

COUNCIL
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CONSEIL
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Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 9300/81

Elvan CAN
against
AUSTRIA

Report of the Commission

(Adopted on 12 July 1984)

STRASBOURG

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I. INTRODUCTION

1. The following is an outline of the case as presented by the parties to the European Commission of Human Rights.

A. The substance of the application

2. The applicant, a Turkish citizen born in 1947, is represented before the Commission by Mr R. Zitta, lawyer in Salzburg.

The Austrian Government are represented by their Agent, Mr. H. TURK, Head of the International Law Department of the Federal Ministry of Foreign Affairs.

3. In August 1980 the applicant, his brother Riza and two Austrian citizens were arrested under suspicion of being involved in a crime of arson (Brandstiftung). The applicant's brother had confessed to setting fire to a restaurant which was managed by the applicant. The applicant was kept in detention on remand until November 1981, when he was released on bail.

4. In the beginning of September 1980 the applicant chose Mr Zitta as defence counsel. In the same month he was visited by his counsel and by an assistant of counsel and was allowed to converse with them only in the presence of an officer of the court. On 23 December 1980 the applicant was again visited by his defence counsel and could now converse with him without being supervised by an officer of the court.

5. On 14 January 1983 the applicant was convicted of being an accomplice to arson and sentenced to 14 months' imprisonment. The judgment became final as the legal remedies lodged by the applicant were to no avail.

6. The applicant complains that after his arrest he initially was not allowed to converse with his defence counsel in private. He also complains of the length of his detention on remand. He invokes in particular Arts 5 (3) and 6 (3) of the Convention.

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B. Proceedings before the Commission

7. The application was introduced with the Commission on 14 April 1981 and registered on 21 April 1981. The Commission proceeded to a first examination of the application on 2 March 1982 and decided in accordance with Rule 42 (2)(b) of its Rules of Procedure to give notice of the application to the respondent Government for observations on the admissibility and merits. The respondent Government were requested to limit their observations to the complaints under Arts 5 (3) and 6 of the Convention, and to deal only with the question of the length of the applicant's detention on remand and the initial restriction according to which the applicant was not allowed to consult his defence counsel in private.

The Government's observations were submitted on 15 June 1982. The applicant's observations in reply were submitted on 30 July 1982.

8. The Commission examined the application again on 4 May 1983 and decided to invite the parties to an oral hearing on admissibility and merits. This hearing took place on 14 December 1983. The parties were represented as follows:

- the Government by their Agent, Mr. H. TURK, Head of the International Law Department of the Federal Ministry of Foreign Affairs, who was assisted by Mr. W. OKRESEK, of the Constitutional Law Department of the Federal Chancellery, and Mrs G. KABELKA, of the Federal Ministry of Justice, Advisers;
- the applicant by his lawyer, Mr. ZITTA of Salzburg.

9. At the end of the hearing the Commission declared the application admissible. Additional submissions in writing on the merits of the application were not submitted.

10. Having declared the application admissible, the Commission, in accordance with Art 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter. In view of the attitude adopted by the parties, the Commission finds that there is no basis for such a settlement.

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C. The present Report

11. The present Report has been drawn up by the Commission in accordance with Art 31 of the Convention, after deliberations and votes in plenary session, the following members being present:

MM. A. NØRGAARD, President
G. SPERDUTI
J. A. FROWEIN
F. ERMACORA
S. TRECHSEL
B. KIERNAN
M. MELCHIOR
A. S. GOZUBUYUK
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS
H. DANELIUS

12. In accordance with Art 31 (1) of the Convention, since no friendly settlement has been reached, the purpose of the present Report is accordingly:

1. to establish the facts; and
2. to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

The following items are appended to this Report: a schedule setting out the history of the proceedings before the Commission (Appendix I), and the text of the decision on the admissibility of the application (Appendix II).

13. The present Report was adopted by the Commission on 12 July 1984 and will be transmitted to the Committee of Ministers in accordance with Art 31 (2) of the Convention.

The full text of the parties' written and oral submissions and the documents submitted to the Commission are in the Commission's archives and can be made available to the Committee of Ministers on request.

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II. ESTABLISHMENT OF THE FACTS

14. This section of the Report contains a description of the facts found by the Commission on the basis of the information submitted by the parties.

A. The applicant's situation

15. The applicant and his Turkish wife live in Austria since 1971. Three of their four children were born in Austria, the youngest shortly before the applicant's arrest.

On 17 July 1980 the competent authorities (Bezirkshauptmannschaft) in Hallein ordered that the applicant was no longer allowed to reside in Austria (unbefristetes Aufenthaltsverbot). The applicant's appeal against this order was still pending at the time of the oral hearing before the Commission.

B. The subject matter of the criminal proceedings against the applicant

16. The applicant was the manager of a restaurant in Hallein which was run by the Austrian citizen Mrs E.R. On the evening of 8 August 1980 a fire broke out in that restaurant. Following the first investigations, there were reasons to suspect the applicant's brother Riza of having started the fire. Heard by the police on 9 August 1980, Riza made a confession and alleged being instigated by Mrs E.R. He was arrested and repeated his confession before the duty judge (Journalrichter) on 10 August 1980 incriminating again Mrs E.R. and alleging that his brother, the applicant, was not involved in the matter. Mrs E.R. was arrested on 10 August 1980.

17. On 17 August 1980 the applicant was arrested on suspicion of having participated in the crime of arson. Mrs E.R.'s daughter, E.F., was likewise arrested. All four arrested persons were also suspected of insurance fraud by having taken away insured objects from the restaurant and later claiming that these objects had been destroyed by the fire. On 18 August 1980 the applicant was heard by the police and stated that he wished to contact a lawyer. On the following day he was remanded in prison. According to the investigating judge there existed a danger of collusion (Verdunkelungsgefahr) and a danger of absconding (Fluchtgefahr).

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C. Initial restrictions concerning the applicant's defence

18. The applicant chose his defence counsel, Mr Zitta, at the beginning of September 1980. A lawyer in Wels, where the applicant was detained, contacted the applicant briefly on 4 September 1980 on the instructions of the defence counsel. On 15 and 30 September 1980 respectively, an assistant of the defence counsel and counsel himself spoke with the applicant in the presence of an officer of the court. Defence counsel's request to examine the court file was partly granted in September, in the sense that certain parts only of the file could be inspected. The full complaint (Vollanzeige) submitted by the Gmunden constabulary on 4 September 1980 (see below, para 21) was not made available to the defence before 10 October 1980 when counsel again inspected the file which was then complete with the exception of a coded letter and its decoded translation.

19. On 6 October 1980 the applicant made a request to be allowed to converse with his defence counsel without being supervised by a court officer. On 9 October 1980 this request was rejected by the investigating judge who simply referred to Section 45 (3) of the Code on Criminal Procedure (StPO), adding that this provision was clearly compatible with constitutional rights. The provision reads as follows:

"A detained defendant may converse with his defence counsel without a court officer being present. But where the defendant is in detention also or exclusively because of danger of collusion, a court officer shall be present at conversations with the defence counsel until the indictment has been communicated."(1)

Para 4 of the same section also allows control of the arrested person's correspondence with his defence counsel.

The period during which a detained person may thus be restricted in his contacts with his defence counsel is limited to a maximum of three months because detention on remand for the sole reason that there is danger of collusion may not, according to Section 193 (3) of the Code on Criminal Procedure, exceed two months. This period may, at the Public Prosecutor's request, be prolonged by one month.

(1) "Der verhaftete Beschuldigte darf sich mit seinem Verteidiger ohne Beisein einer Gerichtsperson besprechen. Ist der Beschuldigte aber auch oder ausschliesslich wegen Verdunkelungsgefahr in Haft, so hat bis zur Mitteilung der Anklageschrift der Besprechung mit dem Verteidiger eine Gerichtsperson beizuwohnen."

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The applicant's appeal against the decision of 9 October 1980 was rejected by the Review Board (Ratskammer) of the Regional Court of Wels on 13 March 1981. The Court stated that, according to Section 45 (3) of the Code on Criminal Procedure, only circumstances related to the person of the remand prisoner were decisive for the maintenance of control with regard to all his contacts with the outside world. This did not mean that the regulation was motivated by the idea that the defence counsel could become an accomplice to machinations of the remand prisoner. It was rather in the interest of the defence counsel that no situation could arise which could give rise to any kind of suspicion in this respect. Section 45 (3) was therefore considered to be compatible with the European Convention on Human Rights as well as with Austrian constitutional law. In so far as the applicant had complained that his defence counsel had not been allowed to examine certain parts of the file, the court stated that at the time these parts had only recently been included in the file and the investigating judge himself had not yet examined them.

20. On 23 December 1980 an assistant of defence counsel and the applicant were able to prepare the defence without being supervised by an officer of the court.

D. The course of the proceedings

21. On 4 September 1980 the Gmunden constabulary established a full report (Vollanzeige) against all four suspects. In addition to a statement of the facts it contained reports on the examination of the suspects, statements by witnesses, results of investigations, sketches, photos, other evidence and the opinion of the expert present at the inspection of the site on 10 August 1980. A supplementary report of the constabulary was submitted to the court on 19 November 1980. Hearings of the four suspects by the investigating judge took place in September and October 1980. The applicant was last heard on 14 October 1980. In a letter of 18 September 1980 defence counsel told the applicant that he should in the future not make any statements renouncing the right to lodge an appeal. Inter alia it was possible to appeal against the indictment. Therefore it was necessary to examine the indictment before deciding whether or not it was advisable to lodge an appeal. On 22 September 1980 the investigating judge made a file note stating that the applicant's defence counsel had advised his client to lodge legal remedies against all court decisions.

22. On 7 October 1980 the investigating judge requested the Salzburg Regional Court (Landesgericht) to submit files concerning bankruptcy proceedings (Insolvenzverfahren) against Mrs E.R. These files were submitted in the same month and the investigating judge had photocopies made of the relevant parts. Subsequently on 1 February 1981 the investigating judge ordered that the trustee in the bankruptcy proceedings and an agent of the insurance company, which had insured the stock allegedly destroyed by the fire, be heard as witnesses by rogatory commission. One of these rogatory commissions was sent to a court which was not competent to deal with it.

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Eventually the two witnesses were heard on 10 and 26 March 1981 respectively. The transcripts of the hearings comprise scarcely one page each. The trustee stated that Mrs E.R. had given up her business in Schwarzach without informing him. He did not know what stock had remained and where she had taken it. He added that he had reported the matter to the bankruptcy court. The insurance agent stated mainly that Mrs E.R. had come to see him on 29 July 1980 to increase the sum insured, which, however, he had advised her not to do. The two transcripts reached the investigating judge by the end of March 1981.

23. On 18 May 1981 the indictment was filed. The applicant was heard by a judge on 21 May 1981 in the absence of his defence counsel and declared that he renounced the possibility of lodging an appeal against the indictment. He requested that a copy of the indictment be sent to his counsel. The trial was fixed to begin on 8 October 1981. As Mrs E.R., who had meanwhile been released (see para 28), did not appear on 8 October 1981 the trial was postponed to 12/13 November 1981. On 21 September 1981 the applicant's defence counsel had requested to take certain evidence (eine Reihe von Beweisanträgen). These requests were complied with, partly by summoning witnesses and hearing these witnesses at the trial, partly by telephone calls or other means of fact finding before or at the trial. Applicant's counsel did not submit further requests at the hearing of 12/13 November 1981. The trial was then adjourned on account of requests for the taking of further evidence made by Mrs E.R.

