



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF SCHIESSER v. SWITZERLAND

(Application no. 7710/76)

JUDGMENT

STRASBOURG

4 December 1979

In the Schiesser case,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. BALLADORE PALLIERI, *President*,

Mr. M. ZEKIA,

Mr. R. RYSSDAL,

Mrs. D. BINDSCHEDLER-ROBERT,

Mr. D. EVRIGENIS,

Mr. P.-H. TEITGEN,

Mr. F. MATSCHER,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*.

Having deliberated in private on 24 January and on 26 October 1979,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Schiesser case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government"). The case originated in an application against the said State lodged with the Commission on 15 November 1976 under Article 25 (art. 25) of the Convention by a Swiss citizen, Mr. Friedrich Schiesser.

2. Both the Commission's request, to which was attached the report provided for in Article 31 (art. 31) of the Convention, and the Government's application were lodged with the registry of the Court within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 16 May 1978 and the latter on 11 July 1978. The request referred to Articles 44 and 48, paragraph (a) (art. 44, art. 48-a), and to the declaration whereby the Swiss Confederation recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the application referred to Articles 45, 47 and 48, paragraph (d) (art. 45, art. 47, art. 48-d). The purpose of the request and the application is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 5 para. 3 (art. 5-3) of the Convention and as to whether or not the applicant is entitled to invoke Article 5 para. 4 (art. 5-4).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 31 May 1978, the President of the Court drew by lot, in the presence of the Deputy Registrar, the names of the five other members, namely Mr. M. Zekia, Mr. R. Ryssdal, Mr. D. Evrigenis, Mr. P.-H. Teitgen and Mr. F. Matscher (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Balladore Pallieri assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Deputy Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 15 June 1978, he decided that the Agent should have until 31 October 1978 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to them by the Registrar.

The Government filed their memorial on 30 October 1978. On 18 December, the Secretary to the Commission advised the Registrar that the Delegates would reply to the Government's memorial during the oral hearings and transmitted to him a note setting out the observations of the applicant's counsel on the Commission's report.

5. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 12 January 1979 that the oral hearings should open on 23 January.

6. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 23 January 1979. Immediately prior to their opening, the Court had held a short preparatory meeting.

There appeared before the Court:

- for the Government:

Mr. J. VOYAME, Director

of the Federal Division of Justice,

Agent,

Mr. R. HAUSER, Professor

at Zürich University,

Mr. O. JACOT-GUILLARMOD,

of the Federal Division of Justice,

Counsel;

- for the Commission:

Mr. J. FROWEIN,

Principal Delegate,

Mr. B. KIERNAN,

Delegate,

Mr. E. SCHÖNENBERGER, who had represented

the applicant before the Commission, assisting the

Delegates under Rule 29 para. 1, second sentence, of the
Rules of Court.

The Court heard addresses by Mr. Voyame and Mr. Hauser for the Government and by Mr. Frowein, Mr. Kiernan and Mr. Schönenberger for the Commission, as well as their replies to questions put by the Court.

AS TO THE FACTS

1. Facts relating to the individual applicant

(a) Mr. Schiesser's initial detention on remand

7. Mr. Friedrich Schiesser, a Swiss citizen born in 1952, resides in Winterthur (Canton of Zürich). On 5 April 1976, after he had been hiding from the police for some time, he gave himself up.

He was at once brought before the Winterthur District Attorney (Bezirksanwalt). The latter heard Mr. Schiesser without his lawyer being present and then, on the same day, made an order directing that Mr. Schiesser be placed in detention on remand (Untersuchungshaft). The District Attorney strongly suspected that the applicant had committed or attempted to commit several offences of aggravated theft and feared that he might suppress evidence (Article 49, sub-paragraph a), of the Zürich Code of Criminal Procedure - Strafprozessordnung, hereinafter referred to as StPO).

8. Mr. Schiesser lodged an appeal (Rekurs) against the above-mentioned order but it was dismissed by the Zürich Public Prosecutor (Staatsanwalt) on 13 April 1976. The Public Prosecutor, adopting the grounds relied on by the District Attorney, stated that the investigations had not been completed and that there was reason to believe that the applicant, who had no fixed abode in Switzerland, might abscond.

9. Mr. Schiesser filed a "public-law appeal" with the Federal Court, alleging that the Public Prosecutor's decision was contrary to Article 4 of the Federal Constitution and to Article 5 paras. 1 (c) and 3 (art. 5-1-c, art. 5-3) of the Convention. He described as arbitrary the statement that he might suppress evidence and questioned whether the District Attorney was an "officer authorised by law to exercise judicial power", within the meaning of Article 5 para. 3 (art. 5-3).

