

THE FACTS

Whereas the facts presented by the Applicant may be summarised as follows:

The Applicant is a German citizen, born in 1937, and at present resident in Dortmund.

The Applicant complains of the revocation on .. June 1964, by the Regional Court (Landgericht), Lüneburg of a probation order made by that Court on .. September 1959.

The facts presented by the Applicant may be summarised as follows:

In 1957 proceedings were brought against the Applicant for acting as an officer of the Free German Youth Movement (Freie Deutsche Jugend or FDJ), an organisation which was proscribed as subversive (Verfassungsfeindlich). On .. August 1958, he was acquitted of these charges by the Regional Court (4. Ferienstrafkammer des Landgerichts) of Lüneburg.

On .. May 1959, on appeal (Revision) by the Public Prosecutor's Office (Staatsanwaltschaft), the Federal Court (3. Strafsenat des Bundesgerichtshofs) set aside the acquittal and sent the case back to the Regional Court for a new trial.

On .. September 1959, at the new trial, the Applicant was convicted by the Regional Court (4. Grosse Strafkammer des Landgerichts) of Lüneburg of offenses against Articles 128, 129 and 129, paragraph (a) with Article 94 of the Penal Code in conjunction (Tateneinheit) with an offense under Article 100, paragraph (d), sub-paragraph II of the Penal Code. The Court found that the Applicant, who had become a member of the Communist party at the age of 16, had continued since 1955 to participate in and further the activities of the proscribed FDJ knowing that it was an illegal organisation with subversive aims. He had been previously convicted of a similar offence.

The Applicant was sentenced to 9 months' imprisonment for juveniles (Jugendstrafe). The sentence was suspended on probation (zur Bewährung ausgesetzt).

In the decision (Beschluss) of the Regional Court of Lüneburg of .. September 1959, the period of probation was fixed at 3 years. The Applicant was required by the decision to refrain from participating in communist directed manifestations ("sich von der Teilnahme an kommunistisch gelenkten Veranstaltungen ... fernzuhalten"). Particular mention was made of World Festivals of Sport, Young Workers Congresses and other similar events.

On .. January 1960, the Federal Court (3. Strafsenat des Bundesgerichtshofs) rejected the appeal (Revision) against the decision of the Regional Court of .. September 1959.

The Applicant states that in the trial in which he was acquitted by the Regional Court of Lüneburg on .. August 1958, in the appeal to the Federal Court in which a new trial was ordered on .. May 1959, and in the resulting new trial in the Regional Court in which he was convicted on .. September 1959, the public prosecutor was a lawyer who had been involved in the illegal activities of special courts (Sondergerichte) under the Nazi regime. The Applicant states that the judge who presided at the hearing of the appeal in the Federal Court, on .. May 1959, had also held office under the Nazi regime. On .. June 1964, on the basis of discoveries made by the Public Prosecutor's Office in May 1963, the Regional Court (4. Strafkammer des Landgerichts) of the Lüneburg revoked the suspension of sentence and ordered the Applicant to serve his sentence of 9 months' imprisonment for juveniles. The Court stated

that the Applicant, in attending a World Youth Festival of Sport in Helsinki in the summer of 1962 had seriously contravened the conditions of the probation order. The Court found that the Applicant had taken photographs of activities at this Festival, although he denied having done so.

On .. August 1964, the Court of Appeal (Oberlandesgericht) of Celle rejected the Applicant's appeal against the decision of the Regional Court of .. June 1964.

On .. December 1964, the Federal Constitutional Court (Bundesverfassungsgericht) rejected as manifestly ill-founded the Applicant's constitutional appeal (Verfassungsbeschwerde) against the decision of the Court of Appeal of .. August 1964, and of the Regional Court, Lüneburg, of .. June 1964.

The Applicant's complaints are directed against the decision of .. June 1964, of the Regional Court of Lüneburg.

i. He claims that the period of probation of 3 years had expired on .. January 1963. As no proceedings were taken against him before that date he claims that the suspended sentence of imprisonment had lapsed, and could not legally be enforced.

ii. He complains that the proceedings of .. June 1964 were not brought against him within a reasonable time.

iii. He further complains that he committed no breach of the probation order, justifying the enforcement of the suspended sentence. The probation order prohibited "participation" at manifestations such as World Youth Festivals. He was present at Helsinki in his capacity as a photographic reporter, for the publication "E...". This presence did not amount to a "participation".

iv. The Applicant claims that in consequence the freedom of expression of the publication for which he was working is also infringed.

v. The Applicant claims that his personal and professional freedom of expression and opinion are infringed by the order of .. June 1964. This amounts in his view to a contravention of Article 10 of the Convention and Article 5, paragraph 1, of the Basic Law (Grundgesetz).

vi. The Applicant complains that the interpretation of the probation order by the order of .. June 1964, prevents him from exercising his profession in certain places. Such a restriction contravenes Article 12, paragraph 1, of the Basic Law, in the Applicant's view. It also misinterprets the intention of probation, which is to encourage regular employment. Probation should not be imposed on political grounds.

The Applicant asks the Commission to decide that the decision of the Regional Court of Lüneburg of .. June 1964 violates the Convention, and in particular Articles 6 and 10.

II. Proceedings before the Commission

The Application was examined by a group of 3 on 28 September 1966, in accordance with Rule 45, paragraph 1, of the Rules of Procedure.

The Commission examined the question of the admissibility of the Application on 7 February 1967, and instructed the Secretariat to make a further attempt to contact the Applicant and if this should be unsuccessful (as it in fact proved to be):

a. to give notice of the Application to the Government of the Federal Republic of Germany under Rule 45, paragraph 3 (b), of the Commission's Rules of Procedure;

b. to invite the Government to submit its observations on admissibility, and

c. to inform the Government that no communication had been received from the Applicant since 16 February 1965.

The Government accordingly submitted the following observations on 2 May 1967, and also informed the Commission of the Applicant's new address.

"According to information received from the Minister of Justice of Land Niedersachsen and addressed to the Federal Minister of Justice, the Applicant, X, now lives at ...-Strasse, Dortmund."

As the Minister of Justice of Land Niedersachsen has further advised the Federal Minister of Justice, the Applicant did not have to serve his sentence as a consequence of the decision of .. June 1964, of Landgericht Lüneburg revoking the conditional suspension of sentence, against which decision the Applicant had filed his Application of .. February 1965, to the Human Rights Commission. The Applicant's sentence, rather, was suspended as an act of grace and the Applicant bound over on probation for a period ending .. May 1967.

In view of this information, the Federal Government confirms its observations to the following:

a. According to the consistent practice of the Commission (see as the most recent instance, the decision in the matter of Application No 2306/64, Recueil de Décisions, Volume 21, page 23), a right of conditional suspension of sentence is not guaranteed by the Convention. In this respect the Application is, therefore, incompatible with the provisions of the Convention (Article 27, paragraph 2).

b. The Federal Government believes that it can desist from showing in detail that Articles 10 and 6 of the Convention have not been violated; for the Applicant, who does not serve his sentence but has been granted a conditional suspension of his sentence has, in any case, not been a victim of any violation of the Convention. From this point of view the Application is manifestly ill-founded.

The Government of the Federal Republic of Germany therefore applies for the Application to be inadmissible.

The Government's observations were communicated to the Applicant who submitted the following reply on 31 May 1967:

"It is true that the decision of .. June 1964, which is the subject of my complaint, was not followed by a period of imprisonment.

The Minister of Justice of Lower Saxony granted a suspension of sentence as an act of clemency with a period of probation which expires today (31 May 1967).

This does not affect the fact that the decision in question constitutes a violation of Articles 10 and 6 of the Convention.

In particular, the extended period of probation, which treats me, a journalist of 30, as a juvenile offender, constitutes a violation of Article 10 of the Convention because, up to today I have been subject to the limitations of which I complain, which are specified in my Application.

I therefore again request the Commission to find:

1. that the decision of the Regional Court of Lüneburg of .. June 1964, violates the rights and freedoms contained in the Convention;
2. that the decision should be annulled."

The Applicant's reply was communicated to the Respondent Government which on 10 July 1967, submitted the following Supplementary Observations:

"The decision of the Regional Court (Landgericht) at Lüneburg of .. June 1964, by which the conditional suspension of the Applicant's sentence was revoked, did not violate any of those rights of the Applicant which are guaranteed by the Convention. This decision, a copy of which is appended hereto as Appendix I, merely ordered the application of something already awarded by the judgement of .. September 1959, which became final in 1960. Reference is made in this regard to the last paragraph but one of page 2 of the decision of .. June 1964. This paragraph reads as follows:

"The enforcement of this sentence has been suspended on probation. The period of probation was fixed at 3 years. At the same time, the probationer was required to refrain from participating in communist directed manifestations, in particular from those taking place in the Soviet zone of occupation, in East Berlin and in the countries of the Eastern bloc of nations. Particular mention is made in the decision of World Festivals, Young Workers' Congresses, Congresses of Workers from both parts of Germany (gesamtdeutsch), celebrations to commemorate the Revolution, singing and dancing festivals, and manifestations of the FDGB."

