CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF M.B. v. SWITZERLAND

(*Application no. 28256/95*)

JUDGMENT

STRASBOURG

30 November 2000

FINAL

01/03/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form.

In the case of M.B. v. Switzerland,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 25 May and 9 November 2000,

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

PROCEDURE

1. The case originated in an application (no. 28256/95) against Switzerland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Ms M.B. ("the applicant"), on 22 May 1995.

2. The applicant was represented by Mr M. Bosonnet, a lawyer practising in Zürich, Switzerland. The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicant alleged, in particular, that the release proceedings in which she was involved were not conducted speedily as required by Article 5 § 4 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 25 May 2000 the Court declared the application partly admissible.

7. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, a Swiss citizen born in 1945, was at the time of filing her application a delegate of the International Committee of the Red Cross residing at Losone in Switzerland.

A. Proceedings before the Federal Attorney's Office

9. On 19 September 1994 the Federal Attorney (*Bundesanwältin*) issued a warrant of arrest against the applicant on suspicion of having committed "repeated assassination (*ripetuto assassinio*), committed as a member of the terrorist group 'Carlos' and repeated participation in the preparation and implementation of ... attacks (*attentati*)", the details of which were then listed.

10. On the same day, 19 September 1994, the applicant was arrested in Locarno in Switzerland and remanded in custody. On 20 September 1994 she was transported to Bern where she arrived at 10h00. At 14h40 she was questioned by police officers of the Federal Attorney's office (*Bundesanwaltschaft*).

11. On 21 September 1994, an investigating judge of the Canton of Bern confirmed the detention on remand of the applicant. The decision noted that the suspicion was based on files of the East German State security authorities and the Hungarian intelligence service, and that the applicant herself admitted having been a member of the Carlos group. In view of this membership, there was an urgent suspicion (*dringender Verdacht*) that she had participated in the various events. Furthermore, there existed a danger of collusion and of absconding. Thus, additional investigations were necessary. Moreover, the applicant, a delegate of the International Committee of the Red Cross, was frequently abroad and had no permanent residence in Switzerland.

12. The investigations were then conducted by the Federal Attorney's office.

13. On 5 October 1994 the applicant was heard by the Federal Attorney's office. As from this date, the applicant refused to comment on the charges laid against her.

14. On Friday, 21 October 1994, the applicant filed a request with the Federal Attorney for release from detention. She submitted that she had withdrawn her statement that she belonged to the Carlos group, and that it did not transpire from the documents referred to by the investigating judge on 21 September 1992 that she had been a member of this group. There were furthermore no documents which indicated that she had committed a criminal offence. A danger of collusion and of absconding could be excluded. The request was received by the Federal Attorney on Monday, 24 October 1994.

15. On Tuesday, 25 October 1994, the Federal Attorney dismissed the applicant's request. The decision was served on the applicant on Wednesday, 26 October. According to the decision, the applicant was suspected of having participated, as a member of the Carlos terrorist group, in bomb attacks in 1982 of French embassies in Beirut and Vienna and of a train in France. She was also suspected of having murdered a diplomat couple in Beirut in 1982. These bomb attacks had occurred after two members of the Carlos group had been arrested in France. The Carlos group transmitted a letter to the French Government, threatening to commit the attacks if the two members were not released. The applicant was suspected of having deposited this letter at the French Embassy in The Hague. After the time-limit mentioned in the letter had elapsed, the attacks were committed.

16. On Wednesday, 26 October 1994, the applicant was questioned by the Federal Attorney's office.

17. On Thursday, 27 October 1994, the applicant asked for permission to consult the entire case file. The Federal Attorney's office refused the request on the same day, *inter alia*, in view of a danger of collusion.

B. Proceedings before the Federal Court

18. On Monday, 31 October 1994, the applicant filed an appeal (*Beschwerde*) against the decisions of 25 and 27 October 1994 with the Indictment Chamber (*Anklagekammer*) of the Federal Court (*Bundesgericht*), invoking Article 5 §§ 1, 2 and 4 of the Convention and requesting release from detention and permission to consult the entire case file. The appeal was received by the Federal Court on Tuesday, 1 November 1994.

19. On the same day, 1 November 1994, the President of the Indictment Chamber transmitted a copy of the appeal to the Federal Attorney who was requested to submit her observations by Monday, 7 November 1994. The Federal Attorney was further requested to send a copy of her observations directly to the applicant who, in turn, was requested to submit any observations by Friday, 11 November 1994.

20. On 7 November 1994 the Federal Attorney filed her observations.

21. The applicant filed her observations in reply on Friday, 11 November 1994. These observations were received by the Federal Court on Monday, 14 November.

22. On Wednesday, 23 November 1994, the Indictment Chamber of the Federal Court dismissed the applicant's request. The decision was served on the applicant on Thursday, 24 November 1994.

23. In respect of the applicant's complaint that she could not consult the entire case file, the Indictment Chamber found that the applicant had had knowledge of the essential documents. Moreover, she did not dispute the Federal Attorney's observations of 7 November 1994 according to which the applicant had been able to read all incriminating documents when questioned.

24. In its decision the Indictment Chamber of the Federal Court further confirmed the suspicion that the applicant had committed the offences at issue, particularly as she herself had originally admitted membership in the Carlos group. The applicant had not withdrawn her statements, she had merely refused to speak to the authorities. The Indictment Chamber also assumed a danger of absconding and of collusion.

C. Applicant's release from detention

25. On 7 December 1994 the applicant filed a further request for release which was granted by the Federal Attorney's Office in a decision dated 13 December 1994. The decision stated that the original suspicion directed against the applicant had not been confirmed (*erhärtet*).

II. RELEVANT DOMESTIC LAW

26. According to Section 52 of the Federal Act of Criminal Procedure (*Bundesstrafrechtspflegegesetz*) a person detained on remand may at any time file a request for release from detention. If the investigating judge or the Federal Attorney refuse the request, an appeal may be filed with the Indictment Chamber of the Federal Court. According to Section 105bis and 217 of the Act, the time-limit for filing the appeal is three days.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

27. The applicant complained that her request for release was not decided speedily within the meaning of Article 5 § 4 of the Convention. This provision states:

> "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."

28. The Government submitted that the duration of the proceedings complied with the requirements under Article 5 § 4 of the Convention.

A. Period to be taken into consideration

29. The applicant submitted that the period to be examined under Article 5 § 4 of the Convention commenced on 21 October 1994, when she filed her request for release from detention, and ended on 23 November 1994, when the Federal Court gave its decision.

30. The Government contended that the period commenced on 24 October 1994 when the applicant's request was received by the Federal Attorney. It ended on 24 November when the Federal Court's decision was served on the applicant. In the Government's view, the period of five days from 26 to 31 October, when the applicant prepared her appeal to the Federal Court, cannot be counted.

31. The Court considers that the submission of the applicant's request for release from detention to the Federal Attorney opened the administrative proceedings and was a prerequisite for the Federal Court's exercise of judicial supervision (see the Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 20, § 54). The period to be examined therefore commenced on 21 October 1994. It ended on 24 November 1994, when the Federal Court's decision was served on the applicant. As a result, the period to be examined under Article 5 § 4 of the Convention lasted 34 days. The period which the applicant required for filing her appeal to the Federal Court falls to be examined together with the issue whether the proceedings were conducted speedily (see below, § 39).

B. Compliance with the requirement that the decision be taken "speedily"

32. The applicant submitted that, although the proceedings were conducted in two stages, this should not have led to an excessive

prolongation of the proceedings. Moreover, the issue of her release from detention was not complex. Indeed, the Federal Court was able to reply to her request for release in a brief and simple response on 23 November 1994. If the Federal Court was faced with a second appeal concerning consultation of the case file, the two issues could have been dealt with separately.

33. The Government contended that a serious assessment of the lawfulness of the applicant's detention could not have been conducted within a shorter period of time. Swiss law provides for a decision of an administrative authority preceding the judicial examination of the detention. This system has been considered to be in conformity with the Convention (see the Sanchez-Reisse judgment cited above, p. 17, § 54). Moreover, the accused has an absolute right to reply, regardless of whether use is made of this right. Such a right necessarily prolongs the proceedings, though in the present case the Federal Court kept the time-limit to the strict minimum.

34. The Government drew attention to the manner in which the applicant's request of 21 October 1994 was dealt with. The Federal Attorney was able to give her reply within one day. The President of the Indictment Chamber opened the procedure before the Federal Court on 1 November 1994, i.e. the day when the applicant's appeal arrived; and after the applicant's reply was received by the Court on 14 November, its decision was served on the applicant only eleven days later, on 24 November 1994.

35. The Government further pointed out that the Federal Court had no knowledge of the case file before the applicant filed her appeal on 31 October 1994. Matters were complicated by the fact that on 21 October 1994 an additional appeal was filed by another applicant. Both cases raised to a large extent the same issues, and parallel proceedings were, therefore, conducted. The present case was decided two days after the other one.

36. The Court recalls that Article 5 § 4 of the Convention, in guaranteeing to persons arrested or detained a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Baranowski v. Poland* [GC], no. 28358/95, ECHR 2000).

37. It is true that in the case of Sanchez-Reisse v. Switzerland – involving extradition proceedings with a similar two tier-procedure as in the present case – the release proceedings lasting 31 days and 46 days, respectively, were found to be in breach of Article 5 § 4 of the Convention. Nevertheless, the requirement of Article 5 § 4 of the Convention that decisions be taken "speedily" must – as is the case for the "reasonable time" stipulation in Articles 5 § 3 and 6 § 1 of the Convention – be determined in the light of the circumstances of each case (see the Sanchez-Reisse judgment cited above, p. 20, § 55, and p. 22, § 60).

38. Turning to the circumstances of the present case, the Court notes that the applicant was remanded in custody on the urgent suspicion of having participated, as a member of a terrorist group, in various criminal acts, and in view of a danger of collusion and of absconding. In her request for release from detention of 21 October 1994, the applicant contested these grounds. In the Court's opinion, these were straightforward matters, and it has not been argued by the parties that the case itself disclosed any features of particular complexity.

39. The Court has next examined the various stages of the proceedings. Once the Federal Attorney had received the applicant's request on 25 October 1994, she dismissed it one day later, on 26 October. It took the applicant five days to file her appeal. This lapse of time (the week-end not counting) did not exceed the time-limit set up under the Federal Act on Criminal Procedure (see above, § 26).

40. After the applicant's appeal had been received by the Federal Court on Tuesday, 1 November 1994, the latter organised the procedure on the same day. It requested the Federal Attorney to comment on the appeal by Monday, 7 November, and the applicant to submit her reply by 11 November. In the Court's view, however, as the Federal Attorney had previously been able to give her decision of 25 October, only one day after having received the applicant's request, and as the applicant was conversant with her own case, this period of 10 days for filing observations appears unnecessarily long.

41. Once the applicant had filed her observations on Friday, 11 November 1994, the Federal Court required an additional 12 days – 8 working days – until it pronounced its decision on Wednesday, 23 November 1994. Bearing in mind that by 11 November the proceedings had already been pending before the Federal Court for 10 days, and that altogether 21 days had lapsed since the request for release from detention of 21 October, the Court finds that this period was excessive.

42. The Court observes that Switzerland has chosen, for such cases involving release from detention on remand, a two tier-procedure which includes as the first instance an administrative authority and, as the second, the Federal Court, which is the highest judicial authority in Switzerland. However, these circumstances cannot in themselves serve to justify the applicant's being deprived of her rights under Article 5 § 4 of the Convention. It is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that provision (see, *mutatis mutandis*, the R.M.D. v. Switzerland judgment of 26 September 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2015, § 54.)

43. Having regard to the delays at issue, the overall duration of the proceedings, and what was at stake for the applicant, the Court concludes that the proceedings were not conducted "speedily" within the meaning of

Article 5 § 4 of the Convention. There has accordingly been a breach of this Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Costs and expenses

45. Under Article 41 of the Convention the applicant claimed 12,632 Swiss francs (CHF) for the proceedings in Strasbourg.

46. The Government recalled that only one of the applicant's complaints had been declared admissible, and that this particular complaint only concerned a minor part of the observations submitted by the applicant during the admissibility proceedings. In this respect, the Government considered the sum of CHF 3,000 as being adequate.

47. The Court, in accordance with its case-law, will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-II).

48. The Court finds the applicant's claim for the Strasbourg proceedings excessive and, making an assessment on an equitable basis, awards her CHF 4,000.

B. Default interest

49. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to

Article 44 § 2 of the Convention, 4,000 (four thousand) Swiss francs for costs and expenses;
(b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 November 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President