AS TO THE ADMISSIBILITY OF

Application No. 28475/95
by Christian GRATZER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
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 17 July 1995 by Christian GRATZER against Austria and registered on 8 September 1995 under file No. 28475/95;

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 is an Austrian citizen, born in 1971 and residing in Voitsberg. Before the Commission he is represented by Mr. M. Zoller, a lawyer practising in Innsbruck.

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

A. Particular circumstances of the case

On 10 March 1995 the Investigating Judge at the Innsbruck Regional Court (Landesgericht) heard the applicant, who was suspected of having committed various counts of fraud and burglary. The applicant, having been informed of the suspicion against him, stated that he could understand that the court investigated these charges and that he was willing to make a statement. After having heard the applicant the Investigating Judge ordered that the applicant be taken into detention on remand and stated that this decision was valid until 21 March 1995. The Investigating Judge found that there was a serious suspicion that the applicant had committed theft and burglary and that

there existed a danger of absconding and the applicant committing further offences of the same kind. The applicant waived his right to appeal, requested that an ex-officio defence counsel be appointed for him and stated that nobody needed to be informed about his detention on remand.

On the same day the Investigating Judge ordered that an ex-officio defence counsel be appointed for the applicant. The Investigating Judge also fixed a hearing on the continuation of the detention on remand (Haftverhandlung) for 20 March 1995 and ordered that the Public Prosecutor, the defence counsel to be appointed for the applicant and the applicant himself be summoned to the hearing. On 15 March 1995 the Tyrol Bar Association appointed Mr M.L. as the applicant's defence counsel.

On 20 March 1995 the hearing on the continuation of the detention on remand took place in the presence of the Public Prosecutor, the applicant and his defence counsel. The Investigating Judge ordered the continuation of the applicant's detention on remand until 20 April 1995.

On 19 April 1995 a further hearing on the continuation of the applicant's detention on remand took place in the presence of the Public Prosecutor, the applicant and his defence counsel. The Investigating Judge ordered the continuation of the applicant's detention on remand until 19 June 1995.

On 21 April 1995 the applicant, assisted by his defence counsel, filed an appeal. He submitted that his social worker (Bewährungshelfer) had been summoned neither to the hearing on 20 March 1995 nor to the hearing of 19 April 1995. The applicant's defence counsel had discovered this when he had inspected the file on 13 April 1995. However, a social assistant had been appointed for him after his release from prison on 30 August 1994 and it was mandatory under Section 182 para. 1 of the Code of Criminal Procedure that the social worker be summoned to the hearings. His detention on remand was therefore unlawful. Furthermore it was not clear from the transcript of the applicant's questioning by the Investigating Judge on 10 March 1995 that he had been sufficiently informed of his rights.

On 9 May 1995 the Court of Appeal dismissed the appeal. It found that under Section 182 para. 1 of the Code of Criminal Procedure a social worker had to be informed of the hearing but need not be summoned. The Investigating Judge had failed to inform the social worker of the hearing but this failure did not render the Investigating Judge's order unlawful. The Court of Appeal had made additional enquiries and according to information given by the social worker by phone, she had only seen the applicant once and he had later been unavailable to her. She could not comment in any way on the applicant's detention on remand. As regards the suspicion against the applicant, the Court of Appeal found that this suspicion was partly based on the police investigations and partly on the applicant's own confession. As regards the reasons for detention on remand, the Court of Appeal noted that the applicant had not raised doubts as to the existence of a risk of his absconding and of his committing further offences. As regards the submission that the applicant had not been properly informed of his rights, the Court of Appeal found that it was clear from the transcript of the questioning that the applicant had been sufficiently informed of the suspicion against him and of his right to remain silent or to make a statement.

On 16 May 1995 the applicant filed a fundamental rights complaint (Grundrechtsbeschwerde) with the Supreme Court (Oberster Gerichtshof) against the above decision. He complained that his social worker had not been summoned to the hearing which constituted a serious procedural mistake which could not be remedied by a simple phone call. In his view the law unambiguously required the summoning of a social worker. The

mere fact that the law used another word, namely "to inform" (verständigen) instead of "to summon" (laden) was not decisive. He further maintained that he had not been sufficiently informed by the Investigating Judge about his right to request the assistance of a defence counsel and his right to remain silent.

On 1 June 1995 the Supreme Court dismissed the complaint. It found that it was not required to deal with the complaints concerning the allegedly incomplete information of the applicant on his rights, as the applicant had not appealed against the decisions of 10 March 1995 and 20 March 1995. The fact that the Court of Appeal, in an obiter dictum, had commented on these complaints was irrelevant.

As regards the applicant's further complaint, the Supreme Court found that under the Code of Criminal Procedure the social worker had to be informed about a hearing on the continuation of detention on remand. The Investigating Judge's failure to inform the applicant's social worker did not, in the circumstances of the case, infringe the applicant's rights. The applicant had not contested that there existed reasons for his detention on remand and he or his defence counsel, at latest at the hearing itself, had had the possibility of drawing the Investigating Judge's attention to the failure to inform the social worker and of requesting the Investigating Judge to remedy this mistake. The applicant had failed to substantiate in his fundamental rights complaint how the absence of his social worker at the hearing could have raised doubts as to the existence of grounds for detention on remand. In these circumstances it was not necessary to consider the fact that on the occasion of ordering his detention on remand the applicant had stated that nobody need to be informed about his arrest.

B. Relevant domestic law

1. Detention on remand

On 1 January 1994 the Code of Criminal Procedure Amendment Act (Strafprozeßrechtsänderungsgesetz) entered into force which changed some of the provisions governing detention on remand. The following description takes these changes into account.

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

Section 181 of the Code of Criminal Procedure provides that decisions ordering or prolonging detention on remand are only valid within a certain time-limit, the expiry of which has to be mentioned in the decision. Before the expiry of the time-limit there must either be a hearing for the review of the detention order (Haftverhandlung) or the accused has to be released (paragraph 1).

Detention on remand may for the first time be ordered for a period of 14 days, it may be prolonged the first time for one month and thereafter repeatedly for two months. Before any prolongation a hearing (Haftverhandlung) before the Investigating Judge must take place. Section 194 provides for a maximum duration of detention on remand. Detention on remand may last up to two months if it is based only on a danger of collusion. If it is based on other grounds, it may last up to six months if the suspicion concerns a minor criminal offence (Vergehen), up to one year if it concerns a crime (Verbrechen) for which the minimum sanction is five years imprisonment, and two years for the most serious crimes. If detention on remand would exceed six months, the court ordering detention on remand must show that the prolongation of detention on remand is necessary because of the particular complexity of the case or because of the need for extensive investigations. After the maximum duration of detention on remand has

expired a person may be taken again into detention on remand for a period not exceeding six weeks if the bill of indictment has been served on him or her and if the detention is necessary to secure his or her appearance before the trial court.

Before deciding on the prolongation of detention on remand the Investigating Judge has to hold a hearing in accordance with Section 182 paras. 1 to 3. Against the Investigating Judge's decision an appeal can be lodged with the Court of Appeal within three days (Section 182 para. 4). A detainee may waive his right to a hearing if two hearings have already taken place (Section 181 para. 5).

Section 182 paras. 1 to 3 read as follows:

> "1. The hearing on the issue of detention is conducted by the Investigating Judge. It shall be non-public. The suspect, his defence lawyer, the Public Prosecutor and the social worker have to be informed of the date.
>
> 2. The suspect must be brought to the hearing, unless this is impossible because of an illness of the suspect. He or she must be assisted by counsel.
>
> 3. The hearing starts with the Public Prosecutor's presentation of the request for continuation of detention on remand and the reasons for this request. The suspect and the defence counsel have the right to reply thereto. The social worker may give his or her view on the issue of detention. The parties may request the court to make further findings on the basis of the case file. The Investigating Judge may, ex-officio or on request of the parties, hear witnesses or take other evidence if he or she finds it appropriate; the parties have the right to ask questions. The hearing must not endanger the purpose of the criminal investigations. The suspect or his defence counsel has the right to make the last statement. Thereupon the Investigating Judge decides whether detention on remand should be prolonged; this decision shall be pronounced orally and subsequently issued in writing. ..."

The accused may, at any time, lodge an application for release with the Investigating Judge (S. 193 para. 5). If the public prosecutor does not oppose the application, the detained person must be released. If the public prosecutor opposes it, the Investigating Judge must fix a hearing without delay.

According to Section 179 para. 1 every person arrested must be heard by the Investigating Judge within 48 hours following his or her arrest. At the beginning of the interrogation the Investigating Judge has to inform the arrested person about the suspicion against him or her and that he or she is free to remain silent or to make a statement and to contact a defence counsel.

2. Fundamental Rights Complaint Act (Grundrechtsbeschwerdegesetz)

Under this act, which entered into force on 1 January 1994, every detained person may lodge a complaint to the Supreme Court, which has to examine whether the fundamental right to personal freedom, as guaranteed by the Constitutional Act on Personal Freedom (Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit) and Article 5 of the Convention, has been violated by a decision of a criminal court. If the Supreme Court has found a violation, the court concerned must take immediately the necessary steps for complying with the decision. The person complaining must exhaust existing remedies and lodge the complaint within a time-limit of 14 days. The complaint must be presented by a lawyer and legal aid is available for such proceedings.

COMPLAINTS

1. The applicant complains under Article 5 para. 1 (c) of the Convention that his detention on remand was unlawful because the Investigating Judge had failed to summon his social worker to the hearings on the continuation of his detention on remand.

2. He further complains under Article 6 of the Convention that the criminal proceedings against him are unfair because the Investigating Judge who questioned him on 10 March 1995 did not inform him sufficiently on his right to remain silent and to contact a defence lawyer, as required by Section 179 para. 1 of the Code of Criminal Procedure.

THE LAW

The applicant complains that his detention on remand was unlawful because the Investigating Judge had failed to summon his social worker to the hearings on the continuation of his detention on remand. He relies on Article 5 para. 1 (c) (Art. 5-1-c) of the Convention which reads 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:
>
> ...
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ..."

The Commission recalls that on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law", the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (Art. 5), namely to protect individuals from arbitrariness (Eur. Court HR, Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185-A, p. 11, para. 24; Quinn v. France judgment of 22 March 1995, Series A no. 311, pp. 18-19, para. 47). The national courts are normally in a better position than the Convention institutions to determine whether domestic law has been complied with (Eur. Court HR, Quinn v. France judgment, loc. cit.)

In the present case, the Court of Appeal and the Supreme Court found that the failure to inform the applicant's social worker of the hearings on the continuation of his detention on remand while not entirely in accordance with the relevant provisions of the Code of Criminal Procedure did not render his detention on remand unlawful. The Supreme Court carefully examined the particular circumstances of the case. It noted in particular the following elements: the applicant had not contested the existence of reasons for his detention on remand; he or his defence counsel could have requested the hearing of the social worker; the social worker who had been contacted by the Court of Appeal had stated that she could not make any statements with regard to the grounds for detention on remand; the applicant had failed to substantiate in his fundamental rights complaint how the absence of his social worker could have raised any doubts as to the existence of reasons for detention on remand.

The Commission further notes that neither at the time when the Investigating Judge ordered the applicant's detention on remand, nor at any of the subsequent hearings did the applicant request that his

social worker be informed of his detention on remand or that she be present at the hearings. According to the submissions of the applicant's defence counsel made in the domestic proceedings, he had become aware of the court's failure to inform the social worker about the hearing on 13 April 1995 while the hearing took place on 19 April 1995.

The Commission finds that in these circumstances there is no appearance that the applicant's detention on remand has not been ordered in accordance with the law as required by Article 5 para. 1 (c) (Art. 5-1-c) of the Convention.

It follows that this part of the application 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 the criminal proceedings against him are unfair because the Investigating Judge who questioned him on 10 March 1995 did not inform him sufficiently on his right to remain silent and to contact a defence lawyer.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads as follows:

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

The Commission finds that this part of the application does not relate to the applicant's detention on remand but to the criminal proceedings pending against him.

The Commission recalls that it can only assess the fairness of criminal proceedings when it is able to consider them in their entirety (No. 9000/80, Dec. 11.3.82, D.R. 28, p. 127; No. 16156/90, Dec. 7.6.90, unpublished). Moreover, an acquittal will normally be regarded as rectifying procedural errors alleged to have violated the Convention (No. 5575/72, Dec. 8.7.74, D.R. 1, p. 44; No. 8083/77, Dec. 13.3.80, D.R. 19, p. 223).

The Commission notes that the applicant has not shown that in the criminal proceedings pending against him he has been convicted and that this conviction has become final. Until these proceedings have finished, with the exhaustion of domestic remedies as required by Article 26 (Art. 26) of the Convention, it is not possible to consider whether Article 6 (Art. 6) has been complied with in this respect, or whether any alleged violations that may have taken place have been remedied by a subsequent acquittal.

This part of the application is therefore premature and must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber