CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF DZELILI v. GERMANY

(Application no. 65745/01)

JUDGMENT

STRASBOURG

10 November 2005

FINAL

10/02/2006

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 Dželili v. Germany,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mrs R. JAEGER,
Mr E. MYJER, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 65745/01) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of the former Yugoslav Republic of Macedonia, Mr Dževdet Dželili ("the applicant"), on 7 December 1999.

2. The applicant, who had been granted legal aid, was represented by Mr B. Wagner, a lawyer practising in Hamburg. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent,* and, subsequently, Mrs A. Wittling-Vogel, *Ministerialrätin*, of the Federal Ministry of Justice.

3. The applicant, invoking Article 5 §§ 1 and 3 and Article 6 § 1 of the Convention, alleged that the length of his detention on remand and of the criminal proceedings against him had exceeded a reasonable time.

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 8 July 2004 the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

8. The Government of the former Yugoslav Republic of Macedonia, having been informed of their right to intervene (Article 36 § 1 of the Convention and former Rule 61 of the Rules of Court), did not propose to exercise this right within the prescribed time-limit.

THE FACTS

9. The applicant was born in 1971. When lodging his application, he was detained in Oldenburg, Germany. He is presently living in Hamburg, Germany.

A. Investigation proceedings

10. On 6 July 1996 the applicant was arrested in Wilhelmshaven. On 7 July 1996 the Wilhelmshaven District Court issued a warrant of arrest against the applicant on the ground that there was a strong suspicion that he had committed five counts of robbery and one count of robbery in connection with attempted murder.

11. On 4 November 1996 the Oldenburg Public Prosecutor's Office charged the applicant with attempted murder, aggravated robbery causing physical injury, and an offence under the Federal Weapons Act.

12. On 6 December 1996 the Oldenburg Regional Court dismissed the applicant's motion to have Mr B. appointed as defence counsel.

13. On 8 January 1997 the Oldenburg Court of Appeal ordered that the applicant's detention on remand be continued on the grounds that the strong suspicion that he had committed the crimes he was accused of persisted and that he was likely to abscond if released.

14. On 14 January 1997 the Oldenburg Court of Appeal dismissed the applicant's appeal against the Regional Court's decision of 6 December 1996.

B. First trial before the Oldenburg Regional Court

15. On 18 February 1997 the Oldenburg Regional Court admitted the indictment without modifications and decided to open the trial against the applicant and two other accused. The trial started on 14 March 1997.

16. On 25 June and 26 September 1997 the Oldenburg Regional Court confirmed the arrest warrant of 7 July 1996. On 29 December 1997 the Oldenburg Regional Court dismissed the applicant's request to suspend the arrest warrant of 7 July 1996.

17. On 22 May 1998, after the trial had taken place on fifty-five days with an average duration of ninety minutes, a lay assessor fell ill. As the

designated substitute lay assessor had withdrawn previously, also due to illness, the trial had to begin anew.

18. On 28 May 1998 the Oldenburg Regional Court upheld the arrest warrant. It found that irrespective of the delays occasioned by the assessors' illness, the applicant's continued detention was proportionate given the serious nature of the crimes he was charged with.

C. Second trial before the Oldenburg Regional Court

19. On 2 June 1998 the trial was reopened with two substitute lay assessors.

20. On 22 June 1998 the Oldenburg Court of Appeal rejected the applicant's appeal against the Oldenburg Regional Court's decision of 28 May 1998 upholding the arrest warrant.

21. On 1 February 1999, the applicant alleged for the first time that he had been in Tetovo, in Macedonia, at the time of the offence.

22. On 10 February 1999 the Oldenburg Regional Court dismissed the applicant's request to suspend the execution of the arrest warrant. It decided that investigations in Macedonia with regard to the applicant's alibi be conducted by way of letters rogatory.

23. On 25 February 1999 the Oldenburg Regional Court, following the applicant's appeal, refused to change its decision of 10 February 1999 (*Nichtabhilfe der Beschwerde*) and forwarded the appeal to the Oldenburg Court of Appeal. According to the Regional Court, the applicant's continued detention on remand was not disproportionate. It reasoned that, if the applicant were convicted, his sentence would exceed the length of the detention on remand so far, due to the serious nature of the crimes and the damages and injuries suffered by the victim. As to the length of the proceedings, the Regional Court noted that there had been debates on whether to disjoin the applicant's case from the proceedings against his co-accused, but the applicant had not seemed interested in speeding up the proceedings.

24. On 28 June 1999 the Oldenburg Regional Court again dismissed the applicant's request to suspend the execution of the arrest warrant. On 12 July 1999 the Oldenburg Regional Court, following the applicant's appeal, confirmed its decision of 28 June 1999.

25. On 23 July 1999 the Oldenburg Court of Appeal dismissed the applicant's further appeal and confirmed the Regional Court's decision of 28 June 1999.

26. On 10 September 1999 the Oldenburg Regional Court rejected the applicant's request to dismiss his court-appointed defence counsel from office, as there was no appearance that the said counsel had not fulfilled his duties. It also found that the loss of trust alleged by the applicant and his counsel had not been substantiated.

27. On 17 September 1999 the Oldenburg Regional Court was informed by the Public Prosecutor's Office that the investigations in Macedonia with regard to the applicant's alibi by way of letters rogatory had not been carried out. The applicant stated that he would adduce one hundred defence witnesses, two at each hearing.

28. On 27 September 1999 the Oldenburg Regional Court rejected the applicant's motion for bias.

29. On 31 January 2000 one of the four alibi witnesses from Macedonia who had been summoned by the Oldenburg Regional Court through diplomatic channels following the alibi of 1 February 1999, appeared and testified in court.

30. On 14 June 2000 the Oldenburg Regional Court dismissed the applicant's request to suspend the execution of the arrest warrant. It found that, if released, the applicant very likely would abscond, given the circumstances of his arrest and the sentence which he risked incurring if found guilty as charged. The Regional Court noted that the applicant was residing illegally in Germany and that an expulsion order had been issued against him. It further observed that he had been about to abscond when he was arrested. Under these circumstances, the length of the applicant's detention on remand was not disproportionate. The Regional Court included a detailed account of the trial, explaining the continued conduct of the proceedings, which disclosed that on several occasions witnesses could not be questioned by the court because they either did not come to the hearing or made use of their right not to testify. Furthermore, the applicant and his co-accused had, often later than necessary, filed numerous motions for evidence to be taken. It observed that at the present time, it was not possible to disjoin the applicant's case from the cases of the other defendants, as they were accused of having committed the offences jointly.

31. On 15 August 2000 the Oldenburg Court of Appeal rejected the applicant's appeal against the decision of 14 June 2000. It found that the length of time spent in detention on remand alone did not justify releasing the applicant and that his continued detention was proportionate.

32. On 26 September 2000 the Oldenburg Regional Court dismissed the applicant's request to suspend the execution of the arrest warrant on the ground that contrary to his allegations, suspicion persisted that the applicant had committed the crimes he was accused of. It was still likely that he would abscond if released, given in particular the high prison sentence he risked incurring if found guilty according to the indictment.

33. On 1 November 2000 the Oldenburg Regional Court refused to change its decision of 26 September and forwarded the applicant's appeal to the Oldenburg Court of Appeal. It noted that the applicant had caused some of the procedural delays himself by knowingly delaying the naming of defence witnesses.

34. On 16 November 2000 the Oldenburg Court of Appeal rejected the applicant's appeal and confirmed the decision of 26 September 2000.

35. On 13 December 2000 the applicant lodged a complaint against the decisions of the Oldenburg Regional Court of 26 September 2000 and of the Oldenburg Court of Appeal of 16 November 2000 with the Federal Constitutional Court. He argued that his continued detention on remand, given, *inter alia*, the excessive duration of the trial before the Oldenburg Regional Court, was unconstitutional.

36. On 28 December 2000 the Oldenburg Regional Court had been informed that another twenty-three defence witnesses from Macedonia refused to appear in court. The translated protocols of their hearing, which had been conducted by way of letters rogatory by judges in Macedonia, were read out in court.

37. On 11 January 2001 the Federal Constitutional Court refused to admit the applicant's constitutional complaint of 13 December 2000.

38. On 20 March 2001 the Oldenburg Regional Court pronounced its judgment after having held an average of less than four hearings per month with an average duration of less than two and a half hours each. It convicted the applicant of aggravated robbery and dangerous bodily injury and acquitted him of attempted murder. It found that the applicant and his co-accused *Cevizovic*, who had both been masked and had been carrying weapons, had broken into L.'s house and had robbed L. by use of force. It sentenced the applicant to eight years' imprisonment. In fixing the length of the sentence, the Regional Court took into consideration as a mitigating factor the inordinate length of his detention on remand and of the criminal proceedings. It refered in particular to the delay occasioned by the sickness of the lay assessors and the ensuing suspension of proceedings, and stated that this delay was not imputable to the applicant.

D. Proceedings before the Federal Court of Justice

39. On 22 March 2001 the applicant lodged an appeal on points of law against the Oldenburg Regional Court's judgment.

40. On 13 July 2001 the Oldenburg Regional Court dismissed the applicant's request to suspend the execution of the arrest warrant. It argued that the applicant had been sentenced to eight years' imprisonment and that his detention on remand was not yet disproportionate as he had not yet served two thirds of his prison sentence.

41. On 7 August 2001 the Oldenburg Court of Appeal dismissed the applicant's appeal against the Regional Court's decision of 13 July 2001. It found that the danger that the applicant might abscond if released still persisted.

42. On 17 August 2001 the applicant lodged another complaint with the Federal Constitutional Court. He complained that the Oldenburg Regional

Court, in its decision of 13 July 2001, and the Oldenburg Court of Appeal, in its decision of 7 August 2001, had refused to suspend the execution of the arrest warrant. In particular, the said courts had not taken the length of his detention on remand and of the criminal proceedings adequately into consideration.

43. On 10 September 2001 the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

44. On 12 September 2001 the reasoned judgment of the Oldenburg Regional Court, comprising 201 pages, was deposited with its registry.

45. On 6 November 2001 the Oldenburg Regional Court decided to suspend the execution of the arrest warrant against the applicant. On 7 November 2001 the applicant was released from prison.

46. On 8 November 2001 the applicant substantiated his appeal on points of law. He argued, *inter alia*, that in its decision, the Regional Court had not taken the length of the criminal proceedings adequately into account and had not specified the effects of this length on the sentence.

47. On 17 April 2002 the Public Prosecutor's Office filed its observations on the applicant's appeal with the Regional Court. On 13 August 2002 the Public Prosecutor's Office sent the case-files to the Federal Public Prosecutor.

48. On 27 November 2002 the Federal Public Prosecutor sent the case-files and his own motions concerning the applicant's appeal to the Federal Court of Justice.

49. On 11 September 2003 the Federal Court of Justice, after a hearing, partly quashed the judgment of the Oldenburg Regional Court in respect of the applicant's sentence and remitted the case to a different chamber of the Oldenburg Regional Court.

50. In the reasons of the judgment prepared on 22 October 2003, the Federal Court of Justice found that the duty to proceed expeditiously guaranteed by Article 6 § 1 of the Convention had been violated at least during the first half of the second trial by the Oldenburg Regional Court. It stated that the judges rehearing the case would have to assess in detail the reasons and exact length of these delays as well as further delays contrary to the rule of law which had occurred afterwards. They would then have to fix explicitly the sentence which would have been adequate without the delays in the proceedings and the actual sentence as mitigated because of these delays, thereby precisely assessing the amount of compensation granted.

E. Retrial before the Oldenburg Regional Court

51. On 13 April 2004 the Oldenburg Regional Court quashed the arrest warrant against the applicant.

52. On 16 August 2004 the Regional Court opened the new trial against the applicant. On 2 September 2004, after a total of four hearings, it

sentenced the applicant to six years and six months' imprisonment for the crimes of aggravated robbery and dangerous bodily injury he had already been finally convicted of. It suspended on probation the remainder of the applicant's sentence which he had not yet served in detention on remand.

53. In its reasons for fixing the said prison sentence, the Regional Court found that, having regard to all factors aggravating and mitigating the applicant's guilt, it would have sentenced the applicant to nine years' imprisonment if the proceedings had been terminated within a reasonable time. However, the applicant's right under Article 6 § 1 of the Convention to a hearing within a reasonable time had been violated in the proceedings against him, which necessitated the reduction of his sentence.

54. The Regional Court argued in particular that in the criminal proceedings as a whole there had been a total delay of three years and eleven months which was imputable to the judicial authorities. In particular, it was attributable to them that the initial trial before the Oldenburg Regional Court had to begin anew after some fourteen months, because a lay assessor had fallen ill.

55. The Regional Court further found that in the second trial before the Oldenburg Regional Court, there had been a total delay of sixteen months and two weeks for which the judicial authorities were responsible. It listed in detail the exact periods in which the proceedings had not been conducted within a reasonable time in this respect. As the courts were understaffed, it had in fact not been possible to conduct the proceedings more expeditiously, but this was not the applicant's fault. However, the applicant himself had also caused considerable delays in these proceedings. He had alleged for the first time only on 1 February 1999 that he had been in Macedonia at the time of the offence, and had subsequently named numerous defence witnesses resident in Macedonia in an attempt to establish his false alibi. The court found that the slow execution of the letters rogatory by the foreign authorities to verify the applicant's alibi was also imputable to the German judicial authorities. Despite this, the applicant's choice of the points in time and way of lodging motions for evidence to be taken had contributed significantly to the total duration of the proceedings.

56. Furthermore, the Regional Court found that there had been a total delay of eleven months in the proceedings before the Federal Court of Justice which were imputable to the judicial authorities, notably the Public Prosecutor's Office and the Federal Court of Justice itself.

57. Finally, the Regional Court observed that there had been a delay of five months in the current retrial proceedings.

58. The Regional Court further found that the delays caused during the second trial before the Oldenburg Regional Court, when the applicant had already been detained on remand for more than two years, were of a particular gravity. These delays also violated Article 5 § 3 of the Convention.

F. Proceedings before the Federal Court of Justice

59. The applicant subsequently lodged an appeal on points of law against the Oldenburg Regional Court's judgment delivered on 2 September 2004.

60. On 17 March 2005 the Federal Court of Justice dismissed the applicant's appeal as ill-founded. It reasoned in particular that in the Regional Court's findings concerning the specific delays in the proceedings there was merely a mistake for the benefit of the applicant. It argued that the illness of two lay assessors in the first trial before the Oldenburg Regional Court had caused an unavoidable interruption of the proceedings. The loss of time caused thereby could not be qualified as a delay within the meaning of Article 6 § 1 of the Convention. Apart from that, the Federal Court of Justice agreed with the periods of time determined by the Regional Court in which the applicant's proceedings had not been conducted with the necessary diligence.

61. As regards the delays caused by the retrial in the Oldenburg Regional Court after the remittal of the case, the Federal Court of Justice stressed that it had been correct merely to take into consideration the actual delays imputable to the judicial authorities. The right to lodge an appeal on points of law served to protect the applicant's rights. The fact as such that the Regional Court's judgment had partly been quashed on appeal did not, therefore, necessitate treating the whole duration of the retrial as a delay within the meaning of Article 6 of the Convention. Only in cases in which a lower court had made a significant error of law a different conclusion might be called for. However, even if the whole duration of the retrial before the Oldenburg Regional Court were to be treated as a delay imputable to the judicial authorities within the meaning of Article 6 of the Convention, the total reduction of the applicant's sentence, having regard to the brutality of his crime, would be adequate.

62. On 17 May 2005 (decision served on 22 May 2005) the Federal Court of Justice dismissed the applicant's complaint that he had not been adequately heard as ill-founded.

G. Proceedings before the Federal Constitutional Court

63. On 22 July 2005 the applicant lodged a complaint with the Federal Constitutional Court. He claimed that the length of his detention on remand and the length of the criminal proceedings against him had violated his rights guaranteed by the Basic Law. The proceedings are currently pending in the Federal Constitutional Court.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 and 3 OF THE CONVENTION

64. The applicant claimed that the length of his detention on remand had been excessive, and that there had accordingly been a breach of Article 5 §§ 1 and 3 of the Convention, which, in so far as relevant, 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;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The parties' submissions

1. The applicant

65. The applicant submitted that after four years of detention on remand at the latest, there had no longer been sufficient grounds for his continued imprisonment. There had no longer been a danger that he would abscond if released, given that he had then served a large part of his potential prison sentence. Furthermore, the criminal proceedings before the Oldenburg Regional Court, both before and after the suspension of the proceedings in 1998, had been delayed by an insufficient number of hearings per month, each of which was of very short duration.

66. The applicant further maintained that he had not lost his status of victim within the meaning of Article 34 of the Convention. Even though the Federal Court of Justice had found that his detention on remand had lasted an unreasonably long time, national law did not provide for adequate redress in this respect. In particular, his sentence had merely been mitigated by the Oldenburg Regional Court after the remittal of the case because of the protracted length of the criminal proceedings, irrespective of his prolonged

detention on remand. It was altogether not comprehensible in how far his sentence had been reduced because of the violation of his Convention rights.

2. The Government

67. The Government maintained that the applicant had lost the status of victim within the meaning of Article 34 of the Convention. They pointed out that in its judgment of 11 September 2003, the Federal Court of Justice had expressly established and recognised a violation of Article 6 § 1 of the Convention on account of the excessive length of the proceedings and the undue length of the applicant's detention on remand. In addition to that, the Oldenburg Regional Court, in its judgment delivered on 2 September 2004, had also expressly acknowledged that Article 5 § 3 of the Convention had been violated. Furthermore, the said court had explicitly and measurably reduced the applicant's prison sentence from nine years to six years and six months, not only because of the excessive length of his proceedings, but also because of his prolonged detention on remand. In its decision delivered on 17 March 2005 the Federal Court of Justice had affirmed the Regional Court's fixing of the sentence. There had not been any further delays imputable to the judicial authorities which would have warranted a further reduction of the applicant's sentence.

B. The Court's assessment

1. Period to be taken into consideration

68. The period to be considered under Article 5 § 3 started on 6 July 1996, when the applicant was arrested. The Court, having regard to its case-law (see, amongst others, *Labita v. Italy* [GC], no. 26772/95, § 147, ECHR 2000-IV), finds that for the purposes of Article 5 § 3 the period of detention on remand ended on 20 March 2001, when the Oldenburg Regional Court pronounced its judgment at first instance. The applicant was accordingly held in detention on remand for a total period of some four years and eight months.

2. The reasonableness of the length of detention

69. The Court recalls that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features and on the basis of the reasons given in the domestic decisions and of the well-documented facts mentioned by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs

the rule of respect for individual liberty (see, among other authorities, *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, p. 15, § 30; *Labita*, cited above, § 152).

70. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see, among others, *I.A. v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2979, § 102; *Labita*, cited above, § 153).

a. Grounds for continued detention

71. As to the grounds for the applicant's continued detention, the Court notes that the national courts advanced several reasons for not suspending the execution of the arrest warrant. They argued that there had been a persisting strong suspicion that the applicant was guilty of aggravated robbery and attempted murder. The applicant's continued detention had been proportionate because of the serious nature of these crimes and because the applicant was likely to abscond if released. He had tried to flee already when arrested, was liable to expulsion to the former Yugoslav Republic of Macedonia and, if found guilty as charged, risked a long prison sentence.

72. The Court notes that the applicant had finally been acquitted of attempted murder, but had been convicted of aggravated robbery and dangerous bodily injury. It accepts that at least a reasonable suspicion that the applicant was guilty of the crimes he had been convicted of had persisted throughout the trial before the Oldenburg Regional Court. It further finds that these offences were of a serious nature.

73. As regards the danger of the applicant's absconding, the Court observes that the possibility of a severe sentence alone is not sufficient after a certain lapse of time to justify the continued detention based on the risk of escape (see *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 25, § 14; *B. v. Austria*, judgment of 28 March 1990, Series A no. 175, p. 16, § 44). However, in the present case the national courts also relied on other relevant circumstances. These comprised the facts that the applicant resided illegally in Germany, that an expulsion order had already been issued against him, and that he had tried to flee already when arrested. The Court is therefore satisfied that a substantial risk of the applicant's absconding persisted for the total period of his detention.

74. Consequently, the Court concludes, as it has also done in respect of the applicant's co-accused in the proceedings underlying this case

(see *Cevizovic v. Germany*, no. 49746/99, §§ 39-42, 29 July 2004), that there have been relevant and sufficient grounds for the applicant's continued detention.

b. Conduct of the proceedings

75. It remains to be ascertained whether the judicial authorities displayed "special diligence" in the conduct of the proceedings.

76. The Court, referring to its findings in the case of *Cevizovic* (cited above, § 44), takes the view that the applicant's case had been complex. It concerned serious charges against him and two co-defendants. It had necessitated *inter alia* inquiries by way of letters rogatory abroad, and had involved hearing many witnesses, some of whom had to be summoned abroad.

77. As regards the applicant's conduct in the proceedings before the Oldenburg Regional Court until its judgment delivered on 20 March 2001 the Court recalls that it should not be overlooked that an accused person in detention is entitled to have his case given priority and conducted with particular expedition. However, this must not stand in the way of the efforts of the judges to clarify fully the facts in issue and to give both the defence and the prosecution all facilities for putting forward their evidence (see *Wemhoff*, cited above, p. 26, § 17). The Court notes that the applicant alleged for the first time on 1 February 1999, that is, more than two and a half years after his arrest that he had been in the former Yugoslav Republic of Macedonia at the time of the offence. In order to verify the applicant's alibi – which had finally proved to be false – the Oldenburg Regional Court had not only conducted investigations in the former Yugoslav Republic of Macedonia through letters of request. That court had also summoned several defence witnesses, the naming of whom the applicant had deliberately delayed on several occasions, through diplomatic channels in the former Yugoslav Republic of Macedonia. The necessity to conduct investigations abroad had, as is characteristic for such investigations, proved to be rather time-consuming. The Court finds that the applicant, by belatedly producing his alibi and naming his defence witnesses, had considerably contributed to the delays in the proceedings from February 1999 onwards.

78. Having regard to the conduct of the proceedings by the judicial authorities, the Court observes that, following the indictment of 4 November 1996, the trial before the Oldenburg Regional Court began on 14 March 1997. The hearings took place on fifty-five days with an average duration of ninety minutes. On 2 June 1998, the trial had to be reopened and all witnesses had to be reheard after a lay judge and her replacement judge had fallen ill. Following this interruption, the trial continued with an average of less than four hearings per month, each lasting an average of less than two and a half hours, until the Regional Court's decision of 20 March 2001.

79. As to the delay resulting from the need to repeat part of the applicant's trial after both a lay judge and his replacement lay judge had fallen ill, the Court accepts that the illness of two lay assessors had not been predictable for the Regional Court. Nevertheless, the delay caused by the interruption of the proceedings is not imputable to the applicant. Responsibility for this delay rests within the sphere of the Regional Court, which alone was in a position to avoid it by appointing a second replacement lay assessor at the beginning of the trial.

80. The Court, referring to its findings in the case of *Cevizovic* (cited above, § 51) in this respect, further finds that after the said interruption the trial court did not proceed with diligence when holding an average of less than four court hearings per month without making an effort to summon witnesses in a more efficient way. Bearing in mind that when the proceedings were resumed in June 1998, the applicant had already been detained on remand for almost two years, the Court finds that the competent court should have fixed a tighter hearing schedule in order to speed up the proceedings. The Court bears in mind that parts of the delays had been caused by the necessity to await the progress and outcome of the Regional Court's investigations abroad. However, these investigations had only been initiated following the applicant's production of an alibi in February 1999, when he had already been held in pre-trial detention for more than two and a half years.

81. In the light of these various factors, the Court finds that the competent national court failed to act with the necessary special diligence in conducting the applicant's proceedings. Therefore, the Court concludes, as it has done in the case of *Cevizovic* (cited above, §§ 55-56), that the length of the applicant's detention cannot be regarded as reasonable.

3. Loss of victim status

82. The question remains whether the applicant, as he asserted, may continue to claim to be a victim of a violation of Article 5 § 3, which is disputed by the Government.

83. The Court recalls that the mitigation of a sentence on the ground of the excessive length of the proceedings does not in principle deprive the individual concerned of his status of victim within the meaning of Article 34 of the Convention. However, this general rule is subject to an exception when the national authorities have acknowledged either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 30, § 66; *Jansen v. Germany* (dec.), no. 44186/98, 12 October 2000; *Beck v. Norway*, no. 26390/95, § 27, 26 June 2001). In cases concerning the failure to observe the reasonable-time requirement guaranteed by Article 6 § 1 of the Convention, the national authorities can afford adequate redress in particular by reducing the applicant's sentence in

an express and measurable manner (see *Eckle*, cited above, p. 30, § 66; *Beck*, cited above, § 27). In the Court's view, such a mitigation of the sentence is also capable of affording adequate redress for a violation of Article 5 § 3 in cases in which the national authorities had failed to hear the case of an applicant held in pre-trial detention within a reasonable time.

84. The Court observes that notably the Oldenburg Regional Court, in its judgment delivered on 2 September 2004 after the remittal of the case, had found that the delays caused during the second trial before that court, when the applicant had already been detained on remand for more than two years, contravened Article 5 § 3 of the Convention. In its decision delivered on 17 March 2005 the Federal Court of Justice had confirmed the Regional Court's judgment, which thereby became final. Consequently, the German courts expressly acknowledged that Article 5 § 3 had been violated.

85. As regards the redress the national courts afforded for the breach of Article 5 § 3, the Court notes that in its judgment of 2 September 2004, the Oldenburg Regional Court reduced the applicant's sentence from nine years to six years and six months' imprisonment. Complying with the decision of the Federal Court of Justice of 11 September 2003, the Regional Court mainly argued that the reduction of the applicant's sentence had become necessary because his right under Article 6 § 1 of the Convention to a hearing within a reasonable time had been violated. It is true that the Regional Court stated that the delays caused in the proceedings at the time when the applicant had already been detained on remand for more than two years had been of a particular gravity. However, the Court, agreeing with the applicant in this respect, finds that the Regional Court's judgment does not specify to what extent this finding had entailed a measurable reduction of the applicant's sentence. The Federal Court of Justice's decision dated 17 March 2005, which affirmed the Regional Court's judgment, does not provide further information on this issue. Therefore, the Court concludes that the national courts have not reduced the applicant's sentence in a measurable manner in order to redress the previous breach of Article 5 § 3.

86. Consequently, the Court finds that the applicant has not ceased to be a victim within the meaning of Article 34 of the Convention.

87. There has accordingly been a violation of Article 5 § 3 of the Convention. No separate issue arises under Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

88. The applicant further considered the length of the criminal proceedings against him excessive. He alleged a violation of Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] tribunal ..."

A. The parties' submissions

1. The applicant

89. The applicant maintained that he had exhausted domestic remedies. He pointed out that he had lodged two complaints with the Federal Constitutional Court, which the latter had refused to admit. Alternatively, he argued that, in the exceptional circumstances of the present case, his application should not be dismissed for non-exhaustion of domestic remedies. The German courts appeared to be unwilling to expedite the proceedings still pending, and further damage was to be prevented.

90. The applicant, endorsing his reasons given with respect to Article 5 § 3 of the Convention, argued that the duration of the criminal proceedings against him had been excessive. He took the view that the initial proceedings before the Oldenburg Regional Court should not have taken more than a year. Furthermore, the first appeal proceedings before the Federal Court of Justice had been delayed for another year. The entire duration of the proceedings before the Oldenburg Regional Court after the remittal of the case were to be qualified as a delay imputable to the judicial authorities, as that court's judgment had been partly quashed because of an error of law. In the second proceedings before the Federal Court of Justice that court again made no effort to expedite the proceedings. The entire delays in these proceedings, which amounted to some five years, were imputable to the judicial authorities.

91. The applicant further maintained that he had not lost his status of victim of a violation of Article 6. He claimed that the reduction of his sentence to six years and six months by the Oldenburg Regional Court did not explicitly and adequately redress the violation of Article 6 of the Convention.

2. The Government

92. The Government contended that the applicant did not exhaust all domestic remedies as required by Article 35 § 1 of the Convention. They argued that the applicant had filed his application with the Court in December 1999, when the Federal Court of Justice had not yet given its judgment and when the applicant had not yet filed his constitutional complaint.

93. The Government further maintained that the applicant had lost his status of victim within the meaning of Article 34 of the Convention also as regards his complaint under Article 6 § 1 of the Convention. Their arguments in this respect were identical with those concerning Article 5 § 3 of the Convention.

B. The Court's assessment

94. The Court does not find it necessary to rule on the question whether the applicant has exhausted domestic remedies in accordance with Article 35 § 1 of the Convention for the reasons which follow.

1. Period to be taken into consideration

95. The period to be considered under Article 6 § 1 started on 6 July 1996, when the applicant was arrested. The proceedings are still pending in the Federal Constitutional Court. To date, they therefore lasted for more than nine years and one month in three levels of jurisdiction. Due to one remittal, decisions were rendered in five instances.

2. The reasonableness of the length of the proceedings

96. As regards the reasonableness of the length of the proceedings in the Oldenburg Regional Court until it rendered its judgment on 20 March 2001, the Court refers to its above findings with regard to Article 5 § 3 of the Convention (see paragraphs 75-81 above). The competent national court failed to act with the necessary special diligence in conducting the applicant's proceedings, rendering the length of the applicant's detention, as well as the length of the proceedings as such excessive.

97. As regards the remainder of the complex criminal proceedings against the applicant, the Court notes that there have been further periods of inactivity. The Court agrees with the findings of the Oldenburg Regional Court in its judgment dated 2 September 2004 (see paragraphs 52-57 above) in this respect.

98. In particular, in the first proceedings before the Federal Court of Justice (see paragraphs 39-50 above), there have been delays in the public prosecutor's submission of his observations on the applicant's appeal (8 November 2001 to 13 August 2002; see paragraphs 46-47 above). Furthermore, given the period of time the applicant's proceedings had then already been pending, the Federal Court of Justice should have given it priority and have rendered its decision more speedily (see paragraphs 48-50 above). The same was the case for the proceedings before the Regional Court after the remittal (see paragraphs 51-58 above). These delays must be attributed to the judicial authorities. Other than in the proceedings before the Oldenburg Regional Court until its judgment of 20 March 2001, the applicant apparently had not contributed to the further prolongation of the proceedings against him.

99. Accordingly, the Court finds – as it has also found in the case of the applicant's co-accused, whose proceedings had already ended on 4 April 2001 (see *Cevizovic*, cited above, §§ 59-61) – that the applicant's case was not heard within a reasonable time.

3. Loss of victim status

100. It remains to be determined whether the applicant has lost his status of victim of a violation of Article 6 § 1.

101. The Court, referring to its settled case-law on this issue cited above (see paragraph 83 above), observes that the Federal Court of Justice, in its decision delivered on 11 September 2003, found that the duty to proceed expeditiously guaranteed by Article 6 § 1 had not been complied with in the criminal proceedings against the applicant (see paragraph 50 above). In its subsequent decisions of 2 September 2004 and 17 March 2005 respectively, the Oldenburg Regional Court (see paragraph 53 above) and again the Federal Court of Justice (see paragraphs 60-61 above) confirmed this finding. Thereby, the judicial authorities expressly acknowledged the breach of Article 6 § 1 of the Convention.

102. In assessing the redress afforded by the domestic courts for the breach of the Convention, the Court notes that in its initial judgment delivered on 20 March 2001, the Oldenburg Regional Court had sentenced the applicant to eight years' imprisonment. It had already then taken into account the length of the proceedings as a mitigating factor (see paragraph 38 above). In its judgment dated 2 September 2004, the said court then stated that it would have sentenced the applicant to nine years' imprisonment if the proceedings had been terminated within a reasonable time. It reduced the sentence to six years and six months' imprisonment because of the breach of Article 6 § 1 of the Convention (see paragraphs 52-53 above).

103. The Court recalls that the question whether a specific reduction of the sentence properly remedied a breach of Article 6 § 1 notably depends on the extent of that breach, which the national authorities must have taken adequately into account (see, *mutatis mutandis*, *Eckle*, cited above, p. 32, § 70). It notes that the Regional Court, in order to determine the adequate reduction of the sentence, had fixed in great detail the exact length of the delays imputable to the judicial authorities (see paragraphs 54-58 above). In doing so, the Regional Court took into account all material delays which occurred throughout the proceedings. In its decision dated 17 March 2005 the Federal Court of Justice upheld the Regional Court's fixing of the sentence. The Court is not convinced that the further prolongation of the proceedings notably by the applicant's renewed appeal to the Federal Court of Justice had warranted a further reduction of the sentence. The Court, agreeing insofar with the Government, is therefore satisfied that the national courts took adequately into account all substantial delays caused by the judicial authorities by significantly reducing the applicant's sentence in an express and clearly measurable way. They therefore afforded the applicant appropriate redress for the breach of Article 6 § 1.

104. The Court concludes that the applicant has ceased to be a victim of a violation of Article 6 § 1 of the Convention within the meaning of

Article 34 of the Convention. Consequently, there has not been a violation of Article 6 § 1. Against this background, the Court does not find it necessary to rule on the Government's objection that the applicant failed to exhaust domestic remedies.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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."

106. The applicant claimed compensation for pecuniary and non-pecuniary damage, and the reimbursement of his costs and expenses.

A. Damage

107. The applicant claimed a total of 147,700 euros (EUR) for pecuniary damage. These comprised a total loss of income of 5,700 EUR during the period of his detention on remand, another 20,000 EUR he could have earned in his home country, as well as additional costs of 50,000 EUR for the services of his defence counsel and additional 72,000 EUR in costs of the proceedings incurred merely because of their excessive length.

108. The applicant notably argued that as a prisoner detained on remand, as opposed to a prisoner serving his sentence, he had not had a right to work. He had therefore lost some 2,500 EUR he would have earned had he been serving his sentence and been working already from June 1998 onwards. Furthermore, he would have earned another 3,200 EUR during the time he had actually worked in prison (from 30 May 2000 to 7 November 2001) if he had already been serving his sentence, because the remuneration for prisoners serving their sentence was higher than for prisoners detained on remand. The applicant further maintained that, if the proceedings had been terminated within a reasonable time, he would have been expelled to his country of origin before the end of his prison sentence and would have been able to earn some 20,000 EUR there. Relying on some documentary evidence in this respect, he took the view that sixty per cent of the costs for the services of his defence counsel, that is, 50,000 EUR, and sixty per cent of the presumed costs of the proceedings, that is, 72,000 EUR, had been incurred merely due to their inordinate length.

109. The applicant also sought 10,000 EUR in compensation for non-pecuniary damage. He argued that if he had been serving his prison sentence earlier instead of having been detained on remand, he would have been released earlier or been expelled to the former Yugoslav Republic of

Macedonia before having served his entire sentence. He also could have received visits from his family in prison more easily. Furthermore, he maintained that due to the length of the proceedings, he was now more likely to be expelled to the former Yugoslav Republic of Macedonia after having served his sentence pursuant to the changed law on aliens.

110. The Government argued in respect of the applicant's claim for pecuniary damages that it was not certain that the applicant would have had an employment if he had been serving his sentence earlier, given that fifty per cent of the prisoners in Germany were in fact unemployed. Furthermore, it was not proved that the applicant would have been expelled to his country of origin before having served his entire sentence and would have found a job there.

111. Furthermore, the Government took the view that the applicant's case did not warrant the award of non-pecuniary damages.

112. As regards the applicant's claim for pecuniary damages, the Court recalls that it cannot speculate as to what the outcome of the proceedings at issue might have been if the breach of the applicant's Convention right – that is Article 5 § 3 of the Convention – had not occurred (see, *inter alia*, *Incal v. Turkey* [GC], judgment of 18 May 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1575, § 82; *Wettstein v. Switzerland*, no. 33958/96, § 53, ECHR 2000-XII). Similarly, the Court cannot speculate whether the applicant would have had a paid occupation in prison earlier, which job he would have had in prison and which remuneration he would have received, or whether he would have been expelled to and would have had an income in the former Yugoslav Republic of Macedonia. Consequently, there is insufficient proof of a causal connection between the excessive length of the applicant's detention on remand and the loss of income he claimed. Moreover, the applicant's claims in these respects are not sufficiently substantiated by documentary evidence. Consequently, the Court does not allow them. The Court will address the applicant's claims for reimbursement of additional costs for the services of his defence counsel and for the costs of the proceedings in the national courts when examining his claim for reimbursement of costs and expenses.

113. As regards the applicant's claim for non-pecuniary damages, the Court, having regard to all the factors before it and to its conclusion in the case of *Cevizovic* (cited above, §§ 67-68), considers that the finding of a violation of Article 5 § 3 constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

114. The applicant claimed a lump sum of 15,000 EUR for the costs and expenses incurred for the services of his defence counsel in those proceedings before the national courts which were exclusively aimed at

remedying the alleged breaches of Articles 5 and 6 of the Convention. These comprised, *inter alia*, the proceedings aimed at putting an end to the applicant's detention on remand and the proceedings before the Federal Constitutional Court. He further sought the reimbursement of 5,000 EUR for costs and expenses incurred for the services of his lawyer representing him in the proceedings before the Court.

115. The Government pointed out that the applicant had caused considerable delays by his own conduct in the proceedings, and that he could not claim reimbursement of the costs incurred for the services of his counsel in this respect.

116. According to the Court's settled case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (see, *inter alia*, *Venema v. the Netherlands*, no. 35731/97, § 117, ECHR 2002-X).

117. As regards the costs and expenses incurred in the domestic proceedings the Court finds that the applicant failed to substantiate which additional costs and expenses he had incurred in an attempt to prevent or rectify the violation of Article 5 § 3 of the Convention. It therefore rejects the claim for costs and expenses in this respect.

118. As regards the applicant's legal expenses incurred in the proceedings before this Court, the Court, having regard to its case-law and making its own assessment, awards the applicant 3,000 EUR, less 824 EUR received by way of legal aid from the Council of Europe, plus any value-added tax that may be chargeable.

C. Default interest

119. 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

1. *Holds* by six votes to one that there has been a violation of Article 5 § 3 of the Convention;

2. *Holds* unanimously that no separate issue arises under Article 5 § 1 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention;

4. *Holds* unanimously that the finding of a violation of Article 5 § 3 constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) in respect of costs and expenses, less EUR 824 (eight hundred and twenty four euros), 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;

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

Done in English, and notified in writing on 10 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Myjer is annexed to this judgment.

B.M.Z.
V.B.

PARTLY DISSENTING OPINION OF JUDGE MYJER

My colleagues found in this case a violation of Article 5 § 3 of the Convention. I disagree with that decision for the following reasons.

I am of the opinion that the Government rightly put forward that the applicant had also lost his victim status as far as Article 5 § 3 is concerned. In its judgment of 2 September 2004 the Oldenburg Regional Court expressly stated that in the applicants' case Article 6 § 1 and Article 5 § 3 had been violated. It sentenced the applicant to six years and six months imprisonment, while adding that, having regard to all the factors aggravating and mitigating the applicants' guilt, it would have sentenced the applicant to nine years' imprisonment if the proceedings had been terminated within a reasonable time.

My colleagues found that in its judgment the Oldenburg Regional Court did not specify to what extent exactly the finding of an violation of Article 5 § 3 had entailed a measurable reduction of the applicant's sentence. In the specific circumstances of the case I consider this to be an artificial approach. In a case like this the violation of Article 5 § 3 (a person in detention in remand has the right to a trial within a reasonable time) and Article 6 § 1 (in the determination of a criminal charge against him everyone has the right to a hearing within a reasonable time) are interconnected. The requirement of a speedy trial, as laid down in Article 5 § 3 is a kind of *lex specialis* to the overall requirement of a speedy trial as laid down in the *lex generalis* of Article 6 § 1: when a person is detained in remand, the hearing should be particularly speedy. In this case the two periods to be taken into account more or less coincide. In my opinion one overall 'overtime'-reduction in the sentence suffices. Further specifications can be kept out of the books.