By a judgment of 14 July 1976, the Federal Court (Public-Law Chamber) rejected the appeal. It accepted that there were reasons to believe that the applicant might suppress evidence if he were released. It also considered that, since the circumstances clearly gave rise to a suspicion that the applicant had committed thefts, there was no violation of Article 5 para. 1 (c) (art. 5-1-c). As regards Article 5 para. 3 (art. 5-3), the Federal Court,

having noted that there was a difference of opinion amongst legal writers over the interpretation of this provision, stated:

"The main criterion for classifying a given activity as 'judicial' is the independence which the bodies acting in that capacity enjoy vis-à-vis other State authorities and other persons entrusted with functions relating to the administration of justice as well as vis-à-vis institutions and organisations in the public sector ...

However, the text of Article 5 para. 3 (art. 5-3) of the Convention demonstrates that it does not see the attributes of a judge or judicial independence in terms of the principle of separation of powers.... The only possible interpretation of this Article is that even bodies which are administrative by reason of their position meet the Convention's requirements to the extent that they exercise judicial functions, that is act independently when giving decisions in that capacity. Thus, according to Article 5 para. 3 (art. 5-3) ..., what is above all decisive is not the place held in the organisation of the State but rather the function to be exercised. In other words, that provision does not in principle preclude the simultaneous exercise by one and the same person of different functions, namely functions relating to investigation as well as functions in other areas of the administration of criminal justice ..."

In support of this interpretation, the Federal Court pointed out that, unlike paragraph 3 (art. 5-3), paragraph 4 of Article 5 (art. 5-4) uses the word "court". A further argument was derived from Article 6 para. 1 (art. 6-1):

"There is good reason to suppose that, had the authors of the Convention wished to confer on an accused such an extensive guarantee as regards the independence and impartiality of the competent authority, they would have utilised in Article 5 para. 3 (art. 5-3) wording identical to that in Article 6 para. 1 (art. 6-1)", namely "an independent and impartial tribunal".

Turning to the powers of the District Attorney, the Federal Court noted that he is both an investigating authority (Ermittlungs- und Untersuchungsbehörde), under the supervision of the Public Prosecutor, and - in cases before a single judge or the District Court - a prosecuting authority. In the present case, the District Attorney had acted as an investigating authority in which capacity Article 31 stop required him to be equally thorough in gathering evidence in favour of and evidence against the accused. From this the Federal Court concluded:

"It is of little consequence that the District Attorney is incorporated in the administrative hierarchy and thus constitutes an administrative authority by reason of his position in the organisation of the State At the investigation stage, he in fact fulfils a judicial function and exercises no administrative activity.... Moreover, the rule on the election of District Attorneys by the people ... shows that the legislature wished to secure for this body a measure of independence vis-à-vis the executive and the administration even as regards the procedure for appointment.

This view is not contradicted by the fact that, during the investigation, the District Attorney's Office may receive from the Public Prosecutor's Office directives concerning either the exercise of his activities in general or a specific case (opening, conduct and closure of the investigation) What is decisive is that, when acting as a

supervisory body during the investigation, the Public Prosecutor's Office as well is carrying out a judicial function of investigation; it is only if and when the case is sent for trial that that Office assumes its role of prosecutor and thereby becomes a party to the proceedings."

(b) The prolongation of Mr. Schiesser's detention on remand

10. On 20 April 1976, the President of the Prosecution Chamber (Anklagekammer) of the Canton of Zürich Court of Appeal (Obergericht) decided that Mr. Schiesser should remain in detention until the following 18 May. The applicant appealed without success, firstly to the Prosecution Chamber, which confirmed the President's order on 10 May, and then to the Federal Court, which dismissed his "public-law appeal" on 25 May 1976.

Mr. Schiesser's detention on remand had in the meantime been prolonged pursuant to Article 51 StPO. He was eventually released on 12 July 1976.

11. In view of the gravity of the charges against the applicant (thefts to a value of more than FS 30,000) the Canton of Zürich Court of Appeal had jurisdiction in the matter; the indictment therefore had to be drawn up by the Public Prosecutor's Office which represented the prosecuting authorities at the trial (see paragraph 14 below). The investigation, on the other hand, had been conducted by an Ordinary District Attorney.

On 11 May 1978, the Court of Appeal imposed on Mr. Schiesser a sentence, suspended for four years, of seventeen months' imprisonment for professional theft as a member of a gang (Article 137 of the Swiss Criminal Code).

