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

FIRST SECTION

**CASE OF SCHÖPS v. GERMANY**

*(Application no. 25116/94)*

JUDGMENT

STRASBOURG

13 February 2001

**In the case of Schöps v. Germany,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr L. FERRARI BRAVO,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr T. PANȚÎRU, *judges*,
Mr H. JUNG, ad hoc *judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 January 2001,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 December 1998. It originated in an application (no. 25116/94) against the Federal Republic of Germany lodged with the Commission under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Jörg Rudolf Schöps ("the applicant"), on 4 July 1994.

2. The applicant was represented by Mr K. Hütsch and Mr W. Küpper-Fahrenberg, both lawyers and notaries practising in Essen (Germany). The German Government ("the Government") were represented by their Agent, Mrs H. Voelskow-Thies, *Ministerialdirigentin*, Federal Ministry of Justice.

3. The case concerns the applicant's complaint that, in the proceedings for the review of his detention on remand, his defence counsel was denied access to the criminal files, contrary to Article 5 § 4 of the Convention.

4. On 14 January 1999 a panel of the Grand Chamber decided, in accordance with Article 5 § 4 of Protocol No. 11 to the Convention taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, that the case should be dealt with by a Chamber constituted within one of the Sections of the Court. Subsequently the President of the Court assigned the case to the First Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr G. Ress, the judge elected in respect of Germany, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr H. Jung to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The Government filed written observations on the merits (Rule 59 § 1). In spite of several reminders, counsel for the applicant did not.

6. On 12 October 1999 the Chamber decided, pursuant to Rule 59 § 2 *in fine*, not to hold a hearing in the case.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a German national, born in 1953 and living in Essen.

8. In 1992 the Essen public prosecutor's office (*Staatsanwaltschaft*) started investigations against the applicant and a number of other people suspected of fraud.

9. On 11 March 1993 the Essen District Court (*Amtsgericht*) issued a warrant for the arrest of the applicant and two other suspects, Ms S. and Ms L., on suspicion of criminal association, drug trafficking and several counts of fraud.

In its decision, the District Court noted that the suspects had been charged with having founded – towards the end of December 1988 – an association for the purpose of gaining large profits from fraudulent trading in options. Moreover, as from mid-1990 the suspects had agreed to import cocaine from Majorca to Germany and to sell it there. Several accomplices had been recruited as members of the criminal organisation and had been involved in the numerous criminal offences. As regards the fraudulent trading in options, almost one thousand victims had been defrauded by the criminal association between the beginning of 1989 and March 1993, and they had lost a total of sixty million German marks. Moreover, between October 1990 and August 1992 approximately 100 kg of cocaine had been imported to and sold in Germany. The District Court found that, having regard to the statements made by some witnesses and the defendants, the results of the telephone-tapping operations and other results of the investigations, there was a strong suspicion that the applicant, Ms S. and Ms L. had committed the criminal offences in question.

The District Court also considered that there was a danger of absconding within the meaning of Article 112 § 2.2 of the Code of Criminal Procedure (*Strafprozeßordnung*). In this respect, the court found that, taking into account the seriousness of the offences with which the suspects were charged and the importance of the damage they had caused, they had to expect a long term of imprisonment. Moreover, the suspects obviously had sufficient financial means to abscond. According to the District Court, there was also a danger of collusion within the meaning of Article 112 § 2.3 of

the Code of Criminal Procedure, since, as members of a criminal association, the suspects were accustomed to disguising the extent of their activities by having recourse to "men of straw" and fictitious contracts, and were therefore likely to suppress evidence or influence witnesses.

10. The applicant was arrested on 19 March 1993. In the presence of his defence counsel, Mr Hütsch, he was informed by the detention judge (*Haftrichter*) of the charges against him and of the arrest warrant of 11 March 1993. The applicant did not make a statement. He requested an oral hearing on the lawfulness of his detention (*Haftprüfung*) but later withdrew his request.

11. According to the applicant, his counsel applied as early as March 1993 to the Essen public prosecutor's office for leave to consult the investigation files, but his request was rejected on the ground that access to those documents would endanger the course of the investigations. However, neither the request nor its dismissal are recorded in the files of the public prosecutor's office.

12. In the ensuing proceedings, counsel for the applicant was joined by a colleague, Mr Küpper-Fahrenberg.

13. On 3 May 1993 the applicant, in the presence of defence counsel, was questioned by the police about the charges against him. He indicated that he had, in the meantime, repeatedly consulted his counsel. In the course of further interrogations on 5 and 6 May, and 13 and 20 July 1993, mostly in the presence of counsel, the applicant was questioned in detail about the charges against him, in particular about the contents of telephone calls which had been recorded by tapping under an order made in May 1992.

14. On 8 September 1993 the Essen District Court amended the arrest warrant, adding in particular further charges of tax evasion, corruption, incitement to make a false entry in official records and making a false affidavit. The District Court confirmed that there was still a danger of the applicant and other suspects absconding and that less stringent measures could be taken only in the case of Ms S. Consequently the execution of the warrant for Ms S.'s arrest could be suspended, whereas the applicant and Ms L. had to be further remanded in custody.

15. On 14 September 1993 the applicant was informed of the amended arrest warrant. His counsel then applied for access to the files. No action was taken on that request as the duplicate copy of the files had already been forwarded to the Düsseldorf Court of Appeal (*Oberlandesgericht*) for the purposes of the review proceedings, while the original files were needed for the purposes of the continuing investigations.

16. On 14 September 1993 the Hamm public prosecutor's office (*Generalstaatsanwaltschaft*) requested the prolongation of the applicant's and Ms L.'s detention on remand. In this request, to which 24 investigation files were attached, the public prosecutor noted the history of the detention proceedings and summarised the offences of which the suspects were

accused. As to the factual details, he referred to the arrest warrant and a police report of July 1993 which were to be found in the attached files. According to the public prosecutor, the strong suspicion against the suspects was based on the statements of the suspects and of witnesses, the opinion of a stockbroking expert, records of telephone tapping and seized business documents, which were all included in the investigation files. He also confirmed that there was a danger of absconding.

17. In his reply of 21 October 1993, the applicant's defence counsel applied to the Düsseldorf Court of Appeal for access to the files, for an oral hearing on the question of the applicant's continued detention and for his release. He submitted that he could not comment in detail on the public prosecutor's submission as, despite repeated promises, he had not yet been granted access to the investigation files, and the public prosecutor's submissions were fragmentary and therefore did not provide a sufficient basis for him to rely on.

18. According to a handwritten file note drafted by the Court of Appeal rapporteur, the applicant's counsel, in answer to a telephone query, had agreed to a decision on the question of the applicant's continued detention on remand being taken without him having been given access to the files beforehand. However, according to the applicant, as confirmed by his counsel, Mr Hütsch, and the latter's colleague, Mr Pott, the rapporteur and counsel had agreed that counsel could not comment on the question of the applicant's continued detention on remand without having had access to the files and that the Court of Appeal judge would therefore arrange for a consultation of the files.

19. On 3 November 1993 the Düsseldorf Court of Appeal ordered the applicant's continued detention on remand.

The Court of Appeal, having regard to the result of the investigations thus far, in particular the applicant's and the co-suspects' statements, the statements of the victims, the records of telephone tapping, seized business documents and the provisional opinion of a stockbroking expert, confirmed that there was a strong suspicion that the applicant had committed the offences in question. As regards the danger of the applicant's absconding, the Court of Appeal noted that he had substantial financial means and real property in Majorca. Moreover, until his arrest, he had had contacts in the United States of America, Switzerland and Spain.

The Court of Appeal also considered that the applicant's continued detention on remand was not disproportionate. As to the conduct of the investigation proceedings, the Court of Appeal observed that the complex nature and the scope of the investigations had not yet enabled a judgment to be reached. In this connection, the Court of Appeal noted that the investigation files already comprised 24 volumes, the indictment being envisaged for November 1993. Finally, the Court of Appeal stated that there had been no need for an oral review hearing.

20. On 22 November 1993 the Essen public prosecutor's office decided to allow the applicant's defence counsel to consult the investigation files. According to the applicant, only 22 of the then 24 files were made available. They were returned in January 1994. According to the applicant, his counsel applied for further consultation of the files at the beginning of 1994.

21. On 7 February 1994, following changes in the jurisdiction of the courts, the Hamm public prosecutor's office requested the Hamm Court of Appeal to order the applicant's continued detention on remand. The public prosecutor's office enclosed the criminal files, which comprised 69 volumes and 3 subsidiary files (*Beiakten*).

22. In his written submission of 28 February 1994, the applicant's counsel stated that he had thus far been able to consult only 22 volumes of the criminal files and that he could not, therefore, add anything to his previous observations.

23. On 1 March 1994 the Hamm Court of Appeal granted the request of 7 February 1994 and ordered the applicant's continued detention on remand.

The Court of Appeal considered that the reasons stated in the Düsseldorf Court of Appeal's previous decision remained valid. Moreover, the investigations had progressed. The police had prepared an intermediate report in January 1994 and indicated that the questioning of about one thousand witnesses had almost been completed. The final police report and the report of the tax-investigation authorities had been announced for the end of February 1994. The public prosecutor's office envisaged preparing the bill of indictment immediately afterwards. Thus the obligation to conduct the proceedings expeditiously had not been disregarded.

The Court of Appeal further found that the applicant's complaint under Article 5 § 4 of the Convention about the lack of access to the investigation files did not affect the validity of the arrest warrant.

24. On 25 March 1994 the applicant lodged a constitutional complaint (*Verfassungsbeschwerde*) about the decisions of 3 November 1993 and 1 March 1994, complaining in particular about the lack of sufficient access to the investigation files. In this respect, he stressed that he had been granted access to only 22 volumes of the investigation files which, at that time, comprised 132 volumes altogether. He and his defence counsel had not, therefore, been able to comment properly on the accusation against him and to exercise the defence rights effectively.

25. On 2 May 1994 the Federal Constitutional Court (*Bundesverfassungsgericht*) decided not to entertain the applicant's complaint.

26. On 25 March 1994 the Essen public prosecutor's office drew up the bill of indictment (*Anklageschrift*) against the applicant and four co-accused, who were charged with various criminal offences. As far as the applicant was concerned, the bill of indictment mentioned 91 counts of fraud, corruption, incitement to make a false entry in an official record and

swearing a false affidavit. The proceedings relating to the charges of tax evasion were severed from these main proceedings. Prosecution for unlawful association was discontinued in view of the seriousness of the other charges. The bill of indictment, which set out in detail the charges against the applicant, the relevant facts and the evidence, was served on the applicant's counsel on 9 June 1994.

27. On 9 June 1994 the Essen public prosecutor's office forwarded copies of the investigation files, namely 132 main and 2 supplementary volumes (about 16,000 pages altogether) to the applicant's defence counsel for consultation. It requested that they be returned within one week to allow consultation by the other defence counsel. On 23 June 1994 the office sent a reminder regarding the return of the files. The date of their return was not recorded. According to the applicant, the copies made available to his counsel were not complete.

28. On 30 June 1994 the Hamm Court of Appeal ordered the applicant's continued detention on remand. Upon request by counsel of one of the applicant's co-accused, the decision had to be adjourned for one week in order to allow an adequate opportunity for submissions to be filed.

The Court of Appeal confirmed the findings as laid down in the earlier decisions of 3 November 1993 and 1 March 1994. As regards the charges against the applicant, the Court of Appeal noted the changes resulting from the bill of indictment, which did not include the charges of founding a criminal association and of tax evasion. The prosecution regarding the first of these charges had been discontinued in accordance with the relevant provisions of the Code of Criminal Procedure, in view of the minor importance of the offence as compared to those set out in the bill of indictment. As regards the tax-evasion offence, further investigations were pending.

The Court of Appeal also considered that the investigations had progressed. The bill of indictment had meanwhile been drawn up and forwarded to the Economic Offences Division at the Essen Regional Court (*Landgericht*). The Regional Court had started examining the complex case and envisaged, if the main trial proceedings were to begin, starting the hearings in September 1994.

29. On 19 October 1994 the Hamm Court of Appeal ordered the applicant's release. The Court of Appeal confirmed that there was still a strong case against the applicant and that the reasons for detaining him on remand remained; however, his continued detention had ceased to be proportionate. The Court of Appeal considered, in particular, that since May 1994 the Essen Regional Court had not made progress in the proceedings. The applicant was released from detention the same day.

30. On 15 December 1998 the Essen Regional Court found the applicant guilty of fraud, bribery and swearing a false affidavit and sentenced him to an aggregate term of five years and six months' imprisonment.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

31. Articles 112 et seq. of the Code of Criminal Procedure (*Strafprozeßordnung*) concern the arrest and detention of a person on reasonable suspicion of having committed an offence. According to Article 112, a person may be detained on remand if there is a strong suspicion that he or she has committed a criminal offence and if there is a reason for arrest, such as the risk of absconding or the risk of collusion. Article 116 regulates the suspension of the execution of an arrest warrant.

32. Under Article 117 of the Code of Criminal Procedure, remand prisoners can ask at any time for judicial review of the arrest warrant. An oral hearing will be held at the request of the remand prisoner, or if the court so decides of its own motion (Article 118 § 1). If the arrest warrant is held to be valid following the hearing, the remand prisoner is entitled to a new oral hearing only if the detention has lasted for three months altogether and if two months have elapsed since the last oral hearing (Article 118 § 3). Article 120 provides that an arrest warrant has to be quashed if reasons justifying the detention on remand no longer persist or if the continued detention appears disproportionate. Any prolongation of detention on remand beyond an initial six months is to be decided by the Court of Appeal (Articles 121-22).

33. Articles 137 et seq. of the Code of Criminal Procedure concern the defence of a person charged with having committed a criminal offence, in particular the choice of defence counsel or appointment of official defence counsel. According to Article 147 § 1, defence counsel is entitled to consult the files which have been presented to the trial court or which would be presented to the trial court in case of an indictment, and to inspect the exhibits. Paragraph 2 of this provision allows for a refusal of access to part or all of the files or to the exhibits for as long as the preliminary investigation has not been terminated, if the purpose of the investigation would otherwise be endangered. Pending the termination of the preliminary investigation, it is for the public prosecutor's office to decide whether to grant access to the file or not; thereafter it is for the president of the trial court (Article 147 § 5). By an Act amending the Code of Criminal Procedure (*Strafverfahrensänderungsgesetz*, *Bundesgesetzblatt*, 2000, vol. I, p. 1253) with effect as from 1 November 2000, the latter provision has been amended to the effect, *inter alia*, that an accused who is in detention is now entitled to ask for judicial review of the decision of the public prosecutor's office denying access to the file.

34. Articles 151 et seq. of the Code of Criminal Procedure regulate the principles of criminal prosecution and the preparation of the indictment. Article 151 provides that any trial has to be initiated by an indictment. According to Article 152, the indictment is to be preferred by the public

prosecutor's office which is, unless otherwise provided, bound to investigate any criminal offence for which there exist sufficient grounds of suspicion.

35. Preliminary investigations are to be conducted by the public prosecutor's office according to Articles 160 and 161 of the Code of Criminal Procedure. On the basis of these investigations the public prosecutor's office decides under Article 170 whether to prefer an indictment or to discontinue the proceedings.

36. According to Article 103 § 1 of the Basic Law (*Grundgesetz*), every person involved in proceedings before a court is entitled to be heard by that court (*Anspruch auf rechtliches Gehör*).

According to the Federal Constitutional Court (*Bundesverfassungsgericht*), this rule requires a court decision to be based only on those facts and evidential findings which could be commented upon by the parties. In cases involving arrest and detention on remand, the arrest warrant and all court decisions upholding it must be founded only on those facts and pieces of evidence of which the accused was previously aware and on which he was able to comment (Federal Constitutional Court, decision of 11 July 1994 (*Neue juristische Wochenschrift*, 1994, p. 3219), with further references).

In the aforementioned decision, the Federal Constitutional Court held that, following his arrest, an accused had to be informed of the content of the arrest warrant and promptly brought before a judge who, when questioning him, had to inform him of all relevant incriminating evidence as well as of evidence in his favour. Moreover, in the course of ensuing review proceedings, the accused must be heard and, to the extent that the investigation will not be prejudiced, the relevant results of the investigation at that stage must be given to him. In some cases, such oral information may not be sufficient. If the facts and the evidence forming the basis of a decision in detention matters cannot or can no longer be communicated orally, other means of informing the accused, such as a right to consult the files (*Akteneinsicht*), are to be used. On the other hand, statutory limitations on an accused's access to the files until the preliminary investigation is completed are to be accepted if the efficient conduct of criminal investigations so requires. However, even while those investigations are in progress, an accused who is detained on remand has a right of access to the files through his lawyer if and to the extent that the information which they contain might affect his position in the review proceedings and oral information is not sufficient. If in such cases the prosecution refuses access to the relevant parts of the files pursuant to Article 147 § 2 of the Code of Criminal Procedure, the reviewing court cannot base its decision on those facts and evidence and, if necessary, has to set the arrest warrant aside (Federal Constitutional Court, op. cit.).

# PROCEEDINGS BEFORE THE COMMISSION

37. Mr Schöps applied to the Commission on 4 July 1994. He complained under Article 5 § 4 of the Convention that he had been denied access to the investigation files in connection with the judicial review of his detention on remand. He further submitted that he had been the victim of a violation of Articles 5 § 3 and 6 § 3 (a) and (b) of the Convention.

38. On 10 April 1997 the Commission declared admissible the complaint under Article 5 § 4, and inadmissible the remainder of the application (no. 25116/94). In its report of 17 September 1998 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry.], it expressed the opinion, by twenty-seven votes to five, that there had been a violation of Article 5 § 4.

# FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

39. In their written submissions, the Government requested the Court to find that the Federal Republic of Germany had not violated its obligations under the Convention.

# THE LAW

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

40. The applicant complained about the proceedings for the review of his detention on remand. He relied on Article 5 § 4 of the Convention, which reads as follows:

> "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. Arguments before the Court

41. The applicant stated that the review proceedings were not truly adversarial, as he and his counsel were not given sufficient access to the investigation files and thus could not properly question the lawfulness of his continued detention on remand.

42. According to the Government, Article 5 § 4 did not provide for a general right for a person detained on remand or his counsel to inspect the files concerning the investigations against him. What mattered was that the accused was given an opportunity to take effective legal action. In the Government's view, it followed from the different scope of application and purpose of Article 5 § 4, when compared with Article 6, that Article 5 § 4 secured only the right for the person concerned to have access to a court and to be heard by it.

As regards the present case, the Government submitted that the proceedings to review the lawfulness of the applicant's detention on remand were truly adversarial and did not infringe the principle of equality of arms. Three stages of proceedings were to be distinguished.

As to the first stage, leading up to the Düsseldorf Court of Appeal's decision of 3 November 1993, the Government argued that no request to inspect the files was made by counsel for the applicant before 14 September 1993. Contrary to the Commission's opinion, the claim that a request to inspect the files was made prior to this date could not be assumed to be correct, in the absence of any entry or record to this effect in the files. If nothing actually happened in response to the request of 14 September 1993, this was because the duplicate files had already been sent to the Düsseldorf Court of Appeal for the purposes of the review proceedings, whereas the original files were still needed for further investigation of the case. However, upon receiving the written reply of 21 October 1993 by counsel for the applicant (see paragraph 17 above), the rapporteur in charge of the case at the Court of Appeal contacted defence counsel by telephone on 28 October 1993. According to a file note of the rapporteur, they both agreed to a court decision without prior inspection of the files. Counsel for the applicant having thus waived his right to have access to the files at this stage of the proceedings, no impediment to the rights of the defence could be identified with respect to the decision of 3 November 1993.

As to the second stage of the proceedings, the one leading up to the Hamm Court of Appeal's decision of 1 March 1994, the Government pointed out that, following the applicant's request of 14 September 1993, on 22 November 1993 all the investigation files which existed at that time, that is to say 24 volumes, were made available to counsel for the applicant, and not only 22 volumes, as claimed by the applicant. The other 45 volumes which were added to the investigation files between the end of November 1993 and the beginning of February 1994 were not automatically delivered to defence counsel as, in the absence of any explicit subsequent request by the latter, the investigation authorities were not under an obligation to do so. Particularly in very extensive proceedings involving detailed investigations, as in the present case, it is up to the accused or his counsel to follow developments and to keep abreast of them and, where necessary, make further requests for inspection of the files. Rather than confining himself to

complaining of this state of affairs as late as 28 February 1994, counsel for the applicant should have made another request for inspection of the files immediately after the public prosecutor's request of 7 February 1994 for the applicant's detention to be prolonged. In any event, a renewed inspection of the files was not necessary at that stage, as the evidence relevant to the issue of the applicant's custody, especially the witness statements, was known to defence counsel following the inspection of the files granted on 22 November 1993 (see paragraph 20 above).

As to the third and last stage of the proceedings, the one leading up to the Hamm Court of Appeal's decision of 30 June 1994, the Government recalled that on 9 June 1994 a full set of copies of the investigation files was handed over to the applicant's defence counsel, well in advance of the hearing before the Court of Appeal.

43. The Commission found that the review proceedings held on 3 November 1993 and 1 March 1994 respectively before the Düsseldorf and Hamm Courts of Appeal did not meet the requirements laid down in Article 5 § 4 of the Convention, whereas those held on 30 June 1994 did.

### B. The Court's assessment

44. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention".

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29, and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II).

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous

meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, *mutatis mutandis*, *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, § 67).

45. In the instant case, the lawfulness of the applicant's detention on remand was reviewed in three sets of proceedings before the Düsseldorf Court of Appeal and the Hamm Court of Appeal, respectively.

At the stage of proceedings leading to the first review hearing before the Düsseldorf Court of Appeal, the applicant was, upon his arrest on 19 March 1993, informed by the detention judge of the charges against him and the content of the arrest warrant, his defence counsel being present. On 14 September 1993 the applicant was, again in the presence of his defence counsel, informed of the amended arrest warrant. In the Government's submission, it was not until the latter date that defence counsel asked for access to the investigation files (see paragraph 15 above). According to the applicant, however, his counsel had unsuccessfully requested access to the files as early as March 1993 (see paragraph 11 above).

46. The Court considers that, while an accused complaining of a denial of access to the investigation files must in principle have duly applied for such access in compliance with the national law (see, *mutatis mutandis*, *Kampanis v. Greece*, judgment of 13 July 1995, Series A no. 318-B, p. 46, § 51), the mere absence of any record of such a request in the case file is, in itself, not sufficient proof that it has not been made.

47. Whatever the date of the first request for access to the files, the Court notes that, as the Government conceded, the request dated 14 September 1993 was not followed by immediate action on the part of the judicial authorities as, in the Government's submission, the original files were needed for the purpose of continuing the investigations, whereas the duplicates had already been sent to the Düsseldorf Court of Appeal.

In this connection, the Court considers that it is for the judicial authorities to organise their procedure in such a way as to meet the procedural requirements laid down in Article 5 § 4, since the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. This would not appear to have been too difficult to achieve in the present case. With no hearing held before the Düsseldorf Court of

Appeal until 3 November 1993, that court was given more than six weeks to take cognisance of the files for the sole purpose of reviewing the lawfulness of the applicant's detention. There was thus ample time to facilitate the consultation of the files by the defence.

48. As regards the Government's further argument that counsel had agreed to the review proceedings being held without prior access to the files, the Court recalls that for the waiver of a right guaranteed by the Convention to be given effect – if at all – it must be established in an unequivocal manner, a waiver of procedural rights requiring in addition minimum guarantees commensurate to its importance (see *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A no. 227, pp. 16-17, § 37).

In the present case, the Court finds that, given the remaining doubts as to the precise content of the telephone conversation in question and regard being had to the importance of the hearing before the Court of Appeal, defence counsel cannot be said to have waived on behalf of the applicant, expressly or in any other unequivocal manner, his right to inspect the files prior to the hearing of 3 November 1993.

49. As a result, when the Düsseldorf Court of Appeal held the review hearing on the last-mentioned date, the applicant's defence counsel had not been able to inspect the investigation files, which amounted to 24 volumes and contained, according to the arrest warrant of March 1993, several statements, by witnesses and by the other two suspects, along with documents relating to the telephone tapping carried out during the investigations. When, in September 1993, the public prosecutor's office requested the prolongation of the applicant's detention on remand, it based the suspicion against him on the contents of the investigation files, which then also included the opinion of a stockbroking expert and business documents which had been seized in the meantime. Those elements thus appear to have been essential to the issue of the applicant's continued detention. In his reply to the prosecutor's request for the applicant's detention to be continued, counsel for the applicant drew the Court of Appeal's attention to the limitations on the defence resulting from the refusal of access to the files (see paragraph 17 above).

50. Admittedly, the applicant was informed about the charges against him by the detention judge and through the arrest warrant as issued and later amended by the Essen District Court (see paragraphs 9-10 and 14-15 above). However, the information provided in this way was only an account of the facts as construed by the District Court on the basis of all the information made available to it by the public prosecutor's office. In the Court's opinion, it is hardly possible for an accused to challenge properly the reliability of such an account without being made aware of the evidence on which it is based. This requires that the accused be given a sufficient opportunity to take cognisance of statements and other pieces of evidence

underlying them, such as the results of the police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence to which he seeks to be given access.

This is even more so in the present case, given the complexity of the investigations against, *inter alios*, the applicant and the large quantity of material on which the suspicion against the applicant was grounded, and which was only referred to in general terms in the arrest warrants and in the request of 14 September 1993 for prolongation of the applicant's detention on remand.

51. In this situation, it was essential for the defence to inspect the files prior to the hearing before the Düsseldorf Court of Appeal, in order to be able effectively to challenge the lawfulness of the applicant's detention on remand, which by that time had already lasted almost eight months.

52. As regards the ensuing proceedings, it was not until 22 November 1993 that access to the files was granted to defence counsel, who had asked for it not later than on 14 September 1993 (see paragraph 15 above). The files then amounted to 24 volumes, all (or most) of which were made available to defence counsel, who returned them in January 1994. However, when, in February 1994, the public prosecutor's office asked for another prolongation of the applicant's detention on remand, the first 24 volumes of the investigation files had been augmented in the meantime by another 45 volumes and 3 subsidiary files, which had not yet been made available to applicant's counsel. Consequently, at the time of the hearing before the Hamm Court of Appeal on 1 March 1994, counsel had been able to consult no more than a limited part of the case file which was before the Court. In his written submissions of 28 February 1994 to the Court of Appeal, counsel stated that he had seen only 22 volumes of the file and could not add anything to his previous observations.

The Court acknowledges that, under German law, access to the file is dependent on a request by the defence. However, in the particular circumstances, an effective opportunity to inspect the additional files ought to have been offered to the defence in a situation where, by its previous requests for full access to the file, the defence had indicated the urgency of its interest in being kept informed about the content of the file and a renewed request for the applicant's continued detention had been made. In view of this, it is an over-formalistic and disproportionate response to require yet another request for access to the numerous new volumes of the case file which had been compiled since access to the file had been granted in November 1993 (see paragraph 20 above). In this connection, the Court notes that the public prosecutor's office does not appear to have waited for another request by the defence before sending to it the complete investigation files on 9 June 1994 (see paragraph 27 above).

53. Regard being had to the findings of the Hamm Court of Appeal as stated in its decision of 1 March 1994 (see paragraph 23 above), it was essential for the defence to inspect the voluminous case file in order to be able to challenge effectively the lawfulness of the arrest warrant, as amended. In the absence of such an opportunity, this stage of the proceedings, for the same reasons as those set out in respect of the first stage of the proceedings (see paragraphs 49-51 above), did not comply with the basic requirements of judicial procedure.

54. As to the proceedings leading to the third review hearing, the Court notes that all the files were forwarded to the applicant's defence counsel on 9 June 1994, once the preliminary investigations were closed and the bill of indictment was served on him. Counsel had the files – 132 main and 2 supplementary volumes – at his disposal for consultation for a period of at least two weeks before the Court of Appeal decided on the applicant's continued detention on remand on 30 June 1994. Consequently, he was given an opportunity of acquainting himself with the essential parts of the admittedly voluminous file and of presenting the applicant's defence in an appropriate manner.

55. In sum, the Court finds that the proceedings held on 3 November 1993 and 1 March 1994 for the review of the lawfulness of the applicant's detention did not satisfy the requirements laid down in Article 5 § 4 of the Convention. This provision has therefore been violated.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Under Article 41 of the Convention,

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

57. Despite several reminders, counsel for the applicant did not file any claims for just satisfaction under Article 41. The Court, for its part, sees no ground for examining this question of its own motion (see, *mutatis mutandis*, *Nasri v. France*, judgment of 13 July 1995, Series A no. 320-B, p. 26, § 49).

## FOR THESE REASONS, THE COURT UNANIMOUSLY

*Holds* that there has been a violation of Article 5 § 4 of the Convention.

Done in English, and notified in writing on 13 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President