AS TO THE ADMISSIBILITY OF

Application No. 21842/93
by George KEMPERS
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 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
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 16 April 1993 by George KEMPERS against Austria and registered on 13 May 1993 under file No. 21842/93;

Having regard to:

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

- the Commission's decision of 6 September 1995 to declare the application partly inadmissible and to communicate the remainder of the application to the respondent Government for observations on its admissibility and merits;

- the observations submitted by the respondent Government on 28 November 1995 and the observations in reply submitted by the applicant on 22 January 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Dutch national born in 1949, who is currently detained in Austria at Karlau prison. Before the Commission he is represented by Mr. F. Insam, a lawyer practising in Graz.

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

A. Particular circumstances of the case

On 30 April 1991 the applicant was arrested in Graz on suspicion of having committed offences against the Drug Offences Act (Suchtgiftgesetz). C.S., H.A. and I.H. were arrested at the same time as co-suspects.

On 3 May 1991 the Investigating Judge at the Graz Regional Court (Landesgericht) heard the applicant and ordered the institution of pre-trial investigations (Voruntersuchung) against him. The applicant admitted that he had tried to sell 5 kg Cocaine in Graz on 30 April 1991 together with his co-suspects. He also admitted a previous drug transaction which had taken place in Aachen (Germany) in the beginning of April 1991.

On the same day the Investigating Judge ordered that the applicant be taken into detention on remand. The Investigating Judge found that there was a danger of collusion, a danger that he might commit offences and a danger of the applicant's absconding. Pursuant to Section 45 para. 3 (1) of the Code of Criminal Procedure (Strafprozeßordnung) the applicant's contact with his defence counsel took place under the surveillance of the Investigating Judge for a period of 14 days after the order of detention on remand as the order had been based on the ground inter alia of the danger of collusion.

On 14 May 1991 the Investigating Judge extended the surveillance of the applicant's contact with his defence counsel, pursuant to Section 45 para. 3 (2) Code of Criminal Procedure, until service of the bill of indictment on the applicant. The Investigating Judge found this measure necessary because the applicant was suspected of being a member of a gang of drug traffickers, further members of the gang had not yet been discovered and the applicant had made contradictory statements. Thus, contacts between the applicant and his defence counsel could prejudice the further investigations, a considerable part of which had to be undertaken outside Austria. The applicant appealed against this decision.

On 29 May 1991 the Judges' Chamber (Ratskammer) of the Graz Regional Court dismissed the applicant's appeal. It found that the order of the Investigating Judge did not involve any criticism of the defence counsel or any reproach against him of conduct contrary to law or the disciplinary rules of members of the bar, but merely had the purpose of preventing any contact whatsoever with third persons in order not to endanger the success of the criminal investigations. The applicant was suspected of drug trafficking on a large scale as a member of a gang which was active in several European States and some members were still at large. In such circumstances the police investigations had to be conducted with utmost care and even the slightest possibility of collusion had to be prevented.

On 3 June 1991 R.M., V.B. and T.M. were arrested by the police when they attempted to sell drugs in Bregenz. These persons were suspected of being members of the same gang as the applicant.

On 29 June 1991 the period of two months under Section 193 of the Code of Criminal Procedure for which detention on remand based solely on the risk of collusion might last elapsed.

On 6 August 1991 the Graz Public Prosecutor's Office preferred a bill of indictment charging the applicant and C.S., J.S., H.A., I.H., R.M., V.B and T.M. with drug trafficking. On 8 August 1991 the bill of indictment was served on the applicant.

On 16 September 1991 the Graz Court of Appeal (Oberlandesgericht) dismissed the applicant's objections against the bill of indictment.

On 8 November 1991 the Graz Court of Appeal, following a request by the Regional Court, authorised the applicant's detention on remand

for a maximum duration of 9 months, on the ground that there was a risk of absconding and that the applicant might commit offences of the kind he was suspected of (Tatbegehrungsgefahr).