If the Applicant was of the opinion that the imposition of this condition and the possibility of a revocation of the suspension of his sentence in case he did not comply with the condition, violated his rights under Article 10 of the Convention, he should have lodged a constitutional appeal (Verfassungsbeschwerde) within the prescribed time after the judgement became final and, if that appeal had been rejected, an application to the Commission. In actual fact, however, the Applicant only lodged a constitutional appeal - on .. September 1964 - against the revocation of the suspension of his sentence as pronounced in the decision of .. June 1964. The Application to the Commission is dated 8 February 1965. It was lodged after the Federal Constitutional Court refused to admit the constitutional appeal for its decision.

The Applicant's view that it had been inadmissible to revoke the suspension of his sentence by the decision of .. June 1964, because that revocation was not pronounced until after the period of probation was over, is incorrect. The passage from the Leipzig Commentary of the Penal Code, which the Applicant quotes in pages 5/6 of his Application of 8 February 1965, in support of his legal view of the case, is incomplete. A photostatic copy of the passage in question and of the further comments in that context is submitted herewith as Appendix II. It appears from this photostatic copy that in Note 1 on Section 25 (Anmerkung 1 zu, paragraph 25), the last sentence of the passage quoted by the Applicant (from page 149 of the Commentary) and which reads: "Therefore, any revocation of a suspension of sentence that may be pronounced must be so pronounced in good time", is followed immediately by the following additional remark: "(disputable; see 2 and there No 2)."

This remark, which is added in the Commentary in brackets, is missing in the Applicant's quotation. It appears from this addition that the commentator himself considered his view "disputable".

The essential consideration in favour of pronouncing in certain circumstances a revocation even after the probation period has ended, is this: only after the probation period has completed can it be said whether a probationer did not, after all, on one of the very last days, fail to observe the conditions on which he was bound over on probation. It goes without saying that it is a prerequisite for revocation that the act constituting non-compliance with the imposed conditions must

have occurred before the end of the period of probation. Once a sentence has been finally remitted after the period of probation is over, revocation is no longer admissible.

It is not contested in the Applicant's case that the conduct for which the Regional Court revoked the suspension of his sentence, came within the time when he was still on probation. A final remittal of his sentence after the end of his probation period had not yet been pronounced.

In view of the above, the question we are concerned with is whether it was admissible in the Applicant's case to revoke the suspension of his sentence even after the period of probation had ended, is one of interpreting German domestic law, the more so - as has already been observed by the Federal Government in its observations of 2 May 1967 - since the Convention does not guarantee a right of conditional suspension of sentence.

The Minister of Justice of Land Niedersachsen has, finally, prevented the Applicant's prison sentence from being enforced (which might have been the result of the decision of .. June 1964) by granting him, on .. June 1965, a further period of probation as an act of clemency. This period ended on 31 May 1967. As a result of this clemency, the Applicant has not suffered any disadvantages through the decision of .. June 1964. Compared with the situation which might have resulted for the Applicant from the judgement of .. September 1959, in conjunction with the decision of .. June 1964, his situation under the clemency of .. June 1965, was a more favourable one.

The Federal Government again applies for the application to be declared inadmissible.

The Supplementary Observations of the Respondent Government were submitted to the Applicant who on 1 August 1967, submitted the following reply:

"I venture to make the following statement in reply to the Federal Government's Observations of 10 July 1967:

In my constitutional appeal of .. September 1964, I have already drawn attention to the marked difference between the terms participation ('Teilnahme') and presence ('Anwesenheit'). In the decision of the Regional Court of Lüneburg of .. September 1959 (...) the term 'participation in manifestations' ('Teilnahme an Veranstaltungen') is used, whereas the disputed decision of .. June 1964, refers expressly merely to presence.

As a journalist, I am almost invariably simply present at such manifestations. In the course of my work I have been present, for instance, at the following events:
Party Conference of the SPD (Social Democratic party)
The Gymnastics Championship of the World
Party Conference of the NPD (National Democratic Party of Germany)
etc

Obviously no one will seriously think that I was a participant at these events. My complaint is therefore directed at the way in which the decision of .. September 1959 was interpreted in the decision of .. June 1964."

