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

THIRD SECTION

CASE OF FROMMELT v. LIECHTENSTEIN

(Application no. 49158/99)

JUDGMENT

STRASBOURG

24 June 2004

FINAL

24/09/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Frommelt v. Liechtenstein,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mrs H.S. GREVE, *judges*,

and also of Mr M. VILLIGER, *Deputy Section Registrar*,

Having deliberated in private on 3 June 2004,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49158/99) against the Principality of Liechtenstein lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Liechtenstein national, Mr Peter G. Frommelt ("the applicant"), on 29 March 1999.

2. The applicant, who had been granted legal aid, was represented by Mr M. Kolzoff, a lawyer practising in Vaduz. The Liechtenstein Government ("the Government") were represented by their Agent, Ambassador D. Ospelt, Permanent Representative of Liechtenstein to the Council of Europe.

3. The applicant alleged, in particular, that there had been procedural shortcomings in the review of his pre-trial detention.

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

5. By a decision of 15 May 2003 the Court declared the application partly admissible.

THE FACTS

6. The applicant was born in 1946.

7. On 14 August 1997 the investigating judge at the Vaduz Regional Court (*Landgericht*), having heard the applicant, ordered that he be taken into pre-trial detention on suspicion of, *inter alia*, embezzlement and

continuous aggravated fraud (file no. 10 Vr 203/97). He found that there was a reasonable suspicion that the applicant had enticed a number of persons to entrust him with the investment of their capital, which he had then fraudulently diverted using a network of partly foreign companies. Giving detailed reasons, the investigating judge found that there was a danger of absconding, a danger that the applicant might influence witnesses, and also a danger of repetition of the offences. Finally, having regard to the seriousness of the offence, the applicant's detention was proportionate to the sentence he risked incurring.

8. On 19 September 1997 the Court of Appeal (*Obergericht*) held a hearing on the applicant's request for release (*Haftprüfungsverhandlung*). The applicant was not represented by counsel at this hearing. Following the hearing, the court ordered that the applicant's detention be continued. It confirmed the reasons advanced by the Regional Court.

9. On the same day the Vaduz Regional Court dismissed the applicant's request of 18 August to have a legal-aid counsel appointed for him. Regarding the applicant's submissions concerning his income and assets, and the fact that he was represented by two counsel of his own choosing in a second set of proceedings (file no. 282/92), it found that he had sufficient means to pay for counsel.

10. On 10 December 1997 the Regional Court ordered the applicant's representation by legal aid counsel. It noted that the investigations and, in particular, an expert opinion, which had meanwhile been submitted, had shown that the applicant had been living exclusively on money obtained from the investors in his various companies and had therefore no means to pay for defence counsel. In the evening of 16 December 1997 the Lawyers' Chamber appointed Mr B.

11. On 17 December 1997 the Court of Appeal held a hearing on the applicant's renewed request for release.

12. At the beginning of the hearing, the applicant's counsel pointed out that he had only been appointed at 6 p.m. on the day before and had therefore been limited to two hours of consultation with the applicant without having had a possibility to study the voluminous file. The Court noted that it had not been informed of the late appointment of counsel for the applicant and drew his attention to the fact that he remained free to request that the hearing be adjourned as the statutory three days' time-limit for its preparation had not been complied with. However, counsel did not request an adjournment.

13. At the close of the hearing, the court ordered the continuation of the applicant's detention. It confirmed the reasons given in the decisions of 14 August and 19 September 1997.

14. On 17 December 1997 the Lawyer's Chamber appointed Mr K. as legal-aid counsel for the applicant.

15. On 14 January 1998 the Court of Appeal, sitting *in camera* as a panel of five judges, dismissed the applicant's appeal against the decision of 17 December 1997. As to the applicant's complaint that he did not have sufficient time to prepare for the hearing of 17 December 1997 concerning his detention, the court noted that his counsel had waived the right to request an adjournment. There were no reasons to doubt the validity of the waiver.

16. On 29 January 1998 the Public Prosecutor's Office requested that the applicant's pre-trial detention be extended to up to one year on account of the complexity of the case. The investigating judge supported this request on 30 January. The applicant was given no opportunity to comment.

17. On 11 February 1998 the Court of Appeal, sitting *in camera* as a panel of five judges, ordered that the applicant's detention would be allowed to last up to one year, i.e. until 13 August 1998 at the latest. With regard to the suspicion against the applicant and the danger of absconding and of a repetition of the offences, the court referred to its decision of 14 January 1998. Invoking Article 131 of the Code of Criminal Procedure (*Strafprozessordnung*), according to which detention on remand must not exceed six months unless the investigations are particularly complex, it found that the present proceedings concerned an exceedingly complex case of white-collar crimes. The offences to be investigated had been committed by a number of co-accused over a period of four years, numerous companies with links to foreign countries were involved and a great number of witnesses had to be heard, many of them under letters rogatory. A period of detention of up to one year appeared proportionate, all the more so because, given the maximum sentence of 10 years' imprisonment, even a further prolongation of the detention to up to two years would be admissible under Article 131.

18. On 5 March 1998 the Supreme Court (*Oberster Gerichtshof*) declared inadmissible the applicant's appeal against the decision of 14 January 1998.

19. On 2 April 1998 the Supreme Court, sitting *in camera*, dismissed the applicant's appeal against the decision of 11 February 1998. As to the applicant's complaint that he had not been heard on the requests for prolongation of his detention prior to the Court of Appeal's decision, the Supreme Court, referring in detail to the Constitutional Court's (*Staatsgerichthof*) case-law, found that the right to be heard could also be complied with where the person concerned had a possibility to appeal against the decision. However, it was advisable in the future to hear detainees on requests for prolongation of the detention.

20. On 4 September 1998 the Constitutional Court dismissed the applicant's complaint against the Supreme Court's decision of 2 April 1998. As to the applicant's complaint that he had not been heard prior to the decision of 11 February 1998, the Constitutional Court noted that the Code

of Criminal Procedure did not require that a detainee be heard prior to a decision to prolong the detention. In these circumstances, the lack of an opportunity to comment was remedied by the possibility to appeal against the decision itself. Nevertheless - as the Supreme Court had rightly pointed out - it would be desirable to hear a detainee before deciding on a request for prolongation of the detention. The Constitutional Court also found that the Supreme Court as well as the Court of Appeal had given sufficient reasons for their decisions.

21. Also on 4 September 1998, the Constitutional Court dismissed the applicant's complaint against the Supreme Court's decision of 5 March 1998. It found that the Court of Appeal had rightly noted that the applicant's first request for legal aid had, on the basis of his own submissions, been dismissed on the ground that he was not indigent. It added that, even conceding that the applicant lost his income on account of his detention, he had considerable assets and had admitted it. The assumption that he was not indigent was confirmed by the fact that at the time he was represented by two counsel of his own choosing in a second set of criminal proceedings. Moreover, the applicant's financial situation had become transparent only after the expert opinion had been filed in November 1997. Shortly afterwards a legal-aid counsel was appointed for him. As to the complaint that the legal aid counsel appointed on 16 December 1997 did not have sufficient time to prepare for the hearing of 17 December, the Constitutional Court confirmed the finding that counsel had validly waived his right to request an adjournment of that hearing.

22. Both the Constitutional Court's decisions were served on 2 October 1998.

THE LAW

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

23. The applicant complained about procedural shortcomings in the review of his pre-trial detention. He relies on Article 5 of the Convention which, so far as material, provides as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed

an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful..”

24. The applicant’s complaint was three-fold: first, that he was not assisted by counsel at the hearing of 19 September 1997 concerning his request for release; second, that his legal aid counsel did not have sufficient time to prepare himself for the hearing of 17 December 1997 concerning his request for release; third, that he was not heard before the decision was given on 11 February 1998 to prolong his detention for up to one year.

25. The Government’s submissions concentrated on the third point. Regarding the fact that the applicant was not heard before the Court of Appeal’s decision of 11 February, the Government argued that Article 5 § 4 did not require an oral hearing in proceedings concerning the review or extension of pre-trial detention.

26. The Government continued that, in any case, procedural shortcomings could be remedied on appeal, which is what happened in the present case. The applicant could put forward his arguments before the Supreme Court and the Constitutional Court. Moreover, both courts recommended that in future a detainee be heard by the Appeal Court in hearings concerning an extension of pre-trial detention, although the Code of Criminal Procedure did not expressly provide for this.

27. The Court notes that the applicant was taken into pre-trial detention falling within the ambit of Article 5 § 1 (c) of the Convention on 14 August 1997. The Liechtenstein courts held hearings on the applicant’s requests for release on 19 September and on 17 December 1997. Further, on 11 February 1998 the Court of Appeal decided upon the investigating judge’s and the public prosecutor’s request to extend the maximum duration of the applicant’s detention to one year.

28. The Court reiterates that Article 5 § 4 of the Convention entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty (see, among may others, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65).

29. Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it is none the less essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see, *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22). Furthermore, the procedure in

question must have a judicial character and give the individual the guarantees appropriate to the kind of deprivation of liberty in question. In particular, it must be adversarial, i.e. it must ensure "equality of arms" between the parties, the prosecutor and the detained person (*Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II with further references).

30. Moreover, in the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see for instance, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3302, § 162 with further references; *Nikolova*, cited above, § 58).

31. The Court will examine each of the applicant's complaints in turn. As to the lack of legal representation at the hearing of 19 September 1997 concerning the applicant's request for release, the Court observes that the applicant's legal aid request was refused on the day of the hearing on the ground that he was not indigent. Moreover, he was represented by counsel of his own choosing in a second set of criminal proceedings. The Court of Appeal could, therefore, assume that the applicant was in a position to appoint counsel if he wished to be represented. The Court does not see any particular circumstances which would have required the court to ensure, of its own motion, that the applicant be represented by counsel (see, *mutatis mutandis, Megyeri*, cited above, §§ 22-23). Consequently, the applicant's rights as guaranteed by Article 5 § 4 have not been infringed in this repect.

32. The applicant complained next that his legal aid counsel had had insufficient time to prepare for the hearing of 17 December 1997 which dealt with a further request for release. The Court notes that following the decision of 10 December to grant the applicant legal aid, counsel had only been appointed by the Lawyers' Chamber on 16 December. At the beginning of the hearing of 17 December counsel drew the court's attention to this fact and submitted that his preparation had been limited to two hours' consultation with the applicant while he had not had a possibility to study the voluminous file. The court cautioned him that he was entitled to request that the hearing be postponed. However, counsel did not make use of this right.

33. According to the Court's case-law, equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29, *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I). The Court considers that lack of adequate time to prepare a hearing bearing on the lawfulness of pre-trial detention may also infringe Article 5 §4. However, in the present case, it must examine whether the applicant validly waived his right to an effective preparation of the said heaing. In this connection, the Court reiterates that the waiver of a right

guaranteed by the Convention - insofar as it is permissible - must be established in an unequivocal manner, a waiver of procedural rights requiring in addition minimum guarantees commensurate to its importance (see *Schöps,* cited above, § 48).

34. In the circumstances of the present case, the Court considers that the failure of the defence to request a postponement of the hearing constituted an unequivocal waiver. It was accompanied by sufficient guarantees, namely the applicant's legal representation and due cautioning by the court. The conditions for a valid waiver of a procedural right are therefore fulfilled. Consequently, Article 5 § 4 has not been infringed in this respect.

35. Finally, the Court turns to the applicant's complaint that he was not heard by the Court of Appeal before its decision of 11 February 1998, which prolonged the maximum duration of his detention to one year.

36. The Court notes that the Court of Appeal examined the issue in camera and in absence of the applicant, whereas it follows from the Court's case-law that a hearing is required for the review of the lawfulness of pre-trial detention (see paragraph 30 above). The Court observes that what was at stake in the present case was the prolongation of the applicant's detention for a substantial period of time, i.e. half a year, involving the assessment of new elements which had not yet been the subject of the previous decision, namely the complexity of the investigations. Moreover, the court had to decide whether the danger of absconding and of a repetition of the offences persisted, and two months had elapsed since the last hearing at which the applicant had been able to address this issue. The lack of a hearing appears all the more important as the applicant was not given an opportunity to comment on the requests of the investigating judge and the public prosecutor to extend the maximum duration of his detention. In sum, the proceedings before the Court of Appeal were not truly adversarial and did not ensure equality of arms between the parties. The Court is not convinced by the Government's argument that any procedural shortcomings were remedied on appeal, as the Supreme Court also did not hold a hearing when dealing with the applicant's appeal against the decision of 11 February 1998.

37. Consequently, there has been a violation of Article 5 § 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

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

A. Damage

39. The applicant requested 10,000 euros (EUR) for non-pecuniary damage. The Government contended that the claim was not justified.

40. The Court, having regard to its established case-law (see, for a summary, *Nikolova*, cited above, § 76) considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage the applicant may have sustained in the present case.

B. Costs and expenses

41. The applicant claimed a total amount of 13,628.30 Swiss francs (CHF), equivalent to EUR 8,789.62 [on 4 June 2003, the date on which the applicant's claim was submitted]. This amount is composed of CHF 4,019.10 (EUR 2,592.13) in respect of costs incurred in the domestic proceedings and CHF 9,609.20 (EUR 6,197.48) incurred in the Convention proceedings. The costs of the Convention proceedings include CHF 3,360 (EUR 2,167.04) for costs of translation of the Court's decision of 15 May 2003 from English into German.

42. The Government submitted that there was no basis for reimbursing the translation costs. Furthermore, the remaining costs were excessive.

43. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred in order to seek prevention or rectification of a violation of the Convention and are reasonable as to quantum (*Nikolova*, cited above, § 79).

44. As to the costs of the domestic proceedings, the Court notes that, as from 10 December 1997 the applicant was represented by legal aid counsel. The legal acts which can be considered as having caused costs necessary for the rectification of the violation found, namely the appeal to the Supreme Court against the Court of Appeal's decision of 11 February 1988 and the further complaint to the Constitutional Court, occurred after that date. The documents submitted by the applicant, namely a global statement of fees relating to the criminal proceedings against him, do not show that the costs claimed related to these acts and were not covered by legal aid. The Court, therefore makes no award under this head.

45. Regarding the costs of the Convention proceedings, the Court notes that the applicant again benefited from legal aid and that only one of altogether five complaints was declared admissible. Further, the Court finds that the translation costs were not necessarily incurred, as the applicant was represented by counsel having a sufficient command of English. Making an assessment on an equitable basis, the Court awards the applicant EUR 1,000 less EUR 685 paid in legal aid by the Council of Europe, that is, EUR 315.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 315 (three hundred and fifteen euros) in respect of costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 24 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Mark VILLIGER
Deputy Registrar

Georg RESS
President