AS TO THE ADMISSIBILITY OF

Application No. 20365/92
by Ismail ALKIN
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 30 November 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 July 1992 by Ismail ALKIN against Austria and registered on 24 July 1992 under file No. 20365/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 22 February 1994 and the observations in reply submitted by the applicant on 18 April 1994;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the parties, may be summarised as follows.

The applicant is a Turkish national, born in 1943 and residing in Gelsenkirchen (Germany). Before the Commission he is represented by Mr. Weh, a lawyer practising in Bregenz (Austria).

A. The particular circumstances of the case

On 19 May 1989, following the applicant's arrest on 11 May 1989, the investigating judge at the Feldkirch Regional Court (Landesgericht) heard him as a suspect. He had been accused by B. of having, together with an accomplice A., threatened him with a knife, taken SF 1,200 and his Swiss asylum papers from him and having attempted by way of threat to make him pay another SF 5,800. The applicant submitted that he was innocent. He had not been present at the incident at issue. B. had told him that he owed money to A. and that A. had threatened him with a knife and had taken money and his papers from him. However, when they went to see A., the latter, who did not have a knife, said that he

would return the papers as soon as B. had paid his debts.

On 22 May 1989 the investigating judge at the Feldkirch Regional Court ordered the applicant's detention on remand. Referring to S. 180 para. 2 subparas. 1 and 2 of the Code of Criminal Procedure (Strafprozeßordnung), he found that there was a reasonable suspicion that the applicant, together with an accomplice, had committed aggravated robbery (schwerer Raub), attempted aggravated extortion (schwere Erpressung) and suppression of documents (Urkundenunterdrückung). Furthermore, there was a danger of collusion and a danger of the applicant's absconding.

On 22 June 1989 the Feldkirch Public Prosecutor's Office (Staatsanwaltschaft) preferred the indictment against the applicant charging him with partly completed, partly attempted aggravated intimidation (Nötigung) and suppression of documents.

On 4 July 1989, at the trial before the Feldkirch Regional Court, B., the only witness against the applicant did not appear. The trial was adjourned. The applicant was released from detention on remand.

On 5 January 1990 the Public Prosecutor's Office withdrew the indictment against the applicant on the ground that the said witness had moved and his actual whereabouts could not be established. The same day he also requested that a decision be taken that the applicant had no claim for compensation under S. 2 para. 1 (b) of the Criminal Proceedings Compensation Act (Strafrechtliches Entschädigungsgesetz).

On 11 January 1990 the Feldkirch Regional Court decided to discontinue the criminal proceedings against the applicant. This decision was served on the applicant on 18 January 1990, together with the request to comment, within one week, on the Public Prosecutor's above request to deny him compensation for his detention on remand.

On 24 January 1990, before the end of the one-week deadline the Judges' Chamber (Ratskammer) at the Feldkirch Regional Court decided that the applicant had no claim for compensation in respect of his detention.

On 6 March 1990 the Innsbruck Court of Appeal (Oberlandesgericht), upon the applicant's appeal, quashed this decision on the ground that he had not been given the possibility to comment on submissions by the Public Prosecutor's Office. The matter was sent back to the Regional Court.

On 9 September and 17 October 1991 the applicant made submissions as regards his compensation claim. He pointed out that he had been taken in detention on remand on the suspicion of aggravated robbery. However, this initially existing suspicion had already been dissipated at the time when the Public Prosecutor had preferred the indictment against him, as he was only indicted for aggravated intimidation. Therefore, he had a right to compensation under S. 2 para. 1 (b) of the Criminal Proceedings Compensation Act. As regards the charge of aggravated intimidation, the applicant argued that, as he did not have any previous convictions, he would not have been sentenced to imprisonment and, therefore, his detention on remand was unlawful.

On 22 November 1991 the Judges' Chamber at the Regional Court again dismissed the applicant's claim. The Judges' Chamber found that the conditions for compensation under S. 2 para. 1 (b) of the Criminal Proceedings Compensation Act were not met. The Judges' Chamber considered in particular that the Public Prosecutor's Office had withdrawn the indictment because the only witness, B., could not be heard. The suspicion against the applicant had not been dissipated. Moreover, the applicant's detention on remand had been justified because at that time a reasonable suspicion of his having committed the offences in question existed. Furthermore, there had been a danger of

collusion and a danger of the applicant's absconding.

On 11 December 1991 the applicant filed an appeal with the Innsbruck Court of Appeal. He complained inter alia that the Judges' Chamber had not dealt with his argument that the suspicion of aggravated intimidation, which remained after the original suspicion of aggravated robbery had been dissipated, did not justify his detention on remand. The Innsbruck Court of Appeal subsequently referred the file to the Innsbruck Senior Public Prosecutor's Office (Oberstaatsanwaltschaft) for comments.

On 20 December 1991 the Senior Public Prosecutor's Office submitted its comments. It stated in particular that, aside from the fact that the applicant was suspected of robbery when he was arrested, detention on remand was also justified by the reasonable suspicion, as stated in the indictment, that he had committed partly completed partly attempted aggravated intimidation and suppression of documents, if there was a risk of absconding. This suspicion too, was not dissipated. The only reason why the indictment was withdrawn was that the prosecutor's witness could not be found.

On 30 December 1991 the Innsbruck Court of Appeal, sitting in camera, dismissed the applicant's appeal. There was no representative of the Senior Public Prosecutor's Office present at the deliberations.

The Court of Appeal confirmed the reasoning by the Judges' Chamber that the question of whether the applicant had committed the offences at issue was still open. At the time of the applicant's arrest there were reasonable grounds to suspect him of having committed aggravated robbery as well as attempted aggravated extortion and suppression of documents. Only after the applicant's hearing before the investigating judge it turned out that it would hardly be possible to furnish proof that he and his accomplice obtained, or intended to obtain, property unlawfully, which prompted the Public Prosecutor to prefer an indictment for partly completed and partly attempted aggravated intimidation and for suppression of documents.

Further the Court dismissed the applicant's argument that these offences, triable by a single judge of the court of first instance, could not justify detention on remand. Referring, inter alia, to S. 180 paras. 1 and 2 of the Code of Criminal Procedure, the Court found that the condition for detention on remand was, that there is a reasonable suspicion that the accused has committed a certain crime or misdemeanour, and that one of the grounds for detention is established. In respect of the partly completed and partly attempted aggravated intimidation, the reasonable suspicion which led to the applicant's detention, had not been dissipated subsequently. The Public Prosecutor only withdrew the indictment as it proved impossible to find the whereabouts of B., who had been the only witness of the offence. The decision was served on 15 January 1992.

B. Relevant domestic law

1. Detention on remand

Under S. 180 paras. 1 and 2 of the Code of Criminal Procedure (Strafprozeßordnung), a person may be held in detention on remand - where there are serious grounds for suspecting him of having committed a criminal offence - if there is a risk of his absconding, of collusion or of committal of the offences.

2. Compensation regarding pecuniary damages resulting from detention on remand

The Criminal Proceedings Compensation Act (Strafrechtliches Entschädigungsgesetz) provides for compensation regarding pecuniary damages resulting from detention on remand. The conditions to be met

are laid down in SS. 2 and 3. S. 2 para. 1 (a) concerns the case of unlawful detention on remand. S. 2 para. 1 (b) mentions as conditions that the accused was acquitted, or that the proceedings against him were otherwise discontinued and the suspicion that he had committed the offence in question did not subsist, or that there was a bar to prosecution which had already existed at the time of his detention.

As regards the proceedings, S. 6 stipulates in particular that the court of second instance regarding the order or prolongation of the detention on remand is competent to decide upon whether the conditions under SS. 2 and 3 are met, the detained person has to be heard and, if necessary, evidence has to be taken. The detained and the Prosecutor's Office have a right to appeal to the superior court which can take, if necessary, further evidence. The final decision in these proceedings is binding.

If the said courts find that the conditions under S. 2 and 3 are met, the injured person has to file a request with the Department of Finance (Finanzprokuratur) for acknowledgment of his claim. If there is no decision upon his request within six months or if his claim is partly or fully refused, the person concerned has to institute civil court proceedings against the Republic of Austria (SS. 7 and 8).

COMPLAINTS

1. The applicant complains under Article 5 para. 5 of the Convention about the refusal of compensation for his detention on remand. He submits that he was suspected of offences which are usually not punished with a prison sentence and that, therefore, his detention on remand was unlawful within the meaning of Article 5 para. 1 (c).

2. He further complains under Article 6 para. 1 of the Convention that the compensation proceedings before the Court of Appeal were unfair. He submits in particular that the Senior Public Prosecutor's Office, submitted a written statement on his appeal to the Court of Appeal, of which he was not informed.

3. Lastly, the applicant in a letter dated 19 October 1993 stated that he, on the basis of the facts already contained in his application, also wished to complain under Article 6 para. 2 of the Convention that the Austrian Courts' decision to refuse him compensation for his detention on remand violated the presumption of innocence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 July 1992 and registered on 24 July 1992.

On 1 December 1993 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 22 February 1994 the Government submitted their observations. The observations in reply by the applicant were submitted on 18 April 1994.

THE LAW

1. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention about the unfairness of proceedings concerning his request for compensation for detention on remand. He submits in particular, that the Court of Appeal gave the Senior Public Prosecutor's Office the possibility to make written observations on his appeal. However, he was not informed about these observations.

Article 6 para. 1 (Art. 6-1), so far as relevant, provides as

follows:

"In the determination of his civil rights and obligations, ..., everyone is entitled to a fair and public hearing ..."

As regards the applicability of Article 6 para. 1 (Art. 6-1), the Government submit that the proceedings under the Criminal Proceedings Compensation Act concern a public law claim. They point out that the Commission, in the case of Bach v. Austria (No. 9661/82, Dec. 14.7.83, D.R. 34, p. 127) did not apply Article 6 (Art. 6) to proceedings under the Criminal Proceedings Compensation Act, finding that the claim is not comparable to claims under the Law of Damages, as is does not require a punishable conduct by a civil servant or a violation of the law at all. Moreover, the proceedings under the Criminal Proceedings Compensation Act, as far as they are conducted by the criminal courts, are only of a preparatory nature. Once the criminal courts have decided on the validity of a compensation claim, compensation has to be requested from the Federal Government, represented by the Department of Finance. If the Department does not decide within six months or if it refuses the claim, action must be brought before the civil courts. Therefore, the outcome of the contested proceedings was not directly decisive for the applicant's civil rights. The applicant contests this view.

As regards the compliance with Article 6 para. 1 (Art. 6-1), the Government submit that the principle of equality of arms was not violated by giving the Senior Public Prosecutor's Office the possibility to comment on the applicant's appeal. In particular, it was not necessary to let the applicant again comment on the Senior Public Prosecutor's statement as it contained no new arguments.

The applicant submits that the right to be heard and to make comments on the other party's observations has to be granted irrespective of whether or not these observations contain new arguments. Moreover, had he been given the possibility, he would have contested the Senior Public Prosecutor's view that the charge of aggravated intimidation justified his detention on remand, and would have shown that according to court practice nobody was sentenced to imprisonment on the charge of intimidation.

After an examination of this issue in the light of the parties' submissions, the Commission considers that it raises questions of fact and law which can only be determined by an examination of the merits. It follows that this complaint cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

2. The applicant further complains under Article 5 para. 5 (Art. 5-5) of the Convention about the refusal of compensation for his detention on remand. He submits that he was suspected of offences which are usually not punished with a prison sentence and that, therefore, his detention on remand was unlawful within the meaning of Article 5 para. 1 (c) (Art. 5-1-c).

The Commission recalls that Article 5 para. 5 (Art. 5-5) only applies, if a breach of any other provision of Article 5 has been established (Eur. Court H.R., Keus judgment of 25 October 1990, Series A no. 185-C, p. 68, para. 29).

In the present case, the Austrian Courts, in the course of the compensation proceedings, dealt with the question of whether the applicant's detention had been unlawful. In particular, the Innsbruck Court of Appeal, in its decision of 30 December 1991, found that there were reasonable grounds to suspect the applicant of having committed, inter alia, aggravated robbery at the time of his arrest. Furthermore, his detention on remand was justified under S. 180 paras. 1 and 2 of

the Code of Criminal Procedure, even after it turned out that there were only reasonable grounds to suspect him of offences triable by a single judge.

As to the proceedings before the Commission, no separate complaint of a violation of Article 5 para. 1 (c) (Art. 5-1-c) has been raised by the applicant. The Commission notes that it cannot ex officio examine the compatibility of the applicant's detention with Article 5 para. 1 (c) (Art. 5-1-c), as the detention came to an end more than six months before the introduction of the application (Article 26 (Art. 26) of the Convention).

In these circumstances the Commission finds no appearance of a violation of Article 5 para. 1 (c) (Art. 5-1-c). Consequently, there is no basis to examine the applicant's complaint under Article 5 para. 5 (Art. 5-5).

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant, in his submissions of 19 October 1993, also complains under Article 6 para. 2 (Art. 6-2) that the Austrian Courts' decision to refuse him compensation for his detention on remand violated the presumption of innocence.

The Commission recalls that, following the discontinuation of criminal proceedings, only statements which reflect the opinion that the person concerned is guilty, and not statements which merely describe a state of suspicion, infringe the presumption of innocence (see Eur. Court H.R., Sekanina judgment of 25 August 1993, Series A no. 266-A, pp. 13-16, paras. 24-30).

In the present case, the Austrian Courts dismissed the applicant's compensation claim on the ground that, although the proceedings against him had been discontinued, the suspicion had not been dissipated.

The Commission, even assuming compliance with the six months' rule under Article 26 (Art. 26) of the Convention, considers that the applicant failed to show that the reasoning of the Austrian Courts amounted to any finding of guilt.

It follows that this part of the application must be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES ADMISSIBLE the applicant's complaint that he did not have a fair hearing relating to his compensation claim for detention on remand, as he did not obtain, and had no possibility to comment upon, the submissions filed by the Senior Public Prosecutor's Office with the Innsbruck Court of Appeal,
without prejudging the merits,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)