AS TO THE ADMISSIBILITY OF

Application No. 25116/94
by Jörg Rudolf SCHÖPS
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
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 4 July 1994 by Jörg Rudolf SCHÖPS against Germany and registered on 12 September 1994 under file No. 25116/94;

Having regard to:

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

- the observations submitted by the respondent Government on 9 January 1996 and the observations in reply submitted by the applicant on 12 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1953, is a German national and resident in Essen. When lodging his application, he was detained in a prison in Essen. In the proceedings before the Commission he is represented by Mr. K. Hütsch, a lawyer and notary practising in Essen.

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

A. Particular circumstances of the case

In 1992 the Essen Public Prosecutor's Office (Staatsanwaltschaft) started investigations against the applicant and numerous other suspects on the suspicion of fraud.

On 11 March 1993 the Essen District Court (Amtsgericht) issued an arrest warrant against the applicant as well as the co-suspects S.

and L. on the suspicion of criminal association, of drug trafficking and several counts of fraud.

In its decision the District Court noted that the suspects were charged with having founded - at the end of December 1988 - an association for the purpose of gaining large profits from fraudulent trading options. Moreover, as from mid 1990 the suspects agreed to import cocaine from Mallorca to the Federal Republic of Germany and to sell it there. Several other accomplices were recruited as members of the criminal organisation and involved in the numerous criminal offences. As regards the fraudulent trading options, almost one thousand victims were defrauded by the criminal association between the beginning of 1989 and March 1993, and a total damage of sixty million DM was caused to them. Moreover, between October 1990 and August 1992 some hundred kilograms of cocaine were imported to, and sold in, Germany. The District Court found that, having regard to the statements of witnesses, the statements of the co-suspects, the results of telephone tapping and the other results of the investigations, there was a strong suspicion that the applicant, S. and L. had committed the criminal offences in question.

The District Court also considered that there was a danger of absconding within the meaning of S. 112 para. 2 (2) of the Code of Criminal Procedure (Strafprozeßordnung). In this respect the Court found that, taking into account the seriousness of the offences with which the suspects were charged and the importance of the damage caused by them, they had to expect a long term of imprisonment. Moreover, the suspects had obviously sufficient financial means in order to finance absconding. According to the District Court, there was also a danger of collusion within the meaning of S. 112 para. 2 (3) of the Code of Criminal Procedure. The District Court assumed that the suspects, as members of a criminal association, were used to disguising the extent of their activities by means of men of straw, fictitious contracts, and they were likely to suppress evidence or influence witnesses.

The applicant was arrested on 19 March 1993. In presence of his defence counsel Mr. Hütsch, he was informed by the Investigating Judge (Haftrichter) about the charges against him and about the arrest warrant of 11 March 1993. The applicant requested that the lawfulness of his detention be examined (Antrag auf mündliche Haftprüfung).

Moreover, according to the applicant, his counsel applied, at the Essen Public Prosecutor's Office, for a provision to consult investigation files, which was refused on the ground that access to these documents would endanger the course of the investigations. This request and its refusal are not recorded in the files of the Public Prosecutor's Office.

On 8 September 1993 the Essen District Court amended the arrest warrant, adding in particular further charges of tax evasion, corruption, incitement to making a false entry into official records and making a false affidavit. The District Court confirmed that there was still a danger of the applicant's and co-suspects' absconding which could only be prevented by less serious measures in the case of S. Thus the execution of the arrest warrant against S. could be suspended, whereas the applicant and L. had to be further remanded in custody.

On 14 September 1993 the applicant was informed about the amended arrest warrant. According to the record of this hearing, his counsel "again" ("nochmals") applied for access to the files.

On 14 September 1993 the Hamm Attorney General's Office (Generalstaatsanwaltschaft) requested the prolongation of the applicant's and L.'s detention on remand. In this request, to which 24 investigation files were attached, the Attorney General noted the history of the detention proceedings, and summarised the suspicion against the co-suspects. As to the details of the facts, he referred

to the arrest warrant and a police report of July 1993 which were to be found in the attached files. The strong suspicion against the co-suspects was, according to the Attorney General, based upon the statements of the suspects and of witnesses, the opinion of a stock taking expert, records of telephone tapping and seized business documents, all included in the investigations files. He also confirmed the danger of absconding.

In his reply of 21 October 1993, the applicant's defence counsel applied with the Düsseldorf Court of Appeal (Oberlandesgericht) for access to the files, for an oral hearing on the question of the applicant's continued detention and for his release. He submitted that he could not in detail comment upon the Attorney General's submission on the ground that, despite promises on several occasions, he had not yet been granted access to the investigation files and as the Attorney General's submissions were in themselves fragmentary.

According to a handwritten file note drafted by the Court of Appeal Rapporteur, the applicant's counsel, upon a telephone query, agreed to a decision on the question of the applicant's continued detention on remand without having previously had access to the files. According to the applicant, as confirmed by his counsel Mr. Hütsch and his counsel's colleague Mr. Pott, the Court of Appeal Rapporteur and counsel had agreed that he could not comment on the question of the applicant's continued detention on remand without having had access to the files and that the Court of Appeal Judge had therefore promised to arrange for a consultation of the files.

On 3 November 1993 the Düsseldorf Court of Appeal ordered the applicant's continued detention on remand.

The Court of Appeal, having regard to the result of the investigations so far, in particular the applicant's and the co-suspects' statements, the statements of the victims, the records of telephone tapping and seized business documents and the provisional opinion of a stock taking expert, confirmed that there was a strong suspicion that the applicant had committed the offences in question. As regards the danger of the applicant's absconding, the court of Appeal noted that the applicant had important financial means and real property in Mallorca. Moreover he had, until his arrest, had contacts in the United States of America, Switzerland and Spain.

The Court of Appeal also considered that the applicant's continued detention on remand was not disproportionate. As to the conduct of the investigation proceedings, the Court of Appeal observed that the particular difficulty and extent of the investigations had not yet enabled a judgment to be reached. In this respect, the Court of Appeal noted that the investigation files already comprised 24 volumes, and that the indictment was envisaged for November 1993. Finally, the Court of Appeal stated that there had been no need for an oral review hearing.

On 22 November 1993 the Essen Public Prosecutor's Office decided that the applicant's defence counsel be allowed to consult the investigation files. According to the applicant, only 22 of the then 24 files were made available to him. He returned the files in January 1994. According to the applicant, his counsel applied for further consultation of the files in the beginning of 1994.

On 7 February 1994, following a change in the courts' competences, the Hamm Public Prosecutor's Office requested the Hamm Court of Appeal to order the applicant's continued detention on remand. The Prosecutor's Office enclosed the criminal files, which comprised 69 volumes and 3 subsidiary files (Beiakten).

In his written submission of 28 February 1994, the applicant's counsel stated that he had so far only be able to consult 22 volumes

of the criminal files and that he could not, therefore, add anything to his previous observations.

On 1 March 1994 the Hamm Court of Appeal granted the request of 7 February 1994.

The Court of Appeal considered that the reasons stated in the Düsseldorf Court of Appeal's previous decision remain valid. Moreover, the proceedings had progressed. The police had prepared an intermediate report in January 1994 and given information according to which the questioning of about one thousand witnesses was almost completed. The final police report and the report of the tax investigation authorities had been announced for the end of February 1994. The Public Prosecutor's Office envisaged preparing the bill of indictment immediately afterwards. Thus the obligation to conduct the proceedings expeditiously had not been disregarded.

The Court of Appeal further found that the applicant's complaint under Article 5 para. 4 of the Convention about the lack of access to the investigation files did not affect the validity of the arrest warrant.

On 25 March 1994 the applicant lodged a constitutional complaint (Verfassungsbeschwerde) about the decisions of 3 November 1993 and 1 March 1994, complaining in particular about the lack of sufficient access to the investigation files. In this respect, he noted that he had been granted access to 22 volumes of the investigation files which, at that time, comprised altogether 132 volumes. He and his defence counsel had not, therefore, been able to properly comment upon the suspicion raised and to exercise the defence rights effectively.

On 2 May 1994 the Federal Constitutional Court (Bundesverfassungsgericht) refused to entertain the applicant's constitutional complaint.

On 25 March 1994 the Essen Public Prosecutor's Office drew up the bill of indictment (Anklageschrift) against the applicant and four co-accused. They were charged with having committed various criminal offences. In particular the applicant was charged with having committed 91 counts of fraud, corruption, incitement to making a false entry in an official record and of having given a false affidavit. The proceedings relating to the charges of tax evasion were separated from these main proceedings. Prosecution for unlawful association was discontinued in view of the severity of the other charges. The bill of indictment, which stated in detail the charges against the applicant, the relevant facts and means of evidence, was served upon the applicant's counsel on 9 June 1994.

Moreover, on 9 June 1994 the Essen Public Prosecutor's Office forwarded copies of the investigation files, i.e. 132 main and 2 supplementary volumes - altogether about 16,000 pages, to the applicant's defence counsel for consultation. It requested that they be returned within one week in order to allow for consultation by the other defence counsel. On 23 June 1994, the Office sent a reminder as to the return of the files. The date of their return was not recorded. According to the applicant, the copies made available to his counsel were not complete.

On 30 June 1994 the Hamm Court of Appeal ordered the applicant's continued detention on remand. Upon the request of counsel of one of the applicant's co-accused, the date for the decision had been postponed for one week in order to have adequate opportunity to file submissions.

The Court of Appeal confirmed the findings as laid down in the earlier decisions of 30 November 1993 and 1 March 1994. As regards the charges against the applicant, the Court of Appeal noted the changes

resulting from the bill of indictment, which did not take up the charges of founding a criminal association and of tax evasion. The prosecution regarding the first of these charges had been discontinued, in accordance with the relevant provisions of the Code of Criminal Procedure, in view of the minor importance of the offence as compared to those at issue in the bill of indictment. As regards the latter further investigations were pending.

The Court of Appeal also considered that the proceedings had progressed. The bill of indictment had meanwhile been drawn up and forwarded to the Chamber for Economic Offences at the Essen Regional Court (Landgericht). The Regional Court had started examining the complex case and envisaged, if main trial proceedings were opened, to start the hearings in September 1994.

On 19 October 1994 the Hamm Court of Appeal discontinued the applicant's detention on remand. The Court of Appeal confirmed that there was still a strong suspicion against the applicant and the reasons for detaining him on remand persisted, however, his continued detention ceased to be proportionate. The Court of Appeal considered in particular that since May 1994 the Essen Regional Court had not duly furthered the proceedings.

The proceedings are still pending before the Essen Regional Court.

B. Relevant domestic law

SS. 112 to 131 of the Code of Criminal Procedure (Strafprozeß-ordnung) 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 has 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 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.

COMPLAINTS

1. The applicant, in the application form submitted on 16 August 1994, complains under Article 5 para. 3 of the Convention about the length of his detention on remand. He submits that most of the charges against him proved to be unfounded as they were not taken up in the bill of indictment against him, thus in particular the suspicion of drug trafficking. Following the termination of the investigation there was no danger of collusion. Moreover, there had been no risk of his absconding, as he had close relations to his parents and had two small children.

2. The applicant further complains under Article 5 para. 4 of the Convention 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. No equality of arms had, therefore, existed.

3. The applicant further complains under Article 6 para. 3 (a) and (b) of the Convention about the lack of access to the files and detailed information about the charges against him and the relevant facts.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 4 July and registered on 12 September 1994.

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

The Government's written observations were, after an extension of the time-limit, submitted on 9 January 1996. The applicant replied on 12 April 1996. The Government amended their observations on 9 May 1996.

THE LAW

1. In his application form, the applicant complains under Article 5 para. 3 (Art. 5-3) of the Convention about the length of his detention on remand. In his letter of 25 July 1995, he indicates that his application is in essence directed at the "unfairness of the proceedings" ("Unfairness des Verfahrens"), and not at the "question of his continued detention on remand" ("Frage der Haftfortdauer").