It is wrong to assume that the Applicant considers his rights were violated by the decision of .. September 1959. Unfortunately, as a young man of 22 I still lacked the necessary understanding of legal procedure.

That is why I was unable to lodge a constitutional appeal at that time, although even then it might well have been successful. This anyway is

the opinion of distinguished lawyers such as the well-known SPD Member of the Federal Parliament, Dr. Adolf Arndt, who says in a written statement:

" ... first of all because I have doubts about the interpretation of the law on which the decision is based and, secondly, because the injunction to refrain from attending communist manifestations in foreign States is, in my opinion, inadmissible."

I consider it inadmissible for unfavourable conclusions to be drawn from my omitting to lodge an appeal at that time.

If I thought that the conditional suspension of sentence was unlawfully revoked, this was not simply because the revocation took place after the period of probation was over, but because it was carried out such a long time after the period of probation was over. I would consider a few days, a few weeks or even a month as normal, but not 17 months.

It is a mistake to think that because of the act of clemency, the Applicant has not suffered injury as a result of the decision of .. June 1964.

Injury is caused not only through the possibility of imprisonment but through many attendant circumstances; in my case through frequent postponement of the date of imprisonment and all its accompanying effects."

In reply to a letter requesting him to supply the Commission with a copy of the decision of the Minister of Justice of Lower Saxony of .. June 1965, suspending his prison sentence but imposing a further period of probation, the Applicant wrote on 21 October 1967 stating that he had not been sent a copy of this decision but was informed thereof when he rang up the Ministry of Justice on .. June 1965. He subsequently received from the District Court (Amtsgericht) Hannover a document entitled "Details of Probation" (Bewährungsplan) setting out the period and conditions of the probation and in particular the condition that he should not take part in or attend communist directed functions (kommunistisch gelenkten Veranstaltungen). The Applicant's lawyer wrote on .. October 1965 to the District Court protesting against this condition as going further than originally imposed and constituting a hindrance to the exercise of the Applicant's profession as a photographic reporter. He further alleged that it was so vaguely formulated as to make it impossible for the Applicant to know what functions he could attend with immunity.

In reply to this complaint the District Court wrote on .. December 1965, stating that the Minister's direction of which the Applicant had complained was cancelled but added that this did not mean that permission was given for the Applicant to take part in or attend communist directed functions.

The Applicant also repeated his contention that the mere fact that he did not have to go to prison did not mean that he had not suffered injury. In support of this contention he points out that the total period of probation was increased to nearly 8 years instead of 3 as fixed in 1959, not to speak of the effect on his reputation and the expense and nervous strain involved.

THE LAW

Whereas the Applicant complains that on .. September 1959, he was convicted by the Regional Court of Lüneburg of being an officer in a subversive organisation and sentenced to 9 months' imprisonment;

Whereas the Court suspended this sentence and placed the Applicant on probation for a period of 3 years on the condition that during that period he refrained from participation in communist directed

manifestations such as World Festivals of Sport, Young Workers Congresses and similar events;

Whereas Article 26 (Art. 26) of the Convention provides that the Commission may only deal with a matter "within a period of 6 months from the date on which the final decision was taken"; and whereas the decision of the Federal Court, which was the final decision regarding the subject of this complaint, was given on .. January 1960; whereas the present Application was not submitted to the Commission until 8 February 1965, that is more than 6 months after the date of this decision; whereas, furthermore, an examination of the case does not disclose the existence of any special circumstances which might have interrupted or suspended the running of that period; whereas it follows that this part of the Application has been lodged out of time (Articles 26 and 27, paragraph (3) (Art. 26, 27-3), of the Convention);

Whereas, in regard to the Applicant's complaint that by a decision of the Regional Court of Lüneburg of .. June 1964, the suspension of his sentence was revoked on the ground that the Applicant had not complied with the conditions which the court had imposed upon him, it is to be observed that the Convention, under the terms of Article 1 (Art. 1), guarantees only the rights and freedoms set forth in Section I of the Convention; and whereas, under Article 25, paragraph (1) (Art. 25-1), only the alleged violation of one of those rights and freedoms by a Contracting Party can be the subject of an application presented by a person, non-governmental organisation or group of individuals; whereas otherwise its examination is outside the competence of the Commission *ratione materiae*; whereas no right to the suspension on probation of a sentence pronounced by a court in a criminal case, nor to the continued enjoyment of such suspension once granted, is as such included among the rights and freedoms set forth in the Convention;

Whereas the Commission refers in this respect to its constant jurisprudence (see for instance decision of 19 July 1966, 2306/64, Collection 21, page 23 at page 3); whereas it follows that the application must be rejected as incompatible with the Convention in so far as the Applicant complains of the revocation as such;

Whereas the Applicant complains, more particularly, that the proceedings under which the Regional Court of Lüneburg revoked the suspension on .. June 1964, were not brought against him within a reasonable time;

Whereas the Commission observes in this respect that the Applicant in these proceedings did not have the status of a person charged with a criminal offence but that of a person convicted by a sentence which had become final although its execution had been suspended; whereas a court, when revoking the suspension of a sentence is not determining a civil right or obligation within the meaning of Article 6 (Art. 6) of the Convention, nor a criminal charge brought against the person in question;

Whereas the provisions of Article 6 (Art. 6) therefore do not apply to such proceedings; whereas the Commission refers in this respect to its decisions in Applications Nos 864/60 - X v. Austria - Collection of Decisions 9, page 17 and 1336/62 - S v. Austria; whereas it follows that this part of the application must also be rejected as incompatible with the Convention;

Whereas the Applicant further complains that the said decision revoking the suspension was pronounced after the expiry of the 3 years period of probation and therefore was not in conformity with the relevant provisions of the German code of criminal procedure; whereas in this respect the respondent Government replies that under German law the decisive date is not the date of the revocation, but the date on which the conditions of suspension were violated, and that the facts on which the order of revocation was based in the present case occurred before

the expiry of the 3 years period; whereas the Commission has frequently stated that in accordance with Article 19 (Art. 19) of the Convention its only task is to ensure observance of the obligations undertaken by the Parties in the Convention; whereas, in particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where the Commission considers that such errors might have involved a possible violation of any of the rights and freedoms limitatively listed in the Convention; whereas, in this respect, the Commission refers to its decisions Nos 458/59 (X v. Belgium - Yearbook III, page 233) and 1140/61 (X v. Austria - Collection of Decisions, Volume 8, page 57); whereas, it is true, the Applicant also complains that the express ground of the said decision was his presence at a certain youth festival which was considered to be a breach of the condition imposed by the original judgement; whereas he submits that the said decision accordingly violated his freedom of expression and constituted as such a violation of Article 10 (Art. 10) of the Convention; whereas, in this respect, the Commission observed that the judgement of the Regional Court of Lüneburg, as successively upheld by the Court of Appeal of Celle and the Federal Constitutional Court, was exclusively concerned with the interpretation and execution of its earlier judgement of .. September 1959; whereas in performing this task the Court merely had to decide whether or not the conditions imposed by that earlier decision had been observed by the Applicant; whereas, therefore, the court in finding that these conditions had not been observed and on that ground revoking the suspension did not apply any new and separate penal sanction but only ordered the execution of its earlier sentence; whereas it follows that this part of the application must therefore be rejected as manifestly ill-founded within the meaning of Article 27, paragraph (2) (Art. 27-2), of the Convention;

Whereas the Applicant further complains that his freedom to receive and impart information has been infringed by the act of the Minister of Justice of Lower Saxony in further suspending his sentence under the same condition, namely that he should not attend or take part in communist directed functions; whereas under Article 25, paragraph (1) (Art. 25-1), of the Convention the Commission may only receive an individual Application where the Applicant claims that he is a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention; whereas it is clear from the letter of the District Court in Hannover dated .. December 1965, that the condition imposed by the Minister and complained of by the Applicant had been cancelled;

Whereas therefore the Applicant is no longer a victim in this respect and the complaint is thus incompatible with the Convention and, in particular, with the provisions of Article 25 (Art. 25) governing the conditions under which the Commission may receive an Application from an individual;

Whereas in this respect the Commission refers to its decisions in Applications Nos 968/61 - X v. Federal Republic of Germany, Yearbook V 196 - 98, and 2257/64 - X v. Federal Republic of Germany, Collection of Decisions 21, page 77; whereas it follows that this part of the Application must be rejected in accordance with Article 27, paragraph (2) (Art. 27-2), of the Convention;

Now therefore the Commission declares this Application INADMISSIBLE.