AS TO THE ADMISSIBILITY OF

Application No. 28976/95
by Marek BUDZISZ
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 27 November 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

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 22 August 1995 by Marek BUDZISZ against Germany and registered on 26 October 1995 under file No. 28976/95;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1960, is a Polish national and resident in Poznan, Poland. When lodging his application he was detained at the Moabit Prison in Berlin. In the proceedings before the Commission, he is represented by Mr. B.F. Müller, a lawyer practising in Hamburg.

The facts of the case, as submitted by the applicant, may be summarised as follows.

In August 1989 preliminary investigations were started against persons unknown on the suspicion of aggravated robbery. In the course of the proceedings, the victims of the robbery and other witnesses were heard and several suspects were questioned and detained on remand. In September 1989 the suspicion arose that the applicant had been involved in the offence at issue and investigations were commenced against him.

On 28 September 1989 the Berlin Tiergarten District Court (Amtsgericht) issued an arrest warrant against the applicant on the suspicion of having acted as an accomplice to aggravated robbery and having caused serious bodily harm. The District Court, having regard to the evidence given by several witnesses as well as the statements made by two further suspects, found that there was a strong suspicion against the applicant and another accomplice that, on 10 August 1989,

they had together with other accomplices robbed two women and stolen jewellery and had caused bodily harm to the two women as well as to a further person, Mr. R. The Court noted in particular that one of the victims had recognised the applicant as one of the assailants.

On 1 February 1994, when entering the territory of the Federal Republic of Germany, the applicant was arrested by the Görlitz frontier police on the basis of the above arrest warrant. Mr. Müller, having been retained by the applicant's family, acted as defence counsel on the applicant's behalf as from 16 February 1994. On 23 February 1994 the applicant was transferred to the Moabit Prison in Berlin. The applicant eventually also retained Mr. Müller as counsel who, on 4 March 1994, applied to the Berlin District Court to be appointed as official defence counsel. On 12 April 1994 the Tiergarten District Court ordered the applicant's continued detention on remand.

On 2 May 1994 the Berlin Public Prosecutor's Office (Staats-anwaltschaft) drew up the bill of indictment (Anklageschrift) against the applicant. The applicant was charged with having, as an accomplice of Mr. Z, who was prosecuted in separate proceedings, committed robbery and having caused bodily harm. It was alleged that the applicant and his accomplice Mr. Z. had lain in wait for the witnesses Ms. A.Z. and Ms. K.Z., owners of a shop dealing in antique jewellery, in the front of a house in Berlin, where Ms. A.Z. had been residing at the relevant time, in order to steal their jewellery. Both accused had hit the two women causing injuries to their faces. The witness Mr. R. who had come to their rescue had been sprayed with teargas. The accused had then escaped with a car driven by a further unknown person, taking along two bags which had only contained used clothes and books.

On 18 May 1994 the Presiding Judge of the 10th Criminal Chamber at the Berlin Regional Court granted the defence's request for appointment of an interpreter. The Presiding Judge, noting that Mr. Müller appeared still prepared to act as chosen defence counsel, found no need to appoint him as official defence counsel. The date for the hearing on the question whether to commit the applicant for trial (Zulassung der Anklage) was fixed for 5 July 1994. On 20 and on 30 May 1994 Mr. Müller reminded the Regional Court about his request for appointment as official defence counsel.

On 1 June 1994 the 10th Criminal Chamber committed the applicant for trial and ordered his continued detention on remand. The Chamber, having regard to the complexity of the case, in particular the evaluation of evidence after a substantial lapse of time, decided to sit with three professional judges, including the Presiding Judge, as well as two lay assessors. Moreover, the Presiding Judge appointed Mr. Müller as the applicant's official defence counsel and authorised him to inspect the files, if necessary through counsel in Berlin acting as agent, and confirmed the appointment of the interpreter. He further fixed 5 July 1994 as the date for the opening of the trial, which was to be continued on 12 and 22 July, 2 and 12 August 1994.

On 5 July 1994 the trial opened before the 10th Criminal Chamber, composed of the Presiding Judge Hi. and Judges Hä. and Ro. The Chamber heard the applicant, the Public Prosecutor and several witnesses and also inspected various documents. The defence requested to hear particular witnesses who would testify that the applicant had been in Poland at the relevant time and presented their written statements on this point. At the end of the hearing, the Chamber, having regard to the result of the preliminary investigations and the taking of evidence so far, dismissed the applicant's request to discontinue his detention on remand. The Chamber found that, on the basis of the investigations and the taking of evidence so far, there was a strong suspicion that he had committed the offences in question. There were no other, more lenient means to prevent him from absconding.

According to the applicant, the Presiding Judge, in the course

of the first hearing day, offered him a "deal", i.e. the discontinuation of the prosecution for robbery and his release from detention, if he pleaded guilty of forgery of documents, namely identity papers used as means of evidence in the proceedings against him. He had refused, claiming his innocence. No such incident was recorded in the trial records.

The trial continued on 12 and 22 July 1994. At the hearing of 22 July 1994, the Presiding Judge refused the requests of the defence that certain passages of a witness statement of 5 July 1994 as well as the statements made by the Presiding Judge regarding the "deal" be added to the trial record. The Presiding Judge found that these requests were belated. The applicant's renewed request to be released from detention on remand was dismissed.

On 25 July 1994 the Berlin Court of Appeal (Kammergericht) dismissed the applicant's appeal against the decision of 5 July 1994 on his continued detention on remand. The Court of Appeal noted that the Regional Court had confirmed the strong suspicion against the applicant on the basis of both the preliminary investigations and the result of the taking of evidence at the trial hearing. The question whether the hearing of the further witnesses, in particular those called by the defence, would eventually lead to another conclusion had to be reserved for the final evaluation of evidence. Moreover, there was still a danger of the applicant's absconding as he was possibly facing a long prison sentence and had no personal or social links in the Federal Republic of Germany.

At the further hearing of 2 August 1994, the Presiding Judge, following deliberations of the Chamber, made a statement to the effect that the defence's request of 22 July 1994 for the amendment of the trial records was misleading or even wrong when referring to a "deal".

On 3 August 1994 the defence challenged the Presiding Judge Hi. as well as the Judges Hä. and Ro. According to the defence, Presiding Judge Hi. had put a trick question to one of the witnesses for the defence and, when questioning a further witness for the defence, he had talked about the visit of the Federal President to Poland. Moreover, he had postponed the hearing of 2 August 1994 at 5.10 p.m. before the defence had finished its pleadings. The two other Judges were biased for failure to oppose to the Presiding Judge's conduct of the proceedings. Moreover, the formulation of a question put by Judge Ro. to one of the witnesses for the defence was criticised.

On 11 August 1994 the 10th Criminal Chamber, composed of three other judges, dismissed this motion. The Chamber considered that there were no reasons to doubt the Judges' impartiality. In particular, the Presiding Judge had, for reasons of lack of acoustical clarity, put a further question to the witness concerned in order to remove any possible uncertainty. The other defence submissions did not disclose any appearance of lack of impartiality, either. As regards the postponement of the trial hearing, the Chamber noted the official statements of the three Judges, according to which they had been conducting hearings since 8.30 a.m. and, due to the midsummer temperatures, had been exhausted in the late afternoon. In such circumstances, it would not have been fair to continue. Moreover, according to the trial record, the defence had not been interrupted. With regard to the two other Judges, the Chamber observed that it was for the Presiding Judge to decide on the conduct of the hearing and, in any event, there had been no misconduct on his part. Furthermore, Judge Ro. had put questions in order to achieve a comprehensive testimony, and the criticised formulation had not been objected to at the trial.

At the hearing of 12 August 1994 the 10th Criminal Chamber of the Regional Court rejected the defence's request for an amendment of the trial record of 2 August 1994 as having been lodged out of time.

Furthermore, the Chamber dismissed the applicant's renewed request for release from detention on remand. On 17 August 1994 the Berlin Court of Appeal rejected the applicant's appeal of 2 August 1994 against the decision of 22 July 1994 on his continued detention on remand on the ground that it had been superseded by the decision of 12 August 1994.

At the trial hearing of 22 August 1994, the Chamber dismissed the defence's request to hear a further witness, who was not present, on the ground that the facts to be confirmed could be assumed in the applicant's favour. The request for an expert opinion on the applicant's credibility was dismissed on the ground that the Chamber, on account of its many years of experience, could assess this matter without expert assistance. Further requests for the taking of evidence were rejected on the ground that the witnesses concerned had already been questioned on the relevant matters. The request for an expert opinion on the distance between the applicant's place of residence and Berlin was dismissed on the ground of the Chamber's own knowledge. The taking of some further evidence was refused as being irrelevant or on the ground that the issues concerned, in particular the applicant's previous blameless conduct of life, could be assumed in his favour.

At the end of the trial hearing of 22 August 1994 the applicant was convicted of aggravated robbery, S. 249 of the Penal Code (Strafgesetzbuch), and of having caused serious bodily harm, S. 223 a of the Penal Code. He was sentenced to six years' imprisonment.

As regards the relevant facts, the 10th Criminal Chamber found that the victims A.Z. and K.Z. were running a shop for antique jewellery in Berlin Charlottenburg. Ms. K.Z. had remembered that the applicant and an unknown person had visited their shop about mid-July 1989 and had looked at the goods exhibited without buying anything. In the evening of 10 August 1989 both victims returned to Ms. A.Z.'s apartment, taking as usual the precious jewellery as well as some bags with old clothes and books as camouflage along. When the two women entered the house, the applicant and the separately prosecuted Mr. Z. had come out of a parked car and followed them into the entrance. Ms. K.Z. had turned on the stairs and had been able to see the applicant face to face. The applicant had then hit her face and sprayed her with tear gas in order to break her resistance. In the meantime Z. had pushed Ms. K.Z. to the ground and had also hit her. Due to their loud shouts for help, a witness living on the ground floor had come to the staircase. Thereupon, both offenders had left, taking the two camouflage bags with them. At some distance they had entered a car waiting for them with an unknown driver and had driven away.

The Chamber rejected the applicant's defence that on 10 August 1989 he had not been in Berlin, but had been engaged on construction works in Poland. In evaluating the evidence, the Chamber considered in particular the statements of three eye-witnesses that having regard to his age and stature the applicant was possibly the offender. One of these witnesses had remembered the registration number of the "getaway" car, and, in the course of the ensuing investigations, forged identity papers with the applicant's photograph had been discovered. On a table containing this photograph and photographs of similar appearance persons, the applicant had been identified by the witnesses A.Z. and K.Z. in September 1989, in the course of the police investigations. The Chamber noted that, on the occasion of a "covert" confrontation with several persons including the applicant in March 1994, Ms. K.Z. had mentioned the persons numbered 2 or 4 and Ms. A.Z. had pointed at person number 4. The applicant had been number 2; number 4 had been a police officer resembling him like a twin brother. In any event, at the trial, both witnesses had recognised the applicant beyond doubt. Ms. A.Z. had explained that she had memorised his face because of his brutal attack on her daughter K.Z. Ms. K.Z. had indicated that she had seen the applicant face to face before he had hit her. As regards her error on the occasion of the earlier confrontation, she had referred to the striking resemblance

of the two persons and also indicated that she had erroneously thought that she was being confronted with the accomplice.

The Chamber regarded the statements made by the witnesses A.Z. and K.Z. as reliable and credible. Considering its own knowledge, the Chamber found the taking of expert evidence on their witness qualities, their way of giving evidence and their credibility unnecessary. The lapse of time between the offence and the trial, the witnesses' way and capability of giving evidence had been taken into account when assessing the evidence.

Assuming that the applicant had been engaged on construction works between August and September 1989, the Chamber was convinced that he had interrupted these works and had been in Berlin on 10 August 1989. The witnesses for the defence had either not been present at the construction sites at the relevant time, or they had based their statements confirming the applicant's presence in Poland on assumptions and not on direct memory. None of these witnesses had been able to give details of the applicant's presence or any work performed by him.

The applicant was acquitted of the charge of having caused bodily harm to the detriment of Mr. R., as it could not be established whether he or his accomplice had sprayed the teargas.

On 23 August 1994 the applicant lodged an appeal on points of law (Revision) against his conviction. The written version of the judgment was served upon the defence on 2 November 1994. The appeal reasons were filed on 30 November 1994. As regards the complaint about bias on the part of the Presiding Judge Hi. as well as Judges Ro. and Hä., the defence referred to the motion of 3 August 1994 and also mentioned the "deal" allegedly proposed by the Presiding Judge at the hearing of 5 July 1994. The appeal further criticised the Chamber's taking and evaluation of evidence.

In his observations in reply of 24 February 1995, the Federal Public Prosecutor (Generalbundesanwalt) at the Federal Court of Justice (Bundesgerichtshof) maintained that the motion of 3 August 1994 had been correctly dismissed as there were no reasons to doubt the Judges' impartiality. The further complaints, in particular about the taking and evaluation of evidence, were likewise unfounded.

On 21 March 1995 the Federal Court of Justice amended the judgment of 22 August 1994 to the effect that the applicant was convicted of attempted aggravated robbery and of having caused serious bodily harm. The remainder of the appeal was dismissed. Having regard to its case-law, the Federal Court of Justice found that the offence in question only constituted an attempt. However, taking into account the grievous bodily harm inflicted by the applicant, it could be excluded that the trial court would have imposed a more lenient sentence.

On 29 June 1995 a group of three judges of the Second Chamber of the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain the applicant's constitutional complaint (Verfassungs-beschwerde).

COMPLAINTS

The applicant complains under Article 5 para. 1 (a) and Article 6 of the Convention about his conviction and his ensuing detention as well as of the criminal proceedings against him.

The applicant maintains that, from the outset, the proceedings against him were wrongly conducted. He submits in particular that the 10th Criminal Chamber only decided to commit him for trial as a sanction for him having insisted upon having Mr. Müller appointed as official defence counsel.

The applicant also complains about the Chamber's taking and evaluation of evidence, in particular the refusal of his requests to take further evidence. In his view, he was merely convicted for having refused the "deal" allegedly offered at the hearing of 5 July 1994.

The applicant further considers that the 10th Criminal Chamber lacked impartiality. In this respect, he refers to the allegedly improper conduct of the proceedings as a whole and in particular to the alleged proposal of a "deal".

THE LAW

1. The applicant complains under Article 5 para. 1 (Art. 5-1) of the Convention that his conviction by the 10th Criminal Chamber at the Berlin Regional Court, and consequently his subsequent detention, were unlawful.

Article 5 para. 1 (Art. 5-1), so far as relevant, provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
> ..."

The Commission recalls that the terms "in accordance with a procedure prescribed by law" and "lawful detention" in Article 5 para. 1 (Art. 5-1) refer to the applicable domestic law, and it follows that disregard of the domestic law may entail a breach of the Convention. However, the scope of review by the Convention organs is limited and it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (cf. Eur. Court HR, Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, pp. 18, 20, paras. 39, 45-46; No. 9997/82, Dec. 7.12.82, D.R. 31, p. 245).

In the present case, the German courts found that the applicant had committed an attempt of aggravated robbery and had caused serious bodily harm within the meaning of the relevant provisions of the German Penal Code.

The Commission considers that the applicant's submissions do not disclose any element which could render his detention not "lawful" within the meaning of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention.

The Commission concludes that the applicant was deprived of his liberty "in accordance with a procedure prescribed by law" and that he was lawfully detained "after conviction by a competent court".

It follows that the applicant's complaint under Article 5 para. 1 (Art. 5-1) of the Convention is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains under Article 6 (Art. 6) of the Convention that he did not have a fair hearing before an impartial tribunal.

Article 6 (Art. 6) of the Convention, so far as relevant, provides as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an

independent and impartial tribunal established by law. ...

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

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

The applicant's complaints about the general conduct of the trial proceedings and the Chamber's taking and evaluation of evidence and his allegations of bias on the part of the Presiding Judge Hi. and the Judges Ro. and Hä. are closely related. In this situation, it seems appropriate to look at the applicant's various complaints from the points of view of paragraphs 1 and 3 of Article 6 (Art. 6-1+6-3) taken together, especially as the guarantees in paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (Eur. Court HR, Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, para. 29; Artner v. Austria judgment of 28 August 1992, Series A no. 242-A, p. 10, para. 19).

In the present case, the applicant was arrested in February 1994 on the basis of an arrest warrant of 1989 issued against him on the charges of robbery and of having caused bodily harm. The bill of indictment was drawn up in May 1994. In June 1994 the 10th Criminal Chamber of the Berlin Regional Court committed him for trial and, having held trial between 5 July 1994 and 22 August 1994, convicted him at the latter date of robbery and having caused bodily harm. The applicant's appeal on points of law and his constitutional complaint were to no avail.

The Commission finds that the applicant's submissions regarding the pre-trial stage of the proceedings, especially the police investigations, the arrest warrant as well as the bill of indictment, do not disclose any appearance of a restriction on the exercise of his defence rights or other unfairness in the handling of his case. In this respect, the Commission recalls that, according to Article 19 (Art. 19) of the Convention, the duty of the Convention organs is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not their function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (cf. Eur. Court HR, Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, para. 45).

As regards the applicant's complaints about the taking and evaluation of evidence, the Commission recalls that it is not for the Convention organs to substitute their own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce. The task under the Convention is to ascertain whether the proceedings in their entirety were fair (cf., Eur. Court HR., Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 31, para. 89; Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

The Commission notes that the 10th Criminal Chamber found the applicant guilty of aggravated robbery and of having caused bodily harm after having heard several prosecution and defence witnesses, including the victims of the offences as well as other eye-witnesses. The Chamber carefully examined their statements and had due regard to the results of the police investigations. The defence had adequate opportunity to examine these witnesses at the trial and to argue the probative value of their statements as well as their credibility.

Moreover, the Chamber granted numerous requests lodged by the defence for the taking of further evidence, in particular the hearing of defence witnesses on the applicant's alleged alibi. To the extent that some requests lodged by defence were dismissed, the Chamber referred to the irrelevance of the matters to be proven or assumed their truth in the applicant's favour. The dismissal of the defence requests for expert evidence as to the applicant's own credibility as well as to the credibility of the main prosecution witnesses, or the distance between Berlin and the applicant's place of residence was based the trial court's own knowledge and experience.

Having regard to all circumstances, the Commission finds no sufficient grounds to conclude that the trial court's taking of evidence in the applicant's case was incompatible with Article 6 (Art. 6). The Commission considers in particular that the applicant failed to show the relevance of the evidence tendered by the witnesses who were not heard by the 10th Criminal Chamber, or the necessity of expert advice on the evaluation of the witness evidence before it. In its reasoning in its judgment of 22 August 1994, the Chamber explained that the statements of the two victims were reliable and that the two witnesses were credible.

As to the applicant's complaints about the alleged lack of impartiality of the judges of the 10th Criminal Chamber sitting at his trial, the Commission has had regard to the relevant criteria established in the case-law of the Convention organs (Eur. Court HR, Hauschild v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 46; Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28; Thomann v. Switzerland judgment of 10 June 1996, para. 30, to be published in Reports 1996).

In the present case, the applicant's allegations of bias are related both to the personal convictions of the judges in question as well as to appearances raising doubts as to their impartiality.

Thus the applicant seems to suggest that the 10th Criminal Chamber took its decision to commit him for trial as a revenge for his counsel's insistence on being appointed as official defence counsel. He further refers to the incident at the trial hearing of 5 July 1994, namely his refusal of the "deal" allegedly offered by the Presiding Judge. He also repeats the reasons put forward in the defence's motion to challenge Presiding Judge Hi. and Judges Ro. and Hä. which was dismissed by the 10th Criminal Chamber, differently composed.

The Commission observes that the first two arguments were not raised at the trial. Moreover, as regards the preparation of the trial against the applicant, the Commission notes that, while in May 1994, the Presiding Judge announced a hearing for 5 July 1994 on the question whether to commit the applicant for trial, the 10th Criminal Chamber, in its decision of 1 June 1994, ordered the applicant's committal for trial which was directed to open on 5 July 1994. In accordance with the defence's wishes, the applicant's chosen defence counsel was thereupon appointed as official defence counsel, and further measures were taken in preparation for the trial. This course of action does not in itself give rise to any reasonable doubts as to the Judges' impartiality. The Commission further notes that the defence failed to ensure the recording of the alleged "deal" and its refusal by the applicant in due time, and, at a later hearing, the Presiding Judge expressly denied having used any such terminology. In these circumstances, the Commission finds that the handling of the applicant's case at the hearing of 5 July 1994 does not appear to be such as to cast doubt on the impartiality of the trial court judges, in particular the Presiding Judge.

Finally, with regard to the applicant's arguments drawn from the conduct of the hearing on 2 August 1994, which had also been raised in the motion of 3 August 1994, the Commission considers that the 10th

Criminal Chamber, sitting with different judges, undertook a thorough examination of these matters. There is nothing to show that the trial court's questioning of the defence witnesses served purposes other than the precise establishment of the relevant facts, nor are there reasons to assume that the postponement of trial hearings in the late afternoon could raise doubts as to the trial court's impartiality.

In sum, the Commission finds that the applicant's submissions do not disclose any element to cast doubt on the impartiality of the judges in question.

The applicant's complaints do not, therefore, disclose any appearance of a violation of his rights under Article 6 paras. 1 and 3 (Art. 6-1, 6-3) of the Convention.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber