AS TO THE ADMISSIBILITY OF

Application No. 24479/94
by Hugo LIETZOW
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
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 March 1994 by Hugo LIETZOW against Germany and registered on 27 June 1994 under file No. 24479/94;

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

Having regard to the observations submitted by the respondent Government on 4 January 1996 and the observations in reply submitted by the applicant on 2 March 1996 ;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1925, is a German national and resident in Schwalbach. In the proceedings before the Commission he is represented by Mr. E. Kempf, a lawyer practising in Frankfurt/Main.

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

A. Particular circumstances of the case

On 30 January 1992 the Frankfurt/Main District Court (Amtsgericht) issued an arrest warrant against the applicant on the suspicion of fraud (Betrug) and corruptibility (Bestechlichkeit).

The District Court found that there was a strong suspicion that, between 1981 and 1989, the applicant, in his position as director of the Vordertaunus sewage disposal authorities (Abwasserverband), had regularly accepted payments by the owner of an engineering office, Mr. N., and his deputy, Mr. W., and that these amounts, increased by

at least 100%, were subsequently included into bills for public construction works financed by the Vordertaunus sewage disposal authorities. Moreover, the applicant had also received a whirlpool. The applicant had agreed with MM. N. and W., who were prosecuted in separate proceedings, that he should ensure that the sewage disposal authorities continuously conferred contracts upon the engineering office. The District Court noted that the strong suspicion was based on the statements made by MM. W. and N.

The District Court further considered that there was a risk of collusion (Verdunkelungsgefahr) within the meaning of the relevant provision of the German Code of Criminal Procedure (Strafprozeßordnung) on the ground that the applicant could contact other accomplices or witnesses, in particular officials of the sewage disposal authorities, or employees of the engineering office, and thereby hinder the establishment of the facts, coordinate their statements or change or destroy relevant documents.

The applicant was arrested on 6 February 1992.

On 7 February 1992 Mr. Kempf, acting as the applicant's defence counsel, requested the Frankfurt District Court to hold an oral hearing on the question of the applicant's detention on remand. He also applied with the Frankfurt Public Prosecutor's Office (Staats-anwaltschaft) for a consultation of the investigation files, or at least the statements of MM. N. and W., as the arrest warrant had referred thereto, and referred to his request with the District Court.

On the same day, the Prosecutor's Office, referring to S. 147 para. 2 of the Code of Criminal Procedure, refused the defence counsel's request, including the statements of MM. W. and N., on the ground that the consultation of these documents would endanger the course of the investigations. The Office noted that the investigations against the applicant formed part of very complex proceedings concerning economic offences (Wirtschaftsstrafverfahren) and that investigations concerning numerous relations between public officials and employees, based on corruption, had not yet terminated. The Office also considered that the investigations against the applicant could not be separated from the other matters.

In written submissions of 12 February 1992, the applicant, through his counsel, commented upon the charges.

On 17 February 1992 the applicant lodged a request for judicial review with the Frankfurt Court of Appeal as regards the decision of the Prosecutor's Office of 7 February 1992. On 19 February 1992, when heard by the Public Prosecutor's Office, the applicant mainly referred to the statements of 12 February 1992.

On 24 February 1992 the Frankfurt District Court, upon the applicant's request of 7 February 1992, held a hearing for the review of his detention on remand. Upon questioning the applicant specified some statements contained in the submissions of 12 February 1992 as far as the places of meetings with Mr. W. were concerned. Moreover, as regards the charge of fraud, he explained his general position in relation to the sewage disposal authorities. Upon query, he further described the circumstances of his having contacted Mr. W. shortly before his arrest.

At the end of the hearing, the District Court ordered the applicant's continued detention on remand. The District Court found that the suspicion against the applicant as stated in the arrest warrant persisted. Furthermore, there remained a risk of collusion. In this respect, the Court referred in particular to the applicant's statement at the hearing that he had contacted Mr. W. The Court considered that the applicant had already at that stage attempted to influence the other suspect and to induce him to make a favourable

statement if questioned at the Public Prosecutor's Office. In this context, the Court attached particular weight to the fact that the applicant took this decision before knowing the concrete charges against him, the means of evidence against him or the statements made by witnesses or the other suspected persons. The District Court also noted that the Public Prosecutor's Office had duly furthered the investigations which could be completed soon.

