AS TO THE ADMISSIBILITY OF

Application No. 18232/91
by J.E.
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 October 1993, 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
G.B. REFFI
B. CONFORTI
N. BRATZA

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 April 1991 by J.E. against Austria and registered on 21 May 1991 under file No. 18232/91;

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

The applicant, born in 1942, is an Austrian national. When lodging his application he was detained in a prison in Krems. Before the Commission he is represented by Mr. E.C.J. Weber, a lawyer practising in Vienna.

A. Particular circumstances of the case

On 31 August 1989 the applicant was arrested on the suspicion of having committed fraudulent conversion (Untreue).

On 1 September 1989 the Investigating Judge at the Krems Regional Court (Kreisgericht) ordered the applicant's detention on remand under S. 180 paras. 1, 2 (1), (2) and 3 (b) of the Austrian Code of Criminal Procedure (Strafprozeßordnung). The Investigating Judge considered in particular that, having regard to the result of the investigations so far and the applicant's statements, there was a strong suspicion (dringender Verdacht) that the applicant had committed fraudulent conversion. Since 1985 the applicant had misused his competencies as manager of a banking institute and thereby caused damage amounting to AS 105 million. There was a danger of his absconding on the grounds of the severe sentence which he had to expect as well as his foreign relations. There was also a risk of collusion with several clients whom he had favoured in his illegal transactions, and a danger of

repetition of offences of the same nature.

In these criminal proceedings the applicant was assisted by defence counsel Mr. E.C.J. Weber.

On 10 November 1989 the Judges' Chamber (Ratskammer) at the Krems Regional Court ordered the applicant's continued detention on remand. The Judges' Chamber noted that the investigations had meanwhile been extended to further charges, namely fraud, forgery of signatures and fraudulent conversion between 1980 and 1982, and considered that there was a danger of repetition.

On 4 December 1989 the Vienna Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal (Beschwerde) against the decision of 10 November 1989.

The Court of Appeal noted in particular that the applicant had not objected to the finding of strong suspicion against him. He had not only admitted fraudulent conversion having caused a damage exceeding by far AS 100 million, but also grave fraud (schwerer Betrug) to the disadvantage of his former employer. Moreover, the Court of Appeal considered that the danger of his absconding persisted. In this respect, it took into account the amount of compensation to be paid by the applicant, the apparent termination of his professional career in Austria, and the suspicion that he had travelled to Liechtenstein several times. The Court of Appeal was also of the opinion that the applicant had continuously committed criminal offences in the course of a longer period of time, and thereby shown a criminal propensity. There were thus concrete reasons to assume that the applicant, were he not detained, would commit further offences notwithstanding the criminal proceedings against him. Having regard to the applicant's intelligence and experience in business life and financial matters, the mere publicity of the criminal proceedings against him would not sufficiently prevent him from repeating his criminal behaviour. The Court of Appeal also mentioned that the moneys involved had not yet been completely located.

On 28 December 1989 the Judges' Chamber at the Krems Regional Court again ordered the applicant's continued detention on remand.

On 26 February 1990 the Vienna Court of Appeal decided that the applicant's detention on remand could last up to ten months. The Court of Appeal referred to the charges against the applicant which had been extended in October 1989 to cover further suspected offences of fraud and fraudulent conversion. As regards the question of strong suspicion, it considered that the suspicion against the applicant had been further confirmed after the hearing of several witnesses. Having regard to the necessity of extensive investigations and the hearing of numerous witnesses, the prolongation of the applicant's detention on remand was justified. The Court of Appeal noted in this respect that the applicant's case already comprised eight files. The period of ten months should be sufficient to conclude the investigations, prefer the indictment and prepare the trial.

On 4 March 1990 the Vienna Court of Appeal dismissed the applicant's appeal against the decision of 28 December 1989.

On 21 March 1990 the Krems Public Prosecutor's Office (Staats-anwaltschaft) preferred the indictment against the applicant. He was charged with fraudulent conversion committed in the period between 1985 and 29 August 1989 to the disadvantage of his former employer in that he granted credits and guarantees to six insolvent firms and thereby caused damage amounting to about AS 117 million. He was also charged with forgery. The proceedings concerning further charges were separated.

On 23 March 1990 the Judges' Chamber at the Krems Regional Court

ordered the applicant's continued detention on remand. The Judges' Chamber referred to the indictment and the previous decisions on detention on remand, the reasons of which had remained unchanged.

On 2 April 1990 the President of the Vienna Court of Appeal, upon complaint of the applicant's counsel, informed counsel that no delays caused by the Krems Regional Court had been established.

On 20 April 1990 the Vienna Court of Appeal, upon the applicant's respective appeals against the indictment and against the decision of 23 March 1990 on his continued detention on remand, committed the applicant for trial and ordered his continued detention on remand. The Court of Appeal had in particular regard to the applicant's submission that the indictment had been premature on the ground that some investigations had not been terminated. It found that the results of further investigations which had been meanwhile received, in conjunction with the investigations so far and in particular the applicant's statements largely admitting the offences concerned, justified the assumption of a strong suspicion. As regards the reasons justifying his continued detention on remand, the Court of Appeal referred to its decision of 4 December 1989. It also considered the applicant's submission that his admission and his family ties as well as the lack of financial means to go abroad excluded the danger of his absconding. The Court of Appeal found that, having regard to the amount of damage caused by the applicant and the fact that the moneys defrauded by him had not yet been completely located, there was a possibility for him to build up an existence abroad. Moreover, the Court considered that, having regard to the sentence the applicant could possibly expect, his continued detention on remand was not disproportionate.

On 21 May 1990 the applicant applied to the Krems Regional Court to declare him unfit to participate in the trial against him on the ground of his strong backache.

On 11 June 1990 the trial against the applicant opened before the Krems Regional Court. The medical expert Prof. K. confirmed the applicant's physical capacity to participate in the proceedings.
The second of altogether thirty-four hearings took place on 5 July 1990. It lasted about three and a half hours.

On 16 July 1990 the Judges' Chamber at the Krems Regional Court dismissed the applicant's request for release and ordered his continued detention on remand. The Judges' Chamber considered in particular that though the trial might last several months, his detention on remand was not disproportionate. Moreover, the applicant had not refuted any of the reasons given in the previous decisions on the continuation of his detention on remand.

The trial was continued on 31 July 1990 (about three and a half hours).

On 14 August 1990 the Vienna Court of Appeal dismissed the applicant's appeal against the decision of 16 July 1990. The Court of Appeal, referring to the earlier decisions, confirmed the findings as to a strong suspicion against the applicant, the risk of repetition of criminal offences and the danger of his absconding. In the latter respect, the Court of Appeal also noted that, although the applicant had not yet attempted to abscond, he had for the first time experienced a deprivation of liberty for a longer period of time and was facing a sentence of imprisonment for a considerable period of time. His financial situation had considerably worsened and there was, therefore, a strong temptation to abscond or to commit further offences against property.

The hearing on 28 August 1990 was discontinued after half an hour on account of the applicant's statements not to be fit to participate

in the proceedings. Prof. K. was requested to examine again the applicant's state of health. On 18 September 1990 Prof. K. submitted his opinion according to which the applicant was capable to participate in the trial, however, there should be regular breaks. The trial was continued on 19 September 1990 (three hours).

On 3 October 1990 the Judges' Chamber ordered the applicant's further detention on remand. The Judges' Chamber considered in particular that the applicant had not made any new relevant submissions.

On 15 October 1990 the Krems Regional Court, in the course of the continued trial (the hearing lasted nine hours), dismissed the applicant's request to send the case back to the Investigating Judge and his request for release. The Court noted that, although the preliminary investigations had not been complete, there were good prospects that the missing evidence would be produced in the course of the trial. Termination of the trial at first instance within a reasonable time thus appeared possible.

Further hearings took place on 16, 22, 23 October 1990 (between three and four hours each). At the hearing on the last-mentioned date, the Regional Court dismissed the applicant's renewed request for release. The next hearing on 30 October 1990 lasted almost four hours. The hearing on 31 October 1990 was discontinued after one hour following the applicant's renewed complaints about his bad state of health.

On 13 November 1990 the Vienna Court of Appeal dismissed the applicant's motion to challenge the Judges at the Krems Regional Court for bias.

On 13 November 1990 the Vienna Court of Appeal also dismissed the applicant's appeal against his continued detention on remand ordered by the Krems Regional Court on 15 and 23 October 1990. The Court of Appeal referred to the reasoning in earlier decisions. It also noted that in the course of the trial the applicant had pretended that for health reasons he could not attend the trial and thereby attempted to evade prosecution. Having regard to the sentence which the applicant had to expect in case of his conviction, i.e. one to ten years' imprisonment, the length of his detention on remand was not yet disproportionate.

The next hearings were held on 21 November and 19 December 1990 (about three hours each). The hearing on 9 January 1991 was postponed after half an hour due to the illness of the applicant's defence counsel. The hearing on 10 January 1991 was postponed after ten minutes upon the request of the trainee lawyer replacing the applicant's defence counsel.

On 15 January 1991 the Vienna Court of Appeal dismissed the applicant's request to fix a new date for continuation of the trial. The Court of Appeal noted that in fixing dates for the trial, the Regional Court had taken into account that the applicant, though not unable to attend the trial, was in want of rest. Having regard to a forensic expert opinion, repeated breaks and short hearings were called for. The Regional Court had already fixed dates for continuation of the trial and expected it to terminate in July 1991. The case concerned a very complex case of economic crimes, which was delayed by the extensive requests of the applicant's counsel to take evidence and his repeated appeals which had obviously no prospect of success. There were no undue delays on the part of the Krems Regional Court.

The trial continued on 30 January 1991 for about three hours.

On 18 February 1991 the Judges' Chamber at the Krems Regional Court dismissed the applicant's request for release and ordered his

continued detention on remand. The Judges' Chamber considered in particular that the length of the applicant's detention on remand was not disproportionate to the sentence which he had to expect in case of conviction. The Judges' Chamber assumed that the Krems Regional Court would have to take the high amount of damages caused and the continuous committing of offences over a considerable period of time into account. It also noted that on 30 January 1991 the applicant had in general revoked his statements so far and thereby considerably reduced his contribution to the finding of truth.

The Regional Court held a further hearing on 20 February 1991 (one and a half hour).

On 4 March 1991 the Vienna Court of Appeal dismissed the applicant's appeal against the decision of 18 February 1991. The Court of Appeal noted that in case of his conviction the applicant had to expect a sentence to imprisonment by far exceeding the period of his detention on remand.

Hearings were again conducted on 6, 11, 12 and 13 March 1991 (between two and a half and more than four hours).

On 14 March 1991 the Vienna Court of Appeal dismissed the applicant's second request to fix a date for continuation of the trial. The Court of Appeal noted that from 20 February until 7 May 1991 further dates for hearings had been fixed. Furthermore, the length of the trial was, inter alia, due to the applicant's bad state of health. At the hearing on 20 February 1991 the applicant had asked for a break after one and a half hour.

The further hearings on 18 and 22 March, 8, 9, 10, 17, 22 and 23 April 1991 lasted between two and about four hours each. The hearing on 24 April had to be postponed due to the absence of the applicant's defence counsel. Further hearings took place on 6 May (more than six hours), 8, 13 and 29 May 1991 (about three and a half hours each).

On 29 May 1991 the Krems Regional Court convicted the applicant of fraudulent conversion and forgery and sentenced him to eight years' imprisonment. The period of his detention on remand was to be counted towards his sentence. In its judgment, comprising 181 pages, the Regional Court referred to the statements of 28 witnesses and reports of banking supervisors.

The applicant announced a plea of nullity (Nichtigkeits-beschwerde) and appeal (Berufung) against sentence. His further attempts to be released from detention pending the appeal proceedings remained unsuccessful.

On 8 April 1992 the Austrian Supreme Court (Oberste Gerichtshof) dismissed his plea of nullity. His appeal was dismissed by the Vienna Court of Appeal on 15 June 1992.

The documents concerning the applicant's case filled nineteen volumes and several supplementary files.

B. Relevant domestic law

Under S. 180 paras. 1 and 2 of the Code of Criminal Procedure, 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 repetition of the offences.

According to S. 193, detention may not last more than two months if it is based only on the danger of collusion, or more than six months if it is based on the other reasons.

The second-instance court may however, if the investigating judge or the prosecuting authorities so request and if the complexity or scope of the investigation makes it necessary, extend the detention up to a maximum of three months in the case of suspected collusion, and one year where the other grounds are relied on, or even two if the sentence risked exceeds five years. In exercising this power the appellate court sits in private session in the absence of the detainee and his lawyer; it gives the principal public prosecutor's office the opportunity to make submissions.

Detention founded on a reason other than the risk of collusion alone is subject to no time-limit as soon as the trial has begun.

The accused may lodge an application for release at any time (S. 194 para. 2). Under S. 194 and 195, such an application is to be examined by the Judges' Chamber (Ratskammer) of the Regional Court in a private hearing, in the presence of the accused and his lawyer and, upon appeal by the public prosecutor's office or the accused, by the second-instance court (S. 195 paras. 5 and 6, S. 196).

COMPLAINTS

The applicant complains under Article 5 para. 3 of the Convention about the length of his detention on remand. He submits in particular that the length of his detention on remand was disproportionate to the sentence which he had possibly to expect.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 April 1991 and registered on 21 May 1991.

On 2 September 1992 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 11 November 1992 the Government submitted their observations, which they amended on 28 January 1993.

The applicant submitted observations in reply on 3 February 1993, which he amended on 11 March 1993.

THE LAW

The applicant complains about the length of his detention on remand. He invokes Article 5 para. 3 (Art. 5-3) of the Convention which, so far as relevant, provides as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial."

The respondent Government consider that the overall length of the applicant's detention on remand of one year and nine months was not unreasonable in the circumstances.

The Government submit in particular that, having regard to the result of the investigations and the applicant's own statements in the course thereof, there was a reasonable suspicion that he had committed the offences in question. The domestic courts had given detailed and plausible reasons to assume a risk that the applicant would commit further offences or abscond, if released.

According to the Government, the length of the applicant's detention on remand was due to the complexity of the case, namely complex economic offences, and the conduct of the applicant. They state that there were no undue delays on the part of the Austrian authorities.

The applicant considers that he had been committed for trial in order to avoid his release, although the preliminary investigations, regarding the complexity of the case, had not lasted long enough in order to complete the evidence. As regards the course of the trial against him, the applicant submits that there is no explanation for the intervals between hearings as from November 1990. The exercise of his right to change his defence and revoke his earlier statements could not be held against him.

The Commission notes that the applicant was arrested on 31 August 1989. His detention on remand was ordered on 1 September 1989. The applicant's detention on remand within the meaning of Article 5 para. 3 (Art. 5-3) lasted until his conviction on 29 May 1991, i.e. one year and nine months (cf. Eur. Court H.R., B. v. Austria judgment of 28 March 1990, Series A no. 175, pp. 14-16, paras. 36-38).

The Commission recalls that it is in the first place for the national authorities to ensure that, in a given case, pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the question of release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Convention organs are called upon to review the reasonableness of the length of detention (cf. Eur. Court H.R., Letellier judgment of 26 June 1991, Series A no. 207, p. 18, para. 35; W. v. Switzerland judgment of 26 January 1993, para. 30, to be published in Series A no. 254).

The persistence of reasonable suspicion that the person arrested has committed an offence is a conditio sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Convention organs must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty, and whether the domestic authorities displayed special diligence in the conduct of the proceedings (cf. Eur. Court H.R., Letellier judgment, loc. cit.; W. v. Switzerland judgment, loc. cit.).

The Judges' Chamber at the Krems Regional Court and the Vienna Court of Appeal, in their numerous decisions on the question of the applicant's detention on remand, referring to the investigations and evidence against the applicant, found that there was a strong suspicion that he had committed fraudulent conversion and forgery and thereby caused a considerable financial damage. Their finding as to the risk of the applicant's absconding was based on the seriousness of the charges against him, the severity of the sentence which he risked as well as the fact that the moneys involved had not been completely located. Their reasoning as to the risk of repetition does not appear arbitrary, either. The applicant's continued detention was thus based on sufficient and relevant grounds.

As regards the conduct of the proceedings by the domestic authorities, the Commission recalls that the right of the accused in detention to have his case examined with particular expedition must not hinder the efforts of the prosecution authorities to carry out their tasks with proper care (cf. Eur. Court H.R., Tomasi judgment of 27 August 1992, Series A no. 241-A, p. 39, para. 102; W. v. Switzerland judgment, loc. cit., para. 42).

The preliminary investigations started in September 1989 and the Public Prosecutor's Office preferred the indictment on 21 March 1990. The applicant was committed for trial on 20 April, and the trial was opened on 11 June 1990. The applicant was convicted on 29 May 1991.

The applicant's case was of a complex nature. It involved an extensive taking of evidence, in particular evidence relating to flow of money in connection with fraudulent conversion continuously committed by the applicant in a period of several years, and filled voluminous files. The applicant who had made statements on the charges against him in the course of the preliminary investigations, changed his defence at the trial and revoked his earlier submissions. Though an accused is not obliged to cooperate with the authorities, he must bear the consequences which his attitude may have caused for the progress of the investigation (W. v. Switzerland judgment, loc. cit., para. 42).

The Commission finds that the applicant failed to show that the Austrian judicial authorities failed to act with the necessary diligence in the conduct of the proceedings him. In particular, there is no indication that deficiencies in the preliminary investigations, which the applicant himself regarded as short, were not remedied in the course of the trial and delayed the proceedings on the whole. Numerous hearings had to be fixed in view of the applicant's bad state of health, as confirmed by a forensic expert who had advised short hearings and repeated breaks. Furthermore, there were no considerable delays on the part of the Regional Court in the fixing of the different hearings. The Commission notes that several hearings were postponed for reasons of the applicant's health or absence of his defence counsel.

In these circumstances, the Commission considers that the period of the applicant's detention on remand did not exceed a reasonable time within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention.

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

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)