The Government maintain that the applicant thus clarified that he did not intend to complain under Article 5 para. 3 (Art. 5-3) of the length of his detention on remand. They consider that such a complaint would anyway be inadmissible.

The Commission finds that, while the applicant, in the application form, expressly complained about the length of his detention on remand and invoked Article 5 para. 3 (Art. 5-3) of the Convention in this respect, the wording of his ensuing letter is ambiguous and not sufficient to establish that the applicant no longer wished to pursue the matter. However, this problem need not be finally

settled, as this complaint is, in any event, inadmissible for the following reason.

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, and within a period of six months from the date on which the final decision was taken. An applicant should have normal recourse to remedies which are available and sufficient to afford redress in respect of the breaches alleged. Article 26 (Art. 26) also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time limits laid down in domestic law (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).

The Commission finds that the applicant failed to exhaust the remedies available to him under German law, as he did not lodge a constitutional complaint with the Federal Constitutional Court regarding the length of his detention on remand. In this respect, the Commission notes that the applicant's constitutional complaint of March 1994 only related to the question of access to the investigation files.

The applicant argues that in the context of his constitutional complaint, he had not wished to plead the unreasonableness of the length of his detention without having consulted the investigation files. However, the Commission considers that, given the general information at the applicant's disposal, his submissions do not show that, in the circumstances of his case, a complaint with the Federal Constitutional Court about the length of his detention on remand would not have constituted an available and effective remedy.

It follows that this part of the application must be rejected under Articles 26 and 27 para. 3 (Art. 26, 27-3)) of the Convention.

2. The applicant further 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."

The Government 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.

The Government note that, in the present case, the applicant's counsel had been granted access to the files on 22 November 1993 and again on 9 June 1994. They maintain that the fact that he was not granted access to the files at an earlier stage does not disclose any appearance of a violation of Article 5 para. 4 (Art. 5-4) as counsel's first request for access only dated from 14 September 1993. No action was taken upon this request on the ground that the duplicate copy of the files had been forwarded to the Düsseldorf Court of Appeal for the purposes of the review proceedings, while the original files were needed for the purposes of the continuing investigations. Indeed, as evidenced by the file note of the Court of Appeal Rapporteur, counsel had agreed to a decision in the review proceedings without having

previously had access to the files. Moreover, they note that in November 1993 counsel did not complain about any alleged incompleteness of the files made available to him.

Furthermore, the Government submit that, in the ensuing proceedings, the applicant's counsel failed to repeat his requests for access to the further files which had been opened as the investigations had gone on. However, the prosecution authorities were not obliged to grant, ex officio, access to such files. As the applicant and his counsel were aware of the complexity of the investigations, they had to keep track of the further developments and to renew requests for access to the files. The submissions to the Court of Appeal dated 28 February 1994, in which the applicant's counsel complained about not having been able to consult all of the then existing files, could not be regarded as a request for access to the files. Moreover, no request to postpone the date for the Court of Appeal's decision on the question of the applicant's continued detention on remand was made. In any event, following consultation of then 24 files in November 1993 the applicant had sufficient knowledge of all relevant elements necessary for an effective defence in the review proceedings.

According to the applicant, his counsel lodged requests for access to the files both in March and September 1993. In his submission, the file note of drafted by the Court of Appeal Rapporteur, is misleading: in fact defence counsel had merely accepted that, in the absence of access to the files, he could no more than believe the Court of Appeal's findings. The files made available to his counsel in November 1993 had been incomplete, in particular, the further files opened in the course of the investigations were not made available to him. In these circumstances he could not effectively exercise his defence rights and question the lawfulness of his continued detention on remand.

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.

3. The applicant further complains under Article 6 para. 3 (a) and (b) (Art. 6-3-a, 6-3-b) of the Convention about the lack of access to the files and detailed information about the charges against him and the relevant facts.

The Commission recalls that 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). Accordingly, the applicant's complaints relating to the preparation of his defence and exercise of his defence rights in the criminal proceedings, which are still pending, are premature.

It follows that this aspect of 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, 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;

DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber