



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

COURT (CHAMBER)

CASE OF W. v. SWITZERLAND

(Application no. 14379/88)

JUDGMENT

STRASBOURG

26 January 1993

In the case of W. 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. MATSCHER,

Mr L.-E. PETTITI,

Mr B. WALSH,

Mr J. DE MEYER,

Mr S.K. MARTENS,

Mr A.N. LOIZOU,

Sir John FREELAND,

Mr L. WILDHABER,

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

Having deliberated in private on 29 August and 26 November 1992,

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 13 December 1991 and by the Government of the Swiss Confederation ("the Government") on 10 January 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. 14379/88) against Switzerland lodged with the Commission under Article 25 (art. 25) by Mr W., a Swiss national, on 20 September 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 Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and the application was to obtain a decision as to whether the facts

^{*} The case is numbered 92/1991/344/417. 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.

of the case disclosed a breach by the respondent State of its obligations under Article 5 para. 3 (art. 5-3).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant - whose identity the Court agreed not to disclose - stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30); the President gave the said lawyer leave to use the German language (Rule 27 para. 3).

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 24 January 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr B. Walsh, Mr J. De Meyer, Mr S.K. Martens, Mr A.N. Loizou and Sir John Freeland (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

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 lawyer for the applicant on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 19 June and the applicant's claims under Article 50 (art. 50) on 23 June.

5. On 22 April, 5 May and 23 June 1992, the Commission, the Government and the applicant produced various documents, including some 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 28 August 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr O. JACOT-GUILLARMOD, Under-Secretary
of the Federal Office of Justice, Head of the International Affairs
Division, *Agent,*

Mr T. MAURER, President
of the Economic Criminal Court of the Canton of Berne,

Mr B. SCHNELL, Cantonal Attorney
of the Canton of Berne for economic criminal cases,

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

- for the Commission

Mrs J. LIDDY, *Delegate;*

- for the applicant

Mr P. SALUZ, Fürsprecher, *Counsel.*

The Court heard addresses by Mr Jacot-Guillarmod, Mr Maurer and Mr Schnell for the Government, Mrs Liddy for the Commission and Mr Saluz for the applicant, and also their replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a Swiss businessman who with eleven accomplices was prosecuted for a series of economic offences, including a large number of frauds in the management of some sixty companies. He was arrested on 27 March 1985 and placed in pre-trial detention with six of his co-accused, on the grounds that there was a risk of absconding, collusion and repetition of offences.

A. The investigation

8. The first complaints relating to him had reached the criminal police of the Canton of Berne in October 1982, inter alia following a number of fraudulent bankruptcies. In October 1984 the cantonal authorities asked the Interpol agencies in Germany, the United States of America, the United Kingdom, Monaco and several Caribbean countries to make inquiries about the applicant, and opened a preliminary investigation against him on 8 February 1985.

In view of the complexity of the case they set up in mid-1985 a subsection of the office of the investigating judge (Untersuchungsrichteramt) of the Canton of Berne, consisting of two investigating judges assigned exclusively to the investigation, under the authority of a cantonal attorney at the Berne Court of Appeal (Obergericht) and the indictments chamber (Anklagekammer) of that court. They were assisted by specialist police officers and considerable facilities were made available to them (secretariat, computer, archives).

9. In the period from March 1985 to June 1986 their investigation, which traced events back as far as 1977, gave rise to eighteen searches, including several at W.'s residence and the office of the companies he controlled. Documents in large quantities were found there, mostly in utter disorder, some in the cellar, some in the bathroom and even some in bin bags ready to be destroyed. W. had in fact altered the accounts of his companies, some of which were incidentally fictitious, in order to thwart possible investigations.

On 3 April 1985 the authorities froze assets in seventeen banks and issued warrants relating to other credit institutions. They drew up a list of

about two hundred accounts in all which were affected by the fraudulent dealings of the applicant and his accomplices.

In 1985 and 1987 money and valuables belonging to the applicant and his co-accused were seized following orders or searches. These were dated 27 and 28 March, 3 April, 4 May, 2, 3 and 27 June, 5 September, 3 October and 25 November 1985, 16 and 19 January, 9 February, 5 March, 14 May, 2 July, 19 and 21 August and 1 December 1987.

The investigators also had to have recourse to international judicial assistance, in particular from the Munich public prosecutor's office. That office sent them a report dated 16 April 1987, as a result of which the Swiss authorities extended their inquiries to Germany and took over criminal proceedings instituted against W. in that country.

On 11 December 1987 the investigating judges requested thirteen insolvency practitioners to provide documents relating to seventeen companies. The last of these reached them in December 1988 and January 1989.

On 26 May 1988, in view of the urgency, they severed the proceedings against the applicant from those against two accomplices.

10. The applicant twice challenged the investigating judges. He also brought eleven appeals and two complaints against decisions by them restricting access to the case-file at the beginning of the investigation. The accused were eventually given access to nine-tenths of the file from May 1986 and the entire file from 22 October of that year. W. had meanwhile reacted by deciding on 11 April 1986 to make no further statements.

On 28 June 1988 he complained of other irregularities, stating that documents had not been given to him and his lawyer had been unable to obtain free photocopies of them. The indictments chamber dismissed his complaint on 27 July 1988. After the committal for trial (see paragraph 13 below) the authorities on 13 October and 30 November 1988 and 3 January 1989 allowed the case-file to be consulted by the defence for nine, seven and five half-days respectively.

There was another incident when W. was not permitted to be present at certain investigative acts. On 27 January 1987 the indictments chamber decided that in principle he had the right to attend these.

His request of 18 December 1987 that there should be no supervision of the visits by his wife was dismissed by the indictments chamber on 16 February and the Federal Court on 19 May 1988.

11. During his pre-trial detention W. committed further offences, which resulted in an additional conviction for fraudulent bankruptcy and criminal mismanagement (see paragraph 24 below); the general meeting of a company controlled by him, which took place in prison on 11 October 1985 in the presence of a lawyer (advocate and notary), had allowed the latter to use a power of attorney to issue bonds secured on the property of the said company and used as security for the applicant's personal debts.

12. Once the basic documentation had been collected and sorted, the authorities in October and July 1986 also ordered three expert reports, one from a psychiatrist and two from accountants, the latter following a defence request for evidence of 6 September 1985, the only such request made by them in the course of the investigation. The reports were filed on 22 December 1986 and in April 1987. The psychiatric report concluded that the applicant was fully criminally liable, and described him as a confidence trickster (Hochstapler) and an unrestrained hedonist (hemmungsloser Hedonist) who had no scruples about causing harm to others.

13. On 29 April 1988 the investigating judges declared, pursuant to Article 98 of the Berne Code of Criminal Procedure (see paragraph 25 below), that they would request the cantonal attorney's office to commit W. for trial before the Economic Criminal Court (Wirtschaftsstrafgericht) of the canton. The order committing for trial (Überweisungsbeschuß) was made on 2 September 1988.

The investigators had carried out a total of approximately 350 interrogations. From 11 April 1986 to 12 July 1988 the applicant himself had been questioned thirty-six times, but he had always refused to answer the questions put to him (see paragraph 10 above). The transcripts recording the questions and noting his silence filled almost 700 pages.

In September 1987 the main case-file comprised about 600 binders. At the time of the trial there were 711, together with the original documents which themselves took up over 120 metres of shelving.

The amount of the damage had been estimated at over 50 million Swiss francs.

B. The applicant's applications for release

14. From 29 March 1985 to 18 May 1988, twenty-five applications for release were submitted by the persons in pre-trial detention in this case. Eight of them came from the applicant. The first of these, made on 24 May 1985, was dismissed by the indictments chamber on 1 July. The indictments chamber also dismissed on 22 July 1985 a complaint of 8 July and on 28 August a complaint of 2 August, relating respectively to the lawyer who had been appointed for W. and his visiting rights.

15. On 13 September 1985 the indictments chamber turned down a further application of 26 August 1985. A public law appeal to the Federal Court was dismissed on 7 November 1985, as that court considered that all the conditions to which pre-trial detention was subject under Article 111 of the Berne Code of Criminal Procedure had been fulfilled (see paragraph 25 below). The court felt that the serious suspicions against W. were supported by the case-file; moreover, he had transferred his residence to Monte Carlo, and his numerous stays in Germany, England, the United States of America and Anguilla also gave reason to fear that he might try to evade the Swiss

judicial authorities; as to the very genuine risk of collusion, this resulted from the way in which the applicant's various companies were entangled and from the large number of his associates.

The Federal Court, however, invited the investigators to act with diligence and in particular to question as soon as possible the persons likely to collude with the applicant, as in the court's opinion the complexity of the facts alone could not justify detention for several years.

16. W. brought a third application for release on 17 March 1986. It was dismissed by the indictments chamber in a decision of 4 June 1986, which was upheld by the Federal Court on 25 August, following a public law appeal. The Federal Court said that even a summary reading of certain transcripts of interrogations showed that there was serious suspicion against the applicant of multiple fraud and fraudulent bankruptcy; he was wrong in claiming that this suspicion was unfounded in the specific cases cited by the indictments chamber in justifying the already considerable duration of the detention in issue.

Moreover, the danger of absconding and that of collusion still both persisted, the former because of the applicant's good relations with foreign countries and his stated intention of starting a new life in the United States, and the latter in the light of his conduct before his arrest and during the investigation. However, as the last of the co-accused had now been arrested and the principal witnesses had already made statements, this ground could no longer be relied upon without specifying the collusive acts which were feared.

Furthermore, W. was primarily responsible for the length of his detention; the lack of any proper accounts of his companies had made it extremely difficult to identify the financial transfers by means of which the companies had been burdened for personal ends. Despite this, the investigating judges had worked intensively. All things considered, the detention complained of did not yet appear to be too long. It was nevertheless disturbing that not much progress had been made with the systematic processing of the documents and the production of a report for the purpose of indicting the applicant. Secondly, there was still some doubt as to whether expert reports on the accounting and psychiatric aspects were needed. A close watch had to be kept on these points.

17. A fourth application for release was made on 12 December 1986, and dismissed by the indictments chamber on 20 January 1987.

The applicant brought a public law appeal against this decision; he complained of the time taken to produce the accounting report, and of the alleged inability of the authorities to complete the file. The Federal Court gave its ruling on 24 March 1987. It considered that the applicant's disregard of the elementary rules of bookkeeping was the reason why it had not been possible to complete the expert report earlier; and the accusation against W. was precisely that he had mingled funds of his various

companies. Since the judgment of 25 August 1986 (see paragraph 16 above) the authorities had taken account of its observations on the processing of the documents, so that in this respect the investigation could not be criticised, bearing in mind in particular the very large number of documents to be classified. That the authorities had entrusted the investigation to a team of two investigating judges also showed the great importance they attached to it. As to the psychiatric report and accountancy reports, which were moreover on the point of being filed, there had been no delay in drawing them up, since W. was refusing to answer any questions at all. In short, the detention in issue had not yet exceeded the maximum period allowed.

The court added, however:

"... a practice according to which an accused who was suspected of serious economic offences but not of acts of violence necessarily had to remain in detention until final judgment in his case, merely because of a general risk of absconding, would not be compatible with the fundamental right of personal freedom It should also be taken into account in this respect that the incentive to abscond generally decreases as the proportion of time already spent in detention increases. The investigating judges, the public prosecutor's office and the indictments chamber will therefore, after carrying out the few investigative acts in respect of which a certain danger of collusion can still be presumed, but at the latest after a period of detention of two and a half years, have to consider the applicant's release subject to appropriate substitute measures within the meaning of Article 111a of the Berne Code of Criminal Procedure. The case would be different only if specific indications of [W.'s] intention to abscond were by then present. The risk of repeated offending ... would on the other hand probably not be of relevance as a ground for detention in the case of the applicant, who has no previous convictions."

18. On 3 August 1987 the applicant once more requested the indictments chamber to terminate his detention. This was refused in a decision of 4 September 1987.

The Federal Court dismissed the applicant's public law appeal on 29 October 1987. In its opinion the slowing down of the investigation, noted since its last judgment (see paragraph 17 above), was not open to criticism, as the Swiss authorities had in the meantime taken over the proceedings brought against W. by the Munich public prosecutor's office (see paragraph 9 above), and this had entailed additional work. In this respect the investigators could not be blamed either for having often questioned the applicant on these proceedings despite his refusal to make a statement; their sole aim had been to allow W. to exercise his rights of defence. No failure to observe the requirement of acting swiftly had resulted; rather it was the applicant's attitude which amounted to delaying the investigation by any legal means. In view of the minimum sentence of five years' imprisonment which the applicant was likely to receive, the pre-trial detention of two years and seven months had in any event not yet reached the critical level.

The Federal Court also invited the investigating judges to reconsider, by the end of January 1988, the length of the detention in issue. On 31 January 1988 they took a decision to extend it (Haftbelassungsbeschluss).

19. The applicant's sixth application for release had meanwhile been made to the indictments chamber on 2 December 1987. It had dismissed it on 9 December on the grounds that nothing had changed since the Federal Court's last judgment of 29 October 1987 (see paragraph 18 above); it considered that there was still a danger of absconding and collusion. W. did not appeal against this decision.

20. On 1 February 1988 he once more requested his release. The indictments chamber refused this on 18 February, and he appealed to the Federal Court.

The Federal Court dismissed the appeal on 25 April 1988. It held that the indictments chamber had not breached the Constitution or the Convention in considering that there was still a danger of absconding; in his application of 1 February 1988, W. had moreover refused to provide a security.

Apart from the applicant himself, the authorities were also partly responsible for the delays in the investigation; they had put forward in explanation reasons - such as the taking over of the German file (see paragraph 9 above) and the different charges against the various co-accused - which they had already been aware of on 13 August 1987, when they said that the investigation would be completed in early 1988. These delays admittedly had not brought about an excessive prolongation of the deprivation of liberty in issue, but in the Federal Court's opinion it was necessary to close the investigation as quickly as possible.

The Federal Court said:

"The judge deciding on detention may prolong the pre-trial detention only to the extent that its duration does not come too close to the sentence to be expected in the specific case; he must not, for example, take the possible maximum sentence as a reference point. Great attention must also be paid to this limit because the trial court might be inclined to take the length of pre-trial detention into account as one factor in determining the sentence. To this extent there is thus a sort of absolute maximum length of pre-trial detention However, even the European Convention institutions allow detention for several years in cases which are both highly complex and also subject to heavy sentences ..."

In this instance the length of the detention had not yet reached the critical level, as the total sentence which could be expected was now considerably more than five years' imprisonment.

21. On 18 May 1988 the applicant submitted his eighth application for release; he supplemented this on 7 June 1988 by offering a security of a maximum of 30,000 Swiss francs (CHF). The indictments chamber dismissed the application on 27 June 1988, inter alia on the grounds that he had not given any information on the third party who would pay the money and that the sum appeared derisory in view of the size of the case and the personality of the defendant.

On a public law appeal by the applicant, the Federal Court quashed the decision on the grounds that Article 5 para. 4 (art. 5-4) of the Convention had been violated, as W. had not had an opportunity to reply to the

arguments of the investigating judge and the cantonal attorney before the indictments chamber.

22. Rehearing the application, the indictments chamber on 6 September 1988 refused to release the applicant, who again appealed to the Federal Court. That court gave judgment on 15 November 1988; it considered that at this stage of the proceedings, after the end of the investigation and the committal for trial (see paragraph 13 above), pre-trial detention on the ground of a risk of collusion could only be justified by specific evidence, such as in this case the applicant's personality and the numerous examples of forgery and interference with witnesses already shown to have been done by him in specific cases. It quashed the decision, however, on the grounds that the indictments chamber, when assessing the maximum permissible period of the detention in issue, had omitted to consider whether there were special circumstances in W.'s case which meant that the possibility of his conditional release should be taken into account.

23. On 10 January 1989 the indictments chamber dismissed the application of 18 May 1988 (see paragraph 21 above) for the third time. The Federal Court upheld its decision on 23 February 1989: having regard to the number and nature of the offences the applicant was accused of, and to his conduct during the investigation and the conclusions of the psychiatric report (see paragraph 12 above), the indictments chamber had been right to conclude that there were no reasons making conditional release appear very probable.

C. The applicant's trial

24. The trial before the Economic Criminal Court (see paragraph 13 above) opened on 17 February 1989 and ended on 30 March 1989 with the applicant being convicted and sentenced to eleven years' imprisonment and a fine of CHF 10,000, for offences including fraud on a professional basis (gewerbsmäßiger Betrug), fraudulent bankruptcy (betrügerischer Konkurs), forgery of documents (Urkundenfälschung) and aggravated criminal mismanagement (qualifizierte ungetreue Geschäftsführung). The 1,465 days spent in pre-trial detention were deducted from the main sentence.

II. RELEVANT DOMESTIC LAW

25. The Code of Criminal Procedure (Gesetz über das Strafverfahren) of the Canton of Berne provides that:

Article 98

"When the investigating judge regards the investigation as sufficient, he shall notify this to the parties whose addresses are known. If it is for the investigating judge and the district attorney to decide on committal, the investigating judge shall state whether

he intends to request that the proceedings be stayed or discontinued or the accused be committed for trial.

The parties may, within a period from such notification determined by the judge, apply in writing, giving brief reasons, for specified further investigative measures or additional questions and express their opinion on the outcome of the proceedings. If the investigative measures applied for are ordered, the parties may be present at their implementation."

Article 111

"During the preliminary investigation the accused shall as a rule remain at liberty.

The investigating judge shall however be empowered to arrest him if there are specific and serious grounds for suspecting him as perpetrator or accomplice, and in addition there are reasons for supposing

(a) that there is a risk of absconding, or (b) that the accused would abuse his liberty in order to frustrate or endanger the discovery of the true facts of the matter, or (c) that the accused, if he has intentionally committed a further criminal offence (Verbrechen oder Vergehen) during the proceedings, will commit further criminal offences.

A risk of absconding shall be presumed if the accused has no fixed residence in Switzerland.

..."