On 15 January 1992 the trial against the applicant and the co-accused took place before the Graz Regional Court. At the trial the applicant admitted the facts as regards the drug transaction in April 1991 in Graz, but pleaded not guilty and submitted that he had been incited to the drug deal by undercover agents acting on behalf of the Austrian State. As regards the drug transaction in Aachen in April 1991 the applicant stated that his submissions before the police and the Investigating judges were wrong. He had made them merely because he had felt cheated by the co-accused who, after his arrest, were still at large.

On 16 January 1992 the Graz Regional Court convicted the applicant under the Drug Offences Act of having, together with his accomplices R.M., C.S. and V.B. attempted in April 1991 to sell a large quantity of drugs in Graz and Aachen respectively. The Court also convicted R.M. and V.B. of a drug transaction which had taken place in Bregenz in June 1991. The Court sentenced the applicant to six years' imprisonment and to a fine of 1,4 million AS or 6 months' imprisonment in default.

The Regional Court found that the applicant, who knew drug suppliers in the Netherlands, had contacted R.M. in Switzerland in December 1990. They agreed that the applicant would procure drugs in the Netherlands while R.M. would look for potential buyers. In the beginning of April 1991 the applicant sold drugs he had procured from C.S. to R.M. This drug transaction took place in Aachen. R.M. brought the drugs to Switzerland and sold them to other persons, amongst them V.B., who also informed him about potential buyers in Graz. Subsequently, between 22 and 27 April 1991, negotiations took place between V.B., acting for these potential buyers, R.M., who financed the transaction, and the applicant and C.S., who procured the drugs in the Netherlands. It was agreed to bring the drugs to Germany close to the Austrian border and to meet the potential buyers in Graz on 28 April 1991. As the potential buyers insisted that the drugs be brought to Graz the transaction did not take place and the drugs were sent back to the Netherlands. After further negotiations a new meeting in Graz was arranged for 30 April 1991. On that day H.A. brought the drugs by car to Graz, where also the applicant and C.S. were present. At the meeting with the potential buyers they were arrested by the police. In June 1991 R.M. organised a further drug transaction with potential buyers who V.B. had found in Bregenz. R.M. procured the drugs in Switzerland and hired T.M. for the transport. On 3 June 1991, when attempting to hand over the drugs to the presumed buyers, R.M., V.B. and T.M. were arrested.

On 13 May 1992 the Graz Public Prosecutor's Office lodged an appeal against the sentence regarding the applicant, V.B and C.S.

On 20 May 1992 the applicant lodged a plea of nullity and an appeal against the sentence. He complained, inter alia, about the surveillance of the contact with his defence counsel at the pre-trial stage and invoked Article 6 of the Convention.

On 16 September 1992 the Procurator General' Office commented on the applicant's plea of nullity in the following way:

> "In the view of the Procurator General's Office, the pleas of nullity brought by the accused George Kempers, R.M. and V.B. meet the criteria for a decision pursuant to Section 285d of the Code of Criminal Procedure. The transmission of a copy of the decision is herewith requested."

The above submissions of the Procurator General's Office were not

served on the applicant.

On 16 September 1992 the Supreme Court rejected the plea of nullity. As regards the applicant's complaint about the surveillance of the contact with his defence counsel at the pre-trial stage, the Supreme Court noted that the applicant in this respect relied on provisions of the Convention, which, however, did not constitute reasons for nullity as provided for in the Code of Criminal Procedure.

On 21 December 1992 the Graz Court of Appeal decided on the applicant's appeal. It upheld the sentence as regards the term of imprisonment and reduced the fine to 1 million AS and the imprisonment in default to 4 months.

B. Relevant domestic law

The following account of the relevant provisions of the Code of Criminal Procedure is based on the law as in force until 1 January 1994 when the Code of Criminal Procedure Amendment Act (Strafprozeßänderungs-gesetz 1993) entered into force.

According to S. 12 para. 1 of the Code of Criminal Procedure the Judges' Chamber at the First Instance Court supervises all measures taken by the Investigating Judge at the First Instance Court in the course of preliminary investigations.

