



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

COURT (PLENARY)

CASE OF HUBER v. SWITZERLAND

(Application no. 12794/87)

JUDGMENT

STRASBOURG

23 October 1990

In the Huber case*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court** and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA RODRIGUEZ,

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

Having deliberated in private on 24 May and 25 September 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss

* The case is numbered 19/1989/179/237. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

Confederation ("the Government") on 13 and 28 July 1989 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 12794/87) against Switzerland lodged with the Commission under Article 25 (art. 25) by Mrs Jutta Huber, a Swiss national, on 27 February 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 para. 3 (art. 5-3).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and designated the lawyers who would represent her (Rule 30).

3. The Chamber to be constituted included *ex officio* Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 August 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr J. Cremona, Mr F. Gölcüklü, Sir Vincent Evans, Mr A. Spielmann and Mr J.A. Carrillo Salcedo (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr B. Walsh, substitute judge, replaced Mr Carrillo Salcedo, who had resigned before the hearing (Rule 2 para. 3).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyers on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the Registrar received the Government's memorial on 31 October 1989. The applicant, for her part, decided not to submit a memorial but, on 13 February 1990, lodged her claims for just satisfaction. On 18 January the Secretary to the Commission had informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 11 January 1990 that the oral proceedings should open on 28 March 1990 (Rule 38).

6. On 1 March the Commission secretariat produced the documents relating to the proceedings before the Commission, as requested by the Registrar on the instructions of the President.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr O. JACOT-GUILLARMOD, Under-Secretary
of the Federal Office of Justice, Head of the International
Affairs Division, *Agent,*

Mr R. LEVI, a former federal judge,

Mr B. MÜNGER, Federal Office of Justice,
Deputy Head of the International Affairs Division, *Counsel;*

- for the Commission

Mr H. G. SCHERMERS, *Delegate;*

- for the applicant

Mr E. SCHÖNENBERGER, Rechtsanwalt, *Counsel.*
Mr K. MÄDER, Rechtsanwalt,

The Court heard addresses by Mr Jacot-Guillarmod and Mr Levi for the Government, by Mr Schermers for the Commission and by Mr Schönenberger and Mr Mäder for the applicant, as well as their replies to its question.

Following the hearing and at the Court's request, the Delegate produced the copy of a document.

8. On 30 March 1990, pursuant to Rule 51, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court.

9. Having taken note of the Government's agreement and the concurring opinions of the Commission and the applicant, the Court decided, on 24 May 1990, to proceed to judgment without holding a further hearing (Rule 26).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

10. Mrs Jutta Huber, a Swiss national, resides in Zürich.

A District Attorney (Bezirksanwalt) of Zürich, Mr J., issued instructions to the police (Vorführungsbefehl) requiring her to be brought to give evidence as a witness on 10 August 1983. He did so in connection with a criminal investigation concerning two persons - Mr K. of Hamburg and Mr B. of Zürich - suspected of living on the earnings of prostitution and of procuring.

1. Detention on remand

11. On 11 August 1983 the applicant was taken by the Zürich municipal police to the District Attorneys' Office (Bezirksanwaltschaft) in that town, where she was questioned as a witness by District Attorney J., although no summons to appear as a witness (Vorladung zur Zeugeneinvernahme) had been issued. In answer to his questions, she admitted making a living from prostitution, but maintained that she knew Mr K. and Mr B. only by name and that she did not pass on to them any of her earnings.

12. On concluding his examination, the District Attorney signed a detention order (Verhaftungsverfügung) remanding the applicant in custody on grave suspicion of having given false evidence.

According to this order, members of the "Hell's Angels" of Zürich and Hamburg were strongly suspected of having brought to Zürich German prostitutes, some of whom had married Swiss nationals who received payment for this. The women were then encouraged, partly under threat, to engage in prostitution under the protection of the "Hell's Angels", who were paid a part of the proceeds in exchange. There were strong grounds for supposing that Mrs Huber was one of these women. When appearing as a witness, she had denied any contact with the "Hell's Angels", which appeared unlikely to be true.

The order referred in particular to the danger of collusion and the possibility that evidence might be tampered with. It stated further that the applicant could appeal within 48 hours to the Public Prosecutor's Office (Staatsanwaltschaft) of the Canton of Zürich.

13. Mrs Huber was released on 19 August 1983.

*2. The criminal proceedings***(a) Proceedings in the Zürich District Court**

14. On 12 October 1984 District Attorney J. instituted proceedings before the Judge in Criminal Cases (Einzelrichter in Strafsachen) at the Zürich District Court (Bezirksgericht). His indictment (Anklageschrift) alleged that the applicant had given false evidence in judicial proceedings and, as a possible additional charge (eventualiter), that she had been an accessory to a criminal offence. He sought the imposition on Mrs Huber of a fine of 5,000 Swiss francs.

The trial took place on 10 January 1985, after the indictment had been accepted (zugelassen, Article 165 of the Zürich Code of Procedure - Strafprozessordnung, "StPO"); the District Attorney was not present. The accused's lawyer stated on that occasion (translation):

"In this case we are confronted in the first place with a violation of ... Article 5 para. 3 (art. 5-3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that anyone who is arrested or detained in

accordance with the provisions of Article 5 para. 1 (c) (art. 5-1-c) ... must be brought promptly before a judge or other officer authorised by law to exercise judicial power. This never happened in the present case. Indeed the person who remanded the accused in custody, District Attorney J., is now also prosecutor [Ankläger]."

15. On 10 January 1985 the District Court acquitted Mrs Huber on the ground that she had never been validly summoned to appear as a witness (vorgeladen zur Zeugeneinvernahme), which made her testimony unlawful and inadmissible. The judgment did not refer to the defence argument based on Article 5 para. 3 (art. 5-3) of the Convention.

(b) The proceedings before the Court of Appeal of the Canton of Zürich

16. On appeal (Berufung) by the prosecution, the Court of Appeal (Obergericht) of the Canton of Zürich fined the applicant 4,000 Swiss francs for attempting to give false evidence.

In its judgment of 13 September 1985, the appeal court found that the accused's testimony was not unlawfully obtained and could therefore be used in evidence. In addition, it referred to the monitoring of telephone conversations between Mrs Huber and Mr K., carried out by the German authorities who had communicated the transcript thereof to the Swiss judicial authorities in accordance with the system of mutual assistance in criminal matters. The court inferred from this evidence that the applicant in fact knew Mr K. and Mr B.

On the question of the issue raised under Article 5 para. 3 (art. 5-3) of the Convention, the appeal court said (translation):

"Finally, ... the appellant's lawyer's objection that, on her arrest and in contravention of Article 5 para. 3 (art. 5-3) of the Convention, the accused was not brought before a judge or other officer authorised by law to exercise judicial power is unfounded. For, according to the case-law of the Federal Court, the Zürich District Attorney also exercises judicial power within the meaning of Article 5 para. 3 (art. 5-3) of the Convention at the stage of the investigation (ATF [Arrêts du Tribunal fédéral suisse] 102 Ia 179)."

3. The appeals lodged by Mrs Huber

(a) The appeal to the Court of Cassation of the Canton of Zürich

17. On 1 July 1986 the Court of Cassation (Kassationsgericht) of the Canton of Zürich dismissed Mrs Huber's application for a declaration of nullity (Nichtigkeitsbeschwerde).

It took the view that the submission relating to Article 5 para. 3 (art. 5-3) could not be taken into account in this instance. If Mrs Huber had wished to challenge the District Attorney on this point, she should have done so during the investigation.

(b) The appeal to the Federal Court

18. On 22 August 1986 Mrs Huber lodged a public-law appeal with the Federal Court. She complained, inter alia, that, notwithstanding Article 5 para. 3 (art. 5-3), the same District Attorney had both ordered her detention on remand and drawn up the indictment.

19. The Federal Court dismissed the appeal by a judgment of 24 November 1986, which was served on 18 December. As to the complaint based on Article 5 para. 3 (art. 5-3), it held as follows (translation):

"As the appellant has long since been released from detention on remand, she no longer has a current, practical interest in a ruling on [her] complaint, for which reason the Court can no longer deal with it. The objection would in any event be unfounded since both the Federal Court (ATF 102 Ia 179 et seq.) and the European Court of Human Rights (the Schiesser judgment of 4 December 1979) have declared that at the stage of the investigation the Zürich District Attorney qualifies as an 'officer authorised by law to exercise judicial power' within the meaning of Article 5 para. 3 (art. 5-3) of the Convention."

II. THE ZÜRICH DISTRICT ATTORNEY

20. The Canton of Zürich is divided into eleven districts, each of which has a District Attorneys' Office with one or more Attorneys. The status and powers of District Attorneys were laid down in the Courts Act of 13 June 1976 (Gerichtsverfassungsgesetz, "GVG"), which came into force on 1 January 1977 and which in substance re-enacted the provisions of an Act of 29 January 1911.

Ordinary District Attorneys are elected by universal suffrage for a term of office of four years (section 80 GVG). If necessary, the Cantonal Government appoints Special District Attorneys for a specified period (sections 81 and 87 GVG). Both Ordinary and Special District Attorneys are subordinate to the Principal Public Prosecutor who in turn comes under the authority of the Department of Justice and the Government (Regierungsrat) of the Canton of Zürich.

1. The functions of District Attorneys

21. District Attorneys carry out three different functions.

(a) Investigation ("L'instruction")

22. The investigation (instruction) of criminal cases comes within the competence of the prosecuting authorities (section 73 GVG). The District Attorney conducts the investigation except in those cases where it is entrusted by law to the Principal Public Prosecutor or a judge (Article 25 StPO).

23. The District Attorney may make a detention order (Verhaftsbefehl - Article 55 StPO), the grounds for which he must state. He has to hear an

arrested suspect within 24 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 order (1956 Circular from the Public Prosecutor's Office). Detention on remand ordered by the District Attorney may not exceed 14 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 Indictments Division of the Court of Appeal (Article 51 StPO).

24. In carrying out the investigation, the District Attorney is under a duty to establish both incriminating and exonerating evidence with equal care (Article 31 StPO).

(b) Prosecution

25. The District Attorney is the prosecuting authority before the "Judge in Criminal Cases" and before the District Courts in cases concerning petty offences and misdemeanours; for the higher cantonal courts (the Court of Appeal and the Assize Court - section 72 GVG), this function is performed by the Principal Public Prosecutor.

26. Unless he finds that there is no case to answer, the District Attorney, or, depending on the seriousness of the offence, the Principal Public Prosecutor, must institute the main proceedings (Hauptverfahren) by drawing up the indictment (Article 161 StPO). In preparing the indictment, he has to take account of both incriminating and exonerating evidence (Article 178 para. 2 StPO), without setting out the grounds of suspicion or any legal considerations (Article 162 para. 3 StPO).

The President of the District Court, or the President of the Indictments Division of the Court of Appeal, as the case may be, decides whether to accept or reject the indictment (Article 165 StPO).

27. Before the trial court, the District Attorney has the status of a party in the proceedings (Article 178 para. 1 StPO). He assumes the role of prosecuting authority, but is not required to attend the hearing unless the sentence sought exceeds eighteen months' imprisonment or additional investigative measures are ordered.

(c) Punishment

28. Finally, the District Attorney is empowered 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 Principal Public Prosecutor (Article 321 StPO).

2. The combination of functions

29. The combination of the functions of investigation and prosecution has given rise to case-law - at cantonal and federal level - which has recently been confirmed.

(a) The Zürich case-law

30. In a judgment of 13 June 1988 (*Ante Djukic gegen Staatsanwaltschaft des Kantons Zürich*), the Cantonal Court of Cassation stated as follows (translation):

"In this connection, the Federal Court has held that the District Attorney of the Canton of Zürich exercises judicial power (ATF 102 Ia 180, confirmed by the European Court of Human Rights, Publications of the European Court of Human Rights, Series A no. 34, ...; see also ATF 107 Ia 254). However, the appellant considers ... that reference to these precedents is not relevant as in the instant case the District Attorney who had drawn up the indictment was the same as the one who had ordered the arrest.

This complaint is unfounded. What is decisive is whether at the time of the arrest the decision was taken by an official who satisfied the requirements of Article 5 para. 3 (art. 5-3) of the European Convention on Human Rights in other words by an officer who exercised judicial power. This question has been answered in the affirmative by the eminent courts referred to above. This finding that the functions discharged by that officer are compatible with the provisions of the Convention cannot subsequently be called in question on the sole ground that, once the investigation has been completed, the District Attorney assumes the role of prosecuting authority. The status of this officer at the time of and in relation to the decision to arrest remains the same, and the arrest, initially regarded as being lawful, cannot subsequently become unlawful on this sole ground. Furthermore, it is only natural that the District Attorney, as the investigating authority and acting within his powers, should draw up an indictment after the investigation has been completed if he considers that he possesses sufficient evidence of the accused's guilt. Nor can it readily be seen what the accused would gain if the indictment had to be drawn up by an officer other than the District Attorney who, at the beginning of the investigation, had ordered his arrest. In other words, as far as Article 5 para. 3 (art. 5-3) of the Convention is concerned, the fact that the officer who ordered the arrest is the same as the officer who drew up the indictment is not decisive."

(b) Federal case-law

31. On a public-law appeal lodged against the judgment cited in the preceding paragraph, the Federal Court held as follows on 14 March 1989 (translation):

"It has to be recognised that it is possible - as the instant case demonstrates - that the District Attorney may subsequently have occasion to draw up the indictment and even to put the prosecution case before the court. The mere fact that this possibility exists is not, however, decisive in this respect. Firstly, the eventuality cannot put in question or negate the Attorney's independence from the parties at the time of an arrest. As has been shown, it is far more a matter of looking at the position as it stands at the time when the detention is ordered. Secondly, the possibility in question was held not to be

decisive by the European Court in its judgment in the Schiesser case. In that case it could also have happened that the District Attorney subsequently had to draw up the indictment, since the jurisdiction of the Public Prosecutor's Office at the stage of beginning the investigation or at the time of the arrest had not been established. This eventuality did not, however, prevent the European Court from finding that there had been no breach of Article 5 para. 3 (art. 5-3) of the Convention in the Schiesser case. That fact likewise shows that the relevant officer's independence and impartiality must be considered exclusively at the time of the arrest and not in the light of the mere possibility that he may play a role later in the proceedings and draw up the indictment."

3. *Statistics*

32. In 1989, 108 District Attorneys in the Canton of Zürich dealt with 17,647 investigations, of which 20.3% resulted in an indictment, 33.8% in the case being discontinued, 42.2% in a punishment order and 3.7% in the referral of the case to a higher court.

33. The number of cases in which the District Attorney personally conducted the prosecution in court does not appear in the statistics, but according to the Government it is very low.

PROCEEDINGS BEFORE THE COMMISSION

34. In her application of 27 February 1987 to the Commission (no. 12794/87), Mrs Huber relied on Article 5 para. 3 (art. 5-3) of the Convention. She complained that the same District Attorney had ruled on her detention and then indicted her. She argued that he could not be regarded as an "officer authorised by law to exercise judicial power".

35. The Commission declared the application admissible on 9 July 1988. In its report of 10 April 1989 (Article 31 of the Convention) (art. 31), it expressed the opinion, by twelve votes to two, that there had been a violation of Article 5 para. 3 (art. 5-3). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

36. At the hearing the Government confirmed the submissions put forward in their memorial. In that document they had asked the Court to

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 188 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

hold "that Switzerland [had] not violated the ... Convention ... on account of the circumstances which gave rise to Mrs Jutta Huber's application".

AS TO THE LAW

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

37. The applicant alleged a violation of Article 5 para. 3 (art. 5-3) of the Convention inasmuch as it secured to "everyone arrested or detained in accordance with the provisions of paragraph 1 (c)" of Article 5 (art. 5-1-c) the right to be "brought promptly before a judge or other officer authorised by law to exercise judicial power".

In her submission, District Attorney J. did not provide the necessary guarantee of independence because he ordered her detention on remand, then indicted her and finally assumed the role of prosecuting authority in the trial court.

Mrs Huber argued further that in general a prosecutor (Ankläger) could never be regarded as an "officer" within the meaning of Article 5 para. 3 (art. 5-3). In the present case, of the various functions a District Attorney was called upon to perform, that of prosecution predominated; the duty to establish incriminating and exonerating evidence with equal care made no difference in this respect.

38. The Commission took the view that Mr J. could not be regarded as independent of the parties to the trial because he could be one of them and indeed was.

Its Delegate invited the Court to depart from the Schiesser judgment of 4 December 1979 (Series A no. 34), which also concerned the status and duties of the District Attorney of the Canton of Zürich. In the Delegate's view, the Court's case-law has moved towards the principle that prosecution and judicial functions must be completely separated; such separation was, he considered, necessary at this stage in the development of the protection of human rights in Europe.

In this connection he noted a difference between the Schiesser and Huber cases. In the former the District Attorney had not assumed the role of prosecuting authority, whereas in the latter he drew up the indictment. The Delegate did not attach decisive importance to this, since circumstances of this nature were determined by the subsequent course of the criminal proceedings and the lawfulness of the Attorney's action in relation to Article 5 para. 3 (art. 5-3) should, in his opinion, be clear at the outset.

39. The Government contended that the District Attorney was in substance, despite his title, an investigating judge. In this, he could be

clearly distinguished from the officers of the prosecuting authority whom the Court had to consider in the cases of *Skoogström* (judgment of 2 October 1984, Series A no. 83) and *Pauwels* (judgment of 26 May 1988, Series A no. 135). Clearly it fell to him to draw up the indictment, but cantonal law required him to take into account exonerating evidence as well as incriminating evidence, without setting out the grounds of suspicion or any legal considerations (see paragraph 26 above).

In the present case he had ordered Mrs Huber's arrest in complete independence and at that stage he was in no way called upon to express an opinion on her guilt. The mere fact that, fourteen months later, he had submitted the indictment could not compromise his independence retrospectively; the Government fully endorsed the reasoning of the Federal Court in its judgment of 14 March 1989, according to which the position of the District Attorney had to be considered exclusively at the time of the arrest, without taking into account the possibility that he might subsequently play a role as prosecuting authority (see paragraph 31 above).

Moreover, the applicant had not contested the detention order, or the lawfulness of her detention on remand, under Article 5 para. 4 (art. 5-4), or challenged the investigative measures. Yet she had not been unaware that Mr J. could subsequently play another role. Nor had she ever claimed that he was prejudiced against her. In general, it was, in the Government's opinion, hard to see what an accused person might gain from having the indictment drawn up by a different judicial officer from the official responsible for his arrest.

The *Schiesser* judgment had, according to the Government, left open the question of the compatibility with the Convention of the combination of the functions of investigation (instruction) and prosecution. Furthermore, the Commission and the Court had based their decision at the time on a number of factors taken together; an isolated circumstance - the drawing up of the indictment - could not justify overruling their case-law. The Swiss authorities were therefore entitled to rely on the above-mentioned judgment in such circumstances, unless there were compelling reasons to the contrary such as a manifest failure on the part of the District Attorney to fulfil his duties or action by him which was *ultra vires*.

The Government drew attention finally to two features of the Zürich system, which were, in their view, capable of guaranteeing, if necessary, the objective and subjective impartiality of District Attorneys. These were the adoption of the Cantonal Code of Criminal Procedure by referendum and the election of the officers concerned by universal direct suffrage for a renewable term of office of four years.

40. The Court notes in the first place that the only issue in dispute is the impartiality of the Zürich District Attorney when the detention order was made. Mrs Huber did not deny that he was independent of the executive, that he heard her himself before placing her in detention on remand and that

he examined with equal care the circumstances militating for and against such detention.

41. In the present case Mr J. first intervened at the stage of the investigation. He considered whether it was necessary to charge the applicant and ordered her detention on remand, then conducted the investigation (Article 31 StPO).

Subsequently, fourteen months after the arrest, he acted as prosecuting authority in drawing up the indictment. However, he did not assume the role of prosecuting counsel in the trial court, the Zürich District Court, although he could have done so because the Cantonal Code of Criminal Procedure attributed to him the status of a party in the trial proceedings (Article 178 para. 1 StPO - see paragraphs 27 and 33 above).

42. In several judgments which post-date the Schiesser judgment of 4 December 1979 and which concern Netherlands legislation on the arrest and detention of military personnel (the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 24, para. 49; the van der Sluijs, Zuiderveld and Klappe judgment of the same date, Series A no. 78, p. 19, para. 44; and the Duinhof and Duijf judgment of the same date, Series A no. 79, p. 17, para. 38), the Court found that the auditeur-militair, who had ordered the detention of the applicants, could also be called upon to assume, in the same case, the role of prosecuting authority after referral of the case to the Military Court. It concluded from this that he could not be "independent of the parties" at that preliminary stage precisely because he was "liable" to become one of the parties at the next stage in the procedure.

43. The Court sees no grounds for reaching a different conclusion in this case as regards criminal justice under the ordinary law. Clearly the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but his impartiality is capable of appearing open to doubt (see the Pauwels judgment cited above, Series A no. 135, pp. 18-19, para. 38, and, *mutatis mutandis*, the Piersack judgment of 1 October 1982, Series A no. 53, p. 16, para. 31, the De Cubber judgment of 26 October 1984, Series A no. 86, p. 16, para. 30 and the Hauschildt judgment of 24 May 1989, Series A no. 154, p. 23, para. 52 in fine) if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority.

Since that was the situation in the present case (see paragraphs 26-27 above), there has been a breach of Article 5 para. 3 (art. 5-3).

II. APPLICATION OF ARTICLE 50 (art. 50)

44. According to Article 50 (art. 50) of the Convention:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party

allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Pursuant to this provision, the applicant sought compensation for damage and the reimbursement of her costs.

A. Damage

45. Mrs Huber claimed to have suffered damage as a result of the breach of the requirement of Article 5 para. 3 (art. 5-3) and sought a sum of 24,000 Swiss francs in respect of "arbitrary detention" and 1,200 Swiss francs for the eight days for which she was unable to work.

The Government denied that there was any causal connection between the contested violation and the damage resulting for Mrs Huber from her detention, the lawfulness of which moreover she had in no way challenged at the time.

The Commission's Delegate subscribed to the Government's view as regards pecuniary damage; he left the question of the existence and the extent of any non-pecuniary damage to be determined by the Court.

46. In the Court's view, just satisfaction could be awarded only in respect of the damage resulting from the deprivation of liberty that the applicant would not have suffered if she had had the benefit of the guarantees of Article 5 para. 3 (art. 5-3). The evidence, however, does not afford any reason to suppose that the detention on remand in question would not have occurred if the making of a detention order had been a matter within the competence of a judicial officer who did offer those guarantees (see, *mutatis mutandis*, the Pauwels judgment cited above, Series A no. 135, p. 20, paras. 43-44). In short, it has not been established that any pecuniary damage flowed from the violation found.

There remains the non-pecuniary damage. Even assuming that the applicant did sustain any such damage, the present judgment provides her with sufficient just satisfaction in the circumstances of the case (see, among other authorities, *mutatis mutandis*, the Lamy judgment of 30 March 1989, Series A no. 151, p. 19, para. 42).

B. Costs and expenses

47. Mrs Huber claimed the reimbursement of costs and expenses borne by her during the proceedings in the Swiss courts and then before the Convention organs.

1. Costs referable to the national proceedings

48. The applicant sought in the first place half the legal costs awarded against her by the domestic courts, namely 732 Swiss francs, together with 360 Swiss francs for the fees of her lawyer.

The Government accepted the first item and raised no objection to the second. The Commission's Delegate found them both acceptable.

The Court agrees. Switzerland should therefore reimburse Mrs Huber 1,092 Swiss francs.

2. Costs referable to the European proceedings

49. In respect of costs incurred in relation to the European proceedings, the applicant claimed in the first place, for her lawyers, the sums of 3,395.50 Swiss francs (Mr Schönenberger) and 9,565 Swiss francs (Mr Mäder).

The Government considered these amounts "manifestly excessive" in view of the shortness of the written observations and the fact that no hearing was held before the Commission together with the fact that no memorial was submitted to the Court; they agreed to the award of a total amount of 3,000 Swiss francs for the two lawyers.

The Court shares the view of the Commission's Delegate that this proposition is reasonable and endorses it.

50. Mrs Huber also claimed 300 Swiss francs for attending the hearing before the Court, corresponding to two days on which she was unable to work, and 400 Swiss francs in respect of her travel and subsistence expenses. The Government and the Commission's Delegate did not make any comment on this.

The Court considers that Switzerland must reimburse the applicant for the expenses in question, but that it is not required to compensate the loss of earnings referred to.

FOR THESE REASONS, THE COURT

1. Holds by twenty-one votes to one that there has been a violation of Article 5 para. 3 (art. 5-3) of the Convention;
2. Holds unanimously that the respondent State is to pay to the applicant, in respect of costs and expenses, the sum of 4,492 (four thousand four hundred and ninety-two) Swiss francs;
3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Matscher is annexed to this judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I approved the Chamber's decision to relinquish jurisdiction so that the plenary Court could define the scope of Article 5 para. 3 (art. 5-3) of the Convention, thereby clarifying its case-law, which is somewhat vague in this area, and laying down clear guidelines for the Contracting States.

However, I had in mind that the Schiesser judgment (Series A no. 34) would be confirmed, with some of its ambiguous elements removed, rather than overruled. That is why I cannot subscribe to the conclusion which the majority of the Court has reached.

In this respect, I propose to set out a number of arguments which seem to me to be relevant.

1. The problem at issue is the interpretation of the phrase "judge or other officer authorised by law to exercise judicial power". While the scope of the word "judge" (or "court"/"tribunal") within the meaning of Article 5 paras. 3 and 4 and Article 6 (art. 5-3, art. 5-4, art. 6) of the Convention may be regarded as settled, that of the expression "... other officer ..." is the subject of dispute.

The starting point for my reasoning is that if for the exercise of the power mentioned in Article 5 para. 3 (art. 5-3) (i.e. the first review of the lawfulness of a detention under Article 5 para. 1 c) (art. 5-1-c) those responsible for drafting the Convention referred to two alternative and different organs, those organs do not have to satisfy exactly the same criteria, otherwise the alternative reference would have no sense, which would be absurd. It is a principle in the interpretation of a legal text that an interpretation which renders it absurd is not to be presumed.

It is therefore necessary to define the criteria for identifying an "officer" or in other words to consider in what way the "other officer" is to be distinguished from the "judge".

The criteria which the Court laid down in this connection in the Schiesser judgment (cited above, paragraph 31) may be summarised as follows:

(a) institutional guarantees: independence vis-à-vis the executive and the parties;

(b) procedural guarantees: obligation for the official concerned to hear himself the accused brought before him;

(c) substantive guarantees: decision on the continuation of detention or release to be taken by reference to legal criteria, after the circumstances militating for and against the detention have been examined; power to order release if there are insufficient reasons to justify the detention.

The formulation and application of criteria (b) and (c) give rise to scarcely any problems; that is also true of the first limb of criterion (a): independence vis-à-vis the executive. Clearly an organ cannot be regarded

as acting as an "officer ... [who exercises] judicial power" where he is under the authority of the executive, in other words he is subject to the latter's instructions.

The situation is, however, different with regard to the second limb of criterion (a): independence in relation to the parties. I confess that I have doubts on this question. The formula was borrowed from the *Neumeister* judgment (Series A no. 8, p. 44), where it related to a court within the meaning of Article 5 para. 4 (art. 5-4) (tribunal in Article 6 (art. 6)), and where it is entirely apt, whereas at the stage of the first examination of the lawfulness of the detention within the meaning of Article 5 para. 3 (art. 5-3), it is, in my view, scarcely appropriate to speak of "parties" in the judicial sense of the word. At that stage, it is material only that the organ which decides the detention is independent of the executive.

It is indeed true that in the *Schiesser* judgment (paragraphs 32 and 33) the Court made a number of observations on the question whether the simultaneous or successive exercise of the function of prosecution, whereby the prosecuting authority acquired the status of "party", could impair the independence of the District Attorney when taking his decision on the detention, which is a measure pertaining to the investigation procedure. However, it did so only in order to reply to an argument, put forward by the applicant and by the minority of the Commission, that such a combination of functions jeopardised the independence of a District Attorney. Ultimately, without however having expressed a view on this argument in the abstract, the Court dismissed it because, in the case under examination, the District Attorney had not acted as prosecuting authority. It was only in subsequent judgments, delivered in a very different context - they concerned military justice in the Netherlands and Belgium -, that the Court found that the combination of functions - whether it actually occurred or was merely theoretically possible - would affect the independence of the judicial officer called upon to decide whether the detention of an accused person should be continued.

Moreover, in the relevant cases there were other circumstances which prompted the Court to deny that - or to call in question whether - the "officer" satisfied the requirements laid down in Article 5 para. 3 (art. 5-3).

I would add that it was only in these latter decisions that the Court - rightly - also referred to the condition of impartiality inherent in the notion of "officer" within the meaning of Article 5 para. 3 (art. 5-3) (see the *Pauwels* judgment, Series A no. 135, p. 18, para. 37).

I conclude that the "officer" within the meaning of Article 5 para. 3 (art. 5-3) must satisfy the conditions set out in the *Schiesser* judgment, excluding that relating to independence vis-à-vis the parties, which has no relevance at the stage of the first examination of the lawfulness of the detention and adding the very important requirement of impartiality.

Where the judicial officer satisfies these conditions, "the purpose of Article 5 para. 3 (art. 5-3) [which] is to establish a system of judicial review and, by that means, to give specific guarantees to persons deprived of their liberty" - in the words of Judge Ryssdal in his dissenting opinion in the Schiesser judgment (Series A no. 35, p. 19) - is attained. To require more would in substance be equivalent to applying the same criteria for "officer" within the meaning of Article 5 para. 3 (art. 5-3) as for "judge" (or "court"/"tribunal") within the meaning of Articles 5 para. 4 and 6 (art. 5-4, art. 6), in other words, to removing any difference between them, and neither the letter of the Convention, which intentionally distinguishes between the two possibilities, nor its spirit lends support to that idea; nor would it serve the legitimate interests of the individuals concerned.

2. The recent decisions of the Court relating to criminal proceedings have often dealt with the question of the combination of the functions of prosecution, investigation and judgment. In certain cases such a combination may be contrary to the Convention; in others it may solely raise problems, without however necessarily leading to incompatibility with the requirements of that instrument.

In general the Convention in no way requires separation of the functions in question, although, in the interests of the proper administration of justice, it is desirable, because it provides a maximum of guarantees to the individuals concerned.

Thus for example for minor offences, the legislation of several countries entrusts the investigation to the same judge who, subsequently, conducts the trial and delivers judgment. In other legal systems, the institution of investigating judge does not exist and the task of investigation then falls to the Public Prosecutor's Office, in other words the prosecuting authority. In those systems it could also happen that certain measures of investigation are left to be carried out by the trial judge.

In principle no criticism may be directed at this combination of functions from the point of view of the Convention, although, as I have just stated, separation is desirable. It is exactly for that reason that, with other colleagues, I was unable to agree with the majority in the Hauschildt case (Series A no. 154, separate opinion, p. 30). Moreover, what about the situation in which the trial judge decides at the hearing to remand the accused in custody? Is he now disqualified from taking this decision for the purposes of Article 5 para. 3 (art. 5-3) because, as the trial judge, he lacks independence and impartiality in this respect, or does he no longer provide the independence and impartiality required under Article 6 para. 1 (art. 6-1) because he took the decision as to the detention?

However, if a legal system provides for the separation as an additional guarantee of objectivity and impartiality, the successive exercise of the function of judgment by the same organ of the judiciary which previously was entrusted with the prosecution or the investigation in the same case

infringes Article 6 (art. 6) of the Convention (Piersack, Series A no. 53; De Cubber, Series A no. 86).

Yet I do not consider that an inversion of this order of ideas is permissible, even "*mutatis mutandis*" (as in the present judgment in paragraph 43), since the situation is fundamentally different in the two cases. In my view, in order to determine the independence or impartiality of a member of the judiciary, it is necessary to consider the first stage, in other words in the present case only the position of the District Attorney at the moment of his decision on the continuation of the detention is decisive. At that stage he may take this decision - a measure pertaining to the investigation procedure - as a fully independent and impartial organ regardless of the fact that at a subsequent stage in the proceedings he will be - or could be - called upon to exercise in the same case other functions, notably those of drawing up the indictment or conducting the prosecution case at the trial, thereby acquiring the status of "party", as provided for in Article 178 para. 1 of the Zürich Code of Criminal Procedure (which concerns, *inter alia*, the District Attorney).

Taking - *mutatis mutandis* - the underlying reasoning in the Piersack and the De Cubber judgments (*supra*), it could perhaps be argued that, at a later stage, since he has previously played a certain role in the investigation, the District Attorney would no longer be an independent and impartial representative of the prosecuting authority. However, no provision of the Convention entitles the accused to have as "opponent" an independent and impartial prosecutor.