AS TO THE ADMISSIBILITY OF

Application No. 23541/94
by Luis Antonio GARCIA ALVA
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 10 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

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 4 January 1994 by Luis Antonio GARCIA ALVA against Germany and registered on 28 February 1994 under file No. 23541/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 21 March 1996 and the observations in reply submitted by the applicant on 7 May 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1964 in Lima, is a Peruvian citizen. When lodging his application, he was detained in a prison in Berlin. In the proceedings before the Commission, he is represented by Mr. M. Zieger, a lawyer practising in Berlin.

A. Particular circumstances of the case

The facts, as submitted by the parties, may be summarised as follows.

The Berlin prosecution authorities investigated against the applicant and other persons on the suspicion of being involved in drug-trafficking (Handel mit Betäubigungsmitteln). In March 1993 when questioned as a witness in the context of other investigation proceedings, Mr. K., who had been convicted of drug-trafficking in 1992

and sentenced to twelve years' imprisonment, outlined his drug-trafficking in Germany since 1991 and named several persons involved therein, including the applicant. He gave more details on these issues upon his questioning in Berlin in late March. He stated inter alia that the applicant had once kept 16kg and on four occasions 1,5kg of cocaine for a third person in an apartment in Berlin. He also maintained that the applicant had twice sold him cocaine.

On 6 April 1993 preliminary investigations were initiated against the applicant on the suspicion of having committed offences under the Narcotics Act (Verstoß gegen das Betäubungsmittelgesetz). In the evening of the same day, the applicant was arrested.

In the morning of 7 April 1993 the applicant was questioned by the Berlin police authorities. In the course of this questioning, he was informed that, following the statements made by the witness K., there was a strong suspicion that in 1991 he had kept 22kg of cocaine for one Mr. A.C. and that he had acted as an accomplice to the offence committed by Mr. A.C., namely drug-trafficking; moreover, that he had sold 40g of cocaine to the witness K. The applicant thereupon explained how he had met Mr. A.C. and that he had known about his involvement in drug-trafficking. He also made statements on the involvement of third persons in drug-trafficking. He denied the accusations raised by the witness K.

Still on 7 April 1993 he was brought before an investigating judge (Haftrichter) at the Berlin-Tiergarten District Court (Amtsgericht) who, after having heard the applicant, issued a warrant of arrest (Haftbefehl) against him. According to the arrest warrant, the applicant was suspected of having as a dealer received in 1991 several deliveries of cocaine (total 6kg) from A.C., against whom separate criminal proceedings were pending; of having received further deliveries (a total of 16kg) between 16 and 18 December 1991; and of having sold in 1991, for a price of DEM 3,000, two lots of cocaine to K., who was likewise prosecuted in separate proceedings. The applicant was informed about the contents of the arrest warrant.

On 8 April 1993 the applicant's defence counsel applied with the Berlin Public Prosecutor's Office (Staatsanwaltschaft) for access to the criminal files. The Prosecutor's Office sent copies of the record on the questioning of the applicant, on the search of his premises, on the hearing before the investigating judge and of the arrest warrant. As regards the remainder of documents contained in the files, counsel's request was dismissed, pursuant to S. 147 para. 2 of the German Code of Criminal Procedure (Strafprozeßordnung) on the ground that such consultation would endanger the course of the investigations.

Subsequently the applicant chose Mr. Zieger as his new defence counsel who repeated the request on 4 May 1993.

On 14 May 1993 the Public Prosecutor's Office again sent copies of the above-mentioned documents and, as regards the remainder, replied that for the time being a full inspection of the file could not be granted, as otherwise the purpose of the investigation proceedings would be jeopardized.

On 27 May 1993 the District Court, after an oral hearing in the presence of the applicant, his counsel and the Prosecutor, ordered that detention on remand should continue. The District Court had particular regard to the statements made by the witness K. who had been further questioned in the meantime. Neither the applicant nor his counsel were given access to the minutes of the questioning of this witness.

On 14 June 1993 the Berlin Regional Court (Landgericht) dismissed the applicant's appeal (Beschwerde). The Regional Court observed that it was not competent to decide on the applicant's complaint about the refusal of full access to the files. The Regional Court found that

there was a risk of collusion.

On 15 July 1993 the Berlin Court of Appeal (Kammergericht) dismissed the applicant's further appeal. The Court of Appeal found that the applicant had orally been sufficiently informed about the statements made by the witness K. He had thereby been in a position effectively to defend himself. Insofar as the applicant had invoked Article 5 para. 4 of the Convention and the Lamy judgment of the European Court of Human Rights, the Court of Appeal considered that the applicant's case was distinguishable in that access to the files was not fully excluded but only to the extent that legitimate public interests in an effective prosecution of offenders required such measures. The Court of Appeal confirmed the risk of collusion.

On 9 August 1993 the applicant lodged a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court (Bundesverfassungsgericht). Furthermore, counsel requested the Prosecutor's Office that the incriminating passages of the statements made by the witness K. should be read out or otherwise be made known to him. According to a file note of 12 August 1993, the Public Prosecutor's Office was not prepared to grant full access to the files as the records on the questioning of the witness concerned contained information about further suspected persons and about other investigation proceedings where arrest or search warrants had not yet been executed.

On 13 August 1993 applicant's counsel obtained copies of the records on the questioning of witness K. to the extent that they related to the applicant. Other passages had been blackened.

On 23 August 1993 counsel again requested full access to the files as the copies sent to him were not comprehensible as a consequence of the blackened passages. Moreover, he requested further investigations. The request for full access to the files was dismissed on 25 August 1993. The requested investigations were carried out.

On 13 September 1993 the Public Prosecution informed applicant's counsel that there were no longer any reasons to deny full inspection of the files, and the Federal Constitutional Court was also informed thereof. In view of this development, the Federal Constitutional Court asked the applicant whether he wished to maintain his constitutional complaint. The applicant's reply was affirmative.

On 27 October 1993 a panel of three judges of the Federal Constitutional Court, referring to S. 93b read in conjunction with S. 93a of the Federal Constitutional Court Act (Bundesverfassungs-gerichtsgesetz) refused to entertain the constitutional complaint.

On 12 July 1994 the applicant was convicted on part of the charges which had been brought against him, namely of having acted as an accomplice to drug-trafficking in respect of the storage of 16kg and 6kg of cocaine. He was sentenced to four years' imprisonment. The time he had spent in detention on remand was counted towards the sentence. The judgment became final.

B. Relevant domestic law

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.

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 after the detention having lasted altogether three months and after a lapse of two months after the last review hearing. S. 120 provides that an arrest warrant has to be quashed if reasons justifying the detention on remand do no longer persist or if the continued detention appears disproportionate.

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 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 otherwise the course of the investigations would be endangered. In the course of the preliminary investigations, the Public Prosecutor's Office decides on the question of granting defence counsel access to the files, afterwards the decision is taken by the trial court (S. 247 para. 4).

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.

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.

COMPLAINTS

The applicant complains under Article 5 paras. 2 and 4 of the Convention that his detention on remand was unlawful insofar as, and as long as, his counsel was not allowed to inspect the files. He submits that this measure deprived him of his right to be informed promptly of the reasons for his arrest and of the possibility to defend himself in an adequate manner and in particular to obtain his release from detention on remand. He furthermore maintains that the violation was aggravated by further isolation measures, such as exclusion from the common recreation hour in prison and limited visiting facilities.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 January and registered on 28 February 1994.

On 17 January 1996 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 21 March 1996. The applicant replied on 7 May 1996.

THE LAW

1. The applicant complains that his defence counsel was denied access to part of the criminal files in his case. He submits that he was not, therefore, promptly informed about the charges against him and could not properly present his defence and contest the reasons for his

detention on remand. He invokes Article 5 paras. 2 and 4 (Art. 5-2, 5-4) of the Convention.

Article 5 paras. 2 and 4 (Art. 5-2, 5-4) provide as follows:

"2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
...
4. 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."

The Commission finds that the applicant's complaint about the lack of full access to the criminal files, in particular the statements made by the witness K., falls within the ambit of Article 5 para. 4 (Art. 5-4) of the Convention.

The Government submit that the applicant's complaint under Article 5 para. 4 (Art. 5-4) is manifestly ill-founded. In their submission, Article 5 para. 4 (Art. 5-4) 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 maintain that the applicant had been informed of the grounds for suspicion and items of evidence against him, as well as the grounds for his detention, in such a way as to enable him effectively to exercise his defence rights. Moreover, the Government explain the refusal of access to the files by the fact that the investigations against the applicant formed part of a complex of proceedings concerning several accused persons in the milieu of the Columbian drugs mafia. With regard to the conspiratorial behaviour of all those concerned, the establishment of the truth would have been hindered, if full access had been granted too early.

The applicant objects to the Government's views. He maintains that his counsel had been in a position to set out his defence effectively and to discuss in particular the credibility of the witness in question.

The Commission considers, in the light of the parties' submissions, that the applicant's complaint under Article 5 para. 4 (Art. 5-4) raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Commission concludes, therefore, that this complaint is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

2. The applicant may further be understood as generally complaining that, contrary to Article 5 para. 2 (Art. 5-2), he was not promptly informed about the reasons of his arrest.

The Commission recalls that paragraph 2 of Article 5 (Art. 5-2) contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5 (Art. 5): by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (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 v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 31, para. 72).

In the present case, the applicant was arrested in the evening of 7 April 1993. When questioned by the police authorities in the course of the next morning, he was informed about the charges against him, namely several offences under the Narcotics Act and the accusations levelled against him by the witness K. were outlined. Still on the same day, he was heard by the investigating judge and he was informed about the contents of this arrest warrant.

In these circumstances, the Commission considers that the applicant's submissions regarding the information given to him upon his arrest do not disclose any appearance of a breach of Article 5 para. 2 (Art. 5-2) of the Convention.

3. As regards the remainder of the applicant's complaints about the conditions of his detention, the Commission finds that, having regard to all the material in its possession, that the applicant's submissions do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint that the procedure to review the lawfulness of his detention on remand did not comply with the requirements of Article 5 para. 4 (Art. 5-4);

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber