COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF IMBRIOSCIA v. SWITZERLAND

(Application no. 13972/88)

JUDGMENT

STRASBOURG

24 November 1993

In the case of Imbrioscia v. Switzerland[*],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")[**] and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr L.-E. PETTITI,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 22 April and 28 October 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 September 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13972/88) against the Swiss Confederation lodged with the Commission under Article 25 (art. 25) by an Italian national, Mr Franco Imbrioscia, on 5 May 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention.

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[*] The case is numbered 32/1992/377/451. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[**] As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and communicated the name of the lawyer who was to represent him (Rule 30). Before the Commission the applicant had been designated by the initial "I.", but he now agreed to the disclosure of his identity.

The Italian Government, who had been informed by the Registrar of their right to intervene in the proceedings (Article 48 (b) of the Convention and Rule 33 para. 3 (b)) (art. 48-b), gave no indication that they wished to do so.

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 September 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr J. De Meyer, Mr I. Foighel, Mr R. Pekkanen, Mr A.B. Baka and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Swiss Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 21 December 1992 and the applicant's memorial on 4 January 1993. On 24 February the Secretary to the Commission informed the Registrar that the Delegate would address the Court at the hearing; subsequently, he produced various documents requested by the Registrar on the instructions of the President.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 April 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr P. BOILLAT, Head
of the European Lawand International Affairs Section,
Federal Office of Justice, *Agent*,

Mr F. SCHÜRMANN, Deputy Head
of the European Law and International Affairs Section,
Federal Office of Justice, *Counsel*;

- for the Commission

Mr B. MARXER, *Delegate*;

- for the applicant

Mr C.F. FISCHER, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr Boillat, by Mr Marxer and by Mr Fischer, as well as their replies to its questions.

6. On 19 May the Agent of the Government filed a number of documents, as requested by the Registrar on the Court's instructions.

AS TO THE FACTS

7. Mr Franco Imbrioscia, a commercial traveller of Italian nationality, resided at Barletta (Italy) at the material time.

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The applicant's arrest

8. On 2 February 1985 the applicant arrived at Zürich airport from Bangkok. The customs officers found 1.385 kg of heroin in the suitcase of another passenger on the same flight, M. When asked whether he had been travelling with someone else, the latter pointed out the applicant. Mr Imbrioscia explained that they were both part of a group; he was searched and, when nothing was found, released.

9. After further investigations, he was none the less suspected of being linked to M., as a result of which he was arrested on the same day at Lugano, on the train on which he was returning to Italy.

B. The investigation

10. Mr Imbrioscia immediately sought the help of Mrs S. C., who contacted a lawyer, Ms B. G.

11. On Sunday 3 February the applicant was questioned by the Zürich district prosecutor (Bezirksanwalt) with the assistance of an interpreter. He stated that he had caught the plane at Zürich because it was the cheapest way of travelling to Bangkok. By pure coincidence another person had also bought a ticket at Barletta for the same flight, but they had never sat next to each other during the trip. In addition, he denied that he had been involved in importing drugs into Switzerland. When he was advised that he was being remanded in custody, he requested that a lawyer be assigned to him as he did not know any lawyers in Zürich.

He remained in custody in the building of the Bülach district prosecutor's department.

12. On 8 February Ms B. G. wrote to Mr Imbrioscia offering to represent him. He returned the necessary authority to act to her after signing it.

13. On 13 and 15 February the police interrogated him without his lawyer being present.

On 18 February 1985 he was questioned by a Bülach district prosecutor and he asked to be confronted with M., in order to prove his innocence.

14. On 25 February Ms B.G. withdrew as the applicant's lawyer. The available documents do not show to what extent she had participated in his defence, but it is apparent from the prison register that she never visited him.

On the same day Mr Fischer was officially assigned to act for Mr Imbrioscia and on 27 February was given permission to visit him, which he did for the first time on 1 March 1985. On 4 March 1985 the case file that had been sent to him for inspection on 27 February was returned by him to the district prosecutor's office .

