EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 25116/94

Jörg Rudolf Schöps

against

Germany

REPORT OF THE COMMISSION

(adopted on 17 September 1998)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a German national, born in 1953 and resident in Essen. He was represented before the Commission by Mr. K. Hütsch and by Mr. W. Küpper-Fahrenberg, both lawyers and notaries practising in Essen.

3. The application is directed against Germany. The respondent Government were represented by their Agent, Ms. H. Voelskow-Thies, Ministerialdirigentin, of the Federal Ministry of Justice.

4. The case concerns the applicant's complaint that, in the proceedings for the review of his detention on remand, his defence counsel had no access to the criminal files. The applicant invokes Article 5 para. 4 of the Convention.

B. The proceedings

5. The application was introduced on 4 July 1994 and registered on 12 September 1994.

6. On 4 July 1994 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 9 January 1996, after an extension of the time-limit fixed for this purpose. The applicant replied on 12 April 1996.

8. On 1 April 1997 the Commission (First Chamber) declared admissible the applicant's complaint under Article 5 para. 4 of the Convention. It declared inadmissible the remainder of the application.

9. The text of the Commission's decision on admissibility was sent to the parties on 25 April 1997 and they were invited to submit such further information or observations on the merits as they wished. No submissions were received.

10. On 2 December 1997 the case was transferred from the First Chamber to the Plenary Commission, by decision of the latter.

11. On 13 January 1998 the Commission examined the merits of the application and decided that, in accordance with Rule 53 para. 2 of the Rules of Procedure, the respondent Government should be invited to submit further written observations.

12. The Government submitted their observations on 4 March 1998. The applicant replied on 23 March 1998.

13. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

14. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM S. TRECHSEL, President
J.-C. GEUS
M.P. PELLONPÄÄ
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
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Mrs G.H. THUNE
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C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

15. The text of this Report was adopted on 17 September 1998 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

16. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

17. The Commission's decision on the admissibility of the application is annexed hereto.

18. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. Particular circumstances of the case

19. In 1992 the Essen Public Prosecutor's Office (Staatsanwaltschaft) started investigations against the applicant and numerous other suspects on the suspicion of fraud.

20. On 11 March 1993 the Essen District Court (Amtsgericht) issued an arrest warrant against the applicant as well as the other suspected persons Ms. S. and Ms. L. on the suspicion of criminal association, drug trafficking and several counts of fraud.

21. In its decision, the District Court noted that the suspects were charged with having founded - at the end of December 1988 - an association for the purpose of gaining large profits from fraudulent trading options. Moreover, as from mid 1990 the suspects agreed to import cocaine from Mallorca to the Federal Republic of Germany and to sell it there. Several other accomplices were recruited as members of the criminal organisation and involved in the numerous criminal offences. As regards the fraudulent trading options, almost one thousand victims were defrauded by the criminal association between the beginning of 1989 and March 1993, and a total damage of sixty million DEM was caused to them. Moreover, between October 1990 and August 1992 some hundred kilograms of cocaine were imported to, and sold in, Germany. The District Court found that, having regard to the statements of witnesses, the statements of the co-suspects, the results of telephone tapping and the 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.

22. The District Court also considered that there was a danger of absconding within the meaning of S. 112 para. 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 caused by them, they had to expect a long term of imprisonment. Moreover, the suspects obviously had sufficient financial means in order to finance absconding. According to the District Court, there was also a danger of collusion within the meaning of S. 112 para. 2 (3) of the Code of Criminal Procedure. The District Court assumed that

the suspects, as members of a criminal association, were used to disguising the extent of their activities by means of men of straw and fictitious contracts, and they were likely to suppress evidence or influence witnesses.

23. The applicant was arrested on 19 March 1993. In presence of his defence counsel Mr. Hütsch, he was informed by the Investigating Judge (Haftrichter) about the charges against him and about the arrest warrant of 11 March 1993. The applicant did not make any statements. He requested an oral hearing on the question of his detention Haftprüfung); he later withdrew this request.

24. Moreover, according to the applicant, his counsel applied, still in March 1993, at the Essen Public Prosecutor's Office, for a permission to consult the investigation files, which was refused on the ground that access to these documents would endanger the course of the investigations. This request and its refusal are not recorded in the files of the Public Prosecutor's Office.

25. In the ensuing proceedings, the applicant was also assisted by further counsel, including Mr. Küpper-Fahrenberg.

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

27. On 8 September 1993 the Essen District Court amended the arrest warrant, adding in particular further charges of tax evasion, corruption, incitement to making 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 only in the case of Mrs. S. could the danger be averted by less stringent measures. Thus the execution of the arrest warrant against Ms. S. could be suspended, whereas the applicant and Ms. L. had to be further remanded in custody.

28. On 14 September 1993 the applicant was informed about the amended arrest warrant. According to the record of this hearing, his counsel "again" ("nochmals") applied for access to the files. No action was taken upon this request as the duplicate copy of the files had 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.

29. On 14 September 1993 the Hamm Attorney General'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 Attorney General noted the history of the detention proceedings, and summarised the suspicion against the co-suspects. As to the details of the facts, he referred to the arrest

warrant and a police report of July 1993 which were to be found in the attached files. The strong suspicion against the co-suspects was, according to the Attorney General, based upon the statements of the suspects and of witnesses, the opinion of a stock taking expert, records of telephone tapping and seized business documents, all included in the investigations files. He also confirmed the danger of absconding.

30. 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 upon the Attorney General's submission on the ground that, despite promises made on several occasions, he had not yet been granted access to the investigation files and as the Attorney General's submissions were in themselves fragmentary.

31. According to a handwritten file note drafted by the Court of Appeal Rapporteur, the applicant's counsel, upon a telephone query, agreed to a decision on the question of the applicant's continued detention on remand without having previously had access to the files. According to the applicant, as confirmed by his counsel Mr. Hütsch and his counsel's colleague Mr. Pott, the Court of Appeal Rapporteur and counsel had agreed that he 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 had therefore promised to arrange for a consultation of the files.

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

33. The Court of Appeal, having regard to the result of the investigations so far, in particular the applicant's and the co-suspects' statements, the statements of the victims, the records of telephone tapping and seized business documents and the provisional opinion of a stock taking 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 the applicant had substantial financial means and real property in Mallorca. Moreover he had, until his arrest, had contacts in the United States of America, Switzerland and Spain.

34. 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 particular difficulty and extent of the investigations had not yet enabled a judgment to be reached. In this respect, the Court of Appeal noted that the investigation files already comprised 24 volumes, and that the indictment was envisaged for November 1993. Finally, the Court of Appeal stated that there had been no need for an oral review hearing.

35. 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 to him. He returned the files in January

1994. According to the applicant, his counsel applied for further consultation of the files in the beginning of 1994.

36. On 7 February 1994, following a change in the courts' competences, the Hamm Public Prosecutor's Office requested the Hamm Court of Appeal to order the applicant's continued detention on remand. The Prosecutor's Office enclosed the criminal files, which comprised 69 volumes and 3 subsidiary files (Beiakten).

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

38. On 1 March 1994 the Hamm Court of Appeal granted the request of 7 February 1994.

39. The Court of Appeal considered that the reasons stated in the Düsseldorf Court of Appeal's previous decision remained valid. Moreover, the proceedings had progressed. The police had prepared an intermediate report in January 1994 and given information according to which the questioning of about one thousand witnesses was almost 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.

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

41. 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 noted that he had been granted access to 22 volumes of the investigation files which, at that time, comprised altogether 132 volumes. He and his defence counsel had not, therefore, been able to properly comment upon the suspicion raised and to exercise the defence rights effectively.

42. On 2 May 1994 the Federal Constitutional Court (Bundes-verfassungsgericht) refused to entertain the applicant's constitutional complaint.

43. On 25 March 1994 the Essen Public Prosecutor's Office drew up the bill of indictment (Anklageschrift) against the applicant and four co-accused. They were charged with having committed various criminal offences. In particular the applicant was charged with having committed 91 counts of fraud, corruption, incitement to making a false entry in an official record and of 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 stated in detail the charges against the applicant, the relevant facts and the evidence, was served upon the applicant's counsel on 9 June 1994.

44. Moreover, on 9 June 1994 the Essen Public Prosecutor's Office forwarded copies of the investigation files, i.e. 132 main and 2 supplementary volumes - altogether about 16,000 pages, to the applicant's defence counsel for consultation. It requested that they be returned within one week in order to allow for consultation by the other defence counsel. On 23 June 1994, the Office sent a reminder as to 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.

45. On 30 June 1994 the Hamm Court of Appeal ordered the applicant's continued detention on remand. Upon the request of counsel of one of the applicant's co-accused, the date for the decision had been postponed for one week in order to allow adequate opportunity to file submissions.

46. 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 at issue in the bill of indictment. As regards the latter, further investigations were pending.

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

48. On 19 October 1994 the Hamm Court of Appeal discontinued the applicant's detention on remand. The Court of Appeal confirmed that there was still a strong suspicion against the applicant and the reasons for detaining him on remand persisted, however, his continued detention 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.

B. Relevant domestic law

49. SS. 112 to 131 of the Code of Criminal Procedure (Strafprozeß- ordnung) concern the arrest and detention of a person on reasonable suspicion of having committed an offence. According to S. 112 a person may be detained on remand if there is a strong suspicion that he or she committed a criminal offence and if there is a reason for arrest,

such as the risk of absconding and the risk of collusion. S. 116 regulates the suspension of the execution of an arrest warrant.

50. Under S. 117 of the Code of Criminal Procedure, the remand prisoner can request a hearing for review of the arrest warrant at any time. An oral hearing will be held upon the request of the remand prisoner, or if the court otherwise so decides (S. 118 para. 1). If the arrest warrant is confirmed following the review hearing, the remand prisoner is only entitled to a new review when the detention has altogether lasted for three months and after a lapse of two months since the last review hearing. S. 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.

51. SS. 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 S. 147 para. 1, defence counsel is entitled to consult the files, which have been presented to the trial court, or which would have to 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 the files or part of the files or the exhibits as long as the preliminary investigations have not terminated, if the course of the investigations would otherwise be endangered. During the preliminary investigations, the Public Prosecutor's Office decides on the question of granting defence counsel access to the files; thereafter the decision is taken by the trial court (S. 247 para. 4).

52. SS. 151 to 177 of the Code of Criminal Procedure regulate the principles of criminal prosecution and the preparation of the indictment. S. 151 provides that the opening of a trial presupposes an indictment. According to S. 152 the indictment is preferred by the Public Prosecutor's Office which is, unless otherwise provided, obliged to investigate any criminal offence of which there is a reasonable suspicion.

53. Preliminary investigations are conducted by the Public Prosecutor's Office according to SS. 160 and 161 of the Code of Criminal Procedure. On the basis of these investigations the Public Prosecutor's Office decides under S. 170 whether to prefer an indictment or to discontinue the proceedings.

54. In German court proceedings, everyone has the "right to be heard by a court in accordance with the law" ("Anspruch auf rechtliches Gehör"), pursuant to Article 103 para. 1 of the Basic Law (Grundgesetz).

55. According to the case-law of the Federal Constitutional Court (Bundesverfassungsgericht), this concept requires a court decision to be based solely on those facts and evidential findings on which the parties had the possibility to comment.

56. In cases involving arrest and detention on remand, the arrest warrant and the court decisions confirming it in review and appeal proceedings must be founded on those facts and that evidence of which the accused was previously aware and on which he was able

to comment (Federal Constitutional Court, decision of 11 July 1994 with further references).

57. In the aforementioned decision, the Federal Constitutional Court, applying this principle to cases involving arrest and detention, found that, following his arrest, an accused must be informed of the contents of the arrest warrant and must be promptly brought before a judge who, when questioning him, must inform him of all relevant incriminating evidence as well as of matters in his favour. Moreover, in the course of ensuing review proceedings, the accused must be heard and, to the extent that the investigations will not be prejudiced, the relevant results of the investigations at that stage must be put to him. In some cases, such oral information may not be sufficient. If the facts and evidence grounding a decision in detention matters cannot or can no longer be communicated orally, it is necessary to have recourse to other means of informing the accused, such as a right to consult the files (Akteneinsichtsrecht). Having regard to the demands of the efficient conduct of criminal investigations, there would be no objection to the statutory limitations on an accused's access to the files pending preliminary investigations. However, even pending those investigations, an accused who is detained on remand has a right of access to the files through his lawyer if and to the extent that information in them would affect the stance taken in the proceedings and oral information is not sufficient. If in such cases the prosecution refuses access to the files pursuant to S. 147 para. 2 of the Code of Criminal Procedure, the court cannot base its decision on those facts and that evidence and, if necessary, has to set the arrest warrant aside (Federal Constitutional Court, loc. cit.).

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

58. The Commission declared admissible the applicant's complaint that the procedures to review the lawfulness of his detention on remand did not comply with the requirements of Article 5 para. 4 of the Convention.

B. Point at issue

59. Accordingly, the issue to be determined is whether there has been a violation of Article 5 para. 4 of the Convention.

C. Article 5 para. 4 of the Convention

60. The applicant complains about the proceedings for the review of his detention on remand. He invokes Article 5 para. 4 of the Convention.

61. Article 5 para. 4 provides 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."

62. The applicant states that he could not effectively exercise his defence rights and question the lawfulness of his continued detention on remand. He submits that his defence counsel Mr. Hütsch repeatedly asked for access to the full files.

63. The Government maintain that Article 5 para. 4 does not give rise to a general right on the part of the accused detained on remand to inspect the files concerning the investigations against him. They submit that the applicant and his defence counsel had regular contact and, in the course of the detailed interrogations, they had ample opportunity to obtain a general view of the charges against the applicant as well as of the details thereof. They also note that the applicant's counsel had been granted access to the files on 22 November 1993 and again on 9 June 1994 which gave him sufficient knowledge of all relevant elements necessary for an effective defence in the review proceedings. At any stage of the proceedings, the applicant's counsel had been able to comment on the charges and the investigation measures in an effective and comprehensive manner.

64. The Commission recalls that the Convention requires that every deprivation of liberty should be "lawful". Lawfulness implies conformity with the substantive and the procedural rules of domestic law and also with the purpose of Article 5, namely to protect individuals from arbitrariness (cf. Eur. Court HR, Kemmache v. France (3) judgment of 24 November 1994, Series A no. 296-C, p. 88, para. 42). Continued detention on remand can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for liberty (cf. Eur. Court HR, Van der Tang v. Spain judgment of 13 July 1995, Series A no. 321, p. 17, para. 55).

65. The purpose of Article 5 para. 4 is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected (cf. Eur. Court HR, De Wilde, Ooms and Versyp v. Belgium judgment of 18 July 1971, Series A no. 12, p. 41, para. 76).

66. The procedure followed must have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question. The judicial proceedings referred to in Article 5 para. 4 need not always be attended by the same guarantees as those required under Article 6 para. 1 for civil or criminal litigation. In order to determine whether proceedings provide the "fundamental guarantees of procedure applied in matters of deprivation of liberty", regard must be had to the particular nature of the circumstances in which such proceedings take place (cf. Eur. Court HR, De Wilde, Ooms and Versyp judgment, op. cit., pp. 41 and 42, paras. 76 in fine and 78; Winterwerp v. the Netherlands judgment of 24 October 1979, pp. 23 and 24, paras. 57 and 60; Megyeri v. Germany judgment of 12 May 1992, Series A no. 237-B,

pp. 11-12, para. 22; Brannigan and McBride v. the United Kingdom judgment of 26 May 1993, no. 258-B, p. 54, para. 58).

67. One of the main safeguards inherent in judicial proceedings conducted in conformity with the Convention is the respect for "equality of arms", an indispensable feature of a really adversarial procedure (cf. Eur. Court HR, Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 19, para. 51; Lamy v. Belgium judgment of 30 March 1989, Series A no. 151, pp. 16-17, para. 29; Kampanis v. Greece judgment of 13 July 1995, Series A no. 318-A, p. 45, para. 47).

68. The opportunity of effectively challenging the statements or views which the prosecution bases on specific documents in the file, may in certain instances presuppose that the defence be given access to these documents (cf. Eur. Court HR, Lamy v. Belgium judgment of 30 March 1989, Series A no. 151, pp. 16-17, para. 29; No. 15964/90, Bernaerts v. Belgium, Comm. Report 30.6.93, not published; see also, mutatis mutandis, Eur. Court HR, Brannigan and McBride judgment, loc. cit.).

69. Given the Court's general approach in its Lamy v. Belgium judgment (loc. cit.), the Commission finds it is necessary to elaborate on the extent to which the defence must be given access to the prosecution file.

70. The Commission recalls that the purpose of detention under Article 5 para. 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus the facts which may raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (cf. Eur. Court HR, Murray v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 27, para. 55; see also No. 8224/78, Dec. 5.12.78, D.R. 15, p. 211; No. 10803//84, Dec. 16.12.87, D.R. 54, p. 35; No. 19601/92, Dec. 19.1.95, D.R. 80, p. 46). It is only at the stage of the trial, that Article 6 para. 1, taken together with paragraphs 2 and 3, requires the prosecution to inform the accused of the case that will be made against him so that he may prepare and present his defence accordingly, and adduce evidence sufficient to convict him (cf. Eur. Court HR, Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 33, paras. 76-78).

71. Accordingly, the information to be given to a person upon his arrest, pursuant to Article 5 para. 2, is limited to the essential legal and factual grounds for his arrest, so as to enable him, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 of Article 5 (cf. Eur. Court HR, Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 19, para. 40; Murray judgment, op. cit., p. 31, para. 72). It may be sufficient to inform the person concerned orally or hand over the arrest warrant (cf. Eur. Court HR, Lamy judgment, op. cit., p. 18, para. 32; Fox, Campbell and Hartley judgment, op. cit., pp. 19-20, paras. 41-43; Murray judgment, op. cit., pp. 32-33, paras. 76-78).

72. However, after a certain lapse of time, information on the legal and in particular the factual grounds of suspicion based on other than personal knowledge of the relevant material ceases to be sufficient, and the prosecution authorities must gradually provide the defence an opportunity to inspect the documents in the file on which the suspicion is based in order to satisfy the "fundamental guarantees of procedure applied in matters of deprivation of liberty" for the purposes of Article 5 para. 4.

73. In the present case, the applicant was, upon his arrest on 19 March 1993, informed by the Investigating Judge about the charges against him and about the arrest warrant. His defence counsel was present. Moreover, on 14 September 1993 the applicant was, again in the presence of his defence counsel, informed about the amended arrest warrant.

74. 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. In order to ascertain whether the applicant was actually adversely affected by the course of these review procedures, the Commission will take account of the state of the proceedings at the relevant time (cf. Eur. Court HR, Kampanis judgment, op. cit., p. 46, para. 49).

75. At the stage of proceedings leading to the first review hearing before the Düsseldorf Court of Appeal, the Public Prosecutor's Office refused any consultation of the investigation files on the ground that access to these documents would endanger the course of the proceedings. In this context, the Commission notes that, as stated by the Essen District Court in its decision of 11 March 1993, the suspects were likely to suppress evidence or influence witnesses.

76. In the Government's submission, the defence had failed to request access to the investigation files before September 1993. According to the applicant, his counsel had unsuccessfully requested access to the files already in March 1993.

77. The Commission considers that, in order to complain about an infringement of the principle of equality of arms in the review proceedings, the accused must have applied for permission to consult the files, in compliance with the national law (cf., mutatis mutandis, Eur. Court HR, Kampanis judgment, op. cit., p. 46, para. 51).

78. In the present case, the Commission, taking into account that the applicant's request of September 1993, as it was recorded in the files, presupposed an earlier request, finds that the absence of any record of this request in the file is, in itself, no sufficient proof to the contrary, as argued by the Government.

79. In any event, as the Government conceded, no immediate action was taken by the judicial authorities on counsel's request for access dated 14 September 1993. The Government explain that, for practical reasons, counsel's request of September 1993 was not considered, the original files being needed for the purpose of the continuing investigations, while their duplicates had already been sent to the Court of Appeal.

However, the Commission considers that the judicial authorities are under an obligation to organise their procedure in such a way as to meet the procedural requirements inherent in Article 5 para. 4 (cf., mutatis mutandis, Eur. Court HR, F.C.B. v. Italy judgment of 28 August 1991 judgment, Series A no. 208-B, p. 21, para. 33; Süßmann v. Germany judgment of 16 September 1996, Reports of Judgments and Decisions 1996, p. 1174, para. 55).

80. As regards the Government's further argument that counsel had agreed to a decision in the review proceedings without having previously had access to the files, the Commission recalls that the waiver of a right guaranteed by the Convention - insofar as it is permissible - must be established in an unequivocal manner. Moreover, in the case of procedural rights, a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance (cf. Eur. Court HR, Pfeifer and Plankl v. Austria judgment of 25 February 1992, Series A no. 227, pp. 16-17, para. 37). In the present case, the Commission finds that, given the circumstances surrounding the telephone conversation in question and bearing in mind the importance of the hearing before the Court of Appeal, it cannot be said that counsel, acting on the applicant's behalf, expressly or at least in an unequivocal manner, waived the right to inspect the files prior to the hearing on the question of the applicant's continued detention on remand.

81. On 3 November 1993, when the Düsseldorf Court of Appeal held the review hearing in the first set of proceedings, the applicant's defence counsel had not been able to inspect the investigation files. These files, which were at the disposal of the Court of Appeal, contained, according to the arrest warrant of March 1993, the statements of witnesses, the statements of the two other suspects and documents on telephone tapping. In September 1993 the Attorney General's Office, when requesting the prolongation of the applicant's detention on remand, based the suspicion against him on the contents of the investigation files, which also included the opinion of a stock taking expert and seized business documents. Accordingly, he had to provide for the applicant's defence at the hearing of 3 November 1993 before having had the opportunity to inspect the files which then comprised 24 volumes.

82. It is true that, in his reply to the Prosecutor's request for a prolongation of the applicant's detention on remand, counsel generally drew the Court of Appeal's attention to the limitations on the defence resulting from the refusal of access to the files.

83. The Commission notes the complexity of the investigations against inter alia the applicant and the large quantity of material on which the suspicion against the applicant was grounded and which was only generally referred to in the warrants of arrest as well as in the request for prolongation of the applicant's detention on remand of September 1993. In the course of the police interrogations, the defence may have obtained a general view of the charges involved, but, given the complexity of the case, such police information could not but remain fragmentary. In this situation, it was essential for the defence to be able to inspect the files prior to the first hearing before the Düsseldorf Court of Appeal in order effectively to challenge the lawfulness of the applicant's detention on remand which had already lasted more than eight months.

84. As regards the ensuing proceedings, the Commission notes that on 22 November 1993 the Prosecutor's Office decided to grant counsel access to the files. The files, or at least most of the then 24 volumes, were made available to counsel who returned them in January 1994.

85. However, when the Public Prosecutor's Office requested the continuation of the applicant's detention on remand in February 1994, criminal files, comprising 69 volumes and 3 subsidiary files were enclosed. These further files had not yet been made available to applicant's counsel.

86. At the time of the Hamm Court of Appeal's hearing on 1 March 1994, counsel had, therefore, consulted no more than a minor part of the case-file which was before the Court. Accordingly, in his written submissions to the Court of Appeal of 28 February 1994, counsel stated that he had only seen 22 volumes of the file and could not add anything to his previous observations. In this context, the Commission considers that a requirement of successive requests for access to further volumes of the case-file, as suggested by the respondent Government, appears too formalistic and disproportionate in a situation in which full access to the files had already been repeatedly requested and had, in principle, been granted in February 1994.

87. The Hamm Court of Appeal, on the basis of the contents of the file and the parties' submissions at the hearing, confirmed that the reasons previously stated by the Düsseldorf Court of Appeal remained valid.

88. In the Commission's view, it was essential for the defence to inspect the voluminous case-file in order effectively to challenge the lawfulness of the arrest warrant, as amended.

89. Whereas the Public Prosecutor, the Düsseldorf Court of Appeal and the Hamm Court of Appeal were familiar with the whole file, these procedures did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify his remand in custody. The Commission finds that under these circumstances the procedures were not truly adversarial and did not therefore comply with the basic requirements of judicial proceedings. In this context, the Commission recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (cf. Eur. Court HR, Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 16, para. 33).

90. As regards the procedure leading to the third review hearing, the Commission notes that all 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 upon him. The Commission notes that counsel had the files, comprising 132 main and 2 supplementary volumes at his disposal for consultation for a period of at least two weeks before the Hamm Court of Appeal decided upon the applicant's continued detention on remand on 30 June 1994. Consequently, he was given the opportunity of acquainting

himself with the essential parts of the admittedly voluminous files and of presenting appropriately the applicant's defence.

91. In sum, the Commission finds that the procedures before the Düsseldorf Court of Appeal and before the Hamm Court of Appeal, insofar as they reviewed the lawfulness of the applicant's continued detention on remand in November 1993 and March 1994, respectively, did not comply with the guarantees afforded by Article 5 para. 4.

CONCLUSION

92. The Commission concludes, by 27 votes to 5, that in the present case there has been a violation of Article 5 para. 4 of the Convention.

M. de SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

DISSENTING OPINION OF MRS. J. LIDDY
JOINED BY MR. G. JÖRUNDSSON, MRS. G.H. THUNE, MM. L. LOUCAIDES AND I. CABRAL BARRETO

After considerable hesitation I voted against a finding of violation for the reasons set out in my separate opinion in Garcia Alva v. Germany, Application No. 23541/94.