AS TO THE ADMISSIBILITY OF

Application No. 19524/92
by K.
against Denmark

The European Commission of Human Rights sitting in private on 5 May 1993, the following members being present:

MM. S. TRECHSEL, President of the Second Chamber
C.A. NØRGAARD
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI

Mr. K. ROGGE, Secretary to the Second 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 9 October 1991 by K. against Denmark and registered on 17 February 1992 under file No. 19524/92;

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 is a Danish citizen, born in 1945. He resides at Holte. Before the Commission he is represented by Mr. Folmer Reindel, a lawyer practising in Copenhagen.

By indictment of 4 December 1987 the applicant was charged with several counts of aggravated tax evasion. The case was heard in the City Court (byret) of Nykøbing Falster from 22 August 1988 to 17 February 1989. During the trial the Court heard the applicant, who was represented by court appointed counsel, as well as 33 witnesses, including the applicant's present representative, Mr. Reindel.

On the basis of an evaluation of the statements made and the documentary evidence produced the City Court, on 17 February 1989, found the applicant guilty of some of the charges brought against him and acquitted him of others. He was sentenced to one year's imprisonment, an additional fine of 1.3 million Danish crowns and ordered to pay outstanding taxes in the amount of approximately one million Danish crowns. The applicant appealed against this judgment to the High Court of Eastern Denmark (Østre Landsret).

By indictment of 14 August 1989 the applicant was charged with one further count of tax evasion. By judgment of 15 March 1990 he was

found guilty by the City Court of Nykøbing Falster and sentenced to pay a fine of 7,000 Danish crowns. The applicant also appealed against this judgment to the High Court of Eastern Denmark which subsequently joined the two cases.

On 11 June 1990 the applicant's present representative, Mr. Reindel, was appointed by the High Court to act as defence counsel for the applicant. Subsequently, however, the Court realised that Mr. Reindel was to be called as a witness in the case and therefore decided, on 17 December 1990, to withdraw the appointment. Leave to appeal to the Supreme Court (Højesteret) against this decision was refused by the Ministry of Justice on 11 April 1991. After having consulted the applicant the High Court appointed another counsel for him.

The trial commenced in the High Court on 27 May 1991. The applicant requested that the three professional judges vacate their seats on the bench as they had all, earlier in their careers, acted as public prosecutors. (According to the applicant's submissions, however, they had never had anything to do with him or his case in such capacity.) By decision of the same day the Court rejected the request stating:

(translation)

"Since the fact that the three legally trained judges, who have all to a greater or lesser extent been active as prosecutors, does not raise doubts as to their absolute impartiality,

the Court decides:

the request that the three legally trained judges vacate their seats is rejected."

Leave to appeal to the Supreme Court was refused by the Ministry of Justice on 21 August 1991.

In the meantime the trial continued in the High Court. The Court heard the applicant and twelve witnesses, including Mr. Reindel. Furthermore, documentary evidence was produced. On the basis of an evaluation thereof the High Court upheld the City Court's conviction and sentence by judgment of 15 June 1991. Leave to appeal to the Supreme Court was refused by the Ministry of Justice on 20 September 1991.

COMPLAINTS

The applicant complains, under Article 6 para. 1 of the Convention, that his case in the High Court of Eastern Denmark was not determined by an impartial tribunal since the legally trained judges had all previously acted as prosecutors.

He furthermore invokes Article 6 para. 3 (c) of the Convention complaining that he was not allowed to defend himself through legal assistance of his own choosing since the High Court refused to accept Mr. Reindel as his counsel.

Finally, the applicant complains that the Ministry of Justice's refusals to grant him leave to appeal to the Supreme Court violate Article 13 of the Convention.

THE LAW

1. The applicant alleges that his case was not determined by an impartial tribunal due to the fact that the legally trained judges had previously in their careers acted as public prosecutors. He invokes in this respect Article 6 para. 1 (Art. 6-1) of the Convention which, in so far as relevant, reads as follows:

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

The Commission recalls that the impartiality required by Article 6 (Art. 6) of the Convention implies a double guarantee: first the subjective requirement that the judge shall be unbiased and, secondly, an objective requirement that the situation must be such as to exclude any legitimate doubts about his impartiality (cf. Eur. Court H.R., Piersack judgment of 1 October 1982, Series A no. 53, p. 14, para. 30).

As regards the subjective requirement the applicant has not alleged that the judges in question showed bias against him, nor has the Commission found any reason to doubt the judges' personal impartiality.

As regards the objective approach the Commission notes that the three legally trained judges had earlier in their careers acted as prosecutors, but it is clear that they had never had anything to do with the applicant or his case in such capacity. It follows that an issue in respect of partiality would only arise in the present case if it could be maintained that former judicial officers in a public prosecutor's department were unable, subsequently, to become judges. The Commission considers, however, that such a radical solution would be based on an inflexible and formalistic conception of the office of public prosecutor and would erect a virtually impenetrable barrier between this office and the bench. Such an interpretation would also run counter to the judicial system of several Contracting States where transfers of this kind are a frequent occurrence. Having regard to this the Commission finds that the mere fact that a judge was once a public prosecutor is not a reason for fearing that he lacks impartiality (cf. also the above-mentioned Piersack judgment, pp. 14-15, para. 30 (b)).

In the present case no other allegation has been submitted which could lead to the conclusion that the impartiality of the High Court of Eastern Denmark, as composed in the applicant's case, was capable of appearing open to doubt. 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 also complains that he was not allowed to defend himself through legal assistance of his own choosing since the High Court refused to accept Mr. Reindel as his counsel. He invokes Article 6 para. 3 (c) (Art. 6-3-c) of the Convention which reads:

> "Everyone charged with a criminal offence has the following minimum rights:
> ...
> 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."

The Commission recalls that the right to legal representation of one's own choosing ensured by this provision is not of an absolute nature (cf. for example No. 5923/72, Dec. 30.5.75, D.R. 3 p. 43) and it does not guarantee the right to choose an official defence counsel who is appointed by the court (cf. No. 6946/75, Dec. 6.7.76, D.R. 6 p. 114). In examining this question under Article 6 para. 3 (c) (Art. 6-3-c) of the Convention the Commission must take account of the situation of the defence as a whole rather than the position of the

accused taken in isolation, having regard in particular to the principle of equality of arms as included in the concept of a fair hearing. Thus Article 6 para. 3 (c) (Art. 6-3-c) of the Convention guarantees that the proceedings against the accused shall not take place without adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured (cf. for example No. 8295/78, Dec. 9.10.78, D.R. 15 p. 242).

Considering the applicant's defence as a whole, therefore, the Commission notes that he was given ample opportunity to present his own case. The restriction imposed on his choice of representation was limited to excluding Mr. Reindel on reasonable grounds, namely that Mr. Reindel was a witness in the case. The applicant could have chosen any other defence lawyer to represent him and was indeed represented by a court appointed counsel after having been consulted. An examination of the trial transcript does not disclose any disadvantage to the defence or unfairness in this respect. The Commission therefore finds that excluding Mr. Reindel from acting as defence counsel does not in the circumstances of the present case disclose any appearance of a violation of Article 6 para. 3 (c) (Art. 6-3-c) of the Convention.

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.

3. The applicant finally complains that the Ministry of Justice's refusals to grant him leave to appeal violate Article 13 (Art. 13) of the Convention which reads:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that Article 13 (Art. 13) has been interpreted by the European Court of Human Rights as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (cf. Eur. Court H.R., Boyle and Rice judgment of 21 June 1988, Series A no. 131, p. 23, para. 52).

However, leaving aside the questions to what extent Article 13 (Art. 13) applies to decisions of a court of appeal and whether a request to the Ministry of Justice for leave to appeal to the Supreme Court could be considered a "remedy" within the meaning of this provision, the Commission finds, having regard to its above conclusions, that the applicant did not have any arguable claims. In these circumstances the Commission finds no appearance of a violation of Article 13 (Art. 13) of the Convention.

It follows that this part of the application is also 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 Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)