15. Mr Imbrioscia was questioned again by the district prosecutor on 8 March. Mr Fischer had not been invited to attend the interview and does not seem to have asked to be present, but he received a transcript of it. On 15 March he visited the applicant.

16. On 2 and 3 April 1985 the district prosecutor and two police officers went to Barletta to examine several witnesses, including two travel agents.

17. On 9 April 1985 Mr Imbrioscia's lawyer had a conversation with the district prosecutor, the subject of which is a matter of dispute. According to the judgment delivered by the Zürich Court of Appeal (Obergericht) on 17 January 1986 (see paragraphs 23-24 below), the district prosecutor told the lawyer that his client would be questioned again on 11 April. Mr Fischer denies this and claims that the discussion centred on the applicant's detention.

In any event, he was not present on 11 April when Mr Imbrioscia was questioned about the inconsistencies in his statements and disputed the findings of the inquiries made in Italy.

18. By a letter of 17 April 1985 Mr Fischer acknowledged receipt of the transcripts of the witnesses' statements in Barletta and of the questioning on 11 April (see paragraphs 16 and 17 above), and complained that he had not been invited to attend. He visited Mr Imbrioscia the next day.

19. Mr Fischer was, on the other hand, present on 6 June 1985 when the applicant was informed that the preliminary investigation had been concluded and that he faced possible charges of heroin smuggling and forgery. Mr Imbrioscia stated that he had had nothing to do with the matters of which he was accused under the first head and that he had acted in good faith as regards the second. His lawyer remained silent.

C. The court proceedings

1. In the Bülach District Court

20. On 10 June 1985 the district prosecutor's office committed Mr Imbrioscia and M. for trial in the Bülach District Court (Bezirksgericht) for drug trafficking.

On 13 June Mr Fischer visited his client in prison.

21. At the hearing on 26 June 1985 the two accused were again questioned about the facts, and their counsel made their submissions. Mr Fischer also examined M.

The court convicted the applicant and his co-defendant of offences against the dangerous drugs legislation (Betäubungsmittelgesetz). It sentenced Mr Imbrioscia to seven years' imprisonment and banned him from residing in Switzerland for fifteen years; his co-defendant was given a six-year prison sentence. The defendants were each ordered to pay half the costs of the proceedings.

22. The court noted that the applicant had contradicted himself on several occasions - as to whether he knew M.'s first name and surname, whether he had sat next to him in the aeroplane and so on. Having regard to these inconsistencies, it considered that the accused's claim that he was innocent could no longer be taken seriously (nicht mehr ernstgenommen werden kann).

M., who was illiterate, had also made such contradictory statements that there were doubts as to his mental capacity; he could not therefore be regarded as having been the organiser of the drug smuggling. On the last occasion he was questioned, on 15 May 1985, he had moreover stated that his co-defendant had been with him continuously and had told him when he should take delivery of the suitcase. Mr Imbrioscia's role had therefore been to assist and supervise M.

The court found that the applicant had knowingly and willingly participated in committing the offence.

2. In the Zürich Court of Appeal

23. On 17 January 1986, after a hearing during which Mr Imbrioscia was again questioned by the judges, in Mr Fischer's presence, the Zürich Court of Appeal (Obergericht) dismissed his appeal (Berufung). It upheld the sentence imposed by the District Court (see paragraph 21 above) and in addition ordered the applicant to pay the costs of the appeal proceedings.

24. As regards his lawyer's absence during the interviews it observed that the lawyer had been informed of the date of the one on 11 April 1985 but had not attended, and that he had not put any questions at the last interview on 6 June 1985, which he had attended (see paragraph 19 above). Nor had the appellant shown how his defence had been adversely affected.

On the merits, the court followed the trial court's reasoning; it considered it scarcely plausible that two people who did not know each other should have travelled together from Barletta to Bangkok and back via Zürich and have stayed in Thailand in the same hotel.

3. In the Zürich Court of Cassation

25. An application by Mr Imbrioscia to the Zürich Court of Cassation (Kassationsgericht) for a declaration of nullity (Nichtigkeitsbeschwerde) was dismissed on 8 October 1986.

With regard to the complaint based on the fact that no lawyer was present at the interviews, the Court of Cassation referred to the case-law of the Federal Court (see paragraph 27 below). The applicant had not alleged that he had asked to have his lawyer present and that his request had been rejected on irrelevant grounds (unsachliche Gründe); his lawyer had, moreover, attended the interview on 6 June 1985 and the hearing on 26 June (see paragraphs 19 and 21 above).

4. In the Federal Court

26. On 5 November 1987 the Federal Court dismissed a public-law appeal by the applicant against the judgments of 17 January 1986 and 8 October 1986 (see paragraphs 23-25 above).

The Federal Court referred to its case-law concerning Article 17 para. 2 of the Code of Criminal Procedure of the Canton of Zürich (see paragraph 27 below). It stressed that Mr Imbrioscia had not complained that a request to have his lawyer present had been arbitrarily rejected; the lawyer had attended the last questioning and had been sent the transcripts of the previous ones. There had therefore been no infringement of the defence rights guaranteed to Mr Imbrioscia under the Swiss Federal Constitution and the Convention.

II. RELEVANT DOMESTIC LAW

27. At the material time Article 17 of the Code of Criminal Procedure of the Canton of Zürich was worded as follows:

> "During the investigation counsel for the defence must be granted access to the file in so far as the purposes of the investigation are not thereby jeopardised. He cannot be refused the right to inspect reports by experts or transcripts of interviews at which he is entitled to be present.
>
> The investigating law officer may give counsel leave to attend personal interviews with the person charged.
>
> Once the investigation is concluded, counsel for the defence shall have unrestricted access to the file."

According to the Federal Court's case-law, the second paragraph of this provision permits the prosecuting authorities to refuse to allow a lawyer to be present on the first occasion when a suspect is questioned without giving reasons, but requires them to give reasons if they intend to exclude the lawyer from subsequent interviews.

The practice in Zürich is that the lawyer does not generally attend when his client is interrogated by the police, but he is usually sent the transcripts.

28. The first two paragraphs of the Article cited above were amended on 1 September 1991 and now provide:

> "During the investigation access to the file must be granted to the person charged and to his defence counsel on request, if and in so far as the purposes of the investigation are in no way thereby jeopardised. The right to inspect documents already communicated to the person charged as well as experts' reports and the transcripts of investigation interviews which counsel for the defence has been given leave to attend cannot be refused.
>
> The investigating law officer must give counsel for the defence an opportunity to attend examinations of the person charged if the latter so wishes and if the purposes of the investigation are not likely to be jeopardised. Members of the cantonal Bar must be admitted to examinations once the person charged has made his first statement to the investigating law officer or if he has been in custody for fourteen days. A defence counsel who attends an examination must be able to put questions to the person charged that are likely to throw light on the case."

PROCEEDINGS BEFORE THE COMMISSION

29. Mr Imbrioscia lodged his application with the Commission on 5 May 1988. He complained that his lawyer had not been present at most of his interrogations; he also complained, inter alia, that the lawyer had not attended the examination of various witnesses in Italy and that an appeal judge had been biased; he relied on Article 6 paras. 1, 2 and 3 (b), (c) and (d) (art. 6-1, art. 6-2, art. 6-3-b, art. 6-3-c, art. 6-3-d) of the Convention.

30. On 31 May 1991 the Commission declared the application (no. 13972/88) admissible as regards the first complaint and dismissed it, as being manifestly ill-founded, in respect of the others.

In its report of 14 May 1992 (made under Article 31) (art. 31), it expressed the opinion, by nine votes to five, that there had been no violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention. The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

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[*] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 275 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

THE GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

31. In their memorial, the Government requested the Court

> "to hold that the Swiss authorities had not infringed the ... Convention ... on account of the facts which gave rise to the application lodged by Mr Imbrioscia".

AS TO THE LAW

32. The applicant complained that he had not been assisted by a lawyer during several of his interrogations by the police and by the Bülach and Zürich district prosecutors; he relied on Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention, which provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

33. According to the applicant, he was, despite his express request, unassisted by counsel when he was questioned by the police or the district prosecutor on 3, 13, 15 and 18 February, 8 March and 11 April 1985, since his successive lawyers had not been invited to attend. The lawyer he had first instructed, Ms B. G., had withdrawn soon after her appointment. Indeed, he had effectively had no lawyer at all until 27 February 1985, when Mr Fischer was informed that he had been officially assigned; and at that time most of the interviews had already taken place. Mr Imbrioscia also drew attention to the importance of the investigation in Zürich criminal procedure; he inferred that in order to be effective, the right to defend oneself must cover not only the trial, but also the preceding interrogations by the police and the phase which took place before the district prosecutor.

34. The Government submitted first that preliminary investigations were not covered by Article 6 paras. 1 and 3 (art. 6-1, art. 6-3). They also maintained that neither the Swiss Constitution nor the Convention directly

guaranteed defence lawyers the right to be present at the interrogations of their clients during criminal investigations. Admittedly, the applicant had requested the assistance of counsel at the outset, but he had not asked for counsel to be present while he was being questioned, and neither Ms B. G. nor Mr Fischer had taken any steps to that end. Furthermore, as soon as he had been assigned, Mr Fischer had received the case file and obtained permission to visit his client, which he did on four occasions. Lastly, as was shown by the transcripts, the hearings in the Bülach District Court and the Zürich Court of Appeal were taken up mainly with the same points as the interrogations, and counsel for the applicant had participated in them and had every opportunity to challenge the evidence gathered at an earlier stage.

35. Taking the proceedings as a whole, the Commission was of the view that the absence of a lawyer at the applicant's various interrogations did not lead to a disadvantage which was likely to affect the position of the defence at the trial and thus also the outcome of the proceedings.

36. The Court cannot accept the Government's first submission without qualification. Certainly the primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article (art. 6) has no application to pre-trial proceedings. The "reasonable time" mentioned in paragraph 1 (art. 6-1), for instance, begins to run from the moment a "charge" comes into being, within the autonomous, substantive meaning to be given to that term (see, for example, the Wemhoff v. Germany judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19, and the Messina v. Italy judgment of 26 February 1993, Series A no. 257-H, p. 103, para. 25); the Court has occasionally even found that a reasonable time has been exceeded in a case that ended with a discharge (see the Maj v. Italy judgment of 19 February 1991, Series A no. 196-D, p. 43, paras. 13-15) or at the investigation stage (see the Viezzer v. Italy judgment of 19 February 1991, Series A no. 196-B, p. 21, paras. 15-17). Other requirements of Article 6 (art. 6) - especially of paragraph 3 (art. 6-3) - may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (see, inter alia, the following judgments: Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22, pp. 38-39, para. 91; Luedicke, Belkacem and Koç v. Germany, 28 November 1978, Series A no. 29, p. 20, para. 48; Campbell and Fell v. the United Kingdom, 28 June 1984, Series A no. 80, pp. 44-45, paras. 95-99; Can v. Austria, 30 September 1985, Series A no. 96, p. 10, para. 17; Lamy v. Belgium, 30 March 1989, Series A no. 151, p. 18, para. 37; Delta v. France, 19 December 1990, Series A no. 191-A, p. 16, para. 36; Quaranta v. Switzerland, 24 May 1991, Series A no. 205, pp. 16-18, paras. 28 and 36; and S. v. Switzerland, 28 November 1991, Series A no. 220, pp. 14-16, paras. 46-51).

37. The right set out in paragraph 3 (c) of Article 6 (art. 6-3-c) is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph 1 (art. 6-1) mutatis mutandis, the Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 15, paras. 32-33, and the Quaranta judgment, cited above, Series A no. 205, p. 16, para. 27).

38. While it confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", Article 6 para. 3 (c) (art. 6-3-c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see the Quaranta judgment previously cited, Series A no. 205, p. 16, para. 30). In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see the Artico judgment previously cited, Series A no. 37, p. 16, para. 33).

In addition, the Court points out that the manner in which Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case; in order to determine whether the aim of Article 6 (art. 6) - a fair trial - has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (see, mutatis mutandis, the Granger v. the United Kingdom judgment of 28 March 1990, Series A no. 174, p. 17, para. 44).

39. At the end of his first examination by the Zürich district prosecutor on 3 February 1985 Mr Imbrioscia requested that counsel should be assigned to him as he did not know any lawyers in Zürich (see paragraph 11 above). However, immediately after his arrest he had taken steps, with the help of a friend, to instruct counsel of his own choosing; and on 8 February Ms B. G. offered her services, whereupon the applicant returned to her the necessary authority to act after signing it (see paragraphs 10 and 12 above).

Ms B. G. ceased to act for the applicant on 25 February (see paragraph 14 above), without having visited him. In the meantime Mr Imbrioscia had been interviewed three times, firstly by the police, on 13 and 15 February 1985, and then by the Bülach district prosecutor on 18 February (see paragraph 13 above). Ms B. G. had not been invited to attend any of these interviews, since Zürich cantonal legislation and practice did not require her to be present (see paragraph 27 above), and she had, moreover, not asked to attend.

40. The applicant and the Government held each other responsible for the inactivity of the defence over that period. Counsel for the applicant pleaded the complexity of the assignment procedure, which he said had

prevented his colleague from being able to prepare herself in time to be able to attend the interviews in question; furthermore, the authorities had done nothing to postpone them. In the Government's view, it was for Mr Imbrioscia, and also for Ms B. G., to react, yet neither of them had protested.

41. However that may be, the applicant did not at the outset have the necessary legal support, but "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes" (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 33, para. 65) or chosen by the accused. Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; under Article 6 para. 3 (c) (art. 6-3-c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention (ibid.).

Since the period in question was so short and the applicant had not complained about Ms B. G.'s inactivity, the relevant authorities could scarcely be expected to intervene. When she informed them of her withdrawal on 25 February 1985, they at once officially assigned a lawyer for his defence (see paragraph 14 above).

42. Mr Fischer received the case file on 27 February 1985 and went to see his client in prison on 1 March. When he returned it to the district prosecutor on 4 March, he did not raise the issue of the non-attendance by a lawyer at the earlier interrogations of which he had inspected the transcripts (see paragraph 14 above).

The district prosecutor questioned Mr Imbrioscia on 8 March, 11 April and 6 June 1985. It appears that the applicant was able to talk to his counsel before and after each of these interviews (see paragraphs 14, 15 and 18 above). Mr Fischer did not, however, attend the first two. It was not until 17 April that he complained that he had not been given notice that they were taking place (see paragraph 18 above). Thereupon the district prosecutor allowed him to attend the last interview, which concluded the investigation; the lawyer did not then put any questions, nor did he challenge the findings of the investigation (see paragraph 19 above), which he was aware of as he had received the relevant transcripts.

43. Furthermore, the hearings in the Bülach District Court and the Zürich Court of Appeal were attended by adequate safeguards: on 26 June 1985 and 17 January 1986 the judges heard the applicant in the presence of his lawyer, who had every opportunity to examine him and his co-defendant (see paragraphs 21 and 23 above) and to challenge the prosecution's submissions in his address.

44. A scrutiny of the proceedings as a whole therefore leads the Court to hold that the applicant was not denied a fair trial.