2. Status and powers of the District Attorney

12. The Canton of Zürich is divided into eleven districts, each of which has a Prosecutor's Office with one or more Attorneys. At the relevant time, the status and powers of District Attorneys were laid down in the Constitution of the Courts Act of 29 January 1911 (Gerichtsverfassungsgesetz, hereinafter referred to as GVG); an Act of 13 June 1976, which entered into force on 1 January 1977, has since replaced, and in substance re-enacted the provisions of, the 1911 Act.

13. Ordinary District Attorneys are elected by universal suffrage for a term of office fixed by the 1911 Act at three years (section 99 GVG) and increased by the 1976 Act to four years. Although any citizen may stand for election, candidates are most often lawyers who have completed university studies and received practical training in the courts, industry, the civil service or the legal profession. If necessary, the Cantonal Government appoints Special District Attorneys for a specified period (sections 100 and 106 GVG).

14. The District Attorney is subordinate to the Public Prosecutor who in turn comes under the authority of the Department of Justice and the

Government (Regierungsrat) of the Canton of Zürich. The District Attorney is the prosecuting authority before the single judge in criminal matters and before the District Courts in cases concerning petty offences and misdemeanours; before the higher Cantonal courts (the Court of Appeal and the Assize Court - section 93 GVG), this function is performed by the Public Prosecutor. The District Attorney also has power to issue a punishment order (Strafbefehl) if the accused has admitted his guilt and if a fine (Busse) or a prison sentence of not more than one month is deemed sufficient (Article 317 StPO); however, the person concerned is entitled to enter an objection (Einsprache) to the punishment order, as is the Public Prosecutor (Article 321 StPO).

15. The investigation of criminal cases comes within the competence of the prosecuting authorities (section 94 GVG). The District Attorney conducts the investigation except in those cases where it is entrusted by law to the Public Prosecutor or a judge (Article 25 StPO). The District Attorney may issue a warrant for arrest (Verhaftsbefehl - Article 55 StPO), the grounds for which he must indicate; he has to hear an arrested suspect within twenty-four hours (Article 64 StPO). During this first interrogation, at which the suspect's lawyer is not normally present, the suspect must be clearly informed of the reasons prompting the suspicions held against him (Article 65 StPO) and of the existence of a right of appeal against the warrant (1956 Circular from the Public Prosecutor's Office). Directive no. 219 (Collection of Circulars from the Public Prosecutor's Office to the District Attorneys's Offices, 1968 - Sammlung der Kreisschreiben der Staatsanwaltschaft an die Bezirksanwaltschaften von 1968) specifies that this interrogation is not to be considered as a pure formality. Under Directive no. 58, the District Attorney is prohibited from delegating his power to interrogate to subordinate officials.

16. Detention on remand ordered by the District Attorney may not exceed fourteen days; this period may be extended by the President of the District Court or, in cases coming within the jurisdiction of the Assize Court, the President of the Prosecution Chamber of the Court of Appeal (Article 51 StPO).

17. The District Attorney remains under the control of the Public Prosecutor as regards both the opening and the conduct of the investigation. The Public Prosecutor is authorised to issue directives to him (Article 27 StPO) and must be kept informed of every serious offence (Directive no. 100). The Department of Justice or the Government of the Canton of Zürich may request the Public Prosecutor to submit a report on the opening and the conduct of criminal proceedings (Strafprozess) and may give him special orders and instructions (besondere Aufträge und Weisungen - Article 28 StPO). A report must be made to the Cantonal Government whenever proceedings having political significance are instituted (Article 29 StPO).

In addition, the Chief Public Prosecutor (*erster Staatsanwalt*) carries out inspections twice every year; their sole purpose is the expedition of proceedings.

For more than thirty years now, District Attorneys in practice receive no special orders or instructions from the Public Prosecutor concerning their powers of placing individuals in detention.

Once the investigation is closed, any District Attorney contemplating the release of an accused must so inform the Public Prosecutor if the prosecution falls within the latter's competence (Directive no. 171).

18. Assuming that the prosecution has not been discontinued, the District Attorney, or the Public Prosecutor, becomes a party to the criminal proceedings; when drawing up the indictment, he must however take into account items in the accused's favour and not confine himself to stressing items that tell against him (Article 178 StPO).

PROCEEDINGS BEFORE THE COMMISSION

19. In his application of 15 November 1976 to the Commission, Mr. Schiesser alleged a violation of Article 5 para. 3 (art. 5-3) of the Convention in that the District Attorney could not be regarded as an "officer authorised by law to exercise judicial power", within the meaning of that provision.

20. The Commission accepted the application on 12 July 1977. Subsequently the applicant also invoked Article 5 para. 4 (art. 5-4) on the ground that he had not been entitled to take proceedings by which the lawfulness of his detention would have been decided speedily by a court.

21. In its report of 9 March 1978, the Commission expresses the opinion:

- by nine votes to five, that there has not been a breach of Article 5 para. 3 (art. 5-3) of the Convention;
- by eleven votes to one, with two abstentions, that it is not called upon to express an opinion on the merits of the claim concerning Article 5 para. 4 (art. 5-4) since the applicant has not exhausted domestic remedies within the meaning of Article 26 (art. 26).

The report contains a joint dissenting opinion by five members of the Commission.

CONCLUDING SUBMISSIONS MADE TO THE COURT

22. In their memorial of 30 October 1978, the Government requested the Court

- "1. to hold that Article 5 para. 3 (art. 5-3) of the Convention has not been violated in the instant case;

2. to hold that the applicant's allegation of a violation of Article 5 para. 4 (art. 5-4) of the Convention, formulated after the Commission's admissibility decision, is incompatible with the obligation derived from Article 26 (art. 26) of the Convention".

The Agent of the Government repeated these submissions at the hearings on 23 January 1979.

23. The Commission's Principal Delegate, for his part, invited the Court "to find that it does not have jurisdiction to state if there was a violation of Article 5 para. 4 (art. 5-4) in the present case".

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 5 PARA. 3 (art. 5-3)

24. Article 5 para. 3 (art. 5-3) of the Convention reads as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) (art. 5-1-c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

Mr. Schiesser contends that the Winterthur District Attorney cannot be regarded as an "officer authorised by law to exercise judicial power".

The Commission and the Government, when referring the case to the Court, requested it to decide whether the applicant's detention on remand violated the right guaranteed by the above-cited provision.

25. In the present case no problem arises either under paragraphs 1 (c) and 2 of Article 5 (art. 5-1-c, art. 5-2) or with regard to the first and last parts of paragraph 3 (art. 5-3) ("brought promptly", "trial within a reasonable time or ... release pending trial"; see, *mutatis mutandis*, the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 21); the Court has to ascertain only whether the said Attorney possessed the attributes of an "officer authorised by law to exercise judicial power".

26. This last phrase has three components.

The second component ("authorised by law to exercise") does not give rise to any difficulty: the Winterthur District Attorney exercised in the instant case powers conferred on him by Cantonal law (see paragraphs 7, 12 and 15-17 above); this is contested neither by the Commission, nor by the Government, nor by the applicant.

The first and third components ("officer", "judicial power") have to be considered together.

27. In providing that an arrested person shall be brought promptly before a "judge" or "other officer", Article 5 para. 3 (art. 5-3) leaves the

Contracting States a choice between two categories of authorities. It is implicit in such a choice that these categories are not identical. However, the Convention mentions them in the same phrase and presupposes that these authorities fulfil similar functions; it thus clearly recognises the existence of a certain analogy between "judge" and "officer". Besides, were this not so, there would scarcely be any explanation for the inclusion of the adjective "other".

28. "Magistrat" in French and, even more, "officer" in English manifestly have a wider meaning than "juge" and "judge".

Again, the exercise of "judicial power" is not necessarily confined to adjudicating on legal disputes. In many Contracting States, officers (magistrats) and even judges exercise such power without adjudicating, for example members of the prosecuting authorities and investigating judges.

A literal analysis thus suggests that Article 5 para. 3 (art. 5-3) includes officials in public prosecutors' departments as well as judges sitting in court (les magistrats du parquet comme ceux du siège).

29. As regards the context of the words falling to be interpreted, the Government and the Commission note that throughout Article 5 (art. 5) use is made of expressions of two kinds, one precise - "court" (para. 1 (a) and (b), para. 4) (art. 5-1-a, art. 5-1-b, art. 5-4) and "judge" (para. 3) (art. 5-3) - and the other rather vague - "competent legal authority" (para. 1 (c)) (art. 5-1-c) and "officer authorised by law to exercise judicial power" (para. 3) (art. 5-3). In their view, it is reasonable to deduce from this that the first kind of expression contemplates stricter requirements than the second kind.

The Court shares this opinion but wishes to emphasise the limits of the distinction which it establishes.