26. According to the Swiss Federal Court, the unwritten constitutional right to individual freedom is to be interpreted in the light of Article 5 para. 3 (art. 5-3) of the Convention and the case-law of the Strasbourg institutions, and requires that pre-trial detention must not be excessively prolonged. Each case must be assessed individually, with the accused's right to liberty being balanced against the State's right to bring criminal proceedings and enforce sentences. If the length of the detention is excessive, the detainee must be released even if serious suspicions and the danger of absconding still subsist (Decisions of the Swiss Federal Court, 108 Ia 66; 107 Ia 257/258; 105 Ia 29/30).

PROCEEDINGS BEFORE THE COMMISSION

27. Mr W. applied to the Commission on 20 September 1988. He complained of the length of his pre-trial detention.

The Commission declared the application (no. 14379/88) admissible on 9 October 1990. In its report of 10 September 1991 (made under Article 31) (art. 31), it expressed the opinion by nineteen votes to one that there had been a violation of Article 5 para. 3 (art. 5-3) of the Convention. The full

text of the Commission's opinion is reproduced as an annex to this judgment.

AS TO THE LAW

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

28. The applicant claimed that the length of his pre-trial detention had been in breach of Article 5 para. 3 (art. 5-3), which reads 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."

The Government contested this view, whereas the Commission agreed with it.

29. The period to be taken into consideration began on 27 March 1985, the date of W.'s arrest, and ended on 30 March 1989 with his conviction by the Berne Economic Criminal Court (see paragraphs 7 and 24 above). It thus lasted for four years and three days.

30. The Commission's opinion was based on the idea that Article 5 para. 3 (art. 5-3) implies a maximum length of pre-trial detention. The Court cannot subscribe to this opinion, which moreover finds no support in its case-law. That case-law in fact states that the reasonable time cannot be assessed in abstracto (see, *mutatis mutandis*, the *Stögmüller v. Austria* judgment of 10 November 1969, Series A no. 9, p. 40, para. 4). As the Court has already found in the *Wemhoff v. Germany* judgment of 27 June 1968, the reasonableness of an accused person's continued detention must be assessed in each case according to its special features (Series A no. 7, p. 24, para. 10). Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.

It falls in the first place to the national judicial authorities to examine all the circumstances arguing for or against the existence of such a requirement and to 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 stated by the applicant in his appeals that the Court is called upon

· Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 254-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

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 lawfulness of the continued detention, but after a certain lapse of time it no longer suffices: the Court must then establish whether the other grounds given 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 *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, p. 35, para. 84).

A. The reasons for continued detention

31. In refusing to release W. the Swiss courts relied, in addition to the serious suspicion against him, on three principal grounds, which the Government also argued from: the danger of absconding, the risk of collusion and the need to prevent the accused committing further offences.

1. The danger of absconding

32. According to the applicant, the longer his detention lasted the more the likelihood of his absconding from justice was reduced. After a certain time it was in his interest to serve his sentence which, having regard to the possibility of conditional release, would hardly exceed the detention already undergone. He added that he had offered to provide a security and had not taken advantage of prison leave granted after his conviction to abscond.

33. The Court points out that the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention (see, as the most recent authority, the *Tomasi* judgment cited above, Series A no. 241-A, p. 37, para. 98). In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts (see, *mutatis mutandis*, the *Neumeister v. Austria* judgment of 27 June 1968, Series A no. 8, p. 39, para. 10).

In their carefully reasoned decisions the Bernese courts based themselves on specific characteristics of the applicant's situation: after transferring his residence from Switzerland to Monte Carlo, he had frequently visited Germany, England, the United States and the island of Anguilla (where he was supposed to be the owner of a bank); he had thus established numerous close connections with foreign countries. Furthermore, he had stated on several occasions that he wished to go and live in the United States. There

were certain indications that he still had considerable funds at his disposal outside his own country and possessed several different passports. As a solitary man who had no need of contacts, he would have had no difficulty in living in concealment outside Switzerland.

The Federal Court examined these reasons carefully on 7 November 1985, 25 August 1986 and 25 April 1988 (see paragraphs 15, 16 and 20 above). On the last of these dates in particular it acknowledged that the danger of absconding decreased as the length of detention increased, as already noted by the European Court (see, *inter alia*, the Neumeister judgment cited above, Series A no. 8, p. 39, para. 10). However, it considered that the factors specified by the indictments chamber left no real doubt as to W.'s intention of absconding and could legitimately suffice to demonstrate that such a danger still existed.

There is no reason for the Court to reach a different conclusion. In this case the investigation constantly brought to light further offences which were likely to result in a more severe sentence. In addition, the circumstances of the case and the applicant's character entitled the relevant courts to decline his offer to provide security of 18 May 1988 (something which he was still refusing to do a short time previously, on 1 February): both the amount (CHF 30,000) and the unknown provenance of the money to be paid meant that it was not a fit guarantee that the applicant would decide not to abscond in order not to forfeit it (see paragraph 21 above).

Finally, the fact that once convicted the applicant returned to prison after each leave cannot retrospectively invalidate the view taken by the courts.

2. The danger of collusion

34. W. argued that the risk of collusion could in any event not have continued beyond 29 April 1988, the date when the investigating judges declared that they would seek committal for trial (see paragraph 13 above); at the latest on that date the case-file must have progressed to a point where such a danger had been dispelled.

35. The Court readily understands that the authorities may consider it necessary to keep a suspect in prison, at least at the beginning of an investigation, in order to prevent him from confusing it, especially in a complicated case like this one where manifold difficult inquiries are necessary. In the long term, however, the requirements of the investigation no longer suffice - even in such a case - to justify such detention: in the normal course of events the risks alleged diminish with the passing of time as inquiries are effected, statements taken and verifications carried out (see the *Clooth v. Belgium* judgment of 12 December 1991, Series A no. 225, p. 16, para. 43).