According to S. 45 para. 3 a person taken into detention on remand may meet his defence counsel in the absence of the Investigating Judge. However, if detention on remand has been ordered on the ground of the danger of collusion the Investigating Judge may, during the first 14 days of the detention, be present when the remand prisoner meets his defence counsel. If, based on specific circumstances, the danger exists that the contact with the defence counsel may interfere with evidence the Investigating Judge may order that the surveillance of the contact with the defence counsel be extended until the bill of indictment is served. Surveillance of the contact with the defence counsel may only be exercised as long as the detention on remand is based on the danger of collusion (S. 180).

S. 113 provides in particular that anybody affected by a decision of the Investigating Judge or by a delay in the course of preliminary investigations or in the proceedings after indictment, may apply for review by the Judges' Chamber, which decides in private after having heard the Investigating Judge and the Public Prosecutor. According to S. 114 there is a further appeal against decisions of the Judges' Chamber to the Court of Second Instance, if these decisions concern the separation of proceedings, the institution or discontinuation of the preliminary investigation, bail, or detention on remand without a hearing concerning release having taken place.

Under S. 180 paras. 1 and 2 a person may be held in detention on remand if he is seriously suspected of having committed a criminal offence and if there is a risk of his absconding, of collusion or that the person might commit offences. According to S. 193, detention may not last more than two months where its sole justification is the risk of collusion; it may not last more than six months where one of the other grounds is relied on. The Court of Appeal may, however, if so requested by the Investigating Judge or the Public Prosecutor and if the difficulty or the scope of the investigations makes it necessary, extend the detention. In such cases the maximum duration of detention is three months where the measure is based on a risk of collusion alone, and one year, or even two years, if the term of imprisonment which the suspect risks is ten years or more, in the other circumstances provided for.

By virtue of SS. 194 and 195, it is open to the suspect to apply for release at any time. Such an application and any appeal against a

decision ordering detention on remand must be examined by the Judges' Chamber at a private hearing in the presence of the accused or his defence counsel.

Under S. 285 (d) para. 1 a plea of nullity may be rejected by the Supreme Court after deliberation in private if the Supreme Court unanimously finds that the complaint should be dismissed as manifestly ill-founded without any need for further deliberation.

COMPLAINTS

1. The applicant complains under Article 6 para. 3 (b) and (c) of the Convention that his right to defence had been prejudiced because at the pre-trial stage the contact with his defence counsel was under the surveillance of the Investigating Judge.

2. He further complains under Article 6 para. 1 of the Convention about a violation of the principle of equality of arms in the proceedings on his plea of nullity before the Supreme Court. He submits that the Procurator General made submissions to the Supreme Court of which the applicant was not informed and to which he had no possibility to react.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 16 April 1993 and registered on 13 May 1993.

On 6 September 1995 the Commission decided to communicate the applicant's complaint concerning the surveillance of the contact with his defence counsel by the Investigating Judge at the pretrial stage and his complaint that he was not given the possibility to react to submissions made by the Procurator General in the proceedings before the Supreme Court and declared inadmissible the remainder of the application.

The Government's written observations were submitted on 28 November 1995. The applicant replied on 22 January 1996.

THE LAW

1. The applicant complains under Article 6 para. 3 (b) and (c) (Art. 6-3-b, 6-3-c) of the Convention that his right to defence was prejudiced because at the pre-trial stage his contacts with his counsel were placed under the surveillance of the Investigating Judge.

Article 6 paras. 1 and 3 (b) and (d) (Art. 6-3-b, 6-3-d) of the Convention, insofar as relevant, read 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:
>
> ...
>
> b. to have adequate time and facilities for the preparation of his defence;
>
> c. to defend himself in person or through legal assistance of his own choosing ..."

The Government submit that the surveillance of the applicant's contacts with his defence counsel lasted until 29 June 1991, the date on which the statutory time-limit of two months for detention on remand

based solely on the risk of collusion expired. After that date the applicant's meetings with his defence counsel were no longer under surveillance. The measure imposed in the course of the criminal investigations had been necessary in order to secure the success of the investigations. In view of the fact that at the time of the applicant's arrest further members of the gang to which he belonged had not been discovered and arrested, it had been imperative that the applicant had no possibility whatsoever to collude with third persons. For this reason even the fact that he and his co-suspects had been arrested had to be kept confidential in the beginning. These measures eventually lead to the arrest of further three members of the gang.

The Government submit further that the temporary surveillance of the applicant's contacts with his defence counsel at the beginning of the criminal investigations did not hinder him in the exercise of his defence rights. Contacts with his defence lawyer had not been prohibited and after surveillance ceased he had at his disposal more than five weeks before the bill of indictment was served on him and more than half a year before the trial commenced during which time he could communicate freely with his lawyer in order to prepare his defence. Therefore the applicant's rights under Article 6 para. 3 (b) and (c) (Art. 6-3-b, 6-3-c) of the Convention have not been violated.

This is contested by the applicant who submits that the surveillance of the contacts with his lawyer ceased on 8 August 1991, as the decision of the Judges' Chamber of 29 May 1991 explicitly provided that the supervision may take place until the bill of indictment was to be served on the applicant. He therefore had no opportunity of confidential conversations with his defence lawyer until that date. Such confidential conversations, however, would have been necessary in order to formulate precise requests for the taking of evidence which required a comprehensive and detailed information on the course of the events. Therefore the surveillance exercised by the Investigating Judge violated his defence rights under Article 6 para. 3 (b) and (c) (Art. 6-3-b, 6-3-c) of the Convention.

The Commission recalls that an accused's right to communicate with his defence counsel out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (Art. 6-3) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would loose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see Eur. Court HR, S. v. Switzerland judgment of 28 November 1991, Series A no. 220, p. 16, para. 48). In the above mentioned case the Court also noted that the risk of collusion merits consideration, however the possibility of several defence counsel collaborating with a view to co-ordinating their defence strategy was not sufficient to restrict the accused's right of defence (S.v. Switzerland judgment, op. cit., p. 16, para. 49).

The Commission observes that after the applicant's taking into detention on remand on 3 May 1991 the contact with his defence counsel took place under surveillance of the Investigating Judge in accordance with Section 45 para. 3 (1) of the Code of Criminal Proceedings, as the detention on remand was ordered on the grounds, inter alia, of the danger of collusion. On 14 May 1991 the Investigating Judge, under Section 45 para. 3 (2) of the Criminal Code, extended the surveillance until the bill of indictment was served on the applicant.

It is in dispute between the parties whether the surveillance ordered by the Investigating Judge lasted until 29 June 1991, the date on which the statutory time-limit of two months for detention on remand based solely on the risk of collusion expired, as is the submission of the Government, or, as the applicant submits, until 8 August 1991, when the bill of indictment was served on him. However, according to

domestic law, surveillance had to stop on 29 June 1991 since from that time onwards the applicant's detention on remand could no longer be based on the ground of danger of collusion. The applicant does not state explicitly that between 29 June and 8 August 1991 he had met his defence counsel or that on such an occasion the Investigating Judge had been present. If this had been the case the applicant could have complained to the Judges' Chamber.

The Commission observes further that in the present case, unlike in the above mentioned case of S. v. Switzerland, several co-suspects were still at large at the time detention on remand was ordered against the applicant. This circumstance could justify surveillance at that stage. In this respect the Commission also observes that three further co-suspects were arrested on 3 June 1991.

Moreover, after the surveillance had ceased, even if this had been as late as the date given by the applicant, he had still more than half a year before the trial commenced during which time he could communicate freely with his lawyer in order to prepare his defence. The applicant has not substantiated that due to the surveillance exercised by the Investigating Judge the exercise of his right to defence had been impaired.

The Commission therefore finds that there is no appearance of a violation of the applicant's rights under Article 6 para. 3 (b) and (c) (Art. 6-3-b, 6-3-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 para. 1 (Art. 6-1) of the Convention about a violation of the principle of equality of arms in the proceedings on his plea of nullity before the Supreme Court. He submits that the Procurator General made submissions to the Supreme Court of which the applicant was not informed and to which he had no possibility to react.

The Government submit that the Procurator General's observations did not amount to comments on the facts of the case, nor did they amount to factual arguments, such that the principle of "equality of arms" was not violated. This is disputed by the applicant.

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 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.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint that he was not given the possibility to react to submissions made by the Procurator General in the proceedings before the Supreme Court

and, by a majority,

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber