

THE FACTS

I. The facts presented by the parties and apparently not in dispute between them may be summarised as follows:

1. The applicant is a German citizen, born in 1956 in East Berlin and at present detained in the women's prison in West Berlin. In the proceedings before the Commission, she is represented by Rechtsanwalt G.J. Roos, a lawyer practising in West Berlin and acting under a power-of-attorney signed by the applicant and her mother.

2. The applicant's parents were divorced in 1956 and in 1957 the mother went to West Berlin with the child. In 1959 the father took the child with him to East Berlin against the mother's will and the mother's subsequent attempts to have the child returned to West Berlin failed.

In October 1972 the present husband of the mother, who had married again, succeeded in bringing the applicant back to West Berlin where she was taken into the household of her mother and stepfather. In November 1972 the District Court (Amtsgericht) of Berlin-Neukölln transferred the parental power to her mother.

3. On 10 May 1973 the applicant confessed to the police in West Berlin that she had killed her father at a rubbish dump near Königs Wusterhausen in the German Democratic Republic (GDR) in July 1972. On the same day the District Court (Amtsgericht) of Berlin-Tiergarten, in investigation proceedings pending in West Berlin, issued a warrant for her arrest and she was remanded in custody.

4. In the GDR, too, investigation proceedings were opened against the applicant. On 7 May 1973 the Attorney General of GDR, referring to a warrant issued by the District Court (Kreisgericht) of Königs Wusterhausen on 4 May, requested the Attorney General at the Court of Appeal (Kammergericht) of West Berlin to inform him when the applicant could be made available for prosecution in the GDR.

5. On 11 May 1973 the applicant and her mother were heard on the above request. Both objected to a transfer (Zulieferung) of the applicant to the GDR. They were afraid that the applicant might be sentenced to an additional penalty for having left the GDR illegally and further stated that, apart from her late father's 86 year old mother, the applicant had no family contact in the GDR.

6. By letter of 17 May 1973 the Attorney General at the Court of Appeal asked the Attorney General of the GDR for certain assurances regarding the proposed proceedings against the applicant in the GDR. By letter of 4 June the Attorney General of the GDR gave six assurances, the contents of which he defined more precisely in a further letter of 15 June 1973. In particular, he stated that the applicant would in no case have to serve a sentence exceeding ten years' imprisonment, i.e. the maximum sentence which she could receive if convicted under the law of the Federal Republic of Germany.

7. By letter of 20 June 1973 counsel for the applicant requested the Attorney General at the Court of Appeal to refuse the request for her transfer to the GDR. He submitted that the request could not be based on the relevant Act of Inner German Mutual Assistance in Criminal Matters (Gesetz über die innerdeutsche Rechts- und Amtshilfe in Strafsachen, hereinafter referred to as Mutual Assistance Act) of 1953. Moreover, the applicant's transfer to the GDR would be contrary to Article 16 (2), first sentence, of the Basic Law which prohibits the extradition of nationals.

8. On 21 June 1973 the applicant and her mother were again heard on the above request for transfer. Having been informed of the assurances given by the Attorney General of the GDR in his letters of 4 and 15

June, they both maintained their objection. The applicant stated generally that she was afraid of the conditions prevailing in the GDR. Her mother said that she would not expose herself to the risks involved in any visits to her daughter in a GDR prison.

9. On 26 June 1973 the Attorney General at the Court of Appeal, referring to the assurances given by the Attorney General of the GDR, granted the request for transfer under Articles 2 and 3 of the Mutual Assistance Act.

10. On 27 June 1973 the applicant, by an application for judicial decision under Article 5 of the Mutual Assistance Act, challenged the order granting her transfer. Her counsel further submitted on 18 July 1973 that, according to a medical opinion, there was a danger of the applicant committing suicide in the case of her transfer to the GDR.

11. On 10 August 1973 the Court of Appeal dismissed the application. The Court held *inter alia*:

- that the applicant's transfer would be used by the GDR only in accordance with the principles of the rule of law;

- that these principles were observed in ordinary criminal proceedings in the GDR; and

- that it was to be assumed that, as a result of her transfer, the applicant would suffer a substantial disadvantage incompatible with the rule of law. The Court observed in this connection that alleged danger of the applicant committing suicide did not constitute such a disadvantage.

12. By letter of 11 August 1973 counsel for the applicant, stating that he intended to seize the European Commission of Human Rights of her case, asked the Attorney General at the Court of Appeal to suspend, pending the Commission's decision, the execution of the order authorising the applicant's transfer to the GDR. The Attorney General replied on 13 August 1973 that the execution of the transfer order had been suspended.

II. Proceedings before the Commission and the domestic authorities since the introduction of the present application.

1. The present application arrived in the Commission's Secretariat on 16 August 1973 and was registered on the same day. On 17 August it was given precedence and unofficially brought to the attention of the Government of the Federal Republic of Germany.

2. On 30 August 1973 a preliminary examination of the admissibility of the application was carried out by a single member of the Commission, appointed as Rapporteur under Rule 45 of the Commission's Rules of Procedure. On his instructions the Government were invited to submit the texts of the letters of 4 and 15 June 1973 from the Attorney General of the GDR to the Attorney General at the Court of Appeal (see I, 6 above).

Copies of the said letters were filed by the Government on 19 September, and the applicant's comments on this information were received on 5 October 1973.

3. On 21 September the Tiergarten District Court annulled its arrest warrant of 10 May 1973 (see I. 3 above). On the same day the arrest warrant issued by the Königs Wusterhausen District Court (see I, 4 above) was served on the applicant under Article 4 (3) of the Mutual Assistance Act.

4. On 1 October 1973 the Commission examined the admissibility of the application. It decided that notice of the application should be given

to the respondent Government and that the Government should be invited to submit their observations on the admissibility of the application, insofar as it raised questions under Article 5 (1) (f) of the Convention.

The Government's observations arrived on 14 December 1973, the applicant's reply was received on 30 January 1974.

5. On 17 December 1973 the applicant, referring to the proceedings before the Commission, requested the Court of Appeal to set aside, or to suspend the execution of, the arrest warrant of the Königs Wusterhause District Court. This was refused by the Court of Appeal on 21 December.

6. On 18 January 1974 the applicant lodged a constitutional appeal (Verfassungsbeschwerde) with the Federal Constitutional Court (Bundesverfassungsgericht). She submitted that her transfer to the GDR, and her detention in West Berlin for that purpose, were unconstitutional because, at any rate since the conclusion of the Basic Treaty of 21 December 1972 between the Federal Republic of Germany and the German Democratic Republic, the Mutual Assistance Act no longer provided a constitutional basis for these measures.

7. On 27 March 1974 the Federal Constitutional Court rejected the constitutional appeal as being in part inadmissible and in part manifestly ill-founded.

The Court stated that it was not competent to examine measures taken by Berlin authorities or courts; the constitutional appeal was therefore inadmissible, insofar as it was directed against the applicant's proposed transfer by, and her detention for that purpose in, West Berlin.

On the other hand, the appeal was admissible, but manifestly ill-founded, insofar as it indirectly attacked a Federal law, namely the Mutual Assistance Act: The Federal Constitutional Court confirmed the constitutional validity of this Act and at the same time fixed inter alia the following criteria for its application:

"The constitutional conditions for the transfer of an accused to the authorities of the German Democratic Republic ... require not only that the person concerned should appear before an impartial court and receive a fair hearing in fair proceedings in which he can put forward a proper defence but also that the object and purpose of the proceedings should take account of requirements of justice and humanity. There must be no danger of the infliction of an obviously unjust sentence or other measure or of the person concerned having to serve his sentence in a manner that does not take account of his fundamental rights. Finally there must be guarantees that while serving his sentence or otherwise detained the convicted person is allowed to have reasonable contact with his relatives and friends in the Federal Republic of Germany without he or his visitors suffering any detriment on that account. His right to return to the Federal Republic of Germany on acquittal or the completion of his sentence must not be restricted.

In view of the fundamental rights of the person concerned particularly those set out in Articles 1 and 2 of the Basic Law and the constitutional principle of proportionality which are deemed to be incorporated in the 'ordinary laws' the Mutual Assistance Act must be interpreted in such a way that transfer for a criminal trial in the German Democratic Republic is out of the question if there are adequate medical grounds for the assumption that such a measure might owing to the mental state of the person concerned lead to serious damage to health or the danger of suicide.

Only when it is beyond all reasonable doubt that all these requirements are fulfilled is a transfer compatible with the public policy (ordre

public) of the Federal Republic of Germany.

Doubts that legal or administrative assistance is being used in accordance with the rule of law cannot be ruled out in advance in cases where the circumstances are such that it is impossible to exclude with certainty that political objects although not mentioned are a determining factor for the prosecution in the German Democratic Republic and the person concerned might suffer disadvantage because he holds different political views or merely because it is considered he might be an opponent of the dominant regime in the German Democratic Republic. This may not infrequently be the position in the case of the so-called deserters of the Republic."

The Federal Constitutional Court stated in conclusion that it was prevented by the Berlin Reservation of the Three Powers to examine whether the above constitutional criteria had been respected by the Court of Appeal of West Berlin. It remained the task of the competent authorities of Berlin to ensure the application of these criteria in the proceedings which were open to them.

8. On 4 April 1974 counsel for the applicant, referring to the above judgment of the Federal Constitutional Court, requested the Attorney General at the Court of Appeal:

- to ensure that the arrest warrant of the District Court of Königs Wusterhausen of 4 May 1973 was immediately quashed and that an order was made for the applicant's release;

- to request the Court of Appeal, under Article 9 (1) of the Mutual Assistance Act, to set aside its decision of 10 August 1973 authorising the applicant's transfer to the German Democratic Republic.

9. The applicant's request that the arrest warrant of the District Court of Königs Wusterhausen should be set aside was refused by the Court of Appeal on 5 April 1974.

On the same day counsel for the applicant challenged the judges of the Court of Appeal who had participated in this decision.

10. The Commission, on 5 April 1974, considered the application in the light of the parties' written observations and the Rapporteur's second report of 7 March 1974. It noted that the applicant had filed a constitutional appeal and that the Federal Constitutional Court had given its judgment on 27 March 1974, but that the full text of this decision had not yet been submitted by the parties in the present proceedings.

The Commission decided:

- to invite the parties to submit the full text of the Federal Constitutional Court's above judgment and also a copy of the file note setting out the grounds of the decision of the Court of Appeal of 10 August 1973;

- to invite the parties to keep it informed as to the outcome of any new proceedings before the Berlin authorities; and

- to inform the parties of its view that the alleged danger of the applicant committing suicide in the case of her transfer to the GDR might raise an issue under Article 3 of the Convention.

11. On 18 April 1974 the Attorney General at the Court of Appeal, requested the Court to reconsider its decision of 10 August 1973 by which it had authorised the applicant's transfer to the GDR.

12. On 22 April 1974 the Court of Appeal rejected the applicant's challenge (see paragraph 9 above) and confirmed its decision of 5 April

by which it had refused the applicant's request that the arrest warrant of the District Court of Königs Wusterhausen should be set aside.

13. On 6 May 1974 the Court of Appeal decided to seek a certificate by the Commandant of the British Sector of Berlin as to whether it was authorised to take the judgment of the Federal Constitutional Court into consideration in reaching a decision on the applicant's petition under Article 9 (1) of the Mutual Assistance Act (see paragraph 8 above).

14. The information requested by the Commission (see paragraph 10 above) was submitted by the parties under cover of their letters of 4 and 6 May (applicant) and 17 May 1974 (Government).

15. On 27 May 1974 the Commission considered the application in the light of the above information and of the Rapporteur's third report of 24 May.

SUBMISSIONS OF THE PARTIES

I. The applicant alleges violations of Articles 3 and 5 to 11 of the Convention and Article 3 of Protocol No. 4. She submits in particular:

1. that her proposed transfer to the GDR, and her continued detention in West Berlin for that purpose, violate Article 5 of the Convention which prohibits inhuman treatment. According to a medical certificate, there is a danger of her committing suicide in the case of her transfer to the GDR. She has in fact already twice attempted to commit suicide and has started a hunger strike on 6 May 1974;

2. that the constitutional criteria laid down by the Federal Constitutional Court for the application of the Mutual Assistance Act have not been respected in her case by the Court of Appeal of Berlin. Her detention for the purpose of her transfer to the GDR is therefore unconstitutional and consequently not "lawful" within the meaning of Article 5 (1) (f) of the Convention;

3. that the rights set forth in Articles 6, 7, 8, 9, 10 and 11 of the Convention are not fully respected by the GDR. Her transfer to the GDR would consequently violate the said provisions;

4. that she is a citizen of the Federal Republic of Germany. Her transfer to the GDR would therefore, as "expulsion" of a national, be contrary to Article 3 (1) of Protocol No. 4.

II. The respondent Government have in their observations of 12 December 1973, i.e. before the Federal Constitutional Court's judgment of 27 March 1974, submitted that Article 5 (1) of the Convention is not violated in the present case. The Mutual Assistance Act is valid law. The applicant is therefore detained on a statutory basis and there is consequently no violation of the general rule of Article 5 (1) of the Convention, which authorises deprivation of liberty "in accordance with a procedure prescribed by law". Her detention is furthermore justified under Article 5 (1) (f) or, possibly, under Article 5 (1) (c).

The Government have made no submissions on the conclusions to be drawn in the present case from the judgment of the Federal Constitutional Court.

THE LAW

I. As to the exhaustion of domestic remedies

1. The Commission notes that, following the Federal Constitutional Court's judgment of 27 March, the applicant has on 4 April 1974 filed with the Court of Appeal a petition to reopen the proceedings under Article 9 of the Mutual Assistance Act. It considers, however, that the

extraordinary remedy provided for by Article 9 does not in the circumstances of the present case constitute an effective and sufficient remedy which the applicant is required to exhaust, in accordance with Article 26 (Art. 26) of the Convention, before addressing herself to the Commission. It refers in this connection to its case-law concerning applications for retrial under the German Code of Criminal Procedure - see application No. 654/59, Yearbook, Vol. 4, pp. 277, 283; application No. 918/60 Collection of Decisions, Vol. 7, pp. 108, 110; see also application No. 4311/69 - X. v. Denmark - Collection of Decisions, Vol. 37, pp. 82, 96. The Commission concludes that the applicant has complied with the condition of exhaustion of domestic remedies.

II. As to the alleged violation of Article 5 (1) (f) (Art. 5-1-f) of the Convention

2. The applicant, referring to the decision of the Federal Constitutional Court of 27 March 1974, complains that her present detention in West Berlin violates Article 5 (1) (f) (Art. 5-1-f) of the Convention. The Government have in their observations of 12 December 1973, i.e. before the above decision of the Federal Constitutional Court, submitted that Article 5 (1) (Art. 5-1) of the Convention is not violated in the applicant's case.

3. The provisions of Article 5 (1) (Art. 5-1) of the Convention, which may be relevant to the present case, read as follows:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a Protocol prescribed by law:

..... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..... (f) the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition."

4. It is not disputed between the parties that the applicant was, from 10 May until 21 September 1973, detained in pursuance of a warrant of arrest issued by the District Court of Berlin-Tiergarten for the purpose of bringing her before the competent legal authority of West Berlin on reasonable suspicion of having killed her father. The Commission finds that this detention was justified under Article 5 (1) (c) (Art. 5-1-c) of the Convention.

5. The question remains whether the applicant's subsequent detention, since 21 September 1973, is also compatible with the provisions of Article 5 (Art. 5). This detention, effected for the purpose of her transfer to the German Democratic Republic (Zulieferungshaft) is, according to the Government, based on Article 4 (3) of the Mutual Assistance Act and on a warrant of arrest issued in the German Democratic Republic by the District Court of Königs Wusterhausen.

The Government have in their observations of 12 December 1973 submitted that the Mutual Assistance Act is a valid law; that the applicant is therefore detained on a statutory basis; and that there is consequently no violation of the general rule of Article 5 (1) (Art. 5-1) of the Convention, which authorises deprivation of liberty "in accordance with a procedure prescribed by law". The detention is furthermore justified under Article 5 (1) (f) (Art. 5-1-f) or, possibly under Article 5 (1) (c) (Art. 5-1-c).

The applicant, following the decision of the Federal Constitutional Court, no longer contests the constitutional validity of the Mutual Assistance Act. She submits, however, that the criteria laid down by the Federal Constitutional Court for the application of the Act have

not been respected in her case by the Court of Appeal of Berlin; that her detention for the purpose of her transfer to the German Democratic Republic is therefore unconstitutional; and that it is consequently not "lawful" within the meaning of Article 5 (1) (f) (Art. 5-1-f) of the Convention.

6. The Commission has had regard both to the constitutional criteria for the application of the Mutual Assistance Act, as laid down by the Federal Constitutional Court, and to the grounds of the earlier ruling by the Court of Appeal, authorising the applicant's transfer to the German Democratic Republic under the said Act, as stated in the file note of the Court of Appeal of 10 August 1973. The criteria laid down by the Federal Constitutional Court restrict the scope of the Mutual Assistance Act. The Commission is consequently faced with the question whether the applicant's detention for the purpose of her transfer is, in the light of these criteria, to be considered as lawful in the sense of Article 5 (1) (f) (Art. 5-1-f) of the Convention.

7. The Commission notes that the judgment of the Federal Constitutional Court is not directly binding on Berlin courts, including the Court of Appeal which, on applicant's new request, has now to decide if the proceedings under Article 9 of the Mutual Assistance Act should be reopened. It further notes that the Federal Government have at this stage of the proceedings made no comments on the legal situation as it presents itself in the light of the Federal Constitutional Court's recent judgment and the position adopted by the Allied authorities.

8. In these circumstances, the Commission considers that the question whether the applicant's detention since 21 September 1973 is "lawful" under Article 5 (1) (f) (Art. 5-1-f)- or, alternatively, under Article 5 (1) (c) (Art. 5-1-c)- raises complex issues of law and fact which cannot be determined at the stage of admissibility but require an examination of the merits of the complaint. It follows that the applicant's complaint concerning her present detention cannot be rejected as being manifestly ill-founded within the meaning of Article 27, paragraph (2) (Art. 27-2), of the Convention.

III. As to the alleged violation of Article 3 (Art. 3) of the Convention

9. The applicant also complains that her proposed transfer to the German Democratic Republic, and her continued detention in West Berlin for that purpose, violate Article 3 (Art. 3) of the Convention which prohibits inhuman treatment. It is stated on her behalf that, according to a medical certificate, there is a danger of her committing suicide in view of her possible transfer to the German Democratic Republic; that she has, in fact, already twice attempted to commit suicide; and that she started a hunger strike on 6 May 1974.

10. The Commission notes that the Federal Constitutional Court held in its judgment of 27 March 1974 *inter alia*:

"In view of the fundamental right of the person concerned, particularly those set out under Articles 1 and 2 of the Basic Law and the constitutional principle of proportionality which are deemed to be incorporated in the 'ordinary laws', the Mutual Assistance Act must be interpreted in such a way that transfer for a criminal trial in the German Democratic Republic is out of the question if there are adequate medical grounds for the assumption that such a measure might owing to the mental state of the person concerned lead to serious damage to health or the danger of suicide."

11. The Commission finds that the present complaint, too, raises complex questions of law and fact which cannot be determined at the stage of admissibility but require an examination of the merits. It follows that this complaint can equally not be rejected as being manifestly ill-founded.

IV. Consideration of other Articles

1. Article 3 (1) of Protocol No. 4 (P4-3-1)

12. With regard to her proposed transfer to the German Democratic Republic, the applicant also alleges a violation of Article 3 (1) of Protocol No. 4 (P4-3-1) of the Convention, which provides that no one shall be expelled from the territory of the State of which he is a national.

13. The Commission considers, however, that the proposed transfer of the applicant to the German Democratic Republic would not constitute an expulsion in the sense of this provision. In international law, there is an essential difference between "expulsion" and "extradition". Expulsion is the execution of an order to leave the country, while extradition means the transfer of a person from one jurisdiction to another for the purpose of his standing trial or for the execution of a sentence imposed upon him. The latter is the situation in the present case.

The above interpretation is confirmed by the Preparatory Work: the Explanatory Report on Protocol No. 4 (P4), prepared by the Committee of Experts on Human Rights, states expressly that it was understood that extradition was outside the scope of Article 3 (1) (P4-3-1)- see Doc. H. /71) 11 of the Council of Europe, p. 47.

14. The Commission further observes that the right not to be extradited by the State of which one is a national is also not guaranteed by any other provision of the Convention or its Protocols.

15. It follows that the applicant's complaint, insofar as she claims such a right, is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 27, paragraph (2) (Art. 27-2).

2. Articles 6 (1), 7, 8, 9, 10 and 11 (Art. 6-1, 7, 8, 9, 10, 11) of the Convention

16. The applicant states that the rights laid down in Articles 6 (1), 7, 8, 9, 10 and 11 (Art. 6-1, 7, 8, 9, 10, 11) of the Convention are not fully respected by the German Democratic Republic. She submits that her transfer to the German Democratic Republic would consequently violate the said provisions.

17. The Commission notes that, according to its case-law as confirmed in application No. 4313/69 (Collection of Decisions, Vol. 21, pp. 96-97), the extradition of a person in certain exceptional circumstances be contrary to Article 3 (Art. 3) of the Convention and that, moreover, it has already found in the present case that the applicant's complaints under this Article, relating to her proposed transfer by the Federal Republic of Germany to the German Democratic Republic, and her detention for that purpose in the Federal Republic of Germany, are not manifestly ill-founded.

For these reasons the Commission

(a) reserves for its examination of the merits the applicant's complaints under Articles 6 (1), 7, 8, 9, 10 and 11 (Art. 6-1, 7, 8, 9, 10, 11) of the Convention, insofar as they are connected with her said detention and transfer and might raise questions of inhuman treatment under Article 3 (Art. 3) of the Convention;

(b) considers that the applicant's complaints, if examined under Article 3 of Protocol No. 4 (P4-3), are incompatible *ratione materiae* with the provisions of the Convention;

(c) considers, however, that the same complaints, if examined under Articles 3 and 5 (1) (f), or 5 (1) (c) (Art. 3, 5-1-f, 5-1-c), of the Convention, are not manifestly ill-founded;

and therefore DECLARES THIS APPLICATION ADMISSIBLE.