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

COURT (CHAMBER)

CASE OF TOTH v. AUSTRIA

(Application no. 11894/85)

JUDGMENT

STRASBOURG

12 December 1991

In the case of Toth v. Austria[·],

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 Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Sir Vincent EVANS,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr R. PEKKANAN,

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

Having deliberated in private on 27 May and 25 November 1991,

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 15 October 1990 and then by the Government of the Republic of Austria ("the Government") on 18 December 1990, 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. 11894/85) against Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Stefan Toth, on 12 October 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application

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[·] The case is numbered 47/1990/238/308. 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.

[···] The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

referred to Article 48 (art. 48). The object of the request and of the application 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 5 paras. 3 and 4 (art. 5-3, art. 5-4).

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 designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Viljhálmsson, Sir Vincent Evans, Mr A. Spielmann, Mr N. Valticos, Mr S.K. Martens, Mr I. Foighel and Mr R. Pekkanen (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr F. Gölcüklü, substitute judge, replaced Mr J. Cremona, who was unable to take part in the further consideration of the case and who had first replaced Mr Valticos, likewise unable to take part (Rules 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). In accordance with the order made in consequence, the Registrar received the Government's memorial on 13 February 1991 and the applicant's memorial on 7 March 1991. On 9 April the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

On 26 November 1990 the President had authorised the applicant to use the German language (Rule 27 para. 3).

5. On 14 May 1991 the Commission produced the documents in the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 May 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr H. TÜRK, Ambassador, Legal Adviser,
  Ministry of Foreign Affairs, *Agent*,
  Mrs S. BERNEGGER, Federal Chancellery,
  Mrs I. GARTNER, Federal Ministry of Justice, *Advisers*;
- for the Commission
  Sir Basil HALL, *Delegate*;
- for the applicant
  Mrs K. HERMANN, Rechtsanwältin, *Counsel*.

The Court heard addresses by the above-mentioned representatives.

7. On the occasion of the hearing, the Agent of the Government filed a document. On 17 October he provided information requested by the Registrar on the President's instructions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mr Stefan Toth, an Austrian national residing in Graz, works washing dishes in a restaurant.

9. On 1 June 1984 the Salzburg Regional Court (Landesgericht) issued a warrant for his arrest (Haftbefehl). He was suspected of aggravated fraud (schwerer Betrug), aided and abetted by a certain J. M.; he had in particular made out a number of bad cheques drawn on bank accounts opened by J. M., then cashed in different banks. The warrant stated that there was a risk of his absconding (Fluchtgefahr), because his address was unknown, and of repetition of the offences (Wiederholungsgefahr), as Mr Toth had several previous convictions.

10. On 24 August 1984 the same court issued an international arrest warrant (Steckbrief) concerning the applicant. It referred to eleven cases of attempted fraud or aggravated fraud involving more than one million Austrian schillings and affecting financial establishments of various towns in the Federal Republic of Germany and Austria. It mentioned a certain B. as the third co-accused.

11. On 11 January 1985 at 11 p.m. the police arrested Mr Toth at the airport of Graz, the town where he was living, although not duly registered there as a resident; he had been waiting for a friend. He was then taken to Feldkirchen.

A. The investigation proceedings

1. The police custody

12. An investigating judge of the Graz Regional Court interviewed the applicant the following day at 10.40 a.m. According to the document entitled "Examination of the accused" (Vernehmung des Beschuldigten), the judge informed him that the arrest warrants were based on suspicion of several offences of aggravated fraud and that the police custody (Verwahrungshaft) was intended to guard against the risk of his absconding and the risk of collusion (Verabredungsgefahr).

On 17 January 1985 Mr Toth was transferred to Vienna and then on 22 January to Salzburg.

2. The initial phase of the detention on remand

13. On 23 January 1985 he was examined by an investigating judge of the Salzburg Regional Court. He signed the document "Examination of the accused", which indicated that a preliminary investigation (vorläufige Untersuchung) had been opened and that he had been placed in detention on remand because of the risk of his absconding and that of repetition of the offences (Article 180 paras. 1 and 2 of the Code of Criminal Procedure).

14. The same day the Regional Court ordered his detention pending trial, for the reasons invoked by the investigating judge. Previously Mr Toth had tried to evade prosecution by changing his place of residence so that if released he was liable to evade trial or to go into hiding to forestall his future conviction. In addition, he was not socially integrated and was unemployed, which gave grounds for fearing new offences, likely to have serious consequences, of the type of those which had already brought him two convictions.

15. The investigating judge questioned Mr Toth on 25, 28, 29, 30 and 31 January and on 1 February.

16. On 7 February the Swiss authorities indicated by telex message that they were contemplating asking Austria to prosecute the applicant for offences committed in Switzerland.

3. The application for release of 15 February 1985

17. On 15 February 1985 Mr Toth applied for his release. He maintained that he could provide proof both of a permanent place of residence at his sister’s home and of prospects of employment.

18. The same day the investigating judge took cognisance of a further complaint. On 19 February he ordered the police to make inquiries in connection with the offences that the applicant had allegedly committed in Switzerland and asked the Vienna Regional Criminal Court to send him a file. The Government did not provide any details on these various points.

19. On 27 February the Ratskammer (Review Chamber) of the Regional Court of Salzburg dismissed his application for release, following a hearing at which the applicant appeared with his lawyer. It reiterated the grounds given in the decision of 23 January and added that other measures less stringent than detention would not be sufficient to attain the aims pursued thereby.

20. On 1 March 1985 the file was again returned to the investigating judge. Between 6 and 19 March it was handed over to the Salzburg public prosecutor’s office and to the Linz Court of Appeal in connection with the

extension of the detention on remand of the co-accused J. M., before being sent back to the Salzburg court.

The investigating judge, who was away on leave from 20 March to 15 April, questioned Mr Toth on 30 April about J. M. On 15 May he requested documents from two Munich banks.

21. From 26 April to 1 May the applicant served a prison sentence, imposed by the Salzburg District Court for a customs offence.

4. The first extension of the detention on remand (19 June 1985)

22. On an application by the investigating judge, made on 7 June 1985, the Linz Court of Appeal (Oberlandesgericht) decided on 19 June 1985, in private session, to extend the maximum duration of the detention on remand to eight months from 23 January 1985. The aggravated fraud of which the accused was strongly suspected had resulted in a loss of more than 2,000,000 Austrian schillings. The file had become exceptionally voluminous on account of the large number of facts and of the contradictions in Mr Toth's statements and those of his co-accused. The most recent findings of the investigation, and the scope and complexity of the case, made it necessary to leave the prosecuting authorities sufficient time to prepare the indictment and, if necessary, the subsequent proceedings in the assize court. There were grounds for fearing that the accused would evade the trial and commit new offences. Finally, less stringent measures than detention were held to be inadequate.

23. On 24 June the investigating judge wrote again to one of the two Munich banks.

24. On 9 July 1985 Mr Toth challenged the decision of the Court of Appeal in the Supreme Court (Oberster Gerichtshof), arguing that he had a permanent place of residence in Austria, prospects of employment and that he was greatly attached to his girlfriend. On 16 July he insisted that his file be forwarded, although the judge had pointed out to him the futility of this step. On 22 August 1985 the Supreme Court found the appeal inadmissible. The file was returned to the investigating judge on 11 September 1985.

5. The application for release of 12 September 1985

25. On 12 September 1985 Mr Toth asked the Salzburg Regional Court to order his release as the period of eight months set by the Linz Court of Appeal had expired. The European Court is not aware of how this application was dealt with.

6. The second extension of the detention on remand (18 September 1985)

26. On 18 September 1985 the Linz Court of Appeal, sitting in private session, extended the maximum duration of the detention on remand to

eleven months, as it had been requested to do by the investigating judge on 9 September. On the matter of the danger of the applicant's absconding and of repetition of the offences, it found that the circumstances had remained unchanged and therefore referred to the grounds of the decisions of 27 February and 19 June 1985. It also considered that the reasons given ruled out other measures less stringent than detention.

27. On 24 September the Salzburg Regional Court extended the investigation to cover a charge of arson in Switzerland. Mr Toth filed an appeal (Beschwerde) against this decision, which was dismissed by the Ratskammer on 2 October 1985, inter alia, because no supporting grounds were submitted.

28. When the investigating judge considered that the preliminary investigation was terminated, he sent the file on 2 October 1985 to the Salzburg public prosecutor's office (Staatsanwaltschaft). On 31 October that office requested further investigative measures, which were ordered on 7, 15 and 19 November.

On 3 December the file was forwarded to the Linz Court of Appeal for its decision on Mr Toth's detention.

7. The application for release of 26 September 1985

29. On 26 September 1985 Mr Toth submitted an application for release to the Constitutional Court (Verfassungsgerichtshof), which declared it inadmissible on 28 February 1986.

8. The third extension of the detention on remand (11 December 1985)

30. On 11 December 1985 at the request of the investigating judge and the public prosecutor's office, the Linz Court of Appeal, sitting in private session, extended the maximum duration of the detention to fifteen months. In addition to the reasons given in the previous decisions, it noted that the accused was also suspected of having incited another person to burn down a restaurant in Switzerland, causing damage of 300,000 Swiss francs. It noted further that the investigation was not yet completed because of the amount of the evidence.

9. The application for release of 13 December 1985

31. On 13 December 1985 the applicant again applied for his release. On 20 December the file was transmitted to the Ratskammer of the Salzburg Regional Court, which dismissed the application on 2 January 1986 at the end of a hearing attended by Mr Toth and his lawyer. The investigation, at the stage which it had reached, gave credence to the allegations of fraud and of issuing bad cheques for 2,000,000 Austrian schillings levelled at Mr Toth. As to the risks of his absconding and of repetition of the offences, the position had not changed since the decision of 11 December 1985.

32. The same day the investigating judge questioned the applicant in connection with the statements of S. R., another co-accused who had implicated him, and organised a confrontation between them.

33. On 16 January 1986 Mr Toth challenged the decision of 2 January in the Linz Court of Appeal. That court dismissed the appeal on 22 January in private session, "after hearing the submissions of the principal public prosecutor's office" ("nach Anhörung der Oberstaatsanwaltschaft"), but without having summoned or heard the accused and his lawyer. It feared that the applicant would abscond and cross the frontier clandestinely; it was immaterial whether it was true, as the applicant claimed, that he did not have identity papers allowing him to go to Germany, that he was banned from entering that country and that he faced prosecution in Switzerland. There was also a risk of repetition of the offences as the applicant had five previous convictions, including a sentence to twenty months' imprisonment, imposed by the Stuttgart Regional Court, for fraud and forgery. The Court of Appeal did not consider that the duration of the detention was excessive at that stage, having regard to the likely sentence in the event of conviction, and deemed the grounds for the detention sufficiently well-founded to rule out other less stringent measures.

34. The investigating judge questioned the applicant for the last time on 22 January 1986. He then went on leave from 1 to 14 February. On 19 February he wrote to an Austrian bank asking for various documents.

10. The conclusion of the investigation

35. By decision of 26 February 1986, the investigating judge concluded the preliminary investigation.

B. The trial proceedings

1. The indictment

36. On 12 March 1986 the Salzburg public prosecutor's office indicted Mr Toth for various instances of attempted aggravated fraud and of aggravated fraud, as well as forgery of a "specially protected document" (besonders geschützte Urkunde). According to the indictment, which was seventeen pages long, the applicant had drawn cheques on various banks in Germany, Austria and Switzerland and had instructed B. and J. M. to cash them in other banks in these countries; the resulting loss amounted to 950,000 Austrian schillings for the offences of aggravated fraud, and to 1,250,000 schillings for those of attempted fraud; the accused already had two convictions for fraud and receiving stolen goods and he was facing prosecution in Germany for nineteen offences of cheque fraud. The prosecuting authorities stated that further investigations were envisaged

because the applicant was suspected of arson as well as other instances of aggravated fraud.

37. On 19 March 1986 the indictment was communicated to Mr Toth, who challenged it on 4 April, but to no avail. On 11 April the Linz Court of Appeal took the view that the conclusions of the investigation were sufficient to support the charges pending against him; it therefore committed him for trial.

2. The fourth extension of the detention on remand (11 April 1986)

38. The same day, but by a separate decision, the Court of Appeal ruled in private session on a request from the investigating judge of 4 April; it extended to seventeen months the maximum duration of the detention on remand, having regard to the scope and the complexity of the investigation. In its view, no new evidence in Mr Toth's favour had come to light since 22 January 1986.

39. On 30 April the file was transmitted to the trial court, the Salzburg Regional Court, which, on 23 May, set down the trial for 11 June 1986.

40. On 5 June the applicant's lawyer indicated that he no longer wished to represent Mr Toth. However, he was urged not to withdraw before 11 June.

41. Mr Toth's trial opened on the appointed day, but the court adjourned it sine die at the end of the first hearing, for further inquiries to be undertaken, and appointed a lawyer to act for him. The transcript of the hearing ran to 116 pages.

3. The application for release of 16 June 1986

42. On 16 June 1986 the applicant again applied for his release, claiming that he had a permanent place of residence in Austria and confirmation of steady employment.

43. His application was dismissed on 25 June by the Ratskammer of the Salzburg Regional Court, then on 9 July by the Linz Court of Appeal where the file had been sent on 3 July. The two courts gave the same reasons as previously. The second gave its decision in private session, "after hearing the submissions of the principal public prosecutor's office".

44. On 24 July, ten days after the return of the file, the Salzburg Regional Court sought information from the Vienna Regional Court on the matter of the proposed date for B.'s release. On 29 July it requested a German court to communicate to it a decision, which was received on 18 August.

4. The application for release of 25 July 1986

45. Claiming that he was financially and socially integrated and that he lacked the necessary funds to flee, Mr Toth filed a further application for release on 25 July 1986.

The Ratskammer of the Salzburg Regional Court dismissed it on 30 July and the Linz Court of Appeal on 20 August, the latter "after hearing the submissions of the principal public prosecutor's office". The two courts reiterated the grounds given in their previous decisions.

46. On 22 September the Regional Court contacted the Hirtenberg detention centre for information concerning the date of B.'s probable release and his address thereafter. On the same day it sent letters rogatory to the Swiss Federal Police Department and to the District Court of Aschaffenburg (Germany) for information in respect of the witness D. On 15 October the Aschaffenburg District Court replied that it did not know D.'s address. On 20 October the Salzburg Regional Court obtained the address by telephoning Frankfurt prison and requested the District Court of that town to question D.

On 25 September the file had been communicated to a court expert, who had lodged his report on J. M. on 8 October.

5. The application for release of 28 October 1986

47. Ruling in private session on 12 November 1986 and giving the same reasons as in its previous decisions, the Ratskammer of the Salzburg Regional Court refused to allow Mr Toth's application for release of 28 October.

48. On 17 November Mr Toth filed an appeal which was dismissed by the Linz Court of Appeal on 26 November, "after hearing the submissions of the principal public prosecutor's office". It noted that J. M. had implicated the applicant, who had not succeeded in allaying the suspicions concerning him. For the rest, it reiterated in substance the reasons given in its previous decisions. The file was returned to the Salzburg Regional Court on 1 December.

49. In the meantime, on 12 November, Mr Toth had stated that he wished to dispense with the services of the lawyer appointed to act for him. On 16 December the Bar declared that it saw no reason to appoint another defence lawyer.

50. On 17 November the applicant complained that no date had been set down for the trial hearing. He was informed that the court was waiting for the examination of D. which was to take place on 27 November in the Frankfurt District Court.

On 3 December the latter court communicated to the Austrian authorities the transcript of the examination of D.

51. On 12 and 16 December 1986, the trial court requested the police of Dornbirn and Bregenz to provide it with the addresses of B. and S. R.; on 22 January 1987 it sought information on the former from the headquarters of the Salzburg federal police.

6. The applicant's application for release of 31 December 1986

52. On 31 December 1986 Mr Toth once again sought his release. The Ratskammer of the Salzburg Regional Court rejected his application on 21 January 1987.

7. The applicant's release

53. A further application for release was submitted to the Ratskammer of the Salzburg Regional Court on 21 January 1987; it was dismissed on 28 January.

On 18 February the Linz Court of Appeal allowed the appeal which Mr Toth had filed on 3 February. It took the view that nearly twenty-five months' detention had significantly reduced the risk of the applicant's absconding and of repetition of the offences and made it possible to impose more lenient measures. It attached several conditions to the release: an undertaking not to evade the trial and not to go into hiding before the conclusion of the trial or to impede the investigation; it imposed an obligation to choose a permanent place of residence in Austria and to communicate it to the court and to report every two days to the police; his identity papers were provisionally confiscated.

The applicant was released on the same day.

8. The additional indictment

54. On 9 July 1987 the Salzburg prosecuting authorities drew up an additional indictment, nine pages long. In it Mr Toth was charged with having, being aided and abetted by S. R., committed other offences of fraud by seeking to cash fraudulently in Germany, Austria and Switzerland bad cheques, which had allegedly caused a loss of approximately 800,000 Austrian schillings. These offences were therefore offences punishable by a term of imprisonment of from one to ten years (Article 147 para. 3 of the Criminal Code).

The applicant appealed against this new indictment, but his appeal was dismissed by the Linz Court of Appeal on 30 September.

55. The same day an application by Mr Toth to the Salzburg Regional Court concerning the conditions imposed on him was allowed, but only in part. He was authorised to report to the police only once a week. The applicant appealed to the Linz Court of Appeal, but his appeal was dismissed on 4 November 1987.

9. The trial

56. On 22 February 1988 the Regional Court set down the trial for 25 and 26 May. On that last date, it found the accused guilty of aggravated fraud and sentenced him to four and a half years' imprisonment, the pre-trial

detention being automatically deducted from the sentence. The text of the judgment comprised sixty-nine pages.

By a judgment of 23 February 1989 the Linz Court of Appeal reduced the sentence to four years. On 6 May 1990 the Salzburg Regional Court stayed enforcement of that sentence.

II. THE RELEVANT DOMESTIC LAW

A. Detention on remand

57. Under Article 180 paras. 1 and 2 of the Code of Criminal Procedure, as amended on 2 March 1983, a person may be held in detention on remand - where there are serious grounds for suspecting him of having committed a criminal offence - if there is a risk of his absconding, of collusion or of repetition of the offences.

58. A risk of absconding may not be presumed if the sentence for which the accused is liable does not exceed five years' imprisonment, if he leads a normal life and if he has a permanent residence in Austria, unless he has already attempted to evade trial (para. 3).

59. According to Article 193, detention may not last more than two months if it is based only on the danger of collusion, or more than six months if it is based on the other reasons.

The second-instance court may however, if the investigating judge or the prosecuting authorities so request and if the complexity or scope of the investigation makes it necessary, extend the detention up to a maximum of three months in the case of suspected collusion, and one year where the other grounds are relied on, or even two if the sentence risked exceeds five years (paras. 3 and 4). In exercising this power the appellate court sits in private session in the absence of the detainee and his lawyer; it gives the principal public prosecutor's office the opportunity to make submissions (para. 2).

Detention founded on a reason other than the risk of collusion alone is subject to no time-limit as soon as the trial has begun (para. 5).

60. The accused may lodge an application for release at any time (Article 194 para. 2). Under Articles 194 and 195, such an application is to be examined by the Ratskammer of the Regional Court in a private hearing, in the presence of the accused and his lawyer; in the appeal court - whether on appeal by the detainee or the prosecuting authorities - the oral proceedings are also conducted in private, in the presence of an official from the principal public prosecutor's office, but without the accused and his lawyer.

Where no such application is lodged, the Ratskammer automatically reviews the detention when it has lasted two months or when three months

have elapsed since the last hearing and the accused does not have a lawyer (Article 194 para. 3).

The fact that an indictment has become final or that the date for the opening of the trial has been fixed means that no further review hearings are conducted. Decisions concerning the continuation of the accused's detention are thereafter taken by the Ratskammer in private session (Article 194 para. 4).

61. Detention on remand comes to an end, at the latest, when the accused begins to serve his sentence, from which the time spent on remand is automatically deducted (Article 38 of the Criminal Code).

B. Alternative measures to detention on remand

62. Article 180 para. 4 of the Code of Criminal Procedure requires that detention on remand be not extended where its aims may be attained by one or more more lenient measures. The main measures envisaged in this respect are the following (Article 180 para. 5): undertaking not to abscond, to hide or to leave the place of residence without the authorisation of the investigating judge; promise not to impede the inquiry; obligation to reside in a specific place or to refrain from frequenting a given locality or from consuming alcoholic beverages; duty to inform the police of changes of address; temporary withdrawal of passport or driving licence; lodging of security; provisional appointment of a probation officer.

Article 190 makes provision for the possibility of release on bail when the offence in question is punishable by a term of imprisonment of not more than ten years and where detention on remand has been ordered to counter the danger of the accused's absconding.

PROCEEDINGS BEFORE THE COMMISSION

63. In his application of 12 October 1985 to the Commission (no. 11894/85), Mr Toth formulated a number of complaints concerning his arrest and his detention on remand and the length of the criminal proceedings as well as the conduct of the Austrian authorities and courts.

64. On 8 May 1989 the Commission declared the application admissible as regards the length of the detention on remand and in relation to the proceedings before the Linz Court of Appeal. In its report of 3 July 1990 (Article 31) (art. 31), it expressed the opinion that there had been a violation of paragraphs 3 and 4 of Article 5 (art. 5-3, art. 5-4). The full text of its

unanimous opinion and of the separate concurring opinion contained in the report is reproduced as an annex to this judgment·.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 PARA. 3 (art. 5-3)

65. Mr Toth relied on Article 5 para. 3 (art. 5-3), which is worded as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

He claimed that the length of his pre-trial detention amounted to a breach of that provision, an allegation contested by the Government but accepted by the Commission.

A. Period to be taken into consideration

66. The period to be taken into consideration began on 11 January 1985, the date of the arrest, and ended on 18 February 1987, with the applicant's release following the decision of the Linz Court of Appeal allowing his appeal (see paragraphs 11 and 53 above), less the period - from 26 April to 1 May 1985 - during which the applicant was serving a prison sentence (see paragraph 21 above). It therefore lasted two years, one month and two days.

B. Reasonableness of the length of the detention

67. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for

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· Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 224 of Series A of the Publications of the Court), but a copy of Commission's report is obtainable from the registry.

release and his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 para. 3 (art. 5-3).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see, as the most recent authority, the Kemmache v. France judgment of 27 November 1991, Series A no. 218, p. 23, para. 45).

1. The justification of the detention

68. In dismissing Mr Toth's applications for release, the courts put forward in essence two reasons: the need to prevent the repetition of the offences and the need to guard against the danger of his absconding.

(a) The risk of repetition of the offences

69. According to the Government there was a genuine risk of repetition of the offences because the applicant had several previous convictions for offences similar to those which were the subject of the proceedings pending against him.

Mr Toth argued on the contrary that those convictions did not constitute sufficient justification.

70. The Court notes that the contested decisions took account of the nature of the earlier offences and the number of sentences imposed as a result, although they differed to some extent between each other on that last point (see paragraphs 14 and 33 above). It shares the Commission's view that the national courts could reasonably fear that the accused would commit new offences.

(b) The danger of absconding

71. The Government further contended that there had been a danger of the applicant's absconding. They cited the severity of the sentence risked by Mr Toth and the gravity of the charges pending against him. They drew attention to the earlier attempts by the applicant to evade prosecution by frequently changing address without registering with the authorities. They added that the courts called upon to rule on Mr Toth's pre-trial detention had envisaged less stringent measures, but ultimately decided against them.

The applicant, for his part, argued that he had a permanent residence in Austria and could easily obtain steady employment which would ensure his re-integration into society.

72. Like the Commission, the Court considers that the national courts based their decisions on grounds which provided a sufficient explanation as to why, notwithstanding the arguments advanced by Mr Toth in support of his applications for release, they considered the danger of his absconding decisive (see paragraphs 19, 22, 26, 30, 31, 33, 38, 43, 45, 47 and 48 above).

(c) Conclusion

73. In sum the reasons put forward for dismissing Mr Toth's applications were both relevant and sufficient.

2. The conduct of the proceedings

74. According to the applicant, various inquiries were still in progress when he was indicted and the trial had been set down for 11 June 1986 only in order to make it possible to prolong his detention without a time-limit.

75. The Government took the view that the length of that detention was in no way unreasonable. They stressed in the first place the complexity and scope of the case. Comparing it with the case of B. v. Austria (judgment of 28 March 1990, Series A no. 175), they referred in support of their argument to the size of the file (twelve volumes) and the length of the first-instance judgment (sixty-nine pages). They also drew attention to the dates of the measures taken in the proceedings in order to show that the authorities had displayed diligence throughout almost all the periods criticised by the Commission in its report (see paragraph 76 below), which corresponded essentially to the holidays of the investigating judge. Finally they emphasised the large number of applications for release made by Mr Toth and therefore held him partly responsible for the length of his detention.

76. The Commission acknowledged that the investigation raised some difficult questions of fact which contributed to lengthening the proceedings. It also considered that several of the applications and appeals by the applicant must have had the same effect, although it did not regard the number of such steps as excessive.

On the other hand, it drew up a list of seven periods of inactivity totalling approximately eleven months: from 19 February (launching of the inquiry into offences committed in Switzerland) to 30 April 1985 (questioning of the applicant), from 24 June (letter from the investigating judge to a German bank) to 24 September 1985 (extension of the investigation), from 19 November 1985 (decision allowing the prosecuting authorities' request for further inquiries) to 2 January 1986 (questioning of Mr Toth), from 22 January (final interrogation of the applicant) to 26 February 1986 (conclusion of the preliminary investigation), from 11 June (adjournment of the trial hearing) to 24 July 1986 (request for information from the Vienna Regional Court), from 18 August (receipt of a German judicial decision) to

22 September 1986 (despatch of two letters rogatory) and from 8 October (filing of report by a court expert on a co-accused) to 12 November 1986 (when Mr Toth dispensed with the services of the lawyer appointed to act for him) (see paragraphs 18-20, 23-35 and 41-46 above).

Even the tasks normally connected with such proceedings and not listed in the documents of the proceedings - such as studying of the papers, preparation of examinations, drawing up of official requests for information and so on - did not, in the Commission's view, excuse all the delays noted in the present case. In short, the proceedings had not been conducted with due expedition.

77. The Court fully appreciates that the right of an accused in detention to have his case examined with particular expedition must not unduly hinder the efforts of the judicial authorities to carry out their tasks with proper care (see, mutatis mutandis, the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 26, para. 17). However, the evidence discloses that the Austrian courts did not in this instance act with all the necessary dispatch.

The length of the proceedings - as far as relevant in the present context - would in fact seem essentially not to be attributable either to the complexity of the case or to the applicant's conduct. Although the offences of which Mr Toth was accused were numerous and concerned several countries, they were relatively commonplace and repetitive. As far as his appeals were concerned, some were bound to fail from the outset, such as that of 9 July 1985 to the Supreme Court and that of 26 September 1985 to the Constitutional Court (see paragraphs 24 and 29 above); however, they scarcely slowed down the examination of the case.

On the other hand, the speed of the investigation suffered considerably from the transmission of the whole file to the relevant court not only on the occasion of each application for release and each appeal by Mr Toth, but also on that of each request from the investigating judge or public prosecutor for the extension of the detention. There were therefore numerous interruptions because the officers concerned relinquished the file, sometimes for quite long periods, to their colleagues (see paragraphs 20, 24, 28, 31, 39, 43-44, 46 and 48 above). Preferred to the use of copies, which is the practice in other member States of the Council of Europe, such toing and froing of the file occurred both before the indictment and after it (see, mutatis mutandis, the König judgment of 28 June 1978, Series A no. 27, p. 36, para. 104). As in practice it had the effect of suspending the investigation during the examination of the question whether the detention should be continued and, consequently, of delaying the applicant's release accordingly, it can hardly be reconciled with the importance attached to the right to liberty secured under Article 5 para. 1 (art. 5-1) of the Convention.

78. In conclusion, there has been a violation of Article 5 para. 3 (art. 5-3).

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 (art. 5-4)

79. The applicant also relied on Article 5 para. 4 (art. 5-4), according to which:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In his submission, the proceedings before the Linz Court of Appeal had not been adversarial either when it ruled on his applications for release or when it authorised the extension of his pre-trial detention.

A. Proceedings concerning the applications for release

1. Government's preliminary objection

80. The Austrian Government raised a preliminary objection in that Mr Toth had not formulated before the Commission, within the six-month period provided for in Article 26 (art. 26) in fine of the Convention, any complaint concerning his absence and that of his lawyer during the examination of his appeals against the dismissal of his applications for release by the Salzburg Regional Court.

They relied in this respect on the letters which Mr Toth sent to the Secretariat on 5 and 26 December 1985, then on 4 July and 11 December 1986, to supplement his initial application of 12 October 1985. The first two letters concerned the decisions of the Court of Appeal, of 19 June and 11 December 1985, in respect of the extension of the detention. The third and fourth dealt with its length. Mr Toth, who was assisted by a lawyer throughout the domestic proceedings, must have been aware both of the participation of a member of the public prosecutor's office in the hearings on the applications for release and of the differences between the two categories of proceedings at issue.

81. At the hearing the Delegate of the Commission invited the Court to reconsider its case-law concerning its jurisdiction to hear such preliminary submissions.

In addition, he made two observations, reiterating in substance the relevant passages of the decision of 8 May 1989 on the admissibility of the application. In the first place, as early as 5 December 1985, Mr Toth complained that he had been unable to participate in the hearing before the Court of Appeal on the extension of his detention; subsequently, in his letter of 4 July 1986 after the Court of Appeal had on 22 January 1986 for the first time dismissed upon appeal his request to be released from detention he wrote that he now extended the scope of his application. This approach led the Commission to conclude not that he was dealing separately with two

different types of proceedings before the Court of Appeal, but that he also complained of his not having been heard when his appeal was before the Court of Appeal. Furthermore, the letters of 5 December 1985 and 4 July 1986 must be viewed as a whole; and the latter was sent less than six months after 22 January 1986, the date on which the Court of Appeal ruled for the first time on an appeal by Mr Toth on his request to be released from detention (see paragraph 33 above).

82. In the light of its own case-law (see, in particular, the Ringeisen judgment of 16 July 1971 Series A no. 13, pp. 37-38, para. 90, the Guzzardi judgment of 6 November 1980, Series A no. 39, pp. 22-23, paras. 62-63, and the Foti and Others judgment of 10 December 1982, Series A no. 56, p. 15, para. 44) and of all the evidence, the Court agrees with this conclusion. In particular, it considers it hardly realistic to expect a detainee without legal training - like the applicant - to understand fully the difference between the two types of procedure in question; it would have been excessively formalistic of the Commission to have confined itself to the letter of the applicant's argument without seeking to establish its true purport. The objection is therefore unfounded.

2. The merits of the complaint

83. The Linz Court of Appeal ruled on Mr Toth's appeals without having summoned or heard him or his lawyer, whereas an official of the principal public prosecutor's office had attended the hearing and been able to reply to the court's questions.

According to the applicant, that destroyed the equality of arms between the prosecution and the defence.

The Government took the contrary view. In their opinion, the fact that the applicant had appeared before the Ratskammer of the Salzburg Regional Court rendered devoid of purpose his presence on appeal. Furthermore, the representative of the prosecuting authority had not made any statements or requests.

84. The Court observes that Article 5 para. 4 (art. 5-4) does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. Nevertheless, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (see, inter alia, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 14, para. 25 in fine, and the Ekbatani judgment of 26 May 1988, Series A no. 134, p. 12, para. 24).

In fact Mr Toth did not have the opportunity to contest properly the reasons invoked to justify the continuation of his detention. Any questions by the Court of Appeal would have enabled the representative of the prosecuting authority to put forward his views; they could have prompted, on the part of the accused, reactions warranting consideration by the

members of the court before they reached their decision. As the proceedings did not ensure equal treatment, they were not truly adversarial (see, mutatis mutandis, the Sanchez-Reisse judgment of 21 October 1986, Series A no. 107, p. 19, para. 51).

There has therefore been a violation of Article 5 para. 4 (art. 5-4) on this point.

B. Proceedings concerning the extension of the pre-trial detention

85. The applicant made a similar complaint concerning the proceedings instituted in the Linz Court of Appeal by the investigating judge for the extension of the pre-trial detention.

86. In the Commission's view, shared by the Government, the contested proceedings did not come within the scope of Article 5 para. 4 (art. 5-4). Their purpose was to fix a maximum period of detention and they were separate from, and in addition to, the "proceedings" which Mr Toth was entitled to take under that provision and of which he availed himself repeatedly in order to request his release.

87. The Court reaches the same conclusion. The appellate court rules on a request from the investigating judge or the prosecuting authority (see paragraph 59 above) and confines itself to setting out a framework within which the former is free to take decisions. It does not therefore itself decide - as it has to in the case of an appeal or for the purposes of the automatic periodic review - on the appropriateness or the necessity of keeping the accused in prison or releasing him, because it does not substitute its own assessment for that of the authority which has taken the decision. Nor does it undertake a review of the "lawfulness of the detention", in other words a review wide enough to bear on each of those conditions which are essential for detention to be lawful (see, mutatis mutandis, the E. v. Norway judgment of 29 August 1990, Series A no. 181-A, p. 21, para. 50).

In short, Article 5 para. 4 (art. 5-4) did not apply to the proceedings in question.

III. APPLICATION OF ARTICLE 50 (art. 50)

88. According to Article 50 (art. 50):

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

89. Mr Toth claimed in the first place 750,000 Austrian schillings for pecuniary damage and 1,000,000 schillings for non-pecuniary damage. The first amount was said to correspond to his loss of earnings during the pre-trial detention and the reduction in his salary after his release. The second was intended to cover the "mental suffering" endured in prison (at a rate of 1,000 schillings per day) and subsequently on his re-integration into society.

90. The Government saw no causal connection between the alleged violation and the pecuniary damage deriving for the applicant from his deprivation of liberty, which he would in any event have had to undergo once convicted. In addition, they considered that a finding of a violation would provide sufficient satisfaction for the non-pecuniary damage.

The Delegate of the Commission did not submit any observations.

91. The Court dismisses the claim for pecuniary damage because the entire period of pre-trial detention was deducted from the sentence. As regards the non-pecuniary damage, it finds that the present judgment constitutes sufficient satisfaction.

B. Costs and expenses

92. The applicant received legal aid before the Convention organs and claimed nothing in respect of the proceedings conducted before them.

On the other hand, he sought 178,083.60 schillings for the costs and expenses incurred in the proceedings in the Austrian courts comprising the following lawyers' fees: Mr Eberl and Mr Müller: 440; Mr Oberrauch and Mr Stadlmeier: 11,132; Mr Paradeiser: 31,438.20; Mr Lechenauer: 50,000; Mrs Hermann: 85,073.40.

93. The Government contested most of these claims. Neither Mr Eberl and Mr Müller nor Mr Oberrauch and Mr Stadlmeier had represented Mr Toth, although the latter's sister had contacted them. Mr Paradeiser was entitled only to 7,853.40 schillings, for the application for release of 15 February 1985 and the hearing of 27 February in the Ratskammer of the Salzburg Regional Court (see paragraphs 17 and 19 above). As regards Mr Lechenauer, no details had been provided. Finally, Mrs Hermann was not to be taken into account because she began to represent the applicant only after his conviction.

The Delegate of the Commission did not express an opinion.

94. The Court agrees with the view expressed by the Government and accordingly awards to Mr Toth 7,853.40 schillings for the expenses and fees of Mr Paradeiser.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been a violation of Article 5 para. 3 (art. 5-3);

2. Dismisses unanimously the preliminary objection raised by the Government concerning the complaint on the proceedings in the Court of Appeal for the examination of Mr Toth's applications for release;

3. Holds by eight votes to one that there has been a violation of Article 5 para. 4 (art. 5-4) inasmuch as those proceedings were not adversarial;

4. Holds by eight votes to one that Article 5 para. 4 (art. 5-4) did not apply to the proceedings in the Court of Appeal concerning the extensions of the applicant's pre-trial detention;

5. Holds unanimously that the respondent State is to pay to the applicant, within three months, 7,853.40 schillings (seven thousand eight hundred and fifty three Austrian schillings and forty groschen) in respect of costs and expenses;

6. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 December 1991.

For the President
Alphonse SPIELMANN
Judge

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 separate opinions of Mr Matscher and Sir Vincent Evans are annexed to this judgment.

A. S.
M.-A. E.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

1. I voted with the majority of the Chamber as regards the excessive duration of the applicant's pre-trial detention, although it was in my view a borderline case. I too consider that on the whole, for a case involving a moderately serious criminal offence, an overall period of detention which exceeds two years does not satisfy the requirements of "expedition" laid down in Article 5 para. 3 (art. 5-3).

However, the Chamber did not take sufficient account of the fact that where economic crime is concerned the investigation is especially intricate and complex and that, in the present case, the accused in no way helped to shed light on the facts constituting the allegations against him, as is clear from his attitude during the two hearings before the Salzburg Regional Court; it may be supposed that he behaved similarly during the investigation. In this way he rendered the investigating judge's task more difficult. Clearly he was free to choose his line of defence, but, to a certain extent, he must equally suffer the unfavourable consequences resulting therefrom. At the same time, the judge must carry out the investigation with the diligence required under Article 5 para. 3 (art. 5-3), notwithstanding the accused's conduct.

The accused is also entitled to have recourse to all the legal remedies available under the applicable procedural law with a view to obtaining his release, but clearly this this too may lead to a prolongation of the detention, for reasons "of a technical nature" (non-availability of the file for the investigating judge), and the accused must bear this in mind; this is particularly true where he files numerous appeals, some of which are patently destined to fail. Nevertheless, here too, the competent court must deal with such a situation by the means at its disposal and must not forget that the right to liberty of person lies at the heart of the Convention, as the Chamber has rightly confirmed (paragraph 77 in fine).

In this context the suggestion that the European Court would seem to formulate for the benefit of national courts (also at the third sub-paragraph of paragraph 77), namely that they should make copies of the files - which sometimes comprise more than 1,000 pages -, so as always to leave a copy for the investigating judge, is in my view hardly realistic; such a suggestion goes well beyond what can reasonably be expected of the courts of a State signatory to the Convention; moreover, it disregards the problems arising from the handling of a large file.

2. The majority of the Chamber found that there had been a violation of Article 5 para. 4 (art. 5-4) on the ground that the decision of the Court of Appeal on the accused's applications for release, following their dismissal

both by the investigating judge and the Ratskammer, had been taken by that court after having heard the submissions of the principal public prosecutor's office, but without hearing the accused.

The Court has often in the past had to consider the problem of the procedural guarantees secured by Article 5 para. 4 (art. 5-4). Its case-law on this matter may be summarised as follows: Article 5 para. 4 (art. 5-4) requires that it be possible to apply to a judge, who can decide on the application for release following a judicial type procedure, with the essential procedural guarantees inherent in that notion (see the judgments of Neumeister of 27 June 1968, Series A no. 8, p. 43, para. 24; Sanchez-Reisse of 21 October 1986, Series A no. 107, p. 19, para. 51; and Lamy of 30 March 1989, Series A no. 151, pp. 16-17, para. 29); however, that is clearly below the level of protection afforded - and required - by Article 6 para. 1 (art. 6-1).

It seems to me that Austrian law does indeed provide the guarantees which - in the light of the relevant case-law of the Convention organs - Article 5 para. 4 (art. 5-4) requires (Articles 195 and 196 of the Code of Criminal Procedure). Apart from the automatic periodical reviews of the lawfulness of the continuation of detention on remand (Article 194 para. 3 of the Code of Criminal Procedure), the detainee may, at any time, request his release, which may be granted by the investigating judge with the consent of the prosecuting authority. Where the investigating judge rejects such a request or the prosecuting authority opposes it, an adversarial hearing is held before the Ratskammer to which the detainee (and his lawyer) and the public prosecutor are summoned and where the detainee and/or his lawyer have the possibility to make any submissions in support of the application for release, in other words to contest the investigating judge's decision to reject the application and/or the position taken by the public prosecutor. Where the decision of the Ratskammer goes against him, the detainee has in addition the right to submit a written appeal to the Court of Appeal. That court decides "after hearing the submissions of the principal public prosecutor's office", in other words after having given him the opportunity to make known - in writing or orally - his point of view. Furthermore, where the appeal (against a decision by the Ratskammer to release a detainee) has been lodged by the prosecuting authority, the detainee too has the possibility of putting forward his submissions provided that the prosecution submissions have been sufficiently brought to his notice - as the Court correctly noted in the Brandstetter judgment of 28 August 1991, Series A no. 211, pp. 27-28, para. 67 (see nevertheless my dissenting opinion, which was joined by Judges Vilhjálmsson and Bindschedler-Robert). Thus both parties have each had the opportunity to put forward their arguments so that the equality of arms is here fully respected.

Of course, over recent years, the Court's case-law on the matter of procedural guarantees has developed and, in the present case, the Chamber

seems to have let itself be influenced by the idea that, in criminal proceedings, it is always the accused who must have the last word. This is a requirement of Article 6 para. 1 (art. 6-1) to which I fully subscribe. However, to transpose it to Article 5 para. 4 (art. 5-4) is in substance to give that provision an equal scope to that of Article 6 para. 1 (art. 6-1) (without the requirement concerning the public nature of hearings), which, in my view is not a reasonable interpretation of Article 5 para. 4 (art. 5-4). In fact the Convention distinguishes clearly between Article 5 para. 4 and Article 6 para. 1 (art. 5-4, art. 6-1) as regards the procedural guarantees inherent in one or the other (see in this respect the Winterwerp judgment of 24 October 1979, Series A. no. 33, p. 24, para. 60).

The undesirable consequence of such case-law could be that, in proceedings for hearing applications for release, States will abolish the second (or third) level of jurisdiction which certain systems (in this instance, the Austrian) make available, where the procedures at the higher levels of jurisdiction do not fully satisfy the requirements of Article 6 para. 1 (art. 6-1). Such a legislative reversal would be in conformity with the letter of Article 5 para. 4 (art. 5-4), but would not be in the interests of the citizen.

Furthermore, the organisation of an appeal procedure in conformity with Article 6 para. 1 (art. 6-1), in cases of this nature, would constitute an excessive burden for the investigation and would run counter to the principle of "expedition" laid down in Article 5 para. 3 (art. 5-3).

PARTLY DISSENTING OPINION OF JUDGE Sir Vincent EVANS

1. I regret that I cannot agree with the conclusion of the majority of the Court that Article 5 para. 4 (art. 5-4) of the Convention did not apply to the proceedings concerning the extension of the pre-trial detention (see paragraphs 85-87 of the Court's judgment) and in my opinion those proceedings also gave rise to a violation of that paragraph of Article 5 (art. 5-4).

2. The purpose of the proceedings in question, as the Court observes, was to obtain a ruling of the Court of Appeal on a request from the investigating judge under Article 193 of the Austrian Code of Criminal Procedure for a prolongation of the permissible length of detention on remand and thereby to set the framework within which the investigating judge was then free, within the law, to take decisions as to the continued detention of the applicant. The effect of the proceedings was thus to make a decision as to an essential pre-condition, under Austrian law, of his continued detention. This being so, Article 5 para. 4 (art. 5-4) required that the applicant should be entitled to take proceedings to contest the "lawfulness" of his continued detention in this respect. But at no stage was this requirement satisfied. The applicant was not entitled to intervene in the proceedings before the Court of Appeal and to present his case for opposing the investigating judge's request and he had no right of appeal against the Court of Appeal's ruling.

3. It is true that the applicant was able to, and did, take separate proceedings under Article 194 para. 2 of the Code of Criminal Procedure to apply for his release but, as I understand the system, such application had to be made within the framework already established by the Court of Appeal's prolongation decision under Article 193 and that decision as such was not open to challenge in the proceedings concerning the application for release. What is more, it is apparent that the Court of Appeal in reaching its decision on prolongation took into account not only the complexity and scope of the case and the severity of the sentence risked but also other considerations including the danger of the accused absconding and committing new offences (see paragraphs 22, 26, 30 and 38 of the Court's judgment). The decision so arrived at could hardly fail to weigh against the applicant in the consideration of the merits of any application for release thereupon to the Ratskammer and in any ensuing appeal to the Court of Appeal. These considerations reinforce the view that Article 5 para. 4 (art. 5-4) was applicable in respect of the prolongation proceedings.

4. My conclusion therefore is that Article 5 para. 4 (art. 5-4) was applicable and was violated not only in regard to the proceedings concerning the applications for release but also in regard to the proceedings concerning the extension of the pre-trial detention.