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

COURT (CHAMBER)

CASE OF LÜDI v. SWITZERLAND

(Application no. 12433/86)

JUDGMENT

STRASBOURG

15 June 1992

In the case of Lüdi 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 J. CREMONA,
Mr F. MATSCHER,
Mr B. WALSH,
Mr A. SPIELMANN,
Mr S.K. MARTENS,
Mr A.N. LOIZOU,
Mr F. BIGI,
Mr L. WILDHABER,

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

Having deliberated in private on 27 January and 26 May 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 8 March 1991 and by the Government of the Swiss Confederation ("the Government") on 25 April 1991, 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. 12433/86) against Switzerland lodged with the Commission under Article 25 (art. 25) by Mr Ludwig Lüdi, a Swiss national, on 30 September 1986.

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), and the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and application was to obtain a decision as to whether

* The case is numbered 17/1991/269/340. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 3 (d) and Article 8 (art. 6-1, art. 6-3-d, art. 8).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30) and whom the President gave leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mrs D. Bindschedler-Robert, 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 22 March 1991, in the presence of the Registrar, Mr F. Matscher, having been duly delegated by the President, drew by lot the names of the other seven members, namely Mr J. Cremona, Mr J. Pinheiro Farinha, Mr A. Spielmann, Mr S.K. Martens, Mr I. Foighel, Mr A.N. Loizou and Mr F. Bigi (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr F. Matscher as substitute judge and Mr L. Wildhaber as the elected judge of Swiss nationality subsequently replaced Mr Pinheiro Farinha and Mrs Bindschedler-Robert respectively, who had resigned from the Court and whose successors had taken up their duties before the hearing (Rules 2 para. 3 and 22 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the organisation of the procedure (Rule 37 para. 1 and Rule 38). Pursuant to the order made in consequence, the Registrar received the memorials of the applicant and the Government on 23 August 1991. On 28 October the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. On 10 September 1991 the Commission supplied various documents, as requested by the Registrar on the President's instructions.

On 10 January 1992 Mr Foighel, who was unable to take part in the further consideration of the case, was replaced by Mr B. Walsh, substitute judge (Rules 22 para. 1 and 24 para. 1).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 January 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, Presiding Judge

of the Economic Criminal Court of the Canton of Berne,
Mr F. SCHÜRMANN, member
of the European Law and International Affairs Section,
Federal Office of Justice, *Counsel*;
- for the Commission
Mr S. TRECHSEL, *Delegate*;
- for the applicant
Mr P. JOSET, avocat, *Counsel*,
Mr D. KRAUSS, Professor
at the University of Basle, *Adviser*.

The Court heard addresses by Mr Jacot-Guillarmod and Mr Maurer for the Government, by Mr Trechsel for the Commission and by Mr Joset and Mr Krauss for the applicant, as well as their replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr Ludwig Lüdi, a Swiss national, resides at Röschenz in the Canton of Berne.

8. In 1983, while in Germany, he was charged with trafficking in drugs. On 30 November 1983 the 16th Criminal Chamber of the Stuttgart Regional Court ordered the proceedings to be discontinued as a result of various procedural problems, including the intervention of a German undercover agent (V-Mann).

On appeal by the public prosecutor's office, the Federal Court (Bundesgerichtshof) set the order aside on 23 May 1984 and remitted the case to the Stuttgart Regional Court. That court adjourned the case sine die on the grounds that the applicant and his co-defendant, who had been at liberty since 2 September 1983, had returned to Switzerland.

A. The intervention of the undercover agent and the applicant's arrest

9. On 15 March 1984 the German police informed the police of the Canton of Berne that the applicant had asked a fellow countryman whom he had met while in detention for 200,000 Swiss francs to finance the purchase of approximately 5 kg of cocaine in Switzerland.

In order to obtain fuller information on the drugs deal and seize the drugs in question, the investigating judge at the Laufen District Court (Amtsgericht) opened a preliminary investigation on 15 March 1984. With

the agreement of the Indictments Chamber of the Court of Appeal (Obergericht) of the Canton of Berne and pursuant to Article 171b of the Berne Code of Criminal Procedure (see paragraph 26 below), he also ordered the applicant's telephone conversations to be monitored.

On 20 June the Indictments Chamber authorised the telephone interception to be extended to 15 September 1984.

10. In addition, the Laufen police and the special drugs unit decided that a sworn officer of the Berne Cantonal Police should pass himself off as a potential purchaser of the cocaine, under the assumed name of Toni. They acted with the authorisation of cantonal police headquarters, and notified the investigating judge at the Laufen District Court of their plan.

11. According to the Government, Toni had attended a course on 12 and 13 December 1978 intended for cantonal officials with responsibility for the fight against drug trafficking, with the aim of drawing their attention to the limits to which their undercover activities were subject and the relevant provisions of the law. Shortly before acting in the present case, Toni was reminded at a meeting with his superior officers of the limits beyond which he was not to go.

12. The applicant met Toni on 19 and 21 March, 15 May and 5 and 14 June 1984, on the latter's initiative on each occasion, as the applicant did not know his real identity, address or telephone number.

13. He was arrested on 1 August 1984 and charged with unlawful trafficking in drugs. The investigating judge at the Laufen District Court terminated the telephone interception on the same day. In a letter of 22 August 1984 he informed the applicant that he had ordered telephone interception and that it had lasted from 15 March to 2 June 1984.

According to Toni's reports, Mr Lüdi had promised to sell him, as intermediary, 2 kg of cocaine worth 200,000 Swiss francs, and had borrowed 22,000 Swiss francs from a third person for the purchase of cocaine or other narcotics.

14. On 3 August 1984 the police searched the applicant's home and found traces of cocaine and hashish on a number of objects.

15. On 5 September 1984 the investigating judge at the Laufen District Court ordered the applicant to be released on the ground that he had made "extensive admissions as to the essential parts of the investigation [and that] there [was] consequently no longer any risk of collusion or flight".

The Berne police, relying on the results of the preliminary investigation, filed a criminal complaint on 25 October 1984.

B. The proceedings before the Laufen District Court

16. On 4 June 1985 the Laufen District Court found the applicant guilty of seven offences against the Federal Drugs Law and sentenced him to three years' imprisonment. In order to preserve the anonymity of the undercover

agent, the court declined to call him as a prosecution witness; it considered that the records of the telephone interception and the undercover agent's reports showed clearly that, even without the agent's intervention, Mr Lüdi had had the intention of acting as an intermediary in the supply of large quantities of narcotics.

C. The proceedings before the Berne Court of Appeal

17. Mr Lüdi appealed against his conviction for two of the seven offences, the attempted supply of cocaine to Toni and the attempted purchase of cocaine or another drug by means of the loan he had arranged.

18. On 24 October 1985 the Berne Court of Appeal (First Chamber) confirmed the judgment of 4 June 1985 (see paragraph 16 above). The Court of Appeal did not call the undercover agent either.

The court found that the evidence adduced before the trial court had in essence corroborated the content of Toni's report, in particular with regard to the general course of events. This had clearly shown that the applicant - as had not been disputed by him - had made great efforts in order to supply Toni with 2 kg of cocaine, had contacted M. and then B., travelled to Ticino and Italy, and arranged meetings between Toni and a possible supplier. After initially minimising things, he had eventually decided to admit all these facts, which also followed partly from the interception of his telephone conversations and the statements of M. It had to be regarded as established that Mr Lüdi had been the first to speak to S. about purchasing cocaine; besides, S. had confirmed this, although he had toned down his original statements on this point to some extent.

The court then dealt with the applicant's argument that section 23 subsection 2 of the Federal Drugs Law did not apply to Toni's actions. The court said that the mere fact that the applicant had planned a significant deal in cocaine before his first contact with the undercover agent brought him within section 19 of that Law.

Finally, the detailed reports of the telephone interception showed very clearly that Mr Lüdi had persistently (beharrlich) and on his own initiative attempted to carry out a drugs deal, and that he had for this purpose intended to bring Toni in as the "banker", as he himself did not have the required funds.

D. The appeals to the Federal Court

19. Mr Lüdi then brought a public law appeal and an application for a declaration of nullity to the Federal Court (Bundesgericht).

20. He alleged in the former that there had been an interference with his right to respect for his private life, which had not been compatible with Article 8 (art. 8) of the Convention. He argued firstly that the monitoring of

his telephone conversations had not been "in accordance with the law" and had not been justified under paragraph 2, as he had been suspected merely of having had the intention of committing an offence. Secondly, he complained of the intervention of an undercover agent, which he alleged had been intended to incite him to take part in drug trafficking. He further claimed that the telephone interception could not be used in evidence and that the mere reading of the agent's reports, without the agent being called as a witness, had prejudiced the exercise of the rights of the defence, in breach of Article 6 (art. 6).

21. On 8 April 1986 the Federal Court dismissed the public law appeal, for the following reasons:

"...

(a) The public law appeal raises two objections to the ordering of the telephone surveillance. Firstly, it is argued that at the stage of 'generally investigative police enquiries' telephone interception was ordered for which there was no statutory provision at that stage; a preliminary investigation was started only for the sake of appearances. Secondly, the appellant complains that Bernese criminal procedure law permits of no preventive telephone surveillance and that the present case did not concern an investigation into an offence which had been committed, but the ascertainment of offences which were about to happen.

