AS TO THE ADMISSIBILITY OF

Application No. 13783/88
by Manfred SCHMID
against Austria

The European Commission of Human Rights sitting in private on 14 December 1989, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 February 1988 by Manfred SCHMID against Austria and registered on 30 April 1988 under file No. 13783/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen born in 1938. He was formerly practising as a lawyer and has been debarred since 1981. At the date of introduction of the application, the applicant was detained at Garsten prison.

This is the applicant's third application to the Commission. His first (No. 10670/83), concerning detention and bail conditions in proceedings under the Foreign Exchange Act (Devisengesetz), was declared inadmissible on 9 July 1985. His second application (No. 11831/85), concerning criminal proceedings under the same Act, was declared inadmissible on 9 December 1987.

The applicant is represented in the proceedings before the Commission by Mr. N. Margreiter, lawyer of Bezau. The facts of the case, as submitted by the applicant and his representative, may be summarised as follows:

The applicant was arrested on 5 April 1986 on suspicion of having incited to murder. Detention on remand was ordered on

7 April 1986. On 3 February 1987 the Innsbruck Court of Appeal (Oberlandesgericht) decided that the detention could be extended to one year.

In the course of the investigation proceedings before the Innsbruck Regional Court (Landesgericht) the applicant had complained of a decision of that court to separate the proceedings against the applicant from those against a co-accused, M. His requests that the proceedings should be joined were variously refused because, as the Innsbruck Court of Appeal found in a decision of 13 September 1986, the joinder of the proceedings would have entailed delays in the proceedings against M., necessitating the extension of M's detention on remand.

On 6 April 1987, the main proceedings were opened in the applicant's jury trial before the Feldkirch Regional Court (Landesgericht) with A. as Presiding Judge. The proceedings were adjourned until 29 April 1987.

The applicant applied to the Review Chamber (Ratskammer) of the Feldkirch Regional Court for his release on the ground that the year's detention authorised on 3 February 1987 by the Innsbruck Court of Appeal expired one year after the applicant's arrest, that is, on 4 April 1986. The Chamber, presided over by A., found on 10 April 1987 that the period ran from the original decision on detention on remand on 7 April 1986, that the applicant was therefore still being lawfully detained when the main proceedings began, and that the time limit on detention on remand lapsed once the main proceedings had been opened. As to whether the applicant should remain in detention on remand, the Chamber referred to Article 180 of the Code of Criminal Procedure (Strafprozeßordnung) which provides, so far as relevant, as follows:

(German)

"(1) Die Untersuchungshaft darf nur verhängt werden, wenn der Beschuldigte dringend verdächtig ist, ein bestimmtes Verbrechen oder Vergehen begangen zu haben, einer der in den Abs. 2 oder 7 angeführten Nichtigheitsgründe vorliegt und der Beschuldigte durch den Untersuchungsrichter bereits zur Sache und zu den Voraussetzungen der Untersuchungshaft vernommen worden ist.

(2) Die Verhängung der Untersuchungshaft setzt abgesehen von den Fällen des Abs. 7 voraus, daß auf Grund bestimmter Tatsachen die Gefahr besteht, der Beschuldigte werde auf freiem Fuße

1. wegen der Größe der ihm mutmaßlich bevorstehenden Strafe oder aus anderen Gründen flüchten oder sich verborgen halten (Fluchtgefahr),

2. Zeugen, Sachverständige oder Mitbeschuldigte zu beeinflussen, die Spuren der Tat zu beseitigen oder sonst die Ermittlung der Wahrheit zu erschweren versuchen (Verdunkelungsgefahr) oder

3. ungeachtet des gegen ihn geführten Strafverfahrens
   a) eine strafbare Handlung mit schweren Folgen begehen ...
   .....

(7) Wenn es sich um ein Verbrechen handelt, bei dem nach dem Gesetz auf mindestens zehnjährige Freiheitsstrafe zu crkennen ist, muß die Untersuchungshaft verhängt werden, es sei denn, daß auf Grund bestimmter Tatsachen anzunehmen ist, das Vorliegen aller im Abs. 2 angeführten Haftgründe

sei auszuschließen."

(English translation)

"(1) Detention on remand may only be imposed if the accused is under grave suspicion of having committed a specific offence, if one of the grounds for detention mentioned in paras. 2 or 7 is present and if the accused has already been heard as to the case and as to the investigating judge's remand conditions.

(2) The imposition of detention on remand requires, apart from the instances mentioned in para. 7, that, on the basis of specific facts, there is a danger that the accused would, if still at liberty,

1. abscond due to the amount of punishment which he would probably receive or for other reasons, or hide (danger of absconding);

2. attempt to influence witnesses, experts or co-accused, destroy evidence of the offence or in any other way impede the determination of the truth (danger of collusion); or

3. regardless of the proceedings instituted against him,

a) commit a criminal offence with serious consequences ...

.....

(7) If an offence is at issue which, according to the law, would result in imprisonment of at least 10 years, detention on remand must be imposed, except if on the basis of specific facts it may be assumed that all grounds of detention mentioned in para. 2 can be excluded."

The Chamber found that "grave suspicion" was established by the valid indictment, and that the applicant's links with his family were not sufficient to rebut the presumption in Article 180 para. 7 of the Code of Criminal Procedure that the applicant should be remanded in custody, bearing in mind that the applicant, if convicted, could be sentenced to a prison sentence of 10-20 years.

The proceedings, at which A. still presided, continued on 29 April 1987, when the applicant was convicted, inter alia, of attempted incitement to murder, incitement to perjury and firearms offences. He was sentenced to 12 years' imprisonment. He was acquitted of one charge of attempted incitement to perjury.

The applicant appealed to the Supreme Court (Oberster Gerichtshof), complaining, inter alia, that A. should have been excluded from the proceedings because he had taken part in a decision on detention on remand. The Supreme Court, in its decision of 5 November 1987, found that, although A. would have been precluded by law from presiding at the applicant's trial if he had acted as investigating judge (Article 68 para. 2 of the Code of Criminal Procedure), in the present case A.'s sole prior involvement had been as president of the Review Chamber of the Feldkirch Court in the decision of 10 April 1987. Such participation did not amount to acting as investigating judge, and so A. could act as judge in the main proceedings. The sentence was increased to 16 years' imprisonment.

On 13 June 1987 and 18 July 1987 the applicant requested that criminal proceedings be instituted against M., who had given evidence in the applicant's trial. The request was refused by the Feldkirch Regional Court on 16 November 1987 as an attempt to have the jury trial's decision reviewed. The Innsbruck Court of Appeal found that

no appeal lay to it.

COMPLAINTS

1. The applicant complains of the participation of A. as Presiding Judge both of the jury court in criminal proceedings against him and of the Review Chamber during an adjournment of the case. He alleges a violation of Article 6 para. 1 of the Convention, referring to the Piersack, De Cubber and Ben Yaacoub cases (Eur. Court H.R., judgments of 1 October 1982 and 26 October 1984, Series A nos. 53 and 86; Comm. Report 7.5.85, Eur. Court H.R., Series A no. 127).

2. He also complains of the decision to separate the proceedings from those of a co-accused, alleging that this was a device to enable the co-accused to give evidence against him, and to cast doubt on the applicant's credibility because of the prior conviction of the "co-accused".

3. Finally, the applicant complains that one witness in the criminal proceedings against him perjured himself in at least 10 instances, and that his complaints in this regard were rejected on formal grounds.

THE LAW

1. The applicant complains of the participation of A. both as presiding judge of the court in the criminal proceedings against him and as presiding judge of the Review Chamber during an adjournement of the case. He alleges a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

The first paragraph of Article 6 para. 1 (Art. 6-1) provides as follows:

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

The mere fact that a trial judge or appeal judge has made decisions on detention on remand does not of itself justify fears as to the judge's impartiality (cf. Eur. Court H.R., Hauschildt judgment of 24 May 1989, Series A no. 154, para. 50). Moreover, in the Austrian legal system, the role of the Review Chamber is not to act as an investigating judge, but rather to supervise the investigating judge. The investigating judge, with his detailed knowledge of the case, is precluded from participating at the trial by virtue of Article 68 para. 2 of the Code of Criminal Procedure.

The function of the Review Chamber over which A. presided was limited to a determination of the questions whether the applicant's detention at the opening of the trial was still lawful, whether the time limits on detention on remand lapsed once the main proceedings opened, and whether the applicant should remain in detention on remand. The first two of these questions concerned purely legal issues unrelated to the merits of the applicant's case, and the judge's participation cannot be seen to raise any problems as to his impartiality. The third question, whether the detention on remand should continue, does involve a certain appreciation of the merits of the case. However, as is apparent from Article 180 of the Code of Criminal Procedure, the extent of that examination was limited because, owing to Article 180 para. 7, the applicant was bound to be detained on remand unless it could be assumed that none of the grounds in Article 180 para. 2 applied. Such a legal position reduces the need for a detailed examination of the merits of the case. The Review Chamber's decision, that the applicant's links with his family could not rebut the presumption in Article 180 para. 7, cannot be seen to overlap with matters which a trial judge must assess with a completely

open mind. A distinction was therefore maintained between A.'s functions as President of the Review Chamber and his functions as President of the trial court.

Finally, the Commission would underline that A. was involved with the Review Chamber only once, and that his participation as President of the Review Chamber took place when he had already been seized of the case as presiding trial judge on 6 April 1987.

Consequently, the Commission considers that the judge's impartiality was not open to doubt in the circumstances of the case.

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 also complains that the proceedings against him were severed from those against M., a "co-accused", and that his requests for joinder of the cases were rejected.

The Commission would first emphasise that the severance or joinder of cases does not, as such, affect the fairness of criminal proceedings, although it may affect the length (cf., for example, Eur. Court H.R., Neumeister judgment of 27 June 1968, Series A no. 8; G. v. Austria, No. 12100/86, Comm. Report 11.4.89). It is for the national authorities to determine whether the interests of a good administration of justice require that charges against several defendants are dealt with jointly or separately. Whatever the decision as to severance, however, the trial in respect of each defendant must comply with the requirements of Article 6 (Art. 6).

The applicant complains that the aim of severing the proceedings against M. was to enable M. to give false evidence in the applicant's case and, as a convicted person, to cast doubt on the applicant's credibility. These complaints are unsubstantiated by the case-file, from which it appears that the Innsbruck Court of Appeal found, on 13 September 1986, that the joinder of the proceedings would have entailed delay in the proceedings against M., and would have required an extension of M.'s detention on remand.

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.

3. The applicant also complains of the refusal of the authorities to act on his complaints that M. perjured himself.

However, under Article 19 (Art. 19) of the Convention, the Commission cannot examine whether M. committed perjury and no right to bring criminal proceedings against third persons is as such included among the rights and freedoms guaranteed by the Convention (cf. No. 864/60, Dec. 10.3.62, Collection 9 p. 17).

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)