36. In order to demonstrate that a substantial risk of collusion existed and continued to exist until the beginning of the trial, the indictments chamber referred essentially to the exceptional extent of the case, the extraordinary

quantity of documents seized and their intentionally confused state, and the large number of witnesses to be questioned, including witnesses abroad. It based a secondary argument on the personality of the applicant, whose behaviour both before and after his arrest reflected his intention of systematically deleting all evidence of liability, for example by falsifying or destroying accounts. According to the indictments chamber, there were also specific indications justifying the fear that he might abuse his regained liberty by carrying out acts, which would also be facilitated by the thorough entanglement of the sixty-odd companies controlled by him and his influence on their employees, namely eliminating items of evidence which were still hidden but whose probable existence followed from other documents, manufacturing false evidence, or conniving with witnesses. Finally, the indictments chamber noted the extension in April 1987 of the investigation to offences which had been committed, and had originally been the subject of proceedings, in Germany.

The Federal Court was appealed to several times, and on each occasion examined scrupulously whether these considerations did indeed make continued detention necessary. Admittedly, it invited the investigating judges on 7 November 1985, 4 June 1986, 24 March 1987 and 25 April 1988 to act with diligence and obtain the missing documents and statements as soon as possible (see paragraphs 15-17 and 20 above), but at no time did it exclude the existence of a danger of collusion. On the contrary, it confirmed that such a risk was present even during the period following the close of the investigation and the committal for trial (2 September 1988). It had regard not only to W.'s personality and antecedents, but also primarily to the circumstance that, according to the case-file, W. had in the context of other proceedings had exonerating evidence manufactured, documents antedated and witnesses manipulated (see paragraph 22 above).

Here too the Court sees no reason for disagreeing with the Federal Court's opinion. Consequently, the national authorities were entitled to regard the circumstances of the case as justification for using the risk of collusion as a further ground for the detention in issue.

3. The danger of repetition of offences

37. The Government argued that there had also been a risk that the applicant would commit further offences if released. Although the indictments chamber considered that it was still reasonable to regard it as necessary to prevent him so doing, the Federal Court did not examine the impugned decisions on this point, as the dangers of absconding and collusion in themselves justified the continued detention. The Court shares this opinion.

4. Summary

38. To sum up, the two above-mentioned dangers were relevant and sufficient reasons in this case; they were not mere "residual" risks, as the Commission appears to have thought (see paragraph 145 of its report).

B. The conduct of the proceedings

39. The conduct of the proceedings must also be examined (see paragraph 30 above).

40. The applicant complained that the investigating judges had caused substantial delays in the investigation: they had continued to question him for weeks on end even though he had made it clear to them on 11 April 1986 that, pursuant to his right of silence, he would not answer any more of their questions. In addition, they had not had the necessary infrastructure for the investigation, which had moreover been complex up to a point only, as in the absence of accounts there had not been any documents to check.

41. The Government for their part stressed that the case was the most difficult case of economic crime so far dealt with in the Canton of Berne. It exceeded by far all other cases of the same type, both in extent and in complexity; the documents collected took up 120 metres of shelf space. Moreover, no other pre-trial detention had ever lasted so long. The authorities had neglected nothing in order to complete the case-file and had even established a unit consisting of two investigating judges who were themselves assisted by persons assigned exclusively to that unit, including two specialist policemen and four secretaries; a cantonal attorney was in charge of supervising them. There had also been substantial technical resources, including computer equipment. A total of 350 interrogations, including 36 of the applicant, and some 30 decisions on appeals by the applicant had been needed to reach the final judgment, which was 1,100 pages long.

The applicant had moreover not made any complaint at all on the manner in which the investigation had been conducted. The sole aim of his repeated interrogations had been to allow him to exercise his rights of defence with respect to each new piece of evidence disclosed by the inquiry.

42. The Court notes that as early as 7 November 1985 the Federal Court, when verifying the proportionality of the length of the impugned deprivation of liberty, gave consideration to the conduct of the proceedings. After an examination it concluded that W.'s complaints in this respect were not substantiated (see paragraph 40 above). Fearing an overlong period of pre-trial detention, it regularly urged the cantonal authorities to act with all speed and even gave them specific instructions, and also observed that these had been complied with. Consequently, despite certain worries, it never regarded the time spent by the applicant in prison as excessive. It considered

that the applicant was primarily responsible for the slow pace of the investigation: there had been great difficulties in reconstructing the financial situation of his companies, as a result of the state of their accounts. It stated that things had become even more difficult when he decided to refuse to make any statement, thereby delaying the progress of the case (see paragraph 10 above).

Having regard to the intensive continuous review thus carried out by the highest national court, the Court agrees in substance with the Government's arguments summarised in paragraph 41 above. It notes that the right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care (see among other authorities, *mutatis mutandis*, the *Wemhoff* and *Tomasi* judgments, cited above, Series A no. 7, p. 26, para. 17, and no. 241-A, p. 52, para. 102). In agreement with the Commission on this point, it finds no period during which the investigators did not carry out their inquiries with the necessary promptness, nor was there any delay caused by possible shortage of personnel or equipment. Consequently, it appears that the length of the detention in issue was essentially attributable to the exceptional complexity of the case and the conduct of the applicant. To be sure, he was not obliged to co-operate with the authorities, but he must bear the consequences which his attitude may have caused for the progress of the investigation.

C. Conclusion

43. The Court accordingly concludes that there has not been a violation of Article 5 para. 3 (art. 5-3).

FOR THESE REASONS, THE COURT

Holds by five votes to four that there has not been a violation of Article 5 para. 3 (art. 5-3).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 January 1993.

For the President
Franz MATSCHER
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 following separate opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Pettiti;
- (b) dissenting opinion of Mr Walsh and Loizou;
- (c) dissenting opinion of Mr De Meyer.

F.M.
M.-A.E.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I have voted for finding a violation of Article 5 (art. 5), I dissociate myself entirely from the vote of the majority of the Chamber, and I regret that the case was not referred to the plenary Court.

In my opinion, the decision in the case of W. in fact departs from the traditional case-law of the European Court on the presumption of innocence and the restrictions to be imposed on pre-trial detention measures.

The decision which has been taken, even if it applies only to W.'s case, could be interpreted as approving pre-trial detention of four years in cases relating to economic legislation: bankruptcies, offences against company law, criminal mismanagement, etc.

