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EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 10486/83

Mogens Hauschildt against Denmark

Report of the Commission

(Adopted on 16 July 1987)

Strasbourg

European Commission of Human Rights

Application No. 10486/83

Mogens HAUSCHILDT

against

DENMARK

REPORT OF THE COMMISSION

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14.130
06.2

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant, Mogens Hauschildt, is a Danish citizen born in 1941. He resides in Switzerland. Before the Commission he is represented by Mr. Geoffrey Robertson, a lawyer practising in London.

3. The Government of Denmark are represented by their Agent, Mr. Tyge Lehmann, Ministry of Foreign Affairs.

4. The case concerns the proceedings relating to criminal charges for economic offences brought against the applicant. The applicant was arrested on 31 January 1980 and detained on remand. His detention on remand was prolonged at regular intervals and he remained in detention on remand until his release after the judgment of the High Court for Eastern Denmark (Østre Landsret) on 2 March 1984. The applicant complained to the Commission that before convicting him the presiding judge of the Copenhagen City Court (Københavns Byret) and the judges of the High Court had taken numerous decisions as to his continued detention on remand, both before and during the trial before the City Court and the appeal proceedings in the High Court, as well as a number of other decisions regarding the evidence to be collected during the investigation of the case (commissions rogatory). The applicant contends therefore that these courts could not be considered to be impartial within the meaning of Article 6 of the Convention when deciding on his guilt.

B. The proceedings

5. As far as the complaint relating to Article 6 of the Convention is concerned, the application was introduced on 27 October 1982 and it was registered on 18 July 1983. The Commission considered the application on 7 December 1983 and on 7 March 1985 and decided on the latter date to give notice of the application to the respondent Government in accordance with Rule 42 para. 2 (b) of its Rules of Procedure and to invite them to present before 24 May 1985 their observations in writing on the admissibility and merits of the application.

6. On 11 May 1985 the Commission extended the time-limit for the submission of the Government's observations until 24 July 1985. The Government's observations were submitted on 24 July 1985.

7. The applicant was invited to submit his observations in reply before 11 October 1985. Having been granted an extension of the time-limit until 18 November 1985 the applicant submitted his observations on 17 November 1985.

8. On 4 March 1986 the Commission decided to invite the parties to appear before it at a hearing on the admissibility and merits of the application.

9. The hearing took place on 9 October 1986. The applicant, who was present himself, was represented by Mr. Geoffrey Robertson, barrister, as counsel, by Mr. Folmer Reindel, advocate, as adviser, and by his wife Mary Hauschildt as assistant. The Government were represented by Mr. Tyge Lehmann of the Ministry for Foreign Affairs as agent, Mr. John Bernhard of the Ministry of Foreign Affairs as adviser, Mr. Bo Vesterdorf of the Ministry of Justice as counsel, Mr. Michael Elmer of the Ministry of Justice as adviser and Ms. Charlotte Schydt of the Ministry of Justice as adviser.

10. Following the hearing, the Commission declared admissible the applicant's complaint under Article 6 para. 1 of the Convention that his case was not heard by an impartial tribunal. The remainder of the applicant's complaints was declared inadmissible.

11. The parties were then invited to submit any additional observations on the merits of the case which they wished to make. No further observations on the merits of the case were received from the Government. The applicant submitted additional observations on 9 March 1987, a copy of which was transmitted to the Government.

12. After declaring the case admissible the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Consultations with the parties took place between 13 October 1986 and 28 January 1987. In the light of the parties' reactions, the Commission now finds that there is no basis upon which such a settlement can be effected.

C. The present Report

13. The present report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. G. SPERDUTI Acting President
C. A. NØRGAARD
J. A. FROWEIN
F. ERMACORA
G. JÖRUNDSSON
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
A. S. GÖZÜBÜYÜK
A. WEITZEL
H. G. SCHERMERS
H. DANELIUS
G. BATLINER
H. VANDENBERGHE
Mrs. G. H. THUNE
M. F. MARTINEZ

14. The text of this Report was adopted on 16 July 1987 and is now transmitted to the Committee of Ministers of the Council of Europe in accordance with Article 31 para. 2 of the Convention.

15. The purpose of this report, pursuant to Article 31 para. 1 of the Convention, is

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

16. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

17. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

18. In 1974 the applicant established a company, Scandinavian Capital Exchange APS (SCE), which acted as bullion dealer and furthermore provided various financial services. SCE became the largest bullion dealer in Scandinavia with associated companies in Sweden, Norway, the Netherlands, England and Switzerland.

19. Over the years, until the end of 1979, difficulties arose between SCE and the applicant, who was the managing director, and the Danish National Bank, the Revenue Service and the Ministry of Trade concerning the flow of money to and from SCE and its associated companies abroad.

20. On 30 January 1980 the Internal Revenue Service forwarded a complaint to the police in which it was stated that the activities of the applicant and SCE seemed to involve violations of the Danish Tax Laws and the Penal Code. After obtaining a court order the police then arrested the applicant on 31 January 1980, seized all available documents in SCE and closed the company.

21. The applicant's arrest on 31 January 1980 was based in particular on a report of the Internal Revenue Service of 13 January 1980 indicating possible violations of the Danish Tax Laws and the Penal Code. Besides arresting the applicant and closing SCE the police also seized a substantial number of documents, not only from SCE's offices, but also from various persons involved. During the period of the investigation, the police seized further documents and property and also carried out investigations in England, the Netherlands, Belgium, Switzerland, Liechtenstein and the USA. From 30 January 1980 until the trial started on 27 April 1981 the judge of the Copenhagen City Court (Københavns Byret) decided on several occasions to request the co-operation of other countries in securing documents as well as in other matters. Insofar as the co-operation concerned European countries, the requests were made in accordance with the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

22. The indictment was served upon the applicant on 4 February 1981. He was charged with fraud and embezzlement on eight counts involving approximately 45 million Danish crowns. The trial commenced before the Copenhagen City Court sitting with one professional judge and two lay judges on 27 April 1981. After approximately 130 court sessions the City Court gave judgment in the case on 1 November 1982, finding the applicant guilty on all counts. He was sentenced to a total of seven years' imprisonment.

23. The applicant appealed against the judgment to the High Court of Eastern Denmark (Østre Landsret). The appeal would be heard at a full hearing during which the Court sitting with three professional

judges and three lay judges would consider both points of fact and law. The hearing of the appeal was scheduled to commence on 9 May 1983 but at the request of the defence it was postponed until 15 August 1983. After approximately 60 court sessions the High Court found the applicant guilty on six of the eight counts in question on 2 March 1984. As a reason for the five year prison sentence imposed, the Court considered as an aggravating circumstance the extensive character of the fraud committed. On the other hand the Court found extenuating circumstances in the fact that the applicant had been detained on remand since 31 January 1980, a detention that was considered harsher than regular imprisonment. The applicant was released on the same day.

24. The applicant's subsequent application for leave to appeal to the Supreme Court (Højesteret) was rejected by the Ministry of Justice on 4 May 1984.

25. With regard to the applicant's detention on remand he was, as mentioned above, arrested on 31 January 1980. On the following day, 1 February 1980, the applicant was brought before a judge of the Copenhagen City Court and charged with fraud and tax evasion. It was decided to keep the applicant under arrest for 3 x 24 hours. There were no objections.

26. The applicant was kept in detention on remand without interruption until his trial and during the trial which started before the City Court on 27 April 1981.

27. On 2 February 1980 the City Court judge heard the prosecution and the defence concerning the question of continued detention on remand. In pursuance of Section 762 sub-section 1 Nos. 1 and 3 of the Administration of Justice Act (retsplejeloven) the City Court judge decided to detain the applicant on remand since he found reason to believe that the applicant, if at large, would abscond or impede the investigation. In his decision the City Court judge indicated the following elements as a justification for the detention:

1. The fact that the applicant had lived outside Denmark until 1976 and that by the time of his arrest he had plans to move to Sweden.

2. The applicant's economic interests abroad.

3. The importance of the case.

4. The risks of his obstructing the investigation by influencing persons in Denmark and abroad.

28. The above elements remained, until 10 April 1980, the reasons for the applicant's continued detention which according to Section 767 of the Administration of Justice Act was under constant judicial control with maximum intervals of four weeks. During the period of the applicant's arrest until 10 April 1980 the applicant secretly communicated with his wife and asked her to remove money from certain bank accounts as well as certain personal property. For that reason, the judge Claus Larsen sitting in the Copenhagen City Court, in his decision of 10 April 1980, also invoked Section 762 sub-section 1 No. 2

as a reason for the continued detention of the applicant. Deciding on an appeal against detention the High Court finally, on 5 September 1980, also referred to Section 762 sub-section 2 since the investigations carried out by the police at that time indicated a possible loss for the injured parties of approximately 19.5 million Danish crowns. The applicant's detention on remand continued on the basis of the said provisions until his conviction by the City Court on 1 November 1982. On 17 August 1982, however, Section 762 sub-section 1 No. 3 was no longer invoked.

29. As from the day of the applicant's arrest on 31 January 1980 and until the trial started in the Copenhagen City Court on 27 April 1981 the continuing police investigations as well as the continuing detention on remand of the applicant on several occasions required decisions to be taken by the City Court sitting with one professional judge. In addition to the initial court session on 30 January 1980, which preceded the applicant's arrest, a total of approximately 40 court sessions were held in the Copenhagen City Court during the period before the trial started. On a total of 20 occasions the City Court judge was requested to decide on the question of prolongation of the detention on remand. During the above period (31 January 1980 to 27 April 1981) the applicant was placed in solitary confinement from his arrest until 27 August 1980, and the decisions as to the detention on remand therefore also concerned the question of solitary confinement. Out of the 20 decisions on detention on remand, 15 decisions were taken by judge Claus Larsen who later became the presiding judge in the applicant's trial before the Copenhagen City Court. These 15 decisions were taken on the following dates:

10 April, 30 April, 28 May, 25 June, 20 August, 27 August, 24 September, 15 October, 12 November, 3 December and 10 December 1980 and 4 February, 25 February, 11 March and 8 April 1981.

In five of these decisions (10 April, 30 April, 28 May, 25 June and 20 August) judge Claus Larsen also decided to prolong the applicant's solitary confinement. On one further occasion (27 August 1980) judge Larsen decided to terminate the applicant's solitary confinement.

30. On three occasions (5 March, 16 June and 13 August 1980) the City Court decided, upon applications by the investigating police, to request the co-operation of other countries in securing documents and in other matters. As mentioned above several of these requests were made in accordance with the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. Two of these decisions to request the co-operation of other countries were taken by judge Claus Larsen (16 June and 13 August 1980).

31. During the above investigation period before the commencement of the applicant's trial the City Court judge was furthermore requested to decide on a number of other procedural matters such as the seizure of the applicant's property and documents, his contacts with the press, access to police reports, visits in prison, payments of defence counsel fees and the applicant's possibilities of corresponding with the outside world. In this respect judge Claus Larsen, in connection with a decision of 30 April 1980 to detain the applicant's wife on remand, also decided to stop a letter written by the applicant. On 28 May 1980 he stopped another letter written by

the applicant. On 12 November 1980 judge Claus Larsen decided to seize a certain amount of money which allegedly belonged to the applicant. On 4 February 1981 he decided on a change of defence counsel and finally on 11 March 1981 he decided about the applicant's access to certain parts of the police files. All decisions were taken either at the request of the prosecutor or the applicant's defence counsel.

32. On several occasions before the commencement of the trial the applicant brought the decisions taken by the City Court judge before the High Court sitting as an appeal court with three professional judges. On five occasions the High Court was called upon to examine such appeals regarding the applicant's continued detention on remand. Altogether 13 different judges participated in these five decisions and none of these judges did subsequently participate in the applicant's appeal proceedings regarding conviction and sentence before the High Court. On appeal the High Court was likewise requested to decide on other procedural matters such as the applicant's contact with the press and visits by his family. A total of six different judges participated in these decisions and none of them participated at a later stage in the hearing of the applicant's appeal against conviction and sentence before the High Court.

33. During the applicant's trial, which commenced on 27 April 1981 and ended on 1 November 1982, the Copenhagen City Court, sitting with one professional judge, judge Claus Larsen, and two lay judges, was also requested to decide on a number of procedural matters. During approximately 130 court sessions the City Court decided 23 times to prolong the applicant's detention on remand. Except on two occasions, all these decisions were taken by the presiding judge, judge Claus Larsen, and on four occasions he was joined by the two lay judges. On five occasions the presiding judge decided to request the co-operation of other countries in securing documents and in other matters, and decisions as to the seizure of documents, payment of defence counsel fees, travel expenses, submission of evidence and the hearing of witnesses were also taken by the City Court.

34. While the trial was going on before the City Court, a number of appeals against decisions taken by that Court were brought before the High Court. As a result of such appeals, decisions on the applicant's continued detention on remand, as well as on other procedural matters, were taken by the High Court sitting as an appeal court with three professional judges in a total of 19 decisions. On 12 occasions the High Court upheld the decision concerning the continued detention on remand and 14 different judges participated in these decisions. None of these judges subsequently participated in the hearing of the applicant's appeal against conviction and sentence before the High Court. Furthermore the High Court was requested to decide on a number of other procedural matters such as the appointment of defence counsel, the hearing of further witnesses, the issue of search warrants, the question of solitary confinement and travel expenses for the defence counsel. A total of 12 different High Court judges participated in these decisions. On one occasion, on 14 July 1981, the question of the continuation of the applicant's solitary confinement was decided by the judges Stürup, Hvidberg and Brydensholt. Judge Brydensholt later participated in the hearing in the High Court of the applicant's appeal against the judgment.

35. After the applicant had appealed against the judgment to the High Court, he was under Danish law still considered to be detained on remand and the High Court accordingly had to decide on the detention question at least every four weeks. By the time judgment was pronounced the High Court had taken 19 decisions to that effect. Ten of these decisions were taken before the hearing of the applicant's appeal in the High Court started whereas the remaining nine were taken during that hearing which ended on 2 March 1984. Except on a few occasions all decisions concerning detention on remand were taken by the same judges as decided on the appeal. Insofar as the decisions were taken during the appeal hearing the professional judges were joined by three lay judges. As from 25 August 1983 and until 8 February 1984 the decisions concerning the continued detention on remand were taken by a vote of five to one. As from 9 February 1984 and until the applicant's release on 2 March 1984 the decisions were taken by a vote of four to two.

36. As a reason for detaining the applicant during the appeal proceedings, the High Court referred to Section 762 sub-section 1 No. 1 and sub-section 2 of the Administration of Justice Act. The Court attached particular importance to the severity of the charges and to the fact that the applicant had lived abroad and still had substantial economic interests abroad. The applicant obtained permission from the Ministry of Justice to bring the question of his continued detention on remand before the Supreme Court. On 26 January 1983 the Supreme Court upheld the decision of the High Court while considering that the detention should also be based on Section 762 sub-section 1 No. 2 since some of the offences for which the applicant had been convicted by the City Court had been committed during the applicant's detention on remand. After the applicant had again been allowed by the Ministry of Justice to bring the matter of his detention on remand before the Supreme Court, that Court decided, on 9 December 1983, that the detention should continue but be based only on Section 762 sub-section 1 Nos. 1 and 2 of the Administration of Justice Act, since the majority of the Supreme Court no longer found that the public interest would require that the applicant remained in detention.

37. During a total of approximately 60 court sessions in the High Court, the Court had to deal with a number of other procedural matters such as the impartiality of the presiding judge, the hearing of witnesses and defence counsel fees. All decisions were taken by the judges who decided on the appeal.

38. On appeal from the High Court, the Supreme Court upheld, as mentioned above, the decisions concerning detention on remand on two occasions and four appeals were declared inadmissible since leave to appeal had not been granted by the Ministry of Justice.

B. Relevant domestic law

39. The Administration of Justice Act

"§742. Anmeldelser om strafbare forhold indgives til politiet.
Stk. 2. Politiet iværksætter efter anmeldelse eller af egen drift efterforskning, når der er rimelig formodning om, at et strafbart forhold, som forfølges af det offentlige, er begået.

§743. Efterforskningen har til formål at klarlægge, om betingelserne for at pålægge strafansvar eller anden strafferetlig retsfølge er til stede, og at tilvejebringe oplysninger til brug for sagens afgørelse samt forberede sagens behandling ved retten."

Translation:

"Section 742. Information about criminal offences shall be submitted to the police.
(2) The police shall start an investigation either on the basis of such information or on its own initiative where there is a reasonable ground for believing that a criminal offence which is subject to public prosecution has been committed.

Section 743. The aim of the investigation is to clarify whether the requirements for establishing criminal responsibility or for imposing any other sanction under criminal law are fulfilled and to produce information to be used in the determination of the case as well as to prepare the case for trial."

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40. "§746. Retten afgør tvistigheder om lovligheden af politiets efterforskningsskridt samt om sigtedes og forsvarerens beføjelser, herunder om begæringer fra forsvareren eller sigtede om foretagelsen af yderligere efterforskningsskridt. Afgørelsen træffes på begæring ved kendelse."

Translation:

"Section 746. The court settles disputes concerning the lawfulness of measures of investigation taken by the police as well as concerning the rights of the suspect and the defence counsel, including requests from the defence counsel or the suspect concerning the carrying out of further investigation measures. The decision shall be taken on request by order of the court."

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41. "§760. Enhver, der anholdes, skal løslades, så snart begrundelsen for anholdelse ikke længere er til stede. Tidspunktet for løsladelsen skal fremgå af rapporten.

Stk. 2. Inden 24 timer efter anholdelsen skal den anholdte, der ikke forinden er løsladt, fremstilles for en dommer. Tidspunktet for anholdelsen og for fremstillingen i retten anføres i retsbogen."

Translation:

"Section 760. Any person who is taken into custody shall be released as soon as the reason for the arrest is no longer present. The time of his release shall appear in the report.

(2) Where the person taken into custody has not been released at an earlier stage he shall be brought before a judge within 24 hours after his arrest. The time of his arrest and of his appearance in court shall appear in the court transcript."

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42. "§762. En sigtet kan varetægtsfængsles, når der er begrundet mistanke om, at han har begået en lovovertrædelse, som er undergivet offentlig påtale, såfremt lovovertrædelsen efter loven kan medføre fængsel i 1 år og 6 måneder eller derover, og

1) der efter det om sigtedes forhold oplyste er bestemte grunde til at antage, at han vil unddrage sig forfølgningen eller fuldbyrdelsen, eller

2) der efter det om sigtedes forhold oplyste er bestemte grunde til at frygte, at han på fri fod vil begå ny lovovertrædelse af den foran nævnte beskaffenhed, eller

3) der efter sagens omstændigheder er bestemte grunde til at antage, at sigtede vil vanskeliggøre forfølgningen i sagen, navnlig ved at fjerne spor eller advare eller påvirke andre.

Stk. 2. En sigtet kan endvidere varetægtsfængsles, når der foreligger en særlig bestyrket mistanke om, at han har begået en lovovertrædelse, som er undergivet offentlig påtale, og som efter loven kan medføre fængsel i 6 år eller derover, og hensynet til retshåndhævelsen efter oplysningerne om forholdets grovhed skønnes at kræve, at sigtede ikke er på fri fod.

Stk. 3. Varetægtsfængsling kan ikke anvendes, hvis lovovertrædelsen kan ventes at ville medføre straf af bøde eller hæfte, eller hvis frihedsberøvelsen vil stå i misforhold til den herved forvoldte forstyrrelse af sigtedes forhold, sagens betydning og den retsfølge, som kan ventes, hvis sigtede findes skyldig."

Translation:

"A suspect may be detained on remand when there is a justified reason to believe that he has committed an offence which is subject to public prosecution provided the offence under the law may result in imprisonment for 1 year and 6 months or more and if

1) according to information received concerning the suspect's situation there is specific reason to believe that he will evade prosecution or execution of judgment or,

2) according to information received concerning the suspect's situation there is specific reason to fear that, if at large, he will commit a new offence of the nature described above or,

3) in view of the circumstances of the case there is specific reason to believe that the suspect will impede the investigation in particular by removing evidence or by warning or influencing others.

(2) A suspect may furthermore be detained on remand when there is a particular confirmed suspicion that he has committed an offence which is subject to public prosecution and which under the law may result in imprisonment for 6 years or more and when respect for the public interest according to the information received about the gravity of the case is assessed to require that the suspect is not at liberty.

(3) Detention on remand may not be imposed if the offence can be expected to result in a fine or in light imprisonment or if the deprivation of liberty will be disproportionate to the interference with the suspect's situation, the importance of the case and the outcome expected if the suspect is found guilty."

III. SUBMISSIONS OF THE PARTIES

43. The following is a summary of the parties' main arguments submitted on the merits at the admissibility stage and during the examination of the merits.

A. The applicant

44. In regard to the question whether the involvement of the trial judges in deciding certain preliminary issues affected their impartiality, when participating in the trial itself, the facts of the present case show that the presiding judge at the applicant's trial in the City Court decided on a substantial number of occasions both prior to the trial and during the trial to prolong the applicant's detention on remand. In addition he decided on the question of solitary confinement, on issues concerning co-operation with a number of other countries in obtaining material alleged to help the Government of Denmark prove the guilt of the applicant. Furthermore he made orders before the trial began stopping correspondence by the applicant, approving the censorship of his letters, ordering his wife to be taken into custody and ordering the seizure of papers and documents. It is contended by the applicant that these prior judicial involvements affected the fairness of the proceedings and the impartiality of the City Court and subsequently of the High Court.

45. Article 6 para. 1 of the Convention provides that everyone shall be entitled to a fair and public hearing by an independent and impartial tribunal. From the case-law of the European Court of Human Rights it is clear that the guarantee of an impartial and unbiased tribunal is absolutely basic. It is not to be whittled down or avoided by technical arguments.

46. The test for determining the impartiality of the tribunal was laid down by the Court of Human Rights in the case of Piersack v. Belgium (Eur. Court H.R., Piersack judgment of 1 October 1982, Series A No. 53). The Court stated that impartiality under Article 6 could be tested in two ways. One way was the subjective approach, i.e.whether the particular judge was, in fact, really biased. Secondly, by the objective approach, namely whether there was any appearance of bias or any possible doubt as to whether bias existed. This approach has subsequently been adopted by the Court in the case of De Cubber v. Belgium (Eur. Court H.R., De Cubber judgment of 26 October 1984, Series A No. 86) and by the majority of the Commission in the case of Ben Yaacoub v. Belgium (Commission Report 7.5.85). The question to be asked, therefore, is not simply whether the tribunal was in fact biased but whether there were any factors present which could legitimately give rise to a suspicion that the tribunal was biased.

47. There is no doubt that in this case the applicant did in fact fear that the presiding judge at the City Court was biased against him and that the appeal judges were biased. The record shows that he made his fears known at the time and he made them known to the Commission very early in his application. The question is not whether his fears

were entirely justified. The question is whether they may have had some basis. The test in this respect is whether the applicant's fears were comprehensible.

48. The reasonableness of the fears is related to the part which the judge plays in the trial according to domestic law. In the present case it is a very important factor that the presiding judge of the City Court was the person who had the largest influence on the verdict. He did not sum up the case and leave it to a jury to decide on the question of guilt. Nor was he one of a number of judges in the Court. He was the chairman of the tribunal with only two lay assessors neither of whom had any legal or financial experience.

49. It is also important to focus on the implications of the decisions to deny bail and to grant the commissions rogatory. The decisions to deny a man liberty for 16 months before trial and for over another year during the trial is a very serious judicial step and one which requires weighty justification in view of both the Convention's guarantee in Article 6 para. 2 and the general record of liberality shown by the Danish courts towards the applications for bail.

50. According to Section 762 of the Danish Administration of Justice Act custody pending trial may be ordered only if there is reasonable suspicion that the person concerned has committed the alleged offence and if there are substantial reasons for believing that there is either a danger of his absconding, or of his interfering with the course of justice, or committing a serious offence. It can only be justified in regard to exceptionally serious offences.

51. In considering whether custody should be ordered, the judicial authority shall have regard to the circumstances, in particular the nature and seriousness of the offence, the strength of the evidence, the penalty likely, the character and personal and social circumstances of the person concerned as well as his conduct. All these matters were raised in the course of the many bail applications.

52. It is recalled that the applicant's contention is that he reasonably feared that both trial and appeal courts were biased against him by virtue, inter alia, of the presence of judges who had made adverse findings againt him on the question of his pre-trial detention. Some nine months after his initial detention, the trial and appeal courts invoked sub-section 2 of Section 762 of the Administration of Justice Act, and this paragraph was applied at every bail hearing prior to his conviction. Quite apart from the prejudicial nature and consequences of the application of sub-section 1 it is felt that the sub-section 2 requirement that the court find a "particular and confirmed suspicion" of guilt is overwhelming proof of the applicant's claim that the respondent State was in breach of its Article 6 duty to provide him with an impartial tribunal.

53. In particular in regard to Section 762 sub-section 2 it is pointed out that originally the Danish Administration of Justice Act provided for custody of the suspect during investigations only if there were a risk of evasion, new crimes or destruction of evidence. This is still the main rule of Danish law, cf. Section 762, sub-section 1.

54. In 1935, the provision contained in Section 762 sub-section 2 was inserted in the Act following an aggravated rape case which received much publicity. In the preparatory documents for the Act, reference is made to the above case and it is then stated that:

> "When everyone assumes the accused guilty and therefore anticipates serious criminal prosecution against him, it may under the circumstances be very objectionable when people, in their business and social lives, still have to observe and endure that he moves around freely. Even though his guilt and its consquences have not yet been established by final judgment, the impression may be given of lacking seriousness and consistency in the enforcement of law, which may be likely to confuse the concept of justice."

55. Thus the provision, which is neither necessary for the completion of court proceedings nor for the prevention of new crimes, contradicts fundamental principles of the administration of justice which may be formulated as being "no punishment without trial" and "anyone must be considered innocent until proved guilty".

56. The preparatory documents also make it clear that the required strength of the suspicion in Section 762 sub-section 2 is greater than in relation to the ordinary remand reasons. It is equally clear that to some extent it is the same concrete matters the judge has to evaluate when assessing the strength of the suspicion at the time of remand and when deciding the question of guilt at the trial.

57. In order to assess whether the legal requirements for "particular and confirmed suspicion" are fulfilled, the judge has to take a decision with regard to one, or possibly more pieces of evidence or circumstantial evidence which later will be part of the ultimate judgment. It is, therefore, very difficult to deny that the judge has taken a position on elements of the ultimate judgment - though this does not necessarily mean that he has made his final assessment of these elements.

58. It must be remembered, however, that the purpose of the particular and confirmed suspicion requirement is that of making certain that as far as possible no innocent person is imprisoned and a judge, therefore, would act in contravention of the law if he did not think, when remanding someone in custody under Section 762 sub-section 2, that there were good reasons to believe that the accused was guilty.

59. This interpretation is supported by the Danish Minister of Justice who, on 30 December 1986, in connection with the discussions of a new Bill which was supposed to extend the sphere of application of Section 762 sub-section 2 to certain crimes of violence which were expected to entail a minimum of 60 days' imprisonment, wrote as follows:

> "When it ... has been pointed out that the Bill opens possibilities for the imprisonment of innocent persons I find reason to stress that my proposed Bill makes it a condition that there is a particular and confirmed suspicion (the minister's emphasis) that the accused has committed the crime before the person in question can be remanded in custody. Thus there has to be a very high degree of clarity with regard to the question of guilt before the provision can be applied and this is the very means of ascertaining that innocent persons are not imprisoned."

60. The particular and confirmed suspicion requirement has accordingly the purpose of ensuring that innocent people are not imprisoned and this the judge will, of course, keep in mind when assessing whether imprisonment can take place pursuant to Section 762 sub-section 2.

61. Common human experience and psychological research show that it is difficult to rid oneself of a certain attitude regardless of the basis on which it was taken. New material is assessed in the light of the thoughts one has already had. Repetition of arguments may make them more convincing and a judge who imposes custodial detention many times will constantly be confronted by the same evidence.

62. Furthermore, for the individual judge - regardless of the Administration of Justice Act provisions - it may be taken as reflecting insufficient firmness and consequence if he passes judgment of acquittal on what seems to be the same material which formed the basis for the custodial detention.

63. A judge making a remand order pursuant to Section 762 sub-section 2 in a case where the accused pleads not guilty, has taken a position on one very significant point: the question of the trustworthiness of the accused. It seems understandable if an accused person cannot have full confidence in a judge who has already indicated that he has no confidence in the explanation of the accused. Regardless of all attempts to explain the role of the judge during investigations and trial, it will always seem to the accused and his family to be unfair that a judge who has made the committal order pursuant to Section 762 sub-section 2 now has to take a decision with regard to the question of guilt.

64. From this it follows that the right of an accused to an impartial judgment in his case is so fundamental to the guarantee of law and order that not even a small risk of prejudicing the question of guilt should be ignored. This consideration as well as consideration for the confidence of the accused in the judge presiding over his case supports the view that in cases in which the accused has been in custody a new judge should be appointed for the ultimate trial.

65. In general, the same principle should be applied also in appeal cases concerning the assessment of evidence if the court of appeal in the past has decided on the custodial imprisonment of the accused.

66. When applying the above general considerations to the applicant's case it is recalled that the presiding judge of the City Court repeatedly decided that the applicant should be detained in custody because of the danger of his committing further criminal offences, the substantial weight of the evidence against him, the likelihood that he would run away and the danger of his interfering with the witnesses. The judge was in effect concluding, long before his trial, that the applicant was a person of deep dyed criminal proclivities, a character of unreliable and irresponsible behaviour, and a person against whom the evidence of guilt was, in the words of Section 762, "particular" and "confirmed".

67. The decisions taken together made it clear to the reasonable observer that the presiding judge could no longer begin the trial with an open mind because he believed that the applicant was likely to be guilty, that the applicant was a person who would commit other crimes, that the applicant was a person of dreadful criminal propensity.

68. Turning to the questions concerning rogatory commissions the judge does not merely rubberstamp a police request but considers the weight and the validity of the reasons for that request and may be apprised of information which is not relevant or admissible at the criminal trial. The decision to issue the commission is a significant step in the investigative process insofar as it involves a formal request to another sovereign state for assistance, and it implies a determination both that the prosecution's case is weighty and that there is every reason to believe that further evidence of the defendant's guilt is to be found abroad.

69. The presiding judge's decision to make the request inevitably brings him into the prosecution and the investigative process and detracts him from approaching the case at trial with an unprejudiced mind. On the basis of the above mentioned facts it is clear that the applicant had legitimate grounds to apprehend judicial bias. The applicant had reason to suspect that the judge would be biased in considering the verdict at the trial, and that the bias would influence the inexperienced lay persons who were the other members of the tribunal. It gave him understandable misgivings as to whether the judge could discard from his mind those devastatingly serious allegations he had already found to be proved, and approach the question of guilt or innocence with an entirely open mind.

70. Regarding the question of impartiality in the High Court the applicant points out that the professional judges taking part in the High Court proceedings made a number of decisions on detention prior to the hearing of the appeal and during that hearing in 1982/83. After the commencement of the appeal hearing these judges made several decisions on detention together with the three lay judges. The basis upon which the High Court judges should take their decisions as to the detention on remand was, as in the City Court, Section 762 of the Administration of Justice Act, and accordingly for similar reasons as above, their decisions did indicate prejudice and, by holding the applicant incarcerated, the judges showed that the High Court also found the applicant guilty prior to the verdict.