



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

CASE OF K.-F. v. GERMANY

(144/1996/765/962)

JUDGMENT

STRASBOURG

27 November 1997

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SUMMARY¹

Judgment delivered by a Chamber

Germany – lawfulness of arrest and detention (Article 127 § 1 and Article 163 b and c of Code of Criminal Procedure)

I. ARTICLE 5 § 1 OF THE CONVENTION

A. Government's preliminary objection (non-exhaustion of domestic remedies)

Applicant had raised his complaint under Article 5 § 1 of the Convention in substance in the German courts – Koblenz Court of Appeal had examined, at least in part, question of lawfulness of applicant's arrest and detention – remedy used by applicant had been effective and adequate.

Conclusion: objection dismissed (seven votes to two).

B. Merits of the complaint

Recapitulation of case-law.

Court could, in principle, follow the reasoning of the Koblenz Court of Appeal in its judgments of 21 May 1992 and 30 November 1993 – applicant had been detained on reasonable suspicion of having committed an offence, within meaning of Article 5 § 1 (c).

Arrest and detention effected also for purpose of bringing person concerned before the competent legal authority, as laid down in that Article.

Court considered various grounds for arrest and detention relied on by Koblenz Court of Appeal, in particular the one based on Article 127 § 1 and Article 163 b of Code of Criminal Procedure: (i) Court of Appeal had found that applicant's arrest and detention had been lawful and the Court saw no reason to come to a different conclusion; (ii) applicant's detention from evening of 4 July to morning of 5 July had been justifiable; (iii) on the other hand, as Koblenz Court of Appeal had indicated in its judgment of 30 November 1993, length of time applicant had spent in detention had exceeded legal maximum laid down by Article 163 c § 3 of Code of Criminal Procedure – in certain circumstances, there might be some limited delay before a detained person was released – however, in the case before the Court, maximum period of twelve hours' detention for purposes of checking identity had been laid down by law and was absolute – it had been for authorities responsible for the detention to take all necessary precautions to ensure that permitted duration was not exceeded.

Conclusion: violation (unanimously).

1. This summary by the registry does not bind the Court.

II. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage: no causal link between violation complained of and alleged pecuniary damage.

B. Non-pecuniary damage: finding of a violation constituted sufficient compensation.

C. Costs and expenses: reimbursed on equitable basis.

Conclusion: respondent State to pay applicant specified sum for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

29.11.1988, Brogan and Others v. the United Kingdom; 30.8.1990, Fox, Campbell and Hartley v. the United Kingdom; 22.9.1994, Hentrich v. France; 28.10.1994, Murray v. the United Kingdom; 22.3.1995, Quinn v. France; 23.4.1996, Remli v. France; 23.10.1996, Ankerl v. Switzerland; 20.3.1997, Lukanov v. Bulgaria; 1.7.1997, Giulia Manzoni v. Italy

In the case of K.-F. v. Germany¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr R. BERNHARDT,

Mr C. RUSSO,

Mr N. VALTICOS,

Mrs E. PALM,

Mr G. MIFSUD BONNICI,

Mr B. REPIK,

Mr K. JUNGWIERT,

Mr U. LÖHMUS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 29 August and 24 October 1997,

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 28 October 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25629/94) against the Federal Republic of Germany lodged with the Commission under Article 25 by a German national, Mr K.-F., on 14 December 1993. The applicant asked the Court not to reveal his identity.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 1 of the Convention.

Notes by the Registrar

1. The case is numbered 144/1996/765/962. 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.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. The applicant stated that he wished to take part in the proceedings (Rule 35 § 3 (d) of Rules of Court B). On 27 November 1996 and 5 August 1997 the President gave him leave to present his own case (Rule 31) and to use the German language in both the written and the oral procedure (Rule 28 § 3).

3. The Chamber to be constituted included *ex officio* Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 29 October 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr C. Russo, Mr N. Valticos, Mrs E. Palm, Mr G. Mifsud Bonnici, Mr B. Repik, Mr K. Jungwiert and Mr U. Löhmus (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the German Government ("the Government"), the applicant and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the orders made in consequence, the Registrar received the applicant's and the Government's memorials on 20 and 27 June 1997 respectively.

5. On 17 January 1997 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 28 August 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr M. WECKERLING, <i>Regierungsdirektor</i> ,	
Federal Ministry of Justice,	<i>Agent,</i>
Mrs MÄDRICH, <i>Regierungsdirektorin</i> ,	
Federal Ministry of Justice,	
Mr L. MAUR, Regional Court judge,	<i>Advisers;</i>

(b) *for the Commission*

Mr K. HERNDL,	<i>Delegate;</i>
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(c) *the applicant.*

The Court heard addresses by Mr Herndl, Mr K.-F. and Mr Weckerling.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mr K.-F. was born in 1946 and is a German national. He was formerly a lawyer and lives with his wife in Karlsruhe.

A. Background to the case

8. In May 1991 the applicant and his wife rented a holiday flat at Ulmen at a daily rent of 40 or 50 German marks (DEM). They occupied the flat from 24 May 1991 and paid DEM 350 rent for their stay in May.

9. On 3 July 1991 the landlady of the flat, Mrs S., asked Mrs K.-F. for payment of rent arrears, including telephone calls, of approximately DEM 4,000.

10. On 4 July 1991, at about 7.50 p.m., Mrs. S. telephoned Cochem-Zell police station and reported that Mr and Mrs K.-F. had caused a car accident. She added that they had rented her flat without intending to perform their obligations as tenants and were about to make off without paying what they owed.

11. Following that call, two police officers went to the flat and took statements from the landlord and the landlady (Mr and Mrs S.) and the tenants. The owners admitted that, for fear that Mr and Mrs K.-F. would make off without paying the rent, they had attempted to stop the couple's son from driving off; they emphasised, however, that he had been determined to force his way through at all costs. Mr and Mrs K.-F., on the other hand, said that the accident had been caused by Mr S.'s aggressive and incomprehensible behaviour towards their son.

12. After consulting the appropriate public prosecutor (*Staatsanwalt*), the police officers inquired into the address of the applicant and his wife at Bad Soden and discovered that it was merely a Post Office box. The Bad Soden police also informed them that the applicant had previously been under investigation for fraud.

B. The applicant's detention

13. At 9.45 p.m. on the same day Detective Sergeant Laux, accompanied by Constables Walther, Kugel and Reuter, arrested Mr and Mrs K.-F. and their son and took them to Cochem-Zell police station so that their identities could be checked. The son was released shortly afterwards but Mr and

Mrs K.-F. were provisionally held in police custody. In a report drawn up at 11.30 p.m. the police stated that they strongly suspected Mr and Mrs K.-F. of rent fraud (*Einmietbetrug*) and that there was a risk that they would abscond. The questioning ended at 12.45 a.m.

14. Inquiries made during the night into the applicant's various addresses revealed that he had been the subject of other criminal proceedings on suspicion of fraud and that the Hanau Public Prosecutor's Office (*Staatsanwaltschaft*) had opened a preliminary investigation in respect of him for the same reason.

15. On the morning of 5 July 1991 (between 8.30 a.m. and 9.40 a.m.), Superintendent Blang of the Cochem-Zell police questioned the applicant further. His wife was interviewed at 9.05 a.m.

16. At about 9.25 a.m. the Hanau Public Prosecutor informed Superintendent Berg, likewise of the Cochem-Zell police, that he did not intend to issue a warrant for the applicant's arrest.

17. At 10.30 a.m. Mr and Mrs K.-F. were released and taken back to Ulmen.

C. Decision not to prosecute the applicant

18. On 5 July 1991 Mrs S. lodged a complaint against Mr and Mrs K.-F. alleging attempted rent fraud.

19. On 13 September 1991 the Koblenz Public Prosecutor's Office discontinued the criminal proceedings against the applicant and his wife on the ground that it had not been proved that Mr and Mrs K.-F. had not intended – or had not been able – to pay the rent owed, as they had paid most of the arrears in mid-July 1991 and there was a civil dispute over the balance. Furthermore, the incident that had occurred at Ulmen on 4 July 1991 did not justify concluding that Mr and Mrs K.-F. had not intended to pay their debts, as only their son had attempted to drive off and there was no concrete evidence to show that they had sought to make off surreptitiously.

D. The criminal proceedings brought by the applicant against the police officers and public prosecutors in the case

1. Proceedings before the offices of the Koblenz Public Prosecutor and the Koblenz Principal Public Prosecutor

20. On 7 October 1991 Mr K.-F. lodged a complaint with the Koblenz Public Prosecutor's Office against the police officers and public prosecutors concerned in the events of 4 and 5 July 1991 alleging false imprisonment (*Freiheitsberaubung*), attempted coercion (*versuchter Nötigung*) and insulting behaviour (*Beleidigung*). He maintained that his arrest and

detention at Cochem-Zell police station had been unlawful, since he had not committed any criminal offence as only the rent tribunal had jurisdiction to hear disputes over the amount of rent. The police officers had likewise acted unlawfully in recording his personal details.

21. On 2 January 1992 the Koblenz Public Prosecutor's Office discontinued the proceedings against Detective Sergeant Laux and three other police officers who had taken part in the arrest, and against the two public prosecutors. The Office considered that in all the circumstances they had not acted unlawfully. In particular, the police officers who had gone to Ulmen during the evening of 4 July 1991 had had reasonable grounds for suspecting Mr and Mrs K.-F. of defrauding Mr and Mrs S. and intending to leave without paying the sums due.

22. The applicant appealed against that decision to the Koblenz Principal Public Prosecutor's Office (*Generalstaatsanwaltschaft*), who confirmed the decision on 28 February 1992.

2. Proceedings in the Koblenz Court of Appeal

23. On 6 April 1992 the applicant applied to the Koblenz Court of Appeal (*Oberlandesgericht*) for an order that Detective Sergeant Laux and Constables Walther, Kugel and Reuter be prosecuted for attempted coercion and false imprisonment.

He described what had happened and said that it had been agreed between his wife and Mrs S. that the rent would be paid on 8 July 1991. That agreement had not been to the liking of Mr S., who had assaulted his son to prevent him driving off. His wife had even called the police for assistance. Furthermore, neither he nor his wife had intended to leave the rented flat; they had not started to pack any suitcases and their personal belongings were still in the cupboards and drawers. The police officers' brutal searching of him, his wife and his son, the searching of their home, their arrest and their subsequent detention had accordingly been totally illegal for want of any basis in law, as they had not complied with the requirements of either Article 163 b or Article 127 § 2 taken together with Article 112 of the Code of Criminal Procedure (*Strafprozeßordnung* – see paragraph 35 below).

24. On 21 May 1992 the Court of Appeal dismissed Mr K.-F.'s application on the ground that there was insufficient cause to prosecute the police officers (*kein hinreichender Tatverdacht*).

It held, *inter alia*:

“There is sufficient cause to prosecute where, in the light of all the evidence and the prosecution’s assessment of the facts, it is to be expected that the potential defendants will be convicted (cf. Kleinknecht/Meyer, [Code of Criminal Procedure], 40th ed., § 170 no. 1). The findings of the investigation do not found such an expectation. There would have been sufficient cause to prosecute for false imprisonment (Article 239 of the Criminal Code) if the accused police officers had unlawfully taken the applicants to the police station and held them there. The investigation did not disclose any such unlawful act. The inquiries made at Ulmen gave the police officers on duty cause to suspect a fraud on Mr and Mrs [S.] (rent arrears and telephone bills amounting to approximately DEM 4,000), especially as the applicants had admitted that they were not then able to find that sum. Furthermore, according to the statements of the witnesses [J.] and [S.] (page 4 of file Js 25638/91) and the findings of the accused police officers (position of the wheels of the vehicle ... – page 4 of the above-mentioned file), the accused police officers had the impression that ‘[K.-F.] intended to drive off come what might’. The fact that the accused police officers, in the light of all these circumstances, consequently suspected the applicant of ‘attempted rent fraud’ cannot be criticised. The arrest was accordingly, on the facts, likewise justified. At the police station the alleged offenders, who had had the applicants’ address checked, learned that, according to inquiries made at Bad Orb, the address there was ‘fictitious’ and that, according to further inquiries made of the Hanau Public Prosecutor’s Office, several sets of proceedings were pending against the applicants for fraud. The applicants’ detention at the police station was therefore justified. The question whether it was necessary to hold them until the following morning can be left open in the instant case as, on grounds of intent at least, the potential defendants’ conviction on a charge of false imprisonment is unlikely.

Nor did the investigation disclose sufficient evidence of joint coercion (Article 240 and Article 25 § 2 of the Criminal Code). On the basis of the information obtained at Ulmen that has previously been referred to, the accused police officers could reasonably presume that an offence had been committed. It was accordingly lawful in the circumstances to carry out a search (Article 163 b § 1, third sentence, of the Code of Criminal Procedure). Besides, even if it were to be accepted that there had been *coercion*, the accused police officers’ behaviour could not be considered reprehensible within the meaning of Article 240 § 2 of the Criminal Code. For the purposes of that provision, reprehensible behaviour is behaviour which in all the circumstances is so manifestly objectionable that it calls for punishment under the criminal law as a gross interference with other people’s exercise of free will (see Criminal Decisions of the Federal Court of Justice 17, 328, 332).

Measured against these principles, the accused police officers’ behaviour cannot be said to have been reprehensible. The findings of the investigation at Ulmen – before the police officers entered the premises – and in particular the conduct of the applicants’ son, who, according to the [S.] family, sought to drive off aggressively in his car, could perfectly well have led the police officers to believe that the applicants might also make off without paying their relatively substantial rent arrears.

The Koblenz Public Prosecutor was therefore right to discontinue the proceedings, there being insufficient cause to bring a prosecution for false imprisonment and coercion.”

3. Resumption of the proceedings against Superintendent Blang before the offices of the Koblenz Public Prosecutor and the Koblenz Principal Public Prosecutor

25. On 21 September 1992 the applicant complained to the Koblenz Principal Public Prosecutor's Office that no official decision had been taken on the allegations against Superintendent Blang of the Cochem-Zell police.

26. On 28 December 1992 the Koblenz Public Prosecutor's Office discontinued proceedings in that case also. It said that the offences of insulting behaviour were statute-barred. As to the offences of attempted coercion and false imprisonment, it pointed to the Koblenz Court of Appeal's judgment of 21 May 1992 to justify discontinuing the proceedings.

27. The applicant appealed against that decision to the Koblenz Principal Public Prosecutor's Office.

28. On 15 February 1993 the Public Prosecutor's Office reopened the investigation in respect of Superintendent Blang and took several written statements, including one from Mr K.-F. and one from Superintendent Blang.

29. On 18 June 1993 the Koblenz Public Prosecutor's Office discontinued the proceedings permanently.

30. The applicant appealed against that decision to the Koblenz Principal Public Prosecutor's Office, which confirmed it on 3 September 1993.

4. Resumption of the proceedings against Superintendent Blang in the Koblenz Court of Appeal

31. On 7 October 1993 Mr K.-F., relying on the same arguments as before (see paragraph 23 above), made a further application to the Koblenz Court of Appeal for an order that Superintendent Blang be prosecuted for attempted coercion, false imprisonment and insulting behaviour.

32. On 30 November 1993 the Court of Appeal dismissed the application on the ground that there was not sufficient cause to bring a prosecution against the superintendent.

It held, *inter alia*:

"There would be sufficient cause to bring a prosecution for false imprisonment (Article 239 of the Criminal Code) if the accused police officer had unlawfully prevented the applicant from leaving the police station. According to the reasons set out on p. 3 of the Division's judgment of 21 May 1992 (1 Ws 164/92), the applicant was held at the police station lawfully. In the aforementioned judgment the Division had already explained that the question whether it had been necessary to hold the applicant in detention until the following morning could be left open as, on grounds of intent at least, the potential defendants (Laux, Walther, Kugel and Reuter) were unlikely to be convicted of false imprisonment. In his report dated 4 July 1991 (pp. 23 et seq. of the file) Detective Sergeant Laux said (p. 24) that 'Mr and Mrs [K.-F.] and their son were first taken to the police station so that their identity could be checked' and Mr and Mrs [K.-F.] were held in police custody after consultation of Supt. Blang. The second sentence of Article 127 § 1 of the Code of Criminal Procedure provides

that the checking of a person's identity by police officers must be conducted in accordance with Article 163 b § 1 of that code. A person affected by a measure taken under Article 163 b for the purposes of checking his identity cannot be deprived of his liberty for more than twelve hours in all. The applicant was detained at 9.45 p.m. on 4 July 1991 (page 19) and released at 10.30 a.m. on 5 July 1991 (page 20). For this detention, which lasted for more than twelve hours, Superintendent Blang was responsible. On the basis of the evidence as it currently stands, however, it appears unlikely that he would be convicted of false imprisonment as ultimately it will not be possible to establish that he was aware that the maximum permitted period had been exceeded.

A conviction for coercion (Article 240 of the Criminal Code) appears equally unlikely.

As to the applicant's allegation that he was ordered to leave the district (*Verweisung*), the decision to discontinue the proceedings rightly points out that it is far removed from reality. The 'raised fist' and the assertion that 'sparks are going to fly' are denied in the accused police officer's statement. No other evidence, beyond the applicant's statements, is to be found. On the basis of the evidence as it currently stands, the decision to discontinue the proceedings cannot be criticised. For these reasons, no offence of extorting a confession (Article 343 of the Criminal Code) has been made out either. Given the information to which the Division has already referred in its judgment of 21 May 1992, the checking of the applicant's identity was justified. Nor, lastly, can the accused police officer be said to be guilty of coercive behaviour in having forbidden the applicant to enter the flat at Ulmen to collect personal belongings. In the police officer's view, his behaviour cannot be shown to have been reprehensible since he had cause to believe that as the rent for the holiday flat had not been paid as agreed, the landlord was entitled to exercise a lien.

The application to the Court against the refusal to prosecute (*Klageerzwingungsverfahren*) was at first sight also admissible in respect of the accusation of insulting behaviour, because the reported criminal act within the meaning of Article 264 of the Code of Criminal Procedure also includes the offences of coercion and false imprisonment, which only the Public Prosecutor's Office can prosecute (*Offizialdelikte*). As, however, there is insufficient cause to bring a prosecution for the offences which can be prosecuted only officially, the third sentence of Article 172 § 2 of the Code of Criminal Procedure again operates to bar (*Sperrwirkung*) the present proceedings to challenge the refusal to prosecute in respect of the alleged insulting behaviour, an offence that can be prosecuted privately (*Privatklagedelikt*), so that the Division is unable to consider the merits of the related accusation."

5. Proceedings in the Federal Constitutional Court

33. On 2 January 1994 the applicant lodged a constitutional complaint (*Verfassungsbeschwerde*) with the Federal Constitutional Court (*Bundesverfassungsgericht*) alleging a violation of his fundamental rights.

34. On 15 March 1994 the Federal Constitutional Court, sitting with three members, declined to accept the complaint for adjudication.

II. RELEVANT DOMESTIC LAW

A. Grounds for arrest and detention

35. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 81 b

“To the extent that they are necessary for the conduct of a criminal investigation or for the purposes of the criminal identification department, a suspect’s photographs and fingerprints may be taken even against his will, his measurements may be recorded and other similar measures taken.”

Article 112 [conditions of detention pending investigation; grounds for detention]

“1. A suspect’s detention pending investigation may be ordered where it is strongly suspected that he has committed an offence and a ground for his detention exists. Detention shall not be ordered if it is disproportionate to the seriousness of the case and to the likely sentence or rehabilitative or security measure.

2. A ground for detention exists where, on the basis of definite facts:

- (1) it is established that the suspect is on the run or in hiding;
- (2) there is a risk, in the circumstances of the case, that the suspect will evade the criminal process (danger of absconding); or
- (3) the suspect’s behaviour gives rise to a strong suspicion that he will
 - (a) destroy, alter, dispose of, suppress, or falsify evidence; or
 - (b) improperly influence other suspects, witnesses or experts; or
 - (c) incite third parties to do so;

and where as a result there is a danger that the discovery of the truth will be impeded (risk of suppression of evidence).

...”

Article 127 [provisional arrest (*vorläufige Festnahme*)]

“1. Anyone may provisionally arrest without a judicial warrant a person caught in the act of committing an offence or being pursued after committing one, if there is reason to believe that he is absconding or if his identity cannot be immediately established. Identity checks by the public prosecutor’s office or the police shall be carried out in accordance with Article 163 b § 1.

2. Members of the public prosecutor’s office and police officers shall have authority to effect a provisional arrest in cases where there is imminent danger, provided that the conditions for the issue of an arrest warrant or warrant of commitment are satisfied.

...”

Article 128 [bringing a suspect before a judge]

“1. If not released, an arrested person must immediately – and in any event no later than the day after his arrest – be brought before a judge of the District Court (*Amtsgericht*) in whose area he was arrested ...

...”

Article 163 b § 1

“The police and the public prosecutor’s office may take such measures as are necessary to establish the identity of a person suspected of an offence ... They may arrest him if his identity cannot be otherwise established or can only be established with great difficulty. On the conditions laid down in the second sentence, the suspect may be searched, articles in his possession examined and measures taken to enable him to be identified.”

Article 163 c

“1. A person affected by a measure provided for in Article 163 b shall under no circumstances be detained for longer than is necessary for his identity to be checked. A person so detained must immediately be brought before a judge of the District Court in whose area he was arrested for it to be decided whether the deprivation of liberty is lawful and whether it should be continued, unless it would foreseeably take longer to obtain a judicial decision than to check his identity.

...

3. Deprivation of liberty for the purpose of checking identity shall not exceed a total of twelve hours.”

36. Article 11 § 1, sub-paragraph 2, of the Rhineland-Palatinate Police Administration Act (*Rheinland-Pfälzisches Polizeiverwaltungsgesetz*) provides:

“The police may take measures to establish or record identity where ... such measures are necessary for the prevention of criminal offences because the person concerned is suspected of having committed a punishable offence and the nature of the offence and the manner in which it was committed are such that there is a danger that it may be repeated.”

B. Review by the courts of judicial administration measures

37. Article 98 §§ 1 and 2 of the Code of Criminal Procedure provide:

“1. Seizure can only be ordered by a judge or, in cases where there is imminent danger, by the public prosecutor or a police officer ...

2. An official who seizes goods without a judicial warrant must, within three days, seek retrospective authority for the seizure from a judge if the seizure was carried out in the absence of the person concerned or a close adult relative, or if the person concerned or (in his absence) a close adult relative expressly objected to it. The person concerned may at any time apply to a judge for a decision ...

...”

38. Under section 23 (1) of the Introductory Act to the Judicature Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz*),

“The lawfulness of orders, injunctions or other measures issued by the judicial authorities in order to settle specific matters in the field of civil law (*bürgerliches Recht*) ... and the administration of criminal justice (*Strafrechtspflege*), shall, upon application, be determined by the ordinary courts ...”

PROCEEDINGS BEFORE THE COMMISSION

39. Mr K.-F. applied to the Commission on 14 December 1993. Relying on Article 5 § 1 of the Convention, he maintained that his arrest and subsequent detention at Cochem-Zell police station were unlawful. He also alleged breaches of Articles 3 and 8 of the Convention, Article 1 of Protocol No. 1 and Articles 1 and 2 of Protocol No. 4.

40. On 16 January 1996 the Commission (First Chamber) declared the application (no. 25629/94) admissible as regards the complaint under Article 5 § 1 and inadmissible as to the remainder. In its report of 10 September 1996 (Article 31), it expressed the opinion by seven votes to six that there had been no violation of Article 5 § 1 of the Convention. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

41. In their memorial the Government asked the Court to declare the application inadmissible for failure to exhaust domestic remedies and, in the alternative, to hold that there had been no breach of Article 5 § 1.

42. The applicant asked the Court to hold that there had been a breach of Article 5 § 1.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

43. The applicant said that his detention overnight from 4 to 5 July 1991 had infringed Article 5 § 1 of the Convention, the relevant part of which provides:

“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;

...”

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

A. The Government's preliminary objection

44. The Government maintained, as they had done before the Commission, that the applicant had not exhausted domestic remedies (Article 26 of the Convention). By merely lodging a complaint against the police officers and making an application to the Court of Appeal to have a prosecution brought (*Klageerzwingungsverfahren*) against them, Mr K.-F. had chosen an inadequate and ineffective means of obtaining a ruling on the lawfulness of his detention. The Koblenz Court of Appeal had had to decide only the issue of the police officers' criminal liability and not the lawfulness of the applicant's arrest and detention, which it had expressly left open. Yet Mr K.-F. could have had the latter issue considered by the domestic courts either by bringing proceedings in the District Court (*Amtsgericht*) under Article 98 § 2, second sentence, of the Code of Criminal Procedure, applied by analogy (see paragraph 37 above) or by making an application to the Court of Appeal under section 23 (1) of the Introductory Act to the Judicature Act (see paragraph 38 above). In failing to use those remedies, the applicant had – contrary to the Court's settled case-law on Article 26 of the Convention – deprived the domestic courts of the possibility of putting right the alleged violation.

45. The applicant, on the other hand, considered that he had satisfied the requirements of that Article, since the Koblenz Court of Appeal had had to examine the issue of the lawfulness of his arrest and detention in the same way as it would have done if he had opted for the other remedies referred to by the Government.

46. The Court reiterates that the purpose of Article 26 is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Convention institutions. Thus the complaint to be submitted to the Commission must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see, for example, the *Ankerl v. Switzerland* judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1565, § 34). However, the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation (see, among other authorities, the *Remli v. France* judgment of 23 April 1996, *Reports* 1996-II, p. 571, § 33), and Article 26 of the Convention must also be applied with some degree of flexibility and without excessive formalism (see, for example, the *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, p. 17, § 30, and the *Ankerl* judgment cited above, *ibid.*).

47. In the instant case the Court notes that, both in his complaint lodged with the Koblenz Public Prosecutor's Office and in his applications to the Koblenz Court of Appeal, the applicant mentioned that his arrest and detention at Cochem-Zell police station had been unlawful (see paragraphs 20 and 23 above). In his appeal to the Federal Constitutional Court against the decisions of the Court of Appeal, he alleged a violation of his fundamental rights (see paragraph 33 above).

The applicant therefore raised his complaint under Article 5 § 1 of the Convention in substance in the German courts.

48. Accordingly, it remains for the Court to determine whether lodging a complaint against the police officers involved in the arrest and detention and then applying to the Court of Appeal to have a prosecution brought against them amounted to an effective and adequate remedy for the applicant's complaint.

49. In that respect the Court, like the Commission, notes that in order to establish whether the police officers had been guilty of false imprisonment, the Koblenz Court of Appeal considered the question of the lawfulness of Mr K.-F.'s arrest and detention.

In its judgment of 21 May 1992 (see paragraph 24 above) it held, *inter alia*, as follows: "There would have been sufficient cause to prosecute for false imprisonment (Article 239 of the Criminal Code) if the accused police officers had unlawfully taken the applicants [Mr and Mrs K.-F.] to the police station and held them there. The investigation did not disclose any such unlawful act." The Court of Appeal then sought to determine whether the police officers had arrested the applicant lawfully on the basis of suspected rent fraud (*Einmietbetrug*) and concluded: "The arrest was accordingly, on the facts, likewise justified." It went on to consider whether there were valid reasons for holding the applicant at the police station and concluded: "The applicants' detention at the police station (*Festhalten auf der Wache*) was therefore justified."

50. It is true that the Court of Appeal left open the question whether the applicant's detention until the following morning had been necessary. However, in its judgment of 30 November 1993 (see paragraph 32 above) it held that Mr K.-F. had been detained for more than the maximum statutory period of twelve hours permitted under Article 163 c § 3 of the Code of Criminal Procedure (see paragraph 35 above) for checking a person's identity.

51. The Court does not doubt that means other than the criminal proceedings the applicant chose to institute were in principle available for obtaining a ruling on the lawfulness of his detention. It considers, however, that in view of the fact that the applicant raised his complaint under Article 5 § 1 in substance and the Court of Appeal examined it at least in part, it cannot be required of him that he should have used other remedies.

52. That being so, the Court, like the Commission, considers that the remedy used by Mr K.-F. was effective and adequate to deal with his complaint. The preliminary objection must consequently be dismissed.

B. Merits of the complaint

53. In the applicant's submission, both his arrest and his detention were unlawful as he had not committed any offence, disputes over the amount of rent belonging, in his view, to the realm of civil law. Furthermore, he had not made any attempt to flee: none of his suitcases had been packed and his personal effects and those of his wife were still in the cupboards and drawers of the rented flat when the police arrived. Nor had he sought at any stage to conceal his identity, having, indeed, supplied the police with all necessary information. In any event, the time he had spent in detention had exceeded the statutory maximum by forty-five minutes.

54. The Government drew a distinction between, on the one hand, the applicant's arrest and detention from 9.45 p.m. on 4 July 1991 to 9.40 a.m. on 5 July 1991 and, on the other hand, the recording of his personal details between 9.45 a.m. and 10.30 a.m. on 5 July 1991. The arrest and detention were justified not only under Article 163 b § 1, first sentence, of the Code of Criminal Procedure (establishing the identity of a person suspected of an offence), but also under Article 127 § 1, first sentence (risk of absconding), and Article 127 § 2 (conditions for issue of an arrest warrant satisfied) (see paragraph 35 above). The maximum limit of twelve hours applied only to detention under the first of those provisions. Under the other two provisions, the person detained had to be brought before a judge at the latest on the day after his arrest, in accordance with Article 128 § 1, first sentence (see paragraph 35 above), and in regard to that requirement the statutory period had not been exceeded. Furthermore, Mr K.-F.'s personal details had been recorded by virtue of Article 81 b of the Code of Criminal Procedure (see paragraph 35 above) and Article 11 § 1 of the Rhineland-Palatinate Police Administration Act (see paragraph 36 above).

55. The Commission expressed the view that the applicant had been arrested and detained on reasonable suspicion of having committed an offence, within the meaning of Article 5 § 1 (c), and for the purpose set out in that Article. Furthermore, it found nothing to persuade it that the relatively minor delay of forty-five minutes in releasing the applicant had resulted in his being arbitrarily deprived of his liberty contrary to the object and purpose of Article 5 § 1.

56. The Court must firstly consider whether the applicant's arrest and detention were based on "reasonable suspicion" of his having committed an offence.

57. In this connection it reiterates that the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c). Having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence (see the *Fox, Campbell and Hartley v. the United Kingdom* judgment of 30 August 1990, Series A no. 182, p. 16, § 32). However, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage of the process of criminal investigation (see the *Murray v. the United Kingdom* judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55).

58. In the present case Mrs S., the landlady, had informed the police that Mr and Mrs K.-F. had rented her flat without intending to perform their obligations as tenants and were about to make off without paying what they owed (see paragraph 10 above). After initial inquiries had revealed that Mr and Mrs K.-F.'s address was merely a Post Office box and that Mr K.-F. had previously been under investigation for fraud (see paragraph 12 above), the police arrested the couple at 9.45 p.m. on 4 July 1991 and took them to the police station so that their identities could be checked (see paragraph 13 above). In a report drawn up at 11.30 p.m. the police stated that they strongly suspected Mr and Mrs K.-F. of rent fraud and that there was a risk that they would abscond.

59. Having regard to those circumstances, the Court can, in principle, follow the reasoning of the Koblenz Court of Appeal, which in its judgments of 21 May 1992 and 30 November 1993 (see paragraphs 24 and 32 above) held that the police officers' suspicions of rent fraud and the danger that Mr K.-F. would abscond were justified. Consequently, the applicant was detained on reasonable suspicion of having committed an offence, within the meaning of Article 5 § 1 (c).

60. It is also a requirement under that provision that the arrest and detention be effected for the purpose of bringing the person concerned before the competent legal authority.

61. The Court points out in this connection that the fact that the applicant was neither charged nor brought before a court does not necessarily mean that the purpose of his detention was not in accordance with Article 5 § 1 (c). The existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 § 1 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, p. 29, § 53).

62. In the instant case there is nothing to suggest that the police inquiries were not conducted in good faith or that the applicant's arrest and detention, which were decided after consultation of the public prosecutor's office, were effected for a purpose other than to complete the inquiries by checking the identity of the applicant and investigating the allegations made against him. To that end, Mr K.-F. and Mrs S., the landlady, were questioned further during the morning of 5 July 1991. Accordingly, it may legitimately be supposed that, had it been possible to confirm the suspicions of rent fraud, the applicant would have been brought before the relevant judicial authority.

The Court therefore finds that the deprivation of liberty in issue pursued the purpose indicated in paragraph 1 (c).

63. Lastly, the Court must determine whether the applicant's arrest and detention were "lawful", including whether they were effected "in accordance with a procedure prescribed by law". It reiterates that the Convention here refers essentially to national law and lays down an obligation to comply with its substantive and procedural provisions, but also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see, for example, the *Lukanov v. Bulgaria* judgment of 20 March 1997, Reports 1997-II, pp. 543-44, § 41; and the *Giulia Manzoni v. Italy* judgment of 1 July 1997, Reports 1997-IV, p. 1190, § 21). In order to resolve that issue, the Court will consider in turn the various grounds for arrest and detention put forward by the Government (see paragraph 54 above).

64. With respect to the danger of the applicant's absconding, the Court observes that it does not follow from the judgment of the Koblenz Court of Appeal (see paragraph 32 above) that that court regarded the danger of absconding as a valid reason for keeping the applicant in custody for more than the permitted twelve-hour period. Furthermore, there is nothing in the case file capable of justifying continued detention on that basis. In deciding to discontinue the proceedings, the Koblenz Public Prosecutor's Office likewise found that there was no concrete evidence to show that Mr and Mrs K.-F. had sought to make off surreptitiously (see paragraph 19 above).

65. As to the ground for arrest set out in Article 127 § 2 of the Code of Criminal Procedure (see paragraph 35 above), it is not apparent from the file that the police relied on that ground as the basis for the arrest and detention or that the strict conditions laid down in that provision were satisfied. On the latter point the Court agrees with the Commission's assessment. In any event, even if that ground had existed, it would have ceased to do so when the Hanau prosecutor informed the police that he did not intend to issue a warrant for Mr K.-F.'s arrest, in other words at 9.25 a.m. on 5 July 1991.

66. There remains to be considered the ground relied on by the Koblenz Court of Appeal, based on Article 127 § 1 and Article 163 b of the Code of Criminal Procedure, which permit, for the purposes of checking identity, the arrest and detention of a person caught in the act of committing an offence if his identity cannot be immediately established (see paragraph 35 above).

67. The Court observes, firstly, that the Court of Appeal, a national court which is in a better position than the Convention institutions to verify compliance with domestic law, found that the applicant's arrest and detention were lawful (see paragraph 24 above). The Court sees no reason to come to a different conclusion.

68. The Court of Appeal left open the question whether it was necessary to hold the applicant until the following morning "as, on grounds of intent at least, the potential defendants' conviction on a charge of false imprisonment [was] unlikely". It has been established, however, that the police continued to make inquiries throughout the night and up until the applicant's release, partly in order to check whether an arrest warrant had been issued against him (see paragraphs 14–16 above). Having regard to those circumstances, the Court concludes that the applicant's detention from 9.45 p.m. on 4 July to 9.45 a.m. the following day was justifiable.

69. On the other hand, it notes that the length of time the applicant spent in detention exceeded the legal maximum laid down by Article 163 c § 3 of the Code of Criminal Procedure (see paragraph 35 above). The Koblenz Court of Appeal came to the same conclusion in its judgment of 30 November 1993 (see paragraph 32 above): "A person affected by a measure taken under Article 163 b for the purposes of checking his identity cannot be deprived of his liberty for more than twelve hours in all. The applicant was detained at 9.45 p.m. on 4 July 1991 (page 19) and released at 10.30 a.m. on 5 July 1991 (page 20). For this detention, which lasted for more than twelve hours, Superintendent Blang was responsible."

70. The Court reiterates in this connection that the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, as the most recent authority, the Giulia Manzoni judgment cited above, p. 1191, § 25).

71. It is true that the Court has accepted that, in certain circumstances, there may be some limited delay before a detained person is released. However, this has been in cases where the period of detention was not laid down in advance by statute and ended as a result of a court order. Practical considerations relating to the running of the courts and the completion of special formalities mean that the execution of such a court order may take time (see the *Quinn v. France* judgment of 22 March 1995, Series A no. 311, p. 17, § 42, and the *Giulia Manzoni* judgment cited above, p. 1191, § 25).

72. However, in the instant case, the maximum period of twelve hours' detention for the purposes of checking identity was laid down by law and was absolute. Since the maximum period of detention was known in advance, the authorities responsible for the detention were under a duty to take all necessary precautions to ensure that the permitted duration was not exceeded. That applies also to the recording of Mr K.-F.'s personal details, which – being included among the measures for checking identity – should have been carried out during the period of detention allotted for that purpose.

73. Having regard to those factors, the Court holds that, because the maximum period laid down by law for detaining the applicant was exceeded, there has been a breach of Article 5 § 1 (c).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

74. Article 50 of the Convention provides:

“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.”

A. Damage

75. Mr K.-F. claimed 3,134.10 German marks (DEM) for pecuniary damage in respect of belongings unlawfully seized by the police and his landlord and landlady, Mr and Mrs S. He also sought DEM 30,000 for non-pecuniary damage on account of the serious consequences which the events of the night of 4 to 5 July 1991 had had on his, his wife's and his son's lives.

76. The Government maintained that the amounts claimed were excessive and that there was no causal link between any possible breach of the Convention and the alleged damage.

77. The Court notes that there is no causal link between the violation complained of and the alleged pecuniary damage.

As to any non-pecuniary damage, the Court considers that the finding of a violation of Article 5 § 1 (c) constitutes sufficient compensation.

B. Costs and expenses

78. The applicant also claimed DEM 11,280 for costs and expenses incurred in the proceedings before the national courts and the Commission, and DEM 2,300 for the proceedings before the Court.

79. In the Government's submission, the amounts claimed were excessive and unfounded as it did not appear that the applicant had incurred them in order to prevent or to have redressed a breach of the Convention.

80. On the basis of the information in its possession and of its relevant case-law, the Court, making its assessment on an equitable basis, awards the applicant DEM 10,000.

C. Default interest

According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by seven votes to two the Government's preliminary objection;
2. *Holds* unanimously that there has been a violation of Article 5 § 1 (c) of the Convention;
3. *Holds* unanimously that the present judgment constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered;
4. *Holds* unanimously
 - (a) that the respondent State is to pay to the applicant, within three months, 10,000 (ten thousand) German marks in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 4% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;
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 27 November 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the partly dissenting, partly concurring opinion of Mr Bernhardt, joined by Mr Löhmus, is annexed to this judgment.

Initialled: R. R.
Initialled: H. P.

PARTLY DISSENTING, PARTLY CONCURRING OPINION
OF JUDGE BERNHARDT, JOINED BY JUDGE LÖHMUS

I.

In my opinion, local remedies were not exhausted in the present case, and the case should have been dismissed for this reason by the institutions of the European Convention on Human Rights.

The applicant was arrested by the German police on 4 July 1991 at 9.45 p.m., and he was kept in police custody until 10.30 a.m. on 5 July. The arrest seems to have been based on two legal provisions: (1) Article 127 § 2 of the Code of Criminal Procedure (the suspicion that Mr K.F. had committed an offence and the risk that he would abscond); (2) Article 127 § 1 in conjunction with Article 163 b (the need to identify persons). On reading, several years after the event, the files available in Strasbourg, one may have doubts as to whether the arrest and its duration were really necessary and could be justified under one or both of these provisions. In order to clarify the lawfulness of the arrest, adequately and finally, the applicant could and should have instituted appropriate proceedings available under German law. These possibilities are mentioned in paragraphs 37 and 38 of the present judgment. The applicant deliberately chose a different procedure; he tried to instigate criminal proceedings against the police officers and certain public prosecutors. These proceedings did not concern primarily the lawfulness of the arrest, but the question whether there was sufficient suspicion that the officials had intentionally committed illegal acts. The decisions quoted in paragraphs 24 and 32 of the present judgment show that ultimately the lack of personal guilt was decisive and that for that reason no criminal proceedings were instituted. The central question of the objective legality of the initial detention was answered only incidentally, and that of its continuation overnight remained entirely open; it would inevitably remain open if no criminal proceedings against the police officers could be instituted for other reasons.

It is the essence of the requirement that domestic remedies be exhausted that national courts have the opportunity to investigate and if necessary redress violations of national law. This the German courts were not able to do in the present case on the basis of the criminal allegations against the officers concerned, which were therefore not an adequate alternative.

II.

Since the majority of the Court decided this preliminary question differently, I feel obliged to base my opinion concerning the merits of the case, the violation of Article 5 § 1 of the Convention, on the assumption that domestic remedies were exhausted.

It was clear at 9.25 a.m. on 5 July 1991 (see paragraph 16 of the judgment) that continued detention was no longer envisaged, and this had the consequence that holding the applicant in custody could not be justified under Articles 112 or 127 § 2 of the German Code of Criminal Procedure. Article 163 c, on the other hand, prohibits detention for the purpose of checking identity for more than twelve hours. Admittedly, the release of the applicant on 5 July at 10.30 a.m. occurred only a short time after the end of the maximum permissible period; nevertheless, in the actual circumstances even this short time of unjustified detention violated the Convention. One could add that Article 163 c permits such an arrest only for the period strictly necessary for identification, and it is difficult to believe that even twelve hours could be considered necessary in the circumstances.