24. On 14 January 1983 the applicant was convicted of being an accomplice to arson and sentenced to 14 months' imprisonment. His appeal and plea of nullity were rejected by the Supreme Court on 15 November and 13 December 1983 respectively.

E. Detention on remand

25. On 2 September 1980 the Review Board of the Regional Court of Wels rejected the applicant's request for his release and stated that there was danger of collusion because the facts had not yet been clearly established.

26. On 30 September 1980 the Review Board rejected another request for the applicant's release. The court stated that not only the applicant's contact with the co-accused, two of whom had likewise requested their release, but also his contact with other persons, risked jeopardising the purpose of the investigation proceedings as, in a letter written by a third person to one of the co-accused, the applicant had been incriminated. Also, a coded letter which was apparently related to the applicant's family had been stopped by the investigating judge. In these circumstances there was still danger of collusion.

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27. The applicant's appeal against the decision of 30 September 1980 was rejected by the Court of Appeal (Oberlandesgericht) in Linz on 22 October 1980. The decision was served on the applicant's defence counsel on 6 November 1980. The Appellate Court considered that suspicion against the applicant continued to exist. Also, there was still danger of collusion as a letter written by the applicant's brother to his wife on 9 September 1980 seemed to indicate that the applicant was involved in the matter although his brother tried to discharge him. Danger of absconding was considered to exist in view of the severe punishment (one to ten years' imprisonment) which the applicant risked and which he could be tempted to avoid by fleeing to his home country. In this connection the court stated that the applicant's family ties were loose as he had an intimate relationship with Mrs E.R.

According to a file note written by the investigating judge on 7 January 1981 the applicant's wife had told the judge that she would go to Turkey and come back in one or two months but also considered remaining with her children in Turkey.

28. On 13 January 1981 the Review Board of the Regional Court rejected another request for the applicant's release. Danger of collusion was no longer considered to exist, but danger of absconding was. This decision was confirmed by the Court of Appeal in Linz on 28 January 1981. On the same day, in view of the complexity of the case and the difficulties of the investigations, the Appellate Court ordered that detention on remand could last up to seven months. The court added that, according to the result of the investigations, it could be expected that the main proceedings against the co-accused would begin in March 1981. However, by decisions of 25 February and 8 April 1981 this court ruled that the applicant's detention could last up to 8 and 10 months respectively.

Meanwhile, on 3 December 1980, the Appellate Court had ordered the release of Mrs E.R, stating that the danger of absconding which still existed in her case could be met by the provisional seizure of her travelling documents. As regards danger of repetition which was also considered to exist with regard to Mrs E.R. the Appellate Court considered that the detention on remand had already had a sufficiently deterring effect.

29. On 30 April 1981 the Regional Court ordered the applicant's release on bail in the amount of 90,000 AS, and under the condition that the applicant respected certain obligations (mainly to remain in Hallein and report to the police once a month). In fixing the amount of bail, the court took account of damage caused by the arson (450,000 AS) and the applicant's personal and financial situation.

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The applicant appealed and requested that bail should not exceed the amount of 20,000 AS. This appeal was rejected on 27 May 1981. The Appellate Court stated that reasons justifying detention on remand were still given but release on bail was, contrary to the Public Prosecutor's opinion, to be granted, as detention had already lasted for more than nine months. Therefore the danger of absconding was diminished. In this context, the court also took into account that compatriots of the applicant had offered to provide bail.

Therefore it appeared unlikely that the applicant would abscond as he then risked to be exposed to reprisals by his compatriots. The amount of the bail was however considered to be adequate as it depended, in the court's opinion, not only on the applicant's personal situation, but also on the amount of damage caused by the criminal offence in question. The bail should, in case of absconding, provide a fund for the compensation of the victim(s).

30. On 16 September 1981 the Regional Court again rejected the applicant's request to be released on bail in the amount of 20,000 AS only, or without bail. Danger of absconding was considered to be given in view of the applicant's nationality. The Appellate Court confirmed this decision on 2 October 1981. It considered that the detention on remand was compatible with Art 5 (3) of the Convention and was also proportionate to the sentence which the applicant had to expect. The court stated that it had not been possible to file the indictment earlier than 20 May 1981 and that the period between the filing of the indictment and the date on which the trial was supposed to begin, namely 8 October 1981, was not objectionable.

The applicant was eventually released on bail in the amount of 20,000 AS on 12 November 1981.

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III. SUBMISSIONS OF THE PARTIES

A. The initial supervision of the applicant's conversations with his defence counsel (Art 6 (3) of the Convention)

31. The applicant considers that it is in general incompatible with the Convention to supervise the conversations of a detained accused with his defence counsel for a longer period than a maximum of 4 to 5 days after arrest because an adequate preparation of the defence is not, so he argues, possible if the defendant cannot converse freely, i.e. unsupervised, with his defence counsel. A detained defendant needs the advice and assistance of defence counsel much more than a defendant at liberty, and it is therefore unjust to impose restrictions with regard to the detained defendant's right to prepare his defence. In addition, he argues that in his particular case it was arbitrary to consider that supervision of his conversations with his defence counsel was necessary to avoid the danger of collusion because there was no such danger, other suspects being likewise in detention. In any event any danger of collusion could have been limited simply by refusing the defence permission to inspect certain parts of the file. This was in fact done and the defence did not know at the time that the investigating judge intended to hear further witnesses, namely a trustee in bankruptcy and an insurance agent, neither of whom the applicant knew at all. There was consequently no reason to supervise the applicant's personal and written contacts with his defence counsel.

The applicant points out that there is no provision in Austrian law which prohibits that information obtained by the officer of the court in supervising conversations between a defence counsel and his client is used against the latter.