Since paragraph 1 (c) forms a whole with paragraph 3 (art. 5-1-c, art. 5-3), "competent legal authority" is a synonym, of abbreviated form, for "judge or other officer authorised by law to exercise judicial power" (Lawless judgment of 1 July 1961, Series A no. 3, p. 52; Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 75, para. 199).

In the present case, greater assistance can be gained from a comparison of paragraphs 3 and 4 (art. 5-3, art. 5-4): unlike paragraph 3, paragraph 4 requires the intervention of a "court". Before a body can properly be regarded as a "court", it must, inter alia, be independent of the executive and of the parties (Neumeister judgment of 27 June 1968, Series A no. 8, p. 44; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, para. 78), but this also holds good for the "officer" mentioned in paragraph 3 (art. 5-3): while the "judicial power" he is to exercise, unlike the duties set out in paragraph 4 (art. 5-4), may not take the form of adjudicating on legal disputes ("un caractère juridictionnel"), nonetheless judicial power is likewise inconceivable if the person empowered does not enjoy independence (see paragraph 31 below).

30. The ordinary meaning of the expression in question (see paragraph 28 above), read in its context (see paragraph 29), is moreover in harmony with the object and purpose of Article 5 (art. 5), as to which Government and Commission take the same view.

According to the Government, the purpose of Article 5 para. 3 (art. 5-3) is to guarantee the impartiality and objectivity of the person before whom the individual concerned will be brought. In addition, the Government see the appearance before a judge or other officer as calculated to protect everyone against any unjustified arrest and detention.

For the Commission, the object of the provision under consideration is to afford to individuals deprived of their liberty a special guarantee: recourse not to a specific institution, namely a court, but to a procedure of a judicial nature.

The Court views Article 5 (art. 5) as designed to ensure that no one should be arbitrarily dispossessed of his liberty (see the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 16, para. 37). This overall purpose entails, in the area covered by paragraph 4 (art. 5-4), the necessity of following a procedure that has a "judicial character" and gives "guarantees appropriate to the kind of deprivation of liberty in question", without which it would be impossible to speak of a "court" (above-mentioned De Wilde, Ooms and Versyp judgment, pp. 40-41, para. 76). The "officer" referred to in paragraph 3 (art. 5-3) must, for his part, offer guarantees befitting the "judicial" power conferred on him by law.

31. To sum up, the "officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.

The first of such conditions is independence of the executive and of the parties (see, *mutatis mutandis*, the above-mentioned Neumeister judgment, p. 44). This does not mean that the "officer" may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.

In addition, under Article 5 para. 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis*, the above-mentioned Winterwerp judgment, p. 24, para. 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned Ireland v. the United Kingdom judgment, p. 76, para. 199).

In verifying whether these various conditions are satisfied, the Court does not have to deal with questions that do not arise in the instant case, for

example whether an officer is fitted, by reason of his training or experience, to exercise judicial power.

32. The Court now has to satisfy itself that the Winterthur District Attorney did offer Mr. Schiesser the guarantees inherent in the notion whose meaning it has indicated above.

Two preliminary remarks appear necessary.

In the first place, the status of the District Attorney and his powers in the matter of detention on remand are laid down in detail in the Constitution of the Courts Act of 29 January 1911 (GVG), the Code of Criminal Procedure of 4 May 1919 (StPO) and the Collection of Circulars from the Public Prosecutor's Office to the District Attorneys' Offices, 1968 (see paragraphs 12 to 18 above). In particular, the StPO sets out clearly the reasons and procedure for placing someone in detention and, in the present case, the Attorney's decision was based on that Code (see paragraph 7 above).

In the second place, the applicant is not alleging any failure to comply with Cantonal law. As the Commission notes, he does not claim that the Winterthur District Attorney did not act independently or did not take into account, as is required by Article 31 StPO, each of the items telling for or against a measure involving deprivation of liberty. Neither does Mr. Schiesser contend that that officer failed to indicate the grounds for the warrant for arrest as is stipulated by a 1956 Circular from the Public Prosecutor's Office. Accordingly, it is the Zürich law as such which the applicant is calling in question.

In this latter connection, the Court recalls its established case-law: being seised of a case originating in an application lodged under Article 25 (art. 25) of the Convention, the Court must not undertake an abstract review of rules but must, as far as possible, confine its examination to the manner in which the Zürich law has been applied in the particular circumstances (see, *inter alia*, the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 13, para. 27).

33. Mr. Schiesser and the minority of the Commission maintain that the District Attorney does not provide the necessary guarantees of independence and that this is so for two reasons: firstly, he acts in certain cases as a prosecuting authority; secondly, he is subordinate to the Public Prosecutor's Office and, through that Office, to the Department of Justice and the Government of the Canton of Zürich. The applicant argues that his contention is corroborated by Articles 27 to 29 StPO and several texts appearing in the aforesaid 1968 Collection of Circulars, including Directives nos. 100 and 171 (see paragraphs 14 and 17 above).

34. As regards the first point (prosecution), the Court emphasises that in the present case the District Attorney intervened exclusively in his capacity as an investigating authority, that is in considering whether Mr. Schiesser should be charged and detained on remand and, subsequently, in conducting enquiries with an obligation to be equally thorough in gathering evidence in

his favour and evidence against him (Article 31 StPO). He did not assume the mantle of prosecutor: he neither drew up the indictment nor represented the prosecuting authorities before the trial court (see paragraph 11 above). He therefore did not exercise concurrent investigating and prosecuting functions, with the result that the Court is not called upon to determine whether the converse situation would have been in conformity with Article 5 para. 3 (art. 5-3).

35. As regards the second point (subordinate status), the Government stress that the Winterthur District Attorney's decision to place Mr. Schiesser in detention on remand was taken in complete independence. They also rely on the practice now followed in the Canton of Zürich for more than thirty years, according to which the Department of Justice and the Public Prosecutor never give to District Attorneys orders or instructions concerning the placing of a given suspect in detention (see paragraph 17 above); admittedly, the Department and the Prosecutor may on occasion issue directives to the Attorneys, but this happens very rarely and legal writers take the view that such directives must relate to questions of lawfulness and not of expediency. The 1968 Collection of Circulars has, say the Government, the sole aim of ensuring that the law is applied uniformly.

This argument, whose validity the Court accepts in view of its Delcourt judgment of 17 January 1970 (Series A no. 11, pp. 17-18, para. 32, second sub-paragraph), corresponds to the realities of the situation. Indeed, the Winterthur District Attorney proves to have received no advice or instructions from the Department of Justice or the Government of the Canton of Zürich or, for that matter, from the Public Prosecutor before ordering the applicant's detention on remand. Besides, the applicant does not contest this. What is more, when hearing Mr. Schiesser the District Attorney acted alone, that is without the Public Prosecutor's assistance or supervision. Since he had neither to submit to outside interference nor to consult another authority, the District Attorney exercised the personal discretion conferred on him by law. In these conditions, the Court considers that in the present case he offered guarantees of independence that are sufficient for the purposes of Article 5 para. 3 (art. 5-3); it attaches no real importance to the Government's additional argument which is derived from the procedure for this officer's appointment, namely election by universal suffrage.

36. With regard to the procedural guarantees, the Court notes firstly that when the applicant gave himself up, he was interrogated by the District Attorney himself and within twenty-four hours, as is required by Article 64 StPO and Directive no. 58 (see paragraphs 7 and 15 above). The District Attorney told Mr. Schiesser why he was suspected of having committed or attempted to commit offences and informed him of his right of appeal against the warrant issued for his arrest (Article 65 StPO and 1956 Circular; see paragraph 15 above).

The applicant complains that his lawyer was not allowed to attend the interrogation. This fact was confirmed by one of the Government counsel and the Commission's Principal Delegate and is consistent with the practice followed in the Canton of Zürich but the Court does not consider it to be incompatible with Article 5 para. 3 (art. 5-3) of the Convention, which does not make a lawyer's presence obligatory.

37. Immediately after the interrogation, the District Attorney issued a detention order based on two of the grounds listed in Article 49 StPO, one being that there were reasons to suspect Mr. Schiesser of an offence (see paragraph 7 above). This is one of the grounds which, under Article 5 para. 1 (c) (art. 5-1-c) of the Convention, justify detention on remand. In addition, the order was made in accordance with a procedure prescribed by law.

38. The Court is therefore of the opinion that the Winterthur District Attorney offered in the present case the guarantees of independence and the procedural and substantive guarantees inherent in the notion of "officer authorised by law to exercise judicial power". There has accordingly been no breach of Article 5 para. 3 (art. 5-3).

II. ON THE ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 (art. 5-4)

39. Mr. Schiesser complained to the Commission, after it had accepted his application, of an alleged breach of Article 5 para. 4 (art. 5-4) which reads:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In fact, he claimed to have been deprived of such an entitlement since during the fourteen days following his arrest he could, under the Zürich Code of Criminal Procedure, appeal only to the Public Prosecutor.