(b) Under Article 171b of the Berne Code of Criminal Procedure (StrV) an investigating judge can order surveillance of a suspect's postal, telephone and telegraph communications 'if an offence whose seriousness or particular features justify the interference or an offence committed by means of the telephone is being investigated'. It is not disputed that in the present case the telephone surveillance was ordered by the competent authority and the procedural rules in Article 171c StrV were complied with. That telephone surveillance in the initial stage of inquiries is excluded by cantonal law does not follow from the Code of Criminal Procedure, nor has it been demonstrated by the appellant. Depending on the circumstances, telephone interception is often appropriate precisely at the beginning of an investigation. From this point of view there is no indication whatever that the order complained of could have infringed the Constitution or that it was made under an arbitrary interpretation of cantonal law.

(c) There is no need to examine here whether under the wording of Article 171b StrV telephone surveillance and the other measures regulated thereby are to be strictly confined to investigations of offences already committed, excluding the possibility of preventive surveillance where there is a strong suspicion that offences are about to be committed. Under the sixth paragraph of section 19 subsection 1 of the Drugs Law (Betäubungsmittelgesetz) a person who takes steps in order to participate in some manner in dealing with drugs, transporting or storing them has already committed an offence. By Lüdi's conduct as reported from Germany, namely his search for finance for a cocaine deal, he had already taken steps as defined above, so that, that being the case, the elements of an offence were already present, and the telephone surveillance ordered related not only to the discovery of planned crimes but also to the investigation of offences which had already been committed.

Moreover, it would not be untenable to interpret Article 171b StrV by analogy as a legal basis for preventive measures too, where the interference is justified by the seriousness or particular features of the offence which is anticipated. The telephone surveillance ordered in this case on a basis of serious suspicion of a crime was certainly not an abuse of the law.

3. (a) The use of so-called undercover agents is not expressly provided for in Swiss criminal procedure law, but the dominant opinion is that it is permissible in principle, in so far as the particular nature of the offences is capable of justifying the covert investigative acts and the undercover agent investigates the criminal activity in a predominantly passive manner without using his own influence to arouse willingness to commit the act and induce criminal conduct ... The federal legislature has in section 23 subsection 2 of the Drugs Law expressly taken into account the possibility of using an undercover agent in criminal investigations in the field of drug trafficking.

(b) In the ... public law appeal the permissibility of covert investigation in terms of the rule of law is not denied in general and as a matter of principle, but the view is taken that the use of an undercover agent represents a serious interference with the private life and personal freedom of the person concerned and such an interference is possible in a State subject to the rule of law only if founded on a sufficiently precise legal basis ...

Such a requirement of a legal basis for the use of undercover agents has not been discussed as yet in Swiss case-law and legal writing, nor expressly acknowledged as a restraint from the point of view of the rule of law. This would be a continuation and extension of the legislature's reasons underlying the requirement for statutory regulation of telephone interception and similar investigative measures. While coercive measures in the course of criminal procedure (such as arrest, house searches, etc.) clearly interfere against the will of the person concerned with legally protected rights, and surveillance of telephone, postal and telegraph communications without the knowledge of the person concerned interferes in the interests of prosecuting crime with areas of confidentiality which are protected by law, the use of undercover agents is problematic at a somewhat different level: the personal freedom of the person concerned is not restricted, nor does he have to tolerate any other coercive measures, but he comes into contact with a partner who is unknown to him, but with whom he would not have dealings if he knew that he was working for criminal investigation. Where the undercover agent by means of his contacts merely ascertains criminal conduct which would have taken place in the same or similar fashion even without his intervention, the use of an undercover agent is no doubt unobjectionable. On the other hand, it would not be permissible if the undercover agent were to take the initiative, as it were, and provoke criminal activity which would otherwise not have come about at all; for the prosecuting authorities must not provoke criminality in order to be able to prosecute criminals whose readiness to commit crime, possibly present but latent, would otherwise not have become manifest. If the undercover agent fosters the criminality of the person concerned without it being possible to regard him directly as initiating or inciting, but nevertheless in such a way that it must be assumed that the criminal act would have been of lesser extent and seriousness without the 'participation' of the undercover agent, this is to be taken into account when passing sentence.

Covert investigation does not encroach on a basic right protected by the Federal Constitution (or the European Convention). The person concerned is free as regards his decisions and his behaviour towards the undercover agent; he is, however,

deceived as to the identity of his negotiating partner and the latter's connection with the police. A criminal is not protected by constitutional law against being observed in the course of his illegal conduct by a police officer who is not recognisable to him as such. Nor can any protection of a criminal against covert investigation be derived from the European Convention (Article 8) (art. 8). Whether the investigative methods of undercover agents should because of certain risks of abuse be statutorily regulated, and whether a statutory rule would be likely to counteract any abuses better than is currently done by case-law, is for the legislature to decide. According to current constitutional law and statute law, the use of an undercover agent is permissible within the bounds set by the general principles of the rule of law, without it requiring an express statutory basis. There are other investigative measures too - as for example the constant surveillance of a suspect - which may seriously affect private life and lead to findings which are unwelcome for the person concerned, without it ever having been thought necessary for there to be a statutory basis for such measures.

(c) If, therefore, as the law stands there is no requirement of a statutory basis for the use of undercover agents, it is not necessary to examine whether section 23 subsection 2 of the Drugs Law could be regarded as a sufficient statutory basis in the absence of a corresponding provision in cantonal procedural law. The wording of the subsection shows that it is not an enabling provision of criminal procedure, but a rule of substantive law on the question, which need not be discussed here, as to the circumstances under which acts by an undercover agent which are objectively the elements of an offence are not liable to punishment.

4. The activity of undercover agent 'Toni' did not go beyond the bounds, described above, of covert investigation acceptable in a State governed by the rule of law:

(a) The investigation of suspected drug offences is often, because of the nature of such offences, possible only by an undercover agent. It is precisely in this sphere that this method proves to be necessary and effective ... Once a report had been received of a definite suspicion that the appellant wished to carry out a substantial cocaine deal, it was not disproportionate to use a police officer to pose as a buyer. This did not involve an arbitrary interpretation of cantonal procedural law, nor was there a breach of a basic right or a human right protected by the European Convention.

(b) On the basis of the statements made by the various parties, and assessing the evidence in a reasonable and non-arbitrary fashion, the court below found that Lüdi first mentioned a cocaine deal to Schneider and then spontaneously offered 'stuff' to the interested party 'Toni' as well. Although subsequently it was always 'Toni' who contacted Lüdi to find out how things were progressing, it does not follow from this that the appellant did not commit an offence. Lüdi of his own accord got in touch with possible suppliers and also tried to find money for drug dealing elsewhere. As he had no telephone number for 'Toni', he necessarily had to wait for him to ring him. The essential point is that 'Toni' did not act as the instigator, but by posing as a buyer merely made it possible to investigate the appellant's activities, which were aimed at a substantial deal in cocaine.

5. The appeal argues at great length that no account may be taken directly or indirectly of the statements of undercover agent 'Toni', for the further reason that he was not summoned and heard as a witness ... . If it is recognised that the use of undercover agents is justified in the public interest in fighting as effectively as possible against drug dealing, it follows that the identity and the investigative methods of such agents are not lightly to be given away in criminal proceedings; for their

continued use would thereby effectively be made largely impossible. Preserving the secrecy of undercover agents does not in itself infringe principles of criminal procedure or constitutional rights. It is a matter for the court assessing the evidence to decide what weight can be attached in a particular case to the written statements of an undercover agent who has not appeared before the court, where there are legally relevant facts which are in dispute. The allegations that the appellant carried out preparatory actions which constituted criminal offences have been substantiated by the result of the telephone interception, the appellant's own statements and those of the other persons involved. If the court below attributed to the undercover agent a somewhat less active role than that alleged by the appellant in his account of the facts, that was not arbitrary but was based on a tenable assessment of the evidence.

..."

(Annuaire suisse de droit international, 1987, pp. 229-230 and 232-234)

22. In contrast, in a judgment of the same day, the Cassation Division of the Federal Court granted the application for a declaration of nullity. The court said that the Laufen District Court, when convicting the applicant, had not taken sufficient account of the effect on his behaviour of the actions of the undercover agent, and the Berne Court of Appeal had not mentioned the outcome of the proceedings brought against the applicant in Germany or the fact that he had no criminal record.

The Federal Court remitted the case to the Berne Court of Appeal.

23. On 19 February 1987 the First Chamber of that court reduced the sentence to eighteen months' imprisonment, suspended for three years. It also ordered that the out-patient medical treatment which Mr Lüdi had started while in detention should be continued. As grounds for its decision it cited its concern to take into account the intervention of Toni, and a psychiatric report stating that the applicant had been under the influence of cocaine at the time of the offences and hence had only limited responsibility.

II. RELEVANT DOMESTIC LAW

A. The Federal Drugs Law of 3 October 1951

24. The Drugs Law provides in sections 19 and 23 that:

Section 19

"1. Any person who unlawfully cultivates alkaloid plants or hemp in order to obtain drugs,

any person who unlawfully manufactures, extracts, transforms or processes drugs,

any person who unlawfully stocks, dispatches, transports, imports or exports them or carries them in transit,

any person who unlawfully offers, distributes, sells, deals in, procures, prescribes, markets or transfers them,

any person who unlawfully possesses, holds, purchases or otherwise obtains them,

any person who takes steps to do so,

any person who finances unlawful traffic in drugs or serves as intermediary for such financing, and

any person who publicly encourages the consumption of drugs or publicly announces an opportunity for the acquisition or consumption of drugs,

shall be liable, if he acts intentionally, to imprisonment or a fine. In serious cases the penalty shall be imprisonment for not less than one year, which may be accompanied by a fine of up to one million francs.

2. A case is serious in particular if the person committing the offence

(a) knows or must be aware that the offence relates to a quantity of drugs which may endanger the health of a large number of people;

(b) acts as a member of a gang formed for the purpose of the unlawful dealing in drugs;

(c) obtains a large turnover or a substantial profit by dealing as a business.

..."

Section 23

"1. If an official responsible for the enforcement of this law intentionally commits an offence under sections 19 to 22, the penalty shall be increased as appropriate.

2. An official who for investigative purposes in person or by the agency of another accepts an offer of drugs or personally or by the agency of another takes possession of drugs shall not be liable to punishment, even if he does not disclose his identity and status."

Statement of the Federal Council to the Federal Parliament of 9 May 1973 relating to an amendment to the Federal Drugs Law [and in particular to the introduction of an amended section 23]

"...

The amendment introduced at the end of the sentence is intended to give the court more latitude in determining the sentence where an official responsible for the enforcement of the Drugs Law deliberately contravenes that law.

The intention of the draft provisions, which follow on from the present section 23, is to facilitate police investigations in a field where they are particularly difficult. This is a question of allowing the police to enter the environment of dealers and sellers without exposing themselves to criticism for having incited the commission of offences or even having committed them themselves. Illegal drug trafficking has often been cited as a typical example of well-organised international gangs, some of which have been broken up in recent months. The police must be given adequate means for increasing the effectiveness of their campaign against these gangs of traffickers, as the Council of Europe asks us to do. Article 32 of the Criminal Code (official duty) is not sufficient to justify such actions. They must rest on a legal basis in each particular case (see Prof. Max Waiblinger, no. 1204, Fiches juridiques suisses, faits justificatifs).

..."

25. The Government stated that section 23 subsection 2 was regarded by cantonal courts and the Federal Court as permitting only a passive attitude on the part of undercover agents, who incurred criminal liability in the event of instigation or provocation by them. Moreover, the use of such agents could be ordered only in serious cases of organised crime relating to drug trafficking.

The Federal Court has held that the section in question derogates from provisions of cantonal law which may conflict therewith:

"... it is not necessary for section 23 subsection 2 of the Drugs Law to have as its purpose the regulation of a procedural point, which the appellant contests; it is sufficient that the cantonal legislation compromises the anonymity which the federal legislature - whose intentions are not in doubt here, if one considers the extracts from the parliament's travaux préparatoires pertinently cited by the cantonal authorities - intended to guarantee to persons pursuing drug dealers.

The anonymity intended by the legislature has one purpose only: to allow the investigator to continue his work subsequently to the arrest of the person or persons whom he has exposed and to allow him to carry on several cases at once without the completion of one of them terminating his activities in the others. If once an inquiry has been completed the police officer has to disclose his identity and explain in detail the role he has played, it is self- evident that he will have to abandon any further work, as his cover will have been blown in drug-dealing circles. For this reason the observance of Articles 58 and 59 of the cantonal Code of Criminal Procedure is in conflict with section 23 subsection 2 of the Drugs Law ..." (Cassation Division, judgment of 5 June 1986).

B. The Berne Code of Criminal Procedure

26. The Berne Code of Criminal Procedure makes provision for various investigative measures:

Article 171b

"The investigating judge may order surveillance of a suspect's postal, telephone and telegraphic communications and have his mail seized if an offence whose seriousness

or peculiar features justify the interference or an offence committed by means of the telephone is being investigated."

Article 171c

"1. The investigating judge shall within twenty-four hours of his decision submit to the Indictments Chamber for approval a duplicate copy of his order together with the case-file and a short statement of reasons.

2. The order shall remain in force for three months at most; the investigating judge may extend it for a maximum of three months. The extension order is to be submitted to the Indictments Chamber for approval with the case-file and reasons ten days before the expiry of the period.

3. The investigating judge shall terminate the surveillance as soon as it becomes unnecessary or the period expires or if the order is withdrawn."

C. The Swiss Criminal Code

27. Articles 24 and 32 of the Swiss Criminal Code provide that:

Article 24

"1. A person who intentionally persuades another person to commit an offence shall, if the offence is committed, be liable to the penalty to which the person who commits the offence is liable.

2. A person who attempts to persuade another person to commit a serious offence shall be liable to the penalty prescribed for the attempted commission of that offence."

Article 32

"An act which is ordered by law or by an official or professional duty, or which is stated by law to be permitted or not liable to punishment, shall not be an offence."

PROCEEDINGS BEFORE THE COMMISSION

28. Mr Lüdi applied to the Commission on 30 September 1986. He complained of the interception of his telephone conversations combined with his manipulation by an undercover agent; he claimed that this had infringed his right to respect for his private life (Article 8) (art. 8). He also maintained that his conviction had been based solely on the reports drawn up by the said agent, who had not been summoned to appear as a witness; he alleged that his right to a fair trial (Article 6 para. 1) (art. 6-1) had been

infringed, and also his right to examine or have examined witnesses against him (Article 6 para. 3 (d)) (art. 6-3-d).

29. The Commission declared the application (no. 12433/86) admissible on 10 May 1990. In its report dated 6 December 1990 (Article 31) (art. 31) it expressed the opinion that there had been a violation of Article 8 (art. 8) (ten votes to four) and of paragraph 3 (d) in conjunction with paragraph 1 of Article 6 (art. 6-3-d, art. 6-1) (thirteen votes to one).

The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment*.

GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

30. The Government asked the Court to hold that "in the present case, in so far as the applicant [could] be regarded as a 'victim', there [had] not been a violation of Article 8 (art. 8) of the Convention or of paragraph 3 (d) in conjunction with paragraph 1 of Article 6 (art. 6-3-d, art. 6-1)".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government argued, as they had previously done before the Commission, that the judgment of the Berne Court of Appeal of 19 February 1987 (see paragraph 23 above) had had the result that Mr Lüdi was no longer a victim for the purposes of Article 25 para. 1 (art. 25-1). The sentence had been reduced to what the applicant, through his lawyer, had himself suggested at the trial.

32. The applicant challenged this argument. The Commission did likewise; it noted that the Court of Appeal's decision had been based solely on the need to take into account the intervention of the undercover agent and a psychiatric report showing diminished responsibility on the part of Mr Lüdi at the time of the offences (see paragraph 23 above).

33. Referring to its consistent case-law (see, as the most recent authority, the B. v. France judgment of 26 March 1992, Series A no. 232-C, p. 45, paras. 34-36), the Court considers that it has jurisdiction to examine the

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 238 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

objection, even though this was disputed by the Commission in its principal submission.

34. The word "victim" in the context of Article 25 (art. 25) denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 50 (art. 50). Consequently, mitigation of a sentence in principle deprives such a person of his status as a victim only where the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, pp. 29-32, paras. 64-70).

It follows from the decisions of the Swiss courts, in particular the decisions of the Federal Court (see paragraphs 21 and 22 above), both that the applicant was directly affected by the intervention of the undercover agent and that the national authorities, far from acknowledging that this intervention constituted a violation, expressly decided that it was in fact compatible with the obligations under the Convention. The objection must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

35. Mr Lüdi complained of a twofold breach of Article 8 (art. 8), which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The first breach had been caused by the prolonged use of the undercover agent Toni, who had made use of the personal contact established by deceit to obtain information and influence the conduct of the applicant; the second breach followed from the fact that the agent had at the same time used technical devices in order to gain access to the applicant's home and record conversations which had been provoked by trickery and wrongly incriminated him. In each case there had been an interference with the exercise of his right to respect for his private life, and the interferences had been unjustified, as they were not "in accordance with the law".

36. In the Commission's opinion, the telephone interception was not a breach of the Convention. However, the involvement of an undercover agent changed the essentially passive nature of the operation by introducing to the telephone interception a new factor; the words intercepted resulted

from the relationship which the undercover agent had established with the suspect. Accordingly, there was a separate interference with Mr Lüdi’s private life, requiring separate justification from the point of view of paragraph 2 of Article 8 (art. 8-2). In short, Toni’s activities did not have a sufficient legal basis in the statutory provisions in force.

37. The Government criticised this approach. In their view it was necessary first to examine the permissibility in itself of the use of the undercover agent, and then to examine whether the use of telephone interception in addition thereto was such as to make the use of the undercover agent - legitimate ex hypothesi - incompatible with the requirements of Article 8 (art. 8).

38. The Court notes that, when opening a preliminary investigation against the applicant on 15 March 1984, the investigating judge of the Laufen District Court also ordered the monitoring of his telephone communications. The Indictments Chamber of the Court of Appeal of the Canton of Berne agreed to this measure and later authorised its extension (see paragraph 9 above).

39. There is no doubt that the telephone interception was an interference with Mr Lüdi’s private life and correspondence.

Such an interference is not in breach of the Convention if it complies with the requirements of paragraph 2 of Article 8 (art. 8-2). On this point the Court is in agreement with the Commission. The measure in question was based on Articles 171b and 171c of the Berne Code of Criminal Procedure, which apply - as the Federal Court found (see paragraph 21 above) - even to the preliminary stage of an investigation, where there is good reason to believe that criminal offences are about to be committed. Moreover, it was aimed at the "prevention of crime", and the Court has no doubt whatever as to its necessity in a democratic society.

40. On the other hand, the Court agrees with the Government that in the present case the use of an undercover agent did not, either alone or in combination with the telephone interception, affect private life within the meaning of Article 8 (art. 8).

Toni’s actions took place within the context of a deal relating to 5 kg of cocaine. The cantonal authorities, who had been warned by the German police, selected a sworn officer to infiltrate what they thought was a large network of traffickers intending to dispose of that quantity of drugs in Switzerland. The aim of the operation was to arrest the dealers when the drugs were handed over. Toni thereupon contacted the applicant, who said that he was prepared to sell him 2 kg of cocaine, worth 200,000 Swiss francs (see paragraphs 9 and 13 above). Mr Lüdi must therefore have been aware from then on that he was engaged in a criminal act punishable under Article 19 of the Drugs Law and that consequently he was running the risk of encountering an undercover police officer whose task would in fact be to expose him.

41. In short, there was no violation of Article 8 (art. 8).

III. ALLEGED VIOLATION OF ARTICLE 6 PARAS. 1 AND 3 (d) (art. 6-1, art. 6-3-d)

42. Mr Lüdi complained that he had not had a fair trial. He relied on paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d):

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

The applicant maintained that his conviction had been based above all upon the undercover agent's report and the transcripts of his telephone conversations with the agent, although he had not at any stage of the proceedings had an opportunity to question him or to have him questioned. By their refusal to hear Toni as a witness the Swiss courts had deprived the applicant of the possibility of clarifying to what extent Toni's actions had influenced and determined his behaviour, a question which according to the Federal Court (see paragraph 21 above) was nevertheless an essential one and was in dispute. The failure to call Toni had prevented the courts from forming their own opinion on the latter's credibility.

43. The admissibility of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings, considered as a whole, including the way in which the evidence was submitted, were fair (see, as the most recent authority, the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, para. 33).

As the requirements of paragraph 3 of Article 6 (art. 6-3) represent particular aspects of the right to a fair trial guaranteed in paragraph 1 (art. 6-1), the Court will examine the complaint from the point of view of these two provisions taken together.

44. Although Toni did not give evidence to the court in person, he must for the purposes of Article 6 para. 3 (d) (art. 6-3-d) be considered as a

witness, a term which is to be given an autonomous interpretation (same judgment, pp. 32-33, para. 33).

45. The Government set great store on two factors. Firstly, the conviction of the applicant had not been based to a decisive extent on Toni's reports, as the relevant courts had relied primarily on the admissions of the applicant himself and the statements of his co-defendants. Secondly, the concern to preserve the undercover agent's anonymity derived from the need to continue with the infiltration of drug-dealing circles and protect the identity of informers.

46. In the Commission's opinion, with which the Court agrees, Mr Lüdi first made admissions after he had been shown the transcripts of the telephone interceptions, and he was deprived throughout the proceedings of any means of checking them or casting doubt on them.

47. The Court notes in addition that while the Swiss courts did not reach their decisions solely on the basis of Toni's written statements, these played a part in establishing the facts which led to the conviction.

According to the Court's consistent case-law, all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see the Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 27).

48. The Laufen District Court and the Berne Court of Appeal both refused to call the undercover agent Toni as a witness, on the grounds that his anonymity had to be preserved (see paragraphs 16 and 18 above). The Federal Court held that "the identity and the investigative methods of such agents are not lightly to be given away in criminal proceedings" (see paragraph 21 above).

49. The Court finds that the present case can be distinguished from the Kostovski v. the Netherlands and Windisch v. Austria cases (judgments of 20 November 1989 and 27 September 1990, Series A nos. 166 and 186), where the impugned convictions were based on statements made by anonymous witnesses. In this case the person in question was a sworn police officer whose function was known to the investigating judge. Moreover, the applicant knew the said agent, if not by his real identity, at least by his physical appearance, as a result of having met him on five occasions (see paragraphs 10 and 12 above).

However, neither the investigating judge nor the trial courts were able or willing to hear Toni as a witness and carry out a confrontation which would enable Toni's statements to be contrasted with Mr Lüdi's allegations; moreover, neither Mr Lüdi nor his counsel had at any time during the

proceedings an opportunity to question him and cast doubt on his credibility. Yet it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future.

50. In short, the rights of the defence were restricted to such an extent that the applicant did not have a fair trial. There was therefore a violation of paragraph 3 (d) in conjunction with paragraph 1 of Article 6 (art. 6-3-d, art. 6-1).

IV. APPLICATION OF ARTICLE 50 (art. 50)

51. Under Article 50 (art. 50) of the Convention,

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

52. Pursuant to this Article Mr Lüdi sought reimbursement of his costs and expenses, namely 5,592 Swiss francs for the public law appeal to the Federal Court, 13,168.20 for the proceedings before the Commission and 11,420.40 for those before the Court, including 3,000 in respect of Professor Krauss's fees.

The Government stated that they were prepared to reimburse the sum - not claimed - of 688 Swiss francs for legal costs incurred before the Federal Court, but considered the amounts claimed to be excessive; a sum of 2,000 Swiss francs for the proceedings before the Federal Court would be reasonable. As to the proceedings before the Convention institutions, these should be assessed on an overall basis in the light of the complexity of the case, which was greater than in the majority of the cases hitherto brought before them. The Government disputed the reasonableness of the amounts claimed and the necessity of consulting Professor Krauss, and stated that they were prepared to pay 10,000 Swiss francs, should the Court find that there had been a violation.

In view of the complexity of the case, the Delegate of the Commission considered that the applicant's claims were justified.

53. Having regard to the above findings of the Court (see paragraphs 41 and 50 above), the evidence at its disposal, the observations of those appearing before it and its case-law in this field, the Court considers it equitable to award 15,000 Swiss francs.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection that the applicant is not a victim;

2. Holds unanimously that there has not been a violation of Article 8 (art. 8);

3. Holds by eight votes to one that there has been a violation of paragraph 1 in conjunction with paragraph 3 (d) of Article 6 (art. 6-1, art. 6-3-d);

4. Holds unanimously that the respondent State is to pay the applicant within three months 15,000 (fifteen thousand) Swiss francs for costs and expenses;

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

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 June 1992.

Rolv RYSSDAL
President

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 partly dissenting opinion of Judge Matscher is annexed to this judgment.

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I regret that I do not feel able to agree with the opinion of the majority of the Chamber in finding that there was a failure to comply with the requirements of paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) taken together.

I am as concerned as the majority are for the rights of the defence, which can be infringed as a result of the intervention of "anonymous witnesses" who are then not called to testify before the court, so that the defendant is deprived of his right to challenge their (written) statements under Article 6 para. 3 (d) (art. 6-3-d), in cases where the court bases its finding of guilt "to a decisive extent" on such statements. This was so in the Kostovski and Windisch cases cited in the present judgment.

But in the present case, unlike in the Kostovski and Windisch cases, it can clearly be seen from the documents of the proceedings before the Swiss courts that the trial court based its decision essentially on the unchallenged admissions of Mr Lüdi and the statements of his co-defendants. It is true that the admissions were obtained by trickery through the intervention of the undercover agent, Toni, but that does not mean that they could not be used.

I also accept that the use of undercover agents or other tricks used by police detectives, although entirely legitimate (within certain limits), is not very "nice", but in the fight against certain types of criminality - such as terrorism or drugs -, which is one of the most important tasks of the police in the interests of society, this is often the only method which makes it possible to identify those who are guilty and break up criminal gangs, who for their part also use all the methods available to them. So anyone who knowingly takes part in organised crime runs the risk of falling into a trap.

Of course even a criminal who is caught by one of the methods just described has the right to a fair trial, one of the essential elements of which is the opportunity to put forward before the court, in a reasonable manner, all the arguments of the defence. But if he has substantially admitted the acts he is accused of, the evaluation of his admissions is part of the free assessment of the evidence which is primarily the duty and the right of the trial court. In such circumstances the dismissal by the court of the application to call the undercover agent as an additional witness is not open to criticism by the European Court, especially as the appearance of the witness in question would have made no contribution at all to the better elucidation of the facts subsequently challenged by the defendant.

This makes it unnecessary for me to speculate as to the suggestions - incidentally rather unrealistic ones, in my opinion - that it might have been possible for the Swiss courts to hear the testimony of the undercover agent in a way which avoided disclosing his identity.

I therefore conclude that there was no violation of the rights of the defence in the present case.