



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

FIRST SECTION

CASE OF LANZ v. AUSTRIA

(Application no. 24430/94)

JUDGMENT

STRASBOURG

31 January 2002

FINAL

30/04/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lanz v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mr G. BONELLO,

Mr E. LEVITS,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

Mrs E. STEINER, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 10 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 24430/94) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Bernhard Lanz ("the applicant"), on 23 March 1992.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr. R. Soyer, a lawyer practising in Vienna (Austria). The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that in criminal proceedings against him, his contacts with his defence counsel during the detention on remand had been under surveillance, that the written observations of the Procurator General on his plea of nullity and of the Senior Public Prosecutor on his appeal had not been communicated to him and that in the proceedings concerning his requests for release the prosecution made submissions to which he had no possibility to reply.

4. On 21 May 1998 the Commission decided to communicate to the respondent Government the above complaints by the applicant and declared the remainder of the application inadmissible.

5. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

6. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

7. By a decision of 30 January 2001 the Court declared the applicant's remaining complaints admissible.

8. As from 1 November 2001 the application was reallocated to First Section of the Court. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

9. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Preliminary investigations against the applicant and his detention on remand

10. On 25 October 1991 the Investigating Judge at the Graz Regional Court (*Landesgericht*) issued a warrant of arrest against the applicant on suspicion of having committed fraud and falsification of documents. The suspicion related to the applicant's business activities, and in particular two real estate investment projects. The Investigating Judge issued a search warrant ordering a house search at the premises of the SDBV company, a private company (*Gesellschaft mit beschränkter Haftung*) for which the applicant acted as general manager. The seizure of documents relating to the real estate investment projects was also ordered. That same day the warrant, search and seizure were executed, the latter in the presence of the Investigating Judge. Later in the day the Investigating Judge questioned the applicant and ordered his detention on remand as he found that there existed a danger of the applicant absconding and collusion. As regards the risk of collusion, the Investigating Judge found that there was the danger that the applicant would attempt to influence the employees of the SDBV company and to remove documents which had not been found at the house search.

11. On 27 October 1991 the applicant requested his release from detention on remand.

12. On 6 November 1991 the Review Chamber (*Ratskammer*) of the Graz Regional Court, after an oral hearing in the presence of the applicant,

his defence counsel and the Public Prosecutor, dismissed his request. The Review Chamber found that no danger of absconding existed. However, the danger of collusion continued to exist as the applicant might try to influence witnesses not yet heard and to remove any traces of the offence. There was also a danger of his committing further offences. On 20 November 1991 the applicant appealed. At an unspecified date also the Public Prosecutor appealed, arguing that detention on remand should also be based on the risk of the applicant absconding.

13. Meanwhile, on 11 November 1991, the Investigating Judge ordered that the applicant's contacts with his defence counsel should take place under the surveillance of the court because of the existence of a danger of collusion. The Investigating Judge found that this measure was necessary because co-suspects were still at large, several witnesses had not yet been heard and there was a risk that the applicant could influence them. The Investigating Judge stated that the validity of this order would expire at the latest when the two-month statutory time-limit for detention on remand based on the risk of collusion would end. The applicant appealed against this decision. He submitted that he did not oppose this measure in principle, however, the measure constituted an unnecessary limitation on his defence rights and the Investigating Judge had failed to order this measure within 14 days as prescribed by law.

14. On 21 November 1991 the Review Chamber dismissed the applicant's appeal against the Investigating Judge's search warrant and the order for surveillance of the applicant's contacts with his defence counsel. As regards the complaint about the surveillance of the applicant's contacts with counsel, the Review Chamber found the Investigating Judge's decision to be correct. This order did not involve any criticism of counsel or any reproach of conduct contrary to law or the disciplinary rules of the members of the bar, but merely had the purpose of preventing any contact whatsoever with third persons in order not to endanger the success of the criminal investigation. The present case concerned the complicated business relations of the SDBV and several other companies managed by the applicant, and the flow of money between them. Further witnesses could only be identified after all the documents seized had been examined and the applicant was to be prevented from influencing them. Furthermore, the decision had been taken within the time limit prescribed by S. 193 § 3 of the Code of Criminal Procedure. The Review Chamber also found the applicant's complaint that he did not have sufficient access to his case-file unfounded. The Investigating Judge had granted access to the file to the official receiver of the SDBV company and the applicant's defence counsel, the latter also being given the possibility to make copies of the documents in the file. The applicant's counsel visited him repeatedly and could have given him copies if he so wished. Moreover, when questioned by the Investigating Judge, the

applicant was informed of the contents of the file and about the statements of witnesses already heard.

15. On 28 November 1991 the Graz Senior Public Prosecutor commented on the applicant's appeal of 20 November 1991. These comments were not served on the applicant.

16. On 12 December 1991 the Graz Court of Appeal (*Oberlandesgericht*) dismissed the appeal lodged by the applicant but granted the Public Prosecutor's appeal. It found that a serious suspicion existed against the applicant and referred to the details of the criminal investigation. There also existed a danger that the applicant would abscond.

17. On 15 January 1992 the Review Chamber, after having held an oral hearing, dismissed a further request of the applicant for release. On 13 February 1992 the Court of Appeal dismissed the applicant's appeal. On 11 March 1992 the Review Chamber dismissed a further request for release by the applicant.

18. After his conviction on 21 June 1992, the applicant filed further requests for release from detention on remand. Such requests were refused by the Review Chamber on 3 February 1993 and 6 April 1993. Appeals were dismissed by the Court of Appeal on 18 February 1993 and 29 April 1993 respectively.

B. The trial against the applicant

19. On 14 February 1992 the Graz Public Prosecutor filed a bill of indictment against the applicant charging him with aggravated fraud.

20. On 21 April 1992 the trial against the applicant started before the Graz Regional Court. It lasted until 21 June 1992. In the course of the trial the Regional Court heard 52 witnesses, some of them repeatedly on the applicant's request. Furthermore 5 experts on book-keeping, building and construction matters, real estate assessment, medicine and psychiatry were heard. The applicant frequently requested that the trial be adjourned for lengthy periods and, towards the end of the trial, requested that the trial be repeated or that the case be remitted to the Investigating Judge. On 21 June 1992 the court convicted the applicant of aggravated fraud and sentenced him to four and a half years' imprisonment. It also acquitted the applicant of an additional charge of fraud raised by the Public Prosecutor at the trial.

21. On 9 September 1992 the judgment of some 150 pages and the transcript of the trial of some 1400 pages were served on the parties.

C. The plea of nullity and appeal proceedings

22. On 1 October 1992 the Public Prosecutor filed a plea of nullity and appeal against that part of the sentence concerning the applicant's acquittal. On 5 October 1992 the applicant filed a plea of nullity and appeal.

23. On 22 October 1992 the applicant commented on the plea of nullity lodged by the Public Prosecutor. Since he claimed that until the expiration of the time-limit for filing his plea of nullity the defence had had insufficient possibilities to inspect the file, the Supreme Court, on 24 December 1992, decided that the applicant should be granted a new time-limit for filing his plea of nullity and appeal.

24. On 19 February 1993 the applicant again filed a plea of nullity and an appeal against sentence. The writ repeated in substance the arguments raised earlier.

25. On 30 March 1993 the Graz Public Prosecutor withdrew the plea of nullity.

26. On 27 April 1993 the Procurator General (*Generalprokurator*) submitted the following comments on the applicant's plea of nullity:

"In the view of the Procurator General the plea of nullity of the accused Bernhard Lanz can be dealt with under Section 285d of the Code of Criminal Procedure. The transmission of a decision is requested. The plea of nullity lodged by the Public Prosecutor's Office has been withdrawn by the attached declaration of 30 March 1993."

27. On 9 June 1993 the Supreme Court, sitting in camera, rejected as inadmissible the applicant's plea of nullity.

28. On an unspecified date, the Senior Public Prosecutor submitted written comments on the applicant's appeal.

29. On 30 August 1993 the Graz Court of Appeal, after an oral hearing in which the applicant and his defence counsel participated, granted the Public Prosecutor's appeal against the applicant's sentence and increased it to five and a half years' imprisonment. In weighing the mitigating and aggravating circumstances, the court found that a higher sentence was called for.

II. RELEVANT DOMESTIC LAW

30. The following account of the relevant provisions of the Code of Criminal Procedure (*Strafprozeßordnung*) is based on the law in force until 1 January 1994.

31. According to S. 12 § 1 of the Code of Criminal Procedure, the Review Chamber at the First Instance Court supervises all measures taken by the Investigating Judge in the course of preliminary investigations.

32. According to S. 45 § 3 a person remanded in custody may meet his defence counsel in the absence of the Investigating Judge. However, if

detention on remand has been ordered on the ground of a danger of collusion, the Investigating Judge may, during the first 14 days of the detention, be present when the remand prisoner meets his defence counsel. If due to specific circumstances a danger exists that contact with defence counsel may interfere with evidence, the Investigating Judge may order the extension of such surveillance until the bill of indictment is served. Surveillance of contact with defence counsel may only be exercised as long as the detention on remand is based on a danger of collusion (SS. 180 and 193 § 3).

33. Under S. 180 §§ 1 and 2, a person may be held in detention on remand if he is seriously suspected of having committed a criminal offence and if there is a risk of his absconding, of collusion, or that the person might commit further offences. According to S. 193, detention may not last more than two months where its sole justification is the risk of collusion; it may not last more than six months where one of the other grounds is relied upon. The Court of Appeal may, however, extend detention if so requested by the Investigating Judge or the Public Prosecutor, and if the difficulty or the scope of the investigation makes it necessary. In such cases the maximum duration of detention is three months where the measure is based on a risk of collusion alone, and one to two years if the term of imprisonment which the suspect risks is ten years or more, for the other grounds.

34. By virtue of SS. 194 and 195, it is open to the suspect to apply for release at any time. Such an application and any appeal against a decision ordering detention on remand must be examined by the Review Chamber at a private hearing in the presence of the accused or his defence counsel. According to S. 114, there is a further appeal against decisions of the Review Chamber to the Court of Appeal.

35. Under S. 285 (d) § 1 a plea of nullity may be rejected by the Supreme Court after deliberations in private if the court unanimously finds that the complaint should be dismissed as being manifestly ill-founded without any need for further deliberations.

THE LAW

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

36. The applicant complains that in the proceedings concerning his requests for release from detention on remand the prosecution made submissions to which he had no possibility to reply.

37. The Court is of the opinion that this complaint falls to be considered under 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.”

38. The applicant submits that the Court of Appeal dismissed his appeal against the Review Chamber’s refusal to order his release from detention on remand after it had heard the Senior Public Prosecutor, and without giving him the possibility to reply to those submissions. He points out that on 28 November 1991 the Senior Public Prosecutor submitted written observations to the Court of Appeal on the applicant’s appeal against the Review Chamber’s decision of 6 November 1991. The submissions were lengthy and carefully reasoned. In those submissions the Senior Public Prosecutor requested that the applicant’s detention on remand be ordered on the further ground of a risk of absconding. The Government’s argument that these submissions did not contain new relevant information is incorrect.

39. The Government submit that in the proceedings before the Review Chamber on the applicant’s request for release from detention on remand, oral hearings were held in which the applicant, assisted by counsel, and the Public Prosecutor participated. The applicant had therefore the opportunity to reply to the submissions made by the Public Prosecutor at the hearing. As regards appeal proceedings on such issues before the Court of Appeal, the Government submit that the standard phrase in the introduction to decisions taken by the Court of Appeal - “after having heard the Senior Public Prosecutor” - only meant that the Senior Public Prosecutor had taken note of an appeal. It did not imply that he or she had participated in the deliberations of the Court of Appeal or actually made submissions. However, even if a Senior Public Prosecutor makes written submissions to a Court of Appeal, the failure to serve them on a detainee does not violate Article 5 § 4 of the Convention as proceedings under this provision need not offer the same procedural guarantees as proceedings under Article 6 of the Convention. In particular, such a step is unnecessary if, like in the present case, those submissions contain no new aspects (see No. 20055/92, *Moser v. Austria*, Dec. 13.4.94, unpublished).

40. The Court recalls that Article 5 § 4 of the Convention entitles arrested or detained persons to take proceedings bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty (*Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65). The domestic court dealing with such matters must provide the “guarantees of a judicial procedure”. The proceedings must be adversarial and must always ensure equality of arms between the parties - the prosecutor and the detainee (*Grauzinis v. Lithuania*, no. 37975/97, § 31, 10.10.2000).

41. 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 (*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 on-going 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, p. 27, § 67 and *Garcia Alva v. Germany*, no. 23541/94, § 39, 13.2.2001).

42. The Court recalls further that Article 5 § 4 guarantees no right, as such, to appeal against decisions ordering or extending detention as the above provision speaks of “proceedings” and not of “appeal”. The intervention of one organ satisfies Article 5 § 4, on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question (*Jecius v. Lithuania*, no. 34578/97, § 100, ECHR 2000-IX). Nevertheless, a State which sets up a second level of jurisdiction for the examination of applications for release from detention must in principle accord to the detainee the same guarantees on appeal as at first instance (*Toth v. Austria* judgment of 12 December 1991, Series A no. 224, p. 23, § 84).

43. In the Court's view the first instance proceedings before the Review Chamber do not raise any problem as hearings were held in which the applicant and the prosecution participated. This is also accepted by the applicant. The Court notes, however, that in the proceedings before the Court of Appeal on the appeal against the decision of the Review Chamber of 6 November 1991 the Senior Public Prosecutor, on 28 November 1991, submitted a written comment which was not served on the applicant. The Government submit that such a failure is not in breach of Article 5 § 4 because this provision would only require that the comments are served on the detainee if they contain relevant new information. They rely on a decision on admissibility of the Commission in the case of *Moser v. Austria* (No. 20055/92, *Moser v. Austria*, Dec. 13.4.94, unpublished).

44. It is true, as the Government indicate, that in the case of *Moser v. Austria* the Commission found that the failure to serve the Senior Public

Prosecutor's submissions on Mr. Moser did not infringe Article 5 § 4 as these submissions did not contain any relevant new aspect. But even if it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal litigation, they have to be "truly adversarial" and must always ensure equality of arms between the parties (*Grauzinis v. Lithuania*, op.cit., § 30). Whether or not a submission by the prosecution deserves a reaction is a matter for the defence to assess (*Bulut v. Austria* judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, § 49). This is so under Article 6 of the Convention and the Court sees no reason why it should be different under Article 5 § 4 of the Convention.

45. The Court concludes that the applicant was not given the guarantees appropriate to the kind of deprivation of liberty in question. Accordingly, there has been a breach of Article 5 § 4 of the Convention

II.. ALLEGED VIOLATION OF ARTICLE 6 § 3 (b) and (c) OF THE CONVENTION

46. The applicant complains that his right to a defence was prejudiced because his contacts with his defence counsel were placed under the surveillance of the Investigating Judge during the first two months of his detention on remand.

47. The Court finds that this complaint falls to be examined under Article 6 § 3 (b) and (c) of the Convention which read as follows:

"Everyone charged with a criminal offence has the following minimum rights: ...

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing ..."

48. The applicant submits that contacts with defence counsel may only be subject to surveillance under extraordinary circumstances and for a very short period. Such a measure would only be justified if there are clear indications that the contacts can be misused. The mere allegation that unknown witnesses could be influenced, or documents not discovered in the course of a house search could be removed, is too vague to justify such a far reaching interference with an accused's defence rights. Confidential conversations with defence counsel would have been necessary in order to formulate precise requests for the taking of evidence, which required comprehensive and detailed information on the course of the events.

49. The Government submit that the surveillance of the applicant's contacts with his defence counsel had been necessary in order to ensure successful investigations as there was a risk that, without it, the contacts between the applicant and his defence counsel would lead to an interference with evidence. There was a serious suspicion that the applicant would try to

influence employees of the SDBV or other still unknown witnesses, and to have documents removed. The temporary surveillance of the applicant's contacts with his defence counsel at the beginning of the criminal investigation did not hinder him in the exercise of his defence rights. Contacts with counsel had not been prohibited and, after surveillance ceased, he had had at his disposal more than six weeks before the bill of indictment was served on him and more than four months before the trial commenced, during which time he could communicate freely with his lawyer in order to prepare his defence.

50. The Court recalls that an accused's right to communicate with his defence counsel out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (*S. v. Switzerland* judgment of 28 November 1991, Series A no. 220, p. 16, § 48). In the latter case the Court noted that the risk of collusion merits consideration, however the possibility of several defence counsel collaborating with a view to co-ordinating their defence strategy was not sufficient to restrict the accused's rights of defence (*loc. cit.*, p. 16, § 49).

51. The Court observes that the surveillance of the applicant's contacts with his defence counsel lasted from 25 October until 25 December 1991 because of a risk that the applicant might influence witnesses or remove documents not yet seized.

52. However, the Court cannot find that these reasons are sufficient to justify the measure. Surveillance by the investigating judge of the contacts of a detainee with his defence counsel is a serious interference with an accused's defence rights and very weighty reasons should be given for its justification. This was so in the case of *Kempers v. Austria* where the applicant was suspected of being the member of a gang and utmost confidentiality was necessary in order to catch the other members (No. 21842/93, *Kempers v. Austria*, Dec. 27.2.97, unpublished). In the present case such extraordinary features cannot be made out. The Court finds that the domestic courts essentially relied on a risk of collusion, but this was the very reason for which detention on remand had already been ordered. The restriction on contacts with defence counsel for a person who is already placed in detention on remand is an additional measure which requires further arguments. The Court cannot find that the Austrian courts or the Government have furnished convincing arguments in this respect.

53. There has, therefore, been a violation of Article 6 § 3 (b) and (c) of the Convention.

III.. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

54. The applicant also complains that in the criminal proceedings against him the Procurator General submitted comments on his plea of nullity to the Supreme Court and the Senior Public Prosecutor submitted comments on his appeal which were not served on him. He relies on Article 6 of the Convention, which, in so far as relevant, provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an ... impartial tribunal established by law ..."

55. The applicant submits that in respect of both sets of proceedings the principle of equality of arms has been violated. As regards the appeal proceedings, he submits that the written submissions of the Senior Public Prosecutor would have been important for him because, without them, he could not properly prepare himself fully for the appeal hearing. At such a hearing, defence counsel has to reply immediately to the submissions of the Senior Public Prosecutor.

56. As regards the proceedings on the plea of nullity, the Government, referring to the *Bulut v. Austria* judgment (op.cit.), refrained from any further submissions. As regards the appeal proceedings, the Government acknowledged the facts but argued that, because an oral hearing had been held in which the Senior Public Prosecutor essentially repeated his written submissions, there was no need to serve the latter on the applicant..

57. The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent (*Dombo Beheer B.V. v. the Netherlands* judgment of 27 October 1993, Series A no. 274, p. 19, § 33; *Ankerl v. Switzerland* judgment of 23 October 1996, Reports 1996-V, p. 1567, § 38). In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice (*Bulut v. Austria* judgment, op. cit., § 47).

58. As regards the contents of submissions filed by the prosecution, the Court recalls further that the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality. It is a matter for the defence to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence (*Bulut v. Austria* judgment, op.cit. § 49).

59. In the present case the Procurator General filed a short comment on the applicant's plea of nullity which has not been communicated to the applicant.

60. The Court observes, that in the case of *Bulut v. Austria* it has found a breach of the principle of equality of arms because the Procurator General

had submitted to the Supreme Court comments on a plea of nullity - similar to those made in the present case - without bringing them to the attention of the accused. The Court sees no reason to come to a different conclusion in the present case and finds that the principle of equality of arms has not been respected in the proceedings before the Supreme Court.

61. As regards the appeal proceedings, the parties agree that the Senior Public Prosecutor submitted written observations on the applicant's appeal which were not served on the applicant. The Government argue, however, that because an oral hearing was held in which the Senior Public Prosecutor essentially repeated his written submissions, there was no need to serve these observations on the applicant.

62. The Court is not persuaded by the Government's argument. It finds that the situation is essentially the same as in the case of *Brandstetter v. Austria* where the Court found a breach of Article 6 § 1 on account of the failure of the Court of Appeal to communicate to the accused observations filed by the Senior Public Prosecutor (*Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, §§ 64-69). In that case the Court did not attach any weight to the fact that upon Mr. Brandstetter's appeal hearings were held before the Court of Appeal. The Court cannot see why a different approach should be taken in the present case. In a system where the filing of written observations by the parties before a hearing is not excluded and where a court, therefore, when deliberating on a case has at its disposal in addition to oral statements made at a hearing written statements filed beforehand, a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent.

63. In view of the above, the Court concludes that the principle of the equality of arms has also not been respected in the proceedings before the Court of Appeal.

64. There has, therefore, been a violation of Article 6 § 1 on account of the Attorney-General's submission of observations to the Supreme Court without the applicant's knowledge and the Senior Public Prosecutor's submissions to the Court of Appeal.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

"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."

A. Damage

66. The applicant claims 5.000,000 Austrian schillings (ATS) i.e. 363,364.17 euros (EUR) as pecuniary damage and submits that as a consequence of the criminal proceedings against him his business had gone bankrupt. Furthermore, he claims 1.000,000 ATS i.e. 72,672.83 EUR as non-material damage. He submits that as a consequence of the criminal proceedings against him he is suffering from psychic disturbances and needs regular medical treatment ever since.

67. The Government dispute the applicant's compensation claim. In their view the applicant has not substantiated his claim sufficiently and, in any event, a finding of a violation would in this case constitute sufficient satisfaction.

68. The Court finds no causal link between the violations of the Convention found and the claim for pecuniary damage. It accordingly dismisses the claim under this head (see, inter alia, the *Demir and Others v. Turkey* judgment of 23 September 1998, Reports 1998-VI, p. 2660, § 63).

69. However, the Court considers that the applicant has suffered certain non-pecuniary damage, which is not sufficiently compensated by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 3000 EUR under this head.

B. Costs and expenses

70. For costs incurred in the domestic proceedings the applicant claims 4,788,455.40 ATS i.e. 347,990.62 EUR. In the proceedings before the Convention organs the applicant, without specifying his claim, requests the court to grant a reasonable amount. These claims are disputed by the Government.

71. The Court recalls that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 80, 20.5.99). The Court considers that these conditions are only met as regards the costs incurred for the applicant's appeal against the Investigating Judge's decision of 11 November 1991, ordering surveillance of the applicant's contacts with his defence counsel, which the applicant puts at 6,797 ATS i.e. 493,96 EUR. Consequently the Court awards this sum.

72. As regards the claim for costs incurred in the Strasbourg proceedings the Court observes that the applicant, who has benefited of legal aid, has not specified the amount or submitted any documents in support of his claim, although having been reminded to do so. Accordingly, no award can be made under this head.

C. Default interest

73. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
2. *Holds* that there has been a violation of Article 6 § 3 (b) and (c) of the Convention;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 493,96 (four hundred ninety three euros ninety six cents) in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 January 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President