

## EUROPEAN COMMISSION OF HUMAN RIGHTS

## FIRST CHAMBER

Application No. 25629/94

H.F. K-F.

against

Germany

## REPORT OF THE COMMISSION

(adopted on 10 September 1996)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a German national, born in 1936 and resident in Karlsruhe.

3. The application is directed against the Federal Republic of Germany. The respondent Government were represented by their Agent Mr. J. Meyer-Ladewig, Ministerialdirigent, of the Federal Ministry of Justice.

4. The admissible complaint concerns the applicant's arrest and his subsequent detention at the Cochem-Zell Police Station. The applicant invokes Article 5 of the Convention.

B. The proceedings

5. The application was introduced on 14 December 1993 and registered on 9 november 1994.

6. On 22 February 1995 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 27 April 1995. The applicant's submissions in reply were received on 22 June 1995.

8. On 16 January 1996 the Commission declared admissible the applicant's complaint under Article 5 para. 1 of the Convention. It declared inadmissible the remainder of the application.

9. The text of the Commission's decision on admissibility was sent to the parties on 29 January 1996 and they were invited to submit such further information or observations on the merits as they wished.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission (First Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mrs. J. LIDDY, President

MM. M.P. PELLONPÄÄ  
 E. BUSUTTIL  
 A. WEITZEL  
 C.L. ROZAKIS  
 G.B. REFFI  
 B. CONFORTI  
 N. BRATZA  
 I. BÉKÉS  
 G. RESS  
 A. PERENIC  
 C. BÎRSAN  
 K. HERNDL

12. The text of this Report was adopted on 10 September 1996 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decision on the admissibility of the application is annexed hereto.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

### A. The particular circumstances of the case

16. In May 1991 the applicant and his wife rented a holiday apartment in Ulmen where they lived as from 24 May 1991. They paid the rent in respect of their stay in May.

17. On 4 July 1991, at 7.50 p.m, the Cochem-Zell Police Station (Schutzpolizeiinspektion) was informed by Mrs. S. that her tenants, the applicant and his wife, had caused a car accident and that they had rented the apartment with the intention of not complying with their tenancy obligations and were about to abscond without having paid outstanding rent and telephone costs.

18. Upon their arrival at Ulmen, the police officers, having consulted the competent public prosecutor (Staatsanwalt), inquired about the further address of the applicant and his family in Bad Soden, which turned out to be a mere postal address. The Bad Soden police further notified that the applicant had already been subject to criminal proceedings on the suspicion of fraud.

19. At 9.45 p.m., following the initial inquiries, Police Officer Laux arrested the applicant and his wife on the suspicion of fraud. The Police Officer assumed a risk of their absconding, as it appeared that they had attempted to leave by car. They were brought to the Cochem-Zell Police Station for verification of their personal data, where they arrived at 11.00 p.m. A police report of 11.30 p.m. referred to a strong suspicion of rent fraud and a danger of their absconding. The examination of the applicant and his wife was

concluded on 5 July 1991 at 0.45 a.m.

20. During the night, further inquiries were conducted as to the applicant's different addresses and information was received that the applicant had been involved in other criminal proceedings on suspicion of fraud and that preliminary investigations on the suspicion of fraud were conducted against him by the Hanau Public Prosecutor's Office (Staatsanwaltschaft).

21. In the morning of 5 July 1991 (between 8.30 and 9.40 a.m.), Police Officer Blang again questioned the applicant and his wife. Mrs. S. was heard at 9.05 a.m.

22. In a telephone conversation at about 9.25 a.m., the competent Public Prosecutor at the Hanau Public Prosecutor's Office informed Police Officer Berg of the Cochem Police about the criminal proceedings conducted against the applicant in Hanau. He stated that there was no intention to request an arrest warrant against the applicant.

23. At 10.30, the applicant and his wife were released. They were brought back to Ulmen.

24. In September 1992 the Koblenz Public Prosecutor's Office discontinued the investigations against the applicant and his wife, noting in particular that they had paid most of the outstanding sums in mid July 1991.

25. In October 1991 the applicant and his wife requested the Koblenz Public Prosecutor's Office to prosecute the police officers and public prosecutors involved in the events of 4 and 5 July 1991 on charges of unlawful deprivation of liberty, attempted coercion and insult.

26. On 2 January 1992 the Koblenz Public Prosecutor's Office discontinued investigations against the Police Officer Laux and three other Police Officers, who had been involved in the arrest, and also two public prosecutors. The Office considered that, having regard to the charges raised by Mrs. S. and the situation found by the Police Officers in Ulmen in the evening of 4 July 1991, there had been a reasonable suspicion of fraud and a risk of their absconding.

27. On 21 May 1992 the Koblenz Court of Appeal (Oberlandesgericht), upon the applicant's request for a court decision ordering the prosecution of the four Police Officers, confirmed the decision of 2 January 1992. The Court found that there was no suspicion that the Police Officers had committed unlawful deprivation of liberty and coercion. The Court agreed with the reasoning of the Prosecutor's Office as regards the suspicion of fraud and also considered that, according to the police inquiries, the family's places of residence were unclear, and, moreover, proceedings on several fraud charges were already pending against the applicant. The Court finally stated that it was not required to decide whether or not their continued detention until the next morning had been necessary as at least the mens rea could not be proven with the required certainty to justify the conviction of the Police Officers for unlawful deprivation of liberty.

28. Subsequently the applicant complained to the Public Prosecutor's Office that no formal decision had been taken upon his charges against Police Officer Blang of the Cochem-Zell Police Station.

29. On 28 December 1992 the Public Prosecutor's Office also discontinued these investigation proceedings for insult, unlawful deprivation of liberty and coercion.

30. On 30 November 1993 the Koblenz Court of Appeal dismissed the

applicant's request for a judicial decision ordering the prosecution of Police Officer Blang. Referring to its earlier decision, the Court repeated that the applicant's detention had been necessary in view of the suspicion of fraud and in order to check his personal data, pursuant to S. 127 para. 1, S. 163 b of the Code of Criminal Procedure (Strafprozeßordnung). There were no indications that Police Officer Blang had been aware that the applicant's detention had already exceeded the permissible period.

31. On 15 March 1994 the Federal Constitutional Court refused to admit the applicant's constitutional complaint against the Court of Appeal's decision of 30 November 1993.

#### B. Relevant domestic law

32. S. 112 to 131 of the German Code of Criminal Procedure (Strafprozeßordnung) concern the arrest and detention of a person on reasonable suspicion of having committed a criminal offence.

33. According to S. 112, detention on remand is ordered against a suspect when there is a strong suspicion that he or she has committed a criminal offence and if there is a reason for his or her detention such as absconding, the danger of absconding or the risk of collusion.

34. S. 127 para. 1 provides for a provisional arrest if the offender is apprehended in the act and if there is a risk of absconding or if his personal data cannot immediately be established. This provision also states that the establishment of the personal data by the police or the Public Prosecutor's Office is governed by S. 163 b para. 1.

35. S. 163 b para. 1 provides that the police or the Public Prosecutor's Office may take the necessary measures to establish the identity of a person suspected of a criminal offence including his arrest if necessary. Detention pursuant to S. 163 b may not exceed the time necessary to establish the person's personal data (S. 163 c para. 1), and it may not exceed a maximum period of 12 hours (S. 163 c para. 3).

36. According to S. 127 para. 2, in case of immediate danger (Gefahr im Verzug), the Public Prosecutor's Office or police officers may order the provisional arrest of a person if the conditions for an arrest warrant or confinement order are met.

37. S. 128 provides that the person who is arrested must, if not released, be promptly brought before a judge at the district court where the person was arrested, at latest during the day following his arrest.

### III. OPINION OF THE COMMISSION

#### A. Complaint declared admissible

38. The Commission has declared admissible the applicant's complaint about his arrest and his subsequent detention at the Cochem-Zell Police Station.

#### B. Point at issue

39. Accordingly, the point at issue is whether there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention.

#### C. As regards Article 5 para. 1 (Art. 5-1) of the Convention

40. The applicant relies on Article 5 para. 1 (Art. 5-1) of the

Convention which, so far as relevant, provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

41. The applicant complains that he was unlawfully arrested in the evening of 4 July 1991, and detained until the morning of 5 July 1991, at the Cochem-Zell Police Station. He considers that a minor tenancy debt had been at issue which could not be regarded as fraud. Moreover, he had not attempted to abscond. In any event, he should have been released after his identity had been established, and his continued detention had not been justified.

42. The Government submit that, at the time of the applicant's arrest, there was a strong suspicion that the applicant had attempted fraud to the disadvantage of his landlord and that he was about to abscond, together with his family. Moreover, the applicant's place of residence could not be established in Ulmen.

43. The Government further explain that the applicant's arrest and detention were based on SS. 127 and 163 b of the Code of Criminal Procedure. Even if his apprehension had first solely been effected for the purposes of S. 163 b of the Code of Criminal Procedure, there had also been the suspicion against the applicant that he had committed a criminal offence and that there was a risk of his absconding. The results of the police investigations regarding the applicant's address and the other criminal proceedings pending against him strengthened this suspicion. Only after the telephone conversation with the competent Hanau Public Prosecutor's Office in the morning of 5 July 1991 to the effect that no arrest warrant against the applicant would be requested, were the conditions for his detention, for reasons of proportionality, no longer fulfilled. Finally, according to the Government, the period of the applicant's detention had to be seen not only under S. 163 c para. 3 of the Code of Criminal Procedure but in the wider context of S. 127 paras. 1 and 2 and S. 128 of the Code of Criminal Procedure.

44. The Government therefore maintain that the applicant's detention was justified under Article 5 para. 1 (c) (Art. 5-1-c) of the Convention.

45. Article 5 para. 1 (c) (Art. 5-1-c) permits the lawful arrest and detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.

46. The Commission notes that the applicant was arrested on charges of fraud brought against him by his landlady Mrs. S. Thus, the Cochem-Zell Police Station had been informed by Mrs. S. that her tenants, the applicant and his wife, had caused a car accident and had rented the apartment with the intention of not complying with their tenancy obligations and were about to abscond without having paid outstanding rent and telephone costs. When arresting the applicant at 9.45 p.m., following initial inquiries, the police officers assumed a risk of the applicant's absconding, as it appeared that the applicant and his

family had attempted to leave by car. The applicant was subsequently brought to the Cochem-Zell Police Station for verification of his personal data and further questioning. The Public Prosecutor's Office and the Koblenz Court of Appeal, in the context of the criminal proceedings against various officials involved in the applicant's arrest, confirmed that there had been a reasonable suspicion that the applicant had committed an attempt of fraud and that there was a risk of his absconding.

47. Accordingly, the arrest and subsequent detention of the applicant were based on a reasonable suspicion of commission of an offence within the meaning of Article 5 para. 1 (c) (Art. 5-1-c).

48. As to the purpose of the applicant's arrest and detention, namely to bring the person concerned before the competent legal authority, the Commission recalls that the existence of such a purpose must be considered independently of its achievement and subparagraph (c) of Article 5 para. 1 (Art. 5-1-c) does not presuppose that the police should have obtained sufficient evidence to bring charges (cf. Eur. Court HR., Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 29, para. 53). In the present case, there is no reason to believe that the police investigation was not in good faith or that the applicant's arrest and detention, having been effected after consultation with a public prosecutor, was not intended to further that investigation by way of establishing the applicant's personal data and inquiring into the charges against him. Thus, the applicant was again questioned in the morning of 5 July 1991 and so was his landlady. Had it been possible to confirm the suspicion of attempted rent fraud, the applicant would have been, as can be assumed, brought before the competent legal authority.

49. The applicant's arrest and detention must therefore be taken to have been effected for the purpose specified in Article 5 para. 1 (c) (Art. 5-1-c). In these circumstances, the Commission finds that the applicant's arrest and detention in principle fall within the ambit of Article 5 para. 1 (c) (Art. 5-1-c) of the Convention.

50. The next issue to be determined is whether the applicant's arrest and detention was "lawful", including whether it complied with "a procedure prescribed by law".

51. The Commission recalls that the Convention here refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (Art. 5), namely to protect individuals from arbitrariness (cf. Eur. Court HR., Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, p. 17, para. 39, and p. 18, para. 40; Quinn v. France judgment of 22 March 1995, Series A no. 311, pp. 18-19, para. 47).

52. The applicant's arrest and detention were effected on the basis of S. 127 and S. 163 b of the German Code of Criminal Procedure which allow for the arrest and provisional detention of a person apprehended in committing a criminal offence, if there is a risk of absconding, for the purpose of establishing his personal data. The Commission, having regard to the material before it, finds that the deprivation of the applicant's liberty were based on these provisions (cf., *mutatis mutandis*, Mc Veigh, O'Neill, Evans v. the United Kingdom, Comm. Report 18.3.81, D.R. 25 pp. 37-43, paras. 168-196).

53. The Commission observes that the Koblenz Court of Appeal, in its decision of 30 November 1993 regarding Police Officer Blang, addressed the procedural defect regarding the length of the applicant's

detention.

54. The Commission notes that the applicant was arrested on 4 July 1991 at 9.45 p.m. at Ulmen and then brought to the Cochem-Zell Police Office, where he arrived at 11 p.m. In the course of the night, investigations were conducted in particular as to his place of residence. The police authorities also received information about other investigation proceedings pending against the applicant, who was questioned again in the early morning of 5 July 1991, between 8.30 and 9.40 a.m. The applicant was released on 5 July 1991 at 10.30 a.m. and brought back to Ulmen.

55. The Koblenz Court of Appeal, in the said decision, considered that the applicant's detention had exceeded the 12-hours'-period under S. 163 c of the Code of Criminal Procedure.

56. The Government maintain that the applicant's detention was not solely warranted for the purposes of establishing his identity, pursuant to SS. 163 b of the Code of Criminal Procedure. Rather, following the information about the suspicion of other fraud offenses committed by the applicant, which could have possibly justified an arrest warrant, the applicant's detention was permitted under S. 127 paras. 1 and 2. However, in such cases, S. 128 of the Code of Criminal Procedure provided that the detainee had to be brought before the competent judge at the latest on the day following his arrest. The applicant had been released before the expiry of this time-limit.

57. According to the applicant, following the telephone conversation with the Hanau Public Prosecutor's Office at 9.25 a.m., it was clear that no request for an arrest warrant would be filed.

58. The Commission, having regard to the circumstances of the applicant's arrest and the course of the further investigations pending his detention, is not persuaded by the Government's argument which is at variance with the findings of the Koblenz Court of Appeal as to the legal basis of the applicant's arrest and detention. In particular, the Government have not shown that the strict prerequisites for an arrest and detention under S. 127 para. 2 of the Code of Criminal Procedure had been met.

59. However, the Commission considers that in a case of deprivation of liberty, some delay in the release of a detainee may be understandable (cf. Eur. Court HR., Quinn judgment, loc. cit., p. 17, para. 42), and would not necessarily entail a breach of the right to liberty within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention. In this respect, the Commission is of the opinion that practical reasons may justify a modest delay in releasing a detainee.

60. In the present case, the delay in the applicant's release following his lawful detention lasted from 9.45 until 10.30 a.m. In accordance with his wish, the applicant was then driven back by the police from Cochem to Ulmen.

61. The Commission notes that the police measures regarding the applicant's case in the morning of 5 July 1991, namely the applicant's questioning, the questioning of Mrs. S. and the telephone conversation with the Hanau Public Prosecutor's Office had all ended before 9.45 a.m., when the permissible period under S. 163 c of the Code of Criminal Procedure expired.

62. The findings of the Koblenz Court of Appeal, in its decision of 30 November 1993, suggest that the Police Officer in charge had not been aware that the applicant's detention had already exceeded the permissible period. The Koblenz Court of Appeal therefore refused to

order the criminal prosecution of the Police Officer concerned.

63. The Commission recalls that, under the Convention system, it is in principle not the task of the Convention organs to substitute their own assessment of the facts for that of the domestic courts, and, as a general rule, it is for these courts to assess the evidence before them (Eur. Court HR., *Klaas v. Germany* judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

64. The Commission considers, that, in the course of the proceedings before it, no material has been produced which could call into question the assessment of facts by the Koblenz Court of Appeal.

65. The Commission, having regard to all circumstances, finds no cogent elements to show that the rather short delay of 45 minutes in releasing the applicant deprived him of his liberty in an arbitrary manner, contrary to the object and purpose of Article 5 para. 1 (Art. 5-1) of the Convention.

66. Accordingly, the applicant's arrest and detention between the evening of 4 July and morning of 5 July 1991, including the period between 9.45 and 10.30 a.m., were not incompatible with Article 5 para. 1 (c) (Art. 5-1-c) of the Convention.

#### CONCLUSION

67. The Commission concludes, by 7 votes to 6, that in the present case there has been no violation of Article 5 para. 1 (Art. 5-1) of the Convention.

M.F. BUQUICCHIO  
Secretary  
to the First Chamber

J. LIDDY  
President  
of the First Chamber

(Or. English)

DISSENTING OPINION OF MRS. LIDDY AND MM. PELLONPÄÄ,  
BUSUTTIL, ROZAKIS, BRATZA, RESS.

To our regret, we cannot follow the reasoning or conclusion of the majority of the Commission in this case. We recognise that the period of delay in effecting the applicant's release was short. However, having regard to the fundamental importance of the right to liberty in a democratic society grounded on the rule of law, a scrupulous supervision by the organs of the Convention is called for wherever there is a deprivation of liberty. We cannot accept that a short period of detention which is unlawful as a matter of domestic law can be disregarded either on the grounds that it falls within a certain margin of appreciation afforded to member States or by the application of some "de minimis" principle. The maxim "de minimis non curat praetor" is not part of the legal framework of the Convention and certainly has no place in the context of the unlawful deprivation of liberty. To delay the release of a person at a police station for even a brief period beyond that permitted by domestic law, in circumstances where there exist no compelling practical or technical reasons for the delay, raises in our view an issue under Article 5 of the Convention.

On the material before us, we see no reason for the delay in the applicant's release following his questioning in the morning of 5 July 1991, the questioning of Mrs. S. and the telephone conversation with the Hanau Public Prosecutor's Office, all of which had ended before 9.45 a.m., when the period permitted by S. 163 c of the Code of Criminal Procedure expired. In this regard, we note that the Koblenz Court of Appeal, in its first decision of 21 May 1992, raised the question whether the applicant's continued detention until the next morning had been necessary at all.

It is true that in certain circumstances, some delay in the release of a detainee may be understandable (cf. Eur. Court HR., Quinn judgment, loc. cit., p. 17, para. 42), as, for example, where such delay results from the practical exigencies of the functioning of the courts (Quinn v. France, Comm. Report 22.10.93, para. 41, Eur. Court HR., Series A no. 311, pp. 23 et seq.). However, the respondent Government have not advanced any plausible explanation as to why the applicant could not have been released at 9.45 a.m. at the latest, but had to be kept until 10.30 a.m. We note that, under the relevant provisions of the Code of Criminal Procedure, the applicant's release did not require any formal decision or the completion of any particular formalities (a contrario, Quinn judgment, loc. cit.). Further, there is nothing to suggest any tacit agreement on the part of the applicant to remain in the police station until arrangements could be made to drive him back from Cochem to Ulmen. Accordingly, the delay in effecting his release cannot be attributed to the applicant himself.

The majority of the Commission seek to justify the prolonged detention of the applicant by reference to the court decisions refusing to order the prosecution of the officers concerned and refer to the finding of the Koblenz Court of Appeal that there was nothing to indicate that Police Officer Blang had been aware that the permissible period of detention had been exceeded. In concluding that there has been a violation of Article 5 of the Convention, we do not call into question these decisions of the national authorities. However, the question whether there was criminal liability as a matter of domestic law is quite distinct from the question whether the detention complied with the requirement of lawfulness in the Convention. Article 5 concerns the lawfulness of the detention and not the question whether persons responsible for the unlawful detention are criminally liable.

In these circumstances, we consider that the applicant's continued detention on 5 July 1991 between 9.45 and 10.30 a.m. was not "lawful" and not "in accordance with a procedure prescribed by law" within the meaning of Article 5 para. 1 (c) of the Convention.