The philosophy of Article 5 (art. 5) and of the European Convention leads me to adopt such a dissenting opinion. Article 5 (art. 5) is an article which protects personal freedom and limits pre-trial detention to specific cases, which must necessarily be given a restrictive interpretation.

Article 5 in combination with Article 6 (art. 5, art. 6) is an important provision of the Convention for protecting the presumption of innocence.

The Court, whether in plenary session or sitting as a Chamber, had always adopted a strict approach to reviewing compliance with Article 5 (art. 5), tending to limit the length of pre-trial detention. In the present case the reasoning of the Swiss Federal Court has prevailed. In my opinion the Federal Court wrongly adopted a criterion for assessment with respect to the risk of absconding which adds to the wording of Article 5 (art. 5). One cannot indeed reverse the burden of proof and require the detainee to prove that he will not abscond, a negative which is virtually impossible to prove. That would be to add a further exception to Article 5 (art. 5), as only imprisonment removes all danger of absconding.

In the present case the judicial authorities made no real attempt to require large sums as security (a normal practice in Switzerland) or lay down conditions for strict judicial supervision, which would have warded off any danger of absconding, while the existence of residences abroad was not enough to make such danger certain. The cantonal judicial authorities appear to have been overburdened by the number of files relating to W.; but in bankruptcy cases liquidators' reports, civil actions by creditors, and expert reports produced in the bankruptcy procedure all provide precise evidence which may speed up the investigative procedures. The volume of documentation does not indicate any exceptional complexity, as it consisted primarily of account books and commercial documents.

In interpreting Article 5 (art. 5) and the nature of pre-trial detention, it must be borne in mind that liberty is the rule, detention the exception. Provisional or pre-trial detention must not damage the presumption of

innocence. But that presumption is not only the fact of not being regarded by the judge as guilty, nor the fact of not being presented to third parties as guilty, but also the fact of making it possible for a defendant to cope with his position as an accused until his trial. As an extreme case, a person who knows he is guilty must be able, by remaining at liberty after being charged, to orientate his professional and family life and make arrangements for the future. In any event, as the European Court has often stated, pre-trial detention cannot be used to anticipate the sentence (Letellier judgment of 26 June 1991; Tomasi judgment of 27 August 1992); it cannot reflect the judge's feeling or opinion as regards the accused's guilt.

Referring to the traditional case-law of the European Court, it will be seen that in cases such as Neumeister (judgment of 27 June 1968) and Stögmüller (judgment of 10 November 1969) the Court did not accept detention even for approximately two years.

Referring to comparative criminal law, it will be seen that the average length of pre-trial detention is less than two or three months and that with respect to economic offences and bankruptcies the average length is less than one year.

The Code of Criminal Procedure of the Canton of Berne provides in Article 111 that "during the preliminary investigation the accused shall as a rule remain at liberty", unless there is a risk of absconding, a risk that the discovery of the truth would be frustrated if the accused abuses his liberty, or a fear - if the accused has intentionally committed a further criminal offence during the proceedings - that he may commit other similar offences. These rules do not appear to have been applied strictly in W.'s case.

Criminologists are also mindful of the fact that every year thousands of persons accused of offences, who have been kept in pre-trial detention, possibly for a long period, have the charges against them dropped or are acquitted. Detention in such cases creates an injustice or an obvious social disorder which results in the judicial system being criticised.

The fact that the Swiss Federal Court delivered a very long judgment and upheld a severe sentence cannot in the circumstances justify the long period of detention, especially as the Swiss Federal Court had previously, with respect to the risk of collusion, partly quashed a decision to extend the detention which had been based on a criterion it considered open to criticism.

The European Commission originally put forward seven criteria for reviewing pre-trial detention. In the W. case the European Commission rightly found in its first report certain points of fact and procedure which induced it to vote by nineteen votes to one that there had been a violation of the Convention: bankruptcies between 1982 and 1984 (the facts went back to 1977); W.'s arrest on 17 March 1985; six out of twelve co-accused remained at liberty; eighteen searches between March 1985 and June 1986;

first warrants issued from 3 April 1985; thereafter a series of rather confused stages:

"26. At the early stages of the proceedings difficulties arose with regard to the various accused persons' right to consult the case-file. At one stage, the investigating authorities considered that consultation of the case-file would have to be refused for some years. Altogether fourteen complaints and appeals were filed against various decisions of the investigating authorities. After April 1986 the accused were permitted to consult approximately 90% of the case-file, after 22 October 1986 virtually the entire case-file.

27. On approximately 350 occasions the investigating authorities questioned the applicant, the other accused and various other persons. However, as from 11 April 1986 onwards the applicant no longer replied to questions put to him by the investigating authorities. The latter nevertheless interrogated the applicant on altogether 36 occasions ...

...

40. The [Federal] Court noted [on 25 August 1986] that the two investigating judges charged with the investigations had so far worked very intensively, but that no assessment of the materials had yet commenced with a view to a subsequent indictment. Nor was it clear whether expert opinions should be ordered in respect of the company accounts and the psychiatric examination of the applicant. Finally, the court considered that the length of the applicant's detention on remand did not yet come too close to the length of the applicant's prospective prison sentence, even if in this respect the indictments chamber had probably gone too far when it assumed that an eventual sentence might be in excess of five years.

41. In July and October 1986 the investigating authorities ordered the preparation of two expert opinions concerning the company accounts, and a psychiatric examination of the applicant, respectively. The accountancy opinion was submitted on 10 April 1987, the psychiatric opinion on 22 December 1986. The latter confirmed the applicant's full criminal responsibility (*Zurechnungsfähigkeit*).

...

52. The Federal Court considered in particular that the delay was justified by the additional work resulting from the investigations. Moreover, an excess of the maximum permissible duration of detention on remand would not be excluded as long as the investigating authorities had handled the investigations speedily. While its decision of 24 March 1987 had envisaged a maximum length of detention of two and a half years, the investigating authorities had meanwhile taken over proceedings instituted against the applicant in the Federal Republic of Germany. Nevertheless, the length of detention on remand should not come too close to the anticipated maximum duration of the prison sentence ...

...

65. The applicant's further public law appeal was partly upheld by the Federal Court on 19 August 1988. With reference to the Convention organs' case-law, the court found in particular that the applicant had not been granted the possibility in these

proceedings to comment on statements of the public prosecutor (Generalprokurator) and the investigating judges.

...

67. The court found that a mere theoretical danger of collusion did not suffice to justify further custody. In the applicant's case however there were concrete indications that such a danger existed. The court referred, inter alia, to the fear expressed by the Berne authorities that, if released from detention, the applicant would attempt to collude with his wife and various persons to fabricate exonerating evidence. The court also noted that on 2 September 1988 the applicant had been committed for trial ... and that therefore it could not be said that the authorities had disregarded the court's instructions of 25 April 1988."

It decided to commit for trial on 2 September 1988 and the applicant was convicted on 30 March 1989 for offences some of which dated back to 1977, civil and commercial proceedings having started in 1983 and the arrest dating back to 27 March 1985.

The national decisions betray a certain embarrassment at the obstacles encountered by the defence in gaining full access to the case-file and the tendency to take account of the sentence which was likely to be passed in order to "justify" the extended detention. The Court could have drawn the consequences of such an assessment; it had always previously refused to accept the concept of detention anticipating the subsequent sentence (Letellier judgment cited above and Kemmache judgment of 27 November 1991).

The argument adopted by the majority in the W. judgment does not seem to me to be adequate to a situation of four years' detention:

"Having regard to the intensive continuous review thus carried out by the highest national court, the Court agrees in substance with the Government's arguments summarised in paragraph 41 above. It notes that the right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care (see among other authorities, *mutatis mutandis*, the *Wemhoff* and *Tomasi* judgments...)."

Such an interpretation of Article 5 (art. 5) might lead to the management of case-files being given priority over the right to liberty. It might be acceptable for swiftness to give way to judges' working requirements in the case of an accused who is at liberty or whose detention has just started, but not for detention for such a long period. The European Court had never accepted a duration of four years in earlier cases. Nor can the fact that the applicant allegedly committed other offences during his detention justify the extension of the detention: either this accusation was maintained and the judge was obliged to issue a separate arrest warrant on separate charges; or else the court was not able to use this fact as an argument for refusing release.

· My emphasis.

The fact that economic or financial criminal proceedings are very complex and require manifold investigations cannot justify extended detention. It is known that accounting reports in this field always take a very long time to produce, and this may prolong the investigation; but in bankruptcy cases specialist judges know how to make best use of the liquidators' reports so as to avoid prolonging their proceedings, which was not the case here, when W.'s bankruptcies dated back to 1982. It should be noted in addition that the accounting report was ordered by the court in July 1986, not in April 1985, although it was a measure which technically was necessary as from the arrest.

If one takes as a typical example the official statistics of the French Ministry of Justice, which could be transposed with similar results for other European States of similar population, the list of serious and less serious crimes by category for 1989 (similar figures in 1990-1992) shows: for bankruptcies, an average length of two months (seven cases of three months, one only in excess of eighteen months); for fraud, extortion and blackmail, an average length of four to eight months. Yet in France Parliament has often deplored the excessive length of pre-trial detention and has attempted to remedy this by reforming the Code of Criminal Procedure.

A reading of legal writing on criminal law and criminal policy shows that no academic specialist or practitioner in Europe justifies pre-trial detention lasting four years for economic offences, even multiple ones. In their writings the most eminent authors regret the excessive length of pre-trial detention. Thus Mr Vassalli, a former Italian Minister of Justice, a member of the Constitutional Court and the originator of criminal reform, in *Droits de l'homme et durée de la détention*, Giusto Processo 1989; similarly Mr Chiavario, *Evolution du droit et procédure pénale*, Vol. II, *Politique criminelle*, Giuffrè, 1991; similarly Belgian legal writing; similarly French legal writing: Delmas-Marty, Bouloc, Levasseur (see *Revue de science criminelle et de droit comparé*, and *Mélanges Levasseur Ed. Litec*).

The study of pre-trial detention in English law by Professor L.H. Leigh, professor at the London School of Economics, makes observations to similar effect. In 1986 the Government had given an assurance to the House of Commons that the average period spent waiting for a hearing (for all summary and indictable offences taken together) was 57 days. In 1985 it was an average of 10.5 weeks, in 1987 12.9 weeks. For more serious offences the periods are still reasonable (see Home Office, *Criminal Justice: a working paper*, 1986).

The case-law on detention also has effects on the criminal policy of States confronted with serious crises and sometimes mutinies caused by the saturation of prisons and in part by excessive use of pre-trial detention. Judges' colleges are worried about such situations. The European Court therefore has a responsibility with respect to criminal policy by means of its case-law.

To justify four years of pre-trial detention is to step backwards in the history of criminal law, to regress to the "prehistoric" era of the Lombroso school of thought.

If the development of criminal law in Europe since the failure of the positivist school is considered as a whole, it will be found that:

(1) a number of States have enacted legislation laying down a maximum length for pre-trial detention (six months or one year, for example in Czechoslovakia);

(2) the case-law of the other States generally limits the length of pre-trial detention to about six months to two years;

(3) the teaching given at judges' training colleges on the European Convention on Human Rights and its Article 5 (art. 5) tends to persuade them to reduce pre-trial detention, in reliance on the case-law of the European Court, as some investigating judges have a tendency to prolong detention in order to put pressure on accused persons and induce them to make admissions or denunciations, which tends to abolish the right of silence;

(4) comparative law shows that no country (other than Switzerland) practises detention for four years in the field of bankruptcy and fraud, even for criminal cases which are more serious than economic offences.

The history of the European Convention and the development of the case-law of its institutions are marked by serious concern to preserve individual freedom and limit pre-trial detention, at least for ordinary crimes.

The teaching given in the judges' training colleges and bar schools is inspired by the same principles. In the member States of the Council of Europe which have investigative proceedings, practitioners have noted that certain judges have a propensity to anticipate the sentence sometimes by pre-trial detention, or to press the accused to make admissions by postponing appearances for months while dismissing requests for release. In the present case W.'s refusal to co-operate may be explicable by the difficulties he experienced in having the documents in the case-file notified to him in full; the Federal Court noted this. In any event this refusal to "co-operate" was not capable of justifying prolongation of his detention for such a long period. An accused is entitled to take the risk that his negative attitude during the investigation may "handicap" him at the trial.

The perverse effects of prolonging pre-trial detention are well known to criminologists and criminal practitioners.

The use made of this by certain investigating judges may transform an investigation into a coercion to confess or a punishment for refusing to accuse oneself. It is known that for first offenders the exemplary and deterrent effect of detention operates from the first days or weeks; prolongation is therefore unnecessary and harmful. There are too many cases known of suicide or early death caused by illness during detention for

one not to approve the tendency in European writing on criminal law to criticise the abuse of pre-trial detention.

The Court followed and - wrongly in my opinion - accepted the reasoning of the Swiss Federal Court without, however, adopting the Federal Court's concept of assessment of the proportionality between the pre-trial detention and the future sentence likely to be passed, when the courts carry out their assessment. The Court has thus not overruled its earlier thinking and case-law which refused to accept that pre-trial detention could anticipate the sentence to be pronounced by the trial court.

The particular circumstances of the W. case admittedly relativise the scope of the European Court's decision. The Court will have other cases before it which will permit it to give better expression to its "philosophy" of criminal policy with respect to pre-trial detention, as where liberty is concerned an overall concept of protection must be preserved.

For all these reasons I have concluded that there was a violation of Article 5 (art. 5).

DISSENTING OPINION OF JUDGES WALSH AND LOIZOU

1. The applicant was arrested on 27 March 1985 on charges of fraud. His trial opened on 17 February 1989 and concluded on 30 March 1989. He had spent over four years in custody awaiting trial. During that period he had made eight unsuccessful applications to the Swiss courts for provisional liberty pending trial. He now claims that he was the victim of a violation of Article 5 para. 3 (art. 5-3) of the Convention.

2. The relevant Code of Criminal Procedure of the Canton of Berne provides in Article 111 that: "During the preliminary investigation the accused shall as a rule remain at liberty". That article is more fully set out in the judgment of the Court at paragraph 25. The investigating judge is however given power to keep the accused in detention if there are reasons "for supposing that there is a risk of absconding or that the accused would abuse his liberty in order to frustrate or endanger the discovery of the true facts of the matter, or that the accused, if he has intentionally committed a further criminal offence during the proceedings, will commit further criminal offences". Also a risk of absconding is to be presumed if the accused has no fixed address in Switzerland.

3. Article 5 para. 3 (art. 5-3) of the Convention enshrines the right to liberty pending trial and, sensibly, permits that liberty to be conditioned by guarantees "to appear for trial". It would be difficult to over-emphasise the stark consequences of refusing provisional liberty pending trial to the person who is accused of a crime (of which he is presumed to be innocent). He will most probably lose his employment, possibly lose his dwelling place, his family's life can be totally disrupted and driven to penury, and even his marriage may be driven to point of breakdown. A person presumed to be innocent cannot in justice be exposed to such terrible consequences unless the reasons for so doing completely outweigh all other considerations.

Insensitivity to this serious problem in member States may be inferred from the fact that, according to the relevant statistics, the numbers of untried persons remanded to prison detention varies from 7% to 52% of the respective total national prison populations.

4. Judges deciding applications for provisional release from custody are expected to decide on evidence the issues raised. There should be no place for judicial speculation or judicial intuition as a substitute for objective evidence. The issues involved should be judged by the same objective standard which is the basis as all other justiciable controversies. The present case, as presented to the Court, does not reveal any record of witnesses having been heard on probability of the applicant absconding or interfering with the gathering of evidence or with the evidence already gathered. The suggestion in one of the Swiss courts that because his bad bookkeeping (referred to in paragraph 16 of the majority judgment) made investigation

more difficult should militate against his provisional liberation is not a reason which should be put against him in the balance. Likewise his alleged failure to assist in the gathering of evidence against himself is also an untenable reason for supporting the refusal to grant him provisional liberty. It is always open to a court to impose conditions upon provisional liberty even to the extent of reporting daily to the police if there exists some suspicion of absconding. If there lingers some suspicion of interfering with the evidence a reasonable condition may be imposed restricting consorting with certain named persons or restricting access to certain offices or documents. None of that appears to have been considered seriously, if at all.

5. The most serious matter is the taking into account of the possibility of future offences. The reasoning underlying the submission is a denial of the whole basis of the Convention system of protection of liberty and the criminal process.

This submission transcends respect for the requirement of Article 6 (art. 6) that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. We say "punishment" because deprivation of liberty, frequently subject to more restrictive conditions than those applied to detention of convicted persons, must be considered as a punishment unless it can be shown that it is required to ensure that an accused person will stand his trial when called upon.

The presumption of innocence until conviction which is demanded by Article 6 (art. 6) is no empty formula. It is a very real thing and not simply a procedural rule taking effect only at the trial. Furthermore imprisonment before trial frequently has an adverse effect on a person's prospect of acquittal because of the difficulty, if not the impossibility in many cases, of the accused and his legal advisers in adequately investigating the case and preparing the defence.

6. In our opinion the pre-trial detention of the applicant has not been shown to have been necessary or justifiable within the provisions of the Convention. The onus of proof is upon the detainer to justify it, and not upon the detainee to justify his being at liberty.

In our opinion there has been a breach of Article 5 para. 3 (art. 5-3).

DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

The present case was not straightforward. It necessitated a thorough-going investigation, which in the nature of things was bound to take a certain time.

But as already stated by the Federal Court in November 1985, that "could hardly justify detention on remand for years".

The applicant was in fact deprived of his liberty for slightly over four years before being tried. This interference with "the rule of respect for individual liberty"[·] and the presumption of innocence was so serious that I cannot regard it as acceptable[·].

[·] Paragraph 35 of the Commission's report.

[·] Neumeister v. Austria judgment of 27 June 1968, Series A no. 8, p. 37, para. 5.

[·] If an accused makes use of his right not to "cooperate with the authorities", that may indeed delay the "progress of the investigation" (paragraph 42 in fine of the judgment), but it is not acceptable that he should be made to "bear the consequences" by having his detention prolonged.