32. The respondent Government submit that the restriction in question did not prevent the communication between the defendant and his lawyer as such. Supervision of conversations between a remand prisoner and his defence counsel is only ordered to the extent required by the objective of the investigation if there is justified suspicion of collusion. As shown by a comparative study, the possibilities of supervising or limiting communications between a lawyer and his imprisoned client are not foreign to virtually all comparable European legal systems. It is true that Section 45 (3) of the Austrian Code of Criminal Procedure contains a general rule which does not make the supervision dependent on the particular circumstances of the individual case, but when this problem was discussed in a working group on fundamental questions of the reform of Austrian criminal procedure, it was found, even by the representatives

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of the Bar, that the Austrian system incorporates certain advantages in that it authorised generally the ordering of supervision of the conversations of a remand prisoner with his defence counsel in case of danger of collusion without regard to the circumstances of each particular case and thus without necessity for the court to make an undesirable distinction between trustworthy and less trustworthy defence counsels.

33. The restriction on free conversation between a detained defendant and his defence counsel is in accord with the criteria of proportionality and the rule of law. Its duration is narrowly limited from the outset and not infrequently ends as soon as danger of collusion no longer exists i.e. even before the expiry of the statutory maximum period of 2 or 3 months. The present system is also flexible in its application. It enables the judge to supervise the conversations himself or have them supervised by a non-judicial officer. Often the supervision amounts to no more than visual control.

34. It is further pointed out that the applicant still had some five months until the filing of the indictment during which he could contact his defence counsel in the absence of a court officer.

For all the above reasons, it is also considered to be compatible with Art 6 (3) of the Convention that the supervision extended to the applicant's correspondence with his defence counsel at the relevant period.

B. The length of detention on remand (Art 5 (3) of the Convention)

35. The applicant denies that the criminal matter was complex and difficult to investigate. He points out that the full police report was available in September 1980. An interpreter needed for the control of the Turkish detainee's correspondence was always available within 24 hours. All suspects had been heard by the end of October 1980 and were never heard again after that time and the two witnesses who were heard at the beginning of 1981 could have been examined by the investigating judge by way of a telephone call. In any event they should have been heard earlier. The fact that one of the rogatory commissions for the hearing of the two witnesses was sent to the wrong court also caused a delay of about two weeks. The statements the witnesses made were very short and of no relevance to the case. In view of the contents of the insolvency files it could have been foreseen that the trustee's evidence was of no importance. The trial could and should have been held in December 1980.

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36. Instead he was kept in detention and cut off from his family and his new-born child although there was no danger of absconding. In this connection, he points out that he and his family were living in Austria since 1971, three of his children were born in Austria and also his wider family was living in Austria. Referring to a statement on oath (eidesstattliche Erklärung) made by his wife on 15 January 1981 he denies the respondent Government's allegation according to which his wife told the investigating judge that she contemplated going back to Turkey with her children. He points out that the investigating judge also misinterpreted his defence counsel's letter of 18 September 1980 which, contrary to the judge's file note of 22 September 1980, did not at all contain the advice to lodge appeals against all court decisions.

Although he had not found employment he also did not leave Austria after his release in November 1981.

37. Although the evidence given by the trustee in the bankruptcy proceedings against Mrs E.R., proceedings which did not at all concern the applicant, and the evidence given by an insurance agent, were available at the end of March 1981 the indictment was still not filed before 18 May 1981. The period between the filing of the indictment and the trial, which was fixed for 8 October 1981, was likewise unreasonably long taking into account that none of the co-accused had raised any objections against the indictment.

He points out that the co-accused Mrs E.R. was released, despite continuing existence of danger of absconding and danger of repetition, without bail. The second Austrian co-accused was likewise released without bail while in his case excessive bail was fixed. Being unemployed it had been impossible for him to gather 90,000 AS.

38. The proceedings were not delayed by him. The requests for his release were rejected with the stereotype repetition of the legal grounds for detention on remand. The investigation judge failed to have photocopies made, as is required by Section 115 of the Code on Criminal Procedure, of relevant parts of the file in order to avoid delays caused by the necessity of submitting the file to higher courts for review.

In view of the manner in which the investigating judge dealt with the case his defence counsel did not submit the request for the taking of evidence earlier than September 1981. This request was dealt with adequately and speedily by the trial court and caused no delay.

He considers that the length of his detention on remand had implications for the fixing of his sentence because the court could hardly impose a sentence shorter than the period he had already spent in detention.

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39. The respondent Government submit that the criminal case was complex and difficult to investigate. In addition to the difficulties the case was complicated by the fact that the services of an interpreter were needed to question the applicant and his brother. As a result of the confiscation of a coded letter, the voluminous correspondence of the detained defendants had to be thoroughly monitored, again with the help of an interpreter.

40. Danger of absconding was always given because the applicant's family ties were rather loose on account of his intimate relationship with the co-defendant, Mrs E.R. His wife had told the investigating judge on 7 January 1981 that she considered going back to Turkey and in fact one child was taken to relatives in Turkey. Moreover, the applicant had lost his employment in Austria and since 17 July 1980 his residence permit had been withdrawn (Aufenthaltsverbot). As the applicant is not an Austrian citizen, it was not possible, unlike in the case of the Austrian co-accused, to release him withholding his passport because he could have tried to avoid further prosecution by secretly leaving Austria where he had to expect a severe punishment. Therefore it was reasonable to fix bail in the amount of 90,000 AS which corresponded to a yearly income.

41. It is also pointed out that the applicant filed a large number of requests for his release, lodging remedies against the decisions rejecting his requests. In addition, he made a request for permission to converse with his defence counsel without the presence of a court officer. All these steps led to repeated interruptions of the course of the preliminary investigation and thus caused difficulties and delays in the whole case.

42. The preliminary investigations could not be terminated in 1980 because at the beginning of 1981 two further witnesses had to be heard by rogatory commission. The defence caused a delay because the request for the taking of certain evidence was not made before September 1981.

In all these circumstances, no delays were caused by the investigating authorities or the Austrian courts dealing with the matter.

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IV. OPINION OF THE COMMISSION

43. The principal points at issue under the Convention are as follows:

- a. Whether the fact that during the first months of his detention on remand the applicant was not allowed to communicate in private with his chosen defence counsel violated his rights of defence under Art 6 of the Convention, in particular his rights under Art 6 (3)(b) to have adequate facilities for the preparation of his defence and under Art 6 (3)(c) to defend himself through legal assistance of his own choosing;
- b. Whether the length of the applicant's detention on remand (17 August 1980 - 12 November 1981) and the fact that after 30 April 1981 his release was made conditional on the payment of bail in the amount of 90,000 AS which he could not provide violated his right under Art 5 (3) of the Convention to be brought to trial within reasonable time or to be released pending trial.

A. On Art 6 of the Convention

44. Art 6 in its first paragraph generally guarantees the right to a fair trial. The third paragraph enumerates specific rights of persons charged with a criminal offence including:

- the right to have adequate time and facilities for the preparation of the defence (sub-para b) and
- the right of the accused to defend himself inter alia through legal assistance of his own choosing (sub-para c).

45. In the applicant's view these provisions secure to the accused an unconditional right to communicate with his defence counsel freely and at all times. He claims that in his case this right was disregarded by the imposition of certain restrictions on his contacts with his chosen defence counsel during the first months of the preliminary investigation. The question therefore arises whether the guarantees of Art 6, and in particular those laid down in the above provisions of Art 6 (3), applied at this stage of the proceedings.

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46. The Commission is not called upon to give a general answer to the question whether Art 6 is as such applicable at the stage of preliminary investigation proceedings. It is only required to deal with the concrete case before it.

47. In this context, the Commission first observes that the guarantees laid down in the various sub-paragraphs of Art 6 (3) are not all of the same kind. Some are by their very nature designed to serve as guidelines for the conduct of the trial in the formal sense and therefore need not, and often cannot, be observed at a previous procedural stage (cf. the Commission's Report of 8 October 1980 on application No. 8269/78, *Adolf v. Austria*, at para 64). However, the provisions of Art 6 (3)(b) and (c) which the applicant invokes are not necessarily limited in scope to the trial itself. In particular Art 6 (3)(b) refers in terms to the "preparation" of the defence for which adequate time and facilities must be provided, and therefore implies a necessity to take certain measures prior to the actual trial. Art 6 (3)(c) does not itself indicate at which stage of the proceedings it applies and is therefore open to interpretation in this respect. It belongs to a group of provisions in Art 6 (3) which might be applicable at the trial itself as well as at a previous stage.

48. The Commission recalls its constant case law according to which the compliance with the requirements of fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident (cf. the Report in the *Nielsen* case, YB 4, at p. 548), although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (cf. applications N° 8603, 8722, 8723 and 8729/79, *Crociani and others v. Italy*, DR 22, 147 at p. 216, and application N° 7945/77 v. *Norway*, DR 14, 228). This principle holds true not only for the application of the concept of fair trial as such, as laid down in Art 6 (1), but also for the application of the specific guarantees laid down in Art 6 (3). They exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Art 6 (3) are therefore not an aim in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings.

49. The Commission is aware that several Governments have in the past denied the applicability of the above provisions to preliminary investigations (cf. e.g. application No. 2178/64, *Matznetter v. Austria*, European Court of Human Rights, Series B, p. 228, and application No. 7899/77 v. *Belgium*, unpublished). No general answer has been given to this question, but the Commission has stated that the application of Art 6 cannot be excluded categorically and without

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exception at this stage at least if due to the particular organisation of the proceedings the preliminary investigation is of crucial importance in their overall context (application No. 9022/80 v. Switzerland, to be published in DR). The Commission also refers to a number of earlier cases in which similar complaints as in the present application were in fact examined by it under Art 6 (3)(b) and (c). Although in these cases the Commission expressly reserved the question of the extent to which these provisions were applicable to investigation proceedings, it is nevertheless noteworthy that in none of these cases the relevant complaint was rejected as being incompatible with the provisions of the Convention (cf. applications No 7854/77, Bonzi v. Switzerland, DR 12, 185; No 8339/78, Schertenleib v. Switzerland, DR 17, 180; No 8463/78, Kröcher and Möller v. Switzerland, DR 26, 24, and No 9370/81 v. UK, to be published).

50. In the present case restrictions were imposed on the applicant's contacts with his chosen defence counsel during a considerable period at the initial phase of the preliminary investigations. The Commission considers having regard to the particular facts of this case that the guarantees resulting from Art 6 (3)(b) and (c) are in principle applicable to this situation. In the Austrian legal system the investigation proceedings are of great importance for the preparation of the trial because they determine the framework in which the offence charged will be considered at the trial. Furthermore it cannot be excluded that evidence obtained in the investigating proceedings will be relied on in the judgment. It is therefore essential for the defence, whether it is assured by the accused himself or with the assistance of a chosen or official defence counsel, that the basis for its defence activity can be laid already at this stage. Whether or not restrictions imposed on the contacts of the accused with his defence counsel at the initial phase amount to inadmissible interferences with the above provisions must, however, depend on further considerations.

51. The Commission first observes that the Convention does not expressly guarantee the right of an accused to freely communicate with his defence counsel, for the preparation of his defence or otherwise. In this respect the Convention differs from other international provisions in the field of human rights and in particular from Art 14, para 3 (b) of the United Nations Covenant on Civil and Political Rights where this right is expressly mentioned alongside with the right to have adequate time and facilities for the preparation of the defence. Rule 93 of the Standard minimum rules for the treatment of prisoners (Resolution (73) 5 of the Committee of Ministers of the Council of Europe) provides that "an untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose ... Interviews between the

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prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official." The Commission finally notes the inclusion of a similar right in Art 3, para 2 (c) of the European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights where it is specified that for the purposes of Convention proceedings a detained person shall have the right " to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts". These texts reflect the fundamental importance which many legal systems attach to the right of the accused to communicate in private with his lawyer.

52. The fact that this right is not specifically mentioned in the Convention does not mean that it may not implicitly be inferred from its provisions, and in particular those of Art 6 (3)(b) and (c). The Commission has in fact recognised that the possibility for an accused to communicate with his lawyer is a fundamental part of the preparation of his defence. However, the Commission has added that in the absence of an express provision, it cannot be maintained that the right to have conversations with one's lawyer and exchange confidential instructions or information with him, as implicitly guaranteed by Art 6 (3), is not susceptible of any restriction (cf. the decisions in the above-cited cases Nos 7854/77, 8339/78, 8463/78 and 9370/81).

53. In order to determine whether or not the particular restrictions imposed on the applicant in the present case were in conformity with the Convention, the Commission has first considered the case in the light of Art 6 (3)(b). This provision guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial (cf. the French text of this provision). The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings. The provision is violated only if this is made impossible.

In the present case the applicant had the possibility for, about one year prior to his trial to communicate freely with his lawyer and to prepare his defence. The applicant does not allege that due to the original restrictions on the contacts with his lawyer he has suffered a disadvantage which persisted after the lifting of the restrictions and was thus likely to influence the material position of the defence at the trial and therefore also the outcome of the proceedings. For this reason the restrictions in question cannot be seen as having interfered with the substantive defence activity which was necessary for the preparation of the trial.

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54. The Commission now turns to the consideration of the case under Art 6 (3)(c) of the Convention which guarantees the right of the accused to defend himself inter alia through legal assistance of his own choosing. Unlike Art 6 (3)(b) this guarantee is not especially tied to considerations relating to the preparation of the trial, but gives the accused a more general right to assistance and support by a lawyer throughout the whole proceedings. The Commission refers in this context to the dictum of the European Court of Human Rights in the Artico case (publications of the Court, Series A, Vol. 37, para 33) where it was stated with particular reference to this provision "that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

55. In order to find out whether Art 6 (3)(c) requires that the remand prisoner be given a right to communicate in private with his defence counsel at the initial stage of the preliminary investigations, it is important to consider the functions which the defence counsel has to perform during this stage of the proceedings. They include not only the preparation of the trial itself, but also the control of the lawfulness of any measures taken in the course of the investigation proceedings, the identification and presentation of any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory, further assistance to the accused regarding any complaints which he might wish to make in relation to his detention concerning its justification, length and conditions, and generally to assist the accused who by his detention is removed from his normal environment.

56. Several of these functions are interfered with or made impossible if the defence counsel can communicate with his client only in the presence of a court official. The accused will find it difficult to express himself freely vis à vis his lawyer on the basic facts underlying the criminal charges because he must fear that his statements might be used, or might be forwarded for use against him by the court officer who is listening. Under these circumstances it is e.g. difficult to discuss with the accused the question whether or not it is advisable in his case to make use of the right of silence, or to advise him to make a confession. The defence counsel will find it difficult to discuss the defence in general. Apart from these matters directly related to the defence, the accused may also find it difficult to raise complaints regarding his detention as he may fear reprisals if he expresses them in the presence of a court official. In this respect, it is not relevant whether such fears are justified.

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57. For these reasons it is apparent that generally speaking the defence counsel cannot fulfil his tasks properly if he is not allowed to communicate with his client in private. Therefore it is in principle incompatible with the right to effective assistance by a lawyer as guaranteed by Art 6 (3)(c) of the Convention to subject the defence counsel's contacts with the accused to supervision by the court. This does not mean, however, that the right to free contact with the defence counsel must be granted under all circumstances and without any exceptions. Any restrictions in this respect must however remain an exception to the general rule, and therefore need to be justified by the special circumstances of the case.

58. This is also borne out by the earlier case law of the Commission referred to above where the Commission has in each case identified special reasons justifying the restrictions complained of. In the Bonzi case (DR 12, 185) the applicant could have requested a relaxation of the isolation insofar as his counsel's visits were concerned. In the Schertenleib case (DR 17, 180) the applicant was able to confer without witnesses with his wife who was also his counsel. Finally the case of Kröcher and Möller (DR 26, 24) concerned serious charges of attempted murder in a context of terrorism, and the applicants in that case were considered to present a particular danger to the public. The Commission further observes that in that case it examined the relevant complaints only under Art 6 (3)(b) and not under Art 6 (3)(c).

59. In the present case the applicant was hindered in his free contacts with his lawyer for about three months at the crucial initial phase of the investigation proceedings. Although the charges against him were of some importance they were not of exceptional gravity and in particular it has not been alleged that there was any danger that the applicant's defence counsel would abuse the possibility to converse with the applicant in private. The court assumed a danger of collusion. There is however no indication in the case that there was a danger of collusion with or through the defence counsel, who was bound by his professional obligations. Even the danger of collusion with other persons could only exist to a limited extent as all four suspects were in detention on remand. A full police report was established already on 4 September 1980 containing a statement of the facts, reports on the examination of the suspects, statements by witnesses, results of the investigations, sketches, photos, other evidence and an expert opinion (para 21). Only two further witnesses were heard subsequently at the request of the investigating judge and these witnesses were, according to the applicant's uncontested statements, unknown to the applicant and his defence counsel. The latter was not shown the police report when he inspected the file in September 1981 and consequently did not know of the investigating judge's intention to have these witnesses examined. Despite all this the supervision of the applicant's contacts with his lawyer had to be ordered because this is mandatory under S. 45 (3) of the Code of Criminal Procedure whenever the court assumes a danger of collusion.

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60. It has not been shown that the supervision of the applicant's contacts with his defence counsel during the period under consideration was justified by special circumstances of the particular case. In view of the fact that the restriction lasted a considerable period at a juncture which was crucial for the development of the proceedings as a whole, it need not be considered whether the right to converse with the defence counsel in private should have been granted without any restrictions throughout that period, and particularly in the first time immediately after the applicant's arrest. In any event the maintenance of this restriction during almost three months must be considered as excessive.

Conclusion

61. The Commission concludes unanimously that there has been a violation of Art 6 (3)(c) of the Convention by reason of the refusal to allow the applicant unsupervised personal contacts with his lawyer.

B. On Art 5 (3) of the Convention

62. The applicant complains, secondly, of the length of his detention on remand. His detention began on 17 August 1980 and lasted without interruption until 12 November 1981, ie fourteen months and 26 days.

Art 5 (3) of the Convention, relied upon by the applicant, provides:

"Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

63. The applicant alleges that the length of his detention on remand exceeded the "reasonable time" provided for in this clause. Whether the length of detention pending trial is reasonable cannot be determined in abstracto. It is primarily on the basis of the reasons stated in the decisions relating to applications for release and of the true facts mentioned by the applicant in his appeals that the question of violation must be considered (Eur Court HR, Neumeister Case, Series A, Vol 8, p 37 para 5).

64. In the present case the extensions of the applicant's detention on remand after 13 January 1981 were based on the ground that there was suspicion of the applicant having participated in the crime of arson and that there was danger of absconding. The applicant has in his final submissions not substantiated that the suspicion of the prosecuting authorities was unfounded. In view of the punishment

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which the applicant had to expect if convicted, the withdrawal of his residence permit, the lack of employment and his Turkish origin enabling him to return and settle without difficulties in his home country, it cannot be found that the Austrian authorities wrongly considered, in the first months of the applicant's detention, that there was danger of absconding.

65. However, the persistence of suspicion and even the danger of absconding do not absolve the authorities from their obligation not to prolong detention unnecessarily and unreasonably (cf. Eur Court HR, Stögmüller Case, Series A, Vol 9, p 40, para 4). In the present case a full police report, including a statement of facts, statements by witnesses, results of investigations and the opinion of an expert, was already submitted on 4 September 1980 and a supplementary report on 19 November 1980. The hearing of all suspects had been terminated by the end of October 1980. In the same month a file concerning bankruptcy proceedings against the co-accused Mrs E.R. was obtained by the investigating judge.

66. Nevertheless the request to obtain evidence by rogatory commission from the trustee in the bankruptcy proceedings and an insurance agent was not made before 1 February 1981 and after receipt of the statements in question by the end of March 1981 the indictment was not filed before 18 May 1981. Subsequently nearly five months elapsed before the trial started on 8 October 1981 and had to be adjourned because Mrs E.R. did not appear. The Commission finds these delays to be inordinate and it therefore falls to the respondent Government to come forward with explanations (Eur Court HR, Eckle Case, Series A, Vol 51, p 36, para 80).

67. The Government argued that the matter was complex and difficult mainly on account of the fact that the service of an interpreter was needed. They further pointed out that the applicant filed a number of requests for his release and for unsupervised contacts with his lawyer and appealed against the decisions rejecting these requests.

However, the Commission cannot find that the criminal case was of a complex nature necessitating extensive and difficult, time consuming investigations. Only two witnesses had to be heard by rogatory commission and there were no difficulties to carry out these rogatory commissions. It is not contested that an interpreter was always available but it has not been shown that the necessity to translate documents or to interrogate the applicant and his brother with the assistance of an interpreter caused any delays. Delays due to judicial review proceedings could, as the applicant rightly argued, have been avoided by the photocopying of the relevant parts of the file.

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68. The Commission considers in these circumstances that the competent authorities did not act with the diligence and expedition called for in cases where a defendant is detained on remand. This factor should have been taken into account when the District Court on 30 April 1981 first ordered the applicant's release on bail in the amount of AS 90.000.-, i.e. a sum which the applicant could not afford. The investigations had been terminated as the statements from the two witnesses who were heard by rogatory commission had been obtained by the end of March 1981, and it has not been submitted that further investigation measures were taken by the investigation judge thereafter.

69. It was therefore possible on 30 April 1981 to evaluate the applicant's role in the arson plot and to have a general idea on the length of the sentence which could be imposed if he was convicted. The applicant had at that time already spent some eight and a half months in prison, that is more than half of the sentence which was eventually fixed. His wife and three of his children were still living in Austria as well as other members of his family. The danger of absconding had in these circumstances considerably diminished and in fact it must be considered as unlikely that there were still any strong incentives for the applicant to abscond. Therefore the amount of bail should have been assessed principally in relation to the applicant, his assets and his relationship with the persons who were to provide the security (Neumeister judgment, loc cit, p 40, paras 13, 14). Instead, the courts mainly assessed bail in relation to the amount of damage caused by the arson, as was expressed in the District Court's decision of 30 April 1981 and the Appellate Court's decision rejecting the applicant's appeal on 27 May 1981.

Conclusion

70. For these reasons the Commission concludes by 11 votes against 1 that the applicant's continued detention on remand constituted a violation of Art 5 (3) of the Convention.

Summary of conclusions

71. The Commission concludes

- unanimously that there has been a violation of Art 6 (3) (c) of the Convention by reason of the refusal to allow the applicant unsupervised personal contacts with his lawyer ;
- by 11 votes against 1 that the applicant's continued detention on remand constituted a violation of Art 5 (3) of the Convention.

Deputy Secretary to the Commission

President of the Commission

(J. Raymond)

(C.A. Nørgaard)

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PARTLY DISSENTING OPINION OF MR. ERMACORA
Concerning the issue under Art 5 (3) of the Convention

1. I cannot agree with the majority of the Commission that there has been a violation of Art 5 (3) of the Convention. I am on the contrary of the opinion that the applicant has not been a victim of a violation in regard to the reasonableness of the length of his detention on remand.

2. The method to consider the reasonableness of the length of a detention on remand is still validly stated in the Wemhoff case (judgment of the Court of 27 June 1968, Publications of the Court, Series A, Vol. 7). In this case the Commission developed the relevant considerations which must be applied in this respect. They are: the complexity of a case, the behaviour of the applicant and the handling of the case by the authorities. The Court stated that it "must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that the detention was not unreasonably prolonged and contrary to Art 5 (3) of the Convention" (p 24 of the above judgment, para 12).

3. In the present case it is true that the applicant's detention on remand lasted from 17 August 1980 until 12 November 1981. That is more than 14 months. But contrary to the majority of the Commission I think that this period can be justified. The majority itself recognises that in the first months of the detention on remand there was a danger of absconding. However, the reference to the Stoegmuller Case (Eur Court HR, Series A, vol 9, p 40, para 4), and in particular to the passage according to which the danger of absconding does not absolve the authorities from their obligation not to prolong detention unnecessarily and unreasonably, is not pertinent in the present case. Looking into the different decisions of the Austrian authorities, the prolongation of the detention on remand seems to me to have been necessary and reasonable.

4. As regards the complexity of the case it must be mentioned that there has been a complex of facts characterised by contradicting and denying statements of the applicant, checking the correspondence of the applicant who wrote in Turkish language which required the help of an interpreter, and the request of evidence by rogatory commission from the trustee in the bankruptcy proceedings and an insurance agent.

As regards the behaviour of the applicant, he challenged several times the decisions of the Review Chamber to prolong the detention on remand. It is true that he did so in exercise of his legal right to defend himself, but he cannot subsequently complain of the delays which were necessarily caused by these procedures. And I do not see that the Austrian authorities failed to handle the applicant's requests for release with diligence and expedition.

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The arguments of the majority of the Commission as to the justification of the continued detention on remand are insufficient in this respect. They do not really consider the decisions of the Austrian authorities as to the existence of a danger of absconding nor the observations of the Government in reply to the applicant's submissions.

5. Reference was made by the Austrian authorities to the fact that the applicant resided illegally in Austria and could therefore easily cross the borders, that he was not really integrated in the Austrian society, that his family had expressed a willingness to return to Turkey, and finally that he had to expect a severe penalty which he might have been tempted to avoid by absconding. In this context reference must also be made to the Schertenleib Case where the Commission stated that "the applicant in no way showed that his wife had broken her links with that country" (i.e. in the circumstances of that case her home country Greece, cf. application N° 8339/78, DR 17, 180).

6. By decision of 30 April 1981 the Review Chamber of the Wels Regional Court was prepared to release the applicant on bail in the amount of 90.000 AS. The applicant's request to reduce the amount of bail to 20.000 AS was several times rejected. The Commission noted that the Austrian courts mainly assessed the bail in relation to the amount of damage caused by the arson. The amount of bail thus was fixed considering the position of the victim of the offence. The detention on remand after 30 April 1981 until 16 September 1981 was still justified in the opinion of the Austrian court because only this amount of bail could outweigh the danger of flight.

7. If the danger of flight can be counterbalanced only by a financial guaranty expressed in a certain amount of bail the authorities do not in my opinion act contrary to Art. 5 (3) of the Convention. Reference must be made to para 71 ss of the Bonnecheaux Case (application No. 8224/78, DR 18, 100). On the one hand the securities in the sense of Art 5 (3) may not be fixed in such a way that they lead to a destruction of the rights guaranteed in Art 5 (3), on the other hand, however, the Commission in considering the element of bail may not just be satisfied by repeating the applicant's arguments as to this problem which in this case appear to be decisive for the length of the detention on remand after the 30 April 1981, but which were rejected by the courts on the basis of a thorough examination of the applicant's situation as a whole.

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A P P E N D I X I.

History of the Proceedings
before the Commission

Item	Date	Note
1. <u>Examination on</u> <u>Admissibility</u>		
Introduction of the application	14 April 1981	
Registration of the application	21 April 1981	
Commission's deliberations and decision to give notice to the respondent Government and to invite the parties to submit their written observations on the admissibility and merits (Rule 42 (2) (b) of the Rules of Procedure)	2 March 1982	MM. Nørgaard Frowein Ermacora Fawcett Jöbrundsson Tenekides Trechsel Kiernan Melchior Sampaio Weitzel Soyer Schermers
Receipt of the Government's observations on admissibility and merits	15 June 1982	
Receipt of observations in reply on behalf of the applicant	4 August 1982	

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Commission's deliberations and decision to invite the parties to appear before it in order to make oral submissions on the admissibility and merits

4 May 1983

MM. Nørgaard
Sperduti
Frowein
Fawcett
Triantafyllides
Trechsel
Kiernan
Melchior
Sampaio
Carrillo
Gözübüyük
Weitzel
Soyer
Danelius

Hearing on admissibility and merits followed by deliberations and decision to declare the application admissible

14 December 1983

MM. Nørgaard
Sperduti
A. Frowein
Ermacora
Jörundsson
Trechsel
Kiernan
Melchior
Sampaio
Gözübüyük
Weitzel
Soyer
Schermers
Danelius

2. Examination of
the merits

Commission's deliberations and votes

4 July 1984

MM. Nørgaard
Sperduti
Frowein
Ermacora
Trechsel
Kiernan
Melchior
Gözübüyük
Weitzel
Soyer
Schermers
Danelius

Adoption of the Report

12 July 1984

Danelius