The applicant filed further written comments on the charges against him on 5 and 13 March 1992. On 18 March 1992 the applicant was again heard by the police authorities in the presence of his defence counsel.

On 27 March 1992 the applicant appealed against the decision of 24 February 1992.

On 3 April 1992 the Frankfurt District Court suspended the execution of the arrest warrant on the conditions that the applicant did not move, or notified any moving to the Frankfurt Public Prosecutor's Office, that he complied with any summons in the case, that he refrained from any conversation about the criminal proceedings with officials of the Vordertaunus sewage disposal authorities and with the employees of the engineering office concerned and that he deposited DM 200,000 as security.

On 24 April 1992 the Frankfurt Court of Appeal (Oberlandesgericht) declared the applicant's request for a judicial review of the decision of 7 February 1992, taken by the Prosecutor's Office, inadmissible.

The Court of Appeal considered that the decision concerned constituted a measure taken by the judicial administration (Justizverwaltungsakt) which could in principle be subject of an appeal under SS. 23 et seq. of the Introductory Act to the Courts Organisation Act (Einführungsgesetz zum Gerichtsverfassungsgesetz). However, this remedy was of a subsidiary nature.

The Court of Appeal found that, as soon as the preliminary investigations which were directed by the Public Prosecutor's Office had terminated, the judge would have to decide on the question of granting access to the files, and that this decision was subject to appeal. This possibility of a subsequent judicial review was sufficient, and the temporary absence of a remedy until termination of the preliminary investigations had to be accepted in the interest of a smooth functioning of criminal justice. In this respect, the Court of Appeal considered that the constitutional right to a court remedy ensures a right to judicial review within a reasonable time and not an immediate judicial review.

The Court of Appeal further stated that the fact that the applicant was detained on remand could not be regarded as a special circumstance, such as the arbitrariness of prosecution, which would call for a remedy before the termination of the preliminary investigations. In the Court of Appeal's view, the applicant's rights were sufficiently secured in the context of the proceedings for a review of his continued detention on remand, in particular according to SS. 120 et seq. of the Code of Criminal Procedure. In this context, the Court of Appeal observed that the courts reviewing an accused's detention on remand were prevented from deciding on whether or not access to the files be granted, this matter being within the sole competence of the Public Prosecutor's Office. However, such absence of immediate judicial control did not amount to a denial of judicial protection. Thus, when reviewing the question of continued detention on remand, the competent court had also to examine whether procedural rights of the remand prisoner under Article 5 para. 4 of the Convention, in the light of the case-law of the European Court of Human Rights, had been violated, and, if so, to order his release.

The decision was served on 6 May 1992.

On 27 April 1993 the applicant's counsel repeated his request for access to the files. The Public Prosecutor's Office, referring to its previous decision, dismissed the request on 3 May 1993.

On 13 May 1992 the applicant, noting that Mr. W. had meanwhile died, applied with the Public Prosecutor's Office for consultation of the statements made by Mr. W. in the course of the criminal proceedings.

On 19 May 1992 the Public Prosecutor's Office dismissed the request on the ground that such access to the files would still endanger the course of the investigations within the meaning of S. 147 para. 2 of the Code of Criminal Procedure.

On 3 June 1992 the applicant lodged a constitutional complaint (Verfassungsbeschwerde) about the decisions of 7 February and 24 April 1992.

On 29 October 1993 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicant's constitutional complaint. The decision was served on 5 November 1993.

On 8 July 1994 the Frankfurt District Court set aside the arrest warrant against the applicant.

On 31 August 1994 the applicant's counsel was granted access to the files.

On 25 January 1995 the applicant's counsel requested the Public Prosecutor's Office to discontinue the proceedings against his client. The applicant's counsel argued that there was no sufficient suspicion against his client. In this respect, he referred to the result of the investigations so far and discussed in detail the statements of the co-accused, including their wording and later amendments.

On 18 December 1995 the Frankfurt Prosecutor's Office discontinued the proceedings against the applicant as far as charges of corruptibility prior to February 1987 were concerned on the ground that the limitation period had expired. Furthermore, it preferred an indictment against the applicant, charging him with two counts of corruptibility.

On 8 July 1996 the Frankfurt District Court convicted the applicant of corruptibility and imposed a fine amounting to DM 40,000. The applicant lodged an appeal, which he subsequently withdrew for personal reasons.

B. Relevant domestic law

SS. 112 to 131 of the Code of Criminal Procedure (Strafprozeßordnung) 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.

According to S. 304 of the Code of Criminal Procedure there is an appeal against any decision taken by courts at first instance or in the course of appeal proceedings, and against any order of a presiding judge, a judge in the course of preliminary proceedings and a delegated or commissioned judge, if the law does not expressly provide otherwise.

S. 23 para. 1 of the Introductory Act to the Courts Organisation Act (Einführungsgesetz zum Gerichtsverfassungsgesetz) provides that the ordinary courts, upon request, decide upon the lawfulness of orders, instructions and other measures taken by judicial authorities in order to settle individual matters in the context of, inter alia, the administration of criminal justice. S. 28 para. 1 stipulates that, to the extent that the measure is unlawful and the applicant's rights are thereby infringed, the measure will be set aside.

COMPLAINTS

The applicant complains under Article 5 para. 4 and Article 6 para. 3 (b) of the Convention that his defence counsel was denied access to the criminal files and could not, therefore, properly present his defence and contest the reasons for his detention on remand. In particular, he could not comment upon the statements made by MM. W. and N. to which the arrest warrant had referred.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 March and registered on 27 June 1994.

On 6 September 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 4 January 1996. The applicant replied on 12 March 1996. He submitted further factual information on 27 January 1997.

THE LAW

1. The applicant complains that his defence counsel was denied access to the criminal files in his case and could not, therefore, properly present his defence and contest the reasons for his detention on remand. He invokes Article 5 para. 4 (Art. 5-4) of the Convention.

Article 5 para. 4 (Art. 5-4) provides as follows:

> "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."

a. The respondent Government maintain that the application is inadmissible for non-exhaustion of domestic remedies on the ground that he did not pursue his appeal against the Frankfurt District Court's decision of 24 February 1992, ordering his continued detention on remand. Thus, even after his release in April 1992, the applicant should have continued these proceedings against the arrest warrant as such. Referring to a Constitutional Court decision of 11 July 1994, they submit that, in such proceedings, the applicant could have argued that the arrest warrant was based on facts and means of evidence of which he had not been aware in advance and in respect of which he had been unable to comment. While oral explanations as to the facts and evidence usually sufficed, the applicant could have argued that in the circumstances of his case, an effective defence presupposed access to the files and that, as access had been refused, the court could not base its decision on such facts and evidence and would have had to set the arrest warrant aside. According to the Government, the remedies taken by him to challenge the refusal of counsel's access to the files cannot be regarded as effective for the purposes of Article 26 (Art. 26).

The applicant objects to the Government's view. He submits that the Constitutional Court decision of 11 July 1994 changed the legal situation prevailing in German case-law at the relevant time. In this respect, he refers to the reasoning of the Frankfurt Court of Appeal in its decision of 24 April 1992.

Under Article 26 (Art. 26) of the Convention, the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. Normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (cf. Eur. Court HR, Akdivar v. Turkey judgment of 16 September 1996, para. 66, to be published in the Reports of Judgments and Decisions for 1996). In this context, it has been recognised that Article 26 (Art. 26) must be applied with some degree of flexibility and without excessive formalism; it is essential to have regard to the particular circumstances of each individual case (cf. Akdivar judgment, op. cit., para. 69).

The Commission notes that, on 17 February 1992, the applicant, assisted by counsel, lodged a request with the Frankfurt Court of Appeal, pursuant to SS. 23 et seq. of the Court Organisation Act, for judicial review of the Public Prosecutor's refusal of access to the files dated 7 February 1992. Moreover, on 27 March 1992 the applicant appealed against the decision of the Frankfurt District Court of

24 February 1992, ordering his continued detention on remand. He was conditionally released from detention on remand on 3 April 1992.

His request of 17 February 1992 was decided upon first. On 24 April 1992 the Frankfurt Court of Appeal found that the Public Prosecutor's decision to refuse access to the criminal files constituted a measure which was in principle subject to review under SS. 23 et seq. of the Court Organisation Act. However, on account of the subsidiary nature of this remedy, the request was inadmissible in the particular circumstances of the applicant's case. In its decision, the Court of Appeal examined in detail the distribution of competences between the Public Prosecutor's Office and the courts in the course of the preliminary investigations. It considered that there was only a subsequent judicial review of the prosecutor's decision not to grant access to the files, namely once the preliminary investigations had terminated, a situation which had to be accepted in the interest of a smooth functioning of criminal justice. As to the particular position of a remand prisoner, the Court of Appeal formed the view that the proceedings for the review of the suspect's continued detention on remand provided for sufficient protection. While the courts were prevented from deciding directly on the question of access, they could order the detainee's release if his procedural rights had been violated. The applicant's constitutional complaint was to no avail.

The Commission finds that in the circumstances of the applicant's case, his request under SS. 23 et seq. of the Court Organisation Act which directly related to his grievance, i.e. the refusal of access to the files, was in principle a remedy which was accessible and capable of providing redress in respect of the applicant's complaints. It is true that the Court of Appeal eventually rejected the applicant's request on account of the subsidiary nature of this remedy. Nevertheless, in view of the Court of Appeal's detailed reasoning, such a request for judicial review did not, from the very outset, lack reasonable prospects of success. Furthermore, given the Court of Appeal's findings, lodging a constitutional complaint with the Federal Constitutional Court in this set of proceedings does not appear as a false course of action.

The Commission further notes that the applicant did not insist on a decision upon his appeal of 27 March 1992 in a situation where he had meanwhile been conditionally released and where the Court of Appeal had rendered its decision of 24 April 1992 in the proceedings under SS. 23 et seq. of the Court Organisation Act. While he could have pursued the matter, formally challenging the suspended arrest warrant, the conduct of such further appeal proceedings did, at the relevant time, no longer appear effective in respect of his specific complaint.

In these particular circumstances, the applicant must be regarded as having complied with the conditions under Article 26 (Art. 26) of the Convention.

It follows that the application is not inadmissible under Article 27 para. 3 (Art. 27-3) of the Convention.

b. The Government further 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 more than 160 accused persons. With regard to the conspiratorial behaviour of all those concerned, and the collusion established in the course of the

investigations, the establishment of the truth would have been hindered, if access had been granted too early.

The applicant states that only in January 1995, following inspection of the relevant files, his counsel had been in a position to set out his defence effectively and to discuss in detail the statements of MM. N. and W.

The Commission considers, in the light of the parties' submissions, that the case 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 the applicant's complaint under Article 5 para. 4 (Art. 5-4) 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 further complains under Article 6 para. 3 (b) (Art. 6-3-b) of the Convention that, as a consequence of the late access to the files, he had no sufficient time to prepare his defence.

The question of whether criminal proceedings conform to the standards laid down in Article 6 (Art. 6) must be decided on the basis of an evaluation of the trial in its entirety (cf. No. 11058/84, Dec. 13.5.86, D.R. 47, p. 230).

However, in the present case, the Commission is not required to examine any complaints as to the alleged unfairness of the proceedings as a whole. In this respect, the Commission notes that the applicant did not pursue his appeal against his conviction by the District Court of July 1996. He has not, therefore, in accordance with Article 26 (Art. 26) of the Convention, exhausted the remedies available under German law. His submissions do not disclose any particular circumstances which might have absolved him, according to the generally recognised rules of international law, from absolving these remedies.

It follows that his complaint must be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

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