideration of the sentence to be imposed upon the applicant.

It is true that German law provides that following an appeal on points of law cases are sent back to another bench or another court of the same level. This rule manifests the national legislator's concern to remove doubts as to the impartiality of the court dealing with a case in a second set of proceedings (cf., mutatis mutandis, Eur. Court HR, Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 50, para. 50). Under the internal organisation of work at the Kassel Regional Court, cases previously dealt with by the 8th Criminal Chamber were accordingly to be conducted before the 7th Criminal Chamber if sent back after an appeal on points of law. Presiding Judge S. was sitting in this Chamber following a change in the composition of the benches, pursuant to the yearly internal distribution of work at the Regional Court. However, German law does not forbid, in a case like this, the participation of a judge who has previously dealt with it in the first set of proceedings.

In these circumstances, the Commission cannot find that the applicant's fears as to the impartiality of Judge S. can be regarded as being objectively justified. Consequently there is no appearance of a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

Moreover, having regard to its decision on Article 6 para. 1 (Art. 6-1), the Commission considers that it is not necessary to examine the case under Article 13 (Art. 13); this is because its requirements are less strict than, and are here absorbed by, those of Article 6 para. 1 (Art. 6-1) (cf. Eur. Court HR, Sporrong and Lönnroth

v. Sweden judgment of 23 September 1982, Series A no. 52, p. 32, para. 88).

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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission