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

CASE OF R.M.D. v. SWITZERLAND

(81/1996/700/892)

JUDGMENT

STRASBOURG

26 September 1997

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SUMMARY[1]

Judgment delivered by a Chamber

Switzerland – person detained in various cantons pending trial unable to have the lawfulness of his detention reviewed by a court

I. ARTICLE 5 § 4 OF THE CONVENTION

A. Government's preliminary objection (non-exhaustion of domestic remedies)

Question closely linked to merits of complaint.

Conclusion: joined to the merits (unanimously).

B. Merits of the complaint

Applicant unable to obtain a decision on lawfulness of his detention from Federal Court – could not be criticised for failing to take all possible steps he had not already taken – in a position of great legal uncertainty as he had had to expect to be transferred from one canton to another at any moment, in which eventuality courts of the transferring canton no longer had jurisdiction to decide lawfulness of his detention.

While remedies had existed in each canton, they had been ineffective in applicant's situation. Where a detained person was continually transferred from one canton to another, it was for State to organise its judicial system in such a way as to enable its courts to comply with requirements of Article 5 § 4.

Conclusion: preliminary objection dismissed, violation of Article 5 § 4 (unanimously).

II. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage: indisputable – award of compensation assessed on an equitable basis.

B. Costs and expenses incurred before the Convention institutions: reimbursement of an amount assessed on an equitable basis.

Conclusion: respondent State to pay applicant specified sums (unanimously).

COURT'S CASE-LAW REFERRED TO

13.5.1980, Artico v. Italy; 21.10.1986, Sanchez-Reisse v. Switzerland; 23.11.1993, Navarra v. France; 20.3.1997, Beis v. Greece

[1] This summary by the registry does not bind the Court.

In the case of R.M.D. v. Switzerland[1]**,**

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr L.-E. PETTITI,
Mr N. VALTICOS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 26 May and 25 August 1997,

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 Mr R.M.D. ("the applicant"), a Swiss national, on 4 July and 29 July 1996 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 19800/92) against the Swiss Confederation lodged with the Commission under Article 25 by Mr R.M.D. on 26 March 1992. The applicant asked the Court not to reveal his identity.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46). The applicant's application referred to Article 48 as amended by Protocol No. 9, which Switzerland has ratified. 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 § 4 of the Convention.

Notes by the Registrar

1. The case is numbered 81/1996/700/892. 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.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. On 29 July 1996 the applicant designated the lawyer who would represent him (Rule 31 of Rules of Court B). The lawyer was given leave by the President to use the German language in both the written and the oral procedure (Rule 28 § 3).

3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 7 August 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr N. Valticos, Mrs E. Palm, Mr I. Foighel, Mr A.B. Baka and Mr K. Jungwiert (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr M.A. Lopes Rocha, substitute judge, replaced Mr Gölcüklü, who was unable to take part in the further consideration of the case (Rule 22 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Swiss Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 24 January and the applicant's memorial on 27 January 1997.

On 7 February 1997 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 April 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr P. BOILLAT, Deputy Director, Head of the
International Affairs Division,
Federal Office of Justice, *Agent*,
Mr T. CLÉMENT, Legal Officer, Human Rights
and Council of Europe Section,
Federal Office of Justice, *Adviser*;

(b) *for the Commission*
Mr S. TRECHSEL, *Delegate*;

(c) *for the applicant*
Mr B. HÄFLIGER, of the Lucerne Bar, *Counsel*.

The Court heard addresses by Mr Trechsel, Mr Häfliger and Mr Boillat.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr R.M.D., a Swiss national born in 1965, currently lives at Benglen in the Canton of Zürich, Switzerland.

A. The applicant's pre-trial detention in various cantons

1. Pre-trial detention in the Canton of Zürich (13–17 January 1992)

7. On 13 January 1992, at the request of the Willisau district authority (*Amtsstatthalteramt*) in the Canton of Lucerne, the Zürich cantonal police arrested the applicant on a warrant issued by the district prosecutor's office (*Bezirksanwaltschaft*) of Uster (Canton of Zürich) and held him in custody at Uster on suspicion of having committed several thefts and other offences in the cantons of Zürich, Lucerne, Berne and Aargau.

8. On 15 January 1992 his counsel applied to the Uster district prosecutor's office for the applicant's immediate release. In an order issued on the same day the district prosecutor's office refused the application and sent it for review by the President of the Uster District Court (*Bezirksgericht*).

On 17 January the investigating judge (*Haftrichter*) at that court declared that the application had become devoid of purpose as Mr R.M.D. had that day been transferred to the Canton of Lucerne and that there was accordingly no need to rule on the merits.

2. Pre-trial detention in the Canton of Lucerne (17–21 January 1992)

9. On 17 January 1992 the applicant was indeed transferred to Willisau. On the same day, the Willisau district authority ordered that the applicant be detained pending trial.

10. On 20 January 1992 the applicant's counsel applied by telephone to the Willisau Prefect (*Amtsstatthalter*) to be appointed as the applicant's lawyer and to be allowed to visit the applicant on 21 January. The Prefect replied that on 21 January Mr R.M.D. was to be transferred to Aarwangen in the Canton of Berne, at the request of the investigating judge in that canton.

3. Pre-trial detention in the Canton of Berne (21–24 January 1992)

11. On 21 January 1992 the applicant was transferred to Aarwangen to be interviewed by the investigating judge. His counsel was informed of this in writing by the Willisau Prefect on the same day.

12. The applicant's counsel sought to challenge the decision to keep his client in detention at Aarwangen. However, the Aarwangen investigating judge informed him by telephone that he himself had not made any order for Mr R.M.D.'s continued detention pending trial as the order issued by the Willisau district authority on 17 January 1992 (see paragraph 9 above) was still valid.

4. Pre-trial detention in the Canton of Glarus (24 January–3 February 1992)

13. On 24 January 1992 the applicant was transferred to the town of Glarus, in order to be interviewed by an investigating judge in connection with a burglary committed in the canton of Glarus. On the same day, the investigating judge ordered that the applicant remain in detention pending trial.

5. Pre-trial detention in the Canton of St Gall (3–21 February 1992)

14. On 3 February 1992 the applicant was transferred to the town of St Gall.

6. Pre-trial detention in the Canton of Schwyz (21–25 February 1992)

15. On 21 February 1992 Mr R.M.D. was transferred to the town of Schwyz.

16. On the same day his counsel applied to the investigating judge in the Canton of Schwyz for his release, but the application was refused on 24 February.

7. Pre-trial detention in the Canton of Zürich (25 February–3 March 1992)

17. On 25 February 1992 the applicant was transferred back to Uster.

18. On 26 February 1992 the Uster district prosecutor's office ordered that he remain in detention.

19. On the same day, the applicant's counsel applied to the Uster District Court for his release. That application was refused on 28 February.

8. Pre-trial detention in the Canton of Aargau (3–13 March 1992)

20. On 3 March 1992 Mr R.M.D. was transferred to the town of Aarau.

21. On 4 March 1992 the Aarau prosecutor's office ordered that he remain in detention.

9. Pre-trial detention in the Canton of Zürich (13 March 1992)

22. On 13 March 1992 the applicant was once again transferred to Uster.

23. His counsel at once made a further application for his release, and he was released that same day.

B. The applicant's appeals to the Lucerne Court of Appeal and the Federal Court

24. On 23 January 1992 Mr R.M.D.'s counsel appealed to the Lucerne Court of Appeal (*Obergericht*) against the detention order issued on 17 January (see paragraph 9 above) and applied for his client's immediate release.

25. On 27 January 1992 the Lucerne Court of Appeal struck out the appeal on the ground that it had become devoid of purpose because, as the applicant had been transferred on 21 January to Aarwangen and on 24 January to Glarus, the detention order made on 17 January had lapsed (*dahingefallen*).

26. On 31 January 1992 Mr R.M.D.'s counsel lodged a public-law appeal with the Swiss Federal Court against the judgment of the Lucerne Court of Appeal.

He asked the Federal Court to quash the judgment of the Court of Appeal and to direct that court to rule on the merits and order his client's immediate release. In his submission, the Court of Appeal's refusal to consider the merits of the case had infringed the provisions of the Canton of Lucerne Code of Criminal Procedure, the Swiss Constitution and the Convention guaranteeing the applicant's right to be given a fair trial, to have the lawfulness of his detention reviewed by a court and to be assisted by a lawyer.

27. On 12 February 1992 the Federal Court dismissed the applicant's public-law appeal.

It said, firstly, that the fact that the Court of Appeal had not considered the merits of the case had not entailed an infringement of the provisions of the Canton of Lucerne Code of Criminal Procedure:

> "The view can reasonably be maintained that the Court of Appeal no longer needs to consider the merits of an appeal against a detention order if the detention in the

Canton of Lucerne ends during the appeal proceedings, either because the accused has been released or because he is detained in another canton and the detention in the Canton of Lucerne accordingly lapses. The Federal Court has proceeded in a similar manner: leaving aside exceptional cases, it will regard an appeal against detention as having become devoid of purpose and strike it out of its list if the applicant has been released during the Federal Court proceedings ... The justification it gives for this case-law is that in such a case there is no longer a live practical interest in securing a decision on the appeal against detention, even in respect of any claims for compensation and satisfaction ... These considerations are applicable also in relation to cantonal appeal proceedings. The applicant can still maintain in any subsequent compensation proceedings that he was unlawfully arrested in the Canton of Lucerne."

With regard to the procedure for "amalgamation" (*Sammelverfahren*) of the judicial investigations in respect of Mr R.M.D. that had been launched in various cantons, the Federal Court held that, in order to avoid any uncertainty about who had jurisdiction to order a person's detention at the beginning of an investigation, it was important to establish clearly whether and when detention in a given canton came to an end so as to enable the person detained to apply to the relevant cantonal court. For that reason it would have been preferable for the Willisau Prefect to have indicated in writing that the applicant's detention in the Canton of Lucerne had come to an end and that Mr R.M.D. was thereafter subject to the jurisdiction of the authorities in the Canton of Glarus. However, that did not alter the fact that the Lucerne Court of Appeal had not in its judgment infringed either the provisions of the Constitution relating to personal freedom or Article 5 § 4 of the Convention, seeing that when the applicant had lodged his appeal he was no longer in detention in the Canton of Lucerne.

Lastly, the Federal Court declared the applicant's complaint under Article 6 § 3 (c) of the Convention inadmissible because the question whether a lawyer had officially been assigned to represent him had not been raised in the Court of Appeal.

II. RELEVANT DOMESTIC LAW

A. The Federal Constitution

28. The first and second sub-paragraphs of Article 64 *bis* of the Federal Constitution of the Swiss Confederation provide:

"The Confederation shall have the right to legislate on criminal law.

The organisation of the judiciary, court procedure and the administration of justice shall be matters for the cantons ..."

29. Each canton consequently applies its own code of criminal procedure.

B. The Swiss Criminal Code

30. The relevant provisions of the Swiss Criminal Code read as follows:

Article 350

"1. Where an accused is prosecuted for several offences committed in different places, the authority of the place where the offence carrying the heaviest penalty has been committed shall also have jurisdiction to prosecute and try the other offences.

If the different offences carry the same penalty, jurisdiction shall vest in the authority of the place where the first investigation was begun.

2. Where an accused, contrary to the rules governing multiple offences (Article 68), has been sentenced by several courts to several terms of imprisonment, the court which has sentenced him to the heaviest penalty shall, on an application by the convicted person, fix a consolidated sentence."

Article 351

"If there is a dispute over jurisdiction between the authorities of several cantons, the Federal Court shall determine which canton has the right and obligation to prosecute and try the accused."

C. The Canton of Lucerne Code of Criminal Procedure

31. The relevant provisions of the Canton of Lucerne Code of Criminal Procedure (*Luzerner Strafprozeßordnung*) read as follows:

Article 83 *bis*

"1. ...

2. Where an order has been issued by the Prefect, the prosecutor or a lower court or its president for the detention of an accused pending trial, the accused may appeal against the order to the Court of Appeal. He must be informed of this right.

3. The Court of Appeal shall rule on the appeal within three days."

Article 83 *quater*

"1. An order for detention pending trial shall lapse after fifteen days. If the reason for keeping the accused in detention continues to apply, the authority dealing with

the case must order that he remain in detention. Such detention may not exceed thirty days ...

2. A person detained may at any time apply to the authority dealing with his case for release. The authority must rule on the application within three days.

3. If the Prefect, the prosecutor or a lower court or its president orders that the accused remain in detention or refuses an application for his release, the accused may appeal to the Court of Appeal, which shall rule on the appeal within seven days."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr R.M.D. applied to the Commission on 26 March 1992. He maintained that the failure by the Lucerne Court of Appeal and the Swiss Federal Court to consider the merits of his appeal against detention pending trial had infringed Article 5 § 4 of the Convention.

33. The Commission (Second Chamber) declared the application (no. 19800/92) admissible on 18 October 1995. In its report of 11 April 1996 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 5 § 4 of the Convention. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

34. In their memorial the Government invited the Court to

"hold that, as domestic remedies had not been exhausted, it had no jurisdiction to consider the merits of the application lodged by Mr R.M.D. against Switzerland".

35. In his submissions the applicant requested the Court to:

"(a) hold that Switzerland had violated Article 5 § 4 of the Convention;

(b) order Switzerland to pay him just satisfaction under Article 50 of the Convention; and

(c) order Switzerland to pay all other costs and expenses."

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1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

36. The applicant maintained that he was the victim of a violation of Article 5 § 4 of the Convention, which provides:

> "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."

A. The Government's preliminary objection

37. The Government argued, as they had done before the Commission, that Mr R.M.D. had not exhausted domestic remedies, since he had failed to take every legal action available to him in Swiss law to obtain a ruling on the lawfulness of his detention.

38. Like the Commission, the Court considers that the question of exhaustion of domestic remedies and the merits of the applicant's complaint under Article 5 § 4 of the Convention are, in the instant case, closely linked; consequently, it will join the preliminary objection to the merits.

B. Merits of the complaint

39. In the applicant's submission, the fact that he had been detained for two months in seven different cantons had deprived him of any possibility of having the lawfulness of his detention reviewed by a court as required by Article 5 § 4 of the Convention. That provision had likewise been infringed by the failure of the Lucerne Court of Appeal and the Federal Court to consider the merits of his application challenging the lawfulness of his detention.

40. The Government criticised Mr R.M.D. on the ground, among others, that he had not applied for release in the cantons of Glarus and St Gall (where he had been detained for ten days and eighteen days respectively), had not appealed against the decision of the investigating judge at the Uster District Court of 17 January 1992 (see paragraph 8 above) and had not made any application to the Indictment Division of the Canton of Berne despite the fact that no order for his detention pending trial had been made by the investigating judge of that canton. Furthermore, in his public-law appeal to the Federal Court, the applicant had done no more than argue that the Lucerne Court of Appeal's judgment was incompatible with Article 5 § 4 of

the Convention; he had not applied for release. Lastly, the applicant could have taken other legal action, such as claiming damages for false imprisonment or bringing proceedings alleging a denial of justice.

41. The Commission considered that Mr R.M.D. had been deprived of his right to make an application to a court to rule on the lawfulness of his detention and therefore concluded that there had been a violation of Article 5 § 4 of the Convention.

42. The Court reiterates that the question whether a person's right under Article 5 § 4 of the Convention to obtain a speedy court decision on the lawfulness of his detention has been respected has to be determined in the light of the circumstances of each case (see the Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 20, § 55).

43. In the present case Mr R.M.D. was arrested at the request of the Willisau district authority (Canton of Lucerne) and held in custody at Uster (Canton of Zürich) on 13 January 1992 (see paragraph 7 above). Being suspected of having committed offences in several cantons, he was successively detained in the cantons of Zürich (see paragraphs 7–8 above), Lucerne (see paragraphs 9–10 above), Berne (see paragraphs 11–12 above), Glarus (see paragraph 13 above), St Gall (see paragraph 14 above), Schwyz (see paragraphs 15–16 above), Zürich (see paragraphs 17–19 above), Aargau (see paragraphs 20–21 above) and Zürich again (see paragraphs 22–23) in connection with the "amalgamation" procedure (see paragraph 27 above), before ultimately being released on 13 March 1992 (see paragraph 23 above). The total length of his detention in seven different cantons was therefore two months.

44. The Court must consequently examine whether, during that period, the applicant had been able to have the lawfulness of his detention decided speedily by a court.

45. It notes that on 17 January 1992 the Willisau Prefect ordered the applicant's detention pending trial (see paragraph 9 above). On 23 January the applicant's counsel appealed to the Lucerne Court of Appeal against that order, seeking his client's immediate release (see paragraph 24 above). On 27 January the Court of Appeal decided to strike out the appeal on the ground that it had become devoid of purpose because in the meantime Mr R.M.D. had been transferred to the cantons of Berne and Glarus (see paragraph 25 above). On 31 January the applicant's counsel lodged a public-law appeal with the Federal Court, requesting it in particular to direct the Court of Appeal to rule on the merits and to order his client's immediate release (see paragraph 26 above).

On 12 February 1992 the Federal Court dismissed the applicant's appeal on the ground, *inter alia*, that the Court of Appeal's judgment had not infringed Article 5 § 4 of the Convention as, when the applicant had lodged

his appeal, he was no longer in detention in the Canton of Lucerne (see paragraph 27 above).

46. Mr R.M.D. was therefore unable in those proceedings to obtain a decision on the lawfulness of his detention. Thus, contrary to the Government's submission, he exhausted domestic remedies since, in the appeal to the Federal Court, his counsel referred to Article 5 § 4 of the Convention and asked the Federal Court to direct the Lucerne Court of Appeal to order his client's immediate release (see paragraph 26 above).

47. Moreover, the applicant cannot be criticised for failing to take all possible steps he had not already taken (see paragraphs 8, 16, 19, 23, 24 and 26 above) in the various cantons where he was held in order to obtain a ruling on his pre-trial detention.

In this connection, the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate and the personal circumstances of the applicant (see, *mutatis mutandis*, the Beis v. Greece judgment of 20 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 569–70, § 32 *in fine*).

The applicant was in a position of great legal uncertainty. In the light of the procedure for "amalgamating" the proceedings against him, he had to expect to be transferred from one canton to another at any moment, in which eventuality the courts of the transferring canton no longer had jurisdiction to decide the lawfulness of his detention; that rendered any remedy ineffective.

48. Under the settled case-law of the Swiss courts, which in the instant case was confirmed in the judgment of the Federal Court (see paragraph 27 above), an application for release must be struck out where the person detained is no longer within the jurisdiction of the canton concerned. That was what both the Lucerne Court of Appeal (see paragraph 25 above) and the investigating judge in the Canton of Zürich (see paragraph 8 above) did in this case.

49. Admittedly, the applicant could have applied for release in the cantons of Glarus, St Gall and Aargau, where he was detained for eleven, eighteen and ten days respectively (see paragraphs 13, 14 and 20–21 above). However, he was at that time still waiting for the judgment of the Lucerne Court of Appeal and indeed of the Federal Court, and as the Court has already noted above, he was expecting to be transferred to another canton at any moment. Regard being had to the time that such applications take, to the practical difficulties that persons held in custody may encounter in arranging effective representation and to the resulting feeling of helplessness, the applicant cannot be blamed for failing to avail himself of those remedies.

50. The submission concerning an action in damages likewise cannot succeed. The right to a speedy decision on the lawfulness of detention is to be distinguished from the right to receive compensation for such detention

(see the Navarra v. France judgment of 23 November 1993, Series A no. 273-B, p. 27, § 24).

51. In that connection, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see the Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

52. In the present case it was not disputed that Mr R.M.D. could have made an application for release in each canton. Had he been detained in one canton only, the procedure would undoubtedly have satisfied the requirements of Article 5 § 4 of the Convention. The problem was not that remedies were unavailable in each of the cantons, but that they were ineffective in the applicant's particular situation. Having been successively transferred from one canton to another, he was unable, owing to the limits of the cantonal courts' jurisdiction, to obtain a decision on his detention from a court, as he was entitled to do under Article 5 § 4.

53. The explanation for that situation lies in the federal structure of the Swiss Confederation, in which each canton has its own code of criminal procedure, and it is not for the Court to express a view on the system as such.

54. Like the Commission, however, the Court considers that those circumstances cannot justify the applicant's being deprived of his rights under Article 5 § 4. Where, as in this instance, a detained person is continually transferred from one canton to another, it is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that Article.

55. Consequently, the Court dismisses the Government's preliminary objection and holds on the merits that there has been a violation of Article 5 § 4.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

56. Article 50 of the Convention provides:

> "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."

A. Non-pecuniary damage

57. Mr R.M.D. said that he had suffered non-pecuniary damage which he put at a minimum of 5,000 Swiss francs (CHF).

58. The Government and the Delegate to the Commission submitted that a finding of a violation of Article 5 § 4 would constitute sufficient just satisfaction.

59. The Court considers that the applicant indisputably suffered non-pecuniary damage. Taking into account the relevant factors and making its assessment on an equitable basis as required by Article 50, it awards him CHF 5,000.

B. Costs and expenses

60. Mr R.M.D. also claimed reimbursement of the costs and expenses he had incurred before the Convention institutions, which he calculated to be CHF 17,873.60.

61. The Government considered that amount excessive.

62. The Delegate of the Commission, on the other hand, found it to be reasonable.

63. Making its assessment on an equitable basis and in the light of the relevant criteria, the Court awards the applicant CHF 15,000.

C. Default interest

64. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* to the merits the Government's preliminary objection, and *dismisses* it after considering the merits;
2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, 5,000 (five thousand) Swiss francs for non-pecuniary damage and 15,000 (fifteen thousand) Swiss francs for costs and expenses;
   (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* 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 26 September 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Pettiti;

(b) concurring opinion of Mr Valticos.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE PETTITI

(*Translation*)

I voted with all the other members of the Chamber in favour of finding a violation of Article 5 § 4 of the Convention for the reasons given by the Court, namely that the applicant was deprived of his rights under Article 5 § 4, it being for the State to organise its judicial system in such a way as to enable the courts (in this case the cantonal ones) to provide effective remedies.

I found particularly persuasive the fact that no attempt had been made by either the Federal Court or the cantonal courts to counteract the cumbersomeness of a system which, in some ways, almost reminds one of the complexity of bilateral extradition arrangements under which persons awaiting extradition are held for excessively lengthy periods (a practice the Court has already had occasion to censure).

CONCURRING OPINION OF JUDGE VALTICOS

(*Translation*)

In this apparently straightforward case a complication has arisen out of the federal structure of the Swiss Confederation.

As a result of the federal structure, the applicant was successively transferred for periods of varying length from one prison to another and one canton to another.

Was he able, in those circumstances, to exhaust domestic remedies effectively as required by the rules of international law in general and the provisions of the Convention in particular? That is an important point and one that may inspire doubts.

The Agent of the Government argued before the Court that the applicant could have had recourse to the Swiss courts to have the lawfulness of his detention decided, but did not do so. The question arises whether, given the mostly short periods of detention in the cantons, he could have had recourse to such proceedings in practice. Quite clearly, he would not have been able to do so where the detention lasted, as in Lucerne, for four or five days; but the length of his detention elsewhere, as in Glarus, St Gall and the Canton of Aargau for eleven, eighteen and ten days respectively, would perhaps have given him enough time at least to institute such proceedings. The problem was exacerbated because the applicant was probably unaware how long his detention would last in each of the cantons and that he could at least have commenced proceedings and no doubt also appealed to the Federal Court.

Admittedly, the applicant challenged the decision of the Lucerne Court of Appeal, but that was the only appeal he brought and it was limited in scope.

Naturally, unifying criminal procedure in the cantons could facilitate matters in the future, but as they stand at present, there were nonetheless domestic remedies available which, as the Agent of the Government pointed out to the Court, were not used; whilst it is true that they are, in their present form, complex, they nevertheless exist.

In these circumstances, a strict interpretation of the rule requiring exhaustion of domestic remedies would lead to the conclusion that it has not been satisfied in the present case; and it might be felt to be going too far to hold that such a question should turn upon the ease with which recourse may be had to the available remedies.

It would therefore appear natural, in the present case, to conclude that domestic remedies have not been exhausted.

However, would that not be to take too rigid a view?

I think ultimately that it would be in this instance.

Certainly, ignorance of the law is no excuse. But it must also be said that no one can be expected to do the impossible, and what is impossible must,

in cases such as this one, cover conditions that are too onerous because of the shortness of the time-limits and the difficulties which detained persons experience in obtaining information about the conditions that have to be satisfied if they are subsequently to be able to rely effectively on the provisions of the European Convention.

In these circumstances, it would ultimately appear that excessive insistence on compliance with the rule of exhaustion of domestic remedies would, in the present case, result in a denial of justice. Accordingly, this opinion, initially a dissenting one, has, on reflection, become one in which I concur in the view of the other members of the Chamber.