40. In its report, the Commission expresses the opinion that, because the Convention has been incorporated into Swiss law and takes precedence over Cantonal law, Mr. Schiesser should have raised this issue before the Federal Court. Having failed to do so, he had not, according to the Commission, exhausted domestic remedies in this respect.

When referring the case to the Court, the Commission and subsequently the Government requested the Court to decide whether the applicant could nevertheless invoke Article 5 para. 4 (art. 5-4). At the hearings, the Principal Delegate invited the Court, on account of the failure to comply with Article 26 (art. 26), to decline jurisdiction to rule on the merits of the complaint relating to Article 5 para. 4 (art. 5-4). The Agent of the Government, for his part, confirmed the argument appearing in their memorial; he asked the Court to hold "that the applicant's allegation of a violation of Article 5 para.

4 (art. 5-4) ..., formulated after the Commission's admissibility decision, is incompatible with the obligation derived from Article 26 (art. 26) ...".

41. The Court takes the view that, on the point now being considered, the Commission's report amounts, in substance, to an implicit decision of inadmissibility although it does not expressly refer to Article 29 para. 1 (art. 29-1) or even to Article 27 para. 3 (art. 27-3). Moreover, the Court notes that in the present case the allegation in question is not merely a further legal submission or argument but a separate complaint going beyond the framework of the case which it is called upon to decide. The Court concludes, in the light of its case-law on the subject, that an examination of the aforesaid implicit decision lies outside its jurisdiction (see, *mutatis mutandis*, the above-mentioned Delcourt judgment, p. 20, para. 40; the above-mentioned De Wilde, Ooms and Versyp judgment, p. 30, para. 51; the Handyside judgment of 7 December 1976, Series A no. 24, pp. 19-20, para. 41; the above-mentioned Ireland v. the United Kingdom judgment, p. 63, para. 157; the above-mentioned Winterwerp judgment, pp. 27-28, paras. 71-72).

FOR THESE REASONS, THE COURT

1. Holds by five votes to two that there has been no breach of Article 5 para. 3 (art. 5-3);
2. Holds unanimously that it does not have jurisdiction to take cognisance of the complaint relating to Article 5 para. 4 (art. 5-4).

Done in English and French, the French text being authentic, at the Human Rights Building, Strasbourg, this fourth day of December, one thousand nine hundred and seventy-nine.

For the President
Rolv RYSSDAL
Judge

Marc-André EISSEN
Registrar

The separate opinions of Judges Ryssdal and Evrigenis, dissenting from the present judgment, are annexed hereto in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE RYSSDAL

I am unable to agree with the conclusion of the majority of the Court that there has been no breach of Article 5 para. 3 (art. 5-3) of the Convention in the present case.

The object and purpose of Article 5 (art. 5) is to give specific guarantees for the protection of personal liberty. It is fundamental that no person may be deprived of his liberty except when this is decided on the basis of very clear reasons prescribed by law. It is also fundamental that such a decision should be taken by an impartial and independent authority in accordance with a procedure prescribed by law. In criminal cases this applies not only to the detention of convicted persons but also to detention on remand.

It would certainly be preferable if everyone arrested on suspicion of having committed an offence had to be brought promptly before a judge and if only the courts had competence to decide on the reasons for and against detention on remand. However, Article 5 para. 3 (art. 5-3) of the Convention leaves it to the Contracting States whether arrested persons are to be brought before a "judge" or before an "other officer authorised by law to exercise judicial power". This wording is not quite clear and it is difficult to say what its meaning is if it is considered apart from its context. Here the relationship between the provisions of Article 5 para. 3 and of Article 5 para. 4 (art. 5-3, art. 5-4) is of importance. According to Article 5 para. 4 (art. 5-4), everyone who is deprived of his liberty by arrest or detention "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court ...". Paragraph 4 (art. 5-4) thus expressly requires the intervention of a court. Both the wording of paragraph 3 (art. 5-3) and the relationship between paragraphs 3 and 4 (art. 5-3, art. 5-4) seem to support the view that Article 5 para. 3 (art. 5-3) does not require for the "officer" mentioned therein the same sort of judicial attributes as it does for the "judge".

The Contracting States cannot, however, enjoy complete freedom as regards the persons whom they may authorise to take decisions concerning detention on remand. The purpose of Article 5 para. 3 (art. 5-3) is to establish a system of judicial review and, by that means, to give specific guarantees to persons deprived of their liberty. If a Contracting State leaves such judicial power to an "officer" other than a judge, it is necessary that this "other officer" should not be dependent on or controlled by the administration and also that he can be regarded as independent and impartial. Depriving a person of his liberty is a very serious measure, and the purpose of Article 5 para. 3 (art. 5-3) is to give the utmost protection to individual liberty.

It is a fundamental principle that prosecution and judiciary should be separated. I think that this principle should be applied also in the interpretation of Article 5 para. 3 (art. 5-3) of the Convention and that an

officer who acts as a public prosecutor cannot be regarded as an "officer authorised by law to exercise judicial power", within the meaning of Article 5 para. 3 (art. 5-3).

In my opinion, the Winterthur District Attorney, whose main activity is investigation and prosecution and who in that capacity acts under the supervision of the highest prosecuting authority, does not fulfil the requirements of Article 5 para. 3 (art. 5-3). I do not find it decisive that the District Attorney did not act as prosecutor in this particular case. That he would not do so was not clear – and certainly not clear to the applicant – when the District Attorney made the order that the applicant should be placed in detention on remand. The District Attorney's main task – that of prosecuting – is in my opinion incompatible with the judicial power under Article 5 para. 3 (art. 5-3) to take decisions as to detention on remand.

For these reasons I have come to the conclusion that in the present case there has been a breach of Article 5 para. 3 (art. 5-3) of the Convention.

DISSENTING OPINION OF JUDGE EVRIGENIS

(Translation)

I voted to the effect that there has been a breach of Article 5 para. 3 (art. 5-3) of the Convention. In my view, the Winterthur District Attorney cannot be regarded as an "officer authorised by law to exercise judicial power" (in the French text: "un magistrat habilité par la loi à exercer des fonctions judiciaires"), within the meaning of Article 5 para. 3 (art. 5-3). My reasons are the following:

(a) Authorisation to exercise fonctions "judiciaires"/"judicial" power signifies, for the purposes of Article 5 para. 3 (art. 5-3), competence to exercise those fonctions/powers which are characteristic of the judiciary. By that I mean the fonctions/powers which specifically distinguish a judge from other officials acting generally within the framework of the judicial system or of the administration of justice. In this respect, it is significant that, while the French text uses the expression "fonctions judiciaires" (translated literally as "judicial functions"), the English text speaks of "judicial power". It is equally significant that the task provided for in Article 5 para. 3 (art. 5-3) entrusted, first and foremost, to a judge. The term "judicial" in this provision should therefore be interpreted as having a narrow meaning. The exercise of fonctions judiciaires/judicial power means the exercise of a judge's fonctions/power by an authority not invested with the formal status of a judge.

(b) A District Attorney in the Canton of Zürich is an investigating and prosecuting authority (see paragraphs 12 et seq. of the judgment). Such functions cannot be described as involving "judicial power" within the meaning of Article 5 para. 3 (art. 5-3). While being true for his powers as a prosecutor, this is no less valid for his investigating activities. Criminal investigation, even when performed, as it should always be, in conditions of independence and objectivity, does not involve a power which in itself confers on the person exercising it the status of a judge. It is thus not reconcilable with Article 5 para. 3 (art. 5-3) of the Convention to affirm that a District Attorney in the Canton of Zürich exercises "judicial power" by reason of the fact that he acts as an investigating authority. Moreover, the position he occupies in the structure of the judicial machinery under consideration and the nature of his hierarchical dependence reinforce this conclusion.

(c) It is equally true, at any rate, that Article 5 para. 3 (art. 5-3) allows the power of decision regarding detention on remand to be entrusted to an authority which holds judicial power concurrently with other power. Nevertheless, such a combination of judicial and non-judicial power must not entail fundamental contradictions as to the nature and the purpose of the diverse powers so combined. Even if, on a broad interpretation of the

expression "officer authorised by law to exercise judicial power", it were accepted that the function provided for in Article 5 para. 3 (art. 5-3) may be attributed to an authority primarily exercising power other than that of a judge, what is nonetheless essential is that this other power should not be incompatible with the power of a judge. To entrust the power of decision regarding detention on remand to an authority which numbers amongst its powers that of a prosecuting authority would be contrary to the Convention. It is immaterial whether or not in a given case this authority is called on to exercise the two kinds of power. Their incompatibility is inherent in the system itself and divests the authority in question of the legal and psychological attributes of independence, objectivity and impartiality that must be possessed by the authority to which Article 5 para. 3 (art. 5-3) entrusts the fate of a person deprived of his liberty.