There has thus been no breach of paragraphs 1 and 3 (c) of Article 6 (art. 6-1, art. 6-3-c) taken together.

FOR THESE REASONS, THE COURT

Holds by six votes to three that there has been no breach of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 November 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinions of Mr Pettiti, Mr De Meyer and Mr Lopes Rocha are annexed to this judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority, being of the opinion that there had been a clear violation of Article 6 (art. 6). While it may be accepted that Article 6 (art. 6) does not formally require the assistance of a lawyer for an initial period of detention, the Convention does require such assistance for the phase of the preliminary investigation. Even though the specific legislation of the Canton of Zürich does not appear to provide for a period of police custody and entrusts to the district prosecutor the task of carrying out the first inquiries, the accused was questioned by the police during the first twenty-four hours and then on several occasions under the responsibility of the prosecutor. The phase of the preliminary investigation, which lasted some weeks, was the equivalent of an investigation conducted by an investigating judge under the continental inquisitorial system.

Even if it may be accepted that within the Zürich system the first stage of this phase can be conducted by a prosecutor rather than by a member of the judiciary, it remains evident that the assistance of a lawyer is indispensable if the proceedings are to be fair and the rights of the defence respected for the purposes of Article 6 (art. 6).

It is clear that the lawyer, Mr Fischer, after his appointment, was not invited to attend the second series of interrogations effected by the prosecutor, who was aware that Ms B. G. had withdrawn her services. That a lawyer should be so summoned is essential for examining whether the principle that proceedings must be adversarial has been complied with. The lawyer cannot be expected to ask to be summoned when he does not know the date of the interrogation. If the lawyer does not comply with such a summons, it will be for the judge to take any appropriate measures: postponement, appointment of a replacement lawyer and so on. Ultimately this question may be relevant to proceedings brought to establish nullity on the ground of breach of an essential procedural requirement.

In any event it is absolutely necessary for the summons to be issued. Yet there was no express provision to this effect in the relevant legislation of the Canton of Zürich. In order to reach its finding that there had been no violation, the Court took the following view:

> "42. Mr Fischer received the case file on 27 February 1985 and went to see his client in prison on 1 March. When he returned it to the district prosecutor on 4 March, he did not raise the issue of the non-attendance by a lawyer at the earlier interrogations of which he had inspected the transcripts (see paragraph 14 above).
>
> The district prosecutor questioned Mr Imbrioscia on 8 March, 11 April and 6 June 1985. It appears that the applicant was able to talk to his counsel before and after each of these interviews (see paragraphs 14, 15 and 18 above). Mr Fischer did not, however, attend the first two. It was not until 17 April that he complained that he had

not been given notice that they were taking place (see paragraph 18 above). Thereupon the district prosecutor allowed him to attend the last interview, which concluded the investigation; the lawyer did not then put any questions, nor did he challenge the findings of the investigation (see paragraph 19 above), which he was aware of as he had received the relevant transcripts.

43. Furthermore, the hearings in the Bülach District Court and the Zürich Court of Appeal were attended by adequate safeguards: on 26 June 1985 and 17 January 1986 the judges heard the applicant in the presence of his lawyer, who had every opportunity to examine him and his co-defendant (see paragraphs 21 and 23 above) and to challenge the prosecution's submissions in his address."

However, in my opinion, a violation should be found on the basis of other elements in the file and the practice of the Canton of Zürich. The interrogations were effected without a lawyer being present or being invited to attend between 13 February and May 1985, after the interrogation carried out by the police on 2 February. Mr Fischer did not have access to the file until 27 February 1985. The change of lawyers, Mr Fischer's visit to the prison, his presence at the final interrogation of the investigation and even his failure to lodge a protest or to express reservations on 6 June cannot justify the earlier infringements of the rights of the defence. The wording of Article 17 of the Code of Criminal Procedure of the Canton of Zürich, as applicable at the material time (it has since been amended), made no reference to an obligation to invite the lawyer to attend.

The legislation of the different cantons is supposed to conform to the European Convention on Human Rights and to the case-law of the European Court and that conformity is subject to the supervision of the Swiss Federal Court. In my opinion the present case shows that at the material time the judicial practice of the Canton of Zürich did not take full account of Article 6 (art. 6).

This situation runs counter to all the recent developments in European criminal procedure, which are directed towards recognising the crucial position of the defence throughout the investigation and the criminal trial.

Admittedly the circumstances of the present case limit the scope of the Court's decision. The fact remains, none the less, that the above-mentioned lacunae in the legislation of the Canton of Zürich are evident and in the instant case resulted in an infringement of the rights of the defence.

That is why I voted in favour of finding a violation of Article 6 (art. 6).

The legislation of the different member States of the Council of Europe is also developing towards securing better protection of the rights of the defence in accordance with the spirit of Article 6 (art. 6). Thus as regards police custody, Germany provides for the intervention and presence of a lawyer immediately and France, following a recent reform, after nineteen hours.

In any event, this intervention is indispensable at the stage of the preliminary investigation, the investigation into the merits of the case.

To comply with this requirement the summons must be a compulsory step in the proceedings so that the completion of this formality can be noted in the official record and to leave open the possibility of subsequently pleading the nullity of the proceedings.

The fact that the proceedings are adversarial in nature at the final stage and at the trial cannot cure earlier irregularities in this respect, because statements obtained in the absence of a lawyer can be decisive in reaching a verdict.

The proceedings in the Imbrioscia case provide an example of the difficulty encountered, even in the member States of the Council of Europe, in securing, after forty years, recognition in the legislation and in the attitudes of the legislators and lawyers of the guiding principles of the notion of fair trial derived from the European Convention on Human Rights.

DISSENTING OPINION OF JUDGE DE MEYER

On the 13th of June 1966, the Supreme Court of the United States of America delivered its well-known Miranda judgment, in which the rules governing custodial interrogation were summarised as follows:

> "(U)nless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him"[*].

In the same judgment it was also stated that there can be no questioning if the person "indicates ... that he wishes to consult with an attorney before speaking" or if, being alone, he "indicates ... that he does not wish to be interrogated"[**].

These principles, then clearly defined, belong to the very essence of fair trial[***].

Therefore I cannot agree with the present judgment, in which our Court fails to recognise and apply them.

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[*] Miranda v. Arizona, Vignera v. New York, Westover v. United States and California v. Stewart, 384 US 436, at 478-479, 16 LEd 2d 694, at 726.

[**] 384 US at 444-445, 16 LEd 2d at 706-707.

[***] See also the dissenting opinion of Mr Loucaides, annexed to the Commission's report in the present case.

DISSENTING OPINION OF JUDGE LOPES ROCHA

(Translation)

I subscribe fully to the views expressed in the dissenting opinions of Judge Pettiti and Judge De Meyer, to which I would add the following comments.

The most modern European codes of criminal procedure recognise that the right of an accused to legal assistance at each stage of the proceedings is an established one which is considered to be the most perfect embodiment of the rights of the defence and therefore of fair proceedings intended to secure for the accused an ever stronger and more effective position as a party to the trial.

The enjoyment of such a right is undoubtedly justified, especially in the initial stages of the proceedings when the accused has to confront the prosecuting authorities on rather unequal terms, and the fact that he is allowed the assistance of a legal specialist at the subsequent interrogations cannot effectively cure this defect.

Admittedly, at the trial the accused has the right to seek to refute the evidence obtained, including any confession that he may have made, but experience shows that at this stage of the proceedings that right is frequently insufficient to overturn opinions formed on the basis of statements made in the absence of a lawyer.

That is why, in the present case, I took the view that there had been a violation of Article 6 paras. 1 and 3 (c) (art. 6-1, art. 6-3-c) of the Convention.