



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

FIRST SECTION

CASE OF HESSE v. AUSTRIA

(Application no. 26186/02)

JUDGMENT

STRASBOURG

25 January 2007

FINAL

09/07/2007

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 Hesse v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 4 January 2007,

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

PROCEDURE

1. The case originated in an application (no. 26186/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Heinz-Dieter Hesse (“the applicant”), on 30 June 2002.

2. The applicant, who had been granted legal aid, was represented by Mrs C. Lanschützer, a lawyer practising in Graz. The Austrian Government (“the Government”) were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that his pre-trial detention had been unjustified and unreasonably long and, therefore, in breach of Article 5 §§ 1 and 3 of the Convention.

4. By a decision of 8 June 2006, the Court declared the application partly admissible. The German Government did not make use of their right to intervene under Article 36 of the Convention.

5. Neither the applicant nor the Government filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1943 and is currently living in Germany.

7. On 26 April 1999 Mr K. was arrested in Sweden while in possession of a bag containing approximately 10 kilograms of heroin. When questioned by the Swedish authorities, Mr K. said that he had been unaware of the contents of the bag, which the applicant had requested him to transport to Norway. In the subsequent proceedings he also admitted that he had already travelled to Norway some weeks previously under the same conditions. He had then also transported a bag, which, after several telephone conversations with the applicant and another person, Mr P., he had finally handed over to someone, who had given him money.

8. Meanwhile, on 28 April 1999 the applicant was arrested in Austria on suspicion of having committed offences under the Drug Offences Act (*Suchtgiftgesetz*) and, on 1 May 1999, placed in pre-trial detention (*Untersuchungshaft*). The Graz Regional Court (*Landesgericht*) found that there was a danger that the applicant would commit further offences of the same kind (*Tatbegehungsgefahr*) and that there was risk of collusion (*Verdunkelungsgefahr*).

9. When questioned, the applicant said that in March 1999 an officer of the Slovenian border police, Mr P., had asked him to transport an unidentified object to Norway on behalf of Albanian friends. He had arranged that Mr K., his former sales representative for his spectacles business, would provide this service. He had twice received a bag from Mr P., the first one weighing between 8 and 10 kg and the second one between 10 and 12 kg. The applicant had made the bag available at his store and Mr K. had picked it up. He had not been aware of the contents of the bag. As Mr K. had run out of money, he had transferred funds to him in Norway. The second journey had taken a similar course. He had assumed that the items were weapons or explosives.

10. On 1 May 1999 the Graz Regional Court opened a criminal investigation in respect of the applicant.

11. On 12 May 1999 the Regional Court held a hearing regarding the applicant's pre-trial detention and ordered its continuation. In addition to the reasons given on 1 May 1999, it referred to the risk of the applicant's absconding (*Fluchtgefahr*). On 4 June 1999 the Graz Court of Appeal (*Oberlandesgericht*) upheld that decision.

12. Meanwhile, on 14 May 1999, the investigating judge requested the Swedish authorities, under arrangements for judicial mutual assistance, to question Mr K.. Mr K. was questioned between 15 and 16 June 1999 in the presence of the applicant's counsel and the investigating judge. He stated

inter alia that the applicant ought to have noticed the drug parcels in the bag as he had requested Mr K. to provide clothes and had subsequently put them into the bag.

13. Subsequently, further criminal investigations were conducted relating to the telephone communications between the applicant, Mr K. and Mr P. and the money transfers between them, the latter requiring the disclosure of bank accounts.

14. In the meantime, on 2 June 1999, Mr P. was arrested in Austria.

15. On 12 July 1999 the Regional Court, having held a hearing regarding the matter, continued the applicant's detention on remand.

16. On 24 August 1999 interviews were conducted in Austria in the presence of the Swedish authorities under arrangements for judicial mutual assistance.

17. On 13 September 1999 the Regional Court continued the applicant's detention. The Court of Appeal dismissed a complaint by the applicant on 28 September 1999.

18. At the end of November 1999 the Slovenian authorities provided an analysis of the data concerning the telephone conversations. The criminal investigations were subsequently extended to Croatia.

19. On 26 November 1999 and 26 January 2000 the applicant's pre-trial detention was prolonged.

20. In January 2000 the Swedish Court of Appeal gave judgment sentencing Mr K. to 10 years' imprisonment.

21. On 27 March, 29 May and 21 July 2000 the Regional Court ordered the continuation of the applicant's detention.

22. Meanwhile, on 18 May 2000, the Graz Public Prosecutor's Office (*Staatsanwaltschaft*) drew up a bill of indictment charging the applicant with incitement to large-scale drug trafficking.

23. On 20 September 2000 Mr P. committed suicide. He had until then denied everything. On the same day and on 27 September 2000 the Graz Regional Criminal Court, sitting as a chamber composed of two professional judges and two lay judges (*Schöffengericht*), held hearings in the criminal case against the applicant. It heard evidence from the applicant and several other witnesses. It then adjourned in order to hear evidence from Mr K., who was detained in Sweden but had requested to serve his sentence in Austria. The presiding judge therefore assumed that evidence could be heard from Mr K. at the trial in Austria.

24. However, at the end of February 2001 the Federal Ministry of Justice (*Justizministerium*) was informed by a letter from the Swedish authorities that Mr K. had unexpectedly withdrawn his request. The Regional Court was informed about this at the end of March 2001, when the letter had been translated into German.

25. On 15 May 2001 the Graz Regional Court dismissed the applicant's request for release and ordered the continuation of his pre-trial detention. It

noted that there was a risk that the applicant would abscond as he was in a precarious financial situation, had contacts abroad and was facing the possibility of a severe sentence. It further noted that the applicant had presumably acted in the context of organised crime and was, therefore, likely to abscond for reasons of security. It noted in this regard that the applicant's accomplice Mr P. had committed suicide in order to avoid responsibility towards the organisation behind the crime and that the organisation had lost considerable assets through the applicant's intervention. It found that the applicant's family bonds were of no relevance in this regard. It also found that there were motives for the applicant to carry out further offences of the kind he was suspected of and referred in this regard to the fact that the applicant was charged with professional (*gewerbsmäßige*) crimes. It noted finally that the case was complicated as it was now indispensable for the court to travel to Sweden in order to hear evidence from Mr K..

26. The applicant appealed on the ground that there was insufficient evidence against him and that his detention was disproportionate to the sentence he might incur. He argued that he had helped find Mr P., had confessed and had no previous criminal record. He further contested that there was any risk of absconding and submitted in this regard that he was socially integrated in Austria, as his wife and two infant children were living there, and that he did not dispose of any financial means. In any event the authorities could prevent his absconding by other means, such as taking his solemn promise or confiscating his passport. He referred finally to the length of the proceedings and submitted that the Swedish proceedings against Mr K. were already finished.

27. On 21 June 2001 the Graz Court of Appeal dismissed the applicant's appeal. It noted that there was a reasonable suspicion against the applicant, based on the evidence given by Mr K.. Noting in particular that the applicant was now substantially less socially integrated on account of the offence with which he was charged, that he was of German nationality, had contacts abroad and was liable to a sentence of up to fifteen years' imprisonment, it confirmed that there was a risk of absconding. It further found that there was a risk that the applicant would carry out further offences of the same kind and referred in this regard to the professional manner in which the smuggling of the heroin had been carried out. It observed that the applicant had acted in the context of an international criminal organisation and that his precarious financial situation had worsened. The court found that the length of the detention until now was not disproportionate to the sentence which the applicant risked incurring. The applicant's further detention was justified on condition that further hearings were held as soon as possible. As to the adjournment of the trial, it noted that the Regional Court had first legitimately assumed that Mr K. could soon give evidence at the trial in Austria.

28. On 30 July 2001 the applicant, invoking Article 5 §§ 1 and 3 of the Convention and referring to the case *Clooth v. Belgium* (judgment of 12 December 1991, Series A no. 225) lodged a fundamental-rights complaint (*Grundrechtsbeschwerde*) with the Supreme Court (*Oberster Gerichtshof*).

29. On 25 October 2001 the Supreme Court gave judgment (served on 4 December 2001) dismissing this complaint and upholding the Court of Appeal's findings.

30. Meanwhile, on 1 August 2001 the Graz Regional Court dismissed a further request by the applicant for release. It noted that the criminal proceedings were likely to end soon as the parties had agreed that Mr K.'s statements at the hearing in Sweden could be read out at the trial. On 21 August 2001 the Court of Appeal upheld that decision.

