

AS TO THE ADMISSIBILITY OF

Application No. 19569/92  
by E.A.  
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 13 October 1993, the following members being present:

MM. A. WEITZEL, President  
C.L. ROZAKIS  
F. ERMACORA  
E. BUSUTTIL  
A.S. GÖZÜBÜYÜK  
Mrs. J. LIDDY  
MM. M.P. PELLONPÄÄ  
B. MARXER  
G.B. REFFI  
B. CONFORTI  
N. BRATZA

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 22 November 1991 by E.A. against Austria and registered on 2 March 1992 under file No. 19569/92 ;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the applicant, may be summarised as follows.

The applicant, born in 1964, is an Austrian national. When lodging his application, he was detained in the prison at the Salzburg Regional Court (Landesgerichtliches Gefangenenhaus). Before the Commission he is represented by Mr. G. Mory, a lawyer practising in Salzburg. Mr. Mory was the applicant's defence counsel in the criminal proceedings set out below.

A. The particular circumstances of the case

On 3 December 1990 the applicant was arrested by officers of the Salzburg Federal Police Department (Bundespolizeidirektion) on the basis of a warrant of arrest issued by the Salzburg Regional Court (Landesgericht) on the same day. According to the warrant of arrest there was a reasonable suspicion that the applicant had committed rape of a woman and forced her to acts of sexual indecency early in the morning. Having regard to the applicant's previous convictions, his apparent sexual abnormality and propensity to violence, there was a danger of repetition.

On 4 December 1990 the applicant was questioned at the Police

Department, where he admitted that he had forced the victim to acts of sexual indecency, but denied the rape.

On 6 December 1990 the Investigating Judge at the Salzburg Regional Court informed the applicant that preliminary investigations (Voruntersuchung) had been instituted against him. He heard the applicant on the charges against him. The applicant confirmed his earlier statements and indicated in particular that, due to his consumption of alcohol before the events in question, he could not well remember details. The Investigating Judge ordered the applicant's detention on remand.

On 11 December 1990 the Investigating Judge appointed the forensic expert Prof. M. to prepare an opinion on the question of the applicant's criminal responsibility at the time of the offences in question, his state of drunkenness, and on the necessity to detain him in a mental hospital or an institution for alcoholics. He was further invited to prepare an opinion on the injuries, as well as psychological damage, suffered by the victim.

The expert submitted his opinion on the questions relating to the applicant on 21 December 1990. The report was based on the criminal files and the reports of the Salzburg mental hospital, as well as a psychiatric examination of the applicant. The expert Prof. M., assisted by Dr. D., concluded that the applicant was an alcoholic, that he could not be held responsible for criminal offences at the time in question and that the conditions for committing him to an institution for alcoholic offenders were met.

On 18 January 1991 the expert Prof. M. amended his opinion as regards the question whether the applicant was not criminally responsible at the time of the offence in question, irrespective of his state of drunkenness. The expert denied this question. However, he stated that the offence resulted from a serious psychiatric abnormality.

On 30 January 1991 Prof. M. informed the Investigating Judge that the victim preferred not to be examined. For the time being, he had therefore not prepared an opinion in this respect.

Following doubts raised by the Public Prosecutor's Office (Staatsanwaltschaft) as to the opinion prepared by Prof. M., the Investigating Judge had appointed Prof. K. to prepare a supplementary opinion, which was submitted on 27 February 1991. Prof. K., having inspected the files and examined the applicant on 7 February 1991, concluded that the applicant's criminal responsibility was not excluded from a medical point of view. A lack of criminal responsibility due to alcohol intoxication was not likely, but could not be excluded. He also considered that the applicant suffered from serious psychiatric abnormality.

On 12 April 1991 the Investigating Judge requested Prof. K. to amend his expert opinion. The amendment was received on 8 May 1991.

On 22 May 1991 the Linz Court of Appeal (Oberlandesgericht), upon the Public Prosecutor's request of 3 May 1991, decided, in private session, to extend the maximum duration of the applicant's detention on remand to eight months. The Court of Appeal, referring to S. 193 para. 4, S. 180 paras. 1 and 2 of the Austrian Code of Criminal Procedure (Strafprozeßordnung), considered that there was a reasonable suspicion that the applicant had committed in particular rape. The reasons to assume a danger of repetition persisted. The investigations were particularly difficult as regards the question of the applicant's criminal responsibility at the time of the offence in question, which was assessed differently by two experts. Furthermore, the question of

the applicant's detention in an institution for alcoholics had to be clarified.

On 12 June 1991 the Judges' Chamber (Ratskammer) at the Salzburg Regional Court dismissed the applicant's request for release from detention on remand (Haftbeschwerde). The Judges' Chamber found that, having regard to the result of the investigations, in particular the testimony of the victim and the statements of the applicant partly admitting his guilt, there was a reasonable suspicion that he had committed the offences concerned. The Judges' Chamber, noting the applicant's previous convictions of inter alia rape, robbery and theft, coercion and fraud, as well as his alcoholism and abnormal personality, further considered that there was a risk of repetition and that he could not be released subject to conditions.

On 24 June 1991 the expert Prof. M., upon the request of the Investigating Judge, submitted a further supplementary opinion. He confirmed in particular his earlier conclusions. Taking into account the opinion of Prof. K., he explained in particular his conclusion that the applicant had not been criminally responsible at the time of the offences in question.

On 10 July 1991 the Linz Court of Appeal, in private session, extended the maximum duration of the detention on remand to eleven months. The Court of Appeal considered the strong suspicion against the applicant and the risk of a repetition of offences. The Court of Appeal noted that the Investigating Judge, in his request for prolongation dated 1 July 1991, had indicated the necessity of requesting a faculty opinion (Fakultätsgutachten). The Court of Appeal suggested that beforehand, the expert Prof. K. should be informed about the opinion of Prof. M. and that both experts be summoned to appear before the Investigating Judge in order to supplement their opinions orally.

On 5 August 1991 the Investigating Judge heard both experts. They agreed that the applicant had been under the influence of alcohol at the time of the offences in question; that an alcohol intoxication was unlikely; that further criminal acts with more than light consequences had to be expected; that the applicant's serious psychiatric abnormality did not, as such, exclude his criminal responsibility. Prof. M. concluded that the applicant had an abnormal reaction due to his alcohol consumption which excluded his criminal responsibility. Prof. K. considered this to be unlikely, but not impossible. The Investigating Judge decided that an opinion on this question had to be prepared by the Faculty of Medicine at the Graz University.

On 31 October 1991 the Linz Court of Appeal, sitting in private, extended the maximum duration of the detention on remand to fifteen months. The Court of Appeal referred to the strong suspicion against the applicant and the danger of repetition. The Court of Appeal found that particular problems had been caused in the course of the investigations due to the divergent expert opinions on the question of the applicant's criminal responsibility, which had necessitated the request for a faculty opinion. The preparation of such an opinion would take, according to the statement of the Director of the Faculty of Medicine, at least two months following submission of the criminal files. Having regard to the further course of the proceedings until the trial against the applicant, a prolongation of the detention on remand up to fifteen months appeared appropriate.

On 14 November 1991 the Investigating Judge at the Salzburg Regional Court submitted his request for a faculty opinion, together with the criminal files, to the Faculty of Medicine at the Graz University.

On 28 January 1992 Prof. K., the Dean of the Faculty of Medicine, submitted the faculty opinion which had been prepared by Prof. Z., and was also signed by Prof. K. and by Prof. L., who was the Chairman of the Committee dealing with faculty opinions. According to the faculty opinion there had been no abnormal reaction to the alcohol consumption which could have excluded the applicant's criminal responsibility. The opinion confirmed that the applicant ought to be detained in an institution for mentally abnormal criminals.

On 12 February 1992 the Linz Court of Appeal, in private session, extended the maximum period of the applicant's detention on remand to seventeen months. The Court of Appeal, referring to the strong suspicion against the applicant and the danger of repetition, found that particular problems had been caused in the course of the investigations due to the divergent expert opinions on the question of the applicant's criminal responsibility, which had necessitated the preparation of a faculty opinion. Having regard to the further course of the proceedings until the trial against the applicant, a prolongation of the detention on remand up to seventeen months appeared appropriate.

On 25 February 1992 the Salzburg Public Prosecutor's Office preferred the indictment (Anklageschrift) against the applicant charging him with rape and coercion. It was received by the Regional Court on 3 March 1992.

The trial against the applicant opened before the Salzburg Regional Court on 12 March 1992, it continued on 4 May and 10 July 1992.

On 10 July 1992 the Salzburg Regional Court convicted the applicant of rape and attempted coercion. It sentenced the applicant to five years' imprisonment. The period of his detention on remand was counted towards his sentence. Furthermore, the applicant's detention in an institution for mentally abnormal criminals was ordered.

#### B. Relevant domestic law

Under S. 180 paras. 1 and 2 of the Code of Criminal Procedure, 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.

According to S. 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. 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.

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.

The accused may lodge an application for release at any time (S. 194 para. 2). Under S. 194 and 195, such an application is to be examined by the Judges' Chamber (Ratskammer) of the Regional Court in

a private hearing, in the presence of the accused and his lawyer.

#### COMPLAINTS

1. The applicant complains under Article 5 para. 3 of the Convention about the length of his detention on remand. He considers that the course of the proceedings relating to the appointment of the two medical experts to prepare opinions on the question of his criminal responsibility as well as the order of a faculty opinion could not be objected to. However, the decision of the Court of Appeal of 31 October 1991 further to prolong his detention on remand was disproportionate.

2. The applicant complains under Article 5 para. 4 of the Convention that the Linz Court of Appeal did not hear him or his defence counsel on the requests of the Public Prosecutor to prolong his detention on remand. He submits that there was no possibility to have the lawfulness of these decisions on prolongation reviewed by a higher tribunal. He considers that, as a consequence, his continued detention was unlawful and contrary to Article 5 para. 1 (c) of the Convention. He also invokes Article 6 para. 1 of the Convention in this respect.

3. In his submissions of 24 June 1993, the applicant further complains under Article 6 para. 1 of the Convention about the length of the criminal proceedings against him.

#### THE LAW

1. The applicant complains under Article 5 para. 3 (Art. 5-3) of the Convention about the length of his detention on remand.

Article 5 para. 3 (Art. 5-3), so far as relevant, provides as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial."

The applicant was arrested on 3 December 1990. His detention on remand within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention terminated on 10 July 1992 when he was convicted at first instance (cf. Eur. Court H.R., B. v. Austria judgment of 28 March 1990, Series A no. 175, pp. 14-16, paras. 36-38). The period to be taken into consideration thus lasted one year, seven months and one week.

The Commission recalls that it is in the first place for the national authorities to ensure that, in a given case, pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the facts arguing for or 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 question of release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Convention organs are called upon to review the reasonableness of the length of detention (cf. Eur. Court H.R., Toth judgment of 12 December 1991, Series A no. 224, p. 18, para. 67; W. v. Switzerland judgment of 26 January 1993, para. 30, to be published in Series A no. 254).

The persistence of reasonable suspicion that the person arrested has committed an offence is a *conditio sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no

longer suffices; the Convention organs must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty, and whether the domestic authorities displayed special diligence in the conduct of the proceedings (cf. Eur. Court H.R., Toth judgment, loc. cit.; W. v. Switzerland judgment, loc. cit.).

The Linz Court of Appeal, referring to the investigations and the applicant's own statements, found that there was a reasonable suspicion that he had committed the offences in question. This view was shared by the Judges' Chamber at the Salzburg Regional Court upon the review of the applicant's detention on remand. Their findings that there was a risk of repetition was based on the applicant's previous convictions, his alcoholism and abnormal personality, and appears reasonable in the circumstances (cf. Eur. Court H.R., Toth judgment, loc. cit., p. 19, para. 17). The applicant's continued detention was thus based on sufficient and relevant grounds.

As regards the conduct of the proceedings by the domestic authorities, the applicant accepts the course of the investigations relating to the appointment of the two medical experts as well as the court order of a faculty opinion.

The Commission notes that the preliminary investigations started in December 1990. The Public Prosecutor's Office preferred the indictment on 25 February 1992 and it was received at the Regional Court on 3 March 1992. The trial before the Salzburg Regional Court started on 12 March 1992 and was continued on 4 May and 10 July 1992, when the applicant was convicted of rape and coercion and sentenced to five years' imprisonment, and his detention in an institution for abnormal psychiatric criminals was ordered.

The Linz Court of Appeal, when ordering further extensions of the maximum period of detention on remand on 22 May, 10 July, 31 October 1991 and 12 February 1992, examined the progress of the criminal proceedings against the applicant and considered the question of reasonableness of the respective prolongation.

The length of the preliminary investigations, namely one year and three months, may at first sight appear excessive, given the testimony of the victim and the statements of the applicant partly admitting his guilt. However, the questions of the applicant's criminal responsibility at the time of the offences concerned and of his detention in a particular institution for mentally abnormal criminals required the taking of expert evidence, including the preparation of a faculty opinion, as the two other experts had expressed divergent views.

The Commission recalls that the right of the accused in detention to have his case examined with particular expedition must not hinder the efforts of the prosecution authorities to carry out their tasks with proper care (cf. Eur. Court H.R., Tomasi judgment of 27 August 1992, Series A no. 241-A, p. 39, para. 102; W. v. Switzerland judgment, loc. cit., para. 42).

The Commission finds that there were no delays in the appointment of the medical experts, Prof. M. and Prof. K., nor in the delivery of their opinions or amendments thereto until 5 August 1991, when the Investigating Judge decided that a faculty opinion was necessary.

The preparation of the faculty opinion could in fact only start in the second half of November 1991, due to the late submission of the request and files to the Faculty of Medicine. The only other procedural step within this period of time, i.e. the request for an extension of the applicant's detention on remand decided upon by the Linz Court of Appeal on 31 October 1991, cannot explain this lapse of

time. The faculty opinion was submitted on 28 January 1992.

The Commission considers that the Austrian authorities acted with the necessary diligence in their handling of the applicant's case, except the period of three and a half months between the decision on requesting an faculty opinion, and its actual transmission, with the criminal files, to the Faculty concerned, for which there is no obvious explanation. However, the Commission finds that this period could be regarded as acceptable if viewed in the context of the total duration of the applicant's detention on remand.

Consequently, the length of the applicant's detention on remand does not appear to be unreasonable for the purposes of Article 5 para. 3 (Art. 5-3) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 5 para. 4 (Art. 5-4) of the Convention that the Linz Court of Appeal did not hear him or his defence counsel on the requests to prolong his detention on remand. He submits that there was no possibility to have the lawfulness of these decisions reviewed by a higher tribunal. He considers that, as a consequence, his continued detention was unlawful and contrary to Article 5 para. 1 (c) (Art. 5-1-c) of the Convention. He also invokes Article 6 para. 1 (Art. 6-1) of the Convention in this respect.

Article 5 para. 4 (Art. 5-4), provides that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

The Commission notes that, in accordance with the relevant provisions of the Austrian Code of Criminal Procedure, the applicant could take proceedings before the Judges' Chamber at the Salzburg Regional Court to have the lawfulness of his detention on remand reviewed. He availed himself of this right in June 1991, and he did not show that this review did not comply with the requirements under Article 5 para. 4 (Art. 5-4) of the Convention.

As regards the proceedings before the Linz Court of Appeal concerning the decisions on extension of the maximum period of the applicant's detention on remand, the Commission recalls that, in these circumstances, the appellate court does not itself decide upon the appropriateness or the necessity of keeping the accused in prison or releasing him, nor does it undertake a review of the "lawfulness of the detention". It confines itself to setting out a framework within which the investigating judge or the prosecuting authority is free to take decisions. Article 5 para. 4 (Art. 5-4) does not, therefore, apply to the proceedings in question (cf. Eur. Court H.R., Toth judgment, loc. cit., pp. 23-24, paras. 86-87).

Therefore, no issues arise under Article 5 para. 1 and Article 6 para. 1 (Art. 5-1, 6-1) in this respect.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. In his submissions of 24 June 1993 the applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the criminal proceedings against him.

The Commission notes that the applicant was detained on remand throughout the course of the criminal proceedings against him which terminated with his conviction at first instance. Even assuming that the applicant lodged this complaint under Article 6 para. 1 (Art. 6-1) within the period of six months, as required under Article 26 (Art. 26) of the Convention, there is no appearance of a violation of his right to trial "within a reasonable time", for the reasons set out with regard to his complaint under Article 5 para. 3 (Art. 5-3) about the length of his detention on remand.

Consequently, this part of the application is likewise manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(A. WEITZEL)