31. On the same day and on 23 August 2001 it held further hearings. Evidence was heard from the applicant again. The Regional Court convicted the applicant on the latter date of professional crimes under the Drugs Act, explained the judgment orally and sentenced the applicant to twelve years' imprisonment (from which the period of pre-trial detention was deductible). In the written version of the judgment, which was served on the applicant's counsel on 15 January 2002, the court held that the applicant had twice retained Mr K. to transport drugs to Norway, once approximately 10 kilograms of heroin and once an undetermined but similar amount of heroin. Both journeys had been covered and supervised by further backers of the international drugs organisation.

32. Upon a further request for release by the applicant, the Regional Court prolonged the applicant's pre-trial detention. On 6 February 2002 the Graz Court of Appeal upheld that decision. The applicant subsequently lodged a fundamental-rights complaint with the Supreme Court in which he complained about the length of his detention, referring, *inter alia*, to alleged delays in the proceedings before his conviction. On 4 April 2002 the Supreme Court dismissed the complaint. On the same day it rejected the applicant's plea of nullity. On 29 May 2002 the Graz Court of Appeal (*Oberlandesgericht*) allowed the applicant's appeal in part and reduced his sentence to ten years' imprisonment.

33. Upon the applicant's request, he was transferred to Germany where he is currently serving his sentence.

II. RELEVANT DOMESTIC LAW

34. Under Article 180 §§ 1 and 2 of the Code of Criminal Procedure (*Strafprozeßordnung*) a person can be held in pre-trial detention *inter alia* if he is strongly suspected of having committed a criminal offence and there is a risk that he will abscond or reoffend. Article 180 § 5 provides other more

lenient measures such as the concerned person's solemn promise not to abscond, the court's instruction to stay at a certain place or to notify any change of address, the provisional withdrawal of travel documents or the setting of a bail. According to § 6 the concerned judge has to order pre-trial detention if the purpose of this detention can not be achieved by more lenient measures.

35. Under Articles 181 and 182 pre-trial detention can initially only be ordered for fourteen days, extendable initially for one month and subsequently extendable repeatedly for two-month periods until the first hearing in the case. From that date onwards a decision ordering pre-trial detention is subject to no further time-limit. It is nevertheless open to the accused to submit an application for release at any time (Art. 193 § 5).

36. In any event, all authorities involved in the criminal proceedings are obliged to make efforts to keep the duration of the pre-trial detention as short as possible (Art. 193 § 1). An accused has to be released when the reasons for his detention no longer exist or the duration of his detention becomes unreasonably long (Art. 193 § 2).

37. Pre-trial detention may only then be extended beyond six months where this is inevitable in view of the reason for the arrest because of the special difficulties or complexity of the investigations (Art. 194 § 3).

38. Pre-trial detention comes to an end, at the latest, when the accused begins to serve his sentence, the duration of which is reduced by the time spent in pre-trial detention (Article 38 of the Criminal Code (*Strafgesetzbuch*)).

39. Where an accused lodges an appeal that has statutory suspensive effect, for example, a plea of nullity (Art. 284 § 3) or an appeal against sentence (Art. 294 § 1), he remains in detention until the final decision (Art. 397).

THE LAW

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

40. The applicant complained that his pre-trial detention had been unjustified and unreasonably long. He invoked Article 5 §§ 1 and 3 of the Convention. The Court finds that the applicant's complaint should be considered under Article 5 § 3 of the Convention, which reads as follows:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within

a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

1. The parties' submissions

41. The Government argued that the applicant's pre-trial detention had been justified and not unreasonably long. They referred in that regard to the domestic courts' reasons for the detention. They stressed that there had been a strong suspicion against the applicant, which had been corroborated in the course of the proceedings and had finally led to the applicant's conviction. Furthermore, there had been a risk that the applicant would abscond because of his extremely precarious financial situation, loss of social integration, contacts abroad, foreign nationality and the impending severe sentence. The applicant's accomplice had already escaped justice and the persons behind the criminal organisation by committing suicide. Moreover, the offence in question had been carried out repeatedly and professionally and the applicant's precarious financial situation had worsened in the meantime. Therefore, there had been a danger that the applicant would commit offences of the same type, either in order to improve his financial situation or on account of the influence of the organisation behind the drug trafficking. Until the arrest of Mr P. on 2 June 1999 there had also been the danger of collusion. The pre-trial detention had been proportionate to the seriousness of the offences. Having regard to the complexity of the preliminary investigations involving requests for mutual assistance from several European states, the voluminous file, the need for sufficient time for preparation for trial and the interest of obtaining Mr K.'s direct evidence, which later turned out to be impossible, the length of the criminal proceedings also appeared reasonable. The applicant had not challenged the length of his pre-trial detention in the proceedings by filing a request that a time-limit be set under section 91 of the Courts Act. The Government referred finally to the relevant domestic legislation which guaranteed an effective remedy against and repeated examination of pre-trial detention and provided that the period of such detention was deducted from the sentence.

42. The applicant contested the Government's submissions. He referred in particular to the fact that, in breach of the relevant domestic legislation, the written judgment had been drafted more than five months after pronouncement. He maintained that, for that reason alone, the length of the proceedings could not be regarded as reasonable. The applicant further argued that the proceedings should be considered as a whole and that pre-trial detention therefore lasted until final conviction. Thus, the guarantees under Article 5 should be extended to the proceedings after pronouncement of the judgment by the first-instance court.

2. The Court's assessment

1. *Period to be taken into consideration*

43. The period to be considered under Article 5 § 3 started on 28 April 1999, when the applicant was arrested. The Court, having regard to its case-law (see, as a recent authority, *Dzelili v. Germany*, no. 65745/01, § 68, 10 November 2005 and *B. v. Austria* judgment of 28 March 1990, Series A no. 175, pp. 14-16, §§ 35-40), finds that for the purposes of Article 5 § 3 the period of pre-trial detention ended on 23 August 2001, when the Graz Regional Court pronounced its judgment at first instance. The applicant was accordingly held in pre-trial detention for a total period of two years and nearly four months.

2. *The reasonableness of the length of detention*

44. The Court reiterates 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, and *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV). 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, and *Labita*, cited above, § 153).

a. **Grounds for the continued detention**

45. The reasons given by the judicial authorities to justify their decisions to continue the applicant's detention were, in addition to the persistent suspicion against the applicant, the possibility that he might commit other offences and the risk that he might abscond. Until the applicant's

accomplice Mr P. was arrested on 4 June 1999, the courts had further referred to the risk of collusion.

46. The Court accepts that a reasonable suspicion that the applicant had been guilty of the crimes of which he was eventually convicted had persisted throughout the criminal proceedings. It further finds that these offences were of a serious nature.

47. 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, and *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; the fact that the applicant was of foreign nationality, had contacts abroad and was in a very precarious financial situation as he was deeply in debt. Furthermore, he had acted in the context of an international criminal organisation and his accomplice had committed suicide before the start of the trial. Accordingly, the Court is satisfied that a substantial risk of the applicant's absconding persisted over the total period of his detention. The Court notes that the authorities did not envisage the possibility of imposing other more lenient measures foreseen by Austrian law to secure a suspect's stay in Austria (see paragraph 34 above). However, taking account of the applicant's very precarious financial situation and his German nationality, which country has under the Schengen agreement removed border posts and checks between Austria and Germany, the Court can accept that alternative effective measures to secure the applicant's stay in Austria, such as the setting of a bail or the withdrawal of travel documents, did not appear appropriate in the particular circumstances of the present case.

48. The Court finally notes that the Austrian authorities found in addition that the presumption that the applicant had acted repeatedly and with the help of a backing organisation and the fact that his financial situation had become even worse since his imprisonment, gave rise to a risk that he would commit further offences if released.

49. The Court finds that these were relevant and sufficient grounds for the applicant's continued detention.

b. Conduct of the proceedings

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

51. The Court takes the view that the applicant's case was complex as it concerned serious offences, namely drug trafficking, which, furthermore, had been carried out in the context of an international criminal organisation operating in more than two countries.

52. Criminal investigations in respect of the applicant started shortly after his arrest on 1 May 1999 and were finished on 18 May 2000 when the Public Prosecutor's Office filed the indictment. They thus lasted about one year, which does not appear excessive given that during this time inquiries were conducted not only in Austria but also in three other countries, namely Sweden, Slovenia and Croatia. The trial began on 20 September 2000 and, after a further hearing on 27 September 2000, was adjourned. It did not continue until August 2001, when the Regional Court, after two further hearings, pronounced its judgment. This period may appear long at first sight; however, the fact should not be overlooked that, while “an accused person in detention is entitled to have his case given priority and conducted with particular expedition, 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 applicant's case was adjourned in order to hear the main witness against him in Austria, which at first appeared possible in the near future. The applicant did not object to this way of proceeding. As this plan turned out to be impossible, the court first intended to travel to Sweden but subsequently, with the parties' agreement, allowed Mr K.'s statements to be read out in court. The Court accordingly cannot find that the competent national court failed to act with the necessary special diligence in conducting the proceedings in the applicant's case.

53. Therefore, the Court concludes that the length of the applicant's detention may be regarded as reasonable within the meaning of Article 5 § 3 of the Convention. There has accordingly been no violation of this Article.

FOR THESE REASONS, THE COURT

Holds by four votes to three that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 25 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following joint dissenting opinion of Mr Rozakis, Mrs Tulkens and Mr Spielmann is annexed to this judgment.

C.L.R.

S.N.

JOINT DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS AND SPIELMANN

We are unable to follow the majority's decision that there has been no violation of Article 5 § 3 of the Convention. Insofar as the grounds for the continued detention are concerned, we would like to emphasise the following considerations.

1. In the present case, the judicial authorities justified their decisions to continue the applicant's detention by the persistent suspicion against the applicant, the possibility that he might commit other offences and the risk that he might abscond. Until the applicant's accomplice Mr P. was arrested on 4 June 1999, the courts also referred to the risk of collusion.

2. Although we consider that these grounds were reasonable, at least initially, we are of the opinion that, with the passage of time, they inevitably became less relevant. Nevertheless, when dismissing the applicant's requests for release, the domestic courts continued to rely on the same reasons (see paragraphs 25 and 27 of the judgment). In this context, we recall that, throughout the entire period of the applicant's pre-trial detention, the authorities did not envisage the possibility of imposing the other more lenient measures expressly foreseen by Austrian law in order to secure a suspect's continued presence in Austria (see paragraph 34 of the judgment). We would emphasise that, under Article 5 § 3 of the Convention, the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial. Indeed, that provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see, amongst other authorities, *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000). Accordingly, we find it open to doubt whether the grounds given by the Austrian courts were sufficient to justify the applicant being kept in pre-trial detention for a period as long as 2 years and 4 months.

3. Turning to the conduct of the proceedings, the following observations should be made. As to whether the judicial authorities displayed the special diligence required in the conduct of the proceedings, we accept that the applicant's case was certainly complex, in that it concerned a serious offence, namely drug trafficking, which, furthermore, had been committed in the context of an international criminal organisation which operated in more than two countries. However, while the duration of the criminal investigation does not in itself appear excessive, an unjustified delay occurred after the indictment had been issued in May 2000. In particular, it remains unexplained why the first hearing of the applicant's trial was not fixed until four months later, namely on 20 September 2000. Furthermore, and more importantly, a considerable period of time elapsed between the

second hearing on 27 September 2000 and the third hearing on 1 August 2001. Whilst accepting that the trial was initially adjourned in order to allow the main witness against the applicant to be heard in Austria, we note that this plan proved impossible to implement as early as February 2001. We do not find that the Government have submitted any convincing explanations that would justify the subsequent postponement until August 2001, when the trial was eventually resumed.

4. We recall once more that the period of pre-trial detention was almost two and a half years. This in itself would require that the national courts paid particular attention to the “special diligence” requirement of Article 5 § 3 of the Convention (see the *Duda v. Poland* and *Dolasiński v. Poland* judgments of 19 December 2006, where the Court found a violation of Article 5 § 3 in connection with pre-trial detentions of two years and four months and two years and three months respectively).

In the light of the foregoing, however, we consider that the duty of “special diligence” enshrined in Article 5 § 3 has not been observed. Consequently, we are of the opinion that there has been a violation of Article 5